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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SACRAMENTO

JOHN TOS, AARON FUKUDA; AND COUNTY OF KINGS, A POLITICAL SUBDIVISION OF THE STATE OF CALIFORNIA,

Plaintiffs,

v.

CALIFORNIA HIGH SPEED RAIL AUTHORITY; JEFF MORALES, CEO OF THE CHSRA; GOVERNOR JERRY BROWN; STATE TREASURER, BILL LOCKYER; DIRECTOR OF FINANCE, ANA MATOSANTOS; SECRETARY (ACTING) OF BUSINESS, TRANSPORTATION AND HOUSING, BRIAN KELLY; STATE CONTROLLER, JOHN CHIANG; AND DOES I-V, INCLUSIVE,

Defendants.

Case No. 34-2011-00113919

DEFENDANTS' MEMORANDUM OF POINTS AND AUTHORITIES IN OPPOSITION TO PLAINTIFFS' "PART I" OPENING BRIEF IN SUPPORT OF PETITION FOR WRITS OF MANDATE

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

Trial Date: May 31, 2013
Action Filed: November 14, 2011

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INTRODUCTION

High-speed rail is the largest public works project in California history. It was conceived to move the state's infrastructure into the 21st century, and to provide jobs, reduce air pollution, and improve mobility for the state's growing population. This lawsuit is one of many thus far unsuccessful attempts to interfere with, slow, or stop its construction. Like most of the state's large public works projects, including the Golden Gate Bridge, the freeway system, and the State Water Project, high-speed rail suffers from its share of critics. Yet all of these projects have come to symbolize the state's vitality and ingenuity, and allow California to be an economic engine for the nation. Today, we cannot envision our state without them.

In 2008, the voters adopted Proposition 1A, which authorized the sale of bonds to begin planning and construction of a high-speed train system that would eventually link the state's population centers. The Legislature, which put the measure on the ballot, and the voters, fully understood that a project as big and complex as the train system, like the freeway system and the State Water Project (both of which are still being built), required phased implementation that would be conceived, funded, and built in stages. It therefore created a basic vision for the funding and scope of the system, and left to the California High-Speed Rail Authority (the Authority) the flexibility to build it, with due fiscal oversight by the Legislature.

Plaintiffs' various challenges to the Authority's decisions all lack merit. They have failed to establish either that the Authority incorrectly interpreted Proposition 1A, or that it abused its discretion in carrying out those duties. Therefore, plaintiffs cannot demonstrate the kind of clear legal error or palpably unreasonable and arbitrary decisions required for mandamus relief. Accordingly, in response to the petitions for writs of mandamus, the state respondents request that judgment be entered in their favor on all claims.

STATEMENT OF FACTS

I. THE BOND ACT

The movement to build high-speed rail in California began many years before Proposition 1A. In 1996, the Legislature saw a rapidly growing population whose transportations needs could not be met by expansion of freeways or airport systems. It decided that a system of high-speed

intercity rail service, coordinated with existing public and private transportation services, could "fill the gap between future demand and present capacity." (Pub. Util. Code, § 185010, subd. (e).) It enacted the California High-Speed Rail Act to prepare for that future by authorizing the creation of the Authority to plan to construct a high-speed rail system, similar to the planning that preceded construction of the freeway system. (*Id.*, §§ 185000, 185010, subd. (h), 185032.) The Authority envisioned a project that would be built over time, and in a bow to modern fiscal realities, would be constructed with federal, state, and private funding.

The Legislature placed Proposition 1A (or the bond act) on the 2008 ballot. On August 26, 2008, the Legislature passed and the Governor signed Assembly Bill 3034 enacting the "Safe, Reliable High-Speed Passenger Train Bond Act for the 21st Century." (Stats. 2008, ch. 267.) Section 9 of AB 3034[1] was placed on the ballot as Proposition 1A, also titled the "Safe, Reliable High-Speed Passenger Train Bond Act." Once approved by the voters, the bond act authorized the issuance of $9.95 billion in general obligation bonds, of which $9 billion was "to initiate the construction of a high-speed train system" in California.[2] (Sts. & Hy. Code, § 2704.04, subd. (a).)[3] The bond act specified that Phase I of the train system would be the corridor between San Francisco and Los Angeles (§ 2704.04, subd. (b)(1)), after which other corridors linking the state's population centers to the Phase I corridor could be constructed. (§ 2704.04, subds. (a), (b)(2), (b)(3).)

Although the bond act defines the terms "high-speed train system," "corridor" and "usable segment," it also provides that bond funds may be used to construct the high-speed rail system in portions smaller than an entire high-speed train system, a corridor, or a usable segment.[4]

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[1] AB 3034 included a total of fourteen separate sections, but only section 9 was placed on the ballot as Proposition 1A and approved by the voters.

[2] The remaining $950 million in bonds was to be allocated to commuter and intercity rail service to provide or improve connectivity to the high-speed rail system, or to provide capital improvements to those services. (Sts. & Hy. Code, § 2704.095, subd. (a).)

[3] Statutory references hereinafter are to the Streets and Highway Code, unless otherwise indicated.

[4] "High-speed train system" is defined in the bond act as a system with high speed trains, right of way, track, power system, rolling stock, stations, and associated facilities. (§ 2704, subd. (e).) "Corridor" is defined as a portion of the train system as described in section 2704.04. (*Id.*, subd. (f).) In addition to the Phase I corridor from San Francisco to Los Angeles, the bond act defines six corridors along which the system may be constructed. (*Id.*, subd. (b)(2).) "Usable (continued...)

Specifically, bond funds may be used to pay for the capital costs of construction of the high-speed rail system "or *any portion* thereof." (§ 2704.04, subd. (c), emphasis added.) When it seeks an appropriation, however, the bond act requires the Authority to prepare for the Legislature and the Director of Finance a funding plan in which it considers the portion of the system for which it seeks an appropriation in the context of the larger corridor or usable segment of which it is a part. (§ 2704.08, subds. (c)-(d) [providing that scope of funding plans to construct the rail system be considered in increments of a corridor or usable segment].)

Through the bond act, the Legislature also established limits on the use of bond proceeds, a system for financial oversight of the Authority, and the basic operating requirements of the train system. For example, the bond act provides that bond proceeds cannot be used to pay for more than 50 percent of the projected cost to construct a corridor or usable segment thereof, requiring matching funds on a dollar-for-dollar basis from other sources. (§ 2704.08, subd. (a); see § 2704.07.) In addition, the bond act provides that bond proceeds cannot be used to fund operating or maintenance costs of trains or facilities. (§ 2704.04, subd. (d).) The bond act states a preference for construction on corridors or usable segments expected to require the least amount of bond funds as a percentage of total cost of construction. (§ 2704.08, subd. (f).) Still other provisions state a preference for construction on corridors or usable segments based on: (1) projected ridership and revenue; (2) the functional ability to test and certify trains operating at high speeds; (3) the utility of the corridor or usable segment for passenger train service other than high-speed service; and (4) the extent to which each corridor or usable segment enhances connectivity to other modes of transit. (*Ibid.*)

To allow the Legislature and state officials the opportunity to provide financial oversight, the bond act imposed limits on the Authority's ability both to request an appropriation of state funds from the Legislature, and to spend funds previously appropriated. These limitations, which are unique to the high-speed rail bond act, are found in separate provisions requiring the

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(...continued)
segment" is defined as a portion of a corridor that includes at least two stations, for example, Merced and San Fernando Valley. (*Id.*, subd. (g).)

Authority to submit funding plans: one funding plan is a prerequisite for requesting an appropriation of bond funds (which is at issue here) (§ 2704.08, subd. (c)); and a second funding plan is a prerequisite for the Authority to spend bond funds previously appropriated (which is not at issue, because none has yet been submitted) (*Id.*, subd. (d)). The first requires the Authority, at least 90 days prior to submitting a request for an appropriation of bond funds, to submit a detailed funding plan (hereinafter "first funding plan") to the Director of Finance, the peer review group established pursuant to Public Utilities Code section 185035 to review funding plans for the Legislature, and the transportation and fiscal committees of both houses of the Legislature. (§ 2704.08, subd. (c)(1); Pub. Util. Code, § 185035, subd. (e).)[5]

The bond act requires the Authority to address particular issues in the first funding plan. (See, e.g. § 2704.08, subd. (c)(2).) Specifically, a first funding plan must include, identify or certify:

> (1) The corridor, or usable segment thereof, in which the authority is proposing to invest bond proceeds. (§ 2704.08, subd. (c)(2)(A).)
>
> (2) A description of the expected terms and conditions associated with any lease agreement or franchise agreement proposed to be entered into by the authority and any other party for the construction or operation of passenger train service along the corridor or usable segments thereof. (*Id.*, subd. (c)(2)(B).)
>
> (3) The estimated full cost of constructing the corridor or usable segment thereof, including an estimate of cost escalation during construction and appropriate revenues for contingencies. (*Id.*, subd. (c)(2)(C).)
>
> (4) The sources of all funds to be invested in the corridor, or usable segment thereof, and the anticipated time of receipt of those funds based on expected commitments, authorizations, agreements, allocations, or other means. (*Id.*, subd. (c)(2)(D).)
>
> (5) The projected ridership and operating revenue estimate based on projected high-speed passenger train operations on the corridor or usable segment. (*Id.*, subd. (c)(2)(E).)

[5] To obtain authority to spend any appropriated bond funds, the Authority must submit a second detailed funding plan (hereinafter "second funding plan") and one or more reports by independent financial experts concerning the viability of that funding plan to the Director of Finance and Chairperson of the Joint Legislative Budget Committee. (§ 2704.08, subd. (d)(1)-(2).) The Director of Finance must review the second funding plan, expert reports, and communications from the Joint Legislative Budget Committee and issue a finding that the plan is likely to be successfully implemented as proposed. (*Id.*, subd. (d).) Only then may the Authority spend previously appropriated bond funds. (*Ibid.*)

(6) All known or foreseeable risks associated with the construction and operation of high-speed passenger train service along the corridor or usable segment thereof and the process and actions the authority will undertake to manage those risks. (*Id.*, subd. (c)(2)(F).)

(7) Construction of the corridor or usable segment thereof can be completed as proposed in the plan. (*Id.*, subd. (c)(2)(G).)

(8) The corridor or usable segment thereof would be suitable and ready for high-speed train operations. (*Id.*, subd. (c)(2)(H).)

(9) One or more passenger train providers can begin using the tracks or stations for passenger train service. (*Id.*, subd. (c)(2)(I).)

(10) The planned passenger service by the authority in the corridor or usable segment thereof will not require a local, state, or federal operating subsidy. (*Id.*, subd. (c)(2)(J).)

(11) The Authority has completed all necessary project level environmental clearances necessary to proceed to construction. (*Id.*, subd. (c)(2)(K).)

In addition to the funding plan requirement, the bond act requires that the high-speed train system be designed to achieve nine specified performance characteristics. (§ 2704.09, subds. (a)-(j) [describing performance requirements].) As relevant here, these include: (1) electric trains capable of sustained maximum revenue operating speeds of 200 miles per hour (*id.*, subd. (a)); (2) nonstop travel time between San Francisco and Los Angeles of no more than two hours and 40 minutes (*id.*, subd. (b)(1)); and (3) passenger travel from any station on a single corridor to any other station on a corridor without having to change trains, also referred to as a "one-seat ride." (*Id.*, subd. (f).)

The official ballot pamphlet for Proposition 1A contained a voter quick-reference guide, an impartial analysis and assessment of potential costs prepared by the Legislative Analyst, arguments in favor of and against the measure, and the full text of the proposed law. (Administrative Record (hereinafter "AR") 17-32.) As a whole, the ballot pamphlet reflected the understanding and communicated to the voters that the bond act was a down-payment on a portion of a system that would be built as funds became available over time.

The quick-reference guide stated explicitly:

A YES vote on this measure means: The state could sell $9.95 billion in general obligation bonds, to plan and *to partially fund* the construction of a high-speed train

> system in California, and to make capital improvements to state and local rail services.
>
> A NO vote on this measure means: The state could not sell $9.95 billion in general obligation bonds for these purposes.

(AR 3, emphasis added.) Arguments against the measure stated that "[t]here's no guarantee it [the train system] will ever get built . . . No on 1A: an open taxpayer checkbook with virtually no accountability." (*Ibid.*)

The analysis stated: "[t]he authority estimated in 2006 that the total cost to develop and construct the entire high-speed train system would be about $45 billion. While the authority plans to fund the construction of the proposed system with a combination of federal, private, local, and state monies, *no funding has yet been provided.*" (AR 5, emphasis added.) The analysis stated: "[w]hen constructed, the high-speed train system will incur unknown ongoing maintenance and operating costs, probably in excess of $1 billion a year. Depending on the level of ridership, these costs would be at least partially, and potentially fully, offset by revenue from fares paid by passengers." (*Ibid.*)

Another argument against the bond act stated: "[t]he whole project could cost $90 billion -- the most expensive railroad in history" and "[n]o one really knows how much this will ultimately cost." (AR 7.)

> Section 8(e) says the bond funds are ". . . intended to encourage the federal government and the private sector to make a significant contribution toward the construction . . . ."
>
> NOTE THE WORD "ENCOURAGED" -- that's bureaucratic language for "we will spend taxpayer money regardless of whether we ever get a penny from the private sector or the federal government."

(*Ibid.*) The rebuttal to the argument in favor of the bond act stated "this high cost train hits taxpayers for $40 billion. Even so, *this is just a 'partial payment' by taxpayers*, with NO guarantee it will be completed." (AR 6, emphasis added.)

The voters passed the bond act.

II. THE AUTHORITY'S FIRST FUNDING PLAN AND DRAFT 2012 BUSINESS PLAN

The Authority worked with experts and in public meetings for three years after voter approval of the bond act, to put together a plan. On November 3, 2011, the Authority met to discuss the selection of one or more usable segments of high-speed rail for construction, and to approve a first funding plan for submission to the Legislature and Director of Finance seeking an appropriation to build the first portion of the usable segment(s) in the central valley. (AR 33.)

Staff proposed that the Authority select two overlapping usable segments in which to invest bond funds. (AR 34-53.) The first usable segment was the "Initial Operating Section-North" (IOS North), which was a part of the Phase I San Francisco to Los Angeles corridor. (AR 34, 39.) The IOS North ran between San Jose and Bakersfield and included six planned stations (running north to south) at San Jose, Gilroy, Merced, Fresno, Kings/Tulare, and Bakersfield. (*Ibid.*) The second, and overlapping, usable segment was the "Initial Operating Section-South" (IOS South), which was also part of the Phase I corridor, but ran between Merced and the San Fernando Valley and included six planned stations (running north to south) at Merced, Fresno, Kings/Tulare, Bakersfield, Palmdale, and San Fernando Valley. (AR 34-35.) Thus, the IOS North and IOS South included overlapping stations at Fresno, Kings/Tulare, and Bakersfield.

These overlapping usable segments, IOS North and IOS South, were carefully selected to meet several requirements and priorities of the bond act. First, neither of these two usable segments would require an operating subsidy. (AR 35, 36; § 2704.04, subd. (d).) Projections showed that ridership and revenues on these usable segments would result in net operating profits. (*Ibid.*) Second, either of the two usable segments could be used to test and certify high-speed trains. (AR 35, 36; § 2704.08, subd. (f).) Third, either of the two segments could be used for conventional passenger train service without incurring any unreimbursed operating or maintenance costs. (AR 37-38; § 2704.08, subd. (f).) Finally, staff identified for construction a 130-mile portion of rail within overlap of the IOS North and South in the central valley (referred to as the "Initial Construction Section" or "ICS"). The ICS would be constructed with bond funds and matching federal grant funds, meeting the bond act's matching funds requirement. (AR 34-35; § 2704.08, subd. (a).) The ICS was to be built from just south of Merced (or near Madera) to

just north of Bakersfield, with stations at Fresno and potentially Kings/Tulare. (See AR 925, 1972 [depicting the ICS within IOS North and South].)

Staff also recommended approval of a first funding plan seeking an appropriation to construct the ICS.[6] (AR 54-56 [memorandum], 57-73 [funding plan].) The first funding plan sought an appropriation of $2.684 billion to supplement $3.316 billion in federal funds. (AR 55; see 60-61.) It addressed all the bond act's requirements. The first funding plan stated:

- numerous lease or franchise agreements would be associated with the usable segments; however, none were proposed to be entered into at that time and none were anticipated for the ICS (AR 62);
- the cost in 2010 dollars to construct the full IOS North or South would be $19.4 or $21.4 billion, respectively, plus $5.2 billion for the ICS (AR 64);
- sources of funds to construct the ICS would be the bond proceeds of $2.618 billion plus federal funding of $3.316 billion, and sources of funding to construct for the entire IOS North or South would be from "potential future funding sources" (AR 67);[7]
- projected ridership and revenue and net operating revenue after operations and maintenance expenses for the IOS North and South, including sensitivity analyses reflecting revenue estimates for high, medium and low scenarios for costs and ridership, showed "a net operating profit commencing in the first year of operations under each scenario" (AR 68-69); and
- known or foreseeable risks associated with the IOS North or South were cost and schedule, staffing and organizational structure, approvals, demand/ridership and revenues, funding, financing, right-of-way and stakeholder agreement, interface and integration. (AR 70.)

The first funding plan also certified, as the bond act required:

[6] The Authority designed the ICS to run high-speed trains, but until it was electrified on completion of the IOS North or South and ready for high-speed passenger service, the ICS would not be electrified and could be used for conventional train service. (AR 37, 62, 1948.) If implemented, this conventional service would link with other rail systems creating an improved network reaching from the central valley to the San Francisco Bay Area and Sacramento. (AR 37, 1938.) This plan was consistent with 2704.08, subd. (c)(2)(I).

[7] The business plan identified as known and potential funding sources for the IOS North or South: (1) federal funding sources; (2) state funding from bond act proceeds; and (3) local funding sources. (AR 202-211.) The plan stated that federal funds have historically supported 50-80 percent of major transportation projects (AR 203), there would be $5.3 billion in remaining matching bond funds for completion of the IOS (AR 208), an important source of future revenue would be local and private revenues from a variety of planned identified sources (AR 208-209), and once the IOS was operable, the Authority would be able to attract private capital to leverage public funds to complete construction of future sections of the train. (AR 209).

- construction of either usable segment can be completed as proposed by the Authority on a phased basis after completion of the ICS as described more fully in the draft business plan;

- upon completion of each usable segment, the segment would be suitable and ready for high-speed train operation and "will be designed and constructed for the purpose of high-speed passenger rail service" (AR 71);

- upon completion of each usable segment, one or more other passenger service providers could begin using the tracks or stations for passenger train service if that became necessary;

- upon completion of each usable segment, the planned high-speed passenger service by the Authority will not require a local, state, or federal operating subsidy; and

- in connection with the ICS, the Authority "will have, prior to expending Bond Act proceeds requested in connection with this Funding Plan, completed all necessary project level environmental clearances necessary to proceed to construction." (AR 71-72.)[8]

The Authority adopted the staff recommendation: it selected the IOS North and South as usable segments for construction (AR 952) and approved and submitted the first funding plan requesting an appropriation to build the ICS. (AR 953.) The plan was submitted to the transportation and fiscal committees in both houses of the Legislature, the peer review group established to advise the Legislature on the appropriateness of funding plans, and the Director of Finance. (§ 2704.08. subd. (c)(1); Pub. Util. Code, § 185035, subds. (a) & (c).)[9] After submission, the first funding plan and draft business plan were the focus of legislative hearings that included public participation and evaluations of the Legislative Analyst, Bureau of State

[8] The draft business plan was supported by nine source documents including a benefit-cost analysis (AR 299-335), a ridership and revenue forecasting analysis (AR 336-608), estimates of capital cost changes from 2009 to 2012 (AR 609-651), an analysis of the cost of providing equivalent capacity to high-speed rail through other modes (AR 652-692), an economic impact analysis (AR 693-740), a report estimating operating and maintenance costs under 24 different scenarios (AR 741-761), international case studies of high-speed train systems (AR 762-780), and a report describing development of the ridership and revenue model for the project-level Environmental Impact Report/Statement. (AR 781-920.) A ridership and revenue development report dated June 2011 also supported the draft business plan. (AR 2642-2781.)

[9] The draft business plan was released for a public comment for a 60-day period before it could be adopted, the comment period was later extended, and comments were heard at three meetings of the Authority. (See AR 934, 954, 1129, 1346.) The original Tos complaint challenging the legality of the Authority's decisions encompassed within the funding and business plans was filed on November 14, 2011, but none of the plaintiffs submitted any public comment. (See AR 1439-1613 [comprising all written comments].)

Audits and peer review group. (See, e.g., AR 968-976 [Legislative Analyst report]; 978-985 [Senate Transportation Committee report]; 1326-1333 [peer review group report]; 1614-1695 [Bureau of State Audits report]; 1909-1918 [Senate Budget Committee report].)

III. THE REVISED 2012 BUSINESS PLAN

On April 12, 2012, the Authority met to discuss and adopted a revised 2012 business plan. (AR 1925, 2782; see AR 1931-2132 [business plan].) The revised plan was developed after outreach to and comment from interested parties, public comment, legislative hearings, and input from the Legislative Analyst and State Auditor. (AR 1925, 1927-1930, 1931-2132, 2151.)

The revised business plan reflected two key changes. First, it committed to construct the IOS South within 10 years. (AR 1937.) Second, it provided for integration or "blending" of high-speed rail improvements with existing or upgraded conventional rail systems at the ends of the Phase I corridor (in the Los Angeles and San Francisco regions) coupled with early investment in these "bookends" for expansion of high speed service. (AR 1937, 1939.) The proposed blending reduced the cost of construction of the entire Phase I corridor by $30 billion; the revised business plan now estimated the cost to build the entire corridor was $68.4 billion. (AR 1939, 2007.) Construction of the IOS South would also close the current gap in train service between Bakersfield and Palmdale and connect the central valley to southern California by rail. (AR 1938, 1942.)

The revised business plan included an updated construction schedule, cost estimates, ridership forecast and benefit-cost analysis. (AR 1949-1953.) The revised construction schedule projected completion of the blended Phase I corridor by 2028, passenger service starting in 2029, and an average fare between San Francisco and Los Angeles of $81. (AR 1948-1949.) In addition, the revised plan identified "cap-and-trade" revenues an additional potential source of revenue to complete the IOS South, if additional federal funds failed to materialize. (AR 1938, 1949.) Following adoption, the Legislature held more legislative hearings. (See AR 2938-2949

[Legislative Analyst report], 2950-2968 [Senate Budget Committee report], 2988-2992 [Assembly Transportation Committee report].)[10]

IV. LEGISLATIVE ENACTMENT OF AN APPROPRIATION TO CONSTRUCT THE INITIAL CONSTRUCTION SECTION

On July 18, 2012, the Legislature enacted Senate Bill 1029 appropriating bond funds and federal funds for construction of the IOS South beginning with the ICS and early blended system projects. The Legislature appropriated $2.609 of bond funds and $3.42 billion of federal grant funds to begin construction of the ICS. (AR 2792-2797; Stats. 2012, ch. 152, §§ 8-9 [Senate Bill 1029].)

In the intervening time since its approval of the first funding plan and its request for an appropriation, the Authority had certified the project-level environmental impact report for the Merced to Fresno portion of the high-speed rail project, covering a portion of the 130-mile ICS. (AR 3144-3145, 3146-3147, 3671.) This meant that as of May 3, 2012, the Authority had completed all necessary project-level environmental clearances necessary to proceed to construction for this portion of the ICS. In addition, on March 1, 2012, the Authority had approved components of a request for proposal for construction package no. 1,[11] including a stipend of up to $2 million to be paid to pre-qualified contractors not awarded the contract for

[10] The revised business plan was supported by updated source information that included a summary of comments from reviewing entities (AR 2155-2167), a benefit-cost analysis (AR 2168-2207), a comparison of providing equivalent capacity through other travel modes (AR 2208-2239), an assessment of costs changes (AR 2240-2282), an economic analysis report (AR 2283-2330), an estimation of operating and maintenance costs for the revised plan (AR 2331-2332), a high-medium-low cash flow analysis (AR 2344-2360), international case studies (AR 2361-2379), ridership and revenue forecasting (AR 2401-2641), and a ridership and revenue development report. (AR 2642-2781.)

[11] As indicated in the first funding plan, the Authority's plan was to construct the ICS in five separate phases pursuant to five design-build contracts. Construction package no. 1 was the first request for proposal that would eventually lead to the award of the first design-build contract. (AR 1727; see 62 [ICS would be developed using one or more design-build contracts as part of a procurement process].) Design-build contracts allow the Authority to transfer design-build completion risk to a contractor under fixed-cost contracts. (AR 1710.) The use of design-build contracts to provide high-speed rail infrastructure is a common contract delivery method for high-speed rail networks around the world. (AR 2032.)

each acceptable proposal submitted.[12] (AR 1751-1752; see AR 1706-1728, 1745, 1746-1749, 1750.)

In considering the propriety of the appropriation, the Legislature had a legal opinion of Legislative Counsel dated June 8, 2012, which addressed complaints voiced about the adequacy of the first funding plan. (AR 2380-2400.) This letter opined that the first funding plan and revised business plan complied with the bond act. Among the many issues addressed in the opinion was one relevant here: whether the first funding plan contained the elements or items required by the bond act to be addressed in a funding plan. (AR 2391-2395.) The Legislative Counsel concluded that the first funding plan satisfactorily addressed all the requirements imposed by the bond act, except the requirement that the Authority certify the completion of all project-level environmental clearances to proceed to construction. (AR 2395, 2399.) Although the Legislative Counsel found that the Authority had not obtained all clearances for the entire ICS (AR 2395), she nevertheless concluded that any defect in satisfying the reporting requirement did not limit the Legislature's authority to appropriate funds to construct the ICS. (AR 2392.)

> [A] court may not enjoin the Legislature from appropriating funds and, therefore, regardless of whether the authority submits a funding plan or an associated request for bond act appropriations, we think the Legislature is free to appropriate or not appropriate bond act funds, consistent with the purposes of the bond act, as it determines best serves the needs of the state.

(*Ibid.*) In other words, the Legislative Counsel concluded that the only consequence of the Authority's failure to certify that it had all project-level clearances for the ICS is that the Legislature might choose not to fund the requested appropriation. The Legislative counsel also concluded that a defect in satisfying a funding plan reporting requirement could not affect the validity of the bonds, relying on an express provision in the bond act. (§ 2704.08, subd. (i).)

[12] The purpose of the stipend is to defray engineering and other costs in return for submission of a responsive proposal; the stipend amount falls within .01% to 0.02% range of estimated contract value, which is an industry standard. (AR 1744.) Payment of the stipend entitles the Authority to use the work product and ideas in an unsuccessful proposal to facilitate future system planning. (See Defendants' Request for Judicial Notice (hereinafter "Defs' RJN"), Exh. 1 [Request for Proposal, Section 7.12, p. 22].)

PROCEDURAL HISTORY

I. THE COMPLAINT

Plaintiffs are two central valley landowners, Jon Tos and Aaron Fukuda, and the County of Kings (hereinafter collectively referred to as "Tos"), who filed their original complaint alleging that the funding plan violated the bond act on November 14, 2011. Tos alleges that the first funding plan to construct a segment of high-speed rail in the central valley and the Legislature's appropriation do not satisfy the requirements of the bond act, and sought to declare the funding plan illegal and to restrain the Authority from use of bond funds. Tos later twice amended the complaint, each time adding petitions for writs of mandate to overturn the first funding plan. The operative second amended complaint (SAC) is not a model of clarity. It alleges twelve separate causes of action lying in mandamus (some of which also seek declaratory or injunctive relief). Substantively, however, the SAC alleges that the first funding plan violates the bond act in several different ways, all of which form the basis for mandamus relief, either alone or in combination with other relief.[13]

Because the causes of action must be construed to encompass all the factual allegations of the complaint, and because mandamus relief to overturn the funding plan is sought for every violation alleged, it is more useful to focus on the factual allegations of the complaint than the nominal causes of action.[14] Specifically, Tos alleges that:

- The ICS will not be electrified and may be used for conventional passenger service (SAC, ¶ 9); therefore, the certification in the funding plan that the usable segment will be suitable and ready for high-speed operation is erroneous (*id.*, ¶ 36.3), and a writ should issue setting aside the first funding plan. (*Id.*, ¶¶ 37-38.)

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[13] Several causes of action seek only declaratory relief but the legal and factual allegations underpinning these causes of action is duplicative of others that seek mandamus relief.

[14] Plaintiffs improperly allege Code of Civil Procedure section 526a as an independent cause of action. (SAC, seventh through tenth and twelfth causes of action.) Section 526a provides a litigant taxpayer standing to bring a cause of action seeking declaratory and injunctive relief or to petition for mandamus, without having to prove he is injured by the spending. (*Blair v. Pitchess* (1971) 5 Cal.3d 258, 267-268 [primary purpose of statute is to enable a large body of the citizenry to challenge governmental action which would otherwise go unchallenged because of the standing requirement]; *Van Atta v. Scott* (1980) 27 Cal.3d 424, 449-450 [authorizing mandamus relief pursuant to section 526a].) Section 526a is not an independent cause of action; there must be an underlying claim, lying either in mandamus, or for declaratory or injunctive relief.

- The first funding plan identified all sources of funding to build the ICS, rather than the entire IOS South (SAC, ¶ 10); therefore, the identification of sources of funding did not comply with the bond act (*id.*, ¶ 36.1), and a writ should issue setting aside the first funding plan. (*Id.*, ¶¶ 37-38.)

- The Authority certified that it would have all project-level environmental clearances for the ICS prior to beginning construction, rather than certifying that it had completed all such clearances, and it also lacked clearances required by the U.S. Corps of Engineers, U.S. Fish and Wildlife Serve and San Joaquin Valley Air Pollution Control District (SAC, ¶¶ 11, 36.5); therefore, the certification failed to comply with the bond act, and a writ should issue setting aside the first funding plan. (*Id.*, ¶¶ 37-38.)

- The Authority is planning for nonstop travel time of three hours between San Francisco and Los Angeles (SAC, ¶ 12); this violates the bond act performance requirement that travel time be no more than two hours and 40 minutes (*id.*, ¶¶ 42, 42.2, 45), and a writ should issue setting aside the first funding plan and the business plan. (*Id.*, ¶ 47.)

- The Authority is planning a high-speed train system that will not be completed until 2028, or even 2032; this violates section 8(f) of AB 3034, which stated the Legislature's intent that the train system would be complete by 2020 (SAC, ¶ 13, see *id.* ¶ 50), and a writ should issue setting aside the first funding plan and the business plan. (*Id.*, ¶ 51.)

- The Authority is planning development of the Phase I corridor in phases so that, until the corridor is complete, passengers traveling between Los Angeles and San Francisco will have to change trains in San Fernando Valley, Palmdale and San Jose (SAC, ¶¶ 14, 46); this violates the bond act's "one-seat ride" performance requirement, and a writ should issue setting aside the first funding plan and the business plan. (*Id.*, ¶ 47.)

- The Authority is planning for an $83 fare between San Francisco and Los Angeles; this violates the bond act, which promised that the fare would be $59 (SAC, ¶ 15), and a writ should issue setting aside the first funding plan and the business plan. (*Id.*, ¶ 51.)

- The Authority's certification that the IOS South will not require an operating subsidy is "erroneous" (SAC, ¶¶ 16, 36.4); therefore, a writ should issue setting aside the funding plan. (*Id.*, ¶¶ 37-38.)

- The Authority's 2009 business plan represented that the Phase 1 corridor would cost $43 billion and the revised 2012 business plan represented that the Phase I corridor would cost between $68-80 billion; this violates the bond act, which promised that the entire cost of the train system, including the Phase I corridor and links to all population centers, would be $45 billion (SAC, ¶ 16a), and a writ should issue setting aside the business plan. (*Id.*, ¶ 51.)

- The Authority is spending bond funds for capital construction costs, including a stipend to contractors who respond with proposals to construct the first phase of the ICS, as well as staff salaries and contractor expenses to develop the request for proposals; the bond act

prohibits this spending in advance of approval of a second funding plan (SAC, ¶¶ 17(b), 17a, 60-63, 66-68), and a writ should issue overturning the decisions authorizing these payments. (*Id.*, ¶¶ 64, 69.)[15]

II. TRIAL OF THE WRIT CLAIMS

The parties agreed at the case management conference that Tos' petition for writs of mandate would be tried on May 31, 2013. The court stated that after the writ proceeding was concluded, an assessment could be made of what remained of the action. This understanding was reflected in a stipulation and order that stated explicitly on its cover that the May 31, 2013 hearing date related to the petition for writs of mandate.

Although the parties stipulated and the court ordered a trial on the petition for writs of mandate, oddly, Tos filed two briefs: a "Part I" brief addressing just two of the ten allegations in support of writs of mandate, and a "Part II" brief addressing overlapping claims for declaratory and injunctive relief. The claims set for trial on May 31, 2013 are just the writ claims, i.e., those allegations of violations of statutory duties for which Tos seeks mandamus relief. Thus, the only submission relevant to the trial of the petition for writs of mandate is the "Part I" brief and "Part I" request for judicial notice.[16] Therefore, the court should consider only the "Part I" brief to determine whether Tos is entitled to the writs of mandate he seeks, and should disregard the "Part II" brief as premature and not relevant to the May 31 hearing.[17]

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[15] In addition to these ten allegations, Tos alleges that defects in the first funding plan are likely to be replicated in the second funding plan (SAC, ¶¶ 81-82), and mandamus should issue to prevent these defects in the second funding plan. (*Id.*, ¶ 85.) These allegations are: (1) not ripe in the absence of any allegation that a second funding plan has been submitted; and (2) speculative because the bond act explicitly requires that a second funding plan address material changes from the first funding plan, which could conceivably cure any defects in the first funding plan. (§ 2704.08, subd. (d)(1)(E).) Because these allegations duplicate allegations made in the context of the first funding plan and because the same arguments would apply, to avoid repetition we do not separately address these the claims in the context of the second funding plan.

[16] The administrative record of the proceedings underlying this action will be lodged by defendants in conformance with local rules.

[17] The Authority objects to the court's consideration of any evidence in the "Part II" brief in this proceeding as premature and prohibited (it has filed formal objections contemporaneously with this opposition), and plaintiffs concede that the court need consider the brief only if the court determines that the "legal and/or factual issues merited further proceedings" after ruling on the mandamus claims. (Tos' Trial Brief, Part I-Opening Brief in Support of Motion for Peremptory Writ of Mandate (hereinafter "OB"), p. 9:20-25.)

ARGUMENTS

Judgment should be entered against Tos on all claims for mandamus relief. First, Tos has abandoned eight of ten grounds for mandamus by failing to address all but two of the ten claimed violations of statutory duties in the "Part I" brief. This entitles the Authority to judgment on the merits of the abandoned claims. Second, the two claims addressed in Tos' memorandum are not actionable as a matter of law because the only potential consequence of this failure would have been a legislative decision not to appropriate funds. Because the Legislature recognized the failure, and in the face of that knowledge chose to appropriate funds, there is no available judicial remedy: setting aside the funding plan would have no legal effect, and the court cannot set aside the appropriation. Third, even if the court considers all ten alleged violations of the bond act on the merits, plaintiffs have failed to show the kind of palpably unreasonable and arbitrary decisions required for traditional mandamus to issue. Finally, Tos cannot state a claim in mandamus as a matter of law against the state officials he has sued because they cannot be sued for their exercise of executive and legislative discretion in implementing the high-speed train system.

I. THE CHALLENGED DECISIONS ARE REVIEWABLE PURSUANT TO CODE OF CIVIL PROCEDURE SECTION 1085, UNDER THE HIGHLY DEFERENTIAL ABUSE OF DISCRETION STANDARD

All of the Authority's decisions here challenged are quasi-legislative decisions based on an application of the bond act, which are properly reviewed for abuse of discretion. (*Hess Collection Winery v. Cal. Agricultural Labor Relations Bd.* (2006) 140 Cal.App.4th 1584, 1596-97.)

A writ of traditional mandate is most often sought to compel the performance of a clear, present, and usually ministerial duty on the part of the respondent, often a public entity or officer. (*See, e.g., Brown v. Chiang* (2011) 198 Cal.App.4th 1203, 1213; *Santa Clara Cnty. Counsel Attorneys Ass'n v. Woodside* (1994) 7 Cal.4th 525, 539.) A ministerial duty is one that the respondent is required to perform under a given set of facts, without the exercise of independent judgment or opinion. (*Cnty. of San Diego v. State of California* (2008) 164 Cal.App.4th 580, 593.) A common example of a ministerial duty is a county clerk's office's issuance of a marriage license to a qualified couple. (*Tuolumne Jobs & Small Bus. Alliance v. Super. Ct.* (2012) 210 Cal.App.4th 1006, 1024.) A respondent's performance of a ministerial duty is judged by whether

the respondent exceeded its legitimate powers. (*Alliance for a Better Downtown Milbrae v. Wade* (2003) 108 Cal.App.4th 128, 133, 135.)

Unlike a ministerial duty, an exercise of discretion involves the use of judgment in deciding what action to take. (*See, e.g., Ridgecrest Charter Sch. v. Sierra Sands Unified Sch. Dist.* (2005) 130 Cal.App.4th 986, 1003.) The exercise of discretion in reaching a decision is susceptible to mandate only in the event of a refusal to exercise that discretion or an abuse of discretion. (*Cal. Ass'n of Med. Prods. Suppliers v. Maxwell-Jolly* (2011) 199 Cal.App.4th 286. 302; *Agosto v. Bd. of Trustees of the Grossmont-Cuyamaca Comm'ty Coll. Dist.* (2010) 189 Cal.App.4th 330, 335.) If an agency's quasi-legislative action depends upon the correct interpretation of a statute (as with all the claims in this case), this is a question of law upon which the court exercises judgment. (*Cal. Correctional Peace Officers' Ass'n v. State* (2010) 181 Cal.App.4th 1454, 1460.) However, in doing so, the court is guided by the principle that an administrative agency's interpretation of controlling statutes will be accorded great respect by the court and will be followed *if not clearly erroneous*." (*Ibid.*, citations and internal punctuation omitted, emphasis added; *Californians for Safe Prescriptions v. Cal. State Bd. of Pharm.* (1993) 19 Cal.App.4th 1136, 1150.)

In determining whether an abuse of discretion has occurred, a court may not substitute its judgment for that of the agency, and if reasonable minds may disagree as to the wisdom of the agency's action, its determination must be upheld. (*Alejo v. Torlakson* (2013) 212 Cal.App.4th 768, 780.) A decision is an abuse of discretion only if it is arbitrary, capricious, entirely lacking in evidentiary support, unlawful, or procedurally unfair. (*Ibid.*) When there is no ministerial duty and review is for abuse of discretion, such limited review is grounded in the doctrine of separation of powers, acknowledges the expertise of the agency, and derives from the view that courts should let administrative boards and officers work out their problems with as little judicial interference as possible. (*Ibid.; Lindell Co. v. Bd. of Permit Appeals* (1943) 23 Cal.2d 303, 315) It also recognizes that a challenged administrative agency action comes before the court with a strong presumption that the agency's official duty has been regularly performed and the burden is on the petitioner to show the agency's action is invalid. (*Ibid.*)

II. INTERPRETATION OF THE BOND ACT IS GOVERNED BY STANDARD RULES OF STATUTORY CONSTRUCTION

Tos argues that interpretation of a voter-approved bond act is governed by rules of statutory construction that are more exacting than those applied to statutes passed by the Legislature. Specifically, Tos claims that interpretation of a voter-approved bond act requires strict adherence to voter intent as compared with the interpretation of an act not approved by the voters. (OB, pp. 12:1-14:13.) This argument lacks any legal authority. Standard rules of statutory interpretation apply whether a statute is enacted by bill or by initiative measure, and to bond acts as well as to other laws.

> Interpreting a voter initiative . . . , [the court will] apply the same principles that govern statutory construction. (See *Horwich v. Superior Court* (1999) 21 Cal.4th 272, 276 (Horwich).) Thus, '[the court will] turn first to the language of the statute, giving the words their ordinary meaning.' (*People v. Birkett* (1999) 21 Cal.4th 226, 231 (Birkett).) The statutory language must also be construed in the context of the statute as a whole and the overall statutory scheme [in light of the electorate's intent]. (*Horwich, supra*, 21 Cal.4th at p. 276.) When the language is ambiguous, '[the court will] refer to other indicia of the voters' intent, particularly the analyses and arguments contained in the official ballot pamphlet.' (*Birkett, supra*, 21 Cal.4th at p. 243.) (*People v. Rizo* (2000) 22 Cal.4th 681, 685 (Rizo).)
>
> In other words, "[the court's' task is simply to interpret and apply the initiative's language so as to effectuate the electorate's intent." (*Hi-Voltage Wire Works, Inc.* v. *City of San Jose* (2000) 24 Cal.4th 537, 576 (Hi-Voltage) (conc. & dis. opn. of George, C. J.).)

(*Robert L. v. Superior Court* (2003) 30 Cal.4th 894, 900-901.) If there is ambiguity in statutory language, the court will "strive to select the construction that comports most closely with the [electorate's] apparent intent, with a view to promoting rather than defeating the statutes' general purposes" and to "avoid any interpretation that would lead to absurd consequences." (*People v. Walker* (2002) 29 Cal.4th 577, 581.)[18]

[18] It is true that one difference between a bond measure and other laws is that the California Constitution limits the power of the Legislature to make substantial changes in the scheme or design of a bond act that induced voter approval. (Cal Const., art XVI, § 1 [moneys raised by authority of such law shall be applied only to the "specific object" stated therein]; *Veterans of Foreign Wars v. State of California* (1974) 36 Cal.App.3d 688, 692-693 [the constitutional provision prevents the Legislature from making "substantial changes in the scheme or design" that induced voter approval].) In *O'Farrell v. Sonoma County* (1922) 189 Cal. 343, 348 and *Jenkins v. Williams* (1910) 14 Cal.App. 89 (discussed at page 12:13-14:4 of the OB), the courts disapproved legislative action that clashed with or was unrelated to voter-approved bond acts that specifically identified the object of bond funds. But this line of cases does not, as Tos (continued...)

III. DEFENDANTS ARE ENTITLED TO JUDGMENT ON ALL THE WRIT CLAIMS BECAUSE THEY ARE WAIVED OR FAIL TO STATE A CLAIM FOR RELIEF

A. Tos' Abandoned Claims Are Waived

As a threshold matter, Tos abandoned eight of the ten allegations in support of his mandamus claims by failing to present any legal argument or evidence to support them in the "Part I" brief.[19] The abandoned claims are waived.

A failure to file a supporting memorandum may be deemed a waiver of the claim. (*Jermstad v. McNelis* (1989) 210 Cal.App.3d 528, 538.) A failure to set forth all the relevant evidence in a mandamus proceeding may also be deemed a waiver of any arguments made in support of a claim. (*City of Lomita v. City of Torrance* (1983) 148 Cal.App.3d 1062, 1069-1070.) A petitioner has an obligation to "set forth all the evidence which might have a bearing on the [challenged] administrative decisions." (*Markley v. City Council of the City of Los Angeles* (1982) 131 Cal.App.3d 656, 673.) Where a petitioner shirks his responsibility in this respect, a reviewing court is not required to undertake an independent examination of the record (*ibid.*), and where there is an "entire absence of any showing" on a petition for writ of mandate, a court may deny the petition on the merits. (See *Denham v. Superior Court* (1970) 2 Cal.3d 557, 564.) Further, a failure to file a supporting memorandum may be construed as an admission that asserted claims for relief are not meritorious. California Rules of Court, rule 3.1113(a) expressly provides that "[a] party filing a motion [e.g., a petition for writ of mandate] . . . must serve and

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(...continued)
would have it, impose any special rule of statutory construction.

[19] The allegations of violation of the bond act not addressed in the Part I brief are: (1) construction of an ICS that is not electrified and may be used for conventional rail service before completion of the IOS South; (2) the Phase I corridor cannot achieve travel time requirements; (3) passengers traveling along the Phase I corridor are required to change trains; (4) the Phase I corridor cannot be completed by 2020; (5) the cost to complete the Phase I corridor exceeds authorized costs; (6) the fare to travel along the Phase I corridor exceeds authorized charges; (7) bond funds are being spent on construction costs in advance of submission and approval of a second funding plan; and (8) an operating subsidy will be required. In addition, there are two claims in the SAC alleging that the funding plan certification relating to environmental clearances is defective. The OB addressed one but failed to address the allegation that the funding plan should have but failed to certify that certain "environmental permits," other than CEQA clearances, were in hand. Thus, this claim is also waived.

file a supporting memorandum" and a "court may construe the absence of a memorandum as an admission that the motion . . . is not meritorious and cause for its denial . . . ."

For those writ claims for which Tos submitted no supporting arguments or evidence in the Part I brief, Tos has failed to meet the burden of proof, and the court should enter judgment for defendants.

B. The Two Allegations of Bond Act Violation That Tos Addressed in the "Part I" Brief Fail to State Claims For Relief as a Matter of Law

Tos is not entitled to any writ relief for the two purported violations of funding plan reporting requirements that the "Part I" brief does address. Tos asserts that the funding plan failed to identify funding in place, or reasonably in place, to construct the entire IOS South, and to certify completion of all environmental clearances for the ICS and IOS South. (OB, p. 26:12-18; SAC, ¶¶ 10, 11, 36.1, 36.5.) The funding plan addresses the two reporting requirements; the dispute is whether Tos finds the reporting satisfactory. Tos is not entitled to a writ because he is unsatisfied with these aspects of the Authority's first funding plan. Tos is not the intended beneficiary of the reporting requirements, and the bond act imposes no statutory consequence for a failure to satisfy funding plan reporting requirements. Further, setting aside the first funding plan would have no legal effect because the Legislature, for whose benefit the first funding plan exists, did not find the alleged deficiencies material, and funded the requested appropriation. The court has not been asked to nor could it use mandamus to invalidate the Legislature's appropriation.

The requirement that the Authority submit a funding plan addressing the items or elements specified in section 2704.08, subdivision (c)(2)(A)-(K), is imposed on the Authority for the benefit of the Legislature, to allow it to determine whether or not to fund a requested appropriation. That would explain why the bond act requires the funding plan to be submitted 90 days prior to a request for an appropriation to fund capital costs. (§ 2704.08, subd. (c)(1).) This requirement then allows the Director of Finance, the peer review group, and the relevant policy and fiscal committees of the Legislature to examine and report to the Legislature on the first funding plan in advance of any appropriation.

In order to state a viable claim for breach of a duty in a statute (e.g., the duty to submit a funding plan identifying all sources of funds to be invested in the corridor or usable segment), the statutory duty must be designed to protect against the particular kind of injury the plaintiff has suffered; i.e., a petitioner must show that his or her injury is one of the consequences that the enacting body sought to prevent through enactment of the statutory duty. (Gov. Code, § 815.6; *Haggis v. City of Los Angeles* (2000) 22 Cal.4th 490, 499.) The funding plan reporting requirements were not enacted to prevent injury to Tos as a landowner or taxpayer (see SAC, ¶ 1); they were enacted to ensure meaningful legislative oversight of development of the train system which the Legislature exercises on behalf of the voters like Tos by the power to appropriate or to withhold an appropriation. (§ 2704.08, subd. (c)(1).)

Where a statutory scheme imposes no penalty or consequence for breach of a statutory requirement, the statutory duty is directory only, not mandatory, and there is no remedy for noncompliance. (*In re C.T.* (2002) 100 Cal.App.4th 101, 111.) There is no penalty or consequence in the bond act for a failure to satisfactorily address funding plan reporting requirements. There is also language suggesting that the Legislature and voters did *not* intend to impose any such penalty or consequence; the bond act states expressly that "[n]o failure to comply" with any funding plan reporting requirements "shall affect the validity of the bonds issued under this chapter." (§ 2704.08, subd. (i).) Therefore, even if there was a failure to satisfactorily address reporting requirements, which there was not, that failure cannot not form the basis for a writ of mandate.

The consequence of the Authority's alleged failure to comply with the reporting requirements of the first funding plan is that the Legislature might have decided not to appropriate the funds requested. The Legislature chose to appropriate funds after much deliberation about the sufficiency, reliability and accuracy of the information in the first funding plan, and that appropriation cannot be disturbed by writ of mandate.

As the Legislative Counsel opined, a failure to comply with funding plan reporting requirements does *not* inhibit the Legislature's authority to appropriate funds, or invalidate the bonds. Implicit in the opinion is the determination that reporting requirements are for the

Legislature, and upon receipt of the information, it can decide to appropriate or not to appropriate. This opinion is entitled to great weight. (*Pacific Lumber Co. v. State Water Resources Control Bd.* (2006) 37 Cal.4th 921, 939.)

Further, because the Legislature appropriated funds, and did so in the face of complaints that the funding plan did not meet statutory requirements, an order setting aside the funding plan will have no legal effect, and would be an empty act. Under these circumstances, Tos cannot state a claim for breach of any funding plan reporting requirements as a matter of law. (Gov. Code, § 815.6.)

IV. IN ANY EVENT, DEFENDANTS ARE ENTITLED TO JUDGMENT ON ALL TEN ALLEGATIONS SUPPORTING CLAIMS FOR MANDAMUS BECAUSE THEY FAIL ON THE MERITS

As set forth above, Tos' abandonment of most of eight allegations supporting the writ claims and the failure as a matter of law of the remaining two are alone sufficient grounds to enter judgment in favor of defendants. But even if the court reaches the merits of these claims, under the applicable legal standard, the administrative record reveals that the Authority properly interpreted the bond act, and that its decisions were supported by the record and in no sense arbitrary. Accordingly, judgment should be entered in defendants' favor on all the writ claims.

The ten claims may be grouped for purposes of analysis into the following six categories:

- claims asserting that partial or phased construction in portions smaller than a corridor or usable segment thereof is not authorized;
- claims asserting that the funding plan certification relating to completion of environmental clearances is not authorized;
- claims asserting that there are bond act requirements that are not actually found in the language of the bond act;
- claims asserting that the Authority is planning to construct a train system that is not designed to achieve mandatory performance requirements;
- claims asserting that the Authority is spending bond funds on capital costs to construct the system without obtaining approval of a second funding plan; and finally

- the claim that the funding plan certification relating to the operating subsidy is incorrect.

Each claim presents a question of law upon which the court exercises its independent judgment. With respect to each claim, there is no violation of the bond act.

A. The Bond Act Contemplates Phased Construction and Service During Construction of the High-Speed Train System

Several allegations hinge on whether the bond act permits the Authority to develop the high-speed train system in phases. Specifically, Tos argues that construction of the system in portions smaller than a full corridor or usable segment is not authorized, and that phasing in electrified service, beginning with conventional rail service, is also forbidden. The claims raising these issues are: (1) whether the bond act requires identification of funds in place to construct the entire IOS South, not just to construct the ICS; (2) whether the bond act allows service on the ICS to begin with conventional rail service and graduate to high-speed rail service on electrification of the full IOS South; and (3) whether the bond act prohibits service along the Phase I corridor that requires passengers to change trains at the San Fernando Valley, Palmdale and San Jose stations until the IOS South and the Phase I corridor are completed, at which time a "one-seat ride" would be the standard.

The AR shows that: (1) the Authority is planning to construct the ICS in phases (AR 37); (2) the first funding plan identifies funding in place to construct the entire ICS and the sources of future funding to be invested in the IOS South (AR 67, 202-211, 1938, 1949); (3) the ICS will be constructed for high-speed rail service, but not be electrified until the IOS South is complete; until then the ICS will be able to accommodate conventional passenger rail service (AR 62, 1938); (4) after the ICS is completed, the IOS South will be completed in future phased development for high-speed train travel (AR 1938); and (5) after the IOS South is completed, the Phase I corridor will be constructed in phases building out north from the IOS South to San Francisco and south to Los Angeles; once it is fully constructed, passengers traveling along the corridor will be able to make the trip without changing trains. (AR 1948.)

These three claims fail because phased implementation of the train system in portions smaller that an entire corridor or usable segment is permissible under the terms of the bond act.

1. The Bond Act Authorizes Phased Construction of the Train System in Portions Smaller Than an Entire Corridor or Usable Segment

The bond act authorizes construction of the high-speed train system in portions, like the ICS, that are smaller than an entire corridor or usable segment; it clearly authorizes the use of bond proceeds to pay for all capital costs to construct a "high-speed train system *or any portion thereof*." (§ 2704.04, subd. (c), emphasis added; § 2704.06; see also § 2704.08, subd. (f) [describing priorities for "initiating" construction "on" corridors or usable segments].) Since the train system envisioned by the bond act will be built over a long period of time, such phased construction allows the Authority to manage the development process, costs, and funding over time. (AR 1999.)

Nothing in the bond act suggests that phased construction in portions like the ICS is prohibited. It is true that for purposes of the first funding plan, when the Authority proposes building a portion of rail smaller than a usable segment or corridor, it must consider the project in the context of the corridor or usable segment in which it will be built. The purpose of the requirement that funding plans consider a request for an appropriation in the larger context of corridors or usable segments is to ensure that, for purposes of making appropriation decisions, the Legislature can assess project planning in segments large enough to ensure that voters receive the best value from the use of bond proceeds and construction plans meet the overarching cost and other priorities established in the bond act. (§ 2704.08, subds. (a) & (f).) This funding plan requirement does not require or even suggest that the Authority may only construct the system in sections as large as entire corridors or usable segments, or that it cannot request an appropriation to construct a portion of a usable segment until funding is in place to construct the entire usable segment.

Where the Legislature has carefully employed a term in one place and has excluded it in another, it should not be implied. (*Wasatch Property Management v. Degrate* (2005) 35 Cal.4th 1111, 1118.) The bond act uses the terms "corridor" and "usable segment" in the part of the bond

act requiring submission of funding plans. (§ 2704.08.) The bond act does not use these terms in the part of the act authorizing the use of bond funds to pay for construction of the high-speed train system. (§ 2704.04, subd. (c).) It is this part of the bond act that authorizes the use of bond funds to construct the high-speed train system or "any portion thereof." (*Ibid.*) In other words, there is significance attributed to the fact that the Legislature omitted the term "corridor" or "usable segment" from the authorization to use bond proceeds: it is not limited to corridors or usable segments.

Finally, construing the bond act as Tos suggests would lead to absurd results. Construction of the high-speed train system is the largest public works project undertaken by a state in terms of complexity, cost and shear physical size. The IOS South itself is 300 miles long stretching from south of Merced to the San Fernando Valley and is estimated to cost $21.4 billion to construct. (AR 60, 64.) Given the size, cost and complexity of the IOS South, an interpretation of the bond act that would require construction of the train system in sections no smaller than the IOS South would be unreasonable.

Because the bond act permits use of bond funds to construct the train system in portions smaller than an entire corridor or usable segment, the funding plan identifying the ICS as the first portion of the IOS South, the funding for it, certifying the Authority's ability to complete it, and certifying that the ICS would not require an operating subsidy, complied with the bond act. Accordingly, these allegations cannot form the basis for mandamus relief.

2. The Bond Act Does Not Require That a Funding Plan Identify Funds in Place to Construct an Entire Corridor or Usable Segment

Given that phased construction of the train system in portions smaller than an entire corridor or usable segment is authorized, Tos' allegation that the funding plan failed to identify funding in place to construct the entire IOS South fails as a basis for mandamus relief. (OB, p. 22:1-24:19.)[20] There is no provision in the bond act requiring a funding plan to identify funds in place, or even reasonably likely to be in place, to build an entire usable segment or corridor. To

[20] This is the first of the two writ claims Tos addressed in the Opening Brief.

the contrary, the bond act specifically acknowledges that bond proceeds are to be used to "initiate" construction (§ 2704.04, subd. (a)), and that additional funds will be required. (§ 2704.07.)

The bond act requires only that a first funding plan *identify*:

> the sources of all funds to be invested in the corridor, or usable segment thereof, and the anticipated time of receipt of those funds based on expected commitments, authorizations, agreements, allocations, or other means.

(§ 2704.08, subd. (c)(2), (c)(2)(D).)[21] The funding plan fully complied by *identifying* all sources of expected funding to be invested in the IOS South, and funds in hand to be invested in the ICS, which was the only portion of the IOS South for which the Authority was seeking an appropriation. (Indeed, because the Authority can have no funds actually in-hand in advance of an appropriation, all reporting in the funding plan must be aspirational, to one degree or another.) The funding plan states that funding to be invested in the IOS South would be from "potential future funding sources" described in the draft business plan. (AR 67.) The draft business plan identifies, as both known and potential funding sources, federal funding sources, state funding from bond act proceeds, and local funding sources. (AR 202-211.) The draft plan states that federal funds have historically supported major transportation projects (AR 203), there would be remaining matching bond funds for completion of the IOS South (AR 208), and future revenue would be local and private revenues from a variety of planned identified sources. (AR 208-209.) The revised business plan identifies "cap-and-trade" revenues from quarterly auctions as an additional potential source of revenue to complete the IOS South, if additional federal funds failed to materialize. (AR 1938, 1949.)

Tos may prefer that the Authority invest bond funds only when funds to complete an entire usable segment are in hand, but this is not what the bond act requires, nor would it be a practical approach to building a project. The funding plan only requires identification of expected funding

[21] The "anticipated time of receipt" language is further indication that funding sources to construct an entire corridor or usable segment need not be available when a funding plan is submitted. (§ 2704.08, subd. (c)(2)(D).)

sources. Accordingly, the Authority's failure to identify funding in place to construct the IOS South cannot be grounds for mandamus relief.

3. The Bond Act Does Not Prohibit Interim Use of the Initial Construction Section for Conventional Passenger Rail Service

Given that the bond act contemplates phased construction of the train system, the fact that the ICS will not be electrified until the IOS South is complete, and may be used for conventional rail service in the interim, is not "so palpably unreasonable and arbitrary as to show an abuse of discretion as a matter of law." (SAC, ¶¶ 9, 44 [alleging lack of electrification and other items violates bond act requirement that the system be designed to operate electric trains capable of sustained maximum operating speeds of no less than 200 miles]; *Carrancho v. California Air Resources Board, supra*, 111 Cal.App.4th at 1264-1265).)

The record shows that the Authority plans to build the ICS track and other structures to high-speed rail standards (AR 84, 1942, 1948), but the ICS will not operate high-speed service until the entire IOS South is completed. During this time, the ICS will have the potential to be used for conventional passenger train service. (AR 37, 82.)

There are several provisions of the bond act that clearly contemplate use of newly constructed high-speed rail for conventional passenger train service, if conditions warrant. (See § 2704.08, subd. (f)(3) [referring to "the utility of those corridors or usable segments thereof for passenger train services other than the high-speed train service"]; § 2704.08, subd. (c)(2)(I) [referring to "one or more passenger service providers . . . using the tracks or stations for passenger train service"]; § 2704.08, subd. (d)(1)(F) [referring to terms and conditions to be entered into by the Authority and any other party for the "operation of passenger train service along the corridor or usable segment thereof"].) Tos has not shown that use of the ICS for conventional passenger train service if conditions warrant is in any way at odds with the Authority's statutory duty to design a system capable of meeting performance requirements for the high-speed train system. Accordingly, this allegation cannot form the basis for mandamus relief to set aside the first funding plan or the incorporated business plan.

4. The Bond Act Does Not Prohibit Phased Implementation of One-Seat Passenger Service While the Phase I Corridor is Being Constructed

The revised business plan states explicitly that the Authority is planning phased development of the corridor but upon completion passengers will have a one-seat ride from San Francisco to Los Angeles. (AR 1948.) The requirement that passengers change trains for a period of time while the Phase I corridor is being completed cannot be an abuse of discretion. Because the bond act contemplates phased development, it is unsurprising that until the Phase I corridor is complete, passengers traveling on the Phase I corridor will have to change trains, and no abuse of discretion can be found in the Authority's determination to have those changes made at the San Fernando Valley, Palmdale and San Jose stations. (SAC, ¶¶ 14, 46 [alleging phased planning will require passengers to change trains]; *Carrancho*, *supra*, 111 Cal.App.4th at 1264-1265).) There would otherwise be no way to achieve a one-seat ride, short of committing to construction of the entire Phase I corridor. Accordingly, this allegation cannot for the basis for mandamus relief.

5. The Funding Plan Complied With the Requirement That the Authority Certify Completion of All Necessary Environmental Clearances

The bond act requires that a funding plan certify the completion of "all necessary project level environmental clearances necessary to proceed to construction." (§ 2704.08, subd. (c)(2)(K).) Tos alleges that the Authority's certification violated the reporting requirement in that it: (1) did not pertain to the entire IOS South (OB, pp. 18:1-19:14);[22] (2) was premature because no environmental clearances had been obtained prior to submission of the first funding plan (*id.*, pp. 19:15-21:3); and (3) was premature because "environmental clearances" *really* means every type of environmental *permit* of any kind (such as permits from the U.S. Corps of Engineers, U.S.

[22] When he filed the SAC Tos understood that the requirement applied only to the project for which funding was sought. (See SAC, ¶ 36.5 [clearances were required "for the project for which Proposition 1A bond funding is sought"].)

Fish and Wildlife Serve and San Joaquin Valley Air Pollution Control District). (SAC, ¶¶ 11, 36.5.) None of these arguments provide a basis for mandamus relief.

a. The Certification of Environmental Clearances Correctly Pertained to the Initial Construction Section

As a threshold matter, the Authority's certification of environmental clearances for the ICS, rather than the entire IOS South, cannot form the basis for mandamus relief because it is not so alleged in the SAC. In any event, the certification properly relates to the ICS, which is the only section for which the Authority sought an appropriation. (AR 72.)

The bond act requires the Authority to address eleven specific items in its first funding plan, only nine of which call for information pertaining to the entire corridor or usable segment in which the Authority proposes to invest bond funds. (§ 2704.08, subd. (c)(2)(A)-(K).) The two items that do not mention "corridor" or "usable segment thereof," pertain to whether: (1) passenger service providers can begin using the tracks or stations for passenger service (*id.*, subd. (c)(2)(I)); and (2) project-level environmental clearances necessary to proceed to construction have been completed. (*Id.*, subd. (c)(2)(K).) Where the Legislature has employed a term in one place and excluded it in another place, the term should not be implied where excluded. (*Wasatch Property Management v. Degrate, supra*, 35 Cal.4th at 1118; *Burden v. Snowden* (1992) 2 Cal.4th 556, 562; Code Civ. Proc., § 1848).) In other words, the "environmental clearances" certification does not apply to corridors or usable segments because the presumption is that the Legislature intentionally omitted them.

b. The Environmental Certification Given Satisfied the Substance of the Funding Plan Reporting Requirement

Plaintiffs assert that because the Authority's certification expressed a commitment to obtaining all project-level environmental clearances before beginning construction rather than certifying that all such clearances were complete, the certification did not comply with reporting requirements for a funding plan and the funding plan should be set aside in its entirety. (OB, p. 19:15-21:3.) This elevates form over substance. As given, the certification substantially

complied with the certification requirement. We know this to be true because the Legislature considered the adequacy of the certification, and after doing so appropriated the requested funds, but it is also true as a practical matter.

The purpose of the certification is to ensure that environmental laws – which typically are triggered by, and must be complied with before, construction – are followed and not trumped by the enormity of the project authorized in the bond act. Environmental law governs which portions of a corridor or usable segment thereof are required to have "clearances" before construction can start. (See, e.g., *Del Mar Terrace Conservancy, Inc. v. City Council of the City of San Diego* (1992) 10 Cal.App.4th 712 [discussing criteria under CEQA for how freeway project permissibly can be divided into sub-parts for CEQA review].) By the time the Legislature appropriated funds in July 2012, the Authority had completed all necessary environmental [CEQA] clearances for construction of the portion of the ICS between Merced and Fresno. (AR 3671.) Because CEQA allows projects to be subdivided into parts for review, completion of the clearance for the Merced to Fresno part of the ICS satisfied the reporting requirement, and nothing more was required.

Further, because the focus of the "environmental clearances" certification is on those necessary to begin *construction*, its purpose must be interpreted as a safeguard against spending bond proceeds on construction that could be deemed illegal for failure to have the necessary prerequisite environmental clearance. The Authority's certification directly addressed that concern. The first funding plan stated

> [T]he Authority will have, prior to expending Bond Act proceeds requested in connection with this Funding Plan, completed all necessary project level environmental clearances necessary to proceed to construction.

(AR 72.) This certification satisfies the legislative purpose behind the reporting requirement (to ensure that no construction begins without completion of the clearances). (See *Burks v. Kaiser Foundation Health Plan, Inc.* (2008) 160 Cal.App.4th 1021, 1029-1030 [substantial compliance with a statutory duty equates to actual compliance where conduct satisfies the reasonable objective of the statute]; *Camp v. Board of Supervisors* (1981) 123 Cal.App.3d 334, 348 [accord].)

Tos' argument that the legislative purpose of the environmental clearance certification is to avoid an appropriation that may be wasted if the clearances cannot be obtained is not reasonable in the context of the bond act. (OB, p. 20:16-21:1.) If a project-level environmental clearance cannot be obtained, there is no risk of waste in an appropriation because all that the appropriation authorizes is project funding; it does not authorize project spending. The Authority cannot spend appropriated funds until a second detailed funding plan (which has not yet been submitted) is approved by the Director of Finance. (§ 2704.08, subd. (b).)

The case of *Tennessee Valley Authority v. Hill* (1987) 437 U.S. 153, upon which Tos relies, is inapposite. (OB, p. 21, 29.) *Tennessee Valley Authority* involved application of the newly-enacted federal Endangered Species Act to a project that was approved and started prior to its enactment. Without the submission and approval of a second funding plan, the ICS is not already approved and started. Therefore, the decision does not apply to the facts in this case.

c. The Certification Correctly Addressed Environmental Clearances Required by the California Environmental Protection Act

Finally, Tos argues that the "all necessary project level environmental clearances" language in section 2704.08 subdivision (c)(2)(K) requires the Authority to certify that it has obtained every type of environmental approval or permit of any kind. (SAC, ¶¶ 11, 36.5 [alleging failure to certify completion of clearances required by U.S Corps of Engineers, U.S. Fish and Wildlife Service and San Joaquin Valley Air Pollution Control District].) This is incorrect. "Project level environmental clearances" means project-level *CEQA* clearance, not every conceivable environmental permit or approval the project proposed for funding might need.

The "clearances" language must be considered in the context of the entire bond act. (*Robert L. v. Superior Court, supra*, 30 Cal.4th at 900-901.) Other parts of the bond act compel a conclusion that the "clearances" language means *CEQA* clearance. The bond act in two different places refers to "the authority's [then-existing] certified environmental impact reports of November 2005 and July 9, 2008." (§§ 2704.04, subd. (a), 2704.06.) These reports were

program level reports.[23] The "clearances" language, therefore, had to specify "*project level* environmental clearances" (italics added) to distinguish the program-level clearance already completed from the project level clearance yet to be done – i.e., program-level environmental impact reports are not enough; project-level environmental impact reports are required. (See *In Re Bay-Delta etc.* (2008) 43 Cal.4th 1143, 1168 [discussing differences between a first-tier program level program environmental impact report and a second tier project level environmental impact report analyzing specific projects].) This strongly suggests that the clearances which are the subject of the reporting requirement are limited to project level CEQA clearances.

Further, that the Legislature used the term "environmental clearances" and not "environmental permits" is intentional and meaningful. "Environmental clearances" is generally accepted to mean CEQA clearance. (*See, e.g., Arviv Enterprises Inc. v. South Valley Area Planning Comm.* (2002) 101 Cal.App.4th 1333, 1350 n. 22 [equating "environmental clearance" with CEQA completion]; *Myers v. Board of Supervisors* (1976) 58 Cal.App.3d 413, 422 [court describing "an environmental clearance" as the stage at which a county cleared a project via a CEQA categorical exemption[24]]; *Plaggmier v. City of San Jose* (1980) 101 Cal.App.3d 842, 845-46 [describing the city's "application for 'environmental clearance'" as being set up and processed pursuant to local code provisions "which the City had enacted by way of implementing parallel provisions of ...CEQA"].) So do California regulations. (*See, e.g.*, Cal. Code Regs., tit. 25, § 7222 [entitled "Environmental Clearances" and referring exclusively to CEQA compliance].)

In contrast, the term "environmental permits" is a term generally reserved to describe the types of post-CEQA environmental hurdles Tos here claims the Authority was required to have completed before submitting a first funding plan. (See *e.g., Clover Valley Foundation v. City of Rocklin* (2011) 197 Cal.App.4th 200, 236-237 [discussing "all necessary federal and state

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[23] This is evident from this court's decision on August 26, 2009 in *Town of Atherton et al. v. California High-Speed Rail Authority* (*Atherton I*) (case no. 34-2008-80000022) in which plaintiffs challenged the second of these program reports. (Defs' RJN, Exh. 2.)

[24] Categorical exemptions are listed and described in California Code of Regulations, title 14, sections 15300 *et seq.*

permits" as being post-CEQA clearance].) The Legislature could have written "environmental permits" in section 2704.08 subdivision (c)(2)(K) if it intended to require every environmental permit be completed prior to submission of a request for an appropriation. That the Legislature chose not to use the term "environmental permits" suggests that the certification does not require them.

For the reasons set forth, none of Tos' allegations about the inadequacy of the Authority's environmental clearance certification will support mandamus relief.

B. The Bond Act Does Not Require Compliance With Obligations Not Found in the Language of the Bond Act

Three of Tos' claims assert violations of promises made to the voters that are not found in the language of the bond act. Tos alleges that voters were promised: (1) there would be completion of the entire train system by 2020 (SAC, ¶¶ 13, 50); (2) at a cost of $45 billion (*id.*, ¶ 16a); and (3) a fare of $50 between San Francisco and Los Angeles. (*Id.*, ¶ 15). Tos alleges that the funding plan violated these promises in that it contemplates a Phase I corridor that: (1) will not be completed until 2028 (AR 1948-1949); (2) will cost $68-80 billion (*id.*, 1949-1950); and (3) will require a fare of $83. (*Id.*, 1949.) There is no language in the bond act requiring that entire train system be completed by 2020; nor is any language requiring a cap on Phase I construction or ticket costs. Therefore, these allegations are meritless.

The 2020 project completion date is aspirational and appeared not in Proposition 1A, but in an uncodified section of AB 3034 that was not put before the voters. That section states that: "[i]t is the intent of the Legislature that the entire high-speed train system shall be constructed as quickly as possible" and that "it be completed no later than 2020." (Stats. 2008, ch. 267, § 8(f).) Further, legislative statements of policy in a preamble of a bill stating legislative goals cannot constitute an operative section of a statute. (*Flatley v. Mauro* (2009) 39 Cal.4th 299, 319; *Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 60-61 [fact the Legislature expressed a concern in a statute's preamble with lawsuits brought primarily to chill First Amendment rights does not mean that a court may add this concept as a separate requirement in the operative sections of the statute]; see *Tahoe National Bank v. Phillips* (1971) 4 Cal.3d 11, 19

[word "security" in a preamble does not create additional rights and duties not specified in the covenants].) The Legislature's policy statement cannot be read to mean that if the system cannot be built by 2020, it should not be built at all.

There is also nothing in either Proposition 1A or AB 3034 capping Phase I construction costs or the fare to travel the full length of the corridor. The only mention of the cost to construct the corridor is in the official voter pamphlet, and it is not a cap. Instead, the analysis of the Legislative Analyst states: "[t]he Authority estimated in 2006 that the total cost to develop and construct the entire high-speed train system would be about $45 billion." (AR 5.) The reference to the date of the cost assessment (2006) is itself tacit acknowledgment of the effect of the passage of time on construction costs. Indeed, the arguments pro and con in the ballot pamphlet stressed that there is *no* construction cost cap at all. (AR 3 [describing act as an "open taxpayer checkbook", 7 [stating that total project cost could be $90 billion but indicating that no one really knows for sure].)

The only mention of a $50 fare is found in an argument in favor of the measure, specifically that it would be "about" $50. (AR 6.) Where the language of an act is ambiguous, it is appropriate for the court to refer to the official voter pamphlet to determine voter intent. However, where there is no language at all in an act suggesting the existence of a statutory duty in an act, as is the case here, language in an official voter pamphlet cannot be used to create a statutory duty that does not otherwise exist. To the extent that any claims for mandamus relief rely on these allegations, judgment should be entered in favor of the state.

C. The Authority is Designing a Train System That Will Achieve All High-Speed Performance Requirements

Three allegations assert that the Authority not designing the train system to meet high-speed performance requirements. Tos alleges: (1) the Authority is planning to allow the ICS to be used for conventional non-electric service that cannot operate electric trains capable of sustained maximum operating speeds of no less than 200 miles per hour (SAC, ¶¶ 9, 36.3; § 2704.09, subd. (a)); (2) passengers traveling between San Francisco and Los Angeles will be required to change trains while phased implementation of the corridor is ongoing (*id.*, ¶¶ 14, 46; § 2704.09, subd.

(f)); and (3) maximum nonstop service travel time between San Francisco and Los Angeles will exceed two hours and 40 minutes (*id.*, ¶ 12; § 2704.09, subd. (b)(1). The first two allegations were resolved earlier in the section addressing claims hinging on whether phased implementation is authorized. The remaining allegation fails because it is simply speculation.

There is nothing in the first funding plan or draft or revised business plans indicating that the Authority is designing a train system that when completed will not be capable of achieving performance requirements, including nonstop service travel time between San Francisco and Los Angeles of no more than two hours and 40 minutes. (§ 2704.09, subd. (b)(1).) There is a strong presumption that the Authority intends to comply with the law; it is Tos' burden to show that the agency does not intend to follow the act. (*Alejo v. Torlakson, supra*, 212 Cal.App.4th at 780.)

Instead, Tos speculates that the Authority is planning to construct a non-compliant train system based an incorrect reading of an "operating plan" for the blended Phase I corridor in the ridership and revenue forecasting final technical memorandum documenting the ridership and revenue forecasts used to support the revised 2012 business plan. (AR 2634 [Scenario 12-042b: Blended Phase I (High) – For 2012 Final Business Plan].) Tos contends that the operating plan shows that the system is *not* capable of meeting the maximum nonstop travel time of two hours and 40 minutes. The operating plan, however, shows only the number of riders that can be expected on the blended Phase I corridor assuming different rail operating criteria, one of which is a 180 minute (or three hour) travel time between San Francisco and Los Angeles. (AR 2634-2635.) It is not a measure of the system's performance capabilities.

An operating plan in the rail industry is a description of the operation of trains as viewed from the perspective of a user of the service. It includes the frequency, running time and stopping pattern of trains in a location. (Declaration of Frank Vacca (hereinafter "Vacca Decl."), ¶ 9.) For purposes of the revised business plan, the operating plan depicted for both peak and off-peak travel along the Phase I corridor (AR 2634) showing a travel time between San Francisco and Los Angeles of 180 minutes (or three hours) was representative of the information provided for the ridership forecasting model which was used to determine ridership levels based on a specific pattern and frequency of train service. These service patterns were designed to achieve maximum

commercial yield (i.e., maximum number of riders and revenue) and were in no way tied to the ultimate performance capabilities for travel time along the Phase 1 corridor. (Vacca Decl., ¶ 10.) Therefore, the operating plan is not proof that the Authority is designing a non-compliant system; the operating plan shows only a pattern of service that yields the maximum number of riders.

The evidence shows that the Authority's design is compliant. Following adoption of the revised 2012 business plan, questions were raised whether a high-speed rail Phase I corridor system containing blended shared tracks on the San Francisco Peninsula, as opposed to dedicated high-speed rail tracks only, could be designed to achieve the two hour and 40 minute San Francisco to Los Angeles travel time characteristic requirement of the bond act. (Vacca Decl., ¶ 2.) In response, the Authority formally assessed whether a nonstop travel time of two hours and 40 minutes could be achieved given then-currently proposed rail alignments and blended operations proposed to date. (*Id.*, ¶ 3.) That assessment concluded that a travel time of two hours and *32 minutes* between San Francisco and Los Angeles could be achieved under current planning (*id.*, ¶4; Defs' RJN, Exh. 3), and there may be even more room for travel time improvement based on train performance improvements, use of tilt technology, more aggressive alignments and higher maximum speeds, all unknown variables at this point in time. (*Id.*, ¶ 4.)

D. The Authority Has Not Yet Spent Funds on Construction Activities

Tos alleges that funds spent to develop a request for proposals to construct the first phase of the ICS, including a "commitment" to pay a stipend to qualified contractors who submit bids, and payment of staff salaries and contractor expenses associated with development of the request for proposals are construction activities, spending for which is not authorized until approval of a second funding plan, which the Authority has not yet submitted.. (SAC, ¶¶ 17(b), 17a, 60-63, 66-68.) These allegations of illegal spending are meritless because these costs are not "construction activities" as defined in the bond act.

Section 2704.08, subdivision (d), prohibits any spending of bond proceeds prior to the approval of a second funding plan "for construction and real property and equipment acquisitions," except as specified in subdivision (g). Subdivision (g) authorizes bond proceeds to

be spent up to 7.5 percent of the aggregate principal amount of the bonds for environmental studies, *planning*, and preliminary engineering activities, among other things. (§2704.08, subd. (g).) The bond act was structured to allow planning and environmental work to begin in advance of approval of a second funding plan, but to require approval of a second funding plan before bond funds could be used to pay for the more significant costs associated with actually constructing the system. The bond act refers to those costs prohibited in advance of approval of a second funding plan as "capital" costs and defines them specifically to include costs associated with:

> *all activities necessary for acquisition of interests in real property and rights-of-way and improvement thereof;* acquisition and construction of tracks, structures, power systems, and stations; acquisition of rolling stock and related equipment; mitigation of any direct or indirect environmental impacts of activities authorized by this chapter; relocation assistance for displaced property owners and occupants; other related capital facilities and equipment; and such other purposes related to the foregoing, for the procurement thereof, and for the financing or refinancing thereof, as may be set forth in a statute hereafter enacted.

(§ 2704.04, subd. (c), emphasis added.) No other purposes have been set forth by subsequent enactment.

Work to develop the components of a request for proposal is classic planning work that is authorized by the bond act. (§ 2704.08, subd. (g) [spending authorized for "planning"].) The work is not "capital" construction work as defined in the bond act, i.e., work related to the acquisition of real property and improvements thereto. (§ 2704.04, subd. (c) [spending prohibited for "all activities necessary for acquisition of interests . . . and *improvement* thereof"].) A commitment to pay a stipend to a contractor who responds to a request for proposal in particular allows the Authority to use the engineering and design work in a response to guide future implementation of the train system and supports a core planning function. (See Defs' RJN, Exh. 1.) Therefore, these planning expenditures are within the Authority's discretion.

Further, the interpretation Tos suggests sets up another unnecessary and wasteful scenario that only serves to delay a project and allow construction inflation to eat at the purchasing power of an appropriation. This could not have been the Legislature's goal and is an unreasonable interpretation of the bond act. By prohibiting construction activities before approval of a second

funding plan, the Legislature ensured continued oversight over project development after an appropriation. However, its goal was not to prohibit spending associated with developing proposal requests which would ensure lengthy and costly delay after approval of a second funding plan while proposals necessary to execute a project are developed. Accordingly, this allegation cannot support mandamus relief.

E. The Operating Subsidy Certification in the Funding Plan is Not Arbitrary, Capricious or Lacking in Evidentiary Support

Tos' final claim alleges that operating subsidy certification in the funding plan is incorrect. (SAC, ¶¶ 16, 36.4 [certification is "erroneous"].) The bond act requires a first funding plan to certify that "[t]he planned passenger service by the authority in the corridor or usable segment thereof will not require a local, state, or federal operating subsidy." (§ 2704.08, subd. (c)(2)(J).) The funding plan made the required certification, stating: "[t]he planned passenger service by the Authority for the Usable Segments[25] will not require a local, state or federal operating subsidy," adding "[f]urthermore, each Usable Segment is projected to generate positive net operating profit (revenues less operations and maintenance expenses) commencing in the first year of operations." (*Ibid.*) Tos cannot litigate whether the certification is correct in a writ action to invalidate the funding plan; the issue is whether the certification is arbitrary, capricious, or entirely lacking in any evidentiary support. (*Alejo v. Torlakson, supra,* 212 Cal.App.4th at 780.) The evidence supporting the certification easily survives this standard of review.

The process undertaken to develop the revised 2012 business plan ridership and revenue forecasts and operation and maintenance cost projections upon which the certification was based is summarized below. It is not possible to document completely the bases of the ridership forecasts and cost projections because of the breadth and complexity of the information. The goal is rather to provide the court enough information to allow the court to determine that the conclusion is not lacking in "any evidentiary support whatsoever." (*Alejo v. Torlakson, supra,*

[25] The certification related to the IOS North and South because the Authority had not yet selected the IOS South as the usable segment for construction.

212 Cal.App.4th at 780.) It is also not possible to address any specific challenge to the certification because this is one of the claims that Tos failed to address in his opening brief.

The ridership forecasts and cost assessments developed for the revised 2012 business plan are based on essentially the same basic ridership model that this court has already found supported by substantial evidence in another proceeding.[26] The business plan forecasts are different than the program environmental impact report forecasts, however, because the purpose of the forecasts in a business plan is different than the purpose of the forecasts in an environmental impact reports. Ridership forecasts in the business plan support the state's financial and investment planning for the system. In contrast, forecasts in the environmental impact reports purposely identify reasonable but higher ridership to ensure there is adequate identification and disclosure of potential environmental impacts in order to identify mitigation measures. The business plan forecasts thus assume fares are higher than assumed in the environmental analyses reducing ridership, and include more conservative assumptions about future population growth and trip-making patterns. These assumptions lower ridership forecasts documented in the revised business plan than in the program environmental impact report. (AR 2053-2054.)

The certification that the IOS South would operate without a subsidy is based on the conservative ridership and revenue forecasts and cost assessments that were developed for the

[26] In a preceding action under the California Environmental Quality Act, this Court determined claims relating to the ridership model and forecasts in the Authority's favor. Prior to release of the funding plan in November 2011, certain aspects of the ridership model and forecasts generated for the Authority's program environmental impact report were challenged in *Town of Atherton et al. v. California High-Speed Rail Authority (Atherton I)* (case no. 34-2008-80000022). This challenge included claims that the Authority: (1) inflated and constrained the frequency of service or "headway" coefficient without supporting evidence; (2) utilized mode-specific constants in the model without substantial supporting evidence; and (3) used unrepresentative and biased data in the model. On November 10, 2011, this Court ruled that substantial evidence supported the Authority's reliance on the Cambridge Systematics' ridership modeling and the Authority reasonably relied on the model in preparing the program environmental impact report after extensive debate regarding criticisms of the model. (Defs' RJN, Exh. 7, p. 28-38 [ruling].) Atherton appealed the final order but on appeal it abandoned the last two claims; therefore the ruling is final as to these claims. (Declaration of Danae Aitchison (hereinafter "Aitchison Decl."), ¶ 5; Code Civ. Proc., § 906.) Atherton also filed a petition for writ of error coram nobis in the same proceeding, asserting that certain modeling data had been concealed from the public; on August 20, 2010, this Court denied the petition and Atherton did not appeal. (Defs' RJN, Exh. 5 [ruling]; Exh. 6 [notice of entry of order]; Aitchison Decl., ¶ 3.)

draft 2012 business plan. (AR 171-190, 191-198 [chapters 6 and 7 of the draft business plan addressing ridership and revenue forecasts and operating and maintenance costs].)[27] Before publication of the draft business plan, these ridership model itself, the data and assumptions used in it, and the resulting ridership and revenue forecasts were exhaustively reviewed by an independent Ridership Peer Review Panel (hereinafter "Ridership Panel") of international experts in travel forecasting. (AR 170, 171.)[28] The Ridership Panel considered all aspects of the forecasts including the forecast approach, the features of the ridership model, the data and assumption, and the documentation supporting the forecasts. (*Ibid.*) The Ridership Panel initially performed a rigorous review over a six month period of data collection and ridership model development to date, considering all aspects of the forecast approach and structural features of the ridership model, the data and assumptions used in it, and the documentation supporting the forecasts. (See fn. 30, *ante.*) The Ridership Panel concluded:

> We are satisfied with the documentation presented in Cambridge Systematics (2011), and conclude that it demonstrates that the model produces results that are reasonable and within expected ranges for the current environmental planning and Business Plan applications of the model.

(AR 171, 4339.)[29] The Ridership Panel then worked with the Authority on updating data and assumptions for use in preparing the draft business plan related to fares, socioeconomic information, and information on travel behavior. The Ridership Panel again emphasized that "it was satisfied with the modeling work completed to date." (AR 4353 [August-December 2011 review period].)

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[27] The business plan incorporated additional information in two source reports, California High-Speed Rail 2012 Business Plan Ridership and Revenue Forecasting (AR 336-608) and California High-Speed Train Ridership and Revenue Model Development, Application, and Project-Level EIR/EIS Forecasts. (AR 781-920.)

[28] The Ridership Panel reported directly to the Authority and its members were under no contractual relationship with other Authority consultants involved in the ridership forecasts. (AR 2035.) The Ridership Panel produced two public reports documenting its review of the ridership and revenue forecasts. (AR 4323-4335 [January-March 2011 review period] and 4336-4346 [April-July 2011 review period].)

[29] In arriving at the conclusion, the Ridership Panel considered whether the model constrained the "headway" coefficient (as Atherton had alleged) and concluded it did not misrepresent travel behavior in any meaningful way. (AR 4342-4343; see also 4349 ["this model has now been extensively reviewed and found to perform satisfactorily for its intended uses of supporting planning and environmental analyses at the system and corridor level"].)

After publication of the forecast and cost data in the draft business plan, the forecast of ridership and revenue drew extensive and intense review, and as result of the review, inputs to the model were updated, the Ridership Panel continued its review of the model (see AR 4356-4370 [January-April 2012 review period]), post-model adjustments were eliminated to reduce the potential for error, bias, or inconsistency, the model was again tested and demonstrated reliability, and all the data and reports were made available for public review. (AR 1950.)

The forecasts in the revised business plan were based on three ridership scenarios (low, medium and high) relying on conservative assumptions for key factors, such as population and the cost of driving. (AR 1951, 2038.) Operating and maintenance costs were highly correlated to the number of riders and use of the system. (*Ibid.*) The revised plan's ridership scenarios (low, medium and high) were used to develop low, medium, and high operating and maintenance cost scenarios (AR 2061), and operating and maintenance cost projections were calculated in 2011 dollars at the three levels to allow the reader to see the effect of real growth with the impact of inflation. (See AR 2061-2062.)[30] The three ridership scenarios show "a net positive cash flow from operations (revenues minus costs) from the first year of operation under each phasing scenario . . . [t]his is a consistent finding across operating segments [including the IOS South], phases, and development scenarios once the IOS is achieved." (AR 1951-1952.) Based on these scenarios, the Authority concluded:

> [E]ach operating section of the California high-speed rail system is projected to operate without a subsidy. This is not only important in terms of achieving the Proposition 1A criteria, but it supports investment of private capital for construction.

(AR 1952; see 2034-2056 [addressing revised ridership forecasts], 2057-2065 [addressing revised cost assessments].)

An important step toward demonstrating the viability of the model and the reliability of outputs for the Legislature prior to the appropriation was to use the model to test actual circumstances in the Northeast Corridor. To do that, the Authority developed a scenario that had service levels comparable to those offered by Acela service between Washington D.C. and

[30] Additional information was provided in the Ridership and Revenue Technical Memorandum (AR 2401-2641) and Operating and Maintenance Cost Report. (AR 2331-2343.)

Boston. (AR 2034.) The ridership modeling based on the scenario concluded that ridership on California high-speed rail with Acela-like service was 79 percent of the ridership on Acela, but this discrepancy in ridership was easily explained by population differences between the two corridors; there was more population along the Northeast Corridor. (*Ibid.*) The Ridership Panel agreed, stating: "[t]he Peer Review Panel reviewed the inputs used in these different runs and endorses the . . . reports as providing a good perspective on the reasons for the differences in the expected CHSR ridership compares to the Acela-NEC ridership. The panel endorses this report as an excellent indication that the ridership estimates . . . in support of the 2012 Business Plan are reasonable, possibly even conservative." (*Ibid.*)

Tos, of course, disagrees with these conclusions by the international panel of experts in the highly-complex field of inter-regional transportation forecasting. He alleges that other high-speed rail operations around the world require a subsidy for operating costs, and the Authority revenue and cost estimates are too low and not credible. (SAC, ¶ 36.4.)[31] It is clear, however, that the operating subsidy certification is based on considerable evidentiary support that underwent exhaustive validation and review by experts. So long as the certification is not entirely lacking in any evidentiary support, which it is not, a court may not substitute its judgment for that of the Authority, and if reasonable minds disagree as to the wisdom of the certification, its determination must be upheld. (*Alejo v. Torlakson, supra,* 212 Cal.App.4th at 780.)

V. THE INDIVIDUAL DEFENDANTS MUST BE DISMISSED

In addition to suing the Authority, Tos sued six high-ranking state officials including the Governor alleging they "allow[ed] the appropriation of Proposition 1A bond funds to occur" based on an invalid funding plan. (OB, p. 25:1-20; SAC, ¶¶ 87-91 [alleging these officials allowed an illegal funding plan to be approved]).) Tos alleges that Chief Executive Officer Jeff Morales presented a flawed funding plan to the Authority and submitted the flawed plan to the Legislature, and Governor Edmund G. Brown Jr. failed to ensure that the appropriation adhered to

[31] Tos alleges that the revenue estimates are one-half of the international average and costs estimates are one-quarter of the international average. (See SAC, ¶ 36.4.)

the constitutional prohibition against substantial legislative changes to bond measures.[32] (*Ibid.*; see Cal. Const., art XVI, § 1).) Tos offers no legal basis at all for his suit against Bill Lockyer, Ana Matosantos, Brian Kelly and John Chiang, and they must be dismissed. As for Jeff Morales and Edmund G. Brown Jr., they cannot be sued for their exercise of discretion, i.e., allowing the appropriation to occur, and they too must be dismissed.

The SAC's twelfth cause of action names all of these public officials as defendants seeking to restrain any spending of bond funds based on a flawed funding plan pursuant to Code of Civil Procedure section 526a. (SAC, ¶¶ 87-91.) Code of Civil Procedure section 526a does not authorize suit against public officials for their exercise of legislative and executive discretion, e.g., for allowing the appropriation to occur. (*Humane Society of the United States v. State Bd. of Equalization* (2007) 152 Cal.App.4th 349, 356-358 (reviewing cases); *Coshow v. City of Escondido* (2005) 132 Cal.App.4th 687, 706-707.) Suit is only authorized against public officials where there is fraud, collusion, ultra vires, or a failure to perform a statutory duty. (*Harman v. City and County of San Francisco* (1972) 7 Cal.3d 150, 160-161.) Tos cannot argue that the bond act imposes duties on Morales and Brown because only the Authority is responsible for implementing the bond act. (Pub. Util. Code, § 185032 [authorization and responsibility for planning, construction, and operation of high-speed train service is exclusively granted to the Authority]; § 2704.08, subd. (d) [only "the authority may enter into commitments to expend bond funds"].)

[32] There is no claim that any defendant violated the California Constitution.

CONCLUSION

For all of these reasons, defendants respectfully request that the court deny plaintiffs' second amended complaint seeking writs of mandate, and that judgment be entered for defendants.

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Respectfully Submitted,

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