



CITY OF BRISBANE

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21 August 2019

Board of Directors
California High-Speed Rail Authority
770 L Street, Suite 620
Sacramento, CA 95814

Re: San Francisco to San Jose – Preferred Alternative Light Maintenance Facility

Dear Boardmembers:

The City of Brisbane (“City”) is writing to express its opposition to the California High-Speed Rail Authority’s (“CHSRA”) identification of the Brisbane Baylands site (the “Baylands”) as the *only possible* location for the placement of a High Speed Rail (“HSR”) Light Maintenance Facility (“Maintenance Facility”) along the San Francisco to San Jose Project Section. Indeed, CHSRA identified the Baylands as the first and second preferred alternative. CHSRA’s identification of the Baylands as the only option is an abuse of discretion and improper for numerous reasons:

- a) *First*, it ignores the importance of the Baylands as a future site of substantial housing in the Bay Area, which is critically in need of additional housing. The Baylands is currently proposed for up to 2,200 residential units, which would be jeopardized by the siting of the Maintenance Facility on the Baylands.
- b) *Second*, it is fundamentally inconsistent with adopted local and regional planning goals and plans, including the Plan Bay Area, the Regional Transportation Plan/Sustainable Communities Strategy (“RTP/SCS”) governing the Bay Area. These inconsistencies undermine the State of California’s climate and sustainability goals.
- c) *Third*, it thwarts informed decisionmaking and consideration of environmental impacts under the California Environmental Quality Act (“CEQA”) process by *improperly predetermining the project* without meaningful consideration of alternatives. CHSRA’s approval will be nothing more than a post hoc rationalization.
- d) *Fourth*, it is clear that CHSRA staff has not performed reasonable due diligence on the Baylands and does not understand the practical difficulties, hazards and costs associated with development of a Maintenance Facility.
- e) *Fifth*, it constitutes unreasonable pre-condemnation activity that artificially diminishes the value of the Baylands in violation of state law.

I. The Brisbane Baylands

The Brisbane Baylands is one of the largest infill sites in the Bay Area. Pursuant to a General Plan Amendment, as approved by citywide initiative on November 6, 2018, the Baylands is planned for the creation of (1) up to 2,200 residential units and (2) seven million square feet of non-residential development in an area rich with existing and planned transit. The City of Brisbane's citizens spoke clearly - the Baylands should be developed with appropriate residential and commercial development. Moreover, the owner of the Baylands, Universal Paragon Corporation ("UPC"), is committed to the redevelopment of the site for substantial residential and commercial uses.¹

CHSRA's taking in excess of 100 acres for the Maintenance Facility, and the resultant land use incompatibility issues, jeopardize the entire Brisbane Baylands redevelopment project, and does so on the basis of patently erroneous facts and assumptions. As an example, we note that as a justification for selecting Alternative A, CHSRA concludes that 10 residential displacements and 211,261 square feet of commercial and industrial displacements will occur. Of course, this may be technically true based on current land uses, it completely disregards the real impact of CHSRA's preferred alternative, which is to thwart the will of the citizens of the City of Brisbane as manifest in General Plan Amendment at a cost of 2,200 residential units and seven million square feet of commercial development. (*See* CHSRA's July 18, 2019 presentation to the City of Brisbane City Council, PowerPoint slide 38.)

II. CHSRA's "Preferred Alternative" Process

The process by which the Baylands was singled out as the *only site* meriting detailed study for a Maintenance Facility was opaque and conducted largely outside the public realm. Notwithstanding the City's consistent objections to the placement of any Maintenance Facility on the Baylands and its suggestion of more appropriate, alternative sites, CHSRA selection process was clearly predisposed to select the Baylands.² CHSRA staff purportedly analyzed other sites (Gilroy, the Port of San Francisco, and San Francisco International Airport). However, without meaningful discussion or disclosure, these alternative sites were summarily dismissed as "infeasible" for reasons which are not clearly defined in the record.³ From the existing record, it appears that the "alternatives" were merely strawmen and that little, if any,

¹ In January 2019, UPC delivered a letter of intent to the Brisbane City Council declaring its intent to revise the specific plan to conform with the citywide initiative (Measure JJ) with a range of 1,800-2,200 units.

² The City pointed out, for instance, that there are significant technical challenges associated with development of a Maintenance Facility on the site, including concerns regarding how providing track access from the main rail line to a maintenance facility would impact future critical infrastructure, most significantly the extension of Geneva Avenue over the Baylands. Geneva Avenue is a planned six-lane (plus two reserved lanes for Bus Rapid Transit) extension of that roadway from its current terminus, over the Baylands to a new connection with US 101. This extension is required due to both background traffic growth and traffic associated with new developments, and has been programmed in numerous regional plans, including the San Francisco/San Mateo Bi-County Transportation Study and in the RTP.

³ To illustrate the clandestine nature of the process, all of the documents and reports related to the San Francisco to San Jose Project Section, including the Alternative Analysis relied upon by CHSRA to justify the Preferred Alternative, are not readily available on CHSRA's website. If one wishes to review the Alternative's Analysis, he or she must submit a Public Records Act request to CHSRA.

consideration was actually given to any of the alternative sites, or how those alternative sites would be better suited for the proposed Maintenance Facility.

a. The Preferred Alternative Would Thwart Construction of Substantial Housing

As discussed above, the Baylands has been designated for substantial redevelopment with up to 2,200 new residential housing units. It is well-settled that the Bay Area faces a deepening housing availability and affordability crisis.⁴ The Association of Bay Area Governments (“ABAG”), the Bay Area’s regional metropolitan planning agency, recognizes that a “coordinated effort to increase housing production at all levels of affordability” is imperative to solving the housing crisis. Construction of the Maintenance Facility on the Baylands would be wholly antithetical to that effort. CHSRA’s failure to pay any credence to this significant impact is arbitrary and capricious, and made even more so by the fact that there are impediments to development of residential units on other alternative sites, the Port of San Francisco (no residential uses on tidelands properties) and San Francisco International Airport (airport safety and land use inconsistency issues). Thus, the Baylands stands alone among the alternatives as the *only alternative on the peninsula appropriate for thousands of units of housing*. The fact that the redevelopment planning process for the Baylands has been substantially completed makes CHSRA’s decision even more egregious.

b. The Preferred Alternative Violates CHSRA’s Own Business Plan

The selection of the Baylands as the location for the Maintenance Facility runs counter to CHSRA’s own legislatively-required 2018 Business Plan. The 2018 Business Plan expressly states that CHSRA is committed to building “a high-speed program with the fewest impacts and greatest benefits” and will develop a full range of “alternatives that will allow [CHSRA] to arrive at the best possible outcome for communities and natural resources.”⁵ CHSRA is clearly not heeding the 2018 Business Plan in its unsupported insistence on the Baylands as the location for the Maintenance Facility.

c. The Preferred Alternative Is Inconsistent With Local and Regional Plans

CHSRA’s identification of the Baylands as the preferred site for the Maintenance Facility is also fundamentally inconsistent with governing regional and local planning documents. ABAG’s RTP/SCS (aka Plan Bay Area 2040), for instance, recognizes the site as a *Priority Development Area* (“PDA”). PDAs are areas that have been identified as appropriate for additional, compact development.⁶ The “core strategy” of Plan Bay Area 2040 is to focus growth in PDAs such as the Baylands to achieve the plan’s growth, housing, transportation, and sustainability goals. Because the Baylands serves as an integral component to achieving the region’s sustainability, CHSRA’s recommendation is inconsistent with statewide and regional sustainability. It appears that no consideration was given to these important issues during the Preferred Alternative selection process.

⁴ See <https://abag.ca.gov/our-work/housing>.

⁵ See https://www.hsr.ca.gov/docs/about/business_plans/2018_BusinessPlan.pdf.

⁶ See http://2040.planbayarea.org/cdn/ff/buje2Q801oUV3Vpib-FoJ6mkOfWC9S9sgrSgJrwFBgo/1510696833/public/2017-11/Final_Plan_Bay_Area_2040.pdf.

Moreover, as the state’s Regional Housing Needs Assessment (“RHNA”) allocation requirements are inextricably intertwined with the RTP/SCS process, any action that precludes redevelopment of the Baylands with regional housing would not only be inconsistent with Plan Bay Area 2040, but would undermine RHNA. Government Code Section 65584.04 explains that regional planning and housing needs are integrated, and that any RHNA allocation by ABAG *must be* consistent with the development pattern in Plan Bay Area 2040 (the applicable RTP/SCS). The Government Code states, with respect to the California Legislature’s intent when adopting the RHNA allocation requirements, “that housing planning be coordinated and integrated with the regional transportation plan” and that the final “allocation plan shall allocate housing units within the region consistent with the development pattern included in the sustainable communities strategy” (See Plan Bay Area 2040). (Govt. Code § 65584.04(m).)

As discussed above, Plan Bay Area 2040 assumes buildout of the Baylands with significant development as a means toward achieving its sustainability and GHG reduction goals.⁷ Any action by CHSRA that would preclude development of residential uses on the Baylands would obstruct implementation of both the state’s sustainability goals (through the RTP/SCS process) as well as its housing goals through RHNA. The Legislature’s direction with respect to sustainable regional planning and housing is clear – the two are fundamentally related and work together to promote sustainability and housing goals. CHSRA’s plan for development of the Baylands with the Maintenance Facility would eviscerate any possibility of meaningful residential development on the Baylands and would undermine years and costs devoted to regional sustainability and housing. It would also saddle the City of Brisbane with the impossible task of identifying new opportunities for residential development that would have been accommodated by the Baylands.

d. The Preferred Alternative Selection Process Violates CEQA

Given the process undertaken by the CHSRA, and its willful ignorance of the serious issues associated with siting the Maintenance Facility on the Baylands, the City must conclude that CHSRA has prematurely and inappropriately predetermined the selection of a maintenance facility location, a violation of CEQA. (*Cedar Fair, L.P. v. City of Santa Clara* (2011) 194 Cal.App.4th 1150, 1170 [predetermination occurs when an agency has committed itself to a project or *particular features*, so as to effectively preclude appropriate consideration of alternatives].) A public agency abuses its discretion when it commits to a particular course of action – such as identifying and pursuing its “preferred alternative” – and concluding that two other alternatives should be eliminated without first complying with CEQA. (See CHSRA’s July 18, 2019 presentation to the City of Brisbane City Council, PowerPoint slide 13.) The California Supreme Court held that the City of West Hollywood failed to comply with CEQA when it approved a funding agreement for an affordable housing project without first complying with CEQA and analyzing all alternatives. (*Save Tara v. City of West Hollywood* (2008) 45 Cal.4th 116.) Here, CHSRA has selected a preferred alternative which it admits has significant impacts without analyzing all of the alternatives equally and even handedly. In fact, in its presentation, CHSRA has already acknowledged that it has undertaken an alternatives analysis outside of the

⁷ See Plan Bay Area 2040 Final Supplemental Report, *Land Use Modeling Report*.

CEQA process and eliminated the San Francisco and San Francisco Airport locations. This clearly is in violation of CEQA as well as the National Environmental Policy Act (“NEPA”).

It stands to reason that either (1) no new alternatives will be considered in the EIR/EIS or (2) that any alternatives to be considered are merely strawmen, identified under the pretense of meaningful consideration but ultimately deemed infeasible. The CHSRA process violates CEQA. “When an environmental review occurs after approval of the project, it is likely to become a post hoc rationalization to support action already taken.” (*Laurel Heights Improvement Assn. v. Regents of University of California* (1998) 47 Cal.3d 376, 394.) CEQA demands meaningful consideration of alternatives that would lessen significant environmental impacts of a proposed project. Evasion of this requirement is a violation of CEQA and precludes informed decisionmaking and analysis of possible environmental impacts associated with the Preferred Alternative, including aesthetics, air quality, cultural and historic resources, hazards and hazardous substances, and traffic. *See* 14 Cal. Code Regs. §15002(a)(2)-(3).

Instead of unlawfully undertaking the selection process outside of the CEQA and NEPA context, CHSRA should have evaluated all four alternatives and a No Build alternative in an environmental document which is circulated for public review and comment.⁸ The information from the various technical studies, and comments received on the CEQA Notice of Preparation and NEPA Notice of Intent will be incorporated into the draft environmental document which will include the Environmental Impact Report (“EIR”) and Environmental Impact Statement (“EIS”). The determination of the preferred alternative would then be made by CHSRA only after the public review of the environmental document and consideration of public comments. This process is not foreign to public agency decision making for large infrastructure projects, as it reflects the environmental review process currently being undertaken by the Transportation Corridor Agencies for the toll road alignment in Southern California.⁹

e. The Preferred Alternative Sabotages the City of Brisbane’s Efforts to Maintain and Enhance its Historic Entrance and Character

With little regard or no regard to its impact on the City of Brisbane, CHSRA’s Preferred Alternative relocates the historic entrance to the City to an industrial park behind an 80 foot tall overpass reminiscent of San Francisco’s old, oppressive and (thankfully) now demolished Embarcadero Freeway in order to preserve train access to the maintenance facility, proving that those who do not learn from history are doomed to repeat it.

⁸ The EIR is the focus of the environmental review process and, as we have explained, “the primary means” of achieving the state’s declared policy of taking “ ‘all action necessary to protect, rehabilitate, and enhance the environmental quality of the state.’ ” *City of Marina v. Bd. of Trustees of California State Univ.* (2006) 39 Cal. 4th 341, 348 (quoting *Laurel Heights Improvement Assn. v. Regents of University of California* (1988) 47 Cal.3d 376, 392, and Pub. Res. Code, § 21000, subd. (a))

⁹ *See* <http://getmovingoc.com/faq/#1507682935434-b6db2387-3c8a>.

f. CHSRA's Lack of Proper Diligence

The most recent CHSRA presentation to the Brisbane City Council regarding the proposed Preferred Alternative only heightened concerns that CHSRA staff has not performed reasonable due diligence in assessing the feasibility of the Baylands as a future site of a Maintenance Facility. To demonstrate the lack of investigation conducted by CHSRA, when questioned at the City Council hearing, CHSRA staff acknowledged that it was unaware that its Preferred Alternative would require the removal of an indeterminate amount of mixed waste (which may or may not include hazardous waste). CHSRA staff also has no idea as to amount of such waste, what the waste constituents might be, or how it might be properly disposed.

It should also be noted that the Baylands site is identified as an area with a very high susceptibility to liquefaction.¹⁰ According to the developer of the Baylands, UPC, there are numerous engineering solutions available in the context of low-rise residential and commercial components of the future Baylands project, such as pilings and shoring improvements to ensure the building footings are capable of surviving a seismic event that results in liquefaction. It is unclear whether improvements could even be constructed to mitigate the risks to the proposed 100 acre Maintenance Facility. What is clear, however, is CHSRA did not address this concern in its July 18 presentation despite the fact that the issue has been raised for years. Similarly, sea level rise and tsunamis have been identified as significant concerns based on public reports and these have also gone unaddressed by CHSRA despite having been raised as concerns in public meetings.

CHSRA's lack of diligence is striking, and demonstrates the perfunctory, half-hearted investigation conducted by CHSRA's staff before formally identifying the Baylands as the preferred Maintenance Facility site. Without this important information, the Preferred Alternative recommendation is highly conclusory and fails to consider the on-the-ground issues that weigh strongly against constructing a Maintenance Facility on the Baylands.

g. Illegal Pre-Condemnation Activity

Finally, CHSRA's conduct constitutes unreasonable pre-condemnation activity. The Baylands site is not for sale to CHSRA and cannot be acquired without the exercise of eminent domain. CHSRA's conduct constitutes unreasonable pre-condemnation activity – diminishing the value of the Baylands – which creates condemnation blight and liability for inverse condemnation under *Klopping v. City of Whittier* (1972) 8 Cal. 3d 39, 52. The long-planned development of the Baylands cannot proceed in the face of the uncertainties created by CHSRA's marking the property for its own future use. Effectively preventing development of the Baylands to preserve it for a possible future project is an invalid taking. (*Jefferson Street Ventures LLC v. City of Indio* (2015) 236 Cal. App. 4th 1175, 1197 (2015) [development of portion of property prevented while freeway exit layout was being considered]; *People ex rel. Dept. of Transportation v. Diversified Properties Co.* (1993) 14 Cal. App. 4th 429, 442-443 [de facto taking occurred when property in the path of planned freeway was precluded from development to lower its ultimate cost of acquisition]). Because CHSRA's continuing its current

¹⁰ See June 2013 Brisbane Baylands Draft EIR.

course of action will destroy the value of the Baylands and result in massive liability to CHSRA, we urge CHSRA to reconsider its actions now.

III. Conclusion

As outlined above, CHSRA's identification of the Baylands as the first and second best option for locating the proposed Maintenance Facility despite the recommendations' being contrary to state law, policy, geology and CHSRA's own business plan confirms that CHSRA came into the process with a predetermined outcome. Its abuse of discretion breaches the public trust and the process must be wholly discarded and a new, comprehensive, transparent and legally compliant process undertaken to identify and fairly evaluate all potential alternatives for the Maintenance Facility. Nothing less will restore public confidence in the process and anything less violates state law.

Thank you for the opportunity to comment on this matter. Please contact Clay Holstine, City Manager at cholstine@brisbaneca.org or 415.508.2110 if you have any questions about the City's comments.

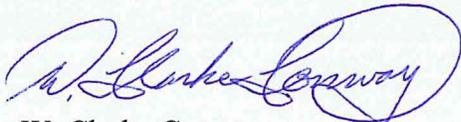
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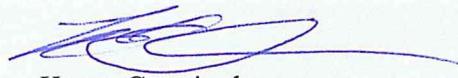
Madison Davis
City of Brisbane, Mayor



Terry O'Connell
City of Brisbane, Mayor Pro Tempore



W. Clarke Conway
City of Brisbane, Councilmember



Karen Cunningham
City of Brisbane, Councilmember



Cliff Lentz
City of Brisbane, Councilmember

cc: Clay Holstine, City Manager
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CHSRA Board of Directors Secretary