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Professional Engineers in California
5 Government and Dennis Alexander

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7
8 IN THE SUPERIOR COURT OF THE STATE OF CALIFORNIA
9 IN AND FOR THE COUNTY OF ALAMEDA
10

11
12 PROFESSIONAL ENGINEERS IN)
CALIFORNIA GOVERNMENT; DENNIS)
13 ALEXANDER)

14 Petitioners/Plaintiffs,

15 v.

16
17 CALIFORNIA DEPARTMENT OF)
TRANSPORTATION; CINDY McKIM as)
18 Director of the Department of Transportation;)
SAN FRANCISCO COUNTY)
19 TRANSPORTATION AUTHORITY; ROSS)
MIRKARIMI as Chair of Board of)
20 Commissioners of the San Francisco County)
Transportation Authority; CALIFORNIA)
21 TRANSPORTATION COMMISSION; JAMES)
EARP as Chair of the California Transportation)
22 Commission; and DOES 1 - 15.)

23 Respondents/Defendants.
24
25

CASE NO.

**VERIFIED PETITION FOR WRIT OF
MANDATE AND COMPLAINT FOR
DECLARATORY AND INJUNCTIVE
RELIEF AND TAXPAYER ACTION**

26 Petitioners and Plaintiffs, Professional Engineers in California Government ("PECG")
27 and Dennis Alexander, petition this Court for issuance of a writ of mandate pursuant to Code of
28 Civil Procedure section 1085 and submit this Complaint for declaratory and injunctive relief and

1 for a taxpayer's action pursuant to Code of Civil Procedure section 526a, and by this verified
2 complaint, allege as follows:

3
4 **INTRODUCTION**

5 1. The California Department of Transportation ("Caltrans") and the San Francisco
6 County Transportation Authority ("SFCTA") are illegally proceeding with a public private
7 partnership ("P3") to replace the existing 1.6 mile six-lane facility on the state highway system
8 south of the Golden Gate Bridge in San Francisco. Caltrans and the SFCTA are proceeding with
9 the "Presidio Parkway Project" to design and replace the existing facility, known as Doyle Drive,
10 in violation of the mandatory duties imposed on them by statute as for any one of three reasons
11 listed below, the Presidio Parkway is not an eligible project under Streets and Highways Code
12 section 143, the sole statutory authority for P3 projects in California.

13 2. Petitioners/Plaintiffs bring this petition for writ of mandate and complaint for
14 injunctive and declaratory relief in order to protect the rights taxpayers, as well as the nearly
15 9,000 public servants represented by PECG who work for Caltrans. These taxpayers and public
16 servants have a right to be protected from the illegal and wasteful actions of the
17 Respondent/Defendant public officials who have been and plan to continue expending public
18 money in violation of the law, wasting nearly \$1 billion on a no-bid P3 contract which is not
19 authorized by statute. Petitioners/Plaintiffs seek to have the project return to a competitively bid
20 "design-bid-build" procurement so that construction contracts can be awarded by the end of 2011
21 so that the construction of the replacement project can proceed on schedule.

22 3. Prior to Caltrans and the SFCTA considering a P3 for this project, the project was
23 proceeding as a fully funded "design-bid-build" project. Under design-bid-build, either Caltrans
24 or the best qualified private engineering firm is selected to design the project, and competitive
25 bids are taken from construction companies for the performance of construction services. The
26 project was fully funded through federal, state and local funds with an estimated cost of \$473
27 million. Despite this fully funded plan and the likelihood that the four remaining construction
28 contract bids would come in substantially lower than \$473 million, Caltrans and the SFCTA

1 requested the California Transportation Commission (CTC) approve this project as a single P3 at
2 a cost of \$1.378 billion paid from the State Highway Account.

3 4. The only statutory authorization for public private partnerships for projects on the
4 state highway system is found at Streets and Highways Code section 143. Section 143 of the
5 Streets and Highways Code was amended by Senate Bill 4, Second Extraordinary Session (2009 -
6 Cogdill), to authorize Caltrans and regional transportation agencies (like the SFCTA) to enter
7 into comprehensive development lease agreements with public or private entities for
8 transportation projects, commonly known as public private partnerships.

9 5. The Legislature limited the P3 authorization to transportation projects under certain
10 circumstances and sets forth specific requirements for entering into those agreements. Those
11 circumstances and requirements have not been, and cannot be, met for this project to replace the
12 existing Doyle Drive facility.

13 6. Among the statutory requirements contained in Section 143 for a P3 is that a project
14 undertaken under its provisions must rely on tolls or user fees, rather than using existing public
15 sources of state or federal transportation revenues. The lease agreement under a P3 is required to
16 authorize the contracting entity to impose tolls or user fees for use of the transportation facility,
17 which must be specified in the agreement, and the agreement must require the toll and user fee
18 revenues to be applied to payment of the capital outlay costs for the project. Instead of relying on
19 private funds from tolls or user fees, the Presidio Parkway Project will instead be financed with
20 "availability payments" for 30 years from the State Highway Account which is derived from fuel
21 tax revenues. The legislative history is clear that availability payments are not an authorized
22 financing mechanism for projects implemented pursuant to Section 143. Thus, this money may
23 not be diverted for the next 30 years from other transportation projects to a no-bid contract. As
24 the Presidio Parkway Project relies upon availability payments and not tolls or fees,
25 Respondents/Defendants' conduct in pursuing this project as a P3 is contrary to Section 143
26 which requires tolls or user fees and does not permit availability payments.

27 7. Doyle Drive is subject to a November 8, 2008 Memorandum of Understanding
28 ("MOU") entered into between the SFCTA, the Golden Gate Bridge District and the

1 Metropolitan Transportation Commission. The MOU confirms that the latter two parties'
2 financial contributions to the project are conditioned on the prohibition of the use of tolls for the
3 Doyle Drive replacement project. Amendments to Section 143 of the Streets and Highways
4 Code added by Senate Bill 4, Second Extraordinary Session (2009) provides at subdivision (s)
5 that "no lease agreement" may be entered into for a project under Section 143 that affects, alters,
6 or supersedes the Doyle Drive Replacement Project MOU dated November 8, 2008. With the
7 addition of Subdivision (s) to Section 143, the Legislature effectively excluded the Presidio
8 Parkway Project from being an eligible transportation project under Section 143. As the Presidio
9 Parkway Project is precluded from including tolls on Doyle Drive, Respondents/Defendants'
10 conduct in pursuing this project as a P3 is contrary to Section 143 which requires tolls or user
11 fees. Respondents/Defendants' conduct in pursuing this project as a public private partnership is
12 contrary to Section 143 which requires tolls or user fees.

13 8. Section 143 of the Streets and Highways Code requires that transportation projects
14 issued under that section be "supplemental to existing facilities currently owned and operated by
15 the department or regional transportation agencies." A project would be "supplemental" to an
16 existing transportation system if it adds an additional lane or provides an alternative to an
17 existing route. As described by Caltrans and the SFCTA, the Presidio Parkway Project is a
18 replacement project for the existing southern approach to the Golden Gate Bridge on a one-for-
19 one basis with a new facility, rather than providing an additional facility that supplements the
20 existing Doyle Drive. As the Presidio Parkway Project is a project that is replacement in nature
21 and therefore not "supplemental" to the existing facilities which establishes a threshold eligibility
22 under the law, Respondents/Defendants' conduct in pursuing this project as a P3 is contrary to
23 Section 143.

24 9. Streets and Highways Code section 143 mandates that for projects on the state
25 highway system, Caltrans shall be the responsible agency for the performance of project
26 development services including performance specifications, preliminary engineering, prebid
27 services, the preparation of project reports and environmental documents, and construction
28 inspection services. Caltrans is also mandated to prepare documents setting forth the scope and

1 estimated price of the project. Caltrans may perform these services with state employees or with
2 consultants. Caltrans resources, including personnel requirements, necessary for the performance
3 of those services shall be included in Caltrans' capital outlay support program for workload
4 purposes in the annual Budget Act.

5 10. The Doyle Drive replacement project proceeded as a traditional "design-bid-build"
6 with a full Federal Highway Administration approved funding plan in May 2009. The
7 environmental documents, nearly a decade in the works, were completed in 2008. The
8 preparation of the project reports and environmental documents were done by Parsons
9 Brinkerhoff through a contract with SFCTA (Contract Number 99/00-7). The Record of
10 Decision environmental document issued in December 2008. As Caltrans did not perform the
11 preliminary engineering, prebid services, the preparation of project reports and environmental
12 documents, nor the documents setting forth the scope and estimated price of the project, the
13 Presidio Parkway Project cannot comply with Section 143. Further, based upon review of the
14 proposed lease agreement, Petitioners/Plaintiffs allege that the Presidio Parkway Project does not
15 contemplate Caltrans performing construction inspection services. As Caltrans did not and will
16 not perform the delineated items in Section 143, the Presidio Parkway Project cannot comply
17 with Section 143 and there is no authority for Respondents/Defendants to proceed with this
18 project as a public private partnership.

19 11. Despite a CTC staff recommendation, a legal opinion from the CTC's own counsel,
20 and a Legislative Counsel (the Legislature's legal arm) opinion each stating that the Presidio
21 Parkway Project did not meet the statutory requirements of Section 143 to proceed as a P3 and
22 was therefore ineligible to proceed under that section, on May 20, 2010 the CTC approved the
23 project under Section 143 as a P3. Respondents/Defendants CTC's approval of this project as a
24 public private partnership violates Section 143 of the Streets and Highways Code.

25 12. As the design-build, public private partnership procurement process is not available
26 for this highway project, by this lawsuit, PECG and taxpayer Dennis Alexander seek to have the
27 project return to the only statutorily authorized procurement process - a competitively bid design-
28 bid-build procurement.

1 **PARTIES**

2 13. Petitioner/Plaintiff PROFESSIONAL ENGINEERS IN CALIFORNIA

3 GOVERNMENT is, and at all times herein mentioned was, a nonprofit corporation organized
4 and existing under the laws of the State of California, with its principal place of business in the
5 County of Sacramento, State of California. PECG is the duly certified exclusive collective
6 bargaining representative of employees in State Bargaining Unit 9, the Professional Engineers
7 unit. PECG also is a supervisory employee organization under Government Code section 3527
8 subdivision (c) in that it represents members who are supervisory employees. PECG represents
9 approximately 8,861 state employees who are affected by the actions of Respondents/Defendants
10 described herein. PECG and the affected employees represented by PECG are therefore
11 beneficially interested in Respondents' faithful performance of the legal duties at issue in this
12 case.

13 14. Petitioner/Plaintiff DENNIS ALEXANDER is a resident of the State of California,
14 a taxpayer to the State of California, and resides in the County of Sacramento.

15 15. Respondent/Defendant CALIFORNIA DEPARTMENT OF TRANSPORTATION
16 is, and at all times mentioned herein was, an agency of the State of California responsible for the
17 planning, design, construction, maintenance and operation of the state's highways and other
18 legislatively designated transportation systems throughout the State of California. (Gov. Code §§
19 14030 and 14520.3.) The California Department of Transportation's District 4 Headquarters
20 Office is located at 111 Grand Avenue, Oakland, CA.

21 16. Respondent/Defendant CINDY McKIM is the Director of the California
22 Department of Transportation and is sued herein in her official capacity only.

23 17. Respondent/Defendant SAN FRANCISCO COUNTY TRANSPORTATION
24 AUTHORITY is, and at all time mentioned herein was, a county transportation authority with the
25 powers and duties provided in Public Utilities Code sections 131260 et seq. The SFCTA was
26 created in 1989 to administer a voter levied half-cent sales tax to be used for transportation
27 purposes. The SFCTA is governed by the eleven members of the Board of Supervisors of the
28 City and County of San Francisco who serve as the Board of Commissioner's of the SFCTA.

1 The SFCTA may sue or be sued in all actions and proceedings, and in all courts of competent
2 jurisdiction. (Pub. Util. Code § 131281.)

3 18. Respondent/Defendant ROSS MIRKARIMI is a Commissioner of the SFCTA and
4 is the elected chairperson of the Board of Commissioners of the SFCTA and is sued herein in his
5 official capacity only. Among his duties as Chairperson, Mr. Mirkarimi presides at all SFCTA
6 meetings, decides the agenda of SFCTA meetings, signs contracts, deeds, and other instruments
7 on behalf of the SFCTA, and performs additional duties as may be designated by the SFCTA.

8 19. Respondent/Defendant CALIFORNIA TRANSPORTATION COMMISSION is
9 responsible for the programming and allocating of funds for the construction of highway,
10 passenger rail and transit improvements throughout California and consists of eleven voting
11 members. (Gov. Code § 14533.) Proposed public-private partnership projects and associated
12 lease agreements proposed by Caltrans or regional agencies are to be submitted to the
13 Commission for approval. (Streets and Highways Code § 143.) The Commission may sue or be
14 sued. (Gov. Code § 14514.)

15 20. Respondent/Defendant JAMES EARP is the Chairperson of the California
16 Transportation Commission and is sued herein in his official capacity only.

17 21. The true names and capacities of Respondents named herein as Does 1 through 15,
18 inclusive, are unknown to Petitioner who therefore sues such Respondents by such fictitious
19 names, and Petitioner will amend this complaint to show their true names and capacities when
20 the same have been ascertained. Petitioner is informed and believes and thereon alleges that each
21 of the Respondents are in some manner responsible for the acts complained of herein.

22 23 **VENUE**

24 22. This Court has jurisdiction over this action pursuant to the California Constitution,
25 Article VI, Section 10, because this case is a cause not give by statute to other trial courts.

26 23. The Attorney General has a an office within Oakland making Alameda County an
27 appropriate venue (Code of Civ. Proc. § 401) and Respondent/Defendant Caltrans' District 4
28 Headquarters Office is located at 111 Grand Avenue, Oakland, CA.

1 **FACTUAL ALLEGATIONS**

2 **I. The Presidio Parkway Project**

3 24. Doyle Drive is part of the existing state highway system and is the section of State
4 Route 101 in San Francisco that is the southern access to the Golden Gate Bridge, connecting
5 Marin and San Francisco counties. In September 1945, Doyle Drive became a State highway.
6 The current structure, built in 1936, does not meet current highway standards and is seismically
7 deficient.

8 25. For decades Caltrans and the San Francisco Board of Supervisors contemplated
9 different recommendations to replace or reconstruct Doyle Drive. In the early 1990s the San
10 Francisco Board of Supervisors approved the recommendations of a Doyle Drive Task Force
11 which urged the rebuilding of Doyle Drive as a parkway. In 1994, the SFCTA initiated the Doyle
12 Drive Intermodal Study which released its results in 1996 which supported the Doyle Drive Task
13 Force recommendation that the Doyle Drive replacement be designed as a parkway.

14 26. Preparation of the Draft Environmental Impact Statement/Report began in 2000
15 and was completed on December 30, 2005. The Final Environmental Impact Statement/Report
16 was completed in September 2008 and the Record of Decision was signed on December 18,
17 2008. The approval of the Record of Decision was based upon the Federal Highway
18 Administration (FHWA) selecting the Presidio Parkway option of replacing the existing six-lane
19 facility with a new six-lane facility.

20 27. The option approved in the Record of Decision and advanced for construction is
21 known as the "Refined Presidio Parkway" alternative in the Final Environmental Impact
22 Statement/Report. This alternative was the unanimous choice of the San Francisco County
23 Transportation Authority's Board of Commissioners.

24 28. As described in the FHWA initial Finance Plan, May 12, 2009, the Refined
25 Presidio Parkway Alternative will replace the existing facility with a new six lane facility and a
26 southbound auxiliary lane, between the Park Presidio Interchange and the new Presidio access at
27 Girard Road. The footprint of the replacement facility will overlap with a large portion of the
28 existing facility's footprint.

1 29. As of the May 2009 submission of the FHWA finance plan, the Presidio Parkway
2 Project was to be designed and constructed through eight contracts with the first contract to be
3 awarded in June 2009.

4 30. Phase I of the Doyle Drive replacement is currently underway having begun
5 construction in December 2009 to shift traffic from the existing structures on to a temporary
6 alignment. This construction work was procured through a design-bid-build procurement with
7 four competitively bid contracts. Bids for those construction contracts came in under the
8 engineer's estimates. The last contract awarded, Contract 4, came in at 40% under the engineer's
9 estimate.

10 31. Phase II of the Doyle Drive replacement project was fully funded with federal, state
11 and local funds with an estimated cost of \$473 million.

12 **II. Environmental and Design Work Performed on the Project**

13 32. The environmental documents for this project began in 1999 and were completed in
14 2008. The preparation of the project reports and environmental documents were done by Parsons
15 Brinkerhoff through a contract with SFCTA (Contract Number 99/00-7). The Record of
16 Decision environmental document issued in December 2008. Caltrans did not perform the
17 preliminary engineering, prebid services, the preparation of project reports and environmental
18 documents, nor the documents setting forth the scope and estimated price of the project.

19 33. In January 2007, the SFCTA awarded a professional services task order no-bid
20 contract to Arup/Parsons Brinkerhoff (Arup/PB) with a budget of \$4,250,000 for initial task
21 orders for General Engineering and Design Services. The SFCTA then approved Amendment
22 No. 1 to the contract in October 2007 authorizing work to complete 35% of the design for the
23 project and increasing the contract amount to \$12,583,200.

24 34. The SFCTA then amended the design and engineering contract with Arup/PB Joint
25 Venture (SFCTA Contract No. 06/07-29) to complete the design (Plans, Specifications &
26 Estimates) to 100% by the Spring of 2009 with a timeline of opening the new Doyle Drive
27 Parkway in late 2012 and completing all construction in 2014. The resolution approving the
28 contract amendment, Resolution 09-48, passed on March 24, 2009. With this amendment, the

1 contract to advance design of the Doyle Drive Replacement Project to the 100% design level was
2 amended to a total amount of \$36,257,265.

3 **III. Following the Passage of SB 4 in 2009**

4 35. In February of 2009, the Legislature passed and Governor Schwarzenegger signed
5 into law Senate Bill 4 (SBX2 4, Cogdill, 2nd Extraordinary Session) which authorizes Caltrans or
6 regional transportation agencies to enter into comprehensive development agreements with
7 public or private entities for transportation. This legislation requires that a P3 project include
8 tolls or user fees, be supplemental to existing facilities, and that Caltrans perform certain
9 delineated functions on projects on the state highway system.

10 36. In June 2009, the SFCTA ceased the development of the detailed Plans,
11 Specifications and Estimates for Contracts 5 to 8 and instead utilized the contract with
12 Arup/Parsons Brinkerhoff to analyze the option of pursuing a P3 method of procurement.
13 Despite having a fully funded project proceeding on schedule, the decision to “cease
14 development of the detailed Plans, Specifications and Estimates for Contracts 5 to 8 through a
15 traditional DBB approach was made at the end of June 2009 while assessment of possible P3
16 procurement was initiated.” (Analysis of Delivery Options for the Presidio Parkway Project,
17 Arup/PB, January 19, 2010.)

18 **IV. May 20, 2010 California Transportation Commission Approval**

19 37. Despite having a fully funded plan, SFCTA and Caltrans requested the California
20 Transportation Commission (CTC) to approve this project as P3 at a cost of \$1.378 billion from
21 the State Highway Account. Caltrans and the SFCTA submitted a project proposal report
22 requesting the CTC’s approval to enter into a P3 agreement with a private entity for the
23 development of the Presidio Parkway Project.

24 38. On May 15, 2010, CTC staff recommended that the CTC not grant the request as
25 the proposal would take up to \$1 billion from State Highway Account capital programs. The
26 recommendation against approval noted that there were legal questions concerning whether the
27 statutes require that financing of a P3 project include tolls or user fees and whether a P3 project
28 must be supplemental to the existing transportation system. The staff recommendation against

1 approval attached three legal opinions, two of which opined the project did not meet the
2 requirements of the law. The first was an April 6, 2010 Legislative Counsel Opinion titled
3 “Comprehensive Development Lease Agreements - #1008978.” The second was a May 4, 2010
4 memorandum from legal counsel to the CTC.

5 39. Despite the CTC staff recommendation and the legal opinions of the CTC counsel
6 and the Legislative Counsel, on May 20, 2010 the CTC approved the Presidio Parkway Project to
7 proceed as a P3 under Streets and Highways Code section 143.

8 **V. The Proposed Lease Agreement**

9 40. Following issuance of Requests for Qualifications and Requests for Proposals
10 Number 04-1637U4 from entities interested in designing, building, financing, operating and
11 maintaining the project through a no-bid P3, on or about October 15, 2010, Caltrans announced it
12 had selected a Golden Link Partners as a “preferred proposer” for the Presidio Parkway Project.
13 On that same date, Caltrans issued a Notice of Intent to Award a contract to Golden Link
14 Partners.

15 41. On October 20, 2010, Caltrans released the final form of the “Public-Private
16 Partnership Agreement for the Presidio Parkway Project Between California Department of
17 Transportation and Golden Link Concessionaire LLC] Contract Number 04-1637U4.” This
18 proposed final lease agreement has not yet been executed. Caltrans has announced it intends to
19 award the contract between December 20 and 29, 2010.

20 42. The proposed lease agreement between Caltrans and the Golden Link
21 Concessionaire LLC, Contract Number 04-1637U4 does not reflect that Caltrans is going to
22 perform construction inspection services as required by Section 143 (f)(1).

23 43. On October 21, 2010, Caltrans conducted a public hearing near the proposed
24 facility for the purposes of receiving public comment on the lease agreement. (Streets and
25 Highways Code section 143 (c)(5).)

26 44. At least 60 days prior to executing a final lease agreement, Caltrans shall submit
27 the agreement to the Legislature and to the Public Infrastructure Advisory Commission for
28 review. Prior to submitting a lease agreement to the Legislature and to the Public Infrastructure

1 Advisory Commission, Caltrans must conduct a public hearing at or near the proposed facility for
2 the purposes of receiving public comment on the lease agreement. (Streets and Highways Code
3 section 143 (c)(5).) Caltrans and the SFCTA held a public hearing on October 21, 2010 in San
4 Francisco near the Presidio Parkway Project location.

5 45. The Secretary of the Business, Transportation and Housing Agency or the
6 Chairperson of the Senate or Assembly fiscal committees or policy committees with jurisdiction
7 over transportation matters may provide comments about the proposed agreement within the 60-
8 day period prior to the execution of the agreement. Caltrans shall consider those comments and
9 shall retain the discretion for executing the final lease agreement.

10 **VI. Availability Payments and Tolling**

11 46. A “user fee” refers to a fee paid in connection with the use of the project and is
12 distinguishable from a tax. A “toll” is defined in pertinent part as “a payment or fee exacted, as
13 by the state, for some right or privilege, as for passage along a road or over a bridge.” (Random
14 House College Dictionary, 1982.)

15 47. An “availability payment” is defined by the Federal Highway Administration as:
16 “a periodic payment made to a concessionaire by a public authority for providing an available
17 facility. Payments are reduced if the facility is not available for a period of time, or not being
18 maintained in satisfactory condition. Using an availability payment structure eliminates the need
19 for the concessionaire to assume any traffic risk and protects the interest of the public by giving
the concessionaire a financial incentive to maintain the facility in satisfactory condition and
operating at a specified level of performance.” <http://www.fhwa.dot.gov/reports/pppwave/08.htm>

20 Unlike revenue from tolls or user fees, the amount of an availability payment generally does not
21 depend on how much the facility is used.

22 48. The Metropolitan Transportation Commission and the Golden Gate Bridge and
23 Highway Transportation District’s contributed \$80 million each to the Doyle Drive
24 reconstruction project. These contributions are subject to a November 26, 2008 Memorandum
25 of Understanding which precludes tolling on the 101/Doyle Drive project. The only exception to
26 this prohibition would be a “regional cordon tolling program” for the purposes of congestion
27 management that tolls the Doyle Drive entrance to San Francisco in a similar manner and time
28 frame as all other entrances to San Francisco are tolled.

1 49. Amendments to Section 143 of the Streets and Highways Code added by Senate
2 Bill 4, Second Extraordinary Session (2009) provides at subdivision (s) that “no lease
3 agreement” may be entered into for a project under Section 143 that affects, alters, or supersedes
4 the November 26, 2008 MOU.

5 **VII. Capital Outlay Support**

6 50. Capital Outlay Support is the work required by Caltrans employees or contractors
7 to produce capital outlay projects. Generally, before a project is constructed, the environmental
8 impact must be assessed, rights-of-way must be acquired, and a project must be designed,
9 engineered and inspected. Capital Outlay Support engineering and related functions and services
10 continue during project construction.

11 51. The Caltrans Capital Outlay Support budget consists primarily of the salaries,
12 wages, benefits, and operating expenses of the state staff who perform these functions and the
13 cost of consultants who perform a portion of this work. The Capital Outlay Support budget has
14 historically been listed in the State Budget at 2660-001-0042 at 20.10 Highway Transportation -
15 Capital Outlay Support.

16 52. Although funding for this project was included in the 2010 - 2011 State Budget for
17 the Presidio Parkway Project, the funding was not placed in Capital Outlay Support as required
18 by Section 143 (f)(1)(B). Instead, the funding was placed in a different part of the Caltrans’
19 budget, 2660-015-0042.

20
21 **FIRST CAUSE OF ACTION**

22 **AGAINST ALL DEFENDANTS/RESPONDENTS**

23 **(Petition for Writ of Mandate: Violation of Mandatory Duty)**

24 53. Petitioners/Plaintiffs hereby incorporate by reference all of the foregoing
25 paragraphs as if fully set forth herein.

26 **A. Streets and Highways Code Sections 143(j)(1)**

27 54. Streets and Highways Code Section 143 (j)(1) as amended by Senate Bill 4, Second
28 Extraordinary Session provides in part:

1 Agreements entered into pursuant to this section shall authorize the contracting
2 entity or lessee to impose tolls and user fees for use of a facility constructed by it,
3 and shall require that over the term of the lease the toll revenues and user fees be
4 applied to payment of the capital outlay costs for the project, the costs associated
5 with operations, toll and user fee collection, administration of the facility,
6 reimbursement to the department or other governmental entity for the costs of
7 services to develop and maintain the project, police services, and a reasonable
8 return on investment... (2) Lease agreements shall establish specific toll or user
9 fee rates...

10 55. According to paragraph 23 of the Assembly Floor Analysis of Senate Bill 4,
11 Second Extraordinary Session (February 15, 2009), the bill:

12 Explicitly provides that P3 agreements **must authorize the lessee to impose tolls**
13 **and user fees for use of a facility constructed by it**, with revenues to be applied
14 to payment of the capital outlay costs, operating costs, and other related costs.
15 Excess revenues must be applied to the lessee's indebtedness, improvements to
16 the facility, or paid into the State Highway Account, or for all three purposes.
17 Excess revenue under a lease with a regional transportation agency may also be
18 used for improving public transportation in and near the P3 facility. (Emphasis
19 added.)

20 56. Streets and Highways Code section 143 contemplates that revenue from which the
21 lessee will pay for capital outlay costs for the project, costs of operation, and other costs, and
22 from which the lessee will derive a return on investment, will be generated by tolls or user fees.

23 57. At all relevant times, Defendants/Respondents have had a clear, present,
24 mandatory, and ministerial duty to comply with Streets and Highways Code section 143 (j)(1)
25 which requires that projects be financed by tolls or user fees.

26 58. Despite their ability to perform this duty, Defendants/Respondents have violated
27 this mandatory duty by pursuing the Presidio Parkway Project as a P3 under Streets and
28 Highways Code section 143. Defendants/Respondents Caltrans and SFCTA have violated this
mandatory duty by issuing a Notice of Intent to Award a P3 contract for the project. The CTC
has violated this mandatory duty by approving the project as a P3.

29 **B. Streets and Highways Code Section 143(s)**

30 59. Streets and Highways Code Section 143 (s) as amended by Senate Bill 4, Second
31 Extraordinary Session, contains the following language regarding the financing of Doyle Drive:

1 Notwithstanding any other provision of this section, no lease agreement may be
2 entered into pursuant to the section that affects, alters, or supersedes the
3 Memorandum of Understanding (MOU) dated November 26, 2008, entered into
4 by the Golden Gate Bridge Highway Transportation District, the Metropolitan
5 Transportation Commission, and the San Francisco County Transportation
6 Authority, relating to the financing of the U.S. Highway 101/Doyle Drive
7 reconstruction project located in the City and County of San Francisco.

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60. The November 26, 2008 MOU precludes tolls of any kind on Doyle Drive, except
for a “regional cordon tolling program” where all entrances to San Francisco are tolled.

61. Streets and Highways Code Section 143 mandates tolling or user fees for P3s, but
effectively precludes tolling on the Presidio Parkway Project. As the law cannot be complied
with on this project, this effectively precludes the project from consideration as a P3.

62. At all relevant times, Defendants/Respondents have had a clear, present,
mandatory, and ministerial duty to comply with Streets and Highways Code section 143 (s)
which acknowledges that there will be no tolls on Doyle Drive.

63. Despite their ability to perform this duty, Defendants/Respondents have violated
this mandatory duty by pursuing the Presidio Parkway Project as a P3 under Streets and
Highways Code section 143. Defendants/Respondents Caltrans and SFCTA have violated this
mandatory duty by issuing a Notice of Intent to Award a P3 contract for the project. The CTC
has violated this mandatory duty by approving the project as a P3.

C. Streets and Highways Code Section 143 (a)(6)

64. Streets and Highways Code Section 143 (a)(6) provides:

“Transportation project” means one or more of the following: planning, design,
development, finance, construction, reconstruction, rehabilitation, improvement,
acquisition, lease, operation, or maintenance of highway, public trust, rail, or
related facilities supplemental to existing facilities currently owned and operated
by the department or regional transportation agencies that is consistent with the
requirements of subdivision (c).

65. As a threshold matter, to be an eligible project under Streets and Highways Code
section 143, a transportation project must be “supplemental to existing facilities currently owned
and operated by the department or regional transportation agencies.” A project would be
“supplemental” to an existing transportation system if it adds an additional lane or provides an

1 alternative to an existing route. The Presidio Parkway Project is a replacement project for the
2 existing southern approach to the Golden Gate Bridge on a one-for-one basis with a new
3 replacement facility, rather than providing an additional facility that supplements the existing
4 Doyle Drive.

5 66. As the Presidio Parkway Project is a project that is replacement in nature and
6 therefore not “supplemental” to the existing facilities which means the project cannot meet the
7 threshold eligibility under the law, Respondents/Defendants’ conduct in pursuing this project as a
8 P3 is contrary to Section 143.

9 67. At all relevant times, Defendants/Respondents have had a clear, present,
10 mandatory, and ministerial duty to comply with Streets and Highways Code section 143 (a)(6)
11 which requires that projects be supplemental to existing transportation facilities.

12 68. Despite their ability to perform this duty, Defendants/Respondents have violated
13 this mandatory duty by pursuing the Presidio Parkway Project as a P3 under Streets and
14 Highways Code section 143. Defendants/Respondents Caltrans and SFCTA have violated this
15 mandatory duty by issuing a Notice of Intent to Award a P3 contract for the project. The CTC
16 has violated this mandatory duty by approving the project as a P3.

17
18 **D. Streets and Highways Code Section 143 (f)(1)**

19 69. Streets and Highways Code section 143 was amended to add Subdivision (f) by
20 Senate Bill 4, Second Extraordinary Session 2009 as follows:

21
22 (1) (A) Notwithstanding any other provision of this chapter, for projects on the
23 state highway system, the department is the responsible agency for the
24 performance of project development services, including performance
25 specifications, preliminary engineering, prebid services, the preparation of project
26 reports and environmental documents, and construction inspection services. The
27 department is also the responsible agency for the preparation of documents that
28 may include, but need not be limited to, the size, type, and desired design
character of the project, performance specifications covering the quality of
materials, equipment, and workmanship, preliminary plans, and any other
information deemed necessary to describe adequately the needs of the department
or regional transportation agency.

(B) The department may use department employees or consultants to perform the
services described in subparagraph (A), consistent with Article XXII of the

1 California Constitution. Department resources, including personnel requirements,
2 necessary for the performance of those services shall be included in the
department's capital outlay support program for workload purposes in the annual Budget Act.

3
4 70. Streets and Highways Code section 143 clearly provides that for projects on the
5 state highway system, Caltrans is the responsible agency for the performance of project
6 development services including performance specifications, preliminary engineering, prebid
7 services, the preparation of project reports and environmental documents, and construction
8 inspection services. For any public private partnership project on the state highway system,
9 Caltrans also is responsible for preparing a set of documents setting forth the scope and estimated
10 price of the project. Those documents may include preliminary plans, performance specifications
11 and other documents necessary to adequately describe the needs of Caltrans or the regional
12 transportation agency. Caltrans is to perform these services with its own employees, or may
13 outsource the task by utilizing Caltrans' retained consultant engineers. The services are to be
14 included in capital outlay support for workload/budget purposes.

15 71. Doyle Drive is a project on the state highway system. Here, the performance
16 specifications, preliminary engineering, project reports and environmental documents were not
17 performed by Caltrans. They were performed through SFCTA contracts with Parsons
18 Brinkerhoff. (SFCTA Contract 99/00-7) and with Arup/Parsons Brinkerhoff (SFCTA Contract
19 06/07-29). The environmental documents were completed in December 2008 when the FHWA
20 issued its Record of Decision.

21 72. In October 2007, the Authority amended a contract for general engineering and
22 design services with Arup/PB to authorize work to complete 35% design for the project. In
23 March 2009, that contract was amended again to authorize Arup/PB to advance design of the
24 Doyle Drive Replacement Project to 100% design level. The decision to "cease development of
25 the detailed Plans, Specifications and Estimates for Contracts 5 to 8 through a traditional design-
26 bid-build approach was made at the end of June 2009 while assessment of possible P3
27 procurement was initiated." The Authority instructed Arup/PB not to continue with the design,
28 rather they were asked to prepare the public private partnership delivery option analysis.

73. As these services which Caltrans is statutorily mandated to perform were not

1 performed by Caltrans, the mandatory provisions of Streets and Highways Code section 143
2 requiring Caltrans to perform these listed services cannot be complied with. As Section 143
3 cannot be complied with for this project, there is no statutory authorization for a P3 on the
4 Presidio Parkway Project.

5 74. The proposed lease agreement between Caltrans and the Golden Link
6 Concessionaire LLC, Contract Number 04-1637U4 does not reflect that Caltrans is going to
7 perform construction inspection services as required by Section 143 (f)(1).

8 75. At all relevant times, Defendants/Respondents have had a clear, present,
9 mandatory, and ministerial duty to comply with Streets and Highways Code section 143 (a)(6)
10 which requires that projects be supplemental to existing transportation facilities.

11 76. Despite their ability to perform this duty, Defendants/Respondents have violated
12 this mandatory duty by pursuing the Presidio Parkway Project as a P3 under Streets and
13 Highways Code section 143. Defendants/Respondents Caltrans and SFCTA have violated this
14 mandatory duty by issuing a Notice of Intent to Award a P3 contract for the project. The CTC
15 has violated this mandatory duty by approving the project as a P3.

16 **E. Streets and Highways Code Section 143 (f)(1)(B)**

17 77. Streets and Highways Code section 143 (f)(1)(B) requires that Caltrans resources,
18 including personnel requirements, necessary for the performance of the services that Caltrans is
19 statutorily required to perform with its employees or with consultants under Section 143(f)(1)(A),
20 must be included in the Caltrans' Capital Outlay Support program for workload purposes in the
21 annual Budget Act.

22 78. Although funding for this project was included in the 2010 - 2011 State Budget,
23 the Caltrans resources, including personnel requirements, necessary for the performance of the
24 services listed in Section 143 (f)(1)(A) are not included in the Caltrans Capital Outlay Support
25 program for workload purposes at Section 2660-001-0042 of the annual Budget Act as required
26 by Section 143 (f)(1)(B).

27 79. At all relevant times, Defendants/Respondents have had a clear, present,
28 mandatory, and ministerial duty to comply with Streets and Highways Code section 143 (f)(1)(B)

1 which requires Caltrans' resources to be included in the Caltrans' Capital Outlay Support
2 program for workload purposes.

3 80. Despite their ability to perform this duty, Defendants/Respondents have violated
4 this mandatory duty by pursuing the Presidio Parkway Project as a P3 under Streets and
5 Highways Code section 143 even though Caltrans resources are not included in the Caltrans'
6 Capital Outlay Support program for workload purposes.

7 **F. General Allegations**

8 81. Petitioners/Plaintiffs have an immediate and direct interest affected by this
9 proceeding in that employees have a statutory right for Caltrans to perform the engineering and
10 related functions laid out by the Legislature on P3 projects.

11 82. Petitioners/Plaintiffs have no plain, speedy, and adequate remedy in the ordinary
12 course of law, other than the relief sought in this petition, in that there is no other legal remedy to
13 prevent or enjoin this unauthorized P3 project from going forward in violation of the Streets and
14 Highways Code.

15 83. Petitioners/Plaintiffs have no administrative remedy which will result in preventing
16 or enjoining this project proceeding in violation of the Streets and Highways Code.

17
18 **SECOND CAUSE OF ACTION**

19 **AGAINST ALL DEFENDANTS/RESPONDENTS**

20 **(Complaint for Declaratory Relief)**

21 84. Petitioners/Plaintiffs hereby incorporate by reference all of the foregoing paragraphs
22 as if fully set forth herein.

23 85. On May 20, 2010, Respondent/Defendant CTC approved the Presidio Parkway
24 Project to proceed as a P3 under Streets and Highways Code section 143.

25 86. On October 20, 2010, Respondent/Defendant Caltrans released the final form of the
26 "Public-Private Partnership Agreement for the Presidio Parkway Project Between California
27 Department of Transportation and Golden Link Concessionaire LLC] Contract Number 04-
28 1637U4" and announced it intends to award the contract between December 20 and 29, 2010.

1 87. Proceeding with the Presidio Parkway Project as a P3 violates Streets and
2 Highways Code section 143 (j)(1) because the law requires that revenue from which the lessee
3 will pay for capital outlay costs for the project, costs of operation, and other costs, and from
4 which the lessee will derive a return on investment, will be generated by tolls or user fees and the
5 Presidio Parkway Project will not be funded by tolls or user fees.

6 88. Proceeding with the Presidio Parkway Project as a P3 violates Streets and
7 Highways Code section 143 (s) because Section 143 mandates tolls or user fees for P3s, but
8 effectively precludes tolling on the Presidio Parkway Project.

9 89. Proceeding with the Presidio Parkway Project as a P3 violates Streets and
10 Highways Code section 143 (a)(6) because the Presidio Parkway Project is a replacement project
11 and is not “supplemental to existing transportation facilities.”

12 90. Proceeding with the Presidio Parkway Project as a P3 violates Streets and
13 Highways Code section 143 (f)(1) because Caltrans has not, and will not, perform the services
14 listed and required by the law on the Presidio Parkway Project.

15 91. As a result of the CTC’s approval of the Presidio Parkway Project as a P3 and
16 Caltrans and the SFCTA proceeding with the project as a P3, an actual controversy has arisen
17 and now exists between Petitioner/Plaintiffs and Respondents/Defendants regarding the Presidio
18 Parkway Project.

19 92. Petitioners/Plaintiffs desire a declaration of their rights and the rights of its affected
20 members with respect to the Respondents/Defendants continued unlawful pursuit of the Presidio
21 Parkway Project as a P3.

22 93. Such a declaration is necessary and appropriate at this time in order to avoid the
23 continued unlawful pursuit of this project as a P3 which would adversely impact the rights of
24 Petitioners/Plaintiffs.

1 the California Transportation Commission and Chairperson Earp are public officials of the State
2 of California who are charged with the duty of expending State funds for lawful purposes and to
3 avoid the expenditure of funds for unlawful and illegal purposes.

4 102. Respondents/Defendants Department of Transportation and Director McKim, and
5 the California Transportation Commission and Chairperson Earp have expended the moneys of
6 the State of California and threaten and will continue to spend such moneys for the illegal
7 purpose of proceeding with the Presidio Parkway Project as a P3. Since the entity that will be
8 awarded the design-build contract will perform work which is required by law to be performed
9 by Caltrans, moneys spent to perform such acts are illegal expenditures and cannot be recovered
10 by the taxpayer, and further, such expenditures should be enjoined by the Court.

11
12
13 **PRAYER FOR RELIEF**

14 WHEREFORE, as remedies for the causes of action asserted above, Petitioners/Plaintiffs
15 prays for relief as follows:

16 1. That the Court issue a peremptory writ of mandate ordering Respondents/Defendants
17 to immediately cease pursuing the Presidio Parkway Project as a public private partnership;

18 2. That the Court issue a writ of mandate ordering Respondents/Defendants California
19 Transportation Commission and Chairperson Earp to rescind the illegal Resolution for Approval
20 of Public Private Partnership Project Presidio Parkway Project (Doyle Drive Phase 2) -
21 Resolution G 10-14, which was passed by the California Transportation Commission on May 20,
22 2010;

23 3. That the Court issue a permanent injunction restraining Respondents/Defendants
24 from pursuing the Presidio Parkway Project as a public private partnership contrary to Streets and
25 Highways Code section 143;

26 4. That the Court issue a declaratory judgment holding that Respondents/Defendants
27 Department of Transportation and its Director McKim and the San Francisco Transportation
28 Authority and its Chairperson Mirkarimi have violated mandatory duties imposed by California

1 law by proceeding with the Presidio Parkway Project as a public private partnership under Streets
2 and Highways Code section 143;

3 5. That the Court issue a declaratory judgment holding that Respondents/Defendants
4 California Transportation Commission and Chairperson Earp have violated mandatory duties
5 imposed by California law by approving the Presidio Parkway Project as a public private
6 partnership under Streets and Highways Code section 143;

7 6. That the Court issue an injunction restraining Respondents/Defendants Department
8 of Transportation and Director McKim, and the California Transportation Commission and
9 Chairperson Earp from expending State funds on the Presidio Parkway Project as a public private
10 partnership;

11 7. Attorneys' fees and expenses;

12 8. Costs of this action; and

13 9. Such other and further relief as the nature of Petitioners/Plaintiffs' cause may
14 warrant.

15
16 Dated: November 2, 2010

Respectfully Submitted,

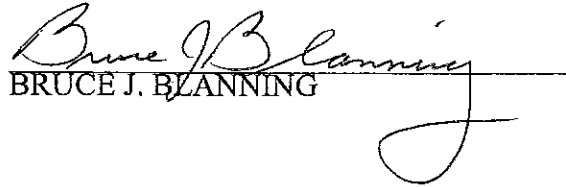
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18 
19 GERALD JAMES
Attorney for Petitioners/Plaintiffs

VERIFICATION

I, Bruce J. Blanning, am the Executive Assistant to the Professional Engineers in California Government, one of the Petitioners in the instant action.

I have read the foregoing Petition for Writ of Mandate and Complaint for Declaratory Relief and know its contents. All facts alleged in the petition and complaint are true of my own personal knowledge, except as to those matters which are alleged on information and belief, and as to those matters, I believe them to be true.

I declare under penalty of perjury that the foregoing is true and correct and that this affidavit was executed on this 2nd day of November, 2010 at Sacramento, California.


BRUCE J. BLANNING

VERIFICATION

I, Dennis Alexander, am a taxpayer residing in the County of Sacramento and am a labor consultant with the Professional Engineers in California Government, one of the Petitioners in the instant action.

I have read the foregoing Petition for Writ of Mandate and Complaint for Injunctive and Declaratory Relief and know its contents. All facts alleged in the petition and complaint are true of my own personal knowledge, except as to those matters which are alleged on information and belief, and as to those matters, I believe them to be true.

I declare under penalty of perjury that the foregoing is true and correct and that this affidavit was executed on this 2nd day of November, 2010 at Sacramento, California.


DENNIS ALEXANDER