

Memorandum

To : Bimla Rhinehart
Executive Director
California Transportation Commission

Date : September 8, 2009

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Subject : Senate Bill 4 (2X); Guidance Concerning Interpretation of Streets and Highways Code, section 143

INTRODUCTION

I have been asked to provide guidance on the interpretation of Streets and Highways Code section 143 as amended by Senate Bill 4 (2009, Second Extraordinary Session).¹ This letter responds to that request. Please note that this letter does not constitute a formal opinion of the Attorney General and does not necessarily represent the views of the Attorney General. This memorandum instead provides informal guidance, and is provided to you in my capacity as legal counsel to the Commission. If a formal opinion of the Attorney General is desired, one can be requested from the Attorney General’s Opinion Unit.

The issue before the Commission has to do with the Commission’s role under section 143 with regard to lease agreements. That issue can be rephrased in the form of the following four questions:

1. What is the nature of the “associated lease agreement” submitted to the Commission with the project? Is it a draft subject to further revisions based on comments generated by the public hearing process or by review by the Public Infrastructure Advisory Commission (“PIAC”) and by legislative committees, or otherwise? Or is it the absolutely final version of the agreement?
2. Is the Commission expected to take the “associated lease agreement,” or any of its provisions, into account when it selects the candidate projects?
3. If the answer to Question No. 2 is “yes,” in what way does it do so?
4. Does the Commission approve the final lease agreement?

In considering the nature of the lease agreement as submitted to the Commission, it may also be helpful to consider the question, “When does the lease agreement become ‘final’ in the sense that no further modifications can be made to it?”

¹ Unless otherwise indicated, all references to sections are to the Streets and Highways Code, and all references to subdivisions are to subdivisions of section 143.

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Due to the nature of your request, and the absence of pertinent case law, it is more appropriate to provide guidance on how the Commission should go about interpreting the statute rather than to provide what purport to be definitive answers to these questions.

THE ROLE OF AGENCIES IN INTERPRETING STATUTES THAT THEY IMPLEMENT

State agencies operate in the context of statutory authority. Occasionally, they have to construe the meaning of a statute which governs their operations or which they are legislatively directed to implement when there do not exist any judicial decisions interpreting the statute. Although the interpretation of statutes is a judicial function, the courts give some deference and weight to an agency's construction of a statute which it is charged with implementing. (See, for example, *Yamaha Corp. v. State Bd. of Equalization* (1998) 19 Cal.4th 1, 12.)

Since there are no judicial decisions interpreting the current version of section 143, it is appropriate for the Commission to attempt to construe the section in a reasonable manner. This letter is intended to guide, rather than to direct, that effort. Given the Commission's role in the planning and funding of highways, the Commission could be viewed as having particular experience and knowledge well-suited to construing section 143. An agency interpreting a statute within its administrative jurisdiction

“may possess special familiarity with satellite legal and regulatory issues. It is this ‘expertise,’ expressed as an interpretation . . . , that is the source of the presumptive value of the agency's views.”

Yamaha Corp., at p. 11.

The Commission's mission is to try to determine what the Legislature intended, not what the Commission independently considers to be the correct policy. However, considerations of policy, as well as recourse to extrinsic aids to interpretation of the statute, would be justified if the language of the statute permits more than one reasonable interpretation.

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**RESORT TO EXTRINSIC AIDS IS PROPER
WHEN STATUTORY LANGUAGE IS AMBIGUOUS**

Courts rely on extrinsic aids when interpreting a statute if the statute is ambiguous. If the statute is clear on its face, it is not necessary, and therefore not appropriate, to rely on extrinsic aids. As the Legislative Counsel opinion notes, citing *Great Lakes Properties, Inc. v. El Segundo* (1977) 19 Cal. 3d 152, when a statute is clear, a court should follow its plain meaning.² The question, however, is whether section 143 is, in fact, clear and unambiguous.

**THE COMMISSION MUST FIRST DETERMINE
WHETHER SECTION 143 IS AMBIGUOUS OR NOT AMBIGUOUS**

The first thing the Commission should determine is whether section 143 is ambiguous. In other words, it should be determined whether the language of section 143 permits more than one reasonable interpretation.

IT IS REASONABLE TO CONCLUDE THAT SECTION 143 IS UNAMBIGUOUS

If one considers the text of section 143, one could conclude that it is fairly unambiguous and that the only reasonable interpretation is that at the time the proposed project is submitted to the Commission the lease agreement is also submitted, and that at the time they are so submitted a contractor has been selected and the lease agreement has been negotiated. Following selection of the project, there is no further modification to the lease agreement although it is subjected to public review as well as review and comment by the Legislature, the PIAC, and the Secretary of the Business, Transportation, and Housing Agency (“Secretary”). The final decision whether to go forward with the project and agreement rests with the department or the regional transportation agency (“RTA”).

The above interpretation is arguably supported by the following characteristics of section 143:

1. The lease agreement associated with the proposed project is submitted to the Commission. There is nothing in the statute that describes that lease agreement as being a draft or otherwise subject to modification.
2. There is nothing in the statute that expressly states that selection of a

² Legislative Counsel’s letter of June 22, 2009, to Sen. Niello.

contractor occurs after the Commission selects the project, or that the specific and final lease agreement is negotiated between the contractor and the department or RTA after selection by the Commission.

3. There is nothing in the statute that states, expressly, that the department or RTA may modify the lease agreement as a result of comments received from the public, the Secretary, or the Legislature, or on any other basis.

IT IS REASONABLE TO CONCLUDE THAT SECTION 143 IS AMBIGUOUS

On the other hand, one could conclude that the language of section 143, taken as a whole, is ambiguous. Such a conclusion could possibly be based on several factors, including the various ways in which the statute makes reference to the lease agreement.

For example, in describing the process after the Commission has selected a project, subdivision (c)(5) states, in part:

“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. . . . 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.”³

The references to “a final lease agreement,” standing alone, could be deemed to suggest that the lease agreement is not expected to be final until after the 60-day review period. A similar factor is the use of the term “proposed agreement,” a term which could be taken to mean that the contractor and the department or RTA have not entered into a final agreement.

It might also be argued that an interpretation of the statute which requires selection of a contractor and negotiation of a final lease agreement prior to selection of the project by the Commission conflicts with the purpose of the statute. The statute clearly was intended to promote the use of public-private partnerships. It is contended that requiring contractor selection and lease negotiation prior to Commission selection of a project will result in a failure to achieve the statute’s objectives, since potential contractors will not undertake to expend the

³ In this memorandum, all emphasis is added unless otherwise indicated.

time and money to prepare proposals and negotiate agreements if it is possible that a third party (i.e., the Commission) could reject the ensuing proposal. Whether this factor renders the statute ambiguous or simply supports the conclusion that an unambiguous statute is unworkable is a matter for the Commission to determine.

(One might conclude that section 143 is not clear simply by noting the significant differences in interpretations advanced in correspondence by the Agency Secretary and by legislative leaders, as well as the on-going debate in the Legislature.⁴ However, mere disagreement as to what various persons hoped the statute would achieve does not necessarily demonstrate a textual ambiguity.)

EXTRINSIC AIDS ON WHICH THE COMMISSION MAY RELY IN DETERMINING THE LEGISLATURE'S INTENT IN ENACTING THE CURRENT VERSION OF SECTION 143 ARE THOSE MATTERS OF WHICH THE LEGISLATURE WAS AWARE AT THE TIME IT WAS CONSIDERING THE LEGISLATION

“Extrinsic” generally means other than the language of the statute itself. Appropriate extrinsic aids generally are those of which the Legislature was aware at the time it was considering the statute and prior to the statute’s enactment.

By contrast, statements made after enactment do not constitute evidence of the Legislature’s intent or understanding. In fact, even a statement by the author of a bill which enacts a statute is not a guide to legislative intent if it comes after the bill is enacted or if it was not communicated to the Legislature as a whole. The Supreme Court has

“repeatedly observed that ‘statements of an individual legislator, including the author of a bill, are generally not considered in construing a statute, as the court’s task is to ascertain the intent of the Legislature as a whole in adopting a piece of legislation.’”

American Financial Services Assn. v. City of Oakland (2005) 34 Cal. 4th 1239, 1262. See, also, *Delaney v. Superior Court* (1990) 50 Cal.3d 785, 801, fn. 12: “[W]e do not consider the motives or understandings of an individual legislator even if he or she authored the statute.”

The same principal applies to other correspondence generated after the enactment of SB 4, including correspondence from individual, albeit high-ranking, legislators and from the

⁴ See video of June 15, 2009, hearing of the Budget Conference Committee, at <http://www.calchannel.com/channel/viewvideo/460>, from 2:04:05 to 2:12:40.

Secretary. Those letters may be persuasive if they are well-reasoned, and may be helpful in that way in guiding the Commission's effort to interpret the law. However, they are not part of the legislative history because they did not exist when the Legislature was considering SB 4. Consequently, these letters had no role in shaping the perception of the members of the Legislature as to what the legislation meant.

Legislative Committee Analyses

Statements communicated to legislative committees are generally considered by the courts to have been communicated to the Legislature as a whole. See, for example, the enumeration in *Kaufman & Broad Communities, Inc. v. Performance Plastering, Inc.* (2005)133 Cal. App. 4th 26, 30, of what is cognizable evidence of legislative intent and what is not, and *Gunther v. Lin* (2006) 144 Cal. App. 4th 223, 244, which states: "A court is always on firm ground to 'consider legislative committee reports and analyses, including statements pertaining to the bill's purpose.'"

Given the rapidity with which SB 4 (as amended February 14, 2009) passed through the Legislature (it was approved by the Governor on February 20, 2009), there were no policy committee or fiscal committee hearings of the bill, and thus no committee analyses.⁵ However, there were two floor analyses.

Legislative Counsel's Digest of SB 4

Another possible source of evidence of legislative intent is the Legislative Counsel's digest. The Digest has potential value as evidence of legislative intent because it is printed at the beginning of legislative bills and thus is communicated to all members of the Legislature. (See *Jones v. The Lodge at Torrey Pines Partnership* (2008) 42 Cal. 4th 1158, 1169-1170.)

Policy Considerations

In addition to statements communicated to the Legislature during consideration of a proposed statute, acceptable aids can include the policy the statute is intended to promote. The policy behind enactment of a measure can help explain its meaning. "If the statutory language permits more than one reasonable interpretation, courts may consider other aids, such as the

⁵ Prior to the February 14, 2009, amendment, SB 4 was a spot trailer bill which had nothing to do with contracts.

statute's *purpose, legislative history, and public policy.*" *Jones v. The Lodge at Torrey Pines Partnership* (2008) 42 Cal. 4th 1158, 1163, quoting from an earlier case; emphasis added.

Although listed here, under the heading of extrinsic aids to interpretation, in some cases the policy which the enactment is intended to further, or the context of the legislation, can help make the meaning of a statute clear so that there is no ambiguity. "To concede that meaning must be determined from context does not indicate that a provision is ambiguous. Many words have a wide range of possible meanings, but context eliminates that ambiguity, leaving the intended meaning clear." *People v. Seneca Ins. Co.* (2003) 29 Cal. 4th 954, 962-963.

Comparison to the Previous Version of the Law

In the case of a statute which represents a modification of a pre-existing statute, an understanding of how the earlier law operated or what it meant can be helpful in interpreting the later version. The Legislature is presumed to know what the law is, including those laws it chooses to amend. Thus, when the Legislature amends an existing law, but leaves certain portions unchanged, it could be reasonable to presume that the unchanged portions continue to mean the same thing.

THE COMMISSION SHOULD TRY TO INTERPRET SECTION 143 IN A MANNER CONSISTENT WITH WHAT THE COMMISSION BELIEVES THE LEGISLATURE INTENDED INsofar AS A PROPER BALANCE BETWEEN PROMOTING THE USE OF PUBLIC-PRIVATE PARTNERSHIPS AND PROVIDING ADEQUATE VETTING

"If statutory language permits more than one reasonable interpretation, courts may consider . . . the purpose of the statute . . . and public policy." (*Prospect Medical Group, Inc. v. Northridge Emergency Medical Group, supra.*) This principle applies both to the consideration of the way public-private partnerships are formed, and to consideration of the role the Legislature may have intended the Commission to perform.

The Commission's role in overseeing the efficient distribution of funds for transportation projects is obviously well known to the Legislature. Under the proper circumstances, that role may serve as a basis for interpreting the intent of legislation. However, it can only serve as a basis for interpretation where the legislation is ambiguous and open to varying interpretations, and where reliance on that role does not unduly conflict with other provisions in the legislation or with the legislation's objectives.

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At the same time, it is undisputed that section 143 is intended to allow the use of public-private partnerships. Consequently, it would be reasonable to interpret section 143 in a way which allows its objectives to be realized.

The Commission should approach the task of interpreting section 143 with the above principles in mind, and with due regard to what it has learned (through public comments made at its meetings and in writing), and what the Legislature presumably knew, concerning the nature of public-private partnership projects, how they are formed, and the difficulties that may exist in attracting private investment in public infrastructure projects (including the costs to the private sector of preparing proposals and the impacts of uncertainty in the approval process). The Commission can also consider what the Legislature is likely to have known about flawed public-private partnerships.

In considering these factors, the Commission must remember to utilize them in its effort to interpret what the *Legislature* intended. The Commission must also recall that where the language of section 143 is unambiguous, or is subject to only one reasonable interpretation, no such interpretation is necessary.

THE COMMISSION MAY CONSIDER THE LEGISLATIVE COUNSEL'S DIGEST TO SB 4

The Legislative Counsel's Digest to SB 4 is potentially significant because of what it says about the Commission's role in approving lease agreements. The Digest notes that pre-existing law required approval of a lease agreement and that SB 4 eliminates "the provision requiring approval or rejection by the Legislature." The Digest goes on to say that "[t]he bill would require that all lease agreements first be submitted to the California Transportation Commission *for approval, then* to the Legislature and the Public Infrastructure Advisory Commission . . . for review, as specified."

However, there are limitations on the extent to which reliance should be placed on the Legislative Counsel's Digest. "Often, the Legislative Counsel's Digest is helpful in construing a statute. But when the plain words of the statute are unambiguous, they are the sole source of legislative intent, not the Digest." *People v. Ranger Ins. Co.* (2006) 141 Cal. App. 4th 867, 871.

The Digest's reference to approval of the lease agreement appears to be based on the perception that Commission approval of the lease agreement replaced legislative approval.

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However, it is possible to reach the conclusion that the Digest rests on a flawed interpretation of the changes to section 143.

Under the old law it was clear that the Legislature, not the Commission, gave final approval to the lease agreement, although one could draw the inference that the Commission was intended to consider the lease agreement in deciding whether to select a project. As the table in the next section of this memorandum illustrates, SB 4 did not change the structure of those portions of the process which expressly involve the Commission, except to add language requiring that the lease agreement associated with a proposed project be submitted to the Commission.

If the added language is ignored, then there was no change in the language describing the Commission's role in the process. Under that circumstance, it would be reasonable to conclude that there was no change in the Commission's authority.

Taking now the additional language into account (i.e., the language requiring the lease agreement to be submitted to the Commission), one could draw several conclusions as to what the Legislature intended. One of those possible conclusions is that the Legislature intended the added language to confer on the Commission a power it did not have before. Yet if that is what the Legislature intended, could it not have easily stated it much more clearly?

One of the factors which could be taken into account, in considering how much weight to place on the Legislative Counsel's Digest, is the fact that the bill was essentially introduced during a hectic time in the Legislature. The P3 language was added to the bill on February 14, 2009, during the Second Extraordinary Session, passed the Senate and Assembly on February 14 and February 15, respectively, and was approved by the Governor six days later.

It might be reasonable to assume that the Legislative Counsel's office was under a lot of pressure to address the business being generated by the Legislature at that time. Under such circumstances, it may be that the Legislative Counsel's Digest was not as accurate as it usually is. There exists judicial recognition of such circumstances. The concurring opinion in one Supreme Court case suggested that a Digest on which one of the parties relied may have been flawed because, possibly, the Legislative Counsel "and his staff were much too busy during the final, hectic days of that legislative session." (*People v. Tanner* (1979) 24 Cal. 3d 514, 542.)

Yet the Digest, whether flawed or not, was physically part of the bill itself and therefore was at least theoretically available to the legislators. Whether the legislators had time to read the Digest, given the date the bill appeared in print and the dates it was passed by the two

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legislative houses, is a matter of speculation.⁶ However, if the Digest is consistent with at least some reasonable interpretations of section 143, it could be reasonable to rely on it for guidance.

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⁶ As amended February 14, 2009, the bill was 49 pages in length, of which 11 pages covered the amendments to section 143.

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IT IS REASONABLE TO CONSIDER THE SIMILARITIES, AS WELL AS THE DIFFERENCES, BETWEEN THE PREVIOUS VERSION OF SECTION 143 AND THE CURRENT VERSION

SB 4 amended section 143. It is worth comparing the structure of the old version with the new version, particularly with regard to the process described in each version.

Previous Version of Section 143	Current Version of Section 143
<p>only department and RTAs may solicit proposals, accept unsolicited proposals, negotiate, and enter into comprehensive development lease agreements with public or private entities for transportation projects.</p> <p>the department or RTA nominates projects</p> <p>CTC shall select the candidate projects from projects nominated</p> <p>[Project characteristics]: address a known forecast demand improve goods movement</p> <p>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.</p> <p>Public comments made during this hearing shall be submitted to the Legislature with the lease agreement.</p>	<p>only department and RTAs may solicit proposals, accept unsolicited proposals, negotiate, and enter into comprehensive development lease agreements with public or private entities for transportation projects.</p> <p>department or RTA submits projects and associated lease agreements to CTC</p> <p>CTC shall select the candidate projects from projects nominated</p> <p>[Project characteristics]: address a known forecast demand, improve mobility, improve operation or safety, provide air quality benefits</p> <p>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.</p> <p>Public comments made during this hearing shall be submitted to the Legislature and the Public Infrastructure Advisory Commission with the lease agreement.</p>
<p>Unless the Legislature passes a resolution, with both houses concurring, rejecting a negotiated lease agreement within 60 legislative days of the agreement being submitted to it, the agreement shall be deemed approved.</p> <p>A lease agreement may not be amended by the Legislature.</p>	<p>The Secretary or the Chairpersons of the fiscal or policy committees may provide any comments about the proposed agreement within the 60-day period prior to the execution of the final agreement.</p> <p>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.</p>

As the table above shows, the process in section 143 is essentially identical to that set forth in the previous version of section 143, at least through the end of the public hearing process and the submission of comments to the Legislature (marked by the double line).⁷

To the extent the Legislature left portions of the law unchanged, it might be reasonable, as a general proposition, to conclude that those portions continue to mean what they meant under the old law. For example, one could reasonably conclude that the public hearing which allows the public to comment on a lease agreement was intended to play the same role in the new law as it did in the old law, since the Legislature did not alter that part of section 143.

On the other hand, where a change is made to a process, one could reasonably conclude that the Legislature intended to modify how that process operated. Thus, the addition of a requirement that, along with the proposed project, a lease agreement (the “associated lease agreement”) be submitted, could be considered a reflection of a legislative intent to alter the process by which the Commission selects projects. (Whether the lease agreement was intended to be submitted to the Commission along with the proposed project or at a later time is discussed below.)

However, there may be other reasons why a language change is made. It may represent an effort by the Legislature to clarify something that before had been implied. For that reason, such changes need to be considered in the overall context in which they occur.

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⁷ The table paraphrases some of the provisions of each of the two versions of section 143. However, where the language used in the table is identical for the two versions, the same is true for the actual language used in the old and new statutes.

DISCUSSION AND ANALYSIS

Several conclusions could be drawn from the comparison of the two versions of section 143 outlined in the table. To begin with, the earlier version did not expressly require the department or RTA to submit the lease agreement to the Commission, whereas the new version does.⁸

An important issue of timing has been raised. Subdivision (c)(2) provides in part:

“Projects proposed pursuant to this section and associated lease agreements shall be submitted to the California Transportation Commission.”

According to a “flowchart” on the website of the Public Infrastructure Advisory Commission, the lease agreement is not submitted at the time the proposed project is submitted. (See Public-Private Partnership Brochure, p. 2, “Flowchart,” linked from www.publicinfrastructure.ca.gov/.) Instead, it is submitted to the Commission at three later times:

1. After the department or RTA has selected a proposer and negotiated a “final form of agreement,” the agreement is submitted to the Commission. (The brochure does not suggest what, if anything, the Commission is to do with the agreement.)
2. 60 days prior to execution of the agreement, it is submitted to the Commission as well as to the Secretary, to the PIAC, and to the legislative policy and fiscal committees for comment.
3. The executed agreement is submitted to the Commission. (The brochure does not suggest for what purpose the executed agreement is submitted to the Commission.)

As to the question of timing, the Commission should consider what was the Legislature’s intent with regard to the language: “Projects proposed pursuant to this section and associated lease agreements shall be submitted to the California Transportation Commission.” Is it more reasonable to conclude that the associated lease agreement be submitted at the same time as the proposed project? Or is it more reasonable to conclude that the quoted sentence was

⁸ The reference to the “associated lease agreement” appears to refer simply to the lease agreement associated with the project being submitted to the Commission.

intended to direct the submission of the two items at two different times? Is the language clear and unambiguous, or is it amenable to more than one reasonable interpretation?

The other issue raised by the Public-Private Partnership Brochure has to do with the Commission's role with regard to the lease agreement. According to the brochure, the only time the Commission plays a role relative to the lease agreement is when the agreement is submitted for comment 60 days prior to execution. (See paragraph 2, above.) Is this a reasonable interpretation of what the Legislature intended? In considering this question, the Commission can take into account the fact that the portion of section 143 that discusses the 60-day review and comment period makes no reference to the Commission. It refers only to the Legislature, the PIAC, the Secretary, and the chairmen of the legislative policy and fiscal committees. (See subd. (c)(5).)

The rest of this discussion assumes, for the sake of discussion, that the language of subdivision (c)(2) means that the lease agreement is submitted to the Commission at the same time as the proposed project.

There are several explanations as to why the new law now expressly requires submission of the lease agreement to the Commission. It could simply be a matter of the Legislature clarifying expressly what had previously been implied.

It is also possible that the Legislature wanted to enhance the Commission's role vis-à-vis the lease agreement compared to what had been intended in the earlier law. If enhancement of some sort was intended, it may have been due to the fact that the limit on the number of authorized projects was eliminated by SB 4, so that the current version of section 143 has potentially greater impact than the previous version could have had. It is possible that because of this greater potential impact the Legislature wanted greater oversight of some sort from the Commission.

Another possible explanation may have to do with the fact that under the new law the Legislature no longer has the power to approve the lease agreement. In other words, considering in the aggregate all of the changes SB 4 caused in the law, the Legislature may have intended to compensate for its loss of approval authority by, among other things, enhancing the Commission's role vis-à-vis the lease agreement. However, even if that is a reasonable interpretation, it begs the question as to the exact nature of the Commission's role with regard to the lease agreement.

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In any event, the Legislature is presumed to have a reason for doing what it does. As our Supreme Court has noted, “[w]e do not presume that the Legislature engages in idle acts.” *Adams v. Murakami* (1991) 54 Cal. 3d 105, 123. Nor do the courts “construe statutory provisions so as to render them superfluous.” *Shoemaker v. Myers* (1990) 52 Cal. 3d 1, 22. On this basis, one could reasonably conclude that the Legislature had some reason for requiring the “associated lease agreement” to be submitted to the Commission.

As for why the Legislature might want the lease agreement submitted, there are several possibilities. One reason might be that the Legislature wanted the Commission, when selecting projects, to consider their financial implications and their impact on conventionally funded transportation projects, about which the Commission is viewed as having particular expertise.

Since the lease agreement might contain financial terms which, as in the case of a usage guarantee,⁹ could require payments by the state out of transportation funds, it might be reasonable to conclude that selection of the project was intended to include a consideration of at least some of the terms of the lease. If that was the Legislature’s purpose, any change to such terms after the project was selected would defeat the purpose, in which case it would have to be concluded that those terms on which the Commission relied could not be changed.

There may be a reasonable basis to conclude that the old law contemplated that the lease agreement would remain unchanged, at least from the time they were made the subject of public hearings. Subdivision (b)(3) of the *old law* provided, in part, as follows:

“All negotiated lease agreements shall be submitted to the Legislature for approval or rejection. Prior to submitting a lease agreement to the Legislature, 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.”

There was no provision in the old law referring to on-going modifications pending legislative review, and in fact the Legislature was expressly precluded from modifying the lease agreement. Since the public hearing was the next step after the Commission’s selection of the project, one could conclude that the lease agreement, under the old law, had reached its final and unmodifiable form at or immediately after selection of the project.

⁹ For instance, the project might consist of a toll road, with the private entity entitled to receive a minimum amount of funding from the state, regardless of usage and, thus, regardless of the amount of tolls actually paid.

One of the two floor analyses prepared for SB 4, suggests that the lease agreement is “final” at least as early as the time it is submitted to the Legislature and to the PIAC. The analysis prepared by Senate Rules Committee staff, states at page 12 that

“This bill . . . require[s] that *the final lease agreement* be submitted to the Legislature and the [PIAC] for review and comment at least 60 days before executing the agreement.”

This language is based on the first sentence of subdivision (c)(5) and suggests that the lease agreement is “final” when it is submitted to the Legislature and to the PIAC. That implies that it will not change afterwards, since “final” means, among other things, “Leaving no further chance for action, discussion, or change.” (Webster’s New World Dictionary, Second College Edition (1972).”¹⁰

However, the language in the Senate Rules Committee analysis does not necessarily track the language of subdivision (c)(5) exactly. Subdivision (c)(5) states, in pertinent part, as follows:

“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.”

This statutory language is not so absolute as the language of the analysis which is based on it.

Apart from the foregoing, neither analysis expressly addresses the question as to whether the department or the RTA can modify the lease agreement after receiving comment, or whether it is limited to deciding whether to sign it or not. In addition, neither analysis expressly states whether the “associated lease agreement” submitted to the Commission is the “final” version, nor does either analysis expressly refer to Commission approval of the lease agreement.

It is possible that addition of the language requiring submission of the lease agreement to the Commission could be nothing more than a codification of what had been implied under the old law. If so, then it may have been intended under the old law that the Commission should consider certain types of lease provisions in deciding whether to select a project, albeit it

¹⁰ The complete definition of “final” in the cited dictionary is: “1. of or coming at the end; last; concluding [the *final* chapter] 2. Leaving no further chance for action, discussion, or change; deciding; conclusive [a final decree] 3. Having to do with the asic or ultimate opurpose, aim, or end [a final cause]”

was clear that the approval of the final lease agreement was reserved to the Legislature.

Based on the foregoing, it is possible that there may be an important distinction to draw between (1) taking the lease agreement, or at least pertinent provisions of the lease agreement, into account when considering the selection of a project and (2) approving the lease agreement itself.

The notion -- that the Legislature intended the Commission's selection of projects to be based, in part, on a consideration of the lease agreement -- finds some possible support in the definition of "transportation project." The definition in the new law is essentially identical to the definition in the old law. (See previous section 143, subd. (a)(2), and current section 143, subd. (a)(6).) The pertinent language as set forth in the current version of section 143 is 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 subdivision (c).”

Is it reasonable to conclude that the word “project,” as used in subdivision (c)(2) [“Projects proposed pursuant to this section and associated lease agreements shall be submitted to the California Transportation Commission.”], and the phrase “transportation project” refer to the same thing? If so, then a “project” can include the *financing* or the *leasing* of a highway, along with other elements, such as the construction, operation, or maintenance of a highway. Since provisions pertaining to financing or leasing would probably be contained in the lease agreement, one could conclude that a lease agreement is an integral part of the “project” which the Commission selects.

The foregoing discussion suggests that the Legislature may have intended that the Commission take at least certain lease agreement provisions into account when selecting projects. However, it is contended by some that the Commission's role is limited to evaluating a project's consistency with the factors enumerated in subdivision (c)(3) and (c)(4). It is true that, insofar as action is concerned, the statute seems to provide support for this view. However, in considering whether it is a reasonable interpretation of the Legislature's intent, one must also consider what purpose was served by requiring the lease agreement to be submitted with the project.

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In addition, it has been stated that the department or the RTA have the discretion to modify the lease agreement following the receipt of comments during the 60-day review period. It is true that the law now refers to the department's or RTA's discretion to execute the lease agreement after receiving (and presumably considering) those comments. But does it necessarily follow, as the Legislative Counsel's letter suggests, that the department or RTA can modify the agreement? In considering this question it is worth considering the old law, the language in the new law, and the consequences of the above-described position.

First, the suggestion that there is discretion to modify the agreement after comments are received presupposes that the comments are intended to be the basis for such modifications. However, under the old law, public comment presumably was to be considered by the Legislature, but the Legislature was limited to approving or rejecting the lease agreement *as is*. Thus, public comment received during the public hearing process *did not play any role in any modification* of the lease agreement. Apparently, the only role public comment played under the old law was to influence a discretionary decision on the part of the Legislature to approve or to disapprove the lease agreement.

Second, there is no language in the current law that expressly provides for such modification. It could be that the department's or RTA's discretion is simply to decide whether to go forward with the agreement or not.

The consequence of the view that the department or RTA can modify the lease agreement can be described in the following way. As noted before, if the Legislature's objective was that the Commission should consider at least some of the provisions of the lease agreement in selecting projects, then presupposing that the department or RTA could change those provisions later would defeat that objective. Conversely, if the intention was to give the department or RTA the right to modify the agreement after receiving comments, then any such right would limit the extent to which the Commission could consider lease agreement provisions in deciding whether to select a project.

The Legislative Counsel opinion (expressed in a letter dated June 22, 2009, to Senator Niello) concludes that the agreement can be modified as a result of the 60-day review period. (See letter at pp. 3-4.) However, that opinion did not consider the previous version of section 143 or expressly draw any conclusions from it. Moreover, the letter was written after SB 4 was enacted and thus does not constitute part of the legislative history of the legislation. Still, an opinion of the Legislative Counsel can be persuasive if it is well-reasoned. (See *Grupe Development Co. v. Superior Court* (1993) 4 Cal. 4th 911, 922. Thus, the Commission should consider the reasoning set forth in the Legislative Counsel's letter and decide whether it is persuasive.

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However, even if the lease agreement, at the time it is submitted to the Commission, is a draft, subject to later modification by the department or RTA, as the Legislative Counsel's opinion suggests, it may be reasonable to conclude that some of its provisions can be the basis for project selection as has been suggested above. Those provisions which might have an impact on the factors enumerated in subdivisions (c)(3) and (c)(4), and other factors on which the Commission might have reasonably relied in selecting projects, would not change later, but other provisions could be modified.

This raises the question: "Which provisions, or types of provisions, are relevant to the selection process in which the Commission is to engage?" Subdivisions (c)(3) and (c)(4) set forth certain types of factors which the Commission is to consider: improvement of mobility, improvement of operation or safety, provision of air quality benefits, and addressing forecast demand.

Could there be provisions in the lease agreement which could affect some or all of these factors? For example, could the financial provisions in a lease agreement associated with a proposed toll facility have an impact on the degree of mobility improvement which the project would achieve? If the lease agreement allows the operator the right to set tolls and to retain them, tolls could end up being set at a level which maximizes revenue to the operator but leads to less utilization of the facility (which could also increase net revenues by decreasing maintenance costs to the operator). If this could occur, it could have an impact on one or more of the factors enumerated in subdivisions (c)(3) and (c)(4).

The Commission's role in exercising various forms of oversight over transportation funding is well known. It allocates virtually all transportation funding, and, importantly, plays a decisive role in the preparation of the State Transportation Improvement Program. The role of the Commission is not only to allocate funds, but to do so in a way which maximizes the efficient use of those funds. To the extent that certain provisions of a lease agreement might have an impact on the availability of state transportation funds for other projects, is it reasonable to conclude that the Commission was intended to have a responsibility to examine those provisions? Is that the reason why SB 4 requires submission of the lease agreement to the Commission?

For instance, a lease agreement might provide that the private operator of a toll facility will receive a negotiated minimum amount of compensation, with the State agreeing to cover the difference between actual toll revenues and the minimum compensation.. If such a provision has the potential to result in future costs which must be borne by the State, is it a proper role of the Commission to examine such a provision and, in evaluating the proposed project, consider what impact the provision might have on the ability of the State to fund future projects?

Section 143 provides some illustrations of the types of provisions a lease agreement could contain. For example, subdivision (i) provides, in part, that, with certain exceptions,

“No agreement entered into pursuant to this section shall infringe on the authority of the department or a regional transportation agency to develop, maintain, repair, rehabilitate, operate, or lease any transportation project. 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.”

One of the exceptions is described in subdivision (i)(5) as follow:

“Projects located outside the boundaries of a public-private partnership project, to be defined by the lease agreement.”

Are the type of provisions noted above the kind that the Legislature intended the Commission to consider in selecting projects?

As to the second provision, would the way in which the “boundaries” of a public-private partnership are set affect other transportation projects? One could reasonably conclude that it would. This provision essentially states an exception to the State’s obligation to compensate the private entity for adverse effects arising from acts taken with regard to supplemental transportation projects. If those other projects our outside of the boundaries of a public-private project, actions taken with regard to them do not require compensation under the type of lease provision described in subdivision (i). Thus, how the boundaries are drawn, and whether they include more or fewer other supplemental transportation projects, may have an impact on whether the private entity would be entitled to compensation. Consequently, it might be reasonable to consider whether the Legislature intended for the Commission to take into account how the boundaries are drawn for a proposed project for purposes of deciding whether to select that project?

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Other types of lease provisions could affect costs borne by the State or by the RTA. For example, subdivision (f)(2) provides, in part, that

“[e]xcept as may otherwise be set forth in the lease agreement, the contracting entity or lessee shall be responsible for all costs due to development, maintenance, repair, rehabilitation, and reconstruction, and operating costs.”

Would such an exception be a matter of legitimate concern to the Commission when it considers selecting a project?

On the other hand, the Legislature included specific factors for the Commission to consider and not others. The Legislature could have expressly included other factors to be considered by the Commission. Is it reasonable to conclude that the lack of any specification of other factors was intentional, or was the reference to submission of the lease agreement to the Commission intended by the Legislature to invoke the sort of oversight associated with the Commission in general?

In considering the foregoing, the Commission should also take into account what the Legislature presumably knows about the realities of public-private partnership projects, the time and expense involved in preparing proposals, and the factors that might inhibit private participation in infrastructure projects, including aversion to risk. The Commission can also reasonably take into account that, in any situation involving competition for projects, there is an element of risk taken by a proposer that its bid or proposal will not be the successful proposal or bid.

At the same time, there are features of public-private partnership projects that may increase the costs of preparing proposals. For example, it may be reasonable for a private investor to expend resources to measure potential demand for a proposed facility, particularly where it is expected that toll revenues (including shadow tolls based on actual usage) will be the private investor's source of income.

CONCLUSION

This memorandum expresses no opinion as to whether section 143 is ambiguous or not, or as to the meaning of the section. This memorandum is intended to provide guidance to the Commission in its determination (1) as to whether the section is ambiguous or not and (2) as to the meaning of the section and as to the role of the Commission.

If it is concluded that the statute is clear on its face, interpretation is simple. On the other hand, the Commission may conclude that there are a number of reasonable interpretations. For example, the Commission's role with regard to the lease agreement

(A) may involve no role at all,

(B) may be limited to a consideration of portions of the lease that may affect the factors enumerated in subdivision (c)(3) and (c)(4),

(C) may include consideration of lease provisions that could affect transportation funding in a larger context, or

(D) may involve actual approval of the final version of the lease agreement.

The Commission should determine which of these possible interpretations is reasonable and then reach a decision as to which best achieves the various objectives the Legislature intended the law to fulfill.

In weighing the various factors mentioned in this memorandum, and others which this memorandum may have overlooked or which might be raised by others later, the Commission should keep in mind two things. First, as previously stated, its task is to try to interpret the statute in accordance with what it believes were the Legislature's objectives, and not in accordance with what the Commission might have preferred as a matter of policy.

Second, as our Supreme Court put it in a case decided a few years ago,

“[E]ven were resort to legislative history justified, we must be careful not to misuse it. It is notoriously easy to support any number of conflicting propositions by selectively quoting legislative history. To be persuasive, such an exercise must offer something more compelling than, as one critical jurist describes it, " 'looking over a crowd and picking out your friends.' " (*People v. Seneca Ins. Co.* (2003) 29 Cal. 4th 954, 962-963.)

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