

California Real Property Journal

OFFICIAL PUBLICATION OF THE REAL PROPERTY LAW SECTION

STATE BAR OF CALIFORNIA

Vol. 27, No. 3, 2009

www.calbar.ca.gov/rpsection

Reconsidering the Creditors' Rights Exclusion: A Practical Guide for Real Estate Attorneys 3

By Michael T. Kovaleski

This article reviews current trial court decisions concerning the breadth of title insurance coverage for creditors' rights claims. In addition, this article provides practical advice for lawyers to minimize creditors' rights issues in acquisition and financing transactions.

"Broken" Condominium Projects: How to Manage Their Acquisition and Develop a Viable Investment or Exit Strategy 12

By Nancy T. Scull, Marjorie J. Burchett, and Cathy L. Croshaw

The acquisition and disposition of a "broken" residential condominium project can create pitfalls for the unwary lender or bulk purchaser. This article discusses what the acquiring entity should know about the property, the owners association, governance structure of the project and the regulatory implications of any transaction, before acquiring the property.

AB 2738: More Restrictions on Residential Construction Subcontracts (The Legislature Again Jumps in the Middle of Private Contract Negotiations) 19

By Jay W. Deverich

This article explores the complex and tangled web of legislation impacting residential construction subcontracting initiated by AB 758 in 2006, enhanced by SB 138 in 2008 and greatly expanded by AB 2738 in 2009. The article concludes with suggested action for different types of projects.

MCLE Test No.17 26

Equitable Indemnity in California Construction Lawsuits: Just An Illusion? . . . 28

By Robert B. Mullen

Defendants seeking equitable indemnity have met resistance from courts of appeal that focus on written contracts. This article reviews the history and limitations of equitable indemnity, and questions whether the claim is still viable in the contract-heavy world of commercial construction.

The Return of Public Private Partnerships to California 34

By Allan T. Marks

Severe fiscal constraints for the state and for local governments may encourage the adoption of innovative arrangements to meet the challenge of building and operating new transportation facilities and other basic infrastructure. With these challenges in mind, a new California state law enacted in February 2009 may accelerate the use of public private partnerships ("P3s") to meet the state's infrastructure needs.

**DISTRIBUTED AT NO EXTRA CHARGE TO MEMBERS OF
THE REAL PROPERTY LAW SECTION OF THE STATE BAR OF CALIFORNIA**

The statements and opinions herein are those of the contributors and not necessarily those of the State Bar of California, the Real Property Law Section, or any government body.

The Return of Public Private Partnerships to California

By Allan T. Marks

©2009 All Rights Reserved.

I. INTRODUCTION

New laws in California may significantly accelerate the use of public private partnerships (“P3s”) to meet the state’s infrastructure needs. In February 2009, as part of the lengthy legislative process of adopting a new state budget, the California State Legislature passed legislation pushed by Governor Arnold Schwarzenegger to reinstate broad legal authority for P3 transactions.¹ The California Department of Transportation (“Caltrans”) and regional transportation agencies are now authorized to enter into concession agreements and other forms of P3 agreements with private sponsors of transportation projects without the need for further legislative action. Existing state legislation authorizing municipal and local governments to use P3 techniques to design, build, finance, and operate infrastructure remains in place. Plans and significant funding for the California High Speed Rail Authority are also moving forward with an express mandate to rely in part on private sector investment, risk transfer, and federal government funds.

II. P3S GENERALLY

P3s can be applied in a variety of contexts, for a number of different purposes. At its core, though, a public private partnership involves private sector participation in the provision of an essential public service through a contractual relationship, exclusive concession or franchise to design, build, finance, and/or operate an infrastructure project. The key and distinguishing characteristic of a public private partnership is the contractual arrangement between a public entity and a private party. The contractual relationship must be exclusive and it often is long term and frequently involves an operations phase. The secret to unlocking the synergistic effect of P3 programs is to balance the special strengths of both the private and public sectors. When this balance is achieved, the advantages of P3s become evident. Among others, the benefits include: reduction in development and operations risk, reduction in public capital investment, improved efficiencies and quicker completion, better environmental compliance, improved service to the local community, improved cost effectiveness, life-cycle costing and efficiencies, shared resources, shared risks, and mutual rewards.² Thus, it is generally recognized that a P3 program offers a long-term, sustainable approach to improving infrastructure, enhancing the value of public assets, and also leveraging and making better use of taxpayers’ money.³

III. P3S FOR TRANSPORTATION PROJECTS IN CALIFORNIA

A. Inception

California was among the very first states to authorize public private partnerships in the late 1980s. California Assembly Bill 680 (“AB 680”), enacted in 1989, permitted the competi-

tive selection of four privately financed toll-road demonstration projects.⁴ In accordance with the goals of combining public and private resources, the authors of AB 680 anticipated that the joint ventures of private and public entities, created under the bill, would “take advantage of private sector efficiencies in designing and building transportation projects,” “allow for the rapid formation of capital necessary for funding transportation projects,” “require continued compliance with environmental requirements and applicable state and federal laws,” and “offer the travelling public alternate route selections in project areas.”⁵ On July 10, 1989, Governor Pete Wilson approved AB 680, authorizing Caltrans to enter into agreements with private entities for the construction by, and lease to, private entities of four transportation demonstration projects, including at least one in northern California and at least one in southern California.⁶

Under this initial grant of authority, the state developed two projects: ten miles of express lanes (high-occupancy toll or “HOT” lanes) in the median of SR-91 (the “91 Express Lanes”) in Orange County and the ten-mile South Bay Expressway toll road in southern San Diego County.⁷ The 91 Express Lanes project was developed in partnership with Caltrans by the California Private Transportation Company (“CPTC”), an entity formed by subsidiaries of Level 3 Communications, Inc., Compagnie Financiere et Industrielle des Autoroutes (Cofiroute), then the world’s largest private toll road operator, and Granite Construction Inc. Privately financed, built and developed, the 91 Express Lanes were designed to connect the rapidly growing residential areas in Riverside and San Bernardino counties with major employment centers in Orange and Los Angeles counties.⁸ After building the lanes, CPTC formally sold the facility to the State of California and then leased it back under a thirty-five-year partnership arrangement. Under the initial agreement, however, Caltrans agreed to a non-compete clause that precluded the Department from making improvements or adding capacity to SR 91 general-purpose lanes. This clause became a source of controversy when Caltrans was unable to improve system capacity.⁹ In 1999, Caltrans moved to add general-purpose lanes on SR 91 to improve on and off ramp movements. After CPTC sued to stop the proposal, Caltrans withdrew its plans.¹⁰

This non-compete clause was very atypical in that it did not simply provide for compensation if a competing project was undertaken but gave the private entity the right to prohibit or seek to prohibit the work itself. Such a non-compete clause would not be expected in modern practice nor permitted in California today. In current and recent U.S. projects, toll road and HOT-Lane concessions typically contain either no non-compete clause or a provision that entitles the concessionaire only to economic compensation if certain specified or unanticipated competing facilities are built. Public agencies retain the unfettered power to approve and build new, competing facilities in fulfilling their public mission.

Nonetheless, at the time, the contractual inability to build additional lanes spawned widespread public outcry which ultimately resulted in the Orange County Transportation Authority purchasing back the 91 Express Lanes from CPTC for \$207.5 million in 2003. Consequently, the public sector was forced to forgo both the initial \$130 million capital cost savings from the private development and construction of the express lanes project, and most of the estimated \$120 million in California Highway Patrol, operations and maintenance expenses it would have saved from the private concessionaire's payments thereof during the franchise period.¹¹ However, the 91 Express Lanes today remain one of the country's most successful toll facilities and the public benefited from its accelerated development through a public-private partnership.

The South Bay Expressway toll road officially opened on November 19, 2007. The toll road consists of four lanes and seven interchanges, running through Chula Vista from SR 54 in Spring Valley to Otay Mesa Road/SR 905 near the U.S.-Mexico international border crossing. It is one of the first roads of its kind in California and the United States. Motorists traveling on it can take advantage of the latest in high-tech toll collection, which allows tolls to be paid while driving at highway speeds using a FasTrak[®] electronic transponder mounted on their vehicle.¹² To date, fees from the toll road have been used to fund community improvements such as the creation of baseball fields, park and trail enhancements, preservation measures protecting the surrounding environment, and donations to the Bonita Historical Museum.¹³

While the foregoing examples demonstrate the successful projects resulting from AB 680, two other proposals developed under the measure show the risks of delay and public opposition that can accompany P3s. These projects were State Route 57 ("SR 57") in Orange County and the Mid-State Tollway, in Alameda and Contra Costa Counties. The SR 57 project proposed to extend Route 57 from Route 5 to Route 405, consisting of four lanes and two, two-lane viaducts running longitudinally down the river channel. The current franchisee, American Transportation Development ("ATD"), requested that the required date for the commencement of construction be extended from January 11, 2001 to January 11, 2007. This request was denied and the franchise was terminated in January 2001. ATD contested this termination and pursued litigation which was resolved in November 14, 2003.¹⁴

The Mid-State Tollway project was reduced in scope to a \$600 million, 400+ mile, 6-lane toll road extending from Route 680 near Sunol to Route 4 near Antioch. The project developer, CTRC, and Caltrans amended the original franchise agreement in 1993 to delete the portions of the original contract that included an extension into Solano County. This deletion was a condition imposed by the Metropolitan Transportation Commission in its review of the project. Nevertheless, work on the project was suspended due to serious political opposition and the franchise was terminated on January 1, 2001.¹⁵

As discussed in greater detail in Part IV below, local governments can have separate statutory authority to enter into infrastructure P3s, including non-state-sponsored transportation projects.¹⁶ Local governments' ability to enter into P3 projects has not suffered the statutory lapses in enabling authority that have affected transportation projects at the state level, but, at

the same time, has been augmented by the recent passage of the legislation described in Part III, section C below.

B. Lapse of Enabling Legislation

California's enabling legislation for P3 concessions for state-sponsored transportation projects lapsed in 2003. In effect, the lapse repealed AB 680. Why did this happen? Fear of private involvement in public works projects and opposition from the Professional Engineers in California Government (PECG), the professional engineers at Caltrans, and other public employee unions contributed to the lapse. In a newspaper opinion editorial, former California Governors Pete Wilson, George Deukmejian, and Gray Davis cited the opposition of certain groups of public employees for the backtracking. According to the former governors, public employees' "fear[s that] their jobs might be threatened if private sector workers are allowed to plan, build or operate projects" undid the enabling law.¹⁷ Additionally, the use of non-standard non-compete clauses in P3 projects that could result in the private partners having the right to prohibit competing facilities, such as in the 91 Express Lanes agreement, enraged motorists and likely contributed to the lapse. Possibly still reeling from the public fallout over SR 91, in 2004 a California Assembly committee did not support a bill to renew P3 enabling legislation.¹⁸

In May 2006, California enacted limited new enabling legislation.¹⁹ Like the initial law, the 2006 legislation was of limited scope, permitting the development of four projects: two in southern California and two in northern California.²⁰ And, the 2006 law contained a number of restrictions that limited its effectiveness. First, the 2006 law did not permit tolls and users fees on noncommercial vehicles with three or fewer axles. Second, the law required that the State legislature approve concession agreements after the public agency had completed the procurement and negotiations thereof, after at least one public hearing. Third, the law required that the concession agreements fix toll rates and that Caltrans approve any rate increases, after a public hearing. Fourth, the 2006 law prohibited non-compete provisions, although it permitted compensation for lost revenue in limited circumstances.²¹ Perhaps not surprisingly given these restrictions, no concession agreements for new transportation projects were entered into under the 2006 P3 law.

C. SB 4

California lawmakers recently expanded the limited grant of authority afforded by the 2006 legislation. On February 20, 2009, Governor Schwarzenegger approved Senate Bill 4 ("SB 4"), Second Extraordinary Session, which allows regional transportation agencies and Caltrans to enter into an unlimited number of P3 projects until January 1, 2017, and deleted many of the restrictions on the number and type of projects that may be undertaken.²² In addition, SB 4 provides legislative authority for up to fifteen design-build demonstration projects: up to five projects (local street or road, bridge, tunnel, or public transit projects) for local transportation agencies and up to ten projects (state highway, bridge, or tunnel projects) for Caltrans. On a statewide basis, the law also authorizes design-build contracting in respect of corrections facilities, court facilities, and redevelopment agencies.²³

The new California P3 law accomplishes the following:

- allows regional transportation agencies and Caltrans to enter into an unlimited number of P3 projects.²⁴
- provides broad authority for P3 arrangements with respect to a range of transportation projects.²⁵
- establishes the Public Infrastructure Advisory Commission to advise the Department of Transportation and regional transportation agencies in developing transportation projects through performance-based infrastructure partnerships.²⁶
- authorizes the contracting entity or lessee (i.e., the private concessionaire) to impose tolls and user fees for use of a facility constructed by it.²⁷

Under SB 4, P3 project participants will go through the following process:

1. **Solicitation:** Caltrans and/or the relevant regional transportation agency may solicit proposals, accept unsolicited proposals, and then negotiate and enter into comprehensive development lease agreements with public or private entities.²⁸ Unsolicited proposals may be accepted for consideration and negotiation but are subject to a competitive process before finalization.
2. **Selection:** if Caltrans or a regional transportation agency wishes to pursue a transportation project using the P3 tool, it must apply to the California Transportation Commission, which is directed to select and evaluate candidate projects based upon how proposed projects will (1) improve mobility by improving travel times or reducing the number of vehicle hours of delay in the affected corridor; (2) improve the operation or safety of the affected corridor; and (3) provide quantifiable air quality benefits for the region.²⁹ In addition, projects must address a “known forecast demand.”³⁰
3. **Approval:** projects selected by the California Transportation Commission may be procured by Caltrans and/or regional transportation agencies. Once the comprehensive lease agreement is complete, it must be submitted to review by the Legislature and the newly established Public Infrastructure Advisory Commission. In addition, Caltrans or the regional transportation agency must hold a public hearing at or near the proposed facility. Prior to executing a final agreement, Caltrans or the regional transportation agency “shall consider” the Legislative and Commission comments.³¹ Ultimately, however, discretion remains with the first actor: Caltrans and/or the regional transportation agency that first negotiated the lease arrangement. The law explicitly provides that Caltrans or the regional transportation “shall retain discretion for executing the final lease agreement.”³²

Like the 2006 law, the new legislation prohibits non-compete clauses that would preclude construction of competing facilities. Under the law, no agreement “shall infringe on the

authority of the department or a regional transportation agency to develop, maintain, repair, rehabilitate, operate, or lease any transportation project.”³³ However, lease agreements may provide for reasonable compensation to the contracting entity or lessee for the adverse effects on toll revenue or user fee revenue due to the development, operation, or lease of supplemental transportation projects with the *exception* of (1) projects identified in regional transportation plans; (2) safety projects; (3) projects that will result in incidental capacity increases; (4) additional HOV lanes or the conversion of existing lanes to HOV lanes; and (5) projects outside the boundaries of a public-private partnership.³⁴

The law provides for additional transparency with respect to tolls. Proposed increases in rates *not otherwise established or identified in the lease agreement* shall be first approved by Caltrans or regional transportation agency, after at least one public hearing.

IV. PUBLIC PRIVATE PARTNERSHIPS FOR LOCAL GOVERNMENT INFRASTRUCTURE PROJECTS

A. Inception

In 1996, California enacted Assembly Bill 2660,³⁵ which affords local governmental agencies authority and flexibility to utilize private investment capital. This law continues to govern infrastructure finance for P3s with local government agencies. The new California P3 law enacted in February 2009 for statewide transportation projects does not affect the existing law governing local government infrastructure projects.

B. Local Government Authority Under AB 2660

The California Government Code provides broad authority for local government agencies to utilize private sector investment capital to design, construct, develop, finance, maintain, improve, repair, and operate fee-producing infrastructure.³⁶ The Code is designed to provide significant local flexibility and authority.³⁷ Furthermore, local government agencies are afforded broad discretion to use the authority conferred by the statute “when they deem it appropriate in the exercise of their discretion.”³⁸

The California Government Code provides specific authorization for private infrastructure financing of certain “fee producing infrastructure projects.”³⁹ The Code defines a “fee-producing infrastructure project” or “fee-producing infrastructure facility” as any project or facility where the operation of the facility “will be paid for by the persons or entities benefited by or utilizing the project or facility.”⁴⁰ The Code lists, and permits specifically, projects related to irrigation; drainage; energy or power production; water supply, treatment and distribution; flood control; inland waterways; harbors; municipal improvements; commuter and light rail; highways or bridges; tunnels; airports and runways; purification of water; sewage treatment, disposal, and water recycling; refuse disposal; and certain structures or buildings.

Explicitly excluded from this broad grant of authority, however, is local government power to design, construct, finance, or operate a state project, including toll roads on state highways.⁴¹

V. PRIVATE INVESTMENT OPPORTUNITIES IN CALIFORNIA HIGH SPEED RAIL

A. Inception

The California High Speed Rail Act of 1996 (the "Rail Act") established the California High Speed Rail Authority (the "HSRA") for the purpose of overseeing and implementing the planning, financing, construction, and operation of a statewide intercity high-speed passenger rail system.⁴² California voters approved the Safe, Reliable High-Speed Passenger Train Bond Act for the 21st Century (the "Bond Act") in November 2008, authorizing \$9.95 billion in general obligation bonds to finance construction of a high-speed train system.⁴³

B. HSRA Authority

1. Section 185036

HSRA may enter into a broad range of P3 contracting arrangements. The Rail Act added section 185036 to the Public Utilities Code, authorizing the HSRA among other things, to "enter into contracts with private or public entities for the design, construction, and operation of high speed trains...including a design-build or design-build-operate contracts" and to "enter into cooperative or joint development agreements with local governments or private entities." However, the powers included in section 185036 were conditioned upon the "approval by the Legislature, by the enactment of a statute, or approval by the voters of a financial plan providing for the necessary funding for the construction of a high-speed rail network."⁴⁴

2. AG Opinion

California's Attorney General Edmund "Jerry" Brown has recently rendered a formal Attorney General's Opinion that the Bond Act authorizes the HSRA to exercise all the powers set forth in section 185036.⁴⁶ On February 27, 2009, Attorney General Brown advised the HSRA that the Bond Act not only vests HSRA with the powers provided in section 185036, but it also authorizes it to utilize the "entire statutory framework established to bring the high-speed rail network into reality."⁴⁷ Thus, Attorney General Brown's opinion clears the way for the HSRA to enter into a wide spectrum of P3 transactions for various parts of the high speed rail project.

C. P3 Opportunities

The HSRA has already held discussions with at least twelve private firms that have experience in the finance, operations, equipment/systems supply, and construction of large rail projects. The HSRA finance team believes that P3 concessions will provide from \$4.5 billion to \$7 billion in vendor and project funds (equity and debt), together with expertise and risk transfer for systems operation and, possibly, private ownership.⁴⁸ The HSRA believes that the proposed system will net a \$1.1 billion annual operating profit once constructed and reports that private sector interest in participating in the rail network has been, and remains, high.⁴⁹

The successful implementation of the project will require substantial private investment. The Bond Act specifically directs the authority to pursue and obtain private funds.⁵⁰ And the

prescribed (and proscribed) uses of bonds funds "are intended to encourage the federal government and private sector to make a significant contribution."⁵¹

Restrictions on the use of proceeds from the Bond Act underscore the project's expected dependence on private capital to leverage the significant investment of state and federal funds. Proceeds from the \$9.95 billion state bond issuance authorized by the voters in November 2008 may not be used for more than one-half of the total cost to construct each segment of the train system⁵² nor to pay the system's operating and maintenance costs.⁵³ Bond funds are available only for "planning and construction."⁵⁴ Additional restrictions and guidance on the use of bond proceeds are under consideration by the California legislature.⁵⁵

The finance plan being developed by the California HSRA includes federal funding for 25 to 33% of the overall construction cost. The entire 700+ mile train system is projected to cost approximately \$40 billion, bringing the expected federal commitment required to well over \$10 billion.⁵⁶ Fortunately for California, recent developments in Washington evidence a renewed commitment to public transport and high-speed rail in particular. New Federal Transportation Secretary Ray LaHood has indicated that high-speed rail "is the transformational issue for this administration when it comes to transportation."⁵⁷ Congress has funded this priority: the American Recovery and Reinvestment Act of 2009 ("Recovery Act") includes \$8 billion in capital assistance for high speed rail ("HSR") corridors and intercity passenger rail service, including projects that reduce congestion or facilitate ridership growth.⁵⁸ The Secretary of Transportation is directed to give priority to projects that develop intercity high speed rail services.

In addition, the Federal Department of Transportation has already designated ten eligible HSR corridors, including the "California Corridor" connecting the San Francisco Bay Area, Sacramento, Los Angeles, the Central Valley, and San Diego.⁵⁹ Thus, California is perhaps the state farthest along in developing and building a true high-speed train project. Representatives from the HSRA are actively courting federal officials for a significant portion of stimulus's HSR funds.

Finally, President Obama's proposed 2010 budget proposes \$5 billion for a five-year high speed rail state grant program.⁶⁰ Like the Recovery Act's HSR grants, it is expected that these funds will be awarded to projects based on assessments of proposed projects' readiness, environmental clearance, and perceived public benefits.

In sum, in the case of California's High Speed Rail project, the legal and financial pieces to the puzzle are coming together quickly, after years of delay and false starts. Moreover, the private sector will have an important role to play in this important project. The HSRA is actively drawing upon the experience of P3 infrastructure projects, including several high speed rail ventures in Europe. P3 opportunities may include the design, development, construction, operation, and finance of the rail system, or some combination thereof. If successful, the California High Speed Rail model could be adapted for similar projects elsewhere in the United States.

VI. CONCLUSION

P3s cannot replace traditional public funding of transportation and infrastructure projects. However, P3s can provide a

mechanism for the public sector to leverage additional private investment in public infrastructure projects, and therefore source much needed investment capital. In addition, fiscal constraints in Sacramento and among local governments will encourage the adoption of innovative financing arrangements. The passage of the Recovery Act has made transportation P3 projects even more attractive by helping to defray the overall costs of certain high-speed rail and other P3 projects.

Public support and involvement in P3 planning and implementation remains crucial. By encouraging transparency, increased public participation, and fair and reasonable competition between partnering public and private entities, California's new law may deliver the synergistic benefits that can result from balancing the unique strengths of the public and private sectors.



Allan T. Marks is a partner in the Global Project Finance Group of Milbank, Tweed, Hadley & McCloy LLP, resident in Los Angeles, and an adjunct professor at the University of California, Berkeley School of Law, where he teaches a course on energy and infrastructure project finance. In addition, Mr. Marks is a founding Co-Chair of the Public Private

Infrastructure Subsection of the Real Property Law Section of the State Bar of California. The author would like to thank Henry T. Scott, an associate attorney at Milbank, for assistance in preparing this article.

ENDNOTES

- 1 This condition has now been met by legislative appropriation of funds (see endnote 45) and the plenary approval by California voters of the Bond Act in November 2008. 2009 Cal. Stat. ch. 2., as codified at CAL. STS. & HIGH. CODE §§ 143 & 149.7.
- 2 Rick Norment, Fundamentals of Public-Private Partnerships, Address at the National League of Cities Meeting, November 13, 2007, available at http://www.ncppp.org/resources/papers/norment_nlc.pdf.
- 3 Bing Li & Akintola Akintoye, *An overview of public-private partnership*, PUBLIC-PRIVATE PARTNERSHIPS 3 (Akintola Akintoye et al. eds. 2003).
- 4 1989 Cal. Legis. Serv. 107 (West).
- 5 *Id.*
- 6 *Id.*
- 7 <http://www.dot.ca.gov/hq/paffairs/about/toll/status.htm>.
- 8 *Id.*
- 9 Susan Shaheen et al., *California's Innovative Corridors Initiative: A New Model for Public-Private Partnerships in Transportation*, Inst. of Transp. Studies, Univ. of Cal., Davis, Research Report UCD-ITS-RR-04-24 at 4, available at http://pubs.its.ucdavis.edu/publication_detail.php?id=186.
- 10 Ted Balaker, *How to Untangle Gridlock*, L.A. TIMES, January 19, 2007, available at <http://www.latimes.com/news/opinion/la-oe-balaker19jan19,0,3271128.story?coll=la-opinion-center>. Eventually, in September 2002, State legislation authorized the Orange County Transportation Authority to purchase the toll road from CPTC for \$207.5 million. As a result, OCTA acquired the franchise rights in January 2003, eliminating the non-compete clauses. Shaheen et al., *supra* note 9.

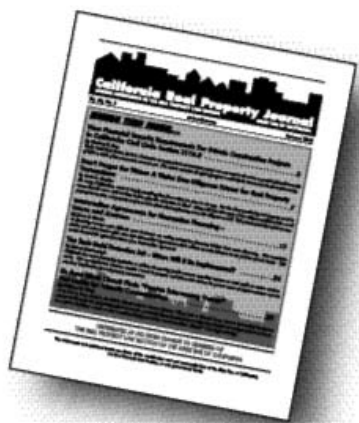
- 11 <http://www.dot.ca.gov/hq/paffairs/about/toll/status.htm>.
- 12 *Id.*
- 13 <http://www.southbayexpressway.com/about/faq.php#sbxwhatis>.
- 14 <http://www.dot.ca.gov/hq/paffairs/about/toll/status.htm>.
- 15 *Id.*
- 16 See CAL. GOV'T CODE §§ 5956–5956.10.
- 17 Jim Wunderman et al., *On Investing in California's Future*, S.F. CHRON., October 26, 2007, available at <http://www.sfgate.com/cgi-bin/article.cgi?file=/c/a/2007/10/26/EDCFT096J.DTL>. See also Justin Carretta, *California assembly nixes public-private infrastructure bill*, FLEET OWNER (May 1, 2008), available at http://fleetowner.com/trucking_regulations/california_assembly_votes_down_bill_0501/.
- 18 Douglas M. Fried et al., *Private Involvement in US Roads*, 297 PROJECT FINANCE INT'L 55 (2004).
- 19 Assembly Bill 1467, 2006 Cal. Stat. ch. 32, amended Section 143 of, and added Section 149.7 to, the CAL. STS. & HIGH. CODE. 2006 Cal. Legis. Serv. Ch. 32.
- 20 *Id.*
- 21 Under the 2006 law, a concessionaire may be entitled to compensation for lost revenue because of the development of a competing facility unless the competing facility is part of a regional transportation plan, is a safety project, is an improvement providing only incidental increases in capacity, is a HOV lane project, or is a project located outside the boundaries of the P3 project, as defined in the concession agreement. *Id.*
- 22 2009 Cal. Stat. ch. 2. as codified at CAL. STS. & HIGH. CODE §§ 143 & 149.7.
- 23 The traditional contracting method for public works projects (“design-bid-build”) is to contract for the architectural/engineering design, advertise the design documents for competitive construction bids, and award a construction contract to the lowest responsible bidder. Under the design-build method, the public agency awards a single contract to an entity that is responsible for both the design and construction phases of the project. The selection of the design-build contractor is based on a methodology and criteria established by the contracting agency to review contract proposals. Assembly Floor Analysis, S.B. 4, 2nd Extraordinary Sess. (Cal. 2009).
- 24 Unlike its predecessor the law does not contain a restriction on the number of projects. CAL. STS. & HIGH. CODE § 143.
- 25 The law defines a transportation project as the “planning, design, development finance, construction,

- reconstruction, rehabilitation, improvement, acquisition, lease, operation, or maintenance of a highway, public street, rail, or related facilities supplemental to existing facilities currently owned and operated by the department or regional transportation agencies...” CAL. STS. & HIGH. CODE § 143(a)(6).
- 26 CAL. STS. & HIGH. CODE § 143(b). Commission duties are to include researching P3 projects, assembling a library of P3-related references, and providing, upon request, procurement-related services to Caltrans and regional transportation agencies for P3 projects. Assembly Floor Analysis, S.B. 4, 2nd Extraordinary Sess. (Cal. 2009).
- 27 The new law does not allow the conversion of any existing non-toll or nonuser-fee lanes into tolled or user fee lanes, with the express exception of a high occupancy vehicle (HOV) lane that may be operated as a high occupancy toll (HOT) lane. See CAL. STS. & HIGH. CODE § 143(q).
- 28 CAL. STS. & HIGH. CODE § 143(c).
- 29 CAL. STS. & HIGH. CODE § 143(c)(3).
- 30 CAL. STS. & HIGH. CODE § 143(c)(4).
- 31 CAL. STS. & HIGH. CODE § 143(c)(5).
- 32 *Id.*
- 33 CAL. STS. & HIGH. CODE § 143(i).
- 34 *Id.*
- 35 1996 Cal. Legis. Serv. Ch. 1040 (West).
- 36 See CAL. GOV'T CODE §§ 5956–5956.10.
- 37 See CAL. GOV'T CODE § 5956.1 (“it is the intent of the Legislature that local government agencies have . . . authority and flexibility”).
- 38 CAL. GOV'T CODE § 5956.2.
- 39 CAL. GOV'T CODE § 5956.4.
- 40 CAL. GOV'T CODE § 5956.3.
- 41 CAL. GOV'T CODE § 5956.10.

- 42 1996 Cal. Legis. Serv. Ch. 796 (West).
- 43 One billion dollars is dedicated to improvements to local and regional passenger trains that complement and connect with the high-speed train system. The Bond Act was enacted by the Legislature in 2002, and was originally scheduled to be submitted for voter approval in November 2004, but was postponed twice. See 2006 Cal. Legis. Serv. Ch. 44 (West) (AB 713).
- 44 CAL. PUB. UTIL. CODE § 185036.
- 45 2006 Cal. Legis. Serv. Ch. 47 (West).
- 46 7 Op. Att’y Gen. 1002 (2009).
- 47 *Id.*
- 48 See California High Speed Rail Authority, Update on Public Private Partnerships, *available at* <http://www.cahighspeedrail.ca.gov/news/UpdateonPublicPrivatePartnerships.pdf>.
- 49 See California High Speed Rail Authority, Business Plan 2008 Summary, *available at* http://www.cahighspeedrail.ca.gov/images/chsr/20081107144941_BPSummary.pdf.
- 50 CAL. STS. & HIGH. CODE § 2704.07.
- 51 2002 Cal. Stat. ch. 697 § 1(d).
- 52 CAL. STS. & HIGH. CODE § 2704.08.
- 53 CAL. STS. & HIGH. CODE § 2704.04(d).
- 54 CAL. STS. & HIGH. CODE § 2704.06.
- 55 On Feb. 26, 2009, California State Senator Lowenthal introduced SB 455 which further refines the delegated powers of the HSRA. If passed, SB 455 will – among other things – establish criteria for making investments with funds made available to Phase I of the high-speed rail project, and will require changes in contracts entered into by the HSRA be approved by its governing board. Senate Floor Analysis, SB 455 (Cal. 2009). The State Senate approved SB 455 on June 2, 2009 and is currently under consideration by the State

*Do you have an article you would like published?
Or maybe an idea for one?*

*The **CALIFORNIA
REAL PROPERTY JOURNAL**
welcomes and encourages the submission
of articles from its readers and others!*



For more information please contact:
Scott Rogers — Tel: (415) 268-1990 or Email: scott.rogers@hro.com
David Roth — Tel: (510) 482-6600 or Email: david@rothrealestatelaw.com