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ENTERED Jun 27 2011  
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JUN 27 2011  
CLERK, U.S. BANKRUPTCY COURT  
SOUTHERN DISTRICT OF CALIFORNIA  
BY \_\_\_\_\_ DEPUTY

# FOR PUBLICATION

## UNITED STATES BANKRUPTCY COURT SOUTHERN DISTRICT OF CALIFORNIA

<p><b>In re</b></p> <p><b>SOUTH BAY EXPRESSWAY, L.P. and CALIFORNIA TRANSPORTATION VENTURES, INC.,</b></p> <p style="text-align: center;"><b>Debtors.</b></p> <hr/> <p><b>SOUTH BAY EXPRESSWAY, L.P. and CALIFORNIA TRANSPORTATION VENTURES, INC.,</b></p> <p style="text-align: center;"><b>Plaintiffs,</b></p> <p style="text-align: center;"><b>v.</b></p> <p><b>COUNTY OF SAN DIEGO,</b></p> <p style="text-align: center;"><b>Defendants.</b></p>	<p>) <b>Chapter 11</b></p> <p>) <b>Case No. 10-04516-A11</b></p> <p>) <b>(Joint Administration Requested)</b></p> <p>) <b>Adv. No. 10-90497-A11</b></p> <p>) <b>MEMORANDUM DECISION ON MOTION FOR JUDGMENT ON THE PLEADINGS</b></p>
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### I. INTRODUCTION

South Bay Expressway, L.P. and California Transportation Ventures, Inc. (collectively "Debtor") filed this adversary proceeding against the County of San Diego ("County"), seeking recovery of almost \$14 million in property taxes paid to the County between 2007-2010 and ordering the County to assess no further

1 taxes on its property.<sup>1</sup> The Debtor's property is a possessory leasehold interest in  
2 a California Streets and Highways Code § 143<sup>2</sup> privately-financed transportation  
3 demonstration project consisting of the toll road portion of State Route 125,  
4 commonly known as the South Bay Expressway (the "SR 125 Toll Road").

5 The Debtor asserts that § 143(o) deems its leasehold interest to be public  
6 property exempt from taxation. Accordingly, the Debtor has filed this motion for  
7 judgment on the pleadings pursuant to Fed. R. Civ. P. 12(c) and Fed. R. Bankr.  
8 P. 7012(b), seeking a declaration that all taxes assessed against its leasehold  
9 interest are void as a matter of law, and that the County may not assess further  
10 taxes against its leasehold interest.

11 The County opposes the motion and requests entry of a judgment in its  
12 favor, asserting that the tax exemption created in § 143(o) is unconstitutional  
13 under Article XIII of the California Constitution ("Constitution"). Because the  
14 County's opposition raised a constitutional challenge and the Attorney General for  
15 the State of California ("Attorney General") had not been apprised of this issue,  
16 the hearing on the motion was continued to give notice of the constitutional  
17 challenge to the Attorney General in compliance with Fed. R. Civ. P. 5.1(a) and  
18 (b) and Fed. R. Bankr. P. 9005.1. The Attorney General, through the California  
19 Department of Transportation ("Caltrans"), has now intervened and filed a  
20 statement in opposition, arguing that § 143(o) does not apply to the Debtor's  
21 leasehold interest so there is no need to reach the constitutional issue.

22 Alternatively, Caltrans argues the Court's ruling of unconstitutionality should be  
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26 <sup>1</sup> The complaint is entitled: "Complaint to Recover Tax Overpayments From County of San  
27 Diego, California Pursuant to F.R.B.P. 7001(1)."

28 <sup>2</sup> Hereinafter, all section references shall refer to the California Streets and Highways Code,  
unless otherwise specified.

1 limited to the statute as applied to the Debtor's leasehold interest.<sup>3</sup>

2 For the reasons more fully set forth below, this Court finds § 143(o) applies  
3 to the Debtor's leasehold interest, but that it is facially unconstitutional.

4 Accordingly, it denies the Debtor's motion and enters judgment in favor of the  
5 County.

6 **II.**

7 **FACTUAL BACKGROUND**

8 **A. Case History.**

9 In January, 1991, the Debtor and Caltrans entered into a Development  
10 Franchise Agreement pursuant to § 143 ("DFA") for the private financing,  
11 development and construction of the SR 125 Toll Road spanning from Spring  
12 Valley to the border crossing at Otay Mesa. The DFA provided that the Debtor  
13 would obtain certain environmental clearances; acquire certain real property in the  
14 County of San Diego; design and construct the SR 125 Toll Road thereon through  
15 private financing; and, upon completion, the Debtor would transfer the land and  
16 the SR 125 Toll Road to Caltrans. Additionally, the DFA provided that, on or  
17 after the transfer date, Caltrans and the Debtor would execute a lease granting to  
18 Debtor the exclusive right to operate and collect tolls for the use of the SR 125  
19 Toll Road for a period of 35 years. The DFA provided that the lease agreement  
20 would be substantially in the form attached thereto as Exhibit B.

21 The Debtor obtained the private financing to develop and construct the SR  
22 125 Toll Road. It encountered many delays and other problems during the  
23 development and construction phases, which are not germane to this opinion.  
24 Upon completion to the apparent satisfaction of Caltrans, the SR 125 Toll Road  
25

26 \_\_\_\_\_  
27 <sup>3</sup> Caltrans does not dispute that application of § 143(o) is unconstitutional as applied to  
28 Debtor's leasehold interest. However, it opposes a ruling that § 143(o) is facially unconstitutional.

1 opened for public use and, on November 16, 2007, Caltrans and Debtor executed  
2 the SR 125 Toll Road lease (“Toll Road Lease”). The Debtor’s operation of the  
3 SR 125 Toll Road was not as profitable as projected. Further, the Debtor became  
4 embroiled in substantial litigation which drained its limited assets.

5 On March 22, 2010, the Debtor filed these administratively consolidated  
6 chapter 11 bankruptcy cases to stay the litigation, determine lien priorities and  
7 restructure its indebtedness. The Debtor commenced an adversary proceeding  
8 against its senior lenders and mechanic’s lien claimants, and filed a motion for  
9 summary judgment to determine the validity and priority of its liens against the SR  
10 125 Toll Road.

11 The Debtor’s motion for summary judgment argued that the mechanic’s  
12 liens asserted against the SR 125 Toll Road were invalid as a matter of law  
13 because mechanic’s liens cannot be asserted against public property. The Debtor  
14 argued the SR 125 Toll Road was public property because § 143(b) deems it to be  
15 state-owned, and § 143(o) deems the Toll Road Lease to be public property  
16 exempt from taxation. The Court denied the motion and granted summary  
17 judgment in favor of the mechanic’s lien claimants, holding the Debtor owned a  
18 variety of distinct, private real property interests in public property arising from  
19 the DFA and the Toll Road Lease, which are not public property. *In re South Bay*  
20 *Expressway, L.P.*, 434 B.R. 589, 593 (Bankr. S.D. Cal. 2010).

21 Thereafter, the Debtor negotiated with its senior lenders, and it reached a  
22 global settlement resolving the lien priority dispute and the pending litigation. On  
23 April 14, 2011, the Court confirmed the Debtor’s Third Amended Joint Plan of  
24 Reorganization, and approved the global settlement with the support of all major  
25 creditor constituencies.

26 The Debtor also commenced this adversary proceeding against the County  
27 to recover the approximately \$14 million in property taxes already paid, and to  
28 prohibit the County from assessing further taxes against the Toll Road Lease. The

1 hearing on the motion was continued to allow the Attorney General to weigh in on  
2 the County's constitutional challenge to § 143(o).

3 **B. History of Streets and Highways Code § 143.**

4 In 1989, the California Legislature enacted emergency legislation  
5 authorizing Caltrans to enter into experimental agreements with four private  
6 developers to privately finance, design, construct, and "operate and lease-back",  
7 public transportation facilities to solve the State's urgent transportation needs due  
8 to the State's lack of public revenue. A.B. 680, 1989-90 Leg., 8740 Sess. (Ca.  
9 1989)("A.B. 680"). Section 2 of A.B. 680 was codified as Streets and Highways  
10 Code § 143. It provided in pertinent part:

11 (a) [Caltrans] may solicit proposals and enter into agreements with  
12 private entities ... for the construction by, and lease to, private entities  
13 of four **public transportation demonstration projects** ....

14 (b) For the purpose of facilitating those projects, the agreements  
15 may include provisions for the lease of rights-of-way in, and airspace  
16 over or under, state highways, for the granting of necessary  
17 easements, and for the issuance of permits or other authorizations to  
18 enable the private entity to construct transportation facilities  
19 supplemental to existing state-owned transportation facilities.  
**Facilities constructed by a private entity pursuant to this section  
shall, at all times, be owned by the state. The agreement shall  
provide for the lease of those facilities to the private entity for up  
to 35 years.** In consideration therefor, the agreement shall provide for  
complete reversion of the privately constructed facility to the state at  
the expiration of the lease at no charge to the state.

20 (Emphasis added.) The 1989 version of § 143 was silent on the issue of taxes, as  
21 were the 1990 and 2002 amendments to this section.

22 In 2006, the Legislature enacted Assembly Bill 521 ("A.B. 521") making  
23 significant amendments to § 143, including the addition of § 143(i),<sup>4</sup> providing:

24 **A lease to a private entity pursuant to this section is deemed to be**  
25 **public property** for a public purpose and exempt from leasehold, real  
26 property, and ad valorem taxation ....

27  
28 <sup>4</sup> Subsection (i) became subsection (o) of § 143, by subsequent amendment.

1 A.B. 521, 2005-06 Leg., 2155 Sess. (Ca. 2006)(emphasis added). Additionally, by  
2 separate bill, the Legislature enacted Senate Bill 463 ("S.B. 463") adding § 143.1  
3 solely regarding the SR 125 Toll Road. The purpose of § 143.1 was to authorize  
4 an amendment to the DFA and the Toll Road Lease to allow the Debtor to collect  
5 tolls for a 45-year period instead of a 35-year period, and, upon conclusion of the  
6 45-year period, to authorize SANDAG to collect tolls thereafter under specified  
7 terms and conditions. S.B. 463, 2005-06 Leg., 2155 Sess. (Ca. 2006). Section  
8 143.1(a)(3) specifies that, except for amendments to the DFA consistent with  
9 § 143.1, the DFA shall remain in full force and effect and the parties' rights are  
10 not modified.

11 In 2007, the Legislature made further amendments to § 143, and in 2009  
12 this section went through another significant amendment. Both amendments  
13 continued the language in § 143(o) as it was enacted in 2006.

#### 14 **C. Other Relevant Facts.**

15 It is undisputed that the DFA was entered into when § 143 was silent on the  
16 issue of taxes. It is also undisputed the Toll Road Lease was executed in 2007  
17 *after* the Legislature added the public property tax exemption in § 143(o).  
18 Although the Toll Road Lease is similar to the form of lease contemplated by  
19 Exhibit B to the DFA, its language is not identical. [Mot. J. Hr'g T. 20:14-20,  
20 May 18, 2011]

### 21 **III.**

### 22 **ISSUES**

- 23 1. Whether Streets and Highways Code § 143(o) applies to the Toll Road  
24 Lease?
- 25 2. Whether the tax exemption created by Streets and Highways Code  
26 § 143(o) is unconstitutional?
- 27 3. Whether § 143(o) is unconstitutional only as applied to the Toll Road  
28

1 Lease?

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3 **IV.**

4 **LEGAL ANALYSIS**

5 The issue presented by the motion is the constitutionality of the public  
6 property tax exemption created by Streets and Highways Code § 143(o). If the tax  
7 exemption in § 143(o) is constitutional, Debtor is entitled to the relief requested by  
8 its motion. If it is unconstitutional, then the County is entitled to a cross-judgment  
9 in its favor. However, the Court is mindful that constitutional challenges are  
10 disfavored. The principle of judicial restraint requires a court to avoid ruling on  
11 the constitutionality of a statute if another basis for the decision is possible.  
12 *Sanchez v. City of Modesto*, 145 Cal. App. 4th 660, 671 (2006). Caltrans' request  
13 for a ruling that § 143(o) does not apply to the Toll Road Lease is, in essence, a  
14 request to exercise judicial restraint.

15 **A. Whether Streets and Highways Code § 143(o) Applies to the Toll  
16 Road Lease.**

17 Caltrans contends that § 143(o) does not apply retrospectively to leases  
18 entered into pursuant to design franchise agreements executed before § 143(o)  
19 became effective. It relies upon the basic canon of statutory interpretation that a  
20 statute does not operate retrospectively unless the Legislature plainly intended it  
21 to do so. *Western Security Bank v. Superior Court*, 15 Cal. 4th 232, 243 (1997).  
22 A statute has retrospective effect if it “substantially changes the legal  
23 consequences of past events.” *Western Security Bank*, 15 Cal. 4th at 243.

24 According to Caltrans, application of § 143(o) to the Toll Road Lease would  
25 be retrospective because it would substantially change the legal consequences of  
26 the DFA. Caltrans does not explain *how* the legal consequences of the DFA  
27 would substantially change if § 143(o) were applied to the Toll Road Lease.  
28 Rather, it argues that the terms of the DFA do not comply with the current version  
of § 143 because the current version contemplates a broader variety of projects

1 and contains more burdensome procedural requirements to award a contract. It  
2 also argues the SR 125 Toll Road project is not contemplated under the current  
3 statute.<sup>5</sup>

4 Caltrans' arguments do not make sense. There is no need for the current  
5 version of § 143 to contemplate awarding the SR 125 Toll Road project since  
6 Caltrans had already awarded it to the Debtor. Further, as explained by *Western*  
7 *Security Bank*, a statute does not operate retrospectively simply because its  
8 application depends on facts or conditions in existence before its enactment. *Id.* at  
9 243. It explains that a statute that *clarifies*, rather than changes, existing law does  
10 not operate retrospectively even if applied to transactions predating its enactment.  
11 *Id.* Thus, if the surrounding facts and circumstances indicate the Legislature  
12 amended a statute in an effort to clarify a statute's true meaning, there is no  
13 retrospective effect because the true meaning of the statute remains the same. *Id.*

14 Caltrans has not considered that § 143(o) merely clarified the Legislature's  
15 existing intent to treat the § 143 transportation facilities, including the Lease, as  
16 public property for the purpose of exempting them from taxation. The 1989, 1990  
17 and 2002 versions of Streets and Highways Code § 143(b) expressly provided:  
18 "Facilities constructed by a private entity pursuant to this section shall, at all  
19 times, be owned by the state." All three versions deemed the facilities to be public  
20 property. Logically, they were silent on the issue of taxes because public property  
21 is automatically tax exempt under Article XIII of the Constitution.

22 The preamble to the 2006 amendment to § 143 confirms that § 143(o) was  
23 likely a clarification. The preamble declares that the amendment modifies the  
24 existing procedures for the Legislature to approve or reject a negotiated lease, but  
25 it is silent about a modification of existing law to make the lease tax exempt. *See*  
26 A.B. 521, 2005-06 Leg., 2155 Sess. (Ca. 2006).

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28 <sup>5</sup> Caltrans presented no evidence in support of these arguments.

1           Regardless, application of § 143(o) to the Toll Road Lease is not  
2 retrospective. Section 143(o) speaks to “a lease to a private entity,” not design  
3 franchise agreements. It deems “a lease to a private entity” entered pursuant to  
4 § 143(o) to be “public property” exempt from taxation. A fundamental rule of  
5 statutory construction is that a court must first look to the words of the statute  
6 itself to ascertain legislative intent. *Transamerica Occidental Life Ins. Co. v. State*  
7 *Bd. of Equalization*, 232 Cal. App. 3d 1048, 1056 (1991). Where the statutory  
8 language is clear and unambiguous, there is no need to turn to the legislative  
9 history, and the sole function of the courts is to enforce the statute as written.  
10 *Transamerica Occidental*, 232 Cal. App. 3d at 1056. Here, no one has contended  
11 there is anything unclear or ambiguous about “a lease to a private entity.” The  
12 Toll Road Lease is “a lease to a private entity” entered pursuant to § 143 after the  
13 enactment of § 143(o). The plain language in § 143(o) deems it to be public  
14 property for a public purpose exempt from taxation, applying the statute  
15 *prospectively*.

16           Further, the Court does not agree that the Toll Road Lease is “part and  
17 parcel” of the earlier DFA. Although the agreements are related, the Toll Road  
18 Lease is a separate agreement entered into in 2007. Any reasonable construction  
19 of the DFA is that the Debtor’s right to the Toll Road Lease depended upon its  
20 satisfaction of several conditions, most obviously, completion of SR 125 Toll  
21 Road using private financing and transferring the underlying land to Caltrans.  
22 The DFA had a copy of the contemplated form of lease attached, but it was not  
23 executed and its terms remained subject to change.

24           Nothing in the Court’s earlier *In re South Bay Expressway* opinion alters its  
25 conclusion that the DFA and Toll Road Lease are separate agreements. In a  
26 completely different factual context, the Court stated that execution of the DFA  
27 vested the Debtor with a bundle of private property rights, including the right to  
28 enter into the 35-year lease, against which mechanic’s liens could attach. *South*

1 *Bay Expressway*, 434 B.R. at 600. The Court did not examine the conditions  
2 precedent to executing the Toll Road Lease because they were not germane to that  
3 opinion. The Court rejected the argument that the enactment of § 143(o) caused  
4 the Debtor's distinct private property rights to become public property, instead  
5 construing § 143(o) as speaking to an exemption for *purposes of taxation*. *Id.* at  
6 600 (emphasis in original). The Court recognized that, in the absence of a  
7 statutory tax exemption, Debtor's private leasehold interest would be subject to  
8 taxation the same as any other private real property interest. *Id.* However, the  
9 Court had no reason to consider the constitutionality of this statutory tax  
10 exemption, or whether this statutory tax exemption was truly new or merely  
11 intended to clarify the Legislature's prior intentions.

12 Finally, the Court does not believe that Streets and Highways Code § 143.1  
13 has any relevance to this dispute.<sup>6</sup> Section 143.1 is the result of a bill introduced  
14 in the Senate as S.B. 463, and enacted in 2006. Section 143(o) was part of a  
15 separate bill introduced in the Assembly as A.B. 521, also enacted in 2006.  
16 Section 143.1 is project-specific. Its purpose is to extend the time period for the  
17 Debtor's collection of tolls from 35 years to 45 years, and to authorize SANDAG  
18 to collect tolls thereafter under certain terms and conditions.

19 Section 143.1(a)(3) specifies that, except for these authorized amendments  
20 to the DFA and the Toll Road Lease, the parties' rights are not modified. From  
21 § 143.1(a)(3), Caltrans seems to argue that if the Legislature had intended the  
22 § 143(o) tax exemption to apply to the Toll Road Lease, it would have said so in  
23 § 143.1. The Court does not agree. By placing the tax exemption in § 143(o), the  
24 Legislature applied it to all leases to private entities entered pursuant to § 143, not  
25 just the Toll Road Lease.

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28 <sup>6</sup> Caltrans raised this issue for the first time in oral argument at the continued hearing.

1           **B.     Whether the Tax Exemption Created by Streets and Highways**  
2           **Code § 143(o) is Unconstitutional?**

3           The next question is the constitutionality of § 143(o). The Court’s analysis  
4 must start with the Constitution itself. Article XIII, § 1(a) of the Constitution  
5 expresses a clear mandate that all property must be taxed, except as declared in the  
6 Constitution itself or by the laws of the United States.<sup>7</sup> *Lundberg v. Alameda*  
7 *County*, 46 Cal. 2d 644, 648 (1956); *Lucas v. County of Monterey*, 65 Cal. App. 3d  
8 947, 952 (1977).

9           Article XIII, § 3 of the Constitution lists the property that is mandatorily tax  
10 exempt. These tax exemptions are self-executing, meaning that they require no  
11 legislative action to permit the tax exemption. *Sutter Hospital of Sacramento v.*  
12 *City of Sacramento*, 39 Cal. 2d 33, 35 (1952). The property includes: “[p]roperty  
13 owned by the State” [§ 3(a)]; and “[p]roperty owned by a local government....”  
14 [§ 3(b)]. Additionally, Article XIII, § 3 exempts certain property that is used for  
15 public purposes such as property used for libraries and museums that are free and  
16 open to the public [§ 3(d)]; property used for public schools, community and state  
17 colleges, and state universities [§ 3(d)]; buildings, land and equipment used  
18 exclusively for educational purposes by a nonprofit institution [§ 3(e)]; and  
19 buildings, land and equipment used exclusively for religious worship [§ 3(f)].  
20 Article XIII, § 3 also exempts certain other property for public policy reasons,  
21 such as cemeteries, growing crops, designated trees, dwellings, certain vessels,  
22 certain personal property, a debt secured by land, and certain property of armed  
23 services personnel and veterans [§§ 3(g)-(p)].

24           Article XIII, § 4 of the Constitution lists the property that the Legislature  
25 may choose to exempt from taxation, either in whole or in part. Because the tax  
26 exemptions in Article XIII, § 4 are permissive in nature, legislative action is

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28           <sup>7</sup> There is no federal law at issue in this dispute.

1 required in order to put into effect an exemption for this property. *Sutter*  
2 *Hospital*, 39 Cal. 2d at 35. The property includes: the home of a disabled veteran  
3 [§ 4(a)]; property used exclusively for religious, hospital or charitable purposes  
4 [§ 4(b)]; property owned by four named educational and charitable institutions  
5 [§ 4 (c)]; and real property used for parking lots for religious institutions exempt  
6 under Article XIII, § 3(f) [§ 4 (d)]. Except for the constitutionally authorized  
7 exemptions, it is beyond the power of the Legislature to enact legislation  
8 exempting from taxation anything capable of private ownership. *Crocker v. Scott*,  
9 149 Cal. 575, 583-84 (1906).

10 The Debtor does not contend that the Legislature invoked its permissive  
11 authority in Article XIII, § 4 of the Constitution in enacting § 143(o). The  
12 Debtor's position is that the Legislature enacted § 143(o) to *clarify* the "public  
13 property" tax exemption in Article XIII, § 3.<sup>8</sup> The Debtor contends that § 143(o)  
14 clarifies that a private leasehold interest in a § 143 transportation demonstration  
15 project is "public property" exempt from taxation because it is used for a public  
16 purpose. Thus, § 143(o) implements the constitutional mandate in Article XIII,  
17 § 3 that "public property" is exempt from taxation.

18 The Court recognizes that it must tread carefully in second guessing the  
19 validity of legislative actions. It must apply the well-settled rule that "[i]n  
20 considering the constitutionality of a legislative act [the court will] presume its  
21 validity, resolving all doubts in favor of the Act. Unless conflict with a provision  
22 of the state or federal Constitution is clear and unquestionable, [the court] must  
23 uphold the Act ...' " *Mission Housing Development Co. v. City and County of San*  
24 *Francisco*, 59 Cal. App. 4th 55, 78-79 (1997) (citation omitted).

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27 <sup>8</sup> The Debtor did not indicate which provision in Article XIII, § 3, the Legislature was  
28 clarifying, but § 3(a) – exempting "[p]roperty owned by the State" – is the only provision that would  
factually apply.

1 Further, there is also a “strong presumption in favor of the Legislature’s  
2 interpretation of a provision of the Constitution.” *Methodist Hosp. of Sacramento*  
3 *v. Saylor*, 5 Cal. 3d 685, 692 (1971). Where the language of the Constitution is  
4 doubtful or obscure in meaning, or is capable of various interpretations, the  
5 Legislature’s construction of the language is presumptively constitutional. *Saylor*,  
6 5 Cal. 3d at 692-93. However, where there is an unmistakable conflict between  
7 the statute and the Constitution, the statute is unconstitutional and, therefore, void.  
8 *Id.*

9 The Court is not persuaded that § 143(o) merely clarifies the meaning of  
10 Article XIII, § 3(a) of the Constitution. The rules of construction and  
11 interpretation that are applicable to statutes also apply in interpreting  
12 constitutional provisions. Thus, the court’s primary task is to determine the  
13 enacting body’s intent. *Delaney v. Superior Court*, 50 Cal. 3d 785, 798 (1990).  
14 To determine intent, a court must first turn to the words themselves for the answer.  
15 *Delaney*, 50 Cal. 3d at 798. Where the words in a constitutional provision are  
16 clear and unambiguous, the plain meaning governs and there is no room for  
17 construction, nor is it necessary to resort to indicia of the intent of the Legislature  
18 (in the case of a statute), or of the voters (in the case of a constitutional provision  
19 adopted by the voters), to determine meaning. *Id.* at 798; *Silicon Valley*  
20 *Taxpayers Ass’n, Inc. v. Santa Clara County Open Space Authority*, 44 Cal. 4th  
21 431, 444-45 (2008).

22 Here, the Debtor has not addressed *why* the language in Article XIII, § 3(a)  
23 needs a statute to clarify its meaning.<sup>9</sup> Nor has the Debtor offered any extrinsic  
24 evidence of the enacting body’s intent in drafting the language in Article XIII,  
25 § 3(a). Likewise, the Court has not found any authority finding the phrases  
26 “public property” or “property owned by the State” unclear or ambiguous in their  
27

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28 <sup>9</sup> Again, Article XIII, § 3(a) is the only provision that could factually apply.

1 meaning.<sup>10</sup> Finally, the Court does not agree that § 143(o) was necessary to  
2 implement Article XIII, § 3 because these exemptions are self-executing.<sup>11</sup>

3 Rather, the Legislature enacted § 143(o) to expand meaning of “public  
4 property” to include private leases of § 143 public transportation demonstration  
5 facilities because it wanted to insulate these leases from the burdens of taxation  
6 since they serve a public purpose. The Legislature’s act of reclassifying these  
7 privately-owned leases as “public property” in order to relieve them from the  
8 burdens of taxation is “positively and certainly” in conflict with the Constitution  
9 because the Constitution does not authorize an exemption for this type of a  
10 privately-owned property interest. *See Saylor*, 5 Cal. 3d at 691. It is well settled  
11 that the Constitution mandates that all property capable of private ownership must  
12 be taxed; it restricts the Legislature’s power to grant tax exemptions, except as  
13 authorized by the Constitution itself. *Crocker v. Scott*, 149 Cal. 575, 583-84  
14 (1906); *Connolly v. County of Orange*, 1 Cal. 4th at n. 14.

15 The Debtor’s cited cases are inapposite. They involved taxation of a public  
16 entity, or a tax exemption authorized by the Constitution itself. *E.g., Lundberg v.*  
17 *Alameda County*, 46 Cal. 2d 644, 651 (1956) (upholding a statutory tax exemption

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18  
19 <sup>10</sup> To the contrary, California Revenue and Taxation Code § 202(a)(4) defers to the  
20 Constitution, providing that: the exemption of “property belonging to this state, a county, or a city”  
21 is “as specified” in Article XIII, §§ 3(a) and (b) of the Constitution. California Civil Code § 669  
22 provides: “OWNER. All property has an owner, whether that owner is the State, and the property  
23 public, or the owner an individual, and the property private.” Black’s Law Dictionary defines public  
24 property as: “State-or-community-owned property not restricted to any one individual’s use or  
25 possession.” (9th ed. 2009); *accord* 58 Cal. Jur. 3d, *State of California*, § 55 (May 2011) (explaining  
that all property within the limits of this State, which does not belong to any person, belongs to the  
people, and whenever the title to any property fails for want of a private owner, it reverts to the  
people.) Thus, the Court’s research confirms the obvious: the phrases “public property” and  
“property owned by the State” exclude privately-owned property interests.

26 <sup>11</sup> The Legislature has enacted Revenue and Taxation Code § 202(a) (4) exempting public  
27 property from taxation “as specified” in Article XIII, § 3(a) and (b) of the Constitution. Although  
28 unnecessary, this statute is valid since the scope of the exemptions are “no broader than” those  
authorized by Article XIII, §§ 3(a) and (b) of the Constitution. *See Connolly v. County of Orange*,  
1 Cal. 4th 1105, 1119 n. 14 (1992).

1 for property used for charitable purposes since Article XIII of the Constitution  
2 empowered the Legislature to grant the exemption); *Anderson v. Cottonwood Irr.*  
3 *Dist. v. Klukkert*, 13 Cal. 2d 191, 197-98 (1939) (invalidating taxes assessed  
4 against a governmental entity for its use of public property); and *Gaspard v.*  
5 *Edwin LeBaron, Inc.*, 107 Cal. App. 2d 356, 359-60 (1951) (holding that  
6 plaintiff's tax deed did not include a strip of land that had been formally dedicated  
7 and accepted for use as a public road since it was not privately owned, so no one  
8 owed the taxes).

9 Likewise, *City of Oakland v. Albers Bros. Milling Co.*, 43 Cal. App. 191  
10 (1919) is distinguishable. In that case, the city sought to collect from the private  
11 developer taxes levied against the improvements the developer had constructed on  
12 public land. 43 Cal. App. at 192. The city had leased the public land to the  
13 developer to construct the improvements, and the lease permitted the developer to  
14 operate the improvements and collect revenues. *Id.* Critically, the lease  
15 contained an express provision that the "[improvements] when so constructed shall  
16 become and remain the property of the lessor." *Id.* The court addressed the "sole  
17 question" of whether the city could tax the developer for the improvements. *Id.*  
18 The court held the city could not tax the developer because the developer did not  
19 own the improvements since they were expressly owned by city. *Id.* at 193.

20 Here, the County is taxing the Debtor's possessory leasehold interest, not  
21 the publicly-owned SR 125 Toll Road. There is a long line of California Supreme  
22 Court authority holding that a private entity's possessory interest in public  
23 property is private property, and is subject to taxation. *Connolly*, 1 Cal. 4th at  
24 1117-118 (1992); *Texas Co. v. Los Angeles County*, 52 Cal. 2d 55, 63 (1959);  
25 *Kaiser Co. v. Reid*, 30 Cal. 2d 610, 618 (1947); *San Pedro, L.A. & S.L.R. Co. v.*  
26 *City of Los Angeles*, 180 Cal. 18, 22 (1919); *State v. Moore*, 12 Cal. 56, 71 (1859)  
27 (Terry, J., concurring).

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1                   **C.    Whether § 143(o) is Unconstitutional Only As Applied to This**  
2                   **Lease?**

3                   Finally, the Court must consider whether § 143(o) is unconstitutional only  
4 as applied to the Toll Road Lease. In determining issues of constitutionality, a  
5 court must presume that the Legislature understood its constitutional limits in  
6 passing a law, and it intended circumstances in which the law would be  
7 constitutional. *See Korea Supply Co. v. Lockheed Martin Corp.*, 29 Cal. 4th 1134,  
8 1146 (2003). Thus, a court should refrain from declaring a statute facially  
9 unconstitutional unless the statute is in total conflict with the Constitution, and its  
10 scope cannot be limited except by rewriting the statute. *Rupf v. Yan*, 85 Cal. App.  
11 4th 411, 423-24 (2000). A statute should not be set aside based upon any unclear  
12 or uncertain meaning to be given to the Constitution. *Van Harlingen v. Doyle*, 134  
13 Cal. 53, 56 (1901). “But where [a statute’s] infraction is clear and unmistakable,  
14 the duty of the court is plain, and should be fearlessly performed.” *Van Harlingen*,  
15 134 Cal. at 56.

16                   In this case, Caltrans believes that § 143(o) could be constitutionally applied  
17 to certain projects authorized under the current version of § 143. It argues that the  
18 leases for certain projects may be structured so that they would not rise to the level  
19 of a taxable property interest. It speculates that a developer could complete a  
20 project where no tolls are collected, and the State would repay the developer for its  
21 investment over time, using public funds, and pay the developer to operate the  
22 project so that the facility would be open to the public.

23                   Although § 143 has been amended, the text in § 143(o) remains unchanged.  
24 On its face, § 143(o) continues to speak only to “a lease to a private entity.” A  
25 privately-owned lease cannot be public property as a matter of law. The  
26 distinguishing characteristics of a leasehold estate are that the lease gives the  
27 lessee the exclusive right to possession of the premises against all the world,  
28 including the owner, for a limited and ascertained period of time. *Howard v.*



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Although the Constitution authorizes tax exemptions for certain private property interests for various public policy reasons, a lease to a private entity of a § 143(o) transportation demonstration project is not listed. Accordingly, the Court concludes that the Legislature’s act of reclassifying this private property interest to be public property in order to escape the Constitutional mandate of taxation is “positively and certainly” in conflict with the Constitution. Because § 143(o) is unconstitutional, the Court denies the Debtor’s motion for judgment on the pleadings and enters cross-judgment in favor of the County.

This Court’s ruling involves an issue of first impression, and matters of public importance which implicate important questions of California law. The Court has concurrently prepared a judgment in accordance with this Memorandum Decision, and it will enter an order certifying the appeal directly to the Ninth Circuit pursuant to 28 U.S.C. § 158(d)(2) and Bankruptcy Rule 8001, upon appropriate motion or stipulation presented at the time a Notice of Appeal is filed.

Dated: 27 June 2011



LOUISE DE CARL ADLER, JUDGE