



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

**FILED**  
ALAMEDA COUNTY

JAN 03 2011

CLERK OF THE SUPERIOR COURT  
By [Signature] Deputy

PROFESSIONAL ENGINEERS IN  
CALIFORNIA GOVERNMENT, et al.,

Petitioners/Plaintiffs,

vs.

CALIFORNIA DEPARTMENT OF  
TRANSPORTATION, et al.,

Respondents/Defendants.

No. RG10-544672

ORDER (1) DISSOLVING THE  
TEMPORARY RESTRAINING ORDER,  
(2) DENYING THE REQUEST FOR A  
PRELIMINARY INJUNCTION AND  
(3) SETTING FINAL HEARING/TRIAL  
ON REQUEST FOR PERMANENT  
INJUNCTION, DECLARATORY RELIEF  
AND WRIT OF MANDATE

On December 21, 2010, Petitioners/Plaintiffs Professional Engineers in California Government ("PECG") and Dennis Alexander ("Alexander")(collectively "Petitioners") filed an Application for a Temporary Restraining Order and Order to Show Cause re Preliminary Injunction ("Application") seeking to prevent 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") from entering into certain agreements implementing a public-private partnership ("P3") for further work on the Presidio Parkway Project in San Francisco. On December 22, 2010, based on the initial filings, the complexity of the issues surrounding the interpretation of California Street and Highways Code section 143,<sup>1</sup> various scheduling problems presented by the holidays and the apparent lack of any appreciable harm to Respondents in maintaining the status quo for one week while the Court considered Petitioners' filings and the various responses thereto, the Court set this matter for hearing at 10 a.m. on December 30, 2010, invited the parties to submit supplemental papers and entered an order preventing the execution of any documents implementing the P3 prior to that hearing or further order of the Court. Having now reviewed the substantial filings to date, and heard the arguments of counsel who appeared for the hearing on December 30, 2010, the Court rules.

**A. Background**

1. 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; Decl. of L. Saage at ¶9.)

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<sup>1</sup> Unless otherwise indicated in the text, all Code citations are to the California Street and Highways Code.

2. Phase I construction, which includes part of the permanent facility and a detour to accommodate traffic during Phase II, is already 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. (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.

3. 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. (Decl. of K. Ajise at ¶¶3-7.)

4. All of the relevant P3 documents for the Presidio Parkway Project are contained in three volumes. Volume I contains the “Public-Private Partnership Agreement” for the Presidio Parkway Project (“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. (Decl. of G. James, Exhs. B & C.)

5. 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 online at various times, all documents were posted on one of two websites as soon as they were released. (Supp. Decl. of K. Ajise at ¶¶4-8.)

6. 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 Public Infrastructure Advisory Commission ("PIAC") and the Legislature for review and comments. (Decl. of K. Ajise at ¶¶7-9.)

7. 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; Petitioners' Amended RJN, Exh. 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.)

8. 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 are 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. (Decl. of L. Saage at ¶¶5-9.)

9. 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 respective rights.

#### **B. The Operative Pleadings**

10. The Complaint challenges 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 revenue derived from 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 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 state highway projects but that some of the covered services for this project were performed by Parsons-Brinkerhoff through contract with SFCTA rather than under supervision and control of CalTrans. (Compl. at ¶9.)

11. In the Application, Petitioners raise a fourth argument. They allege that section 143(c)(5) requires that any P3 agreement be submitted to the Legislature and PIAC for a 60-day review period and that that was not done in this case. Rather, while Volume I of the operative documents was provided to the Legislature and PIAC on October 23, 2010, Petitioners allege that Volumes II and III were not provided until a month later, and thus the 60-day mandatory review period does not run until January 23, 2011. It is alleged that this delay 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 allegedly had indicated an intent to execute the PPP Agreement as early as December 29, 2010 – well before what Petitioners allege to be the end of the 60-day period.

**C. Analysis**

12. **The Standard:** In deciding whether to issue a preliminary injunction, a court must weigh two interrelated factors: (a) the likelihood that the moving party will ultimately prevail on the merits; and (b) the relative interim harm to the parties from issuance or non-issuance of the injunction. The court's determination is guided by a mix

of the potential merit and interim harm factors; the greater the plaintiff's showing on one, the less must be shown on the other to support an injunction. (*Butt v. State of California* (1992) 4 Cal.4th 668, 677-78.) A plaintiff, of course, has the burden of proof on all elements necessary to support its request for injunctive relief. (*O'Connell v. Superior Court* (2006) 141 Cal.App.4th 1452, 1481.)

13. **The Tolls/User Fee Issues:** The parties dispute the significance of the "shall authorize" language in section 143(j)(1).<sup>2</sup> Petitioners argue that this language and the statute taken as a whole reflect a legislative mandate that P3 projects be funded 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

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<sup>2</sup> The section 143(j) in its entirety reads as follows with relevant portions italicized:

(j) (1) Agreements entered into pursuant to this section *shall authorize the contracting entity or lessee to impose tolls and user fees* for use of a facility constructed by it, and *shall require that over the term of the lease the toll revenues and user fees be applied to* payment of the capital outlay costs for the project, the costs associated with operations, toll and user fee collection, administration of the facility, reimbursement to the department or other governmental entity for the costs of services to develop and maintain the project, police services, and a reasonable return on investment. The agreement shall require that, notwithstanding Sections 164, 188, and 188.1, *any excess toll or user fee revenue either be applied to any indebtedness incurred by the contracting entity or lessee with respect to the project, improvements to the project, or be paid into the State Highway Account, or for all three purposes, except that any excess toll revenue under a lease agreement with a regional transportation agency may be paid to the regional transportation agency for use in improving public transportation in and near the project boundaries.*

(2) *Lease agreements shall establish specific toll or user fee rates.* Any proposed increase in those rates not otherwise established or identified in the lease agreement during the term of the agreement shall first be approved by the department or regional transportation agency, as appropriate, after at least one public hearing conducted at a location near the proposed or existing facility.

(3) *The collection of tolls and user fees for the use of these facilities may be extended by the commission or regional transportation agency at the expiration of the lease agreement.* However, those tolls or user fees shall not be used for any purpose other than for the improvement, continued operation, or maintenance of the facility.

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 mandates tolls and user fees as the exclusive funding mechanism, the proposed P3 before this Court violates that section.

14. 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." (CalTrans' RJN, Exh. A, header "SBx2 4 Senate Bill, 2<sup>nd</sup> Ext. Session -- Bill Analysis, Page 3 or 4, ¶23.)

15. While all the provisions cited by Petitioners clearly support the proposition that section 143 anticipates and authorizes the use of tolls and user fees as a funding mechanism, they 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. Moreover, were that the correct interpretation of section 143, 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 section 143 understood that use of tolls and user fees was not a necessary element of every P3 funding mechanism.

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

17. Accordingly, the Court concludes that Petitioners are unlikely to prevail in their attempt to prove Respondents violated section 143 based on an alleged requirement that P3 projects must be funded in whole or in part by tolls and user fees.

18. **The Supplemental Facilities Issues:** Section 143(a)(6) provides that “[t]ransportation 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 subdivision (c).” (Emphasis added.) Petitioners correctly argue that the term “supplemental” modifies not simply “related facilities” but rather the preceding adjectives – namely, “highway, public street, rail ...” – modify “facilities.” 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 completely replaces Doyle Drive and is thus not “supplemental” to an existing facility.

19. The problem with this interpretation of the statute is twofold. First, the definition of “transportation project” quoted above expressly includes the “reconstruction, rehabilitation [or] improvement” of a supplemental facility, and there is no dispute that the Presidio Parkway Project reconstructs, rehabilitates and improves Doyle Drive. Second, it is beyond cavil that Doyle Drive is part of an existing facility – namely, State Highway 101. Respondents’ entire argument hinges on Doyle Drive somehow being 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.

20. Further, if the foregoing were not enough, 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 construct "related facilities supplemental" to what was constructed in Phase I.<sup>3</sup> Thus whether one looks at Phase II of the Presidio Parkway Project in the larger context of the state highway system (and State Highway 101 in particular) or in isolation as simply the replacement of Doyle Drive, Phase II is the "construction, reconstruction, rehabilitation [or] improvement ... of [a] highway ... or related facilities supplemental to existing facilities currently owned and operated by the department or regional transportation agencies."

21. Accordingly, the Court concludes that Petitioners are unlikely to prevail in their attempt to prove Respondents violated section 143(a)(6) based on the claim that Phase II does not involve construction of a facility supplemental to an existing facility owned and operated by CalTrans or SFCTA.

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<sup>3</sup> One might add that a standard definition of "supplement" is "to complete, add to, or extend by a supplement" (see <http://dictionary.reference.com/browse/supplement>), and it cannot be disputed that Phase II "completes," "adds to" and "extends" the project that Phase I begins and thus in this ordinary sense is "supplemental."

22. **The Responsible Agency Issues:** 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.<sup>4</sup> Nor can section 143(f)(1) be satisfied if CalTrans does not perform the construction inspection services for Phase II. Petitioners cite to the legislative history to support this argument that, as the “responsible agency” as that term is used in the statute, CalTrans must either perform these various services directly with its own employees or provide such services through consultants under contract with CalTrans (as opposed to under contract with a regional transportation agency such as SFCTA). (CalTrans’ RJN, Exh. A, header “SBx2 4 Senate Bill, 2<sup>nd</sup> Ext. Session – Bill Analysis, Page 3 or 4, ¶22.)

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

(f) (1) (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.

23. First, it needs to be noted that section 143(f)(1)(B) expressly authorizes CalTrans to “use department employees *or consultants* to perform the services described in subparagraph (A), consistent with Article XXII of the California Constitution.” (Emphasis added.) Thus the use of contractors such as Parsons-Brinkerhoff is not a problem so long as CalTrans remains “the responsible agency for the performance of project development services ... [and] the responsible agency for the preparation of documents ...” The sole basis for challenging CalTrans role as the “responsible agency” in this instance is that the work of the consultants was pursuant to contracts with SFCTA rather than directly with CalTrans. Thus the issues are whether the statute requires a *direct* contractual relationship between CalTrans and the consultants performing the specified work and, if not, how CalTrans can discharge its “responsible agency” obligations.

24. On the issue of the contractual relationship, the statute is silent on whether CalTrans must be the entity with which the consultants contract. If it had been the legislative intent to require direct privity of contract, the statute could have been written that way – e.g., “use department employees *or consultants under contract with the department* to perform ...” Absent such an explicit requirement on the face of the statute, the Court will not infer one if the statutory purpose does not require it. Here the evident purpose was to require CalTrans to be “responsible” for the work performed, and there are many ways that could be accomplished apart from a direct contract. The contract between the agency and consultants could, for example, provide for CalTrans oversight, or the contracting agency could designate CalTrans as its agent to oversee the consultants’ work, or CalTrans and the agency could have some other agreement or

practice for ensuring CalTrans served as the “responsible agency.” Any number of arrangements might suffice.

25. The record on this issue is not fully developed. Respondents presented evidence that the State of California and the SFCTA have entered into several “cooperative agreements” over the years with respect to the Doyle Drive replacement project. Given the short notice for the December 30<sup>th</sup> hearing, Respondents could not provide a copy of the cooperative agreement in place at the time when Parsons-Brinkerhoff did the work at issue here, but they did produce their current “cooperative agreement.” (Decl. of S. Taylor, Exh. A.) The latter document states that the State and SFCTA are “partners” on the Presidio Parkway Project and have been pursuant to written agreements dating back to December 31, 2007. It further describes, *inter alia*, the right of the State to use SFCTA’s “consultants to carry out such services as provided herein.” (*Id.* at Article II, ¶5.) Thus Respondents have produced some evidence that CalTrans may have had a role in the 2007-2009 timeframe that would have satisfied a statutory requirement that it be the “responsible agency.”

26. Petitioners, on the other hand, have no evidence that CalTrans lacked a role or a relationship through SFCTA with the latter’s contractors that would satisfy the “responsible agency” requirement in section 143(f)(1). They simply allege that the work in question was done under contracts between SFCTA and the contractors. (Compl. at ¶71.) They have no evidence as to what, if any, role Caltrans played in the administration of these contracts or what the contractual relationship was between CalTrans and SFCTA in the 2007-2009 period. The burden is on Petitioners to present competent evidence to support their allegations that CalTrans was not the “responsible agency” rather than on

Respondents to produce evidence that CalTrans was such an agency. Petitioners have presented no competent evidence to support their allegations that CalTrans was not the “responsible agency” within the meaning of the statute.

27. In addition to the above, there is a serious issue whether section 143(f)(1) should be interpreted to require that, when an existing project is converted to a P3, the “pre-conversion work” lawfully done by contractors can only be utilized going forward if, at the time it was initially done, CalTrans served as the “responsible agency.” Respondents argue it would be an irrational waste of public resources to require all such previous work to be re-done if CalTrans had no prior supervisory or oversight role with respect to the work of the “pre-conversion” contractors. Petitioners argue that one cannot adopt a construction that allows CalTrans to avoid its statutory obligations by converting design-build projects to P3’s after all the work it should be responsible for is completed. Neither of these arguments, it should be noted, addresses what the *purpose* of the “responsible agency” requirement is or whether, given the statutory purpose, the requirement might be satisfied by, for example, having the P3 agreement specify that, after it is adopted, CalTrans will review the previous work and approve or certify its adequacy so as to become “responsible” for it.<sup>5</sup>

28. The “retroactive issue” need not be resolved at this time, however, because, based simply on the fact that Petitioners have the burden of proof on this issue

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<sup>5</sup> The Court notes that the parties have not addressed the history of the “responsible agency” language in the statute. It is unclear if the purpose behind this language is simply to ensure public safety, for example, or if this language serves some other legislative goal. To the extent Petitioners would argue that one of the purposes was to secure employment for its membership, that goal seems unlikely given the statutory authorization for CalTrans to contract the work out to consultants. This latter provision leads one to suspect that the drafters had other purposes in mind, and if those could be defined, that might shed some light on what CalTrans involvement – either at the time the work was performed or after the fact – might make it the “responsible agency” for the purposes of this section.

and have presented none, the Court concludes that they are unlikely to prevail in their attempt to prove Respondents violated section 143(f)(1).

29. **The 60-Day Review Period Issues:**<sup>6</sup> 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>7</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 has run. As for the public hearing, the documents need only be made available, and they were released on the CalTrans website long before the hearing that was in fact held.

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<sup>6</sup> The Court assumes without deciding at this juncture that Petitioners may advance arguments on the 60-day issue even though it was not pled in the Complaint.

<sup>7</sup> The section 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.

30. 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 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.

31. 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 notice requirement. (Petitioners' Amended RJN, 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.

32. 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.

33. Accordingly, the Court concludes that Petitioners are likely to prevail on the argument that the 60-day waiting period specified in section 143(c)(5) had not run as of December 23, 2010. Whether that is sufficient for Petitioners to be entitled to a continued restraining order or ultimately an injunction is another matter. That requires an analysis of the other prong of the governing legal standard – namely, the relative interim harm to the parties from the issuance or non-issuance of the injunction.

34. **Irreparable Harm:** Petitioner PECG allege that its members as CalTrans “employees have a statutory right for CalTrans to perform the engineering and related functions laid out by the legislature” and that if CalTrans is not restrained “the entity

awarded the [P3 contract] will perform work which is required by law to be performed by Caltrans.” (Compl. at ¶¶81, 96.) But as previously noted, even if Petitioners prevailed on all of their legal theories, there is no requirement that PECCG members who are CalTrans employees perform the work. On the contrary, CalTrans has the statutory option under section 143(f)(1)(B) to hire consultants instead. Moreover, on the legal theories advanced, the Court has found Petitioners are unlikely to prevail on all of them *except* the 60-day notice requirement. PECCG has articulated no way in which it or its members will be harmed – much less suffer irreparable harm – if Respondents execute the PPP Agreement before the expiration of the 60-day period.

35. Petitioner Alexander alleges the same harm but couched in terms of moneys being spent “for the illegal purpose of proceeding with the Park Presidio Project as a P3.” (Compl. at ¶102.) Ordinarily, such allegations by a taxpayer are insufficient to establish irreparable injury. (See *White v. Davis* (2003) 30 Cal.4th 528, 556.) But here, in addition to that general proposition, the legal theories that would make it “illegal” to proceed with the project as a P3 are not theories on which Petitioners are likely to prevail. As for the one theory on which Petitioners may prevail, it is unclear what irreparable harm Alexander would suffer as a taxpayer if the Legislature or the PIAC is not afforded the full sixty days to review the PPP Agreement and submit comments. If any entity may suffer harm from Respondents shortcutting the sixty days it would be the Legislature or the PIAC, and that harm is discussed below. As for taxpayers such as Alexander, though, it is entirely speculative whether the greater harm would flow from allowing Respondents

to shortcut the sixty days or from enjoining the execution of the PPP Agreement and thereby delaying Phase II.<sup>8</sup>

36. With respect to the Legislature and the PIAC and the possible harm to them of the failure to observe the 60-day notice provision, it is questionable whether these Petitioners have standing to seek relief on that basis. As for the Legislature, Petitioners' Amended Request for Judicial Notice attaches letters from both Assemblymembers and Senators. These letters comment on the possible demerits of the PPP Agreement and thus reflect the fact that the Legislature has reviewed and commented on it. Significantly, neither of these letters states that, in order to review the proposed P3 adequately and provide comments, the Legislature needs the full sixty days.<sup>9</sup> While the letters (and the comments of the Legislative Analyst) reflect policy concerns regarding the proposed PPP Agreement, those policy differences do not mean that the Legislature has suffered irreparable harm by not having the full sixty days. Rather they reflect a policy difference – one that is detailed in both the letters and their attachments. As for the PIAC, this record is silent on whether it needs additional time for review and comment. Thus, even if Petitioners could assert the interest of these institutions in having the full sixty days, it does not appear that either has been prejudiced by the lack of the full sixty days and there certainly is no evidence that either of them may suffer irreparable harm.

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<sup>8</sup> The Court is not unmindful of the arguments in the record advanced by various persons and entities as to whether pursuing Phase II as a P3 or under the traditional model would be more or less expensive and whether this particular P3 agreement is economically sound or not. These are, of course, just arguments. There is no basis for this Court to make a judgment on the merits of such claims (either way), and such matters may simply be beyond the institutional competence of the courts.

<sup>9</sup> The Court also will not presume that, if the Legislature requested the full sixty days, CalTrans would ignore that request.

37. The Court needs to weigh Petitioners' lack of cognizable harm to the actual harm Respondents may suffer if the temporary restraining order is continued any longer. This is indisputably a very complex project, and the evidence before the Court is that it is on a very tight schedule. While the details of that schedule and the problems further delay might pose are not fully developed, Respondents' claim of prejudice as described in the Declaration of Leroy Saage is credible. Moreover, whether the project is restrained or not, it is CalTrans and SFCTA that bear all of the risk on these issues. If the project is restrained and progress thereby delayed, Respondents are the ones who suffer the resulting harm. If, on the other hand, further pursuit of the project is not restrained and they sign the PPP Agreement, the Respondents are the ones who bear the risk that this or a higher court might ultimately hold that they cannot proceed with this project as a P3. Either way, the risks of granting or denying interim relief bear much more heavily on Respondents. Suffice it to say for purposes of balancing the relative harms to the parties of granting or not granting interim relief, that balance tips decidedly in favor of Respondents and weighs strongly against granting Petitioners any relief.

38. Finally, it should be noted that Petitioners have not been diligent in pressing their claims or seeking interim relief. Although the CTA approved the Presidio Parkway Project as a P3 on May 20, 2010, Petitioners waited until November 3, 2010, to file this case and then waited until December 21, 2010, to seek a temporary restraining order. While the ostensible emergency was CalTrans' intention of executing the PPP Agreement by December 29, 2010, the three grounds for challenging the legality of that agreement could have formed the basis of a suit as early as May 21, 2010, and Petitioners could have sought a restraining order on the same day they filed the litigation. By

waiting until November to file the suit and December 21, 2010, to seek a restraining order, Petitioners have substantially increased the potential harm to Respondents that would flow from the granting of interim relief. This is yet another factor weighing against granting Petitioners any further relief.

39. For the foregoing reasons, the Court concludes that Petitioners have not met the standard required for continuing the temporary restraining order or for the issuance of a preliminary injunction, and they are unlikely to meet the standard for the issuance of a permanent injunction. In other words, they are unlikely to succeed on the merits of any claim that would entitle them to enjoin the project. On the one claim on which they might prevail, that claim may become moot by the time of the next hearing but in any event would not support injunctive relief because Petitioners have failed to show what, if any, harm they would suffer if such relief is not granted. The only entities that arguably might suffer harm if the 60-day requirement is not observed (i.e., the Legislature and PIAC) do not appear to have been harmed and certainly are not before the Court claiming any such harm. Respondents, on the other hand, have shown they face a substantial risk of irreparable harm if the temporary order is continued or the project is enjoined. Accordingly, the Court finds there is no reason for further delay in ruling on any and all requests for interim relief and therefore dissolves the temporary restraining order and denies the request for a preliminary injunction.

**D. Future Proceedings**

40. Both parties profess an interest in bringing the proceedings in this Court to an expeditious conclusion, and both agree that the issues presented are largely legal

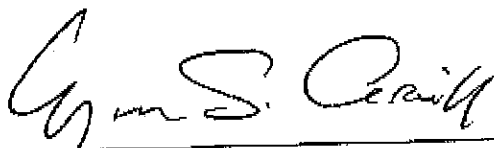
issues that have been fully briefed. Petitioners objected to the December 30<sup>th</sup> hearing also serving as the hearing on the preliminary injunction, though, because they wanted to take very limited discovery of one of Respondents' declarants and perhaps of a "person most knowledgeable" on certain matters related to the 60-day notice question. While the Court concludes that such discovery is not needed for a preliminary injunction hearing, such discovery should be allowed in order to ensure a complete record at the final hearing on the request for injunctive relief and writ of mandate. Such discovery can be done in short order. Accordingly, the Court herein below sets that hearing for January 21, 2011 at 1:30 p.m. The parties may by stipulation advance that date or continue it by not more than one week either way (i.e., January 14 or January 28). The Court notes, however, that if the parties do not advance the date, then, if Caltrans refrains from executing the PPP Agreement before the hearing, the 60-day issue will be moot by the time the Court rules.

\* \* \* \* \*

For the reasons set forth above, IT IS HEREBY ORDERED:

- a. That the temporary restraining order entered in this matter on December 22, 2010, is hereby DISSOLVED;
- b. That Petitioners' request for a preliminary injunction is DENIED; and
- c. That Petitioners' Application for a Permanent Injunction, Declaratory Relief and Writ of Mandate is hereby set for hearing/trial on January 21, 2011 at 1:30 p.m. in D-21.

Dated: January 3, 2010

  
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Wynne S. Carvill  
Judge of the Superior Court