

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

SUPERIOR COURT OF CALIFORNIA
COUNTY OF SACRAMENTO

**JOHN TOS, AARON FUKUDA,
COUNTY OF KINGS**

Plaintiffs and Petitioners,

v.

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

Defendants and Respondents.

Case No. 34-2011-00113919-CU-MC-GDS

**RULING ON SUBMITTED MATTER:
PETITION FOR WRIT OF MANDATE**

Introduction

This ruling addresses the first phase of a two-part proceeding in which John Tos, Aaron Fukuda and the County of Kings assert numerous challenges to the on-going program to build a high-speed railroad system for California.¹

The principal respondent is the California High Speed Rail Authority, the agency charged with administering the planning and construction of the system. Petitioners have also named several state officials as respondents, including: Jeff Morales, the current CEO of the Authority; the Governor; the State Treasurer; the Director of the Department of Finance; the Acting Director of the Department of Business,

¹ For the sake of convenience, these parties will be referred to as “petitioners” in this ruling, which addresses their writ of mandate claims.

1 Transportation and Housing; and the State Controller.²

2 In this phase of the proceeding, the petitioners focus on the validity of the funding plan the
3 Authority approved for the project in November, 2011. Petitioners contend that the Authority failed to
4 comply with certain statutory requirements governing the content of the funding plan. They seek issuance
5 of a writ of mandate under Code of Civil Procedure section 1085 which would direct the Authority to
6 rescind its approval of the plan. Petitioners further seek relief in the form of writs of mandate directing the
7 Authority and other respondents to rescind any additional approvals they have made in furtherance of the
8 high-speed rail program in reliance on the funding plan.

9 The Court heard oral argument by the parties in this writ of mandate phase of the proceeding on
10 May 31, 2013. At the close of the hearing, the Court took the matter under submission for issuance of a
11 written ruling. A second phase of this proceeding is to be scheduled, if necessary, after the final ruling on
12 this first phase has been issued. The second phase will address petitioners' non-writ claims for Code of
13 Civil Procedure Section 526a taxpayer standing relief to prevent alleged illegal expenditures of public
14 funds, and their claims for declaratory and injunctive relief.

15 **Factual and Legal Background**

16 The proposed high-speed rail system is to be financed through the sale of bonds.³ The funding
17 plan at issue in this case is a document the Authority was required by law to prepare, approve, and submit
18 to specified governmental entities as a prerequisite for requesting an appropriation of bond proceeds to
19 begin building the project. This legal requirement was imposed on the Authority through the electorate's
20 passage of Proposition 1A in November, 2008.

21 Proposition 1A is entitled the "Safe, Reliable, High-Speed Passenger Train Bond Act for the 21st
22 Century", and added Sections 2704-2704.21 to the Streets and Highways Code.⁴ Section 2704.08(c)(1)
23 addresses the funding plan at issue here. It provides:
24

25
26 ² The Court also granted the Kings County Water District leave to file a brief as an *amicus curiae*. The Court has received and considered its brief in making this ruling.

27 ³ A separate action is pending before the Court for validation of the bonds. That action is not addressed in this ruling.

28 ⁴ All references to statutes in this ruling are to the Streets and Highways Code unless otherwise stated.

1 No later than 90 days prior to the submittal to the Legislature and
2 the Governor of the initial request for appropriation of proceeds of bonds
3 authorized by this chapter for any eligible capital costs on each corridor,
4 or usable segment thereof, identified in subdivision (b) of Section
5 2704.04, other than costs described in subdivision (g), the authority shall
6 have approved and submitted to the Director of Finance, the peer review
7 group established pursuant to Section 185035 of the Public Utilities Code,
8 and the policy committees with jurisdiction over transportation matters
9 and the fiscal committees in both houses of the Legislature, a detailed
10 funding plan for that corridor or a usable segment thereof.

11 Section 2704.08(c)(2) addresses the content of the funding plan, stating that “[t]he plan shall
12 include, identify, or certify to all” of a list of items set forth in Section 2704.08(c)(2), subsections (A)
13 through (K).

14 Petitioners contend that the Authority did not comply with the statute by making the required
15 identification and certification of items (D) and (K).

16 Item (D) requires the funding plan to identify the following:

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

21 Item (K) requires the funding plan to make the following certification:

22 The authority has completed all necessary project level
23 environmental clearances necessary to proceed to construction.

24 The Authority has lodged an administrative record with the Court which contains the funding plan
25 at issue here.⁵ The Authority approved the funding plan on November 3, 2011.⁶ The funding plan
26 explicitly incorporated by reference a second document entitled “California High-Speed Rail Program
27 Draft 2012 Business Plan”, which provided additional detail supporting the funding plan.⁷

28 As required by Section 2704.08(c)(1), the funding plan identified the “corridor, or usable segment
thereof” in which the Authority was proposing to invest bond proceeds as one of two alternative Initial

⁵ See, Administrative Record (“A.R.”), pp. AG000057-73.

⁶ See, Resolution #HSRA11-23 (“Resolution Approving Funding Plan for Submission Pursuant to Streets and
Highways Code Section 2704.08, Subdivision (c)”), A.R., p. AG000953.

⁷ That document, referred to in this ruling as the “draft 2012 Business Plan”, is found in the administrative record at
pages AG000074-298. The draft 2012 Business Plan is incorporated into the funding plan at AG000059.

1 Operating Sections (“IOS”): either a “usable segment” of approximately 290 miles from Bakersfield in the
2 south to San Jose in the north; or an alternative “usable segment” of approximately 300 miles from Merced
3 in the north to San Fernando in the south.⁸

4 Either option would include a segment the Authority referred to as the Initial Construction Section
5 (“ICS”), a segment of approximately 130 miles from just north of Bakersfield at the southern end to north
6 of Fresno at the northern end.⁹ The ICS would be built first, with the remainder of the chosen IOS (north
7 or south) to be built later. However, the funding plan explicitly addressed, and was required to address,
8 the entirety of the chosen IOS, and not merely the ICS.

9 Section D of the funding plan addressed the identification of funding sources for the chosen IOS
10 as required by Section 2704.08(c)(2)(D).

11 First, the funding plan stated that “all necessary funding sources for the ICS have been identified”,
12 and described those sources as \$2.684 billion in state bond funds and \$3.316 billion in federal grants.¹⁰
13 The funding plan further stated that the combined amount of approximately \$6 billion “...represents the
14 full amount of funding the Authority believes is needed to complete the Initial Construction Section.”¹¹

15 The full cost of completing the chosen IOS, on the other hand, was projected to be in excess of
16 \$24 billion for IOS North, and in excess of \$26 billion for IOS South.¹² With regard to funding for the
17 entirety of either IOS, the funding plan stated:

18
19 Upon identification of additional funding sources, the Authority
20 intends to continue construction beyond the ICS to commence either the
21 IOS North or the IOS South. For planning purposes, construction of the
22 remainder of the IOS North or IOS South is estimated to be performed
23 between 2015 and 2021 to reach completion of the initial Usable Segment.
24 The anticipated timing of the identification of these additional funds for the
25 initial Usable Segment would be not later than 2015 to enable procurement

26
27
28

⁸ See, A.R., page AG000060. In a Revised 2012 Business Plan adopted in April, 2012, the Authority identified the
IOS South as “the preferred implementation strategy”, i.e., the usable segment covered by the funding plan, and thus
identified the IOS South as the segment to be built. (See, A.R., p. AG001938.) The Authority’s selection of the IOS
South over the IOS North is not at issue in this phase of the proceeding.

⁹ *Id.*

¹⁰ See, A.R., p. AG0000065.

¹¹ See, A.R., p. AG000059.

¹² See, A.R., p. AG000064.

1 of construction-related services at that time. The timing of distribution and
2 receipt of the funds then would correspond to the timing of anticipated
expenditures.

3 The draft 2012 Business Plan discusses the potential future funding
4 sources and the timing of the funding needs, to construct the Usable
Segments.¹³

5 The draft 2012 Business Plan contains a discussion of potential funding sources for the completion
6 of the chosen IOS. It states generally that “[t]he IOS will require a mix of funding from federal, state and
7 local sources to support construction in the years 2015 to 2021. Committed funding for this period is not
8 fully identified.”¹⁴

9 The draft 2012 Business Plan describes a variety of existing federal programs which could provide
10 funding for the California high speed rail program, notably the Federal Railroad Administration High-
11 Speed Intercity Passenger Rail Program and Passenger Rail Improvement Act of 2008.¹⁵ It then describes
12 several potential federal transportation funding and financing programs, not yet in existence, which could
13 provide additional funding if enacted.¹⁶ A combination of Qualified Tax Credit Bonds and federal grants
14 is shown as an example of potential funding for construction beyond the ICS, but the 2012 draft Business
15 Plan explicitly states that “...with the exception of construction funding for the ICS, the mix, timing, and
16 amount of federal funding for later sections of the [high-speed rail project] is not known at this time.”¹⁷

17 Section G of the funding plan addresses the certifications the Authority was required to make,
18 including the certification required by Section 2704.08(c)(2)(K), specifically, that all project level
19 environmental clearances necessary to proceed to construction had been completed. The certification was
20 as follows:

21
22 In connection with the Initial Construction Section, the Authority will
23 have, prior to expending Bond Act proceeds requested in connection with

24 ¹³ See, A.R., p. AG000067.

25 ¹⁴ See, A.R., p. AG000202.

26 ¹⁵ See, A.R., p. AG000203-204.

27 ¹⁶ See, A.R., p. AG000204-207. The 2012 draft Business Plan also describes potential sources of locally-generated
revenue and private funds that could be developed and used after the construction of the IOS. (See, A.R., p.
AG000208-209.

28 ¹⁷ See, A.R., p. AG000208.

1 this funding plan, completed all necessary project level environmental
2 clearances necessary to proceed to construction.

3 Furthermore, in connection with the Initial Construction Section, the
4 Authority already has completed the following necessary steps: The draft
5 environmental impact reports/environmental impact statements for the
6 Merced to Fresno and Fresno to Bakersfield segments were released for
7 public comment on August 9, 2011. Public comment closed on October
8 13, 2011. The revised draft environmental impact reports/environmental
9 impact statements for the Fresno to Bakersfield segment will be reissued
10 in spring of 2012 for further public comment.

11 The following steps are scheduled to be completed before construction is
12 to commence: The Record of Decision/Notice of Determination
13 (ROD/NOD) is expected to be obtained for the Merced to Fresno segment
14 by April 2012, and for the Fresno to Bakersfield section by November
15 2012.¹⁸

16 After its approval of the funding plan, the Authority submitted the plan to the governmental
17 entities specified in Section 2704.08(c)(1). Petitioners filed their petition and complaint on November 14,
18 2011, shortly after the Authority approved the funding plan. On July 18, 2012, while this action was
19 pending, the Legislature enacted Senate Bill 1029, which appropriated state bond funds and available
20 federal funds for the construction of IOS South.¹⁹

21 Standard of Review

22 When administrative action is under review, a writ of traditional mandamus under Code of Civil
23 Procedure section 1085 is available to correct an abuse of discretion on the part of the agency. In
24 reviewing a petition for such a writ, the court must review the record of proceedings to determine whether
25 the agency abused its discretion, namely, whether its action was arbitrary, capricious, entirely lacking in
26 evidentiary support, unlawful, or procedurally unfair. The petitioner has the burden of establishing an
27 abuse of discretion. (See, *Khan v. Los Angeles City Employees' Retirement System* (2010) 187 Cal. App.
28 4th 98, 105-106.)

In this phase of the proceeding, petitioners raise the issue of whether the Authority's approval of
the funding plan was unlawful because the content of the plan did not comply with statutory requirements.

¹⁸ See, A.R., p. AG000072 (footnote in original omitted).

¹⁹ See, A.R., p. AG002784-2797.

1 There are no disputes of fact in connection with this issue, because the only relevant facts involve the
2 content of the challenged portions of the funding plan, and that content is not disputed. The issue raised
3 here therefore is the purely legal issue of whether the Authority’s action was consistent with applicable
4 law. This is an issue on which the Court is authorized to exercise its independent judgment. (See,
5 *Associated Builders & Contractors, Inc. v. San Francisco Airports Commission* (1999) 21 Cal. 4th 352,
6 361; *California Correctional Peace Officers’ Association v. State of California* (2010) 189 Cal. App. 4th
7 330, 335.)²⁰

8
9 **Discussion**

10 Having exercised its independent judgment in this matter as authorized by law, the Court
11 concludes that the Authority abused its discretion by approving a funding plan that did not comply with
12 the requirements of law. Specifically, the identification of the sources of all funds to be invested in the
13 IOS and the certification regarding completion of necessary project level environmental clearances did not
14 comply with the requirements set forth in the plain language of Section 2704.08(c)(2), subsections (D) and
15 (K). The reasons for the Court’s conclusion are set forth in the following sections.

16 **Identification of Sources of Funds for the IOS:**

17 Subsection (D), on its face, required the Authority to address funding for the entire IOS.
18 Moreover, it required the Authority to identify sources of funds that were more than merely theoretically
19 possible, but instead were reasonably expected to be actually available when needed. This is clear from
20 the language of the statute requiring the Authority to describe the “anticipated time of receipt of those
21 funds based on expected commitments, authorizations, agreements, allocations, or other means.”
22 (Emphasis added.) Such language, especially the use of the highlighted terms “anticipated” and

23
24 ²⁰ Petitioners and the Authority have submitted requests for judicial notice. Each also has objected to at least some
25 portion of the request submitted by the other. The requests are somewhat ambiguous because much of the attached
26 material appears to be unrelated to this phase of the case, but rather pertains to the non-writ portion of the case. As
27 will be clear from this ruling, the Court has not found it necessary to rely on any judicially-noticed evidence or
28 materials in resolving the issues presented by petitioners’ first-phase writ of mandate claims. The Court has relied
solely on the administrative record and the text of Proposition 1A. All phase 1 requests for judicial notice are
therefore denied on the ground that the materials in question are unnecessary to the resolution of this matter. (See,
County of San Diego v. State of California (2008) 164 Cal. App. 4th 580, 613, fn. 29) This ruling does not address
any requests for judicial notice applicable to the second phase of this case, which the Court will rule on at the
appropriate time.

1 “expected”, indicates that the identification of funds must be based on a reasonable present expectation of
2 receipt on a projected date, and not merely a hope or possibility that such funds may become available.

3 While the approved funding plan adequately addressed the availability of funds for construction of
4 the ICS, it did not do so for the entire IOS as the statute requires. The funding plan itself explicitly stated
5 that funds for construction of the remainder of the IOS would be identified at a later time (“not later than
6 2015”).²¹ It thus candidly acknowledged that the funds could not be identified as of the date of approval
7 of the funding plan. Similarly, the 2012 draft Business Plan, which was incorporated into the funding
8 plan, candidly acknowledged that committed funding for construction of the IOS in the years 2015 to 2021
9 “is not fully identified”, and that “the mix, timing, and amount of federal funding for later sections of the
10 HSR is not known at this time.”²² This language demonstrates that the funding plan failed to comply with
11 the statute, because it simply did not identify funds available for the completion of the entire IOS.
12

13 Moreover, it is clear from the text of the 2012 draft Business Plan that all potential federal sources
14 of funds for construction beyond the ICS are described as theoretical possibilities and not as sources of
15 funds reasonably expected actually to be available starting in 2015.

16 For example, the discussion of funding under existing federal programs such as the High-Speed
17 Intercity Passenger Rail Program and Passenger Investment and Improvement Act of 2008 explicitly
18 recognizes that both programs are funded through the annual federal General Fund appropriations process,
19 and that “...the appropriations process makes the timing and amount of funding more uncertain [than
20 programs funded through a dedicated trust fund] at best.”²³ Thus, to “increase the potential” of actually
21 obtaining funding through these programs, “...the Authority and other California officials will need to
22 team with other states and high-speed rail stakeholders across the nation to promote high-speed rail as a
23 program of national interest.”²⁴ This discussion makes it clear that funding from these sources cannot
24 reasonably be expected to be available without significant further work and legislative advocacy, and that,
25

26 ²¹ See, A.R., p. AG000067.

27 ²² See, A.R., p. AG000202, AG000208.

28 ²³ See, A.R., p. AG000204.

²⁴ *Id.*

1 in reality, there were no anticipated or expected commitments, authorizations, agreements, allocations, or
2 other means of receiving such funds at the time the Authority approved the funding plan.

3 Similarly, the discussion of funding through new federal transportation funding and financing
4 programs (including a new dedicated trust fund structure, availability payments, and qualified tax credit
5 bonds) explicitly acknowledged that these sources are not presently available because such programs do
6 not yet exist. As a result, "...it may take several years working with other stakeholders in the high-speed
7 rail sector to obtain passage of the desired federal legislation."²⁵ This language makes it absolutely clear
8 that there is, in reality, no reasonably anticipated time of receipt for any of the potential new federal funds
9 described in the funding plan and the 2012 draft Business Plan, and that there are no expected
10 commitments, authorizations, agreements, allocations, or other means of actually receiving such funds.

11 The Court therefore concludes that the funding plan does not comply with the plain language of
12 Section 2704.08(c)(2)(D), because it does not properly identify sources of funds for the entire IOS.

13 **Environmental Clearances:**

14 Subsection (K), on its face, requires the Authority to certify that it has completed all necessary
15 project level environmental clearances necessary to proceed to construction. As the language from the
16 funding plan quoted above demonstrates, the plan does not address project level environmental clearances
17 for the entire IOS at all, but only addresses the ICS. Moreover, the funding plan explicitly states that
18 project level environmental clearances have not yet been completed even for the ICS. It is therefore
19 manifest that the funding plan does not comply with the plain language of the statute.
20

21 The Authority's contention that the certification of environmental clearances may address only the
22 ICS is not persuasive. The concept of an "Initial Construction Section" does not appear anywhere in
23 Section 2704.08(c), which explicitly requires the funding plan to address a "corridor, or usable segment
24 thereof". In this case, it is the IOS South, and not the ICS, that the Authority explicitly defined as the
25 "corridor, or usable segment thereof" that the funding plan addresses.

26 The Authority places undue emphasis on the fact that subsection (K) does not use the term
27

28 ²⁵ *Id.*

1 “corridor, or usable segment thereof”. Although this is true, subsection (K) does refer to “construction”.
2 All other uses of the term “construction” in Section 2704.08(C)(2) clearly pertain to the “corridor, or
3 usable segment, thereof” that the funding plan is to address. Notably, subsection (G) requires certification
4 that the “[c]onstruction of the corridor or usable segment thereof can be completed as proposed in the
5 plan”. Moreover, the funding plan as a whole is required to address the “corridor, or usable segment
6 thereof”, and not some portion of that corridor or segment. The reference to “construction” in subsection
7 (K) therefore is most reasonably interpreted as pertaining to the entire “corridor, or usable segment
8 thereof” addressed by the funding plan, and not to the ICS, which is merely a portion of that corridor or
9 usable segment.

10 In addition, the Authority’s argument that certification of environmental clearances for the ICS is
11 sufficient apparently would lead to the unreasonable and unintended result of essentially requiring no
12 certificate of environmental clearances for the remainder of the IOS. Section 2704.08(d) requires the
13 Authority to prepare and approve a second funding plan and submit it to the Director of Finance and the
14 Chairperson of the Joint Legislative Budget Committee prior to committing any proceeds of bonds for
15 expenditure for construction and real property and equipment acquisition on each corridor, or usable
16 segment thereof, with the exception of costs described in subdivision (g). The second funding plan is
17 required to address many of the same subjects as the funding plan under review here, but it is not required
18 to address the completion of project level environmental clearances. Thus, if the Authority’s interpretation
19 is accepted, and the initial funding plan is required to address environmental clearances for only a portion
20 of the entire “corridor, or usable segment thereof”, the completion of environmental clearances for the
21 remainder of the corridor or usable segment may never be certified before funds are committed for
22 expenditure. The Authority offers no authority to support the proposition that a statute that clearly was
23 drafted to require the Authority to address all aspects of project feasibility in detail would have left open
24 the possibility that such a significant factor as the certification of environmental clearances for a
25 significant portion of the corridor or usable segment could be incomplete before the expenditure of funds
26 begins. Such a proposition appears to be in fundamental conflict with the intent of the statute as a whole,
27
28

1 and the Court does not accept it.

2 Similarly, the Authority's contention that its certification complied with the substance of the
3 funding plan reporting requirement for environmental clearances is unpersuasive. The substance of that
4 requirement is amply clear from the language of the statute itself: the Authority is to certify that project
5 level environmental clearances are complete. A certification that such clearances will be completed by
6 some later date obviously fails to comply.

7 Remedy

8 The Court's conclusion that the funding plan did not comply with statutory requirements raises the
9 issue of the proper remedy. The briefing submitted by the petitioners suggests several possible remedies.

10 In their opening brief, petitioners argue that the Court should issue a writ of mandate commanding
11 the Authority to rescind its approval of the November 3, 2011 funding plan, and remand the matter to the
12 Authority with directions to proceed in accordance with the requirements of Proposition 1A.²⁶

13 Also in the opening brief, petitioners argue that the writ should command the Authority to rescind
14 any subsequent approvals it may have made or issued in reliance on the funding plan or on the legislative
15 appropriation they assert was improperly approved in reliance on the funding plan, including requests for
16 proposals and contract approvals.²⁷

17 The opening brief also argues that the writ should command the other respondents/defendants to
18 rescind any approvals they may have granted or issued in improper reliance on the funding plan, and to
19 take any further actions on such matters in full accordance with the requirements of Proposition 1A.²⁸

20 Thus, in the opening brief, petitioners focus potential relief on the invalidation of the funding plan
21 itself and on the invalidation of subsequent approvals taken in reliance on the funding plan. Their
22 argument mentions the subsequent legislative appropriation in passing, but does not explicitly state that the
23 Court should invalidate the appropriation itself. The Second Amended Petition and Complaint does not
24

25
26 ²⁶ See, petitioners' Trial Brief, Part 1 – Opening Brief in Support of Motion for Peremptory Writ of Mandate, p.
26:12-14.

27 ²⁷ *Id.*, p. 26:14-18.

28 ²⁸ *Id.*, p. 26:19-22.

1 explicitly seek such relief, and does not name the Legislature as a respondent.

2 In their reply brief, petitioners reiterate their argument that the Court should declare the funding
3 plan to be invalid and order it to be rescinded, and also declare any actions taken in reliance on that plan to
4 be invalid, describing any such actions as *ultra vires* acts.²⁹ In addition, petitioners also assert for the first
5 time that the Court's writ should extend to the legislative appropriation made on the basis of the funding
6 plan. They argue that the finding of *ultra vires* acts should extend to legislative action taken on the basis
7 of the funding plan, i.e., to the subsequent appropriation pursuant to SB 1029. Petitioners state the
8 argument as follows:

9
10 If the Funding Plan is declared invalid and ordered rescinded as
11 being in violation of the bond measure's requirements, it follows that the
12 Authority's request for an appropriation, submitted in reliance on that
13 Funding Plan, was also invalid. Further, if the request for appropriation
14 was invalid, so [too] must be the appropriation [made] in response to that
15 request. Essentially, Defendants have built a house of cards upon the
16 basis of a Funding Plan that violated the terms of the bond measure. If
17 the Funding Plan is invalid, the entire house of cards must collapse along
18 with it.³⁰

19 Based on its finding that the funding plan did not comply with the requirements of Section
20 2704.08(c)(2), the Court is satisfied that issuance of a writ of mandate directing the Authority to rescind its
21 approval of the November 3, 2011 funding plan may, as a matter of abstract right, be an available remedy
22 in this case. However, the Court is not yet convinced that invalidation of the funding plan, by itself, would
23 be a remedy with any real, practical effect. Unless the writ also invalidated the legislative appropriation for
24 the high-speed rail program or subsequent approvals (such as contracts) made in furtherance of the
25 program, issuance of the writ would have no substantial or practical impact on the program. As a matter
26 of general principle, a writ will not issue to enforce a mere abstract right, without any substantial or
27 practical benefit to the petitioner. (See, *Concerned Citizens of Palm Desert v. Board of Supervisors* (1974)
28 38 Cal. App. 3rd 257, 270.)³¹ The Court accordingly will address the issue of whether writ relief should

29 See, petitioners' Reply Brief in Support of Motion for Peremptory Writ of Mandate, p. 8:20-23.

30 *Id.*, p. 9:1-8.

31 See also, *Derr v. Busick* (1923) 63 Cal. App. 134, 140: "Moreover, the issuance of the writ of mandate is not altogether a matter of right, but it involves the consideration of its effect in promoting justice. If it should

1 extend to invalidating the legislative appropriation made on the basis of the funding plan, or to invalidating
2 subsequent approvals by the Authority or other respondents. If such relief is available, a writ to invalidate
3 the funding plan should issue.

4 The Court finds that the writ should not issue in this case to invalidate the legislative appropriation
5 made through SB 1029. The Court reaches this conclusion on substantive and procedural grounds.

6 The substantive ground for the Court's conclusion is that petitioners have not demonstrated that
7 the Authority's non-compliance with the funding plan requirements of Section 2704.08(c)(2) rendered the
8 subsequent legislative appropriation invalid. Nothing in Section 2704.08(c)(2), or elsewhere in
9 Proposition 1A, provides that the Legislature shall not or may not make an appropriation for the high-
10 speed rail program if the initial funding plan required by Section 2704.08(c)(2) fails to comply with all the
11 requirements of the statute. Lacking such a consequence for the Authority's non-compliance, Proposition
12 1A appears to entrust the question of whether to make an appropriation based on the funding plan to the
13 Legislature's collective judgment. The terms of Proposition 1A itself give the Court no authority to
14 interfere with that exercise of judgment.
15

16 The procedural ground for the Court's conclusion is that petitioners did not seek invalidation of
17 the legislative appropriation in the Second Amended Petition and Complaint, and raised the issue for the
18 first time only in their reply brief.³² As a general rule, arguments raised for the first time in a reply brief
19 will not be considered. (See, *Reichardt v. Hoffmann* (1997) 52 Cal. App. 4th 754, 764; *American Drug*
20 *Stores, Inc. v. Stroh* (1992) 10 Cal. App. 4th 1446, 1453.) As the Third District Court of Appeal explained
21 in the appellate context:

22 Obvious considerations of fairness in argument demand that the
23 appellant present all of his points in the opening brief. To withhold a
24 point until the closing brief would deprive the respondent of his
25 opportunity to answer it or require the effort and delay of an additional
brief by permission. Hence the rule is that points raised in the reply brief
for the first time will not be considered, unless good reason is shown for

26 affirmatively appear that it would be an idle thing to issue it, that thereby no wrong could possibly be remedied or no
27 right could possible be enforced or promoted, the court would naturally refuse to issue the writ because it would
answer no legitimate purpose in the scheme of the law."

28 ³² As noted above, petitioners did not name the Legislature as a party in this case.

1 failure to present them before.

2 (See, *Neighbours v. Buzz Oates Enterprises* (1990) 217 Cal. App. 3rd 325, 335, fn. 8.)

3 The same considerations of fairness apply here. Accordingly, the Court will not invalidate the
4 legislative appropriation for the high-speed rail program through issuance of a writ of mandate.

5 Based on this ruling, the issuance of a writ of mandate invalidating the funding plan may have real
6 and practical effect in this case only if the writ may also invalidate subsequent approvals by the Authority
7 or other respondents. The Court concludes that it cannot determine whether the writ may do so based on
8 the briefing submitted by the parties. That briefing – particularly the briefing submitted by petitioners –
9 deals with the issue of subsequent approvals only in general terms, without identifying the exact nature of
10 the subsequent approvals the writ would affect. A general order invalidating all subsequent approvals,
11 however, may not be appropriate given the terms of Section 2704.08(g), which provides that “[n]othing in
12 this section shall limit use or expenditure of proceeds of bonds...up to an amount equal to 7.5 percent of
13 the aggregate principal amount of bonds...” for purposes specified in that subdivision.

14
15 The Court further notes that Section 2704.08(d) requires the Authority, prior to committing any
16 proceeds of bonds for the project, to prepare and approve a second funding plan and submit it to the
17 Director of Finance and the Chairperson of the Joint Legislative Budget Committee, along with a report
18 prepared by independent parties. That subdivision also provides that the Authority may not enter into
19 commitments to expend bond funds and accept offered commitments from private parties until the
20 Director of Finance finds that the plan is likely to be successfully implemented as proposed. Proposition
21 1A thus appears to preclude the Authority from committing or spending bond proceeds on the high-speed
22 rail project until a second funding plan is prepared and approved, except for expenditures falling within the
23 terms of subdivision (g).

24 The Court cannot determine whether a writ should issue to invalidate subsequent approvals by the
25 Authority or other respondents (and thus, whether a writ should issue to invalidate the funding plan) until
26 it is able to determine what subsequent approvals have been made, and whether such approvals involve the
27 commitment of proceeds of bonds or expenditures of bond proceeds within the scope of Section 2704.08,
28

1 subdivisions (d) or (g). The Court therefore directs the parties to submit supplemental briefing on those
2 issues.

3 The parties are directed to meet and confer and contact the Clerk of this Department to set a date
4 for a hearing on the remedy issues addressed in the supplemental briefing, and to meet and confer to
5 arrange a briefing schedule. The briefing schedule shall provide for an opening brief to be filed by
6 petitioners, an opposition brief to be filed by the Authority, and a reply brief to be filed by petitioners. The
7 briefing schedule shall provide that the reply brief shall be filed no later than seven days prior to the
8 hearing.

9
10 DATED: August 16, 2013

11 _____
12 Judge MICHAEL P. KENNY
13 Superior Court of California,
14 County of Sacramento

CERTIFICATE OF SERVICE BY MAILING
(C.C.P. Sec. 1013a(4))

I, the undersigned deputy clerk of the Superior Court of California, County of Sacramento, do declare under penalty of perjury that I did this date place a copy of the above-entitled **RULING ON SUBMITTED MATTER** in envelopes addressed to each of the parties, or their counsel of record or by email as stated below, with sufficient postage affixed thereto and deposited the same in the United States Post Office at 720 9th Street, Sacramento, California.

MICHAEL J. BRADY
Attorney at Law
1001 Marshall Street, Suite 500
Redwood City, CA 94063-2052
Email: mbrady@rmkb.com

STUART M. FLASHMAN
Attorney at Law
5626 Ocean View Drive
Oakland, CA 94618-1533
Email: stu@stuflash.com

S. MICHELE INAN
Deputy Attorney General
455 Golden Gate Avenue, Ste 11000
San Francisco, CA 94102-7004
Email: michele.inan@doj.ca.gov

STEPHANIE F. ZOOK
Deputy Attorney General
455 Golden Gate Avenue, Ste 11000
San Francisco, CA 94102-7004
Email: Stephanie.Zook@doj.ca.gov

TAMAR PACHTER
Supervising Deputy Attorney General
455 Golden Gate Avenue, Ste 11000
San Francisco, CA 94102-7004
Email: Tamar.Prachter@doj.ca.gov

RAYMOND L. CARLSON, ESQ.
Griswold LaSalle Cobb Dowd & Gen LLP
111 E. Seventh Street
Hanford, CA 93230
Email: carlson@griswoldlasale.com

THOMAS FELLEENZ
Chief Legal Counsel
770 L Street, Suite 800
Sacramento, CA 95814
Email: tfellenz@hsr.ca.gov

Superior Court of California,
County of Sacramento

Dated: August 16, 2013

By: S. LEE
Deputy Clerk