



**FILED**  
ALAMEDA COUNTY

FEB 17 2011

CLERK OF THE SUPERIOR COURT

By \_\_\_\_\_ Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA  
IN AND FOR THE COUNTY OF ALAMEDA

PROFESSIONAL ENGINEERS IN  
CALIFORNIA GOVERNMENT, et al.,

Petitioners/Plaintiffs,

vs.

CALIFORNIA DEPARTMENT OF  
TRANSPORTATION, et al.,

Respondents/Defendants.

No. RG10-544672

ORDER ON COMPLAINT FOR  
PERMANENT INJUNCTION,  
DECLARATORY RELIEF AND WRIT  
OF MANDATE

On January 28, 2011, Petitioners/Plaintiffs Professional Engineers in California Government ("PECG") and Dennis Alexander ("Alexander") (collectively "Petitioners") and Respondents/Defendants California Department of Transportation ("CalTrans"), Cindy McKim as Director of CalTrans, the San Francisco County Transportation Authority ("SFCTA"), Ross Mirkarimi as Chair of SFCTA, the California Transportation Commission ("CTC") and James Earp as Chair of CTC (collectively "Respondents")

appeared through counsel at the hearing on Petitioners' request for the issuance of a writ of mandate and a permanent injunction. The petition seeks to prohibit Respondents from further implementation of a public-private partnership ("P3") for "Phase II" of the Presidio Parkway Project in San Francisco on the grounds that the P3 in question violates California Streets and Highway Code section 143.<sup>1</sup> The Court had previously denied Petitioners' request for a preliminary injunction prohibiting the execution of the "Public-Private Partnership Agreement" for the project ("PPP Agreement"); however, given the importance to all parties of a final adjudication of the merits of the case, the Court set the writ for hearing on an expedited basis on January 21, 2011, which the parties continued by stipulation to January 28, 2011. The Court denied a request by the American Council of Engineering Companies of California ("ACECC") to intervene but has allowed that entity to participate as an amicus curiae. Having now reviewed the substantial filings submitted to date, and considered the arguments of counsel who appeared at the January 28<sup>th</sup> hearing, the Court now rules.

## **I. The Record**

### **A. The Procedural History**

1. In the Complaint filed on November 8, 2010, Petitioners challenged Respondents' actions on three grounds. First, the Complaint alleges that section 143 requires that all P3 projects must rely on tolls and user fees rather than existing state and federal transportation revenues but that the P3 project in this case is financed by fuel tax revenues. (Compl. at ¶6.) Second, the Complaint alleges that section 143 permits the use of P3's only for projects that are "supplemental to existing facilities currently owned and

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<sup>1</sup> Unless otherwise indicated, all citations to code sections are to the California Streets and Highway Code.

operated by [CalTrans] or regional transportation agencies” but that the project here is a complete replacement project rather than merely “supplemental” within the meaning of the statute. (Compl. at ¶8.) Third, the Complaint alleges that section 143 mandates that CalTrans be the responsible agency for a wide range of project services on P3 projects but that some of the covered services for this project were performed by Parsons-Brinkerhoff through contract with SFCTA rather than under the supervision and control of CalTrans. (Compl. at ¶9.)

2. On December 21, 2010, Petitioners filed an Application for a Temporary Restraining Order and Order to Show Cause re Preliminary Injunction (“Application”) in which they raised a fourth argument. They alleged that section 143(c)(5) requires that any P3 agreement be submitted to the Legislature and the Public Infrastructure Advisory Commission (“PIAC”) for a 60-day review period and that this was not done here. Rather, while Volume I of the operative documents was provided to the Legislature and PIAC on October 23, 2010, Petitioners alleged that Volumes II and III were not provided until a month later, and thus the 60-day mandatory review period did not run until January 23, 2011. This delay allegedly also compromised the validity of the public hearing that the statute requires be held prior to the submission of the P3 agreement to the Legislature and PIAC. The Application sought a restraining order because CalTrans had indicated an intent to execute the PPP Agreement as early as December 29, 2010 – well before what Petitioners alleged to be the end of the 60-day period.

3. Based on the pleadings before it, the Court issued a temporary restraining order prohibiting Respondents from executing the PPP Agreement until Petitioners’ request for a preliminary injunction could be heard, and set that hearing for December 30,

2010. The parties appeared and were heard on December 30<sup>th</sup> and the matter submitted. On January 3, 2011; the Court issued an order dissolving the temporary restraining order and denying the request for preliminary injunction on the grounds that (a) the statute did not mandate that P3 projects be funded through tolls and user fees, (b) the project in this case was “supplemental” within the meaning of the statute, (c) there was no evidence presented that CalTrans was not the “responsible agency” as required by the statute, and (d) while the 60-day period had not been provided, Petitioners were not harmed by this shortcoming, the Legislature had already submitted its comments, there was no indication that the PIAC was requesting more time or intended to comment, and the balance of hardships tipped sharply in favor of Respondents.

**B. The Evidence**

4. The Presidio Parkway Project involves the replacement of the current southern approach to the Golden Gate Bridge, known as Doyle Drive, with a new six-lane parkway. It is undisputed that Doyle Drive is part of State Route 101, is a state highway, does not meet current highway standards and is seismically deficient. (Verified Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief and Taxpayer Action [“Complaint”] at ¶24; 12/28/2010 Decl. of L. Saage at ¶9.)

5. Planning for the project began with a feasibility study in 1998 conducted by the SFCTA pursuant to a Memorandum of Understanding between it and CalTrans, which provided funding and “oversight, reviews and approvals.” (01/21/2011 Decl. of S. Taylor at Exh. A, p. 004.) SFCTA and CalTrans subsequently entered into a series of “Cooperative Agreements” in 2003 and 2006 and May and June 2009. (*Id.* at Exh. B through F.) These agreements placed SFCTA in a lead role but gave CalTrans a

substantial degree of oversight and control over the development of the project. For example, the 2006 agreement provided that SFCTA would act “as the lead agency [to] prepare preliminary project development design, approved Environmental Document (EIS/EIR), and approved Project Report (PR)” through SFCTA personnel or consultants. (*Id.* at Exh. C, Recitals #3.) But the resulting documents had to be submitted to CalTrans for “review and concurrence” and its “ongoing review.” (*Id.* at Sec. I, #3.) CalTrans had the right to “monitor and participate in the selection of the personnel” who would do the work and was to provide “quality assurance.” (*Id.* at Sec. I, #7 and Sec. II, #3.) These general terms in varying degrees of detail may be found in all of the various Cooperative Agreements by which SFCTA and CalTrans proceeded with the planning and implementation of Phase I.

6. Phase I construction, which includes part of the permanent facility and a detour to accommodate traffic during Phase II, is currently underway pursuant to an existing set of contracts; however, at some point in 2009 Respondents began a process to pursue Phase II as a P3. (12/28/2010 Decl. of L. Saage at ¶3.) If adopted, the construction of the remainder of the project and long-term maintenance of the facility would be the responsibility of the private contractor entering into the P3 agreement with CalTrans and SFCTA. Under that agreement that contractor would be the “lessee” of the parkway for the term of the agreement.

7. Requests for qualifications went out on February 2, 2010, and responses were received on March 11, 2010. CalTrans announced a shortlist of proposers on April 8, 2010, and issued them a final request for proposals on May 25, 2010. Meanwhile, on May 20, 2010, pursuant to section 143(c)(2), the CTC approved the Presidio Parkway

Project as a P3. Technical proposals were received on September 13, 2010, and financial proposals on October 6, 2010. (12/22/2010 Decl. of K. Ajise at ¶¶3-7.)

8. All of the relevant P3 documents for the Presidio Parkway Project are contained in three volumes. Volume I contains the PPP Agreement that the successful proposer would enter into with CalTrans and the SFCTA. Volume II contains the "Technical Requirements," and Volume III contains the "Manuals and Guidelines" relevant to the project. (12/21/2010 Decl. of G. James, Exhs. B & C.)

9. Throughout the process, CalTrans maintained an internet based "data room" where all of these documents were uploaded as soon as they became available. Thus, for example, the drafts of Volumes II and III were uploaded to this data room in May 2010 and the final versions were uploaded no later than September 7, 2010. The September 7<sup>th</sup> final versions were moved to a different CalTrans website on November 30, 2010. While there is some dispute as to how easy it was to locate the documents on-line at various times, all documents were posted on one of two websites as soon as they were released. (12/28/2010 Supp. Decl. of K. Ajise at ¶¶4-8.)

10. On October 15, 2010, CalTrans announced its intention to award the project to Golden Link Partner G.P., and on October 19, 2010, CalTrans released the PPP Agreement in final form and posted it on the website. A public hearing was held on October 21, 2010, and October 23, 2010, the PPP Agreement contained in Volume I of the project documentation was submitted to the PIAC and the Legislature for review and comments. (12/22/2010 Decl. of K. Ajise at ¶¶7-9.)

11. On November 23, 2010, Volumes II and III were delivered to the Legislature. Senator Lowenthal requested comments from the Legislative Analyst's

Office, and the latter provided comments on December 9, 2010. State Assemblymembers provided comments to CalTrans on December 21, 2010. (*Id.* at ¶¶10-11; 12/29/2010 Petitioners' Amended RJN ("PARJN"), Exhs. 1 & 2.) On December 22, 2010, Senators Lowenthal and Simitian provided comments to CalTrans. The last of these comments objected to the fact that Volumes II and III were not provided until November 23, 2010. (*Id.*, Exh. 1.) The PIAC submitted comments on December 24, 2010. (01/21/2011 Decl. of K. Ajise at ¶4.) Neither the Legislature nor the PIAC requested additional time to submit further comments. (*Id.* at ¶8.)

12. Phases I and II are integrated in the sense that the construction of the parkway is commenced under Phase I but is completed in Phase II. Any delay in the implementation of Phase II may create delays in the overall project. Respondents have negotiated rights of entry onto the surrounding land owned by the federal government and administered by the Presidio Trust, and these rights expire in 2015. The PPP Agreement has a number of deadlines keyed to the execution of agreement, and Respondents were anxious to execute the agreement so as to trigger those deadlines and keep the project on track for completion before their entry rights expire. As construction is already underway and involves the disruption of a major highway corridor in the San Francisco Bay Area, there is also an interest in completing the project as expeditiously as possible so as to minimize the disruption. (12/28/2010 Decl. of L. Saage at ¶¶5-9.)

13. The Phase II contractor has the right to terminate the contract as of March 30, 2011, depending, *inter alia*, on the pendency of litigation. (*Id.* at ¶8.) Such an action by the contractor could delay the project further, and thus Respondents have a strong interest in resolving any uncertainties generated by the current litigation as soon as

possible. The Petitioners also want a speedy resolution of their claims, and thus all parties want this litigation to proceed as quickly as possible without prejudicing their substantive rights.

## II. Statutory History and Framework

14. Before evaluating the parties' competing claims, a review of the underlying statute and its history is in order because both parties invoke the overall statutory scheme and its history to support their respective positions. Section 143 was initially enacted in 1989 and authorized CalTrans "to enter into agreements with private entities for the construction by, and lease to, private entities of 4 transportation demonstration projects, including at least one in Northern California and one in Southern California." (01/14/2011 Petitioners' Request for Judicial Notice ("PRJN") at Exh. A, Legislative Counsel's Digest, AB 680.) During the lease term the private entity was to "have the right to ... charge tolls sufficient to retire the private investment ..., operate and police the facility." (*Id.*) The statute provided for the lease of rights-of-way and airspace to enable the private entity to construct "transportation facilities supplemental to existing state-owned transportation facilities." (*Id.*, AB 680 SEC 2, 143(b).)

15. The statute was subject to modest amendments in 2002, and then in 2006 was subject to more extensive amendments. One of the 2006 changes was to insert as section 143(a)(2) the definition of an eligible "transportation project" that now appears in section 143(6). It reads as follows: "'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 street, 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 [current subdivision (b)].” (PRJN at Exh. D, Legislative Counsel’s Digest, AB 521, SEC. 1, 143(a)(2).)

16. The 2006 amendment limited the number of P3’s to two in Northern and two in Southern California and specified that “[t]he projects shall be primarily designed to improve goods movement, including, but not limited to, exclusive truck lanes and rail access and operational improvements.” (*Id.* at 143(b)(2).) All proposed lease agreements were required, after one public hearing, to be submitted to the Legislature for approval or rejection, and unless rejected within 60 days the submitted agreement was to be deemed approved. (*Id.* at 143 (b)(3).) Section 143(e) of the amendment required the lease agreement to “authorize the contracting entity to impose tolls and user fees for use of a facility constructed by it,” specified the proper application of those tolls and user fees, provided for the disposition of excess tolls and user fees, required the lease agreement to “establish specific toll and user fee rates,” and authorized certain public entities to extend the tolls and user fees after the expiration of the lease. The statute as amended also provided in section 143(f) that the plans and specifications for each transportation project subject to a P3 must comply with CalTrans standards.

17. In 2009 the statute was amended to “delet[e] the limitations on both the number and type of projects eligible to be developed through a PPP” (01/21/2011 ACECC Request for Judicial Notice (“ARJN”) at Exh. B, p. 12) and expand the purpose of P3’s from improved transportation of goods to projects “primarily designed to achieve improved mobility, improved operations or safety, and quantifiable air quality standards.”

(*Id.* at Exh. A, Legislative Counsel's Digest, SB4 at §(4).<sup>2</sup>) The amendments authorized CalTrans to enter into an unlimited number of P3's without legislative approval provided that any proposed P3 be released for public comment at a hearing and thereafter be submitted to the Legislature and the newly established PIAC for comment at least sixty (60) days before execution.<sup>3</sup> Under the amended statute CalTrans is to consider any comments from these two entities but is accorded the discretion to execute the agreements. (*Id.*) The Senate Floor Analysis describes the 2009 amendment as providing that CalTrans is to be the "responsible agency for project development services performed for [the facility subject to the P3]" but can "use either department personnel or consultants for those services." (ARJN at Exh. B, p. 12.) As discussed in greater detail in Part III C below, section 143(f)(1) does not employ the language used in the Senate Floor Analysis summary. Rather it says in one subparagraph that CalTrans is the

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<sup>2</sup> See section 143(c)(3), which provides:

The projects authorized pursuant to this section shall be primarily designed to achieve the following performance objectives:

- (A) Improve mobility by improving travel times or reducing the number of vehicle hours of delay in the affected corridor.
- (B) Improve the operation or safety of the affected corridor.
- (C) Provide quantifiable air quality benefits for the region in which the project is located.

<sup>3</sup> See section 143(c)(5), which provides:

At least 60 days prior to executing a final lease agreement authorized pursuant to this section, the department or regional transportation agency shall submit the agreement to the Legislature and the Public Infrastructure Advisory Commission for review. Prior to submitting a lease agreement to the Legislature and the Public Infrastructure Advisory Commission, the department or regional transportation agency shall conduct at least one public hearing at a location at or near the proposed facility for purposes of receiving public comment on the lease agreement. Public comments made during this hearing shall be submitted to the Legislature and the Public Infrastructure Advisory Commission with the lease agreement. The Secretary of Business, Transportation and Housing or the Chairperson of the Senate or Assembly fiscal committees or policy committees with jurisdiction over transportation matters may, by written notification to the department or regional transportation agency, provide any comments about the proposed agreement within the 60-day period prior to the execution of the final agreement. The department or regional transportation agency shall consider those comments prior to executing a final agreement and shall retain the discretion for executing the final lease agreement.

“responsible agency for the performance” of certain services and in the next that it may use its “employees or consultants to perform” them.<sup>4</sup>

18. The foregoing brief summary of the history of section 143 leads to a few general observations. Initially, the statute authorized a very limited number of “demonstration projects,” these were envisioned to be toll roads, and it did not specify the purpose of such projects – e.g., movement of goods or people, etc. The 2006 amendments continued the limitations in number and inserted a limitation on scope by specifying that the projects were to be focused on the improved movement of goods. Tolls and user fees continued to be authorized as a funding mechanism. The 2006 amendments also introduced the more detailed definition of qualifying transportation projects with the curious use of the term “supplemental” that still appears in the statute today and, further, gave the Legislature veto power over all such projects. The 2009 amendments dropped the numerical limitation, expanded the scope of qualifying projects to include purposes other than the movement of goods and replaced legislative veto power with a legislative comment period. In addition, the 2009 amendment replaced the

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<sup>4</sup> Section 143(f)(1) provides:

(A) Notwithstanding any other provision of this chapter, for projects on the state highway system, the department is the responsible agency for the performance of project development services, including performance specifications, preliminary engineering, prebid services, the preparation of project reports and environmental documents, and construction inspection services. The department is also the responsible agency for the preparation of documents that 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 California Constitution. Department resources, including personnel requirements, 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.

earlier requirement that projects meet CalTrans standards with more detailed provisions regarding CalTrans serving as the “responsible agency.” It is against this rather opaque background that the Court turns to consider the parties’ respective contentions.

### **III. Analysis of Petitioners’ Claims**

#### **A. The Tolls/User Fee Issue**

19. The parties dispute the significance of the “shall authorize” language in section 143(j)(1). Petitioners argue that this language and the statute taken as a whole reflect a legislative mandate that P3 projects be funded in whole or in part by tolls and user fees. Respondents argue that there is no such requirement for P3’s; rather P3’s *may* be financed that way and, where they are, then the operative documents “shall authorize” the P3 to charge tolls and user fees. This difference is significant because it is currently anticipated that Phase II will *not* be financed by tolls and fees. Indeed, there is a Memorandum of Understanding (“MOU”) entered into by the Golden Gate Highway and Transportation District, the Metropolitan Transportation Commission and the SFCTA that prohibits the use of tolls and user fees to finance the reconstruction of Doyle Drive, and section 143(s) provides that no P3 lease may be entered into that “affects, alters or supersedes” that MOU. Thus if section 143 as currently drafted mandates tolls and user fees as the exclusive funding mechanism, the proposed P3 before this Court violates that section.

20. To resolve this dispute, the Court looks to section 143 as a whole in an attempt to determine its intent regarding whether tolls and user fees are a required element of any P3 financing mechanism. Petitioners are correct that section 143 has

various provisions related to the use of tolls and user fees in P3's. Thus section 143(j)(1) provides that P3 agreements "shall authorize" the imposition of tolls and user fees and requires such fees to be used for certain purposes; section 143(j)(2) requires P3 leases to "establish" toll and user fee rates; section 143(j)(3) provides that collection of tolls and user fees "may be extended" by the CTC or regional agency at the end of the lease; and section 143(d) provides that at the end of a P3 lease "the right to collect" tolls and user fees must revert back to CalTrans or the regional transportation agency. In addition, the Assembly floor analysis of the recent amendments to section 143 states that the legislation "[e]xplicitly provides that P3 agreements must authorize the lessee to impose tolls and user fees for use of a facility constructed by it." (12/23/2010 CalTrans' RJN "CRJN"), Exh. A, header "SBx2 4 Senate Bill, 2<sup>nd</sup> Ext. Session – Bill Analysis at pp. 3-4, ¶23.) All of the foregoing is also consistent with the origins of section 143 and the earlier versions of the statute that clearly contemplated the imposition of tolls and user fees on P3 projects.

21. While the provisions cited by Petitioners support the proposition that section 143 anticipates and authorizes the use of tolls and user fees as a funding mechanism, these provisions in the statute as currently drafted all fall short of *requiring* the use of tolls and user fees as a *necessary* funding element or the *sole* funding source in every P3. If that were the legislative intent, it would have been easy to state it.<sup>5</sup> Instead, section 143(f)(2) contemplates the use of at least some public funds by providing that the lessee is responsible for all costs "except as may otherwise be set forth in the lease agreement." But more importantly, if Petitioners' interpretation of section 143 were

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<sup>5</sup> Note that where the drafters of section 143 wanted to impose a requirement instead of simply authorizing an act, the word "require" was used. (Compare sections 143(j)(1) and 143(r).)

correct, then the reference in section 143(s) to the MOU would be nonsensical. That subsection clearly reflects the drafters' awareness of the terms of the MOU and its bar to using any tolls or user fee revenue. If the drafters intended all P3's to use such revenue, then the MOU would make it impossible for Phase II of the Presidio Parkway Project to qualify as a P3 candidate. Yet section 143(s) presupposes that Phase II may qualify as a P3 so long as it does not "affect[], alter[] or supersede[]" the MOU. This provision is a strong indicator that the drafters of the current section 143 understood that use of tolls and user fees was not a necessary element of every P3 funding mechanism under the statute as amended in 2009.<sup>6</sup> The Legislature's funding of this project as a P3 in the 2010 Budget Act serves as further confirmation of this construction of the statute. (CRJN, Exh. D, items #2660-015-0042, 2660-015-0890, 2660-315-0890.) Thus in both the text of 143(s) and in the 2010 Budget Act, the Legislature clearly expressed its understanding that the Doyle Drive project could proceed as a P3 even though the funding would come from public resources rather than tolls and user fees.

22. This conclusion is reinforced by the broad definition of "transportation projects" found in section 143(a)(6). That definition includes "one or more" of a long list of activities – namely, the "planning, design, development, finance, construction, reconstruction, rehabilitation, improvement, acquisition, lease, operation, or maintenance" of certain qualifying facilities. Many of these activities do not require the construction of a facility or presuppose a facility exists that could be subject to tolls or user fees. It makes little sense to infer a requirement that all P3 projects be funded by

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<sup>6</sup> Petitioners attempt to explain section 143(s) as a recognition of the possibility that Doyle Drive could be tolled as part a larger scheme to toll all entrances into San Francisco – including those from San Mateo. The Court finds this remote possibility an insufficient explanation of the language in section 143(s).

tolls and user fees if the qualifying “transportation projects” are defined so broadly as to include activities where that would be an impossibility.

23. In the end, although it is true that toll-and-user-fee language may be found in the earliest and all subsequent versions of section 143, none of these various iterations of the statute contain language barring the use of other funding sources. While it is thus clear that the drafters of the initial and subsequent versions of the statute were keen to authorize the use of tolls and user fees, perhaps thought that such revenue sources were a logical way for a lessee to generate revenue to fund section 143 projects, and may even have assumed that that would be the way these projects would probably go forward, nowhere can one find an intent to limit the broad authority otherwise granted to CalTrans (see, e.g., sections 90 through 155.6; Government Code section 14030(c); etc.), a legislative concern that CalTrans might tap other revenue sources in whole or in part to fund such projects or an indication that the Legislature intended to bar the use of such funds. Absent some signal in the statutory language that the use of funds other than tolls and user fees was a concern to the Legislature, the Court concludes it would be inappropriate to graft onto the statutory language a limitation that the Legislature never saw fit to impose. Accordingly, Petitioners’ “tolls and user fees argument” does not support the issuance of a writ.

**B. The Supplemental Facilities Issue**

24. Citing the statutory history and plain language of section 143(a)(6), Petitioners argue that P3’s may only be used “to provide facilities that are additional to the existing state owned facilities” and cannot be used simply “to replace facilities that are already owned and operated by CalTrans or a regional transportation agency.”

(Opening Br. at pp. 1:19 and 18:22.) As Doyle Drive is an existing part of the state highway system owned and operated by CalTrans, they argue that a project to replace that facility does not come within the statutory definition of a qualifying “[t]ransportation project” found in section 143(a)(6).

25. As already noted “[t]ransportation project” is defined to “mean[] one or more of the following: planning, design, development, finance, construction, reconstruction, rehabilitation, improvement, acquisition, lease, operation, or maintenance of highway, public street, 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).” (Emphasis added.) Petitioners correctly argue that the term “supplemental” does not modify simply “related facilities;” rather the preceding words – namely, “highway, public street, rail” – all modify “facilities” in the same way “related” does.<sup>7</sup> Thus to qualify as a P3 project, the project must be “supplemental” to a “highway, public street, rail, or related” facility. Petitioners argue the Presidio Parkway Project cannot be “supplemental” in the sense of an added highway lane or addition to Doyle Drive because Phase II simply replaces Doyle Drive, which is already owned and operated by the State. They cite the definition of “supplemental” as an adjective meaning “supplying something additional; adding what is lacking.” (Black’s Law Dictionary (9<sup>th</sup> ed., 2009) at p. 1577.) Here, they argue that the project adds nothing to Doyle Drive: “[w]hen completed, the roadway will start and end in the same places, and it will have exactly the same number of lanes as it always has.”

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<sup>7</sup> If the language read “highways, public streets, railways and related facilities supplemental to . . .,” Respondents’ argument that “supplemental” modifies only “related facilities” would at least make grammatical sense.

(Opening Br. at p. 2:5-7.) Thus nothing is “added” to that which is already owned and operated by the State.

26. At its core, the issue Petitioners present is whether to be “supplemental” within the meaning of the statute the facility that is being “reconstruct[ed], rehabilitat[ed] [and] improve[d]” must be something *not* currently owned and operated by the State. While it is true that the existing facilities being “supplemented” by the “[t]ransportation project” must be owned and operated by the State, the statute does not say anything regarding the prior or current ownership of the facilities comprising the “[t]ransportation project.” Petitioners would infer that requirement from the plain meaning of the word “supplemental” and thus argue that the drafters’ intent was to limit qualifying transportation projects to facilities not currently owned by the State – such as “an existing county road or city-owned freeway exchange” – that when “reconstruct[ed], rehabilitat[ed] [and] improve[d]” will become supplemental to a State transportation facility. (Opening Br. at p. 18:28.)

27. While such a construction is not impossible, it is also not the only one to which the statute is reasonably susceptible. The term “supplemental” may also simply mean not apart from an existing State “highway, public street, rail, or related facilit[y].” Thus, for example, if a road, highway, bridge or tunnel in San Francisco were city-owned and did not connect to any facility “owned and operated by” CalTrans, then section 143 could not be used to finance its “reconstruction, rehabilitation, improvement [etc.]” Similarly, a project to build an entirely new “highway, public street, rail, or related facility” – such as a high speed rail line – unconnected to any existing facility owned by CalTrans would not be “supplemental” within the meaning of the definition. The point is

simply that, while it is true that the use of the term “supplemental” in section 143 may be ambiguous, one does not need to import into the definition the notion that whatever is the object of the P3 must *not* be a facility presently “owned and operated by” the State.

28. So what does “supplemental” mean? Accepting the Black’s Law definition cited by Petitioners<sup>8</sup> that “supplemental” means “supplying something additional; adding what is lacking,” Petitioners’ application of that definition is unreasonably narrow. While the number of lanes and beginning and end points may all remain the same, other attributes are “added” by the project to what formerly constituted Doyle Drive. These attributes include seismic upgrades and improved highway safety features in compliance with current standards. These new features are “additional” or “add[ing] what is lacking” just as a new lane would, and there is no principled basis – and certainly none grounded in the statutory language – for finding that a new lane is “supplemental” but a seismic upgrade is not. Indeed, if one looks at the 2009 amendments, the intended purpose was expanded from that stated in the 2006 amendments. The prior version stated the projects should be “primarily designed to improve goods movement, including, but not limited to, exclusive truck lanes and rail access and operational improvements;” however, the purpose according to the 2009 amendments was to support projects “primarily designed to achieve improved mobility, improved operations or safety, and quantifiable air quality standards.” (See Part C above; Section 143(c)(3).) Clearly, the P3 in this case “adds” to the current facility in a way that

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<sup>8</sup> The Court notes that, in citing to the Black’s Law definition, Petitioners cite a relatively narrow definition of the term. As noted by the Court in its previous order, another standard definition of “supplement” is “to complete, add to, or extend by a supplement.” (See <http://dictionary.reference.com/browse/supplement>.) This definition is broader than simply “add.”

advances the goal of “improved mobility” and “improved operations or safety,” and thus “add[s] what is lacking.”<sup>9</sup>

29. Two additional points further undermine Petitioners’ limited construction of the term “supplemental.” First, as noted in the Court’s prior decision, Petitioners’ argument seems to be based on the notion that improvements to Doyle Drive somehow are unrelated – and thus not “supplemental” – to any “existing facilities currently owned and operated by the department or regional transportation agencies.” Yet Doyle Drive does not stand alone. It connects the various approaches to the Golden Gate Bridge to that bridge, and that entire system is an “existing facility.” Indeed, Petitioners’ Complaint admits as much in Paragraph 1 where it is alleged that Respondents “are illegally proceeding with a public-private partnership (‘P3’) to replace the existing 1.6 mile six-lane facility *on the state highway system* south of the Golden Gate Bridge in San Francisco.” (Emphasis added.) That sentence effectively admits that Doyle Drive is “supplemental” to the existing state highway system. Second, Phase II obviously follows Phase I. Upon completion, Phase I will have constructed what will then be “existing facilities currently owned and operated by the department or regional transportation agencies.” Phase II will then “add to” and “complete” the facility owned and operated by CalTrans as a result of Phase I and thus “supplement” that which was constructed in Phase I.

30. For all the reasons stated above, the Court concludes that Phase II of the Presidio Parkway Project fits within the statutory definition of a “[t]ransportation project.” It involves the “construction, reconstruction, rehabilitation, improvement, ...

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<sup>9</sup> The Court understands that the project also adds other, physical features not found in the pre-existing Doyle Drive (see, e.g., Amicus Opp. at p. 14:20-22), but Respondents have not provided record citations to that evidence, and thus the Court does not rely on those features in the above analysis.

operation [and] maintenance of highway... or related facilities” – namely, Doyle Drive – and in doing so “adds to” or “completes” facilities “currently owned and operated” by the State – namely, that portion of State Highway 101 in the broad sense and those facilities constructed in Phase I in the narrow sense. Accordingly, Petitioners’ “supplemental facilities argument” does not support the issuance of a writ.

**C. The Responsible Agency Issue**

**(1) The Parties’ Positions**

31. Petitioners allege that the project reports and environmental documents for the Doyle Drive replacement project were completed in 2008 by Parsons-Brinkerhoff through a contract with SFCTA, that CalTrans was not involved in any of that preparatory work or any of the preliminary engineering, prebid services, price estimates and the like for the project, and that the proposed P3 lease does not contemplate CalTrans performing construction inspection services. (Compl. at ¶10.) Petitioners allege that section 143(f)(1) requires that CalTrans be the “responsible agency” for the project within the meaning of that section and the reliance on the work of Parsons-Brinkerhoff through a contract with SFCTA does not satisfy that requirement. Petitioners also allege that section 143(f)(1) cannot be satisfied unless CalTrans performs the construction inspection services for Phase II.

32. Petitioners’ position rests initially on the statutory requirement that CalTrans serve as the “responsible agency” as that term is used in section 143(f)(1)(A). They point to section 143(f)(1)(B) to argue that CalTrans cannot qualify as the “responsible agency” unless it either performs these various services directly with its own employees or provides such services through consultants under contract with CalTrans as

opposed to under contract with a regional transportation agency such as SFCTA. While the statute does not specify that the consultants must be under contract with CalTrans, the Legislative Counsel's Digest accompanying the 2009 amendments does describe the section in question as allowing CalTrans to "perform those functions with consultants contracted by [CalTrans]." (ARJN, Exh. A, Legislative Counsel's Digest SB 4 at §(8).) This legislative history is relied upon by Petitioners to argue that it is impossible for CalTrans to be the "responsible agency" on the Presidio Parkway Project as required by the statute when the services it was required to do with its own employees or with consultants under contract with it were all done by Parsons-Brinkerhoff over the past several years – long before the attempt to convert the project to a P3.

33. Respondents' rejoinder is that the above argument conflates the requirement in section 143(f)(1)(A) that CalTrans be the "responsible agency for the performance of project development services" and "for the preparation of documents" as described in that subparagraph with the authorization in section 143(f)(1)(B) that CalTrans "may use [CalTrans] employees or consultants to perform the services described in subparagraph (A)." (Emphasis added.) Respondents argue that CalTrans can be the "responsible agency for ... performance" without "performing" the enumerated services. Subparagraph (B) simply says that, if CalTrans elects "to perform" the services itself, it may do so through either its employees or consultants. If CalTrans does not elect "to perform the services described in subparagraph (A)," then the language in subparagraph (B) is irrelevant. If the drafter had intended paragraph (B) to be the exclusive means for CalTrans serving as "the responsible agency," it would have been much simpler for the statute to read: "Notwithstanding any other provision . . . , the

department shall use department employees or consultants under contract with the department to perform ... [the listed services].” The specification in subparagraph (B), it is argued, only makes sense if it addresses a subset of the ways in which CalTrans may fulfill its role as the “responsible agency.” Its purpose is to make it clear that, if CalTrans performs the work, it may do so through consultants rather than just relying on its employees.

(2) The Broader Historical and Statutory Context<sup>10</sup>

34. Before assessing these competing arguments, it should be noted that the disputed language found in section 143(f)(1) appears verbatim in two other California statutes – Government Code section 6532(i) and Public Contract Code section 6808 – and almost verbatim in a third – Public Contract section 6802(c). The appearance of the language in the Government Code is found in a 2009 provision authorizing the creation of a joint powers agency to construct a stadium in Santa Clara County. If that construction requires some activity related to the state highway system, section 6532(i) includes the exact language at issue in the present case to the effect that CalTrans is the “responsible agency” for “performance” and may perform the enumerated tasks through employees or consultants. The very same language appears in a 2009 Public Contract provision (section 6808) that is applicable to up to 10 demonstration projects using a design-build procurement process in lieu of the traditional design-bid-build method. (Pub. Contract Code §6802(a).) On the 10 demonstration projects on state highway, bridge and tunnel projects, CalTrans is designated the “responsible agency” for

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<sup>10</sup> Petitioners submitted the declaration of Theodore Toppin, a lobbyist for the PECCG, regarding the negotiations he participated in regarding the amendments to some of the statutes discussed in this section. For the reasons discussed in *J.A. Jones Construction Co. v. Superior Court* (1994) 27 Cal.App.4th 1568, 1577-1578, such evidence – even from legislators – is not admissible on the issue legislative intent.

“performance” and authorized “to perform” through employees or consultants. Very similar language is found in Public Contract section 6802(c) related to a specific highway project in Riverside. CalTrans is designated the “agency responsible for ... performance of construction inspection services” and “may use department employees or consultants to perform” such services. (Pub. Contract Code §6802(c)(2)&(4).)

35. The language in the above statutes needs to be viewed in light of the enactment of Proposition 35 in November 2000 and its aftermath. Prior to Proposition 35, with certain exceptions, Article VII of the State Constitution impliedly forbid the state from contracting for private companies to perform the kind of services that persons selected through the civil service system could perform “adequately and competently.” (*State Compensation Ins. Fund v. Riley* (1937) 9 Cal.2d 126, 135.) Proposition 35 added Article XXII to the California Constitution to provide that the State of California and all other governmental entities “shall be allowed to contract with qualified private entities for architectural and engineering services for all public works of improvement.” (Art. XXII, § 1.) To leave no doubt about it, Article XXII states that “[n]othing contained in Article VII of this Constitution shall be construed to limit, restrict or prohibit the State or any other governmental entities ... from contracting with private entities for the performance of architectural and engineering services” (Art. XXII, § 2), and that the choice and authority to contract with private entities for architectural and engineering services for public works projects “shall extend to all phases of project development including permitting and environmental studies, rights-of-way services, design phase services and construction phase services.” (Art. XXII, § 1.)

36. In 2006, several years after Article XXII was adopted, the Legislature enacted Senate Bill 1026, which was codified in part in former Public Contract Code sections 20209.20 through 20209.44. The bill authorized the Los Angeles County Metropolitan Transportation Authority to construct a high-occupancy vehicle lane on a state highway. These statutes required that civil service employees prepare the performance specifications and any plans, preliminary engineering, environmental documents, prebid services, and project reports, perform the construction inspection for the project and perform the quality control inspection for the project. (02/08/2011 PECC RJN, Exh. A, sections 20209.26(a)(2), 20209.32 and 20209.34.) These provisions were immediately challenged by private engineering interests, and in *Consulting Engineers and Land Surveyors of California v. Dept. of Transportation* (2008) 167 Cal.App.4th 1457, 1460-1461 (“*CELSOC*”), the foregoing sections of the Public Contract Code were held to violate Article XXII. It was shortly after the *CELSOC* decision that the language in section 143(f)(1) and the other three statutes was adopted.

37. Read against the above history, one might argue that the language in section 143(f)(1) and cited sections of the Government and Public Contract Codes is simply a recognition of the *CELSOC* decision and its reading of Article XXII as a bar to any legislative enactment requiring CalTrans to use only its employees as opposed to private consultants. An alternative interpretation, though, would be that in all these statutes the drafters’ intent was to reserve for CalTrans – acting directly through its employees or its retained consultants – the responsibility for actually performing the listed services. Petitioners obviously argue for the latter and for support point to the last sentence in section 143(f)(1)(B) and the parallel statutes, all of which reference the

resources used being included in the CalTrans “capital outlay support program [‘COSP’] for workload purposes in its annual Budget Act.” They argue that the reference to COSP is significant because of limitations in that program to the amount of resources that may be used for private consultants. (See Opening Br. at pp. 6-7; 01/14/2011 Decl. of T. Toppins at ¶6.<sup>11</sup>)

(3) Construction of the Section 143(f)(1)

38. While this issue is a “closer call” than the other three issues raised by Petitioners, the Court concludes that Respondents have the better of the argument. Had the Legislature intended the “responsible agency” requirement to mean that CalTrans must perform the identified services through its own employees or consultants under contract with it rather than with a regional transportation authority, it could have made that clear by collapsing the two subparagraphs into one (“the department shall use department employees or consultants under contract with the department to perform ...”) rather than have one subparagraph say CalTrans is the “responsible agency” for various services and another to address how CalTrans may “perform” such services. Alternatively, the intent to require CalTrans “to perform” could have been indicated by simply using the word “shall” in subparagraph (B). The second subparagraph, however, uses the term “may” and can reasonably be construed as simply authorizing CalTrans to use consultants if it chooses to do the work its self – thus conforming to the *CELSOC* interpretation of XXII.

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<sup>11</sup> The Court notes without deciding the issue of whether this interpretation might be viewed as an attempt to circumvent the mandate of Article XXII. That issue is avoided if section 143(f)(1)(B) is interpreted simply as a measure making it clear that, if CalTrans taps COSP funds to perform the listed services, it may use either its own employees or consultants.

39. Importantly, as illustrated by the record in this case, CalTrans can clearly be “responsible” for “performance” of the specified functions even if those doing the work are under contract with a regional transportation agency instead of CalTrans. Thus in this case CalTrans and a regional transportation agency were pursuing the work in question as partners, and that partnership was memorialized in a series of “cooperative agreements” by which CalTrans had full oversight responsibility, which included, *inter alia*, input on the consultants selected by the SFCTA, the right to review anything and everything done by the consultants, and the quality assurance role. The fact that SFCTA used consultants is of no moment, as CalTrans could use consultants if it chose to do the work itself rather than its partnering regional transportation agency. The issue comes down to the question of whether CalTrans cannot be the “responsible agency” with respect to the work of consultants unless the consultants are in privity of contract with CalTrans as opposed to its partnering agency. There is no necessary relationship, though, between the ability to be the “responsible agency” and a requirement that the parties be directly in contract with one another.<sup>12</sup> The regional transportation agency can through contract or practice defer to CalTrans or submit to CalTrans oversight so as to make CalTrans “responsible.”

40. Stepping back from the particular section and considering the statute as a whole, it would also appear that the Legislature was fully aware of the fact that CalTrans often “partners” with regional transportation agencies, and indeed in section 114 expressly authorized it to do so. As evidenced by section 143(s), the Legislature also knew that the Presidio Parkway Project was such a venture and that CalTrans and its

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<sup>12</sup> The definition of “responsible” means “answerable or accountable, as for something within one’s power, control, or management” (<http://dictionary.reference.com/browse/responsible>); nowhere in that definition can one find the concept of privity nor can that requirement be some how inferred from it.

public partner (the SFCTA) were exploring a P3. The “responsible agency” requirement in section 143(f)(1)(A) was not meant to bar the conversion of that existing project into a P3 but simply require that CalTrans be “responsible” for the “performance” of the listed tasks. If it had fulfilled that role through the pre-existing cooperative agreements with its regional transportation agency partner, the project would qualify for conversion to a P3.

41. This interpretation is fortified by considering what, if any, legislative purpose would be served by adopting Petitioners’ construction.<sup>13</sup> As previously noted, even where CalTrans performs the work itself, the statute allows it to use consultants rather than its own employees. Thus the statute is not drafted to ensure that CalTrans employees perform the listed services. Subparagraph 143(f)(1)(B)’s express authorization of consultants underscores that fact. Under these circumstances it is difficult to read such a purpose into subparagraph 143(f)(1)(A), and one is left with the undefined phrase “responsible agency for the performance ...” Taking the natural meaning of those words, the most logical inference is that the Legislature intended CalTrans to be “responsible,” and there is no reason to construe the following subparagraph as imposing a limitation on the ways in which CalTrans might discharge that duty.<sup>14</sup>

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<sup>13</sup> The Court raised this same question in its decision denying the request for a preliminary injunction. Petitioners characterize this as the Court “question[ing] whether it was sound policy for the Legislature to designate that the engineering services ... be performed by CalTrans or a consultant under contract to CalTrans ...” (Opening Br. at p. 9 fn. 5.) Petitioners miss the point. The Court has no view as to what is or is not “sound policy” in this regard. The Court is, however, trying to divine the legislative intent in order to interpret the statute, and in that context the Court has discussed at hearings and considered in reviewing the briefs what might reasonably be inferred to be the underlying policy (whether that be “sound” or not).

<sup>14</sup> The Court notes that Petitioners at one point argued that the analysis of these issues should be informed by the concept of “responsible engineer” as it appears in the Business and Professions Code. The Court finds no plausible connection between the latter Code’s regulation of professional engineers and the use of the term “responsible agency” in section 143(f)(1) or the parallel sections of the Government and Public Contract Codes.

42. For all of the foregoing reasons, the Court rejects Petitioners' construction of the term "responsible agency" as used in section 143(f)(1)(A) and concludes that its argument based on that construction does not support the issuance of a writ.

**D. The 60-Day Review Period Issues**

**(1) Prior Rulings**

43. Petitioners' Application alleges that Respondents failed to provide the Legislature and the PIAC the mandatory sixty (60) day review period specified in section 143(c)(5).<sup>15</sup> They argue that the 60-day period did not begin to run until Volumes II and III were delivered to the Legislature and the PIAC, and that was not done until November 23, 2010. They also argue that the required public hearing was inadequate because of the late delivery of Volumes II and III. The Respondents argue that the statute only requires that the "final lease agreement" be delivered to trigger the 60-day clock, and that delivery occurred on October 23, 2010 when Volume I was delivered to the Legislature and PIAC. If the latter date is the correct one, then the 60-day waiting period ran before the PPP Agreement was executed. As for the public hearing, the documents need only be made

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<sup>15</sup> Section 143(c)(5) reads:

(5) At least 60 days prior to executing a final lease agreement authorized pursuant to this section, the department or regional transportation agency shall submit the agreement to the Legislature and the Public Infrastructure Advisory Commission for review. Prior to submitting a lease agreement to the Legislature and the Public Infrastructure Advisory Commission, the department or regional transportation agency shall conduct at least one public hearing at a location at or near the proposed facility for purposes of receiving public comment on the lease agreement. Public comments made during this hearing shall be submitted to the Legislature and the Public Infrastructure Advisory Commission with the lease agreement. The Secretary of Business, Transportation and Housing or the Chairperson of the Senate or Assembly fiscal committees or policy committees with jurisdiction over transportation matters may, by written notification to the department or regional transportation agency, provide any comments about the proposed agreement within the 60-day period prior to the execution of the final agreement. The department or regional transportation agency shall consider those comments prior to executing a final agreement and shall retain the discretion for executing the final lease agreement.

available, and they were released on the CalTrans website long before the hearing that was in fact held.

44. The PPP Agreement, described in Petitioners' Application as "the Public-Private Partnership Agreement between CalTrans and Golden Link Concessionaire LLC Contract Number 04-1637U4 for the construction of the Presidio Parkway Project" (Decl. of G. James, Exh. B), is the "Volume I" that all parties agree was submitted to the Legislature and PIAC on October 23<sup>rd</sup>. On its face, it appears to be the "final lease agreement" referenced in section 143(c)(5). Yet section 1.2 of the PPP Agreement states in relevant part that "[e]ach of the Contract Documents is an essential part of the agreement between the parties." The "Contract Documents" are then defined in section 1.2.1 to include the various documents contained in Volumes II and III. Thus the first issue is whether "the final lease agreement" specified in section 143(c)(5) means simply the document that the parties in fact execute or whether it also includes other documents that are defined to be "essential" by the express terms of the agreement executed by the parties.

45. Petitioners argue that by the document's own terms Volumes II and III are essential and point to the December 22, 2010 letter from two Senators objecting to the November 23, 2010 delivery of those volumes as evidence that the statute requires the delivery of all three volumes in order to satisfy the 60-day period requirement. (PARJN, Exh. 1.) Respondents argue that the November 23<sup>rd</sup> delivery of Volumes II and III was simply a "courtesy" and that in any case those volumes were posted on line long before October 23<sup>rd</sup> and thus have been available to anyone interested for more than sixty days.

46. The Court finds that the posting of the documents in Volumes II and III is an appropriate release of all the documentation necessary for the conduct of the public hearing required by the statute. However, the Court is loathe to interpret section 143(c)(5) so as not to require delivery to the Legislature of documents “essential” to a P3 agreement. Taken to its extreme, such a line of reasoning would allow CalTrans to submit a rather barebones proposed P3 to the Legislature that simply incorporates a large volume of other documents never provided for review. While it is true that Volume II and III are referenced in what was submitted to the Legislature on October 23<sup>rd</sup>, and it is also true that these documents were available on-line, the statute does not provide that CalTrans is required merely to “release” the P3 agreement. Rather the statute states “the department or regional transportation agency *shall submit the agreement to the Legislature and the Public Infrastructure Advisory Commission for review.*” (Emphasis added.) The plain meaning of the statutory language requires *submission*, and in the context of providing a meaningful opportunity for the Legislature to review and comment, CalTrans is required to submit the *entire* agreement or at least what are acknowledged to be “essential” parts of it.

47. For the above reasons, the Court concluded in the context of the request for a preliminary injunction that Petitioners’ position regarding the time when the 60-day period commenced to run was probably correct; however, the Court denied the request for a preliminary injunction because neither Petitioner PEGC nor Petitioner Alexander could show any irreparable injury. If there were any injury, it was suffered by the Legislature or the PIAC, which were denied the full 60-day period in which to prepare and submit comments. Yet the Legislature had already submitted its comments, and

neither the Legislature nor the PIAC was before the Court seeking the benefit of the full 60-day comment period. As the 60-day period was for the benefit of those institutions and neither claimed to be harmed, the Court denied Petitioners' request for a preliminary injunction based on the lack of a full 60-day comment period. The Court also noted, but did not address, the issue posed by the fact that the 60-day period issue was not raised in the Complaint and as of that time there had been no effort to amend to add that claim.

(2) Petitioners' Standing

48. Petitioners have since moved to amend their complaint, and the issues previously discussed in the context of the preliminary injunction come back in a different guise. Respondents argue that Petitioners do not have standing to raise the 60-day period issue on a writ of mandate and argue that, based on that deficiency, the Court should even deny the motion to amend. On the latter point, the Court concludes that it is more appropriate to address the standing issue on the merits rather than in the context of determining whether it is appropriate to grant leave to amend. Accordingly, the Court grants Petitioners' motion to amend the complaint and deems it amended to include a challenge to the PPP Agreement based on the alleged failure to comply with the 60-day period required by section 143(c)(5). For the reasons discussed below, however, the Court concludes that Petitioners lack standing to challenge the PPP Agreement on this basis.

49. As a general rule, a writ of mandate will be issued only to "the party beneficially interested" in the matter. (Code Civ. Proc. § 1086; *Green v. Obledo* (1981) 29 Cal.3d 126, 144.) This is "generally interpreted to mean that one may obtain the writ only if the person has some special interest to be served or some particular right to be

preserved or protected over and above the interest held in common with the public at large.” (*Carsten v. Psychology Examining Com.* (1980) 27 Cal.3d 793, 796.) With respect to Petitioners’ new challenge based on section 143(c)(5), Petitioners lack such a “beneficial interest.” As discussed above, subsection (c)(5) requires submission of the agreement “to the Legislature and the Public Infrastructure Advisory Commission for review” 60 days before the final agreement is executed. This provision does not give Petitioners a “special interest” or right “over and above” the interest held in common with the public at large. (*Carsten, supra*, 27 Cal.3d at p. 796.) To the contrary, the bodies having a “special interest” or right to have time to review the agreement are the Legislature and the PIAC, which are not parties to the instant writ petition.

50. Nevertheless, as Petitioners assert, the California Supreme Court recognizes an exception to the general “beneficial interest” rule as follows: “where the question is one of public right and the object of the mandamus is to procure the enforcement of a public duty, the relator need not show that he has any legal or special interest in the result, since it is sufficient that he is interested as a citizen in having the laws executed and the duty in question enforced.” (*Green, supra*, 29 Cal.3d at p. 144, quoting *Bd. of Soc. Welfare v. County of L.A.* (1945) 27 Cal.2d 98, 100-101.) “The exception promotes the policy of guaranteeing citizens the opportunity to ensure that no governmental body impairs or defeats the purpose of legislation establishing a public right.” (*Id.*)

51. Petitioners argue that they fall within this exception. In their view, subsection (c)(5) “creates a public duty on the part of Respondents to submit P3 agreements for a 60-day review before they are executed, and a public right is at stake in

the proper review of public contracts and the adherence to notice and review requirements.” (Amended Reply at pp. 14-15, citing *Green, supra*, 29 Cal.3d at p. 144, and *Hogar Dulce Hogar v. Community Development Com'n of City of Escondido* (2003) 110 Cal.App.4th 1288, 1294-1295.) Respondents, on the other hand, argue that, as to subsection (c)(5), Petitioners are not seeking to enforce a right belonging to the public in general, but instead the specific right belonging only to two governmental entities – i.e., the Legislature and PIAC – to have sufficient time to review the complete agreement before making comments. Respondents argue that the “public right” exception does not provide standing to the public at large in such instances. (Resp. Opp. at p. 17.) The Court finds that Respondents have the better argument on this point, as cases such as *Green* and *Hogar Dulce* are readily distinguishable.

52. In *Green, supra*, 29 Cal.3d at p. 133, the petitioners, two recipients of AFDC benefits, sought to compel the allowance of work-related transportation expenses in determining eligibility and benefit levels, and to declare a state regulation invalid for not allowing deduction of all expenses reasonably attributable to work. (*Id.*) The Court held that, even though the two petitioners had evidence only of one kind of expense (transportation), they had standing as members of the public to challenge the portions of the regulation relating to other kinds of work-related expenses as well. (*Id.*, at p. 145.) The Court held that “the proper calculation of AFDC benefits is a matter of public right ... and plaintiffs herein are certainly citizens seeking to procure the enforcement of a public duty.” (*Id.*)

53. Similarly, in *Hogar Dulce Hogar, supra*, 110 Cal.App.4th 1288, an association filed a petition for writ of mandate challenging the method by which the

city's community development commission calculated payments to a low income housing fund, allegedly resulting in underpayment. The Court held that the association had standing, as an interested member of the public, to challenge the calculations even as to payments before it came into existence, as the public agency owed a duty to the public to place the proper amount of funds in the Fund. (*Id.*, at pp. 1294-1295.)

54. Thus, in both of these cases, as well as others dealing with the "public duty" exception, the challenged duty is owed by a public body to the public in general, or at least to a broad class of members of the public (such as AFDC recipients) whose rights are affected by the lack of performance of the duty. Here, in contrast, the "duty" being challenged under section 143(c)(5) is not a duty owed to a broad class of members of the public but instead a duty owed to the *Legislature and the PIAC* to provide them time to review lease agreements and submit comments to CalTrans or the regional agency.<sup>16</sup> The timely submission of the lease agreement does not affect the right of *public* comment, as the public's opportunity to comment on the lease agreement must come before the agreement is submitted to the Legislature and PIAC. (*See* section 143(c)(5).) Petitioners argue that a "public right is at stake in the proper review of public contracts," but the specific duty they seek to enforce is only the timely submission of a report to those bodies to enable such review. As it is undisputed that such review did occur in this case, it is hard to see how the public's interest "in the proper review of public contracts" is at stake in this case.

55. Further, even if the duty at issue were to be construed as a "public duty," the exercise of jurisdiction in a mandamus action at the instance of an interested member

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<sup>16</sup> In this case, those bodies did submit such comments after reviewing the lease agreement, and Petitioners do not contend otherwise.

of the public is subject to the “wise discretion” of the Court. (*See McDonald v. Stockton Met. Transit Dist.* (1973) 36 Cal.App.3d 436, 440 (stating that public duty exception applies “[w]hen the duty is sharp and the public need weighty,” but that when the “public need is less pointed, the courts hold the petitioner to a sharper showing of personal need”); *see also Carsten, supra*, 27 Cal.3d at pp. 797-799 (discussing numerous factors in determining whether the “exception to the statutory requirement of beneficial interest” should apply in a particular case).) Here, given the various circumstances discussed above – including that only portions of the challenged agreement were not timely submitted though available on-line, that even those portions were submitted in time for the Legislature and PIAC to provide their comments, and that the Legislature and PIAC have not asked for additional time to review the agreement – the Court finds it inappropriate to apply the “public duty” exception at the Petitioners’ instance. (*Cf. McDonald, supra*, 36 Cal.App.3d at p. 442 (denying relief where petitioners as members of the public were seeking judicial enforcement of contract rights of the federal Department of Transportation, which had not sought to enforce them).) To put it another way, once that the Legislature and PIAC have provided their comments, it serves no purpose to require CalTrans to wait for the sixtieth day before executing the agreement.

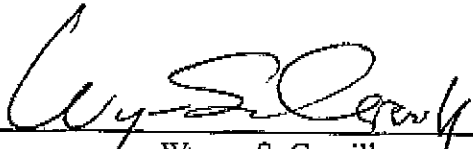
56. As Petitioners lack standing on this issue, and in any event in the exercise of discretion the Court should not issue a writ under the “public duty” exception to the general rule, the Court concludes that Petitioners’ “60-day comment period argument” does not support the issuance of a writ.

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For good cause shown, IT IS HEREBY ORDERED:

1. That the motion to amend the Complaint/Petition is GRANTED;
2. That the writ of mandate and request for injunctive relief are DENIED;
3. That on or before February 23, 2011, Respondents shall submit a form of final judgment; and
4. That the February 23, 2011 Initial Case Management Conference is MAINTAINED as a compliance date for submission of a form of judgment with no appearances required if a form of judgment has been lodged in D-21 and filed in the Clerk's office.

Dated: February 17, 2011

  
Wynne S. Carvill  
Judge of the Superior Court