

Memorandum

To: Chair and Commissioners

Date: October 22, 2008

From: JOHN F. BARNA, JR.
Executive Director

File No: 5
Action

Ref: **Executive Director's Report: Prop. 1B Bond Accountability and Comment Letter to Attorney General's Office Regarding Sale of Excess Properties**

Prop. 1B Bond Accountability: As a follow-up to the discussion that ensued at the September meeting regarding quarterly reporting and bond accountability, staff will discuss the status of the simplification efforts. By way of background, the following summarizes succinctly the CTC-Caltrans/Regional Agency roles, responsibilities and expectations moving forward. These expectations have been communicated numerous times, but perhaps have not been presented as plainly.

In pursuing an effective accountability framework, the Commission's intent has been to support the delivery of the projects for which it has committed construction financing on behalf of the state's voters. The Commission is an investor in the construction and completion of these projects. The Commission's oversight is designed to track the progress of the Prop. 1B construction investment portfolio and to ensure that the best projects are completed on time and on budget. The challenges we have faced this past year in finalizing the accountability framework are fundamentally ones of reporting and not the lack of consensus on the purpose and need for accountability.

As administering agency for program purposes, the CTC is responsible for reporting on the status of the individual Prop. 1B bond programs under its purview.

Caltrans is responsible for reporting on project development and management. The Commission expects Caltrans to provide a quarterly report, with an accompanying letter of transmittal that asserts that the information contained in the quarterly report is accurate to the best extent possible. The information contained in these quarterly reports applies to Caltrans-led projects, as well as to those for which Caltrans acts as the state's fiduciary agent in providing bond funding. CTC staff and Caltrans Prop. 1B staff have agreed that the format of these quarterly reports will be based on the Director's Contracts for Delivery, with added cost information.

In addition, the Commission expects Caltrans to provide written comment on all environmental documents for Prop. 1B projects. These comments should confirm that the scope of the project alternatives (in the case of NOPs and draft EIRs)--and the scope of the preferred alternative for final EIRs--is consistent with the scope detailed in the project baseline agreements.

As to thresholds, there are none. The Commission expects Caltrans and regional agencies to manage to the baselines.

Variations in cost or schedule are up to the department and regional agencies to report. If cost and schedule variations during pre-construction do not affect the quarter and year of the construction allocation—as specified in the project baseline agreements and the published quarterly and semi-annual reports—then all the Commission needs is written notification of the changes. The Commission assumes that the department and regional agencies will take whatever corrective actions necessary to enhance project delivery. We would, of course, expect that those variations would be identified in the next quarterly report.

If cost and schedule variations require CTC action, as in a change in TCRP or STIP funding, then the department and the regional agencies will need to communicate that through the existing programming process. Clearly, by asking for CTC discretionary action, the sponsoring agencies should expect questions about the status of the project and whether it is still on track to receive its construction allocation in the specified quarter and year. Asking for CTC action is necessarily an element of a corrective action plan.

Any, and all, scope changes require amending the project baseline agreement, which constitutes the required corrective action. Scope changes necessarily call into question whether or not the project, as changed, will achieve the purpose and benefits that were identified during the initial programming. Needless to say, any changes to the quarter and/or year of construction allocation require CTC approval through the Prop. 1B programming process. The Commission has consistently underscored that increases in construction estimates are the responsibility of the regional agency involved. Construction savings are similarly subject to further Commission action, although no formal policy on how to treat construction savings has been approved.

Attached is a list of the CMIA, SR 99, and TCIF construction portfolio.

Attorney General Opinion on the Sale of Excess Property: At last month's meeting, the Commission discussed providing a comment letter in support of Caltrans' letter to the Opinion Unit of the Attorney General's Office regarding a request by Assembly Member Anthony Portantino for a formal opinion on whether or not Caltrans can sell excess property at below fair market value. Attached to this book item are copies of Assembly Member Portantino's letter to the Attorney General's Office and Caltrans' letter on the topic. Also included is a draft letter for your consideration that presents the Commission's views on the matter.

The CTC letter can be summarized as follows:

Part one:

The draft CTC letter states that the CTC agrees with the analysis and conclusions in Caltrans' letter. Under Article XIX of the Constitution excess properties can neither be disposed or sold for less than fair market value nor can rents be less than fair market value. The exception to fair market value occurs under section 9 of Article XIX where properties located in coastal zones can be disposed of at the original acquisition cost to State Parks, Fish and Game or Wildlife Conservation Board.

Part two:

The draft CTC letter pick up the comment made in the Caltrans letter starts regarding the Roberti Bill. Caltrans notes that excess properties on the Interstate 710 corridor shall be sold at an affordable price, but not less than the original acquisition cost to low and moderate income persons and families. Caltrans then notes that the Legislature's concern with the constitutionality of the Roberti Bill resulted in a series of findings that Legislature made in passing that bill. (Because the Roberti Bill's constitutionality has never been challenged, Caltrans and CTC must comply with it, as required by Article I, section 26 of the California Constitution.)

The draft CTC letter picks up on the constitutionality of the Roberti Bill. The Roberti Bill references significant environmental effects due to highway activities as the rationale for selling excess properties to low and moderate income persons and families. Since the Interstate 710 project has not moved forward, a fatal flaw exists in the Roberti Bill because the significant environmental effects resulting from the construction of the freeway has not occurred. Further, the sale of excess properties does result in the displacement of low to moderate income persons and families, but not due to the relevant highway activities called out in Article XIX -- construction, improvement, maintenance or operation of public streets and highways.

Conclusion:

The draft CTC letter urges the Attorney General to conclude that under Article XIX, excess properties must be at fair market value, except as permitted under section 9 of Article XIX. The letter states that the Roberti Bill's interpretation of environmental effects due to highway activities is inconsistent with Article XIX, section 1.

Staff concurs with the draft letter and recommends that you approve it for transmitting to the Attorney General's Opinion Unit. However, staff would note that the references to the constitutionality of the Roberti Bill are an opinion that has not yet been addressed by the courts. All in all, the letter reflects the positions the Commission has taken on excess property sales and raises the salient points for the Attorney General's Office to consider.

Attachments

Planned CMIA, SR 99 TCIF Construction Allocations

Prop 1B Program	Project Title	Co	Const. Contract Award	Total Project Cost	Construction Bond Funding	Estimated Construction Allocation Date	Estimated Construction Allocation Amount
CMIA	SR-4 Angels Camp Bypass	CAL	Sep-07	\$ 61,552	\$ 4,438	Sep-07	
CMIA	Route 5/805 North Coast Corridor - Stage 1A - Unit 1	SD	Aug-07	\$ 52,664	\$ 24,500	Sep-07	
CMIA	I-15 Managed Lanes (No/So Stages) South Segment - Unit 3	SD	Feb-08	\$ 122,206	\$ 104,739	Sep-07	
CMIA	I-80 HOV Lanes, Paving - Seg 2	SOL	Jun-08	\$ 3,800	\$ 3,800	Dec-07	
CMIA	I-80 HOV Lanes, TMS & Ramp Metering - Seg 3	SOL	Jun-08	\$ 10,026	\$ 8,226	Dec-07	
CMIA	I-80 Capacity/Operational Improvements Phase 2	PLA	May-08	\$ 80,232	\$ 17,700	Jan-08	
CMIA	Route 219 Expressway Phase 1	STA	May-08	\$ 50,624	\$ 14,760	Jan-08	
CMIA	I-15 Managed Lanes (No/So Stages) South Segment - Unit 1	SD	May-08	\$ 118,756	\$ 94,025	Feb-08	
CMIA	I-80 HOV Lanes, I-80/I-680/12 to Putah Creek, Seg 1	SOL	Jun-08	\$ 66,761	\$ 44,184	Feb-08	
CMIA	SR 65 Lincoln Bypass	PLA	Jun-08	\$ 324,000	\$ 73,715	Feb-08	
CMIA	Route 580 EB HOV Lane Project-Portola to Greenville - Seg 1	ALA	Jul-08	\$ 59,280	\$ 29,037	Mar-08	
CMIA	I-15 Managed Lanes (No/So Stages) South Segment - Unit 2	SD	Aug-08	\$ 166,207	\$ 146,236	Apr-08	
CMIA	US 101 HOV Lanes between Santa Rosa - Windsor	SON	Sep-08	\$ 120,260	\$ 69,860	May-08	
TCIF	Columbia Avenue Grade Separation	RIV	Sep-08	\$ 29,100	\$ 6,000	Jun-08	\$ 641,220 FY 07/08
CMIA	US 50 HOV Lane - El Dorado Hills Blvd to w. of Bass Lake	ED	Dec-08	\$ 44,568	\$ 20,000	Sep-08	
CMIA	US 101 HOV Lanes - Wilfred Ave to Santa Rosa Ave	SON	Jan-09	\$ 89,715	\$ 43,300	Sep-08	
CMIA	Route 405 Carpool Lane I-10 to US 101(Northbound)	LA	Feb-09	\$ 950,000	\$ 730,000	Sep-08	
CMIA	Route 580 EB HOV Lane Project-Hacienda to Portola - Seg 2	ALA	Jan-09	\$ 72,326	\$ 21,640	Oct-08	
CMIA	Rte 580 and Route 84 Interchange - Seg 3	ALA	Feb-09	\$ 87,700	\$ 39,500	Oct-08	
TCIF	State Route 905	SD	Jul-09	\$ 104,700	\$ 91,605	Oct-08	
CMIA	Widen HOV Lanes on I-5 from Rte 134 to Rte 170 - Ph 1	LA	Apr-09	\$ 120,930	\$ 20,000	Nov-08	
CMIA	SR 1 Salinas Road Interchange	MON	May-09	\$ 48,516	\$ 37,061	Nov-08	
CMIA	SR 49 La Barr Meadows Widening	NEV	May-09	\$ 40,500	\$ 18,568	Nov-08	
CMIA	I-80 Capacity/Operational Improvement Phase 3A	PLA	May-09	\$ 34,000	\$ 31,300	Nov-08	
TCIF	Washington Blvd Widening & Reconstruction Project	LA	May-09	\$ 32,000	\$ 5,800	Nov-08	
TCIF	Shafter Intermodal Rail Facility	KER	Jun-09	\$ 30,000	\$ 15,000	Dec-08	
TCIF	ACE North Milliken Ave Railroad Grade Separation at UPRR	SBD	Jun-09	\$ 74,210	\$ 6,490	Dec-08	
TCIF	Magnolia Avenue Grade Separation - UPRR	RIV	Jun-09	\$ 52,960	\$ 20,000	Dec-08	
TCIF	I-10 Corridor Logistics Access Project (IC reconst @ Riverside)	SBD	Jun-09	\$ 34,000	\$ 14,096	Dec-08	
CMIA	Rte 580 and Route 84 Interchange - Seg 1	ALA	Feb-09	\$ 54,400	\$ 24,600	Dec-08	
CMIA	Rte 580 and Route 84 Interchange - Seg 2	ALA	Feb-09	\$ 10,900	\$ 3,900	Dec-08	
CMIA	WB 580/NB 101 Connector	MRN	Mar-09	\$ 20,000	\$ 15,300	Jan-09	
TCIF	US 101 Rice Avenue Interchange	VEN	Mar-09	\$ 86,993	\$ 30,449	Jan-09	
CMIA	I-80 Intergrated Corridor Mobility Project	CC	Jul-09	\$ 63,400	\$ 55,300	Jan-09	
CMIA	Kings/Tulare Rte. 198 Expressway	KIN	Jul-09	\$ 124,367	\$ 71,600	Jan-09	
CMIA	US101 HOV Lanes - Railroad Ave to Rohnert Park Exp	SON	Jul-09	\$ 118,250	\$ 42,848	Jan-09	
TCIF	Auto Center Drive Separation	RIV	Jul-09	\$ 32,000	\$ 16,000	Jan-09	
CMIA	Route 24/Caldecott Tunnel Corridor	ALA	Aug-09	\$ 420,000	\$ 175,000	Feb-09	
CMIA	SR 91 Eastbound Lane - Route 241 to Route 71	ORA	Aug-09	\$ 80,500	\$ 71,440	Feb-09	
SR 99	Feather River Bridge Replacement and widening	SUT	Aug-09	\$ 88,726	\$ 69,000	Feb-09	
CMIA	State Route 210/215 Connectors	SBD	Aug-09	\$ 96,204	\$ 22,000	Feb-09	
CMIA	Interstate 215 North Segment 5	SBD	Aug-09	\$ 66,676	\$ 59,000	Feb-09	
CMIA	US 50 HOV lanes & Community enhancements	SAC	Sep-09	\$ 165,000	\$ 80,000	Mar-09	
CMIA	Interstate 215 North Segments 1 & 2	SBD	Sep-09	\$ 424,085	\$ 49,120	Mar-09	
TCIF	New Siding on the Antelope Valley Line (MP44 to MP61) For Freight Trains	LA	Sep-09	\$ 14,700	\$ 7,200	Apr-09	
CMIA	SR 219 Expressway, Phase 2	STA	Oct-09	\$ 50,500	\$ 18,813	Apr-09	
TCIF	ACE:Gateway-Valley View Grade Separation Project	LA	Oct-09	\$ 75,177	\$ 25,570	Apr-09	
CMIA	Widen HOV Lanes on I-5 from Rte 134 to Rte 170 - Ph 4	LA	Oct-09	\$ 189,138	\$ 45,000	May-09	
CMIA	I-10 Widen ramps, aux lanes: Cherry, Citrus & Cedar	SBD	Dec-09	\$ 32,693	\$ 19,233	Jun-09	\$ 2,015,733 FY 08/09
CMIA	I-10, Construct Westbound mixed flow lane	SBD	Jan-10	\$ 43,186	\$ 26,500	Jul-09	
TCIF	Sacramento Intermodal Track Relocation	SAC	Jan-10	\$ 51,584	\$ 20,000	Jul-09	
CMIA	Route 5/805 North Coast Corridor - Stage 1A - Unit 2	SD	Jan-10	\$ 102,000	\$ 57,500	Jul-09	
CMIA	Route 22/405/605 HOV Connector with ITS	ORA	Mar-10	\$ 400,000	\$ 200,000	Sep-09	
CMIA	I-5 Cottonwood Hills Truck Climbing Lane	SHA	Mar-10	\$ 27,443	\$ 22,902	Sep-09	
CMIA	E. Sonora Bypass Stage II	TUO	Mar-10	\$ 65,920	\$ 17,233	Sep-09	
CMIA	US 101 Improvements (I-280 to Yerba Buena Rd)	SCL	Mar-10	\$ 62,975	\$ 30,000	Oct-09	
TCIF	Ports Rail System - Tier I (Reconfigure Control Point/Computerized Train Con	LA	Apr-10	\$ 26,460	\$ 10,000	Oct-09	
TCIF	Ports Rail System - Tier I (West Basin Road Rail Access Improvements)	LA	Apr-10	\$ 125,340	\$ 51,230	Oct-09	
SR 99	Butte SR 99 Chico Auxiliary Lanes - Phase II	BUT	May-10	\$ 39,520	\$ 23,520	Nov-09	
SR 99	Arboleda Road Freeway	MER	May-10	\$ 176,787	\$ 139,000	Nov-09	
CMIA	SR 57 Northbound widening, Route 91 to Lambert Road	ORA	Jun-10	\$ 140,000	\$ 70,000	Dec-09	
SR 99	Calvine Rd to Mack Rd Auxiliary Lanes on SR 99	SAC	Jun-10	\$ 8,500	\$ 6,750	Dec-09	FY 09/10
CMIA	Route 46 Corridor Improvements (Whitley 1)	SLO	Jun-10	\$ 105,000	\$ 67,742	Dec-09	Mid Year
TCIF	San Joaquin Valley Short Haul Rail/Inland Port Project	STA	Jun-10	\$ 57,434	\$ 22,467	Dec-09	\$ 764,844
CMIA	Route 46 Expressway - Segment 3	KER	Jul-10	\$ 94,032	\$ 45,000	Jan-10	
SR 99	Goshen/Kingsburg 6-Lane	TUL	Jul-10	\$ 172,824	\$ 151,966	Jan-10	

Planned CMIA, SR 99 TCIF Construction Allocations

Prop 1B Program	Project Title	Co	Const. Contract Award	Total Project Cost	Construction Bond Funding	Estimated Construction Allocation Date	Estimated Construction Allocation Amount
TCIF	Track and Tunnel Improvements at Donner Summit	PLA	Jul-10	\$ 86,800	\$ 43,000	Jan-10	
TCIF	Iowa Avenue Grade Separation	RIV	Jul-10	\$ 32,000	\$ 13,000	Jan-10	
CMIA	Widen HOV Lanes on I-5 from Rte 134 to Rte 170 - Ph 2	LA	Jul-10	\$ 248,627	\$ -	Feb-10	
CMIA	Widen HOV Lanes on I-5 from Rte 134 to Rte 170 - Ph 3	LA	Jul-10	\$ 50,844	\$ 8,000	Feb-10	
CMIA	Route 580 EB HOV Lane Project-Portola to Greenville - Seg 3	ALA	Aug-10	\$ 22,263	\$ 21,563	Feb-10	
TCIF	Sacramento River Deep Water Channel Project	YOL	Aug-10	\$ 83,275	\$ 10,000	Feb-10	
CMIA	I-205 auxiliary lanes-Tracy	SJ	Aug-10	\$ 51,660	\$ 25,000	Feb-10	
TCIF	Brawley Bypass (SR 78/111 Expressway) Project	IMP	Aug-10	\$ 76,564	\$ 49,549	Feb-10	
CMIA	SR 12 Jameson Canyon	NAP	Sep-10	\$ 139,500	\$ 73,990	Mar-10	
CMIA	SR 1 Auxiliary lanes, Morrissey to Soquel Ave	SCR	Sep-10	\$ 22,327	\$ 16,190	Mar-10	
TCIF	Ports Rail System - Tier I (Pier F Support Yard)	LA	Oct-10	\$ 24,140	\$ 10,000	Apr-10	
TCIF	Ports Rail System - Tier I (Track Realignment @ Ocean Blvd)	LA	Oct-10	\$ 65,840	\$ 27,000	Apr-10	
TCIF	Placentia Avenue Undercrossing	ORA	Oct-10	\$ 39,369	\$ 14,934	Apr-10	
CMIA	SR-4 East Widening from Somersville to SR 160	CC	Nov-10	\$ 445,000	\$ 85,000	May-10	
CMIA	Rte 5 Carpool Lane from Orange Co Line to I-605	LA	Nov-10	\$ 1,240,524	\$ 387,000	May-10	
TCIF	ACE Glen Helen Pkwy Railroad Grade Separation	SBD	Nov-10	\$ 26,868	\$ 7,172	May-10	
CMIA	Highway 101 Marin-Sonoma Narrows Project Contract A1	MRN	Dec-10	\$ 77,310	\$ 49,930	Jun-10	
CMIA	I-215 Add mixed-flow lane from Rte 15 to Scott Rd	RIV	Dec-10	\$ 62,321	\$ 38,570	Jun-10	
TCIF	Gerald Desmond Bridge Replacement	LA	Dec-10	\$ 1,125,200	\$ 250,000	Jun-10	\$ 2,091,708 FY 09/10
TCIF	South Wilmington Grade Separation	LA	Jan-11	\$ 73,060	\$ 17,000	Jul-10	
TCIF	Kraemer Blvd Undercrossing	ORA	Jan-11	\$ 45,910	\$ 22,642	Jul-10	
CMIA	US 101 HOV Lanes, Mussel Shoals to Casitas Pass Road	VEN	Jan-11	\$ 151,470	\$ 131,600	Jul-10	
SR 99	Freeway Upgrade & Plainsburg Road I/C	MER	Jan-11	\$ 118,720	\$ 103,000	Jul-10	
SR 99	Los Molinos	TEH	Mar-11	\$ 6,400	\$ 4,800	Sep-10	
TCIF	Outer Harbor Intermodal Terminals (OHIT)	ALA	Mar-11	\$ 220,000	\$ 110,000	Sep-10	
CMIA	I-15 Managed Lanes (No/So Stages) South Segment Unit 5	SD	Mar-11	\$ 56,798	\$ -	Sep-10	
CMIA	SR 57 Northbound widening - Katella Ave to Lincoln Ave	ORA	Apr-11	\$ 41,086	\$ 20,086	Oct-10	
CMIA	SR101 Auxiliary Lanes - Embarcadero Rd to Marsh Rd	SM	Apr-11	\$ 111,389	\$ 60,000	Oct-10	
TCIF	San Gabriel Valley Grade Separation Program	LA	Apr-11	\$ 723,046	\$ 336,600	Oct-10	
TCIF	SR 47 Expwy-Schuyler Heim Bridge Replace/Construct Expwy & Flyover	LA	Apr-11	\$ 687,000	\$ 158,000	Oct-10	
TCIF	I-10 Corridor Logistics Access Project (IC reconst @ Citrus)	SBD	Apr-11	\$ 54,458	\$ 23,600	Oct-10	
CMIA	White Rock Rd Widening, Grant Line to Prairie City	SAC	May-11	\$ 26,600	\$ 19,100	Nov-10	
SR 99	SR 99/Elverta Rd. Interchange	SAC	May-11	\$ 29,600	\$ 19,110	Nov-10	
SR 99	SR 99/Riego Road Interchange	SUT	May-11	\$ 30,840	\$ 19,110	Nov-10	
TCIF	Port of San Diego National City Marine Terminal (Wharf Extension)	SD	May-11	\$ 34,300	\$ 15,000	Dec-10	
CMIA	Highway 101 Marin-Sonoma Narrows Project Contract B1	MRN	Jun-11	\$ 67,440	\$ 10,443	Dec-10	
CMIA	Highway 101 Marin-Sonoma Narrows Project Contract B2	MRN	Jun-11	\$ 58,049	\$ 22,027	Dec-10	
CMIA	Route 91 HOV Lane Gap closure	RIV	Jun-11	\$ 240,277	\$ 157,198	Dec-10	
TCIF	Ports Rail System - Tier I (Terminal Island Wye Track Realignment)	LA	Jun-11	\$ 12,850	\$ 3,790	Dec-10	
CMIA	US 101 Aux Lanes - SR 85 to Embarcadero Rd	SCL	Jun-11	\$ 102,258	\$ 84,930	Jan-11	
CMIA	I-880 Widening (SR 237 to US 101)	SCL	Jun-11	\$ 95,000	\$ 71,600	Jan-11	
TCIF	Lakeview Avenue Overcrossing	ORA	Jul-11	\$ 58,525	\$ 28,685	Jan-11	
CMIA	Route 580 Westbound HOV Lane Project	ALA	Aug-11	\$ 145,400	\$ 101,700	Feb-11	
TCIF	I-10 Corridor Logistics Access Project (IC reconst @ Cherry)	SBD	Aug-11	\$ 77,806	\$ 30,773	Feb-11	
TCIF	I-110 Fwy Access Ramp Imp SR 47/110 NB Connector Widening	LA	Sep-11	\$ 50,719	\$ 14,700	Mar-11	
TCIF	LOSSAN N Rail Corridor - Sorrento to Miramar Double Track - Phase I	SD	Sep-11	\$ 23,700	\$ 10,800	Mar-11	
TCIF	7th Street Grade Separation	ALA	Sep-11	\$ 350,000	\$ 175,000	Apr-11	
CMIA	SR 91 Widening - Route 55 connector to Weir Canyon Rd	ORA	Oct-11	\$ 96,000	\$ 22,000	Apr-11	
TCIF	Martinez Subdivision Rail Improvements	ALA	Oct-11	\$ 215,000	\$ 74,000	Apr-11	
TCIF	Riverside Avenue Grade Separation	RIV	Dec-11	\$ 30,300	\$ 8,500	Jun-11	\$ 1,875,794 FY 10/11
TCIF	Streeter Avenue Grade Separation	RIV	Jan-12	\$ 36,800	\$ 15,500	Jul-11	
TCIF	March Inland Cargo Port Airport-I215 Van Buren Blvd - Ground Access Imp	RIV	Jan-12	\$ 97,550	\$ 10,000	Jul-11	
TCIF	Sunset Avenue Grade Separation	RIV	Jan-12	\$ 36,500	\$ 10,000	Jul-11	
TCIF	I-580 Eastbound Truck Climbing Lane	ALA	Feb-12	\$ 64,465	\$ 64,265	Aug-11	
CMIA	I-880 southbound HOV Lane Extension - Heegenberger	ALA	Mar-12	\$ 108,000	\$ 94,600	Sep-11	
SR 99	SR 99 Widening in Manteca and San Joaquin	SJ	Mar-12	\$ 250,000	\$ 122,300	Sep-11	
TCIF	Tehachapi Trade Corridor Rail Improvement Project	KER	Mar-12	\$ 111,400	\$ 54,000	Sep-11	
TCIF	C Street Access Ramps Improvements	LA	Mar-12	\$ 29,281	\$ 8,300	Sep-11	
TCIF	Clay Street Railroad Grade Crossing	RIV	Mar-12	\$ 37,350	\$ 12,500	Oct-11	
TCIF	3rd Street Grade Separation	RIV	Apr-12	\$ 40,161	\$ 17,500	Oct-11	
TCIF	ACE Lenwood Grade Separation at BNSF Cajon	SBD	Apr-12	\$ 25,075	\$ 6,694	Oct-11	
TCIF	South Line Rail Improvements/San Ysidro Yard - Mainline Improvements	SD	Apr-12	\$ 107,030	\$ 98,060	Oct-11	
SR 99	SR 99 (South Stockton) Widening	SJ	May-12	\$ 250,500	\$ 116,600	Nov-11	
TCIF	Ports Rail System - Tier I (Pier B St. Realignment)	LA	Jun-12	\$ 30,270	\$ 4,180	Dec-11	
TCIF	San Francisco Bay to Stockton Ship Channel Deepening Project	SJ	Jun-12	\$ 141,447	\$ 17,500	Dec-11	
TCIF	Bay Marina Drive at I-5 At-Grade Improvements	SD	Jun-12	\$ 2,380	\$ 910	Dec-11	

Planned CMIA, SR 99 TCIF Construction Allocations

Prop 1B Program	Project Title	Co	Const. Contract Award	Total Project Cost	Construction Bond Funding	Estimated Construction Allocation Date	Estimated Construction Allocation Amount	
TCIF	Civic Center Drive at Harbor Drive and I-5 At-Grade Improvements	SD	Jun-12	\$ 3,260	\$ 1,150	Dec-11		
TCIF	ACE Palm Grade Separation at BNSF/UP Cajon	SBD	Jul-12	\$ 35,176	\$ 9,390	Jan-12		
TCIF	I-880 Reconstruction, 29th & 23rd Avenues, Oakland	ALA	Aug-12	\$ 96,787	\$ 73,000	Feb-12		
SR 99	Island Park 6-Lane	FRE	Sep-12	\$ 93,000	\$ 82,600	Mar-12		
SR 99	Ave 12 Interchange	MAD	Oct-12	\$ 68,000	\$ 4,800	Apr-12		
TCIF	Ports Rail System - Tier I (Reeves Ave Closure and Grade Separation)	LA	Oct-12	\$ 108,760	\$ 24,570	Apr-12		
TCIF	I-80 Eastbound Cordelia Truck Scales Relocation	SOL	Oct-12	\$ 100,900	\$ 49,800	Apr-12		
TCIF	Ports Rail System - Tier I (Navy Mole Storage Yard)	LA	Dec-12	\$ 32,960	\$ 6,000	Jun-12		
TCIF	SR 91 connect aux lanes through IC on WB SR 91 btwn SR 57 & I-5	ORA	Dec-12	\$ 73,400	\$ 34,950	Jun-12		
TCIF	ACE South Milliken Grade Separation at UP Los Angeles	SBD	Dec-12	\$ 30,083	\$ 8,031	Jun-12		
TCIF	South Archibald Avenue Railroad Grade Separation at UP/Los Angeles	SBD	Dec-12	\$ 30,505	\$ 7,658	Jun-12		
TCIF	ACE Vineyard Grade Separation at UP Alhambra	SBD	Dec-12	\$ 25,786	\$ 6,884	Jun-12	\$ 961,742	FY 11/12
TCIF	Avenue 56 Grade Separation on Yuma Subdivision of UPR Mainline	RIV	Dec-12	\$ 60,000	\$ 10,000	Jul-12		
TCIF	Avenue 66 Grade Separation on Yuma Subdivision of UPR Mainline	RIV	Dec-12	\$ 33,500	\$ 10,000	Jul-12		
TCIF	Southline Rail Improvements/San Ysidro Yard - Yard Expansion	SD	Jan-13	\$ 40,460	\$ 25,900	Jul-12		
TCIF	San Juan Road Interchange	MON	Jan-13	\$ 90,600	\$ 28,325	Jul-12		
TCIF	State College Grade Separation	ORA	Apr-13	\$ 62,083	\$ 30,731	Oct-12		
TCIF	Raymond Avenue Grade Separation	ORA	Apr-13	\$ 63,739	\$ 12,757	Oct-12		
TCIF	State Route 11 and Otay Mesa East Port of Entry (POE)	SD	Apr-13	\$ 708,820	\$ 75,000	Oct-12		
TCIF	Ports Rail System - Tier I (New Cerritos Rail Bridge/Triple Track S. of Thenard)	LA	Jun-13	\$ 155,600	\$ 38,330	Dec-12		
TCIF	4 West Crosstown Freeway Extension Stage I	SJ	Jun-13	\$ 193,640	\$ 96,820	Dec-12		
TCIF	Orangethorpe Avenue Grade Separation	ORA	Jul-13	\$ 83,957	\$ 41,666	Jan-13		
TCIF	Tustin Avenue/Rose Drive Overcrossing	ORA	Jul-13	\$ 63,400	\$ 31,387	Jan-13		
TCIF	Colton Crossing Flyover	SBD	Jul-13	\$ 198,300	\$ 97,305	Jan-13		
TCIF	Grade Separation at Magnolia Avenue Railroad Grade Crossing - BNSF	RIV	Sep-13	\$ 81,750	\$ 13,700	Apr-13		
TCIF	I-15 Widening and Devore Interchange Reconstruction	SBD	Nov-13	\$ 368,553	\$ 118,012	May-13		
TCIF	10th Avenue at Harbor Drive Grade-Separated Improvements	SD	Nov-13	\$ 67,200	\$ 30,910	May-13		
TCIF	32nd Street at Harbor Drive Grade-Separated Improvements	SD	Nov-13	\$ 118,460	\$ 50,665	May-13	\$ 711,508	FY 12/13
				\$ 19,405,628	\$ 8,297,705		\$ 8,297,705	

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July 17, 2007

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Opinion Unit
P. O. Box 85266-5299
San Diego, CA 92186-5266

Dear Mr. Lilyquist,

The California Department of Transportation (Caltrans) has considerable property holdings throughout the 44th Assembly District. Multiple issues regarding the sales and rental of those properties have come to the attention of my office. As Caltrans Director Will Kempton and I have worked towards resolving these issues, it has become clear that an Opinion of the Attorney General would be helpful in assisting Caltrans to continue to uphold the spirit and intent of current law. Therefore, I respectfully request that the Attorney General's office consider the following questions as stated below.

Do the provisions of the California Constitution (specifically Article XIX, sections 1-9 and Article XVI, section 6) prohibit the Department of Transportation from selling or disposing of excess property at less than its fair market value?

Do the provisions of the California Constitution (specifically Article XIX, sections 1-9 and Article XVI, section 6) prohibit the Department of Transportation from leasing or renting its property at less than fair market value?

Should further information be required to assist in responding to this inquiry, please contact my District Director, Julianne Hines, at (626) 577-9944. Your timely response to this question is greatly appreciated.

Sincerely,

Anthony J. Portantino

ANTHONY J. PORTANTINO
Assemblymember
44th District

AJP: jh
T3

cc: Will Kempton, Department of Transportation
Doug Failing, Department of Transportation, District 7
Representing Cities

Altadena, Arcadia, Duarte, East Pasadena, La Cañada Flintridge, Los Angeles, Mayflower Village, Monrovia, Pasadena, South Pasadena, and Temple City

DEPARTMENT OF TRANSPORTATION

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October 3, 2007

Mr. Marc Nolan
Deputy Attorney General
300 S. Spring Street
Los Angeles, CA 90013

Re: Opinion No. 07-801

Dear Mr. Nolan:

Thank you for providing the Department of Transportation (Department) with the opportunity to submit comments in response to the request from Assemblymember Anthony J. Portantino for an opinion of the Attorney General on the following question:

Does the Constitution (Cal. Const., art. XVI, § 6, art. XIX, §§ 1-9) prohibit the Department of Transportation from selling or disposing of excess property or leasing or renting its property at less than fair market value?

The Department, through its Legal Division, submits the following comments for your consideration:

California Constitution, article XIX, sections 1-9

Article XIX, section 1, of the California Constitution requires that revenues from taxes imposed by the state on motor vehicle fuels for use in motor vehicles upon public streets and highways be used for specified highway and public mass transit guideway purposes. Section 2 of article XIX requires that revenues from fees and taxes imposed by the state upon vehicles or their use or operation not used for the regulation and registration of vehicles and enforcement of traffic and vehicle laws also be used for the purposes specified in section 1.

Ever since the voters approved the addition of article XXVI to the California Constitution in the statewide general election of November 8, 1938, the use of revenue derived through the imposition of motor vehicle fuel taxes and license and registration fees has been expressly limited to the construction and maintenance of public streets and highways and enforcement of motor vehicle regulations. In 1974, article XXVI was repealed and substantially reenacted (and renumbered art. XIX in 1976) in an expanded version to reflect environmental concerns and to provide funding for the research and development, including construction, of exclusive public mass transit systems. Section 1 of article XIX currently states:

“Revenues from taxes imposed by the state on motor vehicle fuels for use in motor vehicles upon public streets and highways, over and above the costs of collection and any refunds authorized by law, shall be used for the following purposes:

“(a) The research, planning, construction, improvement, maintenance, and operation of public streets and highways (and their related public facilities for nonmotorized traffic), including the mitigation of their environmental effects, the payment for property taken or damaged for such purposes, and the administrative costs necessarily incurred in the foregoing purposes.

“(b) The research, planning, construction, and improvement of exclusive public mass transit guideways (and their related fixed facilities), including the mitigation of their environmental effects, the payment for property taken or damaged for such purposes, the administrative costs necessarily incurred in the foregoing purposes, and the maintenance of the structures and the immediate right-of-way for the public mass transit guideways, but excluding the maintenance and operating costs for mass transit power systems and mass transit passenger facilities, vehicles, equipment, and services.”

Section 2 of article XIX adds:

“Revenues from fees and taxes imposed by the state upon vehicles or their use or operation, over and above the costs of collection and any refunds authorized by law, shall be used for the following purposes:

“(a) The state administration and enforcement of laws regulating the use, operation, or registration of vehicles used upon the public streets and highways of this state, including the enforcement of traffic and vehicle laws by state agencies and the mitigation of the environmental effects of motor vehicle operation due to air and sound emissions.

“(b) The purposes specified in Section 1 of this article.”

The rules of construction applicable to the interpretation of statutes apply equally to the California Constitution. (*McMillan v. Siemon* (1940) 36 Cal.App.2d 721, 726.) In this connection, ballot arguments may be used to determine the intent of the voters in enacting a constitutional provision. (*Delaney v. Superior Court* (1990) 50 Cal.3d 785, 801-802.) The 1938 ballot pamphlet argument in favor of the enactment of the original version of article XXVI reads in relevant part:

“California motorists have been threatened many times with the misuse or diversion of moneys paid by them for the maintenance and development of routes for motor travel and for support of the Department of Motor Vehicles. The purpose of this amendment is forever to end such threats.”

Thus, the apparent intent of the voters in adopting article XXVI was to permanently prohibit the diversion of revenues from the gas tax and vehicle license and registration fees to purposes unrelated to the maintenance and development of highways. In this connection, statutory and

constitutional provisions “must be construed so as to give a reasonable and common-sense construction consistent with the apparent purpose and intention of the lawmakers – a construction that is practical rather than technical, and will lead to wise policy rather than mischief or absurdity. [Citation.]” (*People v. Martinsen* (1987) 193 Cal.App.3d 843, 848.)

The most reasonable interpretation of the restrictive provisions of article XIX is that the voters intended to set aside these revenues in a special fund, like a trust fund, to be used only for specified purposes.

Certain proceeds from vehicle fuel taxes are ultimately deposited in the Highway Users Tax Account in the Transportation Tax Fund for specified uses. (Rev. & Tax. Code, §§ 9303, 60652, subd. (b); Sts. & Hy. Code, § 2100, et seq.) After making specified apportionments or appropriations for those uses, the balance of the Highway Users Tax Account is transferred to the State Highway Account in the State Transportation Fund for expenditure on state highways (and their related public facilities for nonmotorized traffic) and for exclusive public mass transit guideway purposes. (Sts. & Hy. Code, § 2108.) The funds deposited in the State Highway Account are available for expenditure by the Department for those stated purposes. (Sts. & Hy. Code, § 182.) Property owned by the Department is usually acquired with funds from the State Highway Account which, as a special fund, is not available for any other purpose. (*Daugherty v. Riley* (1934) 1 Cal.2d 298, 309; *Kizziah v. Department of Transportation* (1981) 121 Cal.App.3d 11, 16.)

Because the voters clearly expressed their intention to restrict the use and prevent the diversion of moneys derived from motor vehicle fuel tax revenues, the State Highway Account is tantamount to a public trust fund. (38 Ops.Cal.Atty.Gen. 207, 210.) Here, property acquired by the Department with funds from the State Highway Account is clearly subject to the restrictions on the funds themselves. The California Supreme Court, applying fundamental principles of trust law, has observed: “Once it is made clear that the lands are held in trust, it necessarily follows that their proceeds, whether by sale or lease, are likewise subject to the trust. It would be manifestly absurd to say that although property is held in trust, none of the benefits of the trust accrue to the beneficiaries, and that none of the rents or profits of the trust property need be used in furtherance of the trust purposes.” (*Provident Land Corp. v. Zumwalt* (1938) 12 Cal.2d 365, 375.) This basic principle, that interest and accretions to a trust fund are subject to the same restrictions as the principal of the fund, is applicable to public trusts as well as private trusts. (*City of Long Beach v. Morse* (1947) 31 Cal.2d 254, 257-258.)

Further evidence that the lawmakers intended to restrict the use of income and accretions to property acquired with gas tax funds is contained in article XIX itself. Section 9 was added to article XIX in 1978 and reads:

“Notwithstanding any other provision of this Constitution, the Legislature, by statute, with respect to surplus state property acquired by the expenditure of tax revenues designated in Sections 1 and 2 and located in the coastal zone, may authorize the transfer of such property, for a consideration at least equal to the acquisition cost paid by the state to acquire the property, to the Department of Parks and Recreation for state park purposes, or to the Department of Fish and Game for the protection and preservation of fish and wildlife habitat, or to the Wildlife Conservation Board for purposes of the

Wildlife Conservation Law of 1947, or to the Coastal Conservancy for the preservation of agricultural lands.

“As used in this section, ‘coastal zone’ means ‘coastal zone’ as defined by Section 30103 of the Public Resources Code as such zone is described on January 1, 1977.” [Emphasis added.]

Had the Legislature, in recommending to California voters that section 9 be added to article XIX, believed that the property acquired with revenues specified in sections 1 or 2 could be sold at acquisition cost, there would have been no need to add the language underlined above.

More recently, the Legislature acknowledged the constitutional use restrictions placed on revenues from motor vehicle fuel taxes and license and registration fees by enacting Streets and Highways Code section 183.1, which authorizes money deposited into the State Highway Account that is not subject to article XIX to be used for any transportation purpose authorized by statute upon appropriation by the Legislature. For example, money derived from the rental of state property (which itself must be at a fair market rate) is not restricted to the uses set forth in article XIX. (See *Professional Engineers v. Wilson* (1998) 61 Cal.App.4th 1013, 1027, in which the Court of Appeal held that non-gas tax funds, such as rental income, are not subject to the restrictions of article XIX.)

Finally, the Legislature, clearly concerned about the constitutionality of enacting the Roberti Bill (Gov. Code, § 54235, et seq.), expressly included within Government Code section 54235 the following findings, all of which would have been unnecessary if article XIX did not require the Department to obtain fair market value for the sale of its excess land:

“...The Legislature finds and declares that actions of state agencies including the sales of surplus residential properties which result in the loss of decent and affordable housing for persons and families of low or moderate income is contrary to state housing, urban development, and environmental policies and is a significant environmental effect, within the meaning of Article XIX of the California Constitution, which will be mitigated by the sale of surplus residential property pursuant to the provisions of this article.

“The Legislature further finds and declares that the displacement of large numbers of persons as a result of the sale of surplus residential property owner by agencies of the state is a significant environmental effect, within the meaning of Article XIX of the California Constitution which will be mitigated by sale of such properties pursuant to the provisions of this article.

“...The Legislature further intends by this article to mitigate the environmental effects, within the meaning of Article XIX, of the California Constitution, caused by highway activities.”

After analyzing the intent of the voters in enacting the original version of article XIX, applying the fundamental principles of trust law, and considering the express actions of the Legislature in recommending amendments to article XIX and subsequently enacting statutes, the only reasonable and common sense construction of the restrictions of article XIX is that they apply as well to

interest, rents, other income and increases in value of all property acquired by the Department with funds from the State Highway Account.

Under the authority granted by section 118 of the Streets and Highways Code, the Department may sell its excess property in the manner and upon the terms, standards, and conditions established by the California Transportation Commission (CTC). The CTC has adopted Resolution G-98-22 requiring the Department to sell its excess property at fair market value. In implementing this policy, the CTC requires the Department to sell excess parcels to private parties by seeking competitive bids except in cases in which the sale to other than the adjoining owner would give rise to inconsistent land use development or loss of access. The Department may sell property directly to public agencies but only at fair market value and only for continued public use. None of the exceptions in Resolution G-98-22 to the competitive bid procedure authorize the Department to sell excess parcels at less than their fair market value.

The only constitutional exception to the requirement that the Department receive fair market value upon sale of its property is contained in article XIX itself. Section 9 of article XIX expressly permits the Legislature, by statute, to authorize the transfer of property acquired with restricted funds and located within the coastal zone to the Department of Parks and Recreation for state park purposes, to the Department of Fish and Game for the protection and preservation of fish and wildlife habitat, to the Wildlife Conservation Board for purposes of the Wildlife Conservation Law of 1947, or to the State Coastal Conservancy for the preservation of agricultural lands. All transfers made under section 9 must be for a consideration at least equal to the acquisition cost paid by the Department to acquire the property.

In *Citizens for Hatton Canyon v. Dept. of Transportation* (2003) 112 Cal.App.4th 838, a taxpayer group challenged the constitutionality of a statute directing the Department to transfer excess land to the Department of Parks and Recreation at its acquisition cost for use as a state park. Although the Court of Appeal upheld the validity of the statute based upon the Legislature's finding that the property was within the coastal zone, and therefore subject to article XIX, section 9, the Court acknowledged that "[s]ince 1938 there has been a constitutional prohibition in article XXVI of the California Constitution against the sale for less than fair market value of DOT properties acquired with tax fund revenues. The clear purpose of this provision is to protect the highway trust funds. Article XIX, section 9 of the California Constitution provides for an exception to this rule where the property is in the coastal zone and is sold for park purposes." (*Citizens for Hatton Canyon v. Dept. of Transportation, supra*, 112 Cal.App.4th 838, 843.)

Statutory Provisions Relating to the Sale of the Department's Excess Property

As mentioned above, the Roberti Bill (Gov. Code, § 54235, et seq.) does require the Department to sell certain specified surplus residential property at an affordable price, not less than the price paid for the original acquisition, to persons or families of low or moderate income. (Gov. Code, § 54237.) By its terms, the Roberti Bill currently applies only to surplus residential properties on Route 710 in Los Angeles County. Because its constitutionality has never been challenged, the Department is obligated to comply with the terms of the Roberti Bill. (Cal. Const., art. III, § 3.5.)

Section 14012 of the Government Code allows the Department to sell or lease excess parcels to local public agencies for public purposes and to accept as all or part of the consideration any

substantial benefits the state would receive as a result of the agency's undertaking maintenance or landscaping costs that would otherwise be the state's obligation. However, nothing in the language of this section requires or authorizes the Department to sell or lease its excess property at less than fair market value.

Other than the Roberti Bill, the only other actions of the Legislature requiring the Department to sell its excess property at less than fair market value have been occasional additions to budget legislation requiring the Department to sell specified parcels to specified public entities at specified prices.

Statutory Provisions Relating to the Rental or Leasing of the Department's Property

There are a number of statutes relating to the leasing of property acquired by the Department for transportation purposes. Section 104.6 of the Streets and Highways Code authorizes the Department to lease any land acquired for state highway purposes but not currently needed for construction. As set forth above, the Department is obligated to receive fair rental value for the leasing of this property. The only statutory exception to this rule is contained in Streets and Highways Code section 104.7 which requires the Department, if requested, to lease any unoccupied, unimproved property held for future use to a local public entity for agricultural or recreational purposes at the rate of one dollar per year for a one-year renewable term. The constitutionality of section 104.7 has not been challenged, and the Department is obligated to comply with its terms. (Cal.Const., art. III, § 3.5.)

Government Code section 14013 permits the Department to lease nonoperating right of way to local governmental entities for public purposes and to contribute toward the cost of developing local parks and other recreational facilities on that property. As all or part of the consideration for the lease or contribution, the Department may accept any substantial benefits the state will derive from the local entity's undertaking of maintenance or landscaping costs that would otherwise be the obligation of the state. However, nothing in the wording of section 14013 requires the Department to receive less than fair rental value.

Similarly, under section 104.15 of the Streets and Highways Code, the Department may lease to a local agency for park purposes any portion of acquired property remaining outside the boundary of the state highway improvement that will improve its view, appearance, light, air and usefulness. Terms and conditions for these leases must be prescribed by the CTC. By Resolution No. G-3, the CTC has authorized the Department to lease only those areas where the fair rental value substantially equals the value of the enhancement and benefit to the state highway and has permitted the Department in determining the rental rate to consider the benefits received by any maintenance or landscaping costs being undertaken by the lessee.

Within operating highway rights of way, section 104.12 of the Streets and Highways Code authorizes the Department to lease airspace (areas within highway rights of way and above and below state highways) in accordance with the procedures established by the CTC. Leases with private entities must be made only after competitive bidding unless the CTC finds that in certain cases competitive bidding would not be in the best interests of the state. The rent received by the

Department from these airspace leases must be at a fair market rate with two exceptions: (1) parking for authorized emergency vehicles while on duty and (2) accommodation of needed passenger, commuter or high-speed rail, magnetic levitation systems and other public mass transit facilities. (See CTC Resolutions No. G-02-14 and No. G-03-03.)

In addition, Streets and Highways Code sections 104.16, 104.17, 104.18 and 104.21 require the Department to lease specified parcels under freeways in San Francisco, San Joaquin, Santa Barbara and San Diego counties for emergency shelter or feeding program purposes for specified periods at a rate of one dollar per month plus lease administration costs. Streets and Highways Code section 104.19 requires the Department to continue to lease certain excess property in Los Angeles County to the Century Housing Corporation, a nonprofit corporation, for job training and placement purposes at the existing rent until June 30, 2028. Again, the constitutionality of these statutes has not been challenged.

Subject only to the stated statutory exceptions, the Department is required to receive fair rental value for its leased property.

California Constitution, article XVI, section 6

Most sales or leases of Department owned property at less than fair market value are also prohibited by article XVI, section 6, of the California Constitution. That section provides that the Legislature shall have no power to “make any gift or authorize the making of any gift, of any public money or thing of value to any individual, municipal or other corporation whatever....” As discussed above, the conveyance or rental of property at less than its fair market value constitutes a gift of a “thing of value” to the extent of the difference between its fair market value and the transfer price.

Not all transfers of money or property for inadequate or no consideration are treated as gifts prohibited by the Constitution. Appellate courts have long adopted the public purpose doctrine, permitting the disbursal of public funds so long as there is a “direct and substantial public purpose” and non-state entities are benefited only as an incident to the public purpose. (*California Housing Finance Agency v. Elliott* (1976) 17 Cal.3d 575, 583; *County of Alameda v. Janssen* (1940) 16 Cal.2d 276, 281.) However, in order to avoid the constitutional prohibition against gifts, the transfer must not only be for a public purpose, but it must also benefit generally the people within the transferring entity. (*City of Oakland v. Garrison* (1924) 194 Cal. 298, 304.) Thus, an expenditure of income from the sale of oil and gas produced from tide and submerged lands granted in trust to the City of Long Beach by the State of California for city storm drains, an incinerator, a public library, public hospitals, public parks, a fire alarm system, off-street parking, and city streets and highways was a gift of state funds in violation of the constitution. (*Mallon v. City of Long Beach* (1955) 44 Cal.2d 199, 211-213.) Similarly, in *Golden Gate Bridge etc. Dist. v. Luehring* (1970) 4 Cal.App.3d 204, 206, 214, the Court of Appeal, citing the Supreme Court’s holding in *Mallon*, ruled that a proposed payment of surplus revenues from the Golden Gate Bridge District to the governments of the counties within the district would be an unconstitutional diversion to an extraneous purpose (county general fund use) of public moneys raised for a limited purpose (transportation across the Golden Gate).

Revenues derived from taxes on motor vehicle fuels and the operation and use of motor vehicles are to be used for specified purposes. Any transfer of the principal or income from property originally purchased for the permitted uses would constitute an unconstitutional gift of state funds.

To the extent that it is not inconsistent with the United States Constitution, the California Constitution is the supreme law of this state. Article I, section 26, of the California Constitution states: "The provisions of this Constitution are mandatory and prohibitory, unless by express words they are declared to be otherwise." All sections of the Constitution are binding upon every department of state government whether executive, legislative or judicial, and all branches of government are required to comply with constitutional directives or prohibitions. (See, e.g., *Bauer-Schweitzer Malting Co. v. City and County of San Francisco* (1973) 8 Cal.3d 942, 946; *Sail'er Inn, Inc. v. Kirby* (1971) 5 Cal.3d 1, 8; *Leger v. Stockton Unified School Dist.* (1988) 202 Cal.App.3d 1448, 1454.) Every constitutional provision is self-executing, and everything done in violation of it is void. (*Oakland Paving Co. v. Hilton* (1886) 69 Cal. 479, 484; *Katzberg v. Regents of University of California* (2002) 29 Cal.4th 300, 306-307.)

For all of the above reasons, the Department asserts that the California Constitution prohibits the Department from selling or renting its property at less than fair market value.

If you have any questions or would like to discuss any aspect of this matter, please feel free to contact me.

Sincerely,



RICHARD B. WILLIAMS
Assistant Chief Counsel

cc Bruce A. Behrens, Chief Counsel
Rodney O. Lilyquist, Senior Assistant Attorney General

Mr. Marc Nolan
Deputy Attorney General
300 S. Spring Street
Los Angeles, CA 90013

Re: Opinion No. 07-801

Dear Mr. Nolan:

The California Transportation Commission appreciates this opportunity to comment on the request submitted by Assemblymember Anthony J. Portantino for an opinion on the question:

Does the Constitution prohibit the Department of Transportation (“Department”) from selling or disposing of excess property at less than fair market value?

The Commission is aware of the October 3, 2007, letter submitted by the Department. The Commission concurs in that letter’s analysis and conclusions.

When, in 1938, the voters approved Article XXVI to the Constitution (later renumbered as Article XIX), they made it clear that fuel taxes should be used for transportation purposes. As the Department points out in its letter, and as the Attorney General noted in a formal opinion, the proceeds of fuel taxes are in the nature of a trust. (See 38 Ops. Cal. Atty. Gen. 207.) If those proceeds are used to purchase property, that property is in effect held in trust. If that property later becomes excess, all the proceeds from the sale of the property likewise are subject to the conditions of the trust: i.e., the limitations set forth in what is now Article XIX, section 1, of the Constitution.

Article XIX, section 1, is part of the Constitution and can only be circumvented by another constitutional provision. Section 9 of Article XIX constitutes such a provision. It allows the sale of excess property for a price equal to the cost of acquisition of the property if the sale meets one of the enumerated conditions set forth in that section, regardless of any intervening change in the value of the property. That exception supports the conclusion that, except for those enumerated exceptions, all the proceeds from the sale of excess property which was originally acquired through the use of the proceeds of fuel taxes should be used only for purposes set forth in Article XIX.

It is true that Article XIX, section 1, permits the use of fuel tax proceeds for, among other things, “research, planning, construction, improvement, maintenance, and operation of public streets and highways (and their related public facilities for nonmotorized traffic), including the mitigation of *their* environmental effects.” (Emphasis added.) It is clear that use of fuel tax proceeds for environmental mitigation is restricted to environmental effects caused by those activities specifically enumerated in Article XIX, section 1. Since research and planning do not cause environmental effects, the environmental effects contemplated by Article XIX, section 1, are those that are caused by “construction,” “improvement,” “maintenance,” or “operation” of public streets and highways. Thus, use of fuel tax proceeds for environmental mitigation is

constitutional only if the use addresses the environmental effects caused by *construction, improvement, maintenance, or operation* of public streets or highways.

With regard to the Roberti Bill (Gov. Code §§ 54235 et seq.), that measure pertains to property acquired for purposes of completing Interstate Highway 710 through South Pasadena. (See Gov. C. § 54238.3.) That highway, however, has never been completed. If the Roberti Bill's references to "significant environmental effects" (see the Department's letter at page 4) are references to the environmental effects caused by the completion of Interstate Highway 710, the Commission fails to see how such effects could have been caused by a project that has never moved forward. This flaw in the Roberti Bill is fatal, since it assumed the existence of a project which has never gone forward and which, therefore, has not caused "highway activities" with "environmental effects."

If, on the other hand, the environmental effects are the result of something other than the construction of a transportation project, such as the mere sale of excess highway property, the Commission fails to see how those effects fall within the scope of Article XIX. The Roberti Bill refers to the environmental effects caused by the sales of surplus residential properties and the resulting displacement of large numbers of persons. (Gov. C. § 54235.) While the sale of surplus residential properties may result in the displacement of their occupants, and thereby might arguably cause an environmental effect, this environmental effect is not the type of environmental effect described in Article XIX, section 1. Neither the sale of surplus residential property, nor the displacement such a sale may cause, falls within the constitutional provision. It is neither construction, nor improvement, nor maintenance, nor operation of public streets or highways. Constitutionally, any mitigation of the environmental effects of the sales of surplus residential properties must be funded from other sources, and not from fuel tax revenues. Only the mitigation of environmental effects caused by construction, improvement, maintenance, or operation of public streets or highways is eligible for funding from fuel tax revenues.

Pursuant to Article III, section 3.5, of the Constitution, the Department and the Commission must act as if that legislation is constitutional unless and until an appellate court holds otherwise. Thus, the fact that properties acquired through the use of fuel tax proceeds were later sold for less than fair market value does not constitute any sort of precedent.

Based on the foregoing, the Commission urges the Attorney General to conclude that, in general, sales of property acquired through the use of proceeds of fuel taxes, as defined in Article XIX, section 1, must be at fair market value, excepting only those transactions described in Article XIX, section 9. With regard to the Roberti Bill, the Commission believes that measure's references to "environmental effects" represents an unwarranted and unjustified effort to interpret the reference to "environmental effects," in Article XIX, section 1, in a manner inconsistent with the intention of the voters and inconsistent with the limited scope of the environmental effects described in that constitutional provision.

Yours truly,