



BOARD OF DIRECTORS 2021

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SPECIAL MEETING / BOARD STUDY SESSION

PENINSULA CORRIDOR JOINT POWERS BOARD

Due to COVID-19, this meeting will be conducted via teleconference only (no physical location) pursuant to the [Governor's Executive Orders N-25-20 and N-29-20](#).

Directors, staff and the public may participate remotely via Zoom at <https://us06web.zoom.us/j/82535051693?pwd=VFBqRDgvMFVLUHpSWm5jb2F5NCtsUT09> or by entering Webinar ID: **825 3505 1693**, Passcode: **715195** in the Zoom app for audio/visual capability or by calling 1-669-900-6833 (enter webinar ID and press # when prompted for participant ID) for audio only. The video live stream will be available after the meeting at <http://www.caltrain.com/about/bod/video.html>

Public Comments: Members of the public are encouraged to participate remotely. Public comments may be submitted to publiccomment@caltrain.com prior to the meeting's call to order so that they can be sent to the Board as soon as possible, while those received during or after an agenda item is heard will be included into the Board's weekly correspondence and posted online at http://www.caltrain.com/about/bod/Board_of_Directors_Meeting_Calendar.html.

Oral public comments will also be accepted during the meeting through *Zoom or via the teleconference number listed above. Public comments on individual agenda items are limited to one per person PER AGENDA ITEM. Use the Raise Hand feature to request to speak. For public participants calling in, dial *67 if you do not want your telephone number to appear on the live broadcast. Callers may dial *9 to use the Raise the Hand feature for public comment and press *6 to accept being unmuted when recognized to speak for two minutes or less. Each commenter will be automatically notified when they are unmuted to speak for two minutes or less. The Board Chair shall have the discretion to manage the Public Comment process in a manner that achieves the purpose of public communication and assures the orderly conduct of the meeting.

Thursday, September 30, 2021

9:00am – 1:00pm

1. Call to Order/Roll Call
2. Caltrain Governance Special Meeting #5 (including governance process updates; re-cap and refinement of self-directed options; approach to developing a governance recommendation; and next steps)
 - PRESENTATION & DISCUSSION – James Harrison, Sebastian Petty, Howard Permut, Katie Miller

➤ BOARD GUIDANCE AND DIRECTION

3. Adjourn

INFORMATION FOR THE PUBLIC

All items appearing on the agenda are subject to action by the Board. Staff recommendations are subject to change by the Board. If you have questions on the agenda, please contact the JPB Secretary at 650.508.6242. Agendas are available on the Caltrain website at www.caltrain.com. Communications to the Board of Directors can be e-mailed to board@caltrain.com. *Free translation is available; Para traducción llama al 1.800.660.4287; 如需翻译 请电1.800.660.4287*

Date and Time of Board and Committee Meetings

JPB Board: First Thursday of the month, 9:00 am; JPB Finance Committee: Fourth Monday of the month, 2:30 pm. Date, time and location of meetings may be changed as necessary. Meeting schedules for the Board and committees are available on the website.

Location of Meeting

Due to COVID-19, the meeting will only be via teleconference as per the information provided at the top of the agenda. The Public may not attend this meeting in person.

*Should Zoom not be operational, please check online at

[http://www.caltrain.com/about/bod/Board of Directors Meeting Calendar.html](http://www.caltrain.com/about/bod/Board_of_Directors_Meeting_Calendar.html) for any updates or further instruction.

Public Comment*

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Accessible Public Meetings/Translation

Upon request, the JPB will provide for written agenda materials in appropriate alternative formats, or disability-related modification or accommodation, including auxiliary aids or services, to enable individuals with disabilities to participate in and provide comments at/related to public meetings. Please submit a request, including your name, phone number and/or email address, and a description of the modification, accommodation, auxiliary aid, service or alternative format requested at least at least 72 hours in advance of the meeting or hearing. Please direct requests for disability-related modification and/or interpreter services to the Title VI Administrator at San Mateo County Transit District, 1250 San Carlos Avenue, San Carlos, CA 94070-1306; or email titlevi@samtrans.com; or request by phone at 650-622-7864 or TTY 650-508-6448.

Availability of Public Records

All public records relating to an open session item on this agenda, which are not exempt from disclosure pursuant to the California Public Records Act, that are distributed to a majority of the legislative body will be available for public inspection at 1250 San Carlos Avenue, San Carlos, CA 94070-1306, at the same time that the public records are distributed or made available to the legislative body.

**PENINSULA CORRIDOR JOINT POWERS BOARD
STAFF REPORT**

TO: Joint Powers Board

FROM: Michelle Bouchard
Acting Executive Director

SUBJECT: **CALTRAIN GOVERNANCE SPECIAL MEETING #5**

ACTION

It is recommended that the Peninsula Corridor Joint Powers Board (Board) receive a staff presentation providing information for the fifth Caltrain governance special meeting of 2021, including information on governance process updates; re-cap and refinement of self-directed options; approach to developing a governance recommendation; and next steps.

SIGNIFICANCE

This is the fifth of six planned special Board meetings on Caltrain governance to support development of the Board's 2021 recommendation on governance by December 2021. At the fifth meeting on September 30, Sebastian Petty, Howard Permut, and Katie Miller will present and moderate the Board's discussion. The special meeting materials include a powerpoint that presents information about the self-directed governance options, including refined options developed following the August 20, 2021 special meeting, as well as the approach to developing a governance recommendation. The JPB's general counsel, James Harrison of Olson Remcho, will present on legal analysis findings. The presentation will also include information about next steps in the 2021 governance process.

This staff report includes eight attachments:

- Attachment 1: Presentation slides for the September 30, 2021 Special Meeting;
- Attachment 2: Summary of estimated financial impacts of the self-directed governance options discussed at the August 20, 2021 meeting;
- Attachment 3: Summer 2021 summary organizational charts for the San Mateo County Transit District;
- Attachment 4: Summary of staffing assumptions for the self-directed governance options;
- Attachment 5: Information on the estimated costs for fiscal year 2020 and 2021 governance processes;
- Attachment 6: A detailed legal memo from Olson Remcho regarding State and Federal powers over Joint Powers Authorities;
- Attachment 7: A detailed legal memo from Olson Remcho regarding member agency withdrawal from the Peninsula Corridor Joint Powers Authority; and,

- Attachment 8: A detailed legal memo from Olson Remcho regarding arbitration and mediation for the member agencies.

BACKGROUND

In August of 2019, the Board received a Caltrain Organizational Assessment report from Howard Permut as part of the Caltrain Business Plan effort. In November 2019, the Board held a special workshop to discuss the Caltrain organization and governance issues in greater depth. Following the workshop, at its regular December 2019 meeting, the Board agreed to form a Governance Ad Hoc Committee and hire a special counsel to research and clarify key issues in a fact-finding report. The Governance Ad Hoc Committee met regularly in the first half of 2020, and in July 2020, the special counsel presented their fact-finding report to the full Board.

In August 2020, the Board held a substantial discussion regarding the placement of Measure RR on the November 2020 ballot in San Francisco, San Mateo, and Santa Clara counties. If approved by two-thirds of the voters in all three counties, Measure RR would provide dedicated funding to Caltrain via a 1/8 cent sales tax in each county. At the August 2020 meeting, the Board approved Resolution 2020-42 to authorize placement of Measure RR on the ballot. This resolution also included provisions related to governance, including a commitment by the Board to develop and approve a governance recommendation by December 2021.

Over two-thirds of the voters in San Francisco, San Mateo, and Santa Clara counties approved Measure RR on November 3, 2020. Following its passage, the Board requested that Caltrain staff commence the 2021 governance process to support the Board in development of its governance recommendation by the end of 2021. A Governance Process Ad Hoc Committee of the Board was established to aid with the process, comprised of four Board members: Chair Davis, Director Chavez, Director Pine, and Director Walton. In addition to the Board members, JPA member agency staff also participated in the Governance Process Ad Hoc Committee meetings.

The special meeting on March 19, 2021 was the first special meeting intended to assist the full Board in the process of reaching a governance recommendation by the end of the year. At the first special meeting, the Board accepted the 2021 Governance Roadmap for the process, with the understanding that the Governance Process Ad Hoc Committee may come back with updates to refine the plan. Additionally, the Board accepted the 2021 Proposed Objectives for the Governance Outcome, with the amendment that 1) an additional objective be equitable decision making across the board for all JPB member agencies and 2) governance changes be focused on improving ridership of all income levels for Caltrain. The full minutes from the first special meeting can be found [here](#).

The second special meeting on May 14, 2021 was focused on refinement of three self-directed governance options, as well as the approach to evaluating the self-directed options, which includes both quantitative and qualitative analyses. The presentation also discussed the resources required to support the governance process. The full minutes from the second special meeting can be found [here](#).

The third special meeting on June 25, 2021 was intended to focus on the approach to regional and non-self-directed relationships; active and emerging regional discussions; strategic issues; and next steps. The meeting was adjourned early without discussion of the prepared materials on regional options. The full minutes from the third special meeting can be found [here](#).

The fourth special meeting on August 20, 2021 provided updated information regarding the governance process. It was focused on providing an overview of self-directed governance options and the approach to evaluating the options. Then, the financial and legal analyses of the options were presented, as well as Board and leadership perspectives on the options. The meeting concluded with next steps in the governance process for the Caltrain Board.

The Governance Process Ad Hoc Committee met monthly to support the overall 2021 governance process. They met twice in advance of the Board's first special meeting, and they held two additional meetings in advance of the Board's second special meeting. One additional meeting was held in advance of the Board's third special meeting. In August of 2021, the Governance Process Ad Hoc Committee was disbanded because the committee had fulfilled its intended purpose of outlining a governance process for JPB consideration.

BUDGET IMPACT

There is no budget impact associated with receiving this report or taking any actions.

NEXT STEPS

There is one additional special meeting on governance scheduled in 2021:

- Special Meeting #6: Friday, October 22, 2021, 1:00pm – 4:30pm.

Prepared by: Sebastian Petty, Deputy Chief, Caltrain Planning

Attachment 1: Presentation Slides for the September 30, 2021 Special Meeting

A photograph of a red and white Caltrain train (number 932) stopped at a station platform. The train is viewed from a low angle, showing its front and side. The platform is dark, and the background shows some trees and a fence. The train has the Caltrain logo and the number 932 on its side.

**Caltrain
Governance**

**JPB Special Meeting #5
on Governance**

September 30, 2021



**Welcome to Special
Meeting #5**



Special Meeting #5 Agenda

- Introduction
- Objectives for Today
- Re-Cap and Refinement of Self-Directed Options
- Public Comment & Board Discussion

~ Break ~

- Approach to Developing a Governance Recommendation
- Public Comment & Board Discussion
- Next Steps

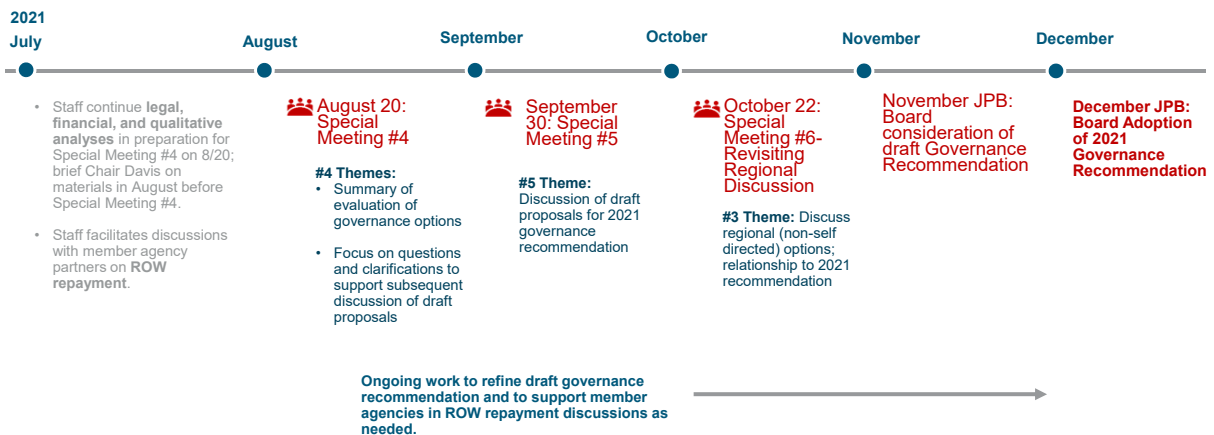


Phase 2 - 2021 Roadmap

Phase 2

Goals:

- Discussion of options and financial and legal analysis towards developing the 2021 governance recommendation.
- Adoption of governance recommendation at December 2021 JPB meeting.



Objectives

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Objectives for Special Meeting #5

1. **Review** analysis presented at Special Meeting #4, address outstanding Board member questions and summarize discussion.
2. **Consider** additional variations and refinements to self-directed options presented previously.
3. **Discuss** the approach to developing an end-of-year governance recommendation for the JPB.
4. **Review** legal and staff analysis regarding options and consequences if the JPB is unable to reach a recommendation by the end of 2021.



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Re-Cap & Refinement of Self-Directed Options

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“Self-Directed” Options Presented at Special Meeting #4

Less Change

More Change

Option 1

Refined Shared Services Model & ED Relationship

Maintain the San Mateo County Transit District (SMCTD) as managing agency of Caltrain with increased JPB oversight over the Caltrain Executive Director (ED) and increased Caltrain oversight of services provided to the railroad by SMCTD through shared service agreements.

Option 2

New Shared Services Model & ED Relationship

Adjust the SMCTD managing agency model to provide for greatly expanded JPB oversight and authority, including direct JPB employment of the Caltrain ED and senior leadership; expansion of services provided to the railroad directly by Caltrain; and establishment of purchased service agreements for remaining services provided to the railroad by SMCTD.

Option 3

Independent Agency

Dissolve the managing agency model and replace with a separate, independent Caltrain agency to directly manage and administer the railroad, either through reorganizing JPA or forming a special district.

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Summary of Options Presented on 8/20/21

Option	Annual Costs	One-Time Costs	Time to Implement*
Nominal Baseline	\$63.8M	\$0	N/A
Option 1	\$63.8M	\$1.5M	6 to 18 months
Option 2	\$69.7M	\$4.6M	12 to 18 months
Option 3	\$73.0M	\$48.9M	12 to 36 months

* Time to implement starts at execution of MOU between member agencies that contains key decisions regarding implementation of the option.

- Changes to Pension, OPEB and other liabilities are a significant additional consideration but cannot be fully known in advance as they are negotiated outcomes.
- There is the potential that liability payments by Caltrain could be significantly impacted under any option that triggers a formal re-negotiation of how services are provided to the railroad.
- In practical terms, liability impacts would be most significant for Option 3 given the large number of individuals changing employer in this option.



More detailed summary slide and notes included in appendix in packet.

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What Staff Heard at Special Meeting #4

- Important to keep all options on the table.
- Desire to see a restated “baseline” reflecting a managing agency arrangement consistent with past practice and the text of JPA (e.g., without a separate Caltrain ED).
- Significant concerns related to costs (one-time, ongoing, and liabilities) associated with becoming a fully independent agency (“Option 3”).
- Interest in exploring further variations of Options 1 and 2.



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“Nominal” Baseline vs “2020” Baseline

The “**Nominal**” **Baseline** was presented as the baseline at special meeting #4. It reflects current staffing levels and organization at Caltrain and also includes 11 additional positions that will be needed to operate an effective railroad and deliver electrified service. Staff believes this is the best comparator to use as a basis for comparison against future alternative structures.

The “**2020**” **Baseline** reflects the staffing of the Caltrain organization as it existed in 2020 – including 11 fewer total positions and a combined Caltrain ED / SMCTD GM position.

	2020 Baseline	Nominal Baseline
SMCTD Staff Providing Direct Services to JPB	94	105
SMCTD Staff Providing Shared Services to JPB	104	104
Annual cost	\$61.6M	\$63.8M



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Revised Summary of Options Presented

Option	Annual Costs	One-Time Costs	Time to Implement*
2020 Baseline	\$61.6M	N/A	N/A
Nominal Baseline	\$63.8M	N/A	N/A
Option 1	\$63.8M	\$1.5M	6 to 18 months
Option 2	\$69.7M	\$4.6M	12 to 18 months
Option 3	\$73.0M	\$48.9M	12 to 36 months

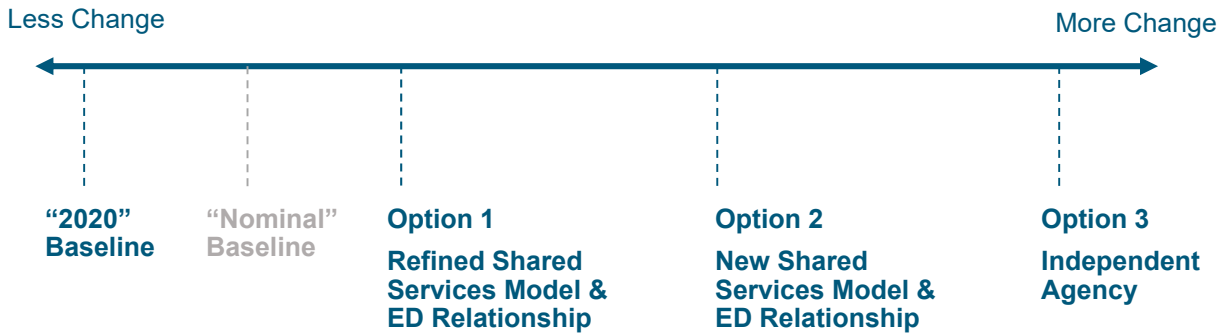
* Time to implement starts at execution of MOU between member agencies that contains key decisions regarding implementation of the option.

- Changes to Pension, OPEB and other liabilities are a significant additional consideration but cannot be fully known in advance as they are negotiated outcomes
- There is the potential that liability payments by Caltrain could be significantly impacted under any option that triggers a formal re-negotiation of how services are provided to the railroad
- In practical terms, liability impacts would be most significant for Option 3 given the large number of individuals changing employer in this option



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Refinement of Options



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Refinement of Self-Directed Options

There is significant room for variation and refinement of any of the self-directed options previously presented around the variables shown to the right.

The options laid out to date all reflect different approaches to these issues.

- A. **Caltrain Executive Director (ED):**
 - A. Does a separate Caltrain ED position exist?
 - B. How is the ED selected?
 - C. Who decides how ED is evaluated and compensated?
 - D. Who has ultimate hire and fire authority over the ED?
- B. **Employer of Staff:**
 - Who employs staff working for Caltrain?
 - Does the JPB act as a direct employer?
- C. **Reporting Relationships:**
 - Who does staff working for Caltrain report to?
 - Which functions and staff report directly to the Caltrain ED vs. which functions and staff are provided through service agreements?
- D. **Service Agreements:**
 - Which functions and employees serve Caltrain under a “service agreement” structure?
 - How is this agreement detailed and structured – as a shared service with allocated costs or as a purchased service?



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ED Relationship

Is there a separate Caltrain ED?

Who hires, fires and evaluates the ED?

2020 Baseline → No Separate Caltrain ED

- Caltrain ED and SMCTD GM are the same person.
- All actions related to ED hiring, evaluation, and employment at SMCTD discretion.
- Opportunities for JPB input into SMCTD hiring process (similar to multi-agency sub-committee that participated in hiring of former GM in 2015).

Option 1 → JPB Recommends and SMCTD Approves Separate Caltrain ED

- JPB recommends ED candidate to SMCTD for approval.
- JPB sets annual goals and conducts evaluation.
- JPB recommends hiring, termination and other personnel actions to SMCTD.

Joint Approval Required for Separate ED

- JPB selects ED candidate.
- JPB sets annual goals and conducts evaluation.
- JPB recommends hiring, termination and other personnel actions to SMCTD.
- By agreement all personnel actions related to Caltrain ED require approval of both boards.

Option 2 → JPB Hires Separate ED Directly

- Option 3 →
- JPB hires ED directly as employee. All actions related to hiring, evaluation and termination conducted by JPB.



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Employer of Staff

Who employs the staff that support Caltrain?

2020 Baseline → All Staff are Employed by SMCTD

- Option 1 →
- All staff are SMCTD employees.
 - Some serve Caltrain directly (e.g., report up to Caltrain ED and work exclusively on Caltrain issues). Others support Caltrain via shared services arrangements (e.g., provide specific services to Caltrain but report up through SMCTD GM).

JPB Employs Key Executives

- JPB hires Caltrain ED, COS and CFO (1 to 3 positions).
- Remaining staff provided by SMCTD – with some individuals providing direct services to Caltrain and others working in a shared capacity.

Option 2 → JPB Employs Senior Staff

- JPB hires ED and senior executives directly (5 – 12 positions).
- Remaining staff provided by SMCTD – with some providing direct services and others working in a shared capacity.

Option 3 → JPB Employs All Staff

- All staff are employed directly by JPB.



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Reporting Relationships

Who does staff supporting Caltrain report to? Do they report directly to the Caltrain ED or do they provide services to the railroad under the terms of a service agreement?

2020
Baseline

Option 1

Staff is evenly split between “direct” reporting to the Caltrain Chief Operating Officer or Caltrain ED vs. “shared” reporting to SMCTD GM

- Reporting relationships remain similar to today's, with roughly 95 staff working on Caltrain full time and reporting directly up to Caltrain ED (or the Caltrain COO in the 2020 Baseline).

All staff with “policy” functions report directly to Caltrain ED

- All positions that exercise discretionary “policy” type decision-making authority report directly to Caltrain ED.
- Supporting positions are shared between railroad and SMCTD.

Option 2

Majority of staff report to Caltrain ED

- Significant majority of staff provides direct services to Caltrain and report up to Caltrain ED.
- Only a few transactional functions (accounting, etc.) remain as shared services.

Option 3

All staff report to Caltrain ED

- All staff are employed directly by JPB and report to Caltrain ED.



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Service Agreements

What is the nature of agreements governing services provided to the JPB?

2020
Baseline

Option 1

Staff shared, no detailed service agreements

- Under a general agreement, SMCTD staff effort required to support the railroad is billed to Caltrain based on timesheet records and an audited allocation formula. There is no detailed agreement as to the level of service provided in specific areas.

Option 1 → Staff shared, detailed service agreements

- Under a general agreement, SMCTD staff effort required to support the railroad is billed to Caltrain based on timesheet records and an audited allocation formula. This approach would be supplemented by the development of detailed service agreements that specify required resourcing levels and performance outcomes for individual support activities.

Option 2

Conversion to “purchased” service agreements

- Agreement between JPB and SMCTD would be renegotiated as a “purchased” services agreement with a more contractual structure and detailed specification of outcomes.

Option 3

No sharing of services assumed

- No sharing of services with SMCTD is assumed. Any sharing or purchasing of outside services would occur at the JPB's future discretion.



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Additional Options

Example Variation 1A

A. Caltrain Executive Director (ED):

- Dedicated Caltrain ED.
- Joint Decision between JPB and SMCTD:
 - JPB selects ED candidate.
 - JPB sets annual goals and conducts evaluation.
 - JPB recommends hiring, termination, and other personnel actions to SMCTD.
 - By agreement all personnel actions related to Caltrain ED require approval of both JPB and SMCTD.

B. Employer of Staff:

- SMCTD employs all staff.

C. Reporting Relationships:

- Small expansion of direct services provided to Caltrain.
 - Direct services include policy-supportive departments such as Communications senior staff, Community Affairs, Real Estate, etc.
 - All ~132 staff who provide direct services to Caltrain report to Caltrain Executives.
- Small reduction in shared services provided to Caltrain.
 - All transactional departments remain shared services to continue efficiencies.
 - All ~85 staff (FTE equivalent) provide shared services and report to SMCTD GM.

D. Service Agreements:

- Shared service agreements are formalized and specified at a higher level of detail but fundamentally continue as “shared” (e.g., derived on an allocation basis).



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Additional Options

Example Variation 2A

A. Caltrain Executive Director (ED):

- Dedicated Caltrain ED.
- JPB Decision:
 - JPB selects ED candidate.
 - JPB sets annual goals and conducts evaluation.
 - JPB makes all decisions related to hiring, termination, and other personnel actions.

B. Employer of Staff:

- JPB directly employs small executive team.
 - 3 staff total – Executive Director, Chief of Staff, Chief Financial Officer.
- SMCTD employs all other staff.

C. Reporting Relationships:

- Small expansion of direct services provided to Caltrain.
 - Direct services include policy-supportive departments such as Communications senior staff, Community Affairs, Real Estate, etc.
 - All ~136 staff who provide direct services to Caltrain report to Caltrain Executives.
- Small reduction in shared services provided to Caltrain.
 - All transactional departments remain shared services to continue efficiencies.
 - All ~85 staff (FTE equivalent) provide shared services and report to SMCTD GM.

D. Service Agreements:

- Shared service agreements are formalized and specified at a higher level of detail but fundamentally continue as “shared” (e.g., derived on an allocation basis).



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Illustrative Staffing Assumptions

Total Number of Employees Supporting Caltrain, by Option

Option	Caltrain Employees Reporting Exclusively up to Caltrain ED and JPB	SMCTD Employees Providing Direct Services To Caltrain and Reporting Exclusively to Caltrain ED and JPB	SMCTD Employees Reporting up to SMCTD GM but Providing Some Services to Caltrain Under an Agreement	Total Employees Supporting Caltrain
2020 Baseline	0	94	104	198
Nominal Baseline	0	105	104	209
Option 1	0	105	104	209
Option 2	8	179	40	227
Option 3	236	0	0	236
Variation 1A	0	132	85	217
Variation 2A	3	136	85	224



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Summary of Options Presented

Option	Annual Costs	One-Time Costs	Time to implement
2020 Baseline	\$61.6M	N/A	N/A
Nominal Baseline	\$63.8M	N/A	N/A
Option 1	\$63.8M	\$1.5M	6 to 18 months
Option 2	\$69.7M	\$4.6M	12 to 18 months
Option 3	\$73.0M	\$48.9M	12 to 36 months
Variation 1A	Greater than Option 1, less than Option 2	Comparable to Option 1	Comparable to Option 1
Variation 2A	Greater than Option 1, less than Option 2	Comparable to Option 2	Comparable to Option 2



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Clarifying Questions

- Are there any details or clarifications staff can provide regarding the various options discussed and presented?



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Public Comment

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Discussion

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Questions for the Board

- Has your thinking about any of the options for Caltrain's governance changed or evolved since the last meeting?
- Which element of the options is of primary importance to you (ED relationship, employer of staff, reporting structure, services agreements)?



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Break

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**Developing a
Recommendation**

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JPB Recommendation

Overview

- JPB has committed to adopting a governance recommendation by the end of 2021.
- Recommendation would presumably minimally include language pertaining to:
 - A recommended self-directed governance option (as defined in terms of changes to the ED relationship, employer of staff, staff reporting structure and nature of any service agreements).
- The recommendation could also include:
 - Language or direction related to potential next steps and engagement on regional governance.
 - Discussion or recommendations on additional governance-related issues (e.g., other updates to the JPA, Board terms and appointment process, etc.).
 - Recommendations on other issues of importance to the JPA member agencies, such as ROW repayment.



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JPB Recommendation

vs.

Agreement by Member Agencies

- The JPB is not a party to the Joint Powers Agreement (JPA) or the Real Property Ownership Agreement (RPOA).
- The JPB may study and recommend governance changes but it does not necessarily have the ability to effectuate them.
- To go into effect, any recommended governance changes that rely on modification of the JPA or RPOA would require the consideration and approval of all three JPA Member Agencies:
 - The City and County of San Francisco
 - The San Mateo County Transit District
 - The Santa Clara Valley Transportation Authority



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JPB Recommendation

vs.

Agreement by Member Agencies

- Analysis and discussion of governance at the JPB has focused narrowly on potential governance options and their costs and implications for Caltrain.
- The JPA Member agencies may (and do) have additional considerations and concerns that require resolution before an agreement on governance can be reached.
 - In correspondence to the JPB and other member agencies, the San Mateo County Transit District has made it clear that resolution of ROW repayment closely tied to any consideration of governance change.
 - There may be additional matters that require discussion among the JPA members before agreement can be reached.
- The JPB must decide to what extent it wishes to directly consider or address these broader issues as part of crafting a recommendation on governance by the end of 2021.



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JPB Recommendation: Process

Recommended Governance Option

- JPB adopts resolution recommending governance option to member agencies before 12/31/21.
- JPB presents proposal to member agencies.
- Member agencies consider JPB proposal.
- If they approve of proposal, member agencies authorize their staff to negotiate MOU setting forth terms of selected governance option.
- Member agencies consider MOU approval.



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JPB Recommendation: Process

Recommended Governance Option (continued)

- If they approve MOU, counsel will draft proposed amendments to agreements necessary to implement selected governance option (e.g., JPA, RPOA).
- Member agencies consider approval of proposed amendments to agreements.
- If all member agencies approve amended agreements, selected governance option takes effect and implementation commences.
- Amendments to JPA and RPOA require unanimity among member agencies, i.e., any member agency may prevent implementation of selected governance option.



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Use of Measure RR Revenues

Measure RR Revenues

- Special tax – proceeds restricted to Caltrain operating and capital purposes with a priority on:
 - Expanded service, capacity, and access;
 - Leverage federal/state/local funds for capital projects; and,
 - Steady funding for electrified service.
- Use of RR revenues to repay SMCTD for its investment would be vulnerable to legal challenge because not presented to voters.
- Use of RR revenues to implement governance options likely permissible because they are a type of operating cost contemplated by Measure RR.



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What Happens if Member Agencies Do Not Reach Agreement?

No Agreement on Governance Option

- Resolution No. 2020-42 continues to require super majority to approve use of Measure RR revenues in excess of \$40M.
- Member agencies could consider mediation.
- One or more member agencies could withdraw from JPB.
- State Legislature could intervene.



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Measure RR Constraints on Expenditures

JPB Resolution No. 2020-42

- Resolution No. 2020-42 specifies that Caltrain may not spend in excess of \$40M in Measure RR revenues per FY, without the vote of 6 directors, until the JPA has been amended to modify governance structure in a manner satisfactory to member agencies.
- After that time, JPB may allocate any and all revenues for operating and capital expenditures with 5 votes.



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Member Agency Mediation

Mediation to Resolve Impasse

- Member agencies could use mediation as a means of resolving their differences over governance and SMCTD's investment in Caltrain.
- JPA contemplates that member agencies will participate in mediation under auspices of MTC if a member seeks to withdraw.
- Although member agencies cannot agree to binding arbitration over governance solutions, mediation may be a means of narrowing their differences and reaching agreement on a path forward.



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Member Agency Withdrawal

Withdrawal of One or More Member Agencies

- JPA authorizes member agencies to withdraw from JPB.
- Requires 1 year notice, followed by mediation under auspices of MTC.
- If 1 member withdraws, JPB continues.
- If 2 members withdraw, JPA terminates at end of FY following expiration of 1-year notice given by 2nd member to withdraw.
 - E.g., if 2nd member provides notice of withdrawal on 6/30/22, then JPA terminates 6/30/24.



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Member Agency Withdrawal

Effects of Withdrawal of Two Member Agencies

- JPA provides that property and funds are distributed pursuant to “separate agreement” among members.
- RPOA provides that it governs disposition of ROW (real property/assets) and is the “separate agreement” referenced in JPA.
- RPOA provides that unless parties agree or law or contractual obligations require otherwise, disposition of ROW occurs only if ROW is not used by any member agency to provide a minimum of 44 trains per day for a period of 7 consecutive years.
- After 7 years without at least 44 trains per day, JPB or SMCTD must sell ROW System Option Properties.
- Assets from sale used first to pay contractual obligations and then to pay member agencies for Additional Contribution.



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State Could Intervene

Power of State Legislature

- Legislature could pass statute to dictate JPB’s governance structure or dissolve JPB and distribute its assets.
- Member agencies cannot assert Impairment of Contract Claim against State.
- Member agencies cannot assert Takings Claim against State.



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Organizational Implications

- The prospect of an protracted governance impasse or conflict is of great concern to Caltrain as an organization.
- Concurrent to these governance discussions, Caltrain is grappling with series of real and pressing challenges including;
 - Seeking funding and completing PCEP while preparing the organization to receive and operate an electrified railroad
 - Near- and long-term COVID recovery and adaptation to a post-COVID world
 - Engaging deliberately and constructively in ongoing regional governance discussions
- These are not routine or easily resolved issues. Caltrain needs a focused organization and a united and engaged Board to be successful.
- Success requires cooperation to achieve a system of governance that is viewed as legitimate and supported by all parties.



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Clarifying Questions

- Are there any details or clarifications staff can provide regarding the topics discussed and presented?



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Public Comment

Discussion

Board Discussion

How would the Board like to proceed with the development of a governance recommendation?

- Should staff continue to target a December 2021 deadline?
- Is the Board still in agreement with using the final special meeting on October 22 to focus on 'regional governance'?
- Is the Board still in agreement with using the November JPB meeting to discuss a draft governance recommendation?



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Board Discussion

How would the Board like staff to develop a draft recommendation?

Example approaches;

- Draft solely based on discussion and input received at JPB special meetings
- Convene and work with JPA member GMs to incorporate member agency feedback
- Identify an outside facilitator (agency or individual) who could help develop a consensus recommendation



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Board Discussion

To what extent are we approaching JPB consensus on a governance recommendation?

- What basic governance option(s) do Board members prefer? What options could be acceptable?
- Are there specific governance issues, outcomes or details that must be explicitly addressed in a JPB recommendation?



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Next Steps

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Next Steps

- **Upcoming Special Meetings on Governance:**

- Special Meeting #6: Friday, October 22, 2021, 1:00pm – 4:30pm
- November JPB Meeting: Thursday, November 4, 2021 9:00am – 12:00pm



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Attachment 2: Summary of Estimated Financial Impacts of the Self-Directed Governance Options Discussed at the August 20, 2021 Meeting

At the August 20, 2021 special meeting on governance, it was requested that staff put together a summary table showing the estimated range of costs for the self-directed governance options. This information is shared below, including explanatory text for how to interpret the costs shown in the table. Additionally, summary information showing cost drivers for the self-directed options is also provided.

Table 1: Summary of Estimated Costs for Self-Directed Governance Options

Option ¹	Annual Costs ²	One-Time Costs	Range of Potential Pension Liabilities ³	Range of Potential OPEB Liabilities ⁴	Potential PTO Liabilities
Nominal Baseline ⁵	\$63.8M	\$0	\$17.7M - \$100.0M	\$5.1M - \$10.7M	\$2.1M
Option 1	\$63.8M	\$1.5M	\$17.7M - \$100.0M	\$5.1M - \$10.7M	\$2.1M
Option 2	\$69.7M	\$4.6M	\$17.8M - \$100.4M	\$5.2M - \$10.7M	\$2.1M
Option 3	\$73.0M	\$48.9M	\$22.0M - \$122.0M	\$6.2M - \$12.7M	\$2.1M

Table 1 Notes:

1. All options' cost estimates are in 2021 dollars, expressed in thousands, and rounded to the nearest \$100K.
2. Annual costs exclude TASI costs, fuel, and other annual operating contracts; costs to member agencies; capital infrastructure and rolling stock costs; and the JPB's unfunded pension and OPEB liabilities payments to SMCTD.
3. It is extremely difficult to calculate a clear number for the pension liabilities given the degree of uncertainty for many key factors. The actual pension liability amount would be a function of negotiations between Caltrain and SMCTD, as to the responsibility to pay for pension liabilities and the terms of payment (lump sum, annual contributions, interest rate) and may require CalPERS approval for certain scenarios. The estimates shown in this table are based on active participant headcount by option and on high level assumptions for the following scenarios: (1) Caltrain becomes responsible for direct payments to CalPERS with at a discount rate of 7%, (2) Caltrain remits a lump-sum payment to SMCTD at a discount rate of 1.75%. The estimates shown are all-in, total costs for the options' pension liabilities.
4. Similar to pensions, it is extremely difficult to calculate a clear number for the OPEB liabilities given the degree of uncertainty for many key factors. The actual OPEB liability amount would be a function of negotiations between Caltrain and SMCTD, as to the responsibility to pay for OPEB liabilities and the terms of payment (lump sum, annual contributions, interest rate), and no CalPERS approval would be needed. These estimates are based on active participant headcount by option and on high level assumptions for the following scenarios: (1) Caltrain adopts a CERBT as administered by CalPERS at a discount rate of 7%, (2) Caltrain adopts an irrevocable trust outside of CalPERS at a discount rate of 1.75%. The estimates shown are all-in, total costs for the options' OPEB liabilities.

5. The Nominal Baseline is defined as the positions necessary to operate an efficient railroad and prepare to deliver electrified service. It includes costs related to pre-existing JPB decisions to have an independent auditor and independent counsel.

Understanding the Summary Table of Estimated Financial Costs

Why do all of the options, including the nominal baseline, show a range of potential pension, OPEB, and PTO liabilities?

- All of the options show a big (and broadly similar) range because all options 1) would involve roughly the same number of total employees; 2) would involve some negotiated adjustment to the current shared services arrangements; and 3) could involve negotiations with SMCTD regarding payment terms for the liabilities.
- These negotiations – even in the Nominal Baseline or Option 1 – could result in an outcome that includes a different approach to calculating liability payments. The specifics of a new approach to liability payments could result in major changes to liability costs incurred by the JPB.
- Ultimately, the outcomes of any negotiations between SMCTD and JPB would drive the actual liabilities amounts in each option.

Understanding that the actual liabilities amount would depend on negotiations between SMCTD and JPB, what could the JPB expect with regards to the relative magnitude of the liabilities costs between the options?

- While the ranges are hypothetically similar for all options, in actuality, it is far more likely that major changes to liability amounts would occur in a scenario in which the JPB became an employment entity and took over employment of former SMCTD employees.
- In this instance, the driving factors in determining any expanded liabilities cost would be (A) the specific agreement reached between SMCTD and the JPB, and (B) the number of employees impacted.
- Under this logic, it could be expected that the most significant financial impact for the JPB would occur in Option 3, with much less impact for Option 2, and little to none for Option 1 and the Nominal Baseline.

Cost Drivers for Self-Directed Governance Options

Known Cost Drivers

Increase in “Direct” Reporting & Reduction in “Service Sharing”

- Reducing the number of functions that rely on a shared service model and increasing the number of positions reporting to the Caltrain ED will generally result in ongoing increases to staffing levels and operating costs.

Legal and Human Resource Costs

- Most governance changes will include some degree one-time legal and human resources cost to effectuate the change.

New IT and Accounting Systems

- Any option that involve wholesale separation from SCMTD will incur significant one-time costs related to setting up new IT and accounting systems.

Cost Drivers To be Negotiated

Provision of Services

- Changes to the agreements between Caltrain and SMCTD regarding the provision of services may trigger a renegotiation of how these services are billed to the JPB. This would be the subject of negotiation and could have significant cost implications.

Pension, OPEB and Other Liabilities

- All options that involve either establishing the JPB as its own employment entity or that involve significant changes to shared service agreements have the potential to result in different or expanded liability costs to the JPB. These costs are likely to be particularly significant in any option where a large number of SMCTD employees transfer to a new entity.

Attachment 3: Summer 2021 Summary Organizational Charts for the San Mateo County Transit District



Organizational Structure Legend

Colors

<div style="background-color: red; height: 15px; margin-bottom: 5px;"></div> <p>Red Caltrain employee reporting exclusively to Caltrain ED and JPB</p>	<div style="background-color: purple; height: 15px; margin-bottom: 5px;"></div> <p>Purple SMCTD employee providing direct services to Caltrain and reporting exclusively up to Caltrain ED and JPB</p>	<div style="background-color: teal; height: 15px; margin-bottom: 5px;"></div> <p>Teal SMCTD employee reporting to SMCTD GM but providing some services to Caltrain under a shared or purchased services agreement</p>	<div style="background-color: blue; height: 15px; margin-bottom: 5px;"></div> <p>Blue SMCTD employee reporting exclusively to SMCTD GM and SMCTD Board.</p>
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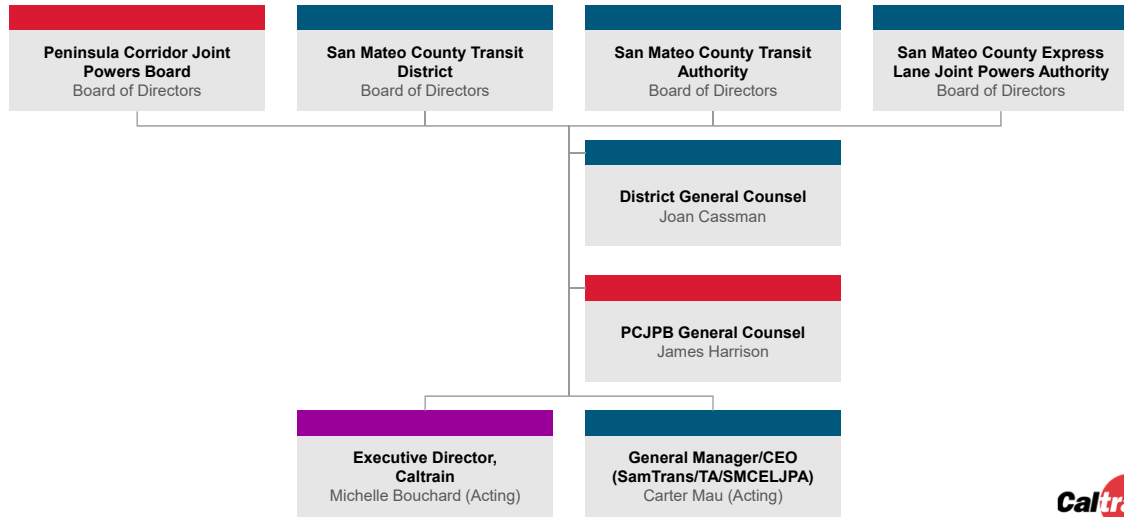
Definitions

<p>Employing Entity Entity with staff on payroll</p>	<p>Reporting Entity Entity that directs work and evaluates staff performance</p>	<p>Staff Assignments A staff person's employment entity may be different than the entity they report to for their work</p>
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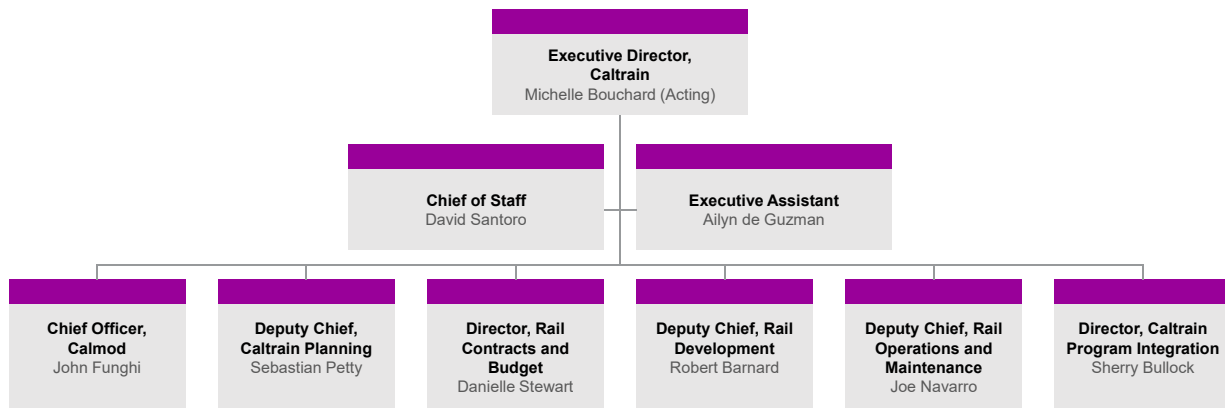
Please note that these summary charts generally show senior positions within the organization, from General Manager-level positions down to Deputy Director-level positions.

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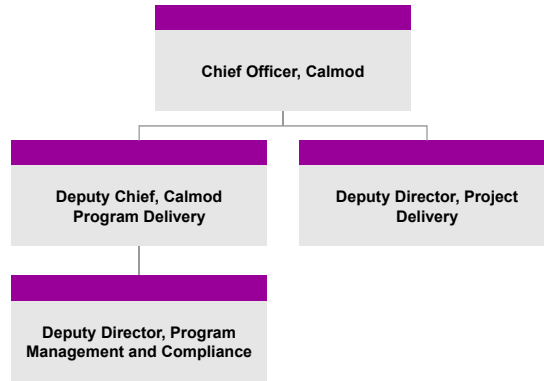
San Mateo County Transit Structure



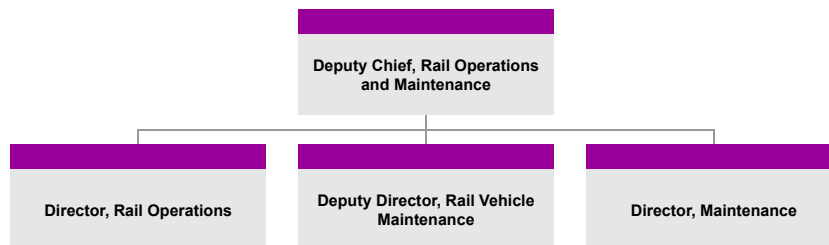
Rail Division



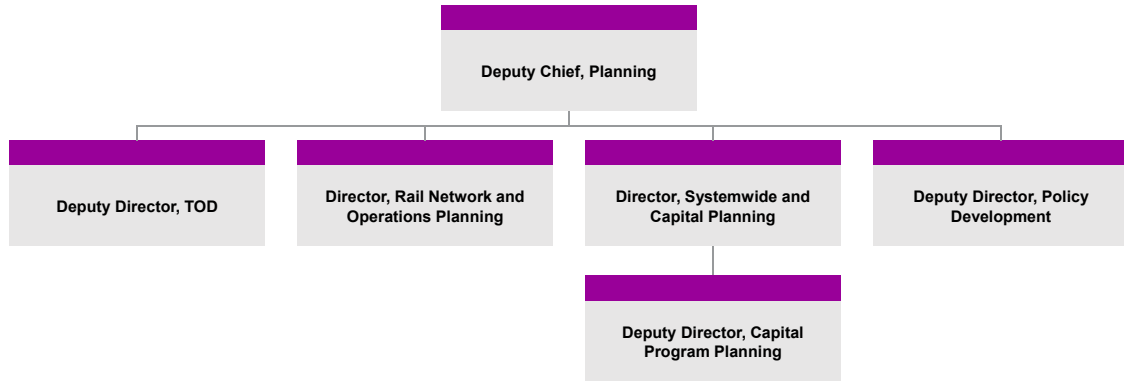
Calmod



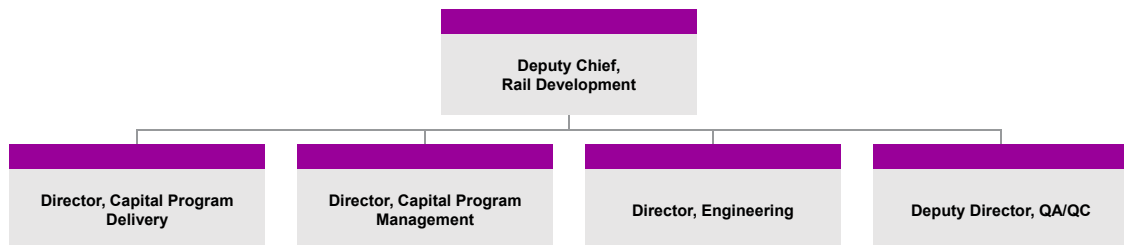
Rail Operations and Maintenance



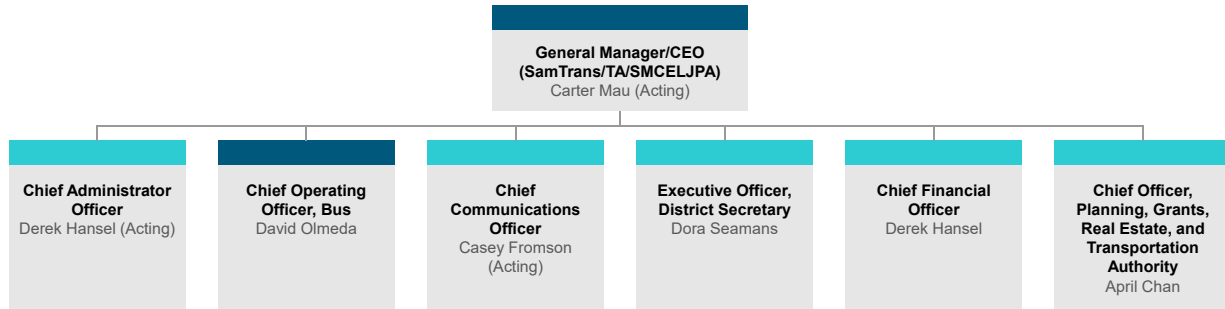
Caltrain Planning



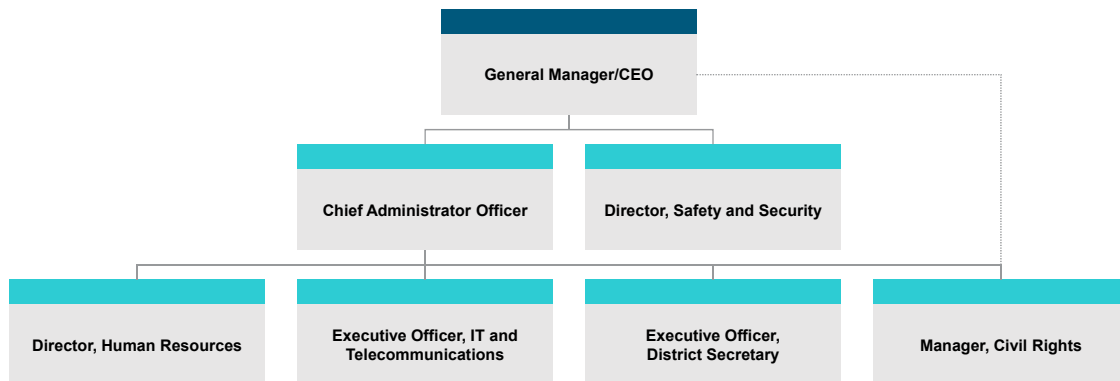
Rail Development



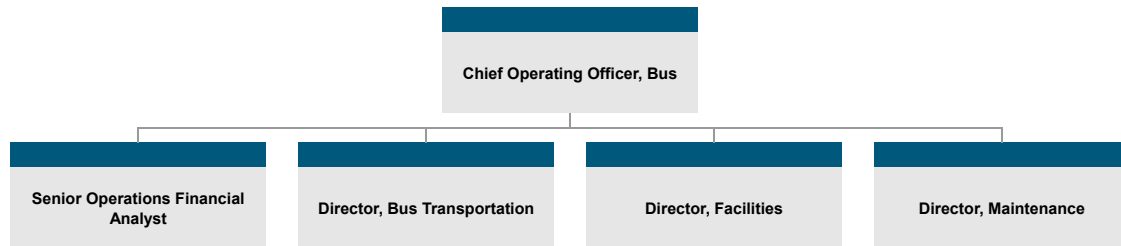
San Mateo County Transit District



Administrative



Bus Division



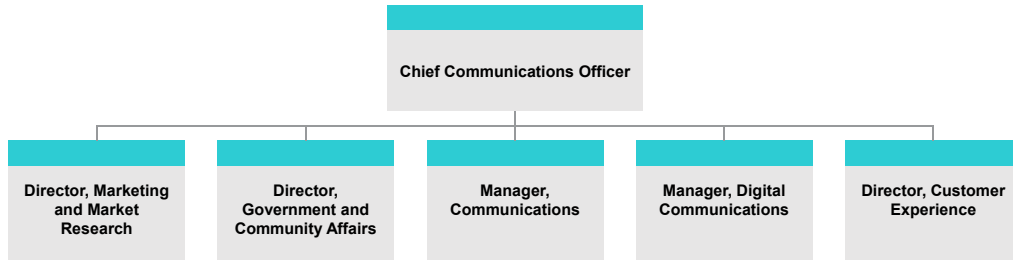
11

Finance Division



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Communications Division



PGRETA



Attachment 4: Summary of Staffing Assumptions for the Self-Directed Governance Options

At the August 20, 2021 special meeting on governance, it was requested that staff share the staffing assumptions (FTE equivalents) for each of the self-directed governance options, by department. This information is shown in the tables below, including a summary table and an individual table for each of the following options:

- 2020 Conditions, developed as requested at the August 20, 2021 meeting (reflects 2020 staffing levels and the text of the JPA with one staff person serving as SMCTD General Manager and Caltrain Executive Director);
- the Nominal Baseline, developed for comparative analysis and as presented at the August 20, 2021 meeting (Nominal Baseline includes the positions necessary to operate an efficient railroad and prepare to deliver electrified service);
- Option 1, as presented at the August 20, 2021 meeting;
- Option 1A, developed as a refined option for the September 30, 2021 meeting;
- Option 2A, developed as a refined option for the September 30, 2021 meeting;
- Option 2, as presented at the August 20, 2021 meeting; and,
- Option 3, as presented at the August 20, 2021 meeting.

It is important to note that aside from the 2020 Conditions, these staffing assumptions for the Nominal Baseline and the Options are illustrative and were developed for analytical purposes only.

Table 1: Total Staffing by Department for Each Option

Department	2020 Conditions	Baseline	Option 1	Option 1A	Option 2A	Option 2	Option 3
Human Resources	13	13	13	13	13	13	13
Safety and Security	4	4	4	4	4	5	6
Customer Service	7	7	7	7	7	7	7
Budgets	4	4	4	4	4	4	4
Financial Planning and Analysis	4	4	4	4	4	4	4
Contracts	13	13	13	13	13	13	13
Information Technology (IT)	12	12	12	12	12	12	15
Environmental Planning	1	1	1	1	2	2	2
Grants	6	6	6	6	7	7	7
Real Estate	4	4	4	4	8	8	8
Civil Rights	3	3	3	3	3	3	3
Communications	6	6	6	8	8	6	6
Marketing	4	4	4	4	4	6	6
Community Affairs	0	0	0	4	4	4	4
Accounting	18	18	18	18	18	18	19
Treasury	3	3	3	3	3	3	6
Administration	2	2	2	2	2	2	3
Executive	0	0	0	2	2	5	5
JPB Rail Division	94	105	105	105	106	105	105
Total Full-Time Employees	198	209	209	217	224	227	236

Table 2: Staffing for 2020 Conditions

Department	2020 Conditions			
	Caltrain Employees Reporting Exclusively up to Caltrain ED and JPB	SMCTD Employees Providing Direct Services To Caltrain and Reporting Exclusively to Caltrain ED and JPB	SMCTD Employees Reporting up to SMCTD GM but Providing Some Services to Caltrain Under an Agreement	Total Employees Supporting Caltrain
Human Resources	-	-	13	13
Safety and Security	-	-	4	4
Customer Service	-	-	7	7
Budgets	-	-	4	4
Financial Planning and Analysis	-	-	4	4
Contracts	-	-	13	13
Information Technology (IT)	-	-	12	12
Environmental Planning	-	-	1	1
Grants	-	-	6	6
Real Estate	-	-	4	4
Civil Rights	-	-	3	3
Communications	-	-	6	6
Marketing	-	-	4	4
Community Affairs	-	-	-	-
Accounting	-	-	18	18
Treasury	-	-	3	3
Administration	-	-	2	2
Executive	-	-	-	-
JPB Rail Division	-	94	-	94
Total Full-Time Employees	-	94	104	198

Table 3: Staffing for Nominal Baseline

Department	Nominal Baseline			
	Caltrain Employees Reporting Exclusively up to Caltrain ED and JPB	SMCTD Employees Providing Direct Services To Caltrain and Reporting Exclusively to Caltrain ED and JPB	SMCTD Employees Reporting up to SMCTD GM but Providing Some Services to Caltrain Under an Agreement	Total Employees Supporting Caltrain
Human Resources	-	-	13	13
Safety and Security	-	-	4	4
Customer Service	-	-	7	7
Budgets	-	-	4	4
Financial Planning and Analysis	-	-	4	4
Contracts	-	-	13	13
Information Technology (IT)	-	-	12	12
Environmental Planning	-	-	1	1
Grants	-	-	6	6
Real Estate	-	-	4	4
Civil Rights	-	-	3	3
Communications	-	-	6	6
Marketing	-	-	4	4
Community Affairs	-	-	-	-
Accounting	-	-	18	18
Treasury	-	-	3	3
Administration	-	-	2	2
Executive	-	-	-	-
JPB Rail Division	-	105	-	105
Total Full-Time Employees	-	105	104	209

Table 4: Staffing for Option 1

Department	Option 1			
	Caltrain Employees Reporting Exclusively up to Caltrain ED and JPB	SMCTD Employees Providing Direct Services To Caltrain and Reporting Exclusively to Caltrain ED and JPB	SMCTD Employees Reporting up to SMCTD GM but Providing Some Services to Caltrain Under an Agreement	Total Employees Supporting Caltrain
Human Resources	-	-	13	13
Safety and Security	-	-	4	4
Customer Service	-	-	7	7
Budgets	-	-	4	4
Financial Planning and Analysis	-	-	4	4
Contracts	-	-	13	13
Information Technology (IT)	-	-	12	12
Environmental Planning	-	-	1	1
Grants	-	-	6	6
Real Estate	-	-	4	4
Civil Rights	-	-	3	3
Communications	-	-	6	6
Marketing	-	-	4	4
Community Affairs	-	-	0	0
Accounting	-	-	18	18
Treasury	-	-	3	3
Administration	-	-	2	2
Executive	-	-	-	-
JPB Rail Division	-	105	-	105
Total Full-Time Employees	-	105	104	209

Table 5: Staffing for Option 1A

Department	Option 1A			Total Employees Supporting Caltrain
	Caltrain Employees Reporting Exclusively up to Caltrain ED and JPB	SMCTD Employees Providing Direct Services To Caltrain and Reporting Exclusively to Caltrain ED and JPB	SMCTD Employees Reporting up to SMCTD GM but Providing Some Services to Caltrain Under an Agreement	
Human Resources	-	-	13	13
Safety and Security	-	-	4	4
Customer Service	-	-	7	7
Budgets	-	4	-	4
Financial Planning and Analysis	-	4	-	4
Contracts	-	-	13	13
Information Technology (IT)	-	-	12	12
Environmental Planning	-	1	-	1
Grants	-	6	-	6
Real Estate	-	4	-	4
Civil Rights	-	-	3	3
Communications	-	2	6	8
Marketing	-	-	4	4
Community Affairs	-	4	-	4
Accounting	-	-	18	18
Treasury	-	-	3	3
Administration	-	-	2	2
Executive	-	2	-	2
JPB Rail Division	-	105	-	105
Total Full-Time Employees	-	132	85	217

Table 6: Staffing for Option 2A

Department	Option 2A			Total Employees Supporting Caltrain
	Caltrain Employees Reporting Exclusively up to Caltrain ED and JPB	SMCTD Employees Providing Direct Services To Caltrain and Reporting Exclusively to Caltrain ED and JPB	SMCTD Employees Reporting up to SMCTD GM but Providing Some Services to Caltrain Under an Agreement	
Human Resources	-	-	13	13
Safety and Security	-	-	4	4
Customer Service	-	-	7	7
Budgets	-	4	-	4
Financial Planning and Analysis	-	4	-	4
Contracts	-	-	13	13
Information Technology (IT)	-	-	12	12
Environmental Planning	-	2	-	2
Grants	-	7	-	7
Real Estate	-	8	-	8
Civil Rights	-	-	3	3
Communications	-	2	6	8
Marketing	-	-	4	4
Community Affairs	-	4	-	4
Accounting	-	-	18	18
Treasury	-	-	3	3
Administration	-	-	2	2
Executive	2	-	-	2
JPB Rail Division	1	105	-	106
Total Full-Time Employees	3	136	85	224

Table 7: Staffing for Option 2

Department	Option 2			
	Caltrain Employees Reporting Exclusively up to Caltrain ED and JPB	SMCTD Employees Providing Direct Services To Caltrain and Reporting Exclusively to Caltrain ED and JPB	SMCTD Employees Reporting up to SMCTD GM but Providing Some Services to Caltrain Under an Agreement	Total Employees Supporting Caltrain
Human Resources	-	9	4	13
Safety and Security	-	5	-	5
Customer Service	-	7	-	7
Budgets	-	4	-	4
Financial Planning and Analysis	-	4	-	4
Contracts	-	13	-	13
Information Technology (IT)	-	-	12	12
Environmental Planning	-	2	-	2
Grants	-	7	-	7
Real Estate	-	8	-	8
Civil Rights	-	-	3	3
Communications	-	6	-	6
Marketing	-	6	-	6
Community Affairs	-	4	-	4
Accounting	-	-	18	18
Treasury	-	-	3	3
Administration	-	2	-	2
Executive	5	-	-	5
JPB Rail Division	3	102	-	105
Total Full-Time Employees	8	179	40	227

Table 8: Staffing for Option 3

Department	Option 3			
	Caltrain Employees Reporting Exclusively up to Caltrain ED and JPB	SMCTD Employees Providing Direct Services To Caltrain and Reporting Exclusively to Caltrain ED and JPB	SMCTD Employees Reporting up to SMCTD GM but Providing Some Services to Caltrain Under an Agreement	Total Employees Supporting Caltrain
Human Resources	13	-	-	13
Safety and Security	6	-	-	6
Customer Service	7	-	-	7
Budgets	4	-	-	4
Financial Planning and Analysis	4	-	-	4
Contracts	13	-	-	13
Information Technology (IT)	15	-	-	15
Environmental Planning	2	-	-	2
Grants	7	-	-	7
Real Estate	8	-	-	8
Civil Rights	3	-	-	3
Communications	6	-	-	6
Marketing	6	-	-	6
Community Affairs	4	-	-	4
Accounting	19	-	-	19
Treasury	6	-	-	6
Administration	3	-	-	3
Executive	5	-	-	5
JPB Rail Division	105	-	-	105
Total Full-Time Employees	236	-	-	236

Attachment 5: Information on the Estimated Costs for Fiscal Years 2020 and 2021 Governance Processes

At the August 20, 2021 special meeting on governance, it was requested that staff share the estimated costs to Caltrain to support the governance processes. In FY2020 and FY2021, the estimated costs to Caltrain totaled approximately \$1.06M across the two years. The JPB budgeted \$2.0M in the FY2022 budget for governance, and staff currently estimates that the governance process costs in FY2022 will remain within that budgeted amount. The estimates for FY2020 and FY2021 are shown below in the table below.

Table 1: Estimated Caltrain Costs to Support the Governance Processes

Cost Item	FY20	FY21
Consultant Support	\$70,000	\$370,000
Legal Support	\$250,000	\$140,000
Staff Time	\$60,000	\$160,000
Other Direct Expenses	\$10,000	\$0
Total	\$390,000	\$670,000

Attachment 6: A detailed legal memo from Olson Remcho regarding State and Federal powers over Joint Powers Authorities

MEMORANDUM

TO: Peninsula Corridor Joint Powers Board

FROM: James C. Harrison, Robin B. Johansen, Thomas A. Willis, Aaron D. Silva,
and Anna S. Myles-Primakoff

DATE: September 22, 2021

RE: State and Federal Authority Over Joint Powers Board

INTRODUCTION

We have been asked to provide an overview of the power that the State Legislature holds over joint powers authorities (JPAs) in California and what actions the Legislature may take to effect changes or modifications to existing JPAs, particularly with respect to the Peninsula Corridor Joint Powers Board (JPB). We have also been asked to provide an overview of the power that the federal government holds over JPAs in California and what actions the federal government, including Congress, may exercise with respect to JPAs, particularly with respect to the JPB. Finally, we have been asked to identify whether a JPA, including the JPB, or stakeholders would have any recourse in the event the State Legislature or the federal government were to effect changes or modifications to the JPA.

I. General Authority of the State Legislature Over Local Government Agencies

The California courts have generally recognized the broad authority of the Legislature to alter the structure of local governmental entities by statute. All local governments, districts, and the like are subdivisions of the state. *City of El Monte v. Commission on State Mandates*, 83 Cal. App. 4th 266, 279 (2000). As such, local agencies “are mere creatures of the state and exist only at the state’s sufferance.” *Board of Supervisors v. Local Agency Formation Commission*, 3 Cal. 4th 903, 914 (1992).

It follows from the fundamental nature of this hierarchical relationship between the state and its political subdivisions that the state has extraordinarily wide latitude in creating the various types of political subdivisions and conferring authority upon them. *California Redevelopment Association v. Matosantos*, 53 Cal. 4th 231, 255 (2011). The state may modify, expand, or narrow a local agency’s various powers, and may even withdraw a local agency’s powers at the state’s pleasure. *Id.* at 255-56. That is, “[t]he Legislature is free, within the confines of the California Constitution, to reconfigure and redistribute authority to its subdivisions as it chooses.” *City of Emeryville v. Cohen*, 233 Cal. App. 4th 293, 312 (2015). Indeed, the Legislature has plenary power to establish the conditions under which the state’s

political subdivisions are created, and it equally has plenary power to abolish political subdivisions. *California Redevelopment Association v. Matosantos*, *supra*, 53 Cal. 4th at 255.

The manner in which the Legislature exercises this authority may vary. On the one hand, as alluded to above, the Legislature may enact legislation that imposes invasive structural changes on an entity of local government, even to the point of abolishing a local agency. In perhaps the most notable example of this, the Legislature ended the system of redevelopment agencies (RDAs) by passing legislation that barred RDAs from engaging in new business, providing for their windup and dissolution, and transferring their assets and liabilities to successor agencies. *California Redevelopment Association v. Matosantos*, *supra*, 53 Cal. 4th at 241, 250-51. The California Supreme Court upheld that legislation against legal challenge, recognizing the broad authority of the Legislature to control the fate of local agencies. *Id.*

Significantly, among the arguments raised in opposition to the dissolution was the contention that the existence of indebtedness on the part of the RDAs insulated them from termination and gave them a right to continue to operate until their obligations were satisfied. *Id.* at 261. However, the court rejected that argument, finding that the presence of debt on the part of a local agency does not negate the Legislature's authority to disband the agency. *Id.* The court acknowledged that an entity of local government that has entered into contractual and other obligations with private parties cannot be dissolved instantaneously without accounting for those liabilities. *Id.* at 263. Assuming, though, that mechanisms are created for outstanding obligations to private parties to be honored, the existence of debt is not a barrier to the dissolution of a local agency by legislative act. *City of Grass Valley v. Cohen*, 17 Cal. App. 5th 567, 592 (2017).

On the other hand, the Legislature may also choose to provide financial incentives for local governments to implement policies, which could include incentives for a local agency to change its governance structure. Pursuing state policy objectives through financial incentives is generally constitutional, given the state's plenary lawmaking authority over the state's budget. *City of El Centro v. Lanier*, 245 Cal. App. 4th 1494, 1506 (2016). Therefore, the Legislature could effect changes in an agency of local government via a number of different approaches, both direct and indirect.

II. Joint Powers Authorities

A JPA is formed by an agreement between two or more public agencies to jointly exercise any power common to the contracting parties. Cal. Gov't Code § 6502. JPAs are generally deemed to be agencies of local government and, as such, they are effectively subdivisions of the state and are subject to the preemptive authority of state statutes. *Mountains Recreation & Conservation Authority v. Kaufman*, 198 Cal. App. 4th Supp. 1, 7-8 (2011). The status of JPAs as subordinate to state law is apparent from the framework of law in

which they are created and operate. JPAs are purely creatures of state law and exist only by virtue of their enabling statute, known as the Joint Exercise of Powers Act (Cal. Gov't Code §§ 6500 et seq.).

Moreover, beyond just enacting the enabling statute that allows for JPAs generally, the Legislature also on many occasions has passed legislation authorizing a particular JPA to be formed, authorizing a particular JPA to exercise specifically enumerated powers, or specifying how a particular JPA may operate or be organized. *See, e.g.*, Cal. Gov't Code § 6502.5 (authorizing the Resource Conservation Energy JPA to finance, construct, install, and operate specified energy production projects); Cal. Gov't Code § 6532 (authorizing the creation of the Santa Clara Stadium Authority JPA); Cal. Gov't Code § 6539 (prohibiting the Orange County Fire Authority JPA from including alternate members on its board of directors). In addition, the Legislature has also enacted legislation to dissolve a JPA and replace it with a successor agency. *See, e.g.*, the San Gabriel Basin Water Quality Authority Act (Ch. 776, Stats. 1992) (dissolving the JPA created by various San Gabriel Valley municipal water districts and creating the San Gabriel Basin Water Quality Authority as the JPA's successor agency).

Thus, it is clear that the scope of authority of JPAs, and indeed their very existence, is at the sole discretion of the State Legislature, which has absolute authority to shape the legal landscape in which any particular JPA operates by passing or amending statutory law to create a JPA, alter a JPA, or even abolish a JPA. All JPAs exist only by virtue of their enabling statute, the Joint Exercise of Powers Act. And as discussed above, agencies created by statute can be dissolved by statute. *California Redevelopment Association v. Matosantos, supra*, 53 Cal. 4th at 254-55.

III. Legislative Control of Peninsula Corridor Joint Powers Board

The JPB itself has a long history of being the subject of legislation to create, modify, and even replace the agency. In 1987, the Legislature enacted legislation authorizing the creation of the Peninsula Corridor Study Joint Powers Board, the original iteration of the current JPB. Ch. 1328, Stats. 1987. In 1988, the Legislature enacted legislation that would have in effect converted the Peninsula Corridor Study Joint Powers Board into a transit district, to be called the Peninsula Rail Transit District, for the purpose of assuming responsibility for the operation of Caltrain. Ch. 1434, Stats. 1988.¹ In 1989, the Legislature enacted legislation authorizing the California Department of Transportation to negotiate and contract with a railroad corporation to provide rail service between the City and County of San Francisco and

¹ The operation of the statute was made contingent on the governing bodies of the City and County of San Francisco, the County of San Mateo, and the County of Santa Clara determining to their satisfaction the sources of financing by which the rail transit system was to be acquired and operated. *See* Section 11, Ch. 1434, Stats. 1988. That contingency was never satisfied, and the transit district was never in fact created.

the Counties of San Mateo and Santa Clara, and then to assign that contract to the Peninsula Corridor Study Joint Powers Board. Ch. 1283, Stats. 1989. Finally, in 2017, the Legislature enacted legislation authorizing the JPB to submit to the voters of the Counties of San Francisco, San Mateo, and Santa Clara a ballot measure imposing a retail transactions and use tax, and giving the JPB authority to expend the resulting revenue for the operating and capital purposes of Caltrain. Ch. 653, Stats. 2017.

Based on that history and the expansive control the Legislature has over JPAs, it is our view that the Legislature has the constitutional authority to effect extensive changes in the governance structure of the JPB by statute, either by directly imposing changes or by offering financial incentives for the member agencies to reach agreement on specified changes.² Changes imposed by the Legislature could include revising the terms of the agreement among the member agencies, altering the relative rights and responsibilities of the member agencies, and even abolishing the JPB altogether and creating a successor agency to assume control of Caltrain or vesting control of Caltrain in the state itself.³

The Legislature's authority would also extend to revising the terms of the 1991 Real Property Ownership Agreement (RPOA), as amended in 2008, and altering or abrogating the property rights of the member agencies under that agreement. Agencies of local government, as subdivisions of the state, do not have vested property rights that can be invoked against the state. *Doctors General Hospital v. County of Santa Clara*, 188 Cal. App. 2d 280, 288 (1961). All local governmental entities are mere political agencies of the state and hold property on behalf of the state for governmental purposes, without any private proprietary interest that may be asserted against state action. *Reclamation District v. Superior Court*, 171 Cal. 672, 680 (1916). In the absence of a constitutional restriction, the Legislature has full control of the property held by a local agency and may dispose of that property without the need to either secure the consent of the local agency or compensate the local agency for its loss of property. *Id.* at 679. Thus, the power of a local governmental entity to acquire and hold property is subject to state law directives regarding the disposal of that property. *Anderson v. City of San Jose*, 42 Cal. App. 5th 683, 712-18 (2019).

² Depending on what funding sources the Legislature draws on to create financial incentives for the JPB, there could be constitutional constraints. For example, funds in the state's Public Transportation Account and the Transportation Investment Fund are subject to restrictions and may be used only for specified purposes. See Cal. Const. arts. XIX A, XIX B, and XIX C.

³ If the Legislature were to abolish the JPB, it would be necessary to account for the revenue generated pursuant to the retail transactions and use tax authorized in the 2017 legislation described above. At the November 3, 2020, statewide general election, the voters approved Measure RR to impose the tax, which is now being collected and generating revenue for expenditure by the JPB or a successor agency.

In short, we conclude that the Legislature has plenary authority, subject only to constitutional constraints that will be discussed below, to effect substantial changes in the governance structure of the JPB by altering the respective rights and responsibilities of the member agencies or even abolishing the JPB outright. In addition, the Legislature's authority extends to altering the property rights of the member agencies under the RPOA by revising the terms of the agreement, which may include refashioning and recasting the scope of those rights or even abrogating the property rights of the member agencies altogether.

IV. Authority of the Federal Government

As noted above, JPAs are creatures of state law, deriving their existence from the authority granted by the California statute known as the Joint Exercise of Powers Act. The federal government has no general authority to directly amend or revise provisions of state law, or to alter structures of governance created pursuant to the sovereign power of a state. However, under our system of government, federal law reigns supreme over state law and takes precedence to the extent there is a conflict between the two or there is overlapping jurisdiction in a particular sphere. *Arizona v. United States*, 567 U.S. 387, 398-99 (2012).

In that regard, it is significant that the JPB is an entity of local government created specifically to operate a *railroad*. The federal regulation of railroads, through the Interstate Commerce Act and subsequent legislation, is "among the most pervasive and comprehensive of federal regulatory schemes," flowing from the expansive power of Congress to regulate common carriers pursuant to the Commerce Clause of the United States Constitution. *Chicago & North Western Transportation Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 318 (1981).

Pursuant to this expansive federal authority to regulate railroads, Congress has created an extensive regulatory framework to govern the rail industry, both through the use of a complex apparatus of administrative agencies as well as directly legislating sweeping changes in rail operations. With respect to administrative agencies, Congress has created the Surface Transportation Board, which has broad regulatory oversight of the economic affairs of railroads, including rate and service issues; rail restructuring transactions, such as carrier mergers; the construction, acquisition, and abandonment of rail lines; and the interchange of traffic among carriers. 49 U.S.C. §§ 1301 et seq. Congress has also created the Federal Railroad Administration to establish and enforce safety standards for the rail industry. 49 U.S.C. § 103. And Congress has created the Federal Transit Administration to provide financial and technical assistance to public transit systems, including passenger rail, largely by overseeing grants and ensuring that grantees comply with statutory and administrative requirements. 49 U.S.C. §§ 5301 et seq.

In addition to creating administrative agencies, Congress has also at times more directly regulated the passenger rail industry by passing legislation that has had significant

operational and economic impacts on the industry. In perhaps the most significant example, Congress enacted the Rail Passenger Service Act in 1970, creating the National Railroad Passenger Corporation (i.e., Amtrak) to absorb the various privately operated intercity passenger rail services around the country that were failing due to the economic challenges of the industry. Pub. L. No. 91-518, 84 Stat. 1327 (1970).

Beyond creating Amtrak, Congress has also significantly influenced the passenger rail industry through various pieces of legislation that have impacted the operations and the finances of the industry generally. For example, Congress has created a number of discretionary grant programs to expand or otherwise improve passenger rail service. *See, e.g.*, Passenger Rail Investment and Improvement Act of 2008, Pub. L. No. 110-432, 122 Stat. 4848 (2008); Passenger Rail Reform and Investment Act of 2015, Pub. L. No. 114-94, 129 Stat. 1312 (2015). These grant programs can and often do impose mandates on local operators of rail lines to comply with certain requirements as a condition of receiving funding. The United States Congress has the power under the spending clause of the federal Constitution to grant federal funds to state and local agencies upon condition that those agencies take certain actions. *City of El Centro v. Lanier, supra*, 245 Cal. App. 4th at 1506.⁴

Thus, it can fairly be said that the federal government has sweeping preemptive authority to regulate the railroad industry generally, including public agencies that operate passenger rail services, and has exercised this authority both through acts of Congress that have resulted in organizational, operational, and financial changes as well as through the day-to-day regulatory acts of administrative agencies charged with overseeing various elements of the railroad industry.

V. Recourse of Joint Powers Authority or Stakeholders

As noted above, the power of the Legislature to reconfigure its subdivisions is limited by applicable constitutional constraints. *City of Emeryville v. Cohen, supra*, 233 Cal. App. 4th at 312. Therefore, in considering whether the JPB or other stakeholders would have any recourse to challenge legislation that imposes changes on the agency, we look to provisions of the federal and state Constitutions for any constraints on the power of the Legislature or Congress to act.

A. Recourse Against State Action

With regard to any recourse that would be available to the JPB itself or its member agencies in the event the State Legislature were to effect changes or modifications to

⁴ The Metropolitan Transportation Commission is often the designated recipient of such federal funding, with responsibility for distributing it to Bay Area transit operators such as Caltrain. *See* Cal. Gov't Code §§ 66506, 66520, and 66530.

the JPB, any such recourse would likely be extremely limited. As discussed at length above, the Legislature has plenary authority to reconfigure its subdivisions. This legislative control over agencies of local government gives rise to the well-established rule that subordinate political entities, as creatures of the state, cannot challenge state action as violating the entities' rights under such provisions as the Due Process Clause, the Equal Protection Clause, or the Contracts Clause. *Star-Kist Foods, Inc. v. County of Los Angeles*, 42 Cal. 3d 1, 6 (1986). In addition, as noted above, local agencies have no right to compensation for the loss of property taken by the state, so they are necessarily foreclosed from challenging such state action under the Takings Clause. *Reclamation District v. Superior Court, supra*, 171 Cal. at 679.

Thus, in general, a political subdivision simply has no privileges or immunities under the Constitution that it may invoke against the state. *Williams v. Baltimore*, 289 U.S. 36, 40 (1933). For example, the state is free to modify or abolish its subdivisions, and those subdivisions have no right to complain that the state is thereby impairing their contractual rights, nor do they have the right to seek compensation from the state for such actions. *City of Grass Valley v. Cohen, supra*, 17 Cal. App. 5th at 592 (city has no right to complain that redevelopment agency dissolution statute impairs its contractual rights); *Reclamation District v. Superior Court, supra*, 171 Cal. at 679 (county has no right to compensation for the taking by the state of county land). Therefore, we think there is very little, if any, recourse available to the JPB or to the member agencies of the JPB in response to any action taken by the State Legislature to reconfigure the agency, including an action that abrogated the property rights of the JPB or its member agencies.⁵

Outside of recourse available to the JPB itself or its member agencies, there could be some avenues of recourse for other persons or entities impacted by any reorganization of the JPB. In that regard, we note that a reorganization of the JPB could have implications for contracts that the JPB has entered into with private parties, for bonds that the JPB has issued, and for the vested pension rights of employees impacted by a reorganization.

Under the Contracts Clause of the United States Constitution, states have limited authority to pass laws that impair the obligations contained in existing contracts. U.S. Const.

⁵ We note that there is a provision of the California Constitution that permits a "municipal corporation" to establish, purchase, and operate public works to furnish, among other things, transportation services. Cal. Const. art. XI, § 9. Assuming that this provision applies to the JPB, it is not clear it would insulate the JPB from state interference. Acts of the Legislature are presumptively valid unless they are contrary to a clear constitutional prohibition. *County of Riverside v. Superior Court*, 30 Cal. 4th 278, 284 (2003). Moreover, a legislative reconfiguration of the JPB does not foreclose the ability of the member agencies from otherwise exercising their rights under this provision.

art. I, § 10.⁶ The parameters of this limitation with regard to contracts generally are that the Legislature cannot enact a statute that substantially impairs a contractual relationship of a private party unless the statute serves a significant and legitimate public purpose and the adjustment of the rights and responsibilities of the contracting parties is based upon reasonable conditions and is of a character appropriate to the public purpose. *20th Century Insurance Co. v. Superior Court*, 90 Cal. App. 4th 1247, 1269 (2001). The impairment of a contractual right is deemed substantial if the right has been extinguished, made invalid, or significantly altered. *Marin Association of Public Employees v. Marin County Employees' Retirement Association*, 2 Cal. App. 5th 674, 703 (2016). The rights of bondholders are considered contractual in nature for purposes of the Contracts Clause, as are the rights of public employees with respect to earned pensions. *State School Building Finance Committee v. Betts*, 216 Cal. App. 2d 685, 691 (1963) (Contracts Clause applies to rights of bondholders); *Lyon v. Flournoy*, 271 Cal. App. 2d 774, 779-81 (1969) (Contracts Clause applies to pension rights of public employees).

We also note that any attempt to reconfigure the JPB should at least consider the possible applicability of California Government Code section 6519, which provides as follows:

Notwithstanding any other provision of law, the State of California does hereby pledge to, and agree with, the holders of bonds issued by any agency or entity created by a joint exercise of powers agreement by and among two or more cities, counties, or cities and counties, that the state will not change the composition of the issuing agency or entity unless such change in composition is authorized by a majority vote of the legislative body of each such city, county, or city and county, or by a majority vote of the qualified electors of each such city, county, or city and county.

"Change in composition," as used in this section, means the addition of any public agency or person to any agency or entity created by a joint exercise of powers agreement pursuant to this chapter, the deletion of any public agency from any such joint powers agency or entity, or the addition to, or deletion from, the governing body of any such joint powers agency, or entity of any public official of any member public agency or other public agency, or any other person.

⁶ The California Constitution contains a similar limitation. Cal. Const. art. I, § 9. The California courts do not differentiate between the federal and state contracts clauses and generally construe them as imposing the same constraints on legislative action. *Hermosa Beach Stop Oil Coalition v. City of Hermosa Beach*, 86 Cal. App. 4th 534, 559 n.15 (2001).

Section 6519 seems to indicate that if the Legislature were to impose a change in composition, as defined, on a certain type of JPA that has issued bonds, the change in composition would have to be approved by a vote of the governing bodies of the member agencies or a vote of the people. The type of JPA covered by this provision is one made up of “two or more cities, counties, or cities and counties.”

There is no case law or relevant legislative history to assist with construction of this provision. Therefore, there are a number of open questions with respect to its potential application. First, it is not clear that, by its terms, it would apply to the JPB. The JPB is a JPA among one city and county and two transit districts, not two or more cities, counties, or cities and counties. More fundamentally, though, it is not clear whether this provision has any actual constraining effect on the power of the Legislature.

It is a basic tenet of constitutional law that one state legislature cannot bind a future incarnation of that same body, and that the only limits on a state legislature’s power to act are those imposed by the Constitution. *County of Sacramento v. Lackner*, 97 Cal. App. 3d 576, 589-90 (1979). We are aware of one instance in which a statutory covenant to bondholders enacted by a state legislature was held to constitute a binding contract that could not be unilaterally repealed by the legislature after the issuance of affected bonds. *See United States Trust Co. v. New Jersey*, 431 U.S. 1, 31 (1977). However, the circumstances of that case appear to have been highly unusual and particularized. It is the far more commonly applied principle of law that “absent some clear indication that the legislature intends to bind itself contractually, the presumption is that ‘a law is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise.’” *National Railroad Passenger Corporation v. Atchison, Topeka & Santa Fe Railway Co.*, 470 U.S. 451, 465-66 (1985) (quoting *Dodge v. Board of Education*, 302 U.S. 74, 79 (1937)).

Based on this analysis, Government Code section 6519 would likely not be deemed a part of the contract with bondholders and would not constrain the ability of the Legislature to alter the governance structure of the JPB by statute. Instead, any bondholder who sought to object to a reconfiguration of the JPB would necessarily have to demonstrate that the alteration actually deprived the bondholder of a substantial right or remedy with respect to the expected return on their investment. *State School Building Finance Committee v. Betts, supra*, 216 Cal. App. 2d at 691. Assuming that any successor agency would succeed to the debts of the JPB, this would be a difficult showing to make. However, there is a risk that a statutorily imposed change in the composition of the JPB, within the definition of the statute, could be challenged if the legislation does not comply with the vote approval requirements of Government Code section 6519.

Therefore, any legislative enactment that reconfigures the JPB should be mindful of its impact on any existing contracts entered into with private parties, including contracts with

privately-owned service providers, bonds issued by the JPB, and the pension rights of public employees affected by the reconfiguration. However, assuming that any such contractual rights are not substantially impaired and the parties to those agreements would be entitled to the same benefits they would have received without the legislation, it is our view that there are likely few if any limitations on the power of the State Legislature to effect changes or modifications to the JPB by statute.

B. Recourse Against Federal Action

In the case of a reconfiguration imposed by Congress, affected entities and individuals would have no recourse under the Contracts Clause, as the constraints of the Contracts Clause discussed above do not apply to actions taken by the federal government. *Pension Benefit Guaranty Corp. v. R. A. Gray & Co.*, 467 U.S. 717, 732 (1984). However, contractual rights are a form of property, and federal legislation that effectively deprives a party of existing contractual rights could be subjected to review under the Takings Clause of the United States Constitution. *Lynch v. United States*, 292 U.S. 571, 579 (1934). Moreover, a taking of the property of local government by the federal government is subject to review in an action brought pursuant to the Takings Clause. *United States v. 50 Acres of Land*, 469 U.S. 24, 31 (1984).

In such a proceeding, a court would weigh the economic impact of the governmental action on the claimant, the extent to which the governmental action has interfered with distinct economic expectations, and the character of the governmental action. *Buffalo Teachers Federation v. Tobe*, 464 F.3d 362, 375 (2nd Cir. 2006). However, governmental action that only incidentally interferes with the performance of a contract, and does not target the contract directly, is generally deemed to merely frustrate but not take contract rights for purposes of the Takings Clause. *Omnia Commercial Co. v. United States*, 261 U.S. 502, 513 (1923). Alternatively, an affected entity or individual could claim that the governmental action violates their substantive due process rights. Such a claim requires a showing that the governmental action is arbitrary and capricious. *National Railroad Passenger Corporation v. Atchison, Topeka & Santa Fe Railway Co.*, *supra*, 470 U.S. at 472. However, as a general matter, Congress has considerable leeway to fashion economic legislation, including the power to affect the contractual rights of private parties. *Eastern Enterprises v. Apfel*, 524 U.S. 498, 528 (1998).

CONCLUSION

In sum, as an entity of local government created pursuant to state law, the JPB is subject to the plenary authority of the State Legislature to modify or alter its governance structure, or even to terminate its existence and supplant it with a successor agency, provided that in doing so the state ensures that the rights of parties to contracts, including bondholders and public employees earning pensions, are protected.

At the same time, as an entity of government that operates a railroad, the JPB is also subject to the preemptive authority of the federal government to regulate that industry pursuant to the power of Congress under the Commerce Clause of the United States Constitution. Such regulation normally takes the form of compliance with the directives of administrative agencies or the requirements imposed as a condition of federal funding. However, Congress could also theoretically impose direct changes on a railroad operator through particularized legislation, which could include alterations to the operator's governance structure.

In our view, if either the State Legislature or Congress were to take such action, there would be very little recourse available to the JPB itself or its member agencies. However, there is some risk that third-party stakeholders could challenge legislative action through litigation under a variety of theories. It is beyond the scope of this memorandum to anticipate every possible legal theory on which a party impacted by a reconfiguration of the JPB might bring a cause of action, or to assess the likelihood of success of such actions. We simply note that the possibility of litigation is present and could potentially entail significant expenses to both plaintiffs and defendants, as well as risk of disruption to various business, governmental, and contractual relationships depending on the identity of the parties.

Attachment 7: A detailed legal memo from Olson Remcho regarding member agency withdrawal from the Peninsula Corridor Joint Powers Authority

MEMORANDUM

TO: Peninsula Corridor Joint Powers Board

FROM: James C. Harrison, Robin B. Johansen, Thomas A. Willis, and Aaron Silva

DATE: September 22, 2021

RE: Procedures If One or More Member Agencies Withdraw from the Joint Powers Board

INTRODUCTION

We have been asked to describe the process and required action that must be taken if one or more member agencies wishes to withdraw from the Peninsula Corridor Joint Powers Authority. The memorandum that follows assumes that the relationship among the member agencies remains as it exists as of this writing. In particular, the memorandum assumes that SamTrans has not been fully reimbursed for its Additional Contribution to the purchase of the railroad right of way in 1991 and that SamTrans has not elected to treat its unreimbursed share of the Additional Contribution as an equity interest in the ROW pursuant to Part 7 of the 1991 Real Property Ownership Agreement.

We begin with a description of the withdrawal and termination provisions of the 1996 Joint Powers Agreement (“JPA”) and the 1991 Real Property Ownership Agreement (“1991 RPOA”) and 2008 amendment (“2008 Amendment”). We then turn to how those provisions would apply to disposition of the Joint Powers Board (“JPB”) assets and its contractual obligations in the event that two or more member agencies withdraw from the JPA. As discussed below, the interaction between the JPA and the 1991 RPOA create ambiguity regarding the operation of the termination and disposition of property provisions of the parties’ agreements if two members withdraw. Finally, we describe the implications of such withdrawal for continued collection and use of Measure RR funds.

A. Withdrawal From the JPA

1. Joint Powers Agreement

Under Section 12 of the JPA, any party may withdraw by giving one year’s notice to the other parties at the end of any fiscal year. If *one* party withdraws, the JPB continues to exist and the withdrawing party is not entitled to distribution of any assets or funds of the JPB. Prior to withdrawal, the parties must participate in mediation with Metropolitan Transportation Commission (“MTC”) regarding the issues that gave rise to the notice of withdrawal. If the mediation is unsuccessful, the parties must participate in further mediated negotiation

regarding disbursement of regional funds to assure that remaining member agencies are not subject to undue financial hardship.

If two parties withdraw, Section 12 provides that the JPA terminates at the end of the fiscal year following expiration of one year's notice given by the second party (*e.g.*, if the second member provides notice on June 30, 2022, the Agreement terminates June 30, 2024). Section 12 goes on to say that in such a case “. . . the property and funds of the JPB shall be distributed to the Member Agencies pursuant to the terms of Section 13.”

Section 13 in turn states that upon termination of the JPA and after payment of all obligations, any property interest remaining in the JPB shall be disposed of and the property or proceeds shall be allocated according to a separate agreement among the parties.

2. 1991 RPOA

Although the 1991 RPOA does not directly address withdrawal by members, Section 9 of that document states that it “supersedes and amends Section 12 of the JPA,” which deals only with withdrawal from the JPA. Normally the term “supersedes” means “to replace” something,¹ but the statement that Section 9 “supersedes and amends Section 12 of the JPA” suggests that it is to be read *with* that section rather than as a substitution for it. This interpretation is strengthened by the fact that although the parties amended and restated the entire JPA in 1996, which was five years *after* they drafted Section 9 of the 1991 RPOA, they did not materially change Section 12 except to insert a mediation requirement.

Rather than changing what types of actions amount to withdrawal or termination of the JPA, Section 9 focuses on what does *not* constitute withdrawal or termination by providing that the decision of one or more member agencies to cease “to support operations” does not constitute withdrawal or termination of the JPA. The term “to support operations” apparently refers to Section 7(A) of the JPA, titled “Financial Commitments,” which provides that “[e]ach Member Agency agrees to share in the operating cost associated within the PCS [Peninsula Commute Service]” and that the members’ operational subsidies for the Main Line Service were to be based on the existing passenger boarding formula. For a member agency to decide to cease to support operations appears to mean that it has notified the other member agencies that it will cease providing operational subsidies pursuant to Section 9 of the RPOA..

Section 9 goes on to state that when a member withdraws operational support it shall “(a) no longer be entitled to vote on any matter involving operational issues, (b) no longer be obligated to subsidize the PCS as provided herein or to participate in capital projects, (c) remain entitled to its share of Net Nonoperating Revenues . . . up to such time as its

¹ *Supersede*, Dictionary.com (accessed September 7, 2021), <https://www.dictionary.com/browse/supersede>.

participation in the Additional Contribution has been repaid in full, and (d) remain obligated to contribute its share of any Net Nonoperating Deficit on system option properties and state transferred properties . . . until the ROW and all system assets are finally disposed of.”²

We do not believe that Section 9 applies to the current situation whereby the JPB adopted a budget that did not include member agency contributions toward operational costs for fiscal year 2021-22 in light of Measure RR funds being available to pay the operational costs, since that decision was made by the JPB, and not by any individual member. Rather we believe that Section 9 would apply only if subsidies were necessary to meet Caltrain’s operating budget and one or two member agencies notified the other member(s) that they would no longer contribute to the operating costs of the railroad.

Finally, Section 9 concludes abruptly with a sentence that reads: “Upon the effectuation of the sale of the ROW [right of way] and PCS assets, the JPB shall be deemed dissolved.” This sentence is seemingly unconnected to any of the other sentences in Section 9, which deal only with the member agencies’ contributions to operating costs, as described above. Because Section 9 is limited to the issue of what occurs if a party ceases to support operations of the PCS and because Section 9 provides that an agency’s withdrawal of operational support “. . . shall not constitute a withdrawal from the JPB by said Member Agency . . .” we do not understand why that sentence was included in Section 9 of the RPOA. However, it further reinforces our conclusion that Section 9 does not replace the termination and dissolution provisions contained in Section 12 of the JPA.

In sum, our best understanding of the interplay between Section 12 of the JPA and Section 9 of the 1991 RPOA is as follows:

1. One member may either: (a) withdraw under Section 12 of the JPA and presumably avoid all future capital or operating payments, with membership of the JPB adjusted to show two members; or (b) discontinue operating subsidy payments under Section 9 of the RPOA and no longer have to participate in capital projects but remain responsible for its share of any annual ongoing net operating deficits on system option and state transferred properties, and be entitled to its share of net nonoperating revenues; or

² Section 1.8 of the 1991 RPOA defines a Net Nonoperating Deficit as “[a]ny deficit between Net Nonoperating Revenues and Nonoperating Expenses for each fiscal year this Agreement is in effect.” System option properties are properties that the JPB acquired under options in the agreement for purchase of the railroad from Southern Pacific. 1991 RPOA, ¶ 1.17. State transferred properties are real property transferred from Caltrain to the JPB at closing of the agreement with Southern Pacific. 1991 RPOA, ¶ 1.16.

2. Two members may either: (a) withdraw under Section 12 of the JPA and after a year the JPA terminates (per Section 12) but any disposition of assets is still controlled by Section 10 of the RPOA, which is discussed below; or (b) discontinue subsidy payments under Section 9 of the RPOA, remain responsible for any annual ongoing net operating deficits on system option and state transferred properties, and be entitled to their share of net nonoperating revenues.

Regardless, we believe that whether a member withdraws operational subsidies or withdraws from the JPA, the disposition of assets is the same in either case, as discussed below.

B. Dissolution and Disposition of Assets

1. Dissolution and Sale of the ROW

As discussed above, Section 12 of the JPA provides for withdrawal from the JPA and concludes with this sentence:

If two or more of the parties to this Agreement withdraw, then this Agreement shall terminate at the end of the fiscal year following expiration of the one-year's notice given by the second party to withdraw from the Agreement, at which time the property and funds of the JPB shall be distributed to the Member Agencies pursuant to the terms of Section 13.

We understand "the property and funds of the JPB" to refer to all the assets of the railroad, including real property, rolling stock and other non-real estate, as well as funds held by the JPB.

Although Section 12 says that the property and funds shall be distributed "pursuant to the terms of Section 13 and although Section 13 is titled "Disposition of Property and Funds," Section 13 merely provides:

At such time as this Agreement is terminated, any property interest remaining in the JPB, following discharge of all obligations due by the Board, shall be disposed of and the proceeds or property shall be allocated *in accordance with a separate agreement to be entered into between the parties.*

1996 JPA, § 13 (emphasis added).

Sections 12 and 13 of the JPA were originally written in 1991. Section 5 of the 1991 RPOA, which was written at almost the same time as the 1991 JPA, provides:

This Agreement shall become effective upon the acquisition of the ROW by the JPB and SAMTRANS and shall continue in full force and effect until disposition of the ROW pursuant to Section 10 below is effected. *This Agreement [the 1991 RPOA] shall govern the disposition of the ROW and represents the “separate agreement” referenced in Section 13 of the JPA.*

Thus, Section 5 makes clear that the RPOA, not the JPA, provides the rule for how the member agencies shall dispose of JPA’s property and funds, including the ROW, upon termination of the JPA.

That rule is set forth in Section 10 of the RPOA, which states that “[u]nless otherwise agreed by the parties or otherwise required by laws . . . in the event the ROW is not used by any Member Agency to provide a minimum level of PCS equal to 44 trains per day for a period of seven consecutive years the JPB or SAMTRANS shall sell the ROW System Option Properties at the earliest practicable opportunity.” Notably, Section 10 provides only for the sale of the “ROW System Option Properties,” a term that is not defined in the Agreement itself and that does not appear anywhere else in the Agreement. Section 1.15 defines the ROW as “[a]ll real property and other assets to be acquired by the JPB and SAMTRANS pursuant to the Purchase Agreement other than the Local Option Properties,” and Section 1.17 defines System Option Properties as “[t]hose properties acquired pursuant to the options established in the Purchase Agreement other than the Local Option Properties.”

Presumably, the drafters of Section 10 meant to say that “the JPB or SAMTRANS shall sell the ROW *and* System Option Properties at the earliest practicable opportunity,” because that is the only way that the RPOA could provide the separate agreement for disposition of property called for by the JPA. However, Section 10 does not address disposition of State Transferred Property, an issue that is discussed below.

Finally, Section 11 of the 1991 RPOA is titled “Waiver of Partition” and reads:

As long as this Agreement is in full force and effect, each party hereto hereby waives the right it would otherwise have to institute an action or otherwise require partition of the ROW or any part thereof, or any similar remedy, and each party also waives the same on behalf of its successors and assigns.

We note that Section 11 makes no reference to the JPA; instead it says that as long as “this Agreement” is in full force and effect, the parties will not try to partition the ROW. That language suggests that the parties intended for the Real Property Ownership Agreement to remain in effect even if the JPB were dissolved and that dissolution would not necessarily require sale of the ROW and other assets.

Thus, in the event that two members withdraw entirely from the JPB (as opposed to ceasing to provide operational subsidies) and absent a different agreement among the members, the remaining agency would have to discontinue providing a minimum level of services (44 trains per day) for a period of seven years before the ROW could be sold. As long as that agency maintained a minimum level of service, the disposition of assets under Section 10 apparently would not be triggered.

This is where the interaction between the RPOA and the JPA becomes very difficult to interpret. Under Section 12 of the 1996 JPA, if two or more parties withdraw, the Agreement terminates “at which time the property and funds of the JPB shall be distributed to the Member Agencies pursuant to Section 13” of the JPA. As explained above, Section 13 of the JPA merely states that the parties will provide for disposition of assets by a separate agreement. At nearly the same time, in 1991, the parties wrote in Section 5 of their original Real Property Ownership Agreement that the RPOA “represents the ‘separate agreement’ referenced in Section 13 of the JPA” and Section 10 of the RPOA provides that as long as one agency maintains a minimum level of service, the mandatory disposition of assets would not be triggered. Under what circumstances, then, will the ROW and other JPB assets be disposed of and distributed to the member agencies?

The answer may lie in the fact that Section 10 is titled “*Mandatory Disposition of Assets*” and begins with the phrase, “[u]nless otherwise agreed by the parties or otherwise required by laws, regulations, or contractual obligations” This could be read to mean that in the event that two member agencies withdraw and the JPA is terminated, the third member agency cannot be forced to agree to sale of the railroad until it has failed to provide the minimum level of 44 trains per day for seven years. This would be a huge undertaking, but it would allow the remaining agency a long enough period of time to put together a viable alternative to sale of the railroad. If, however, the remaining agency does *not* want to try to continue running the railroad, then the parties would agree to sell the railroad and dispose of the assets pursuant to Section 10 of the RPOA. The parties’ agreement to waive their right “to require partition of the ROW or any part thereof, or any similar remedy” as long as the RPOA remains in effect strengthens this interpretation by assuring that the entire ROW will remain intact until the seven year period has expired.

2. Distribution of Assets

In the event of a dissolution and either assuming that none of the member agencies wishes to continue running the railroad or, if one agency undertakes that effort, then either by agreement among all the member agencies or after the remaining agency has failed to provide the minimum level of service for seven years, the disposition provisions of Section 10 will apply. Under those provisions, the ROW and System Option Properties will be sold and the proceeds and other JPB funds will be distributed pursuant to Section 10 of the RPOA. Section 10 provides that the distribution of assets shall be made as follows:

Upon disposition, the proceeds of the sale will be used first to satisfy any contractual obligations, second, to pay to any Member Agency any amount it has contributed to the principal of the Additional Contribution which has not been reimbursed previously, with interest on said amount from the date of said principal contribution at the rate provided in Section 3.3 above. The remainder of the sales proceeds, if any, shall be shared among CCSF, SAMTRANS and SCCTD in accordance with the Mileage Formula.

Thus, Section 10 sets out the following priorities for distribution of the proceeds of sale of the ROW:

1. Contractual obligations, including bondholders;
2. Reimbursement of payments for the principal of the Additional Contribution, with interest as provided in Section 3.3;
3. Division of the remainder among the three agencies according to the Mileage Formula.

The first priority is to pay the JPB's contractual obligations. It is, of course, very difficult to know what the market price of the railroad, including all of its assets, would be at any given time and whether it would be enough to discharge the JPB's debts. However, Caltrain's most recent Comprehensive Annual Financial Report, which covers the fiscal year ending June 30, 2020, indicates that its assets far outweigh its liabilities, meaning that the proceeds of sale should be more than sufficient to meet Caltrain's outstanding contractual obligations.³

Given that financial positions may change, however, there are two scenarios that should be considered: (a) what happens if the proceeds of sale are insufficient to cover the JPB's contractual obligations, and (b) what happens if the proceeds are sufficient to meet Caltrain's contractual obligations, leaving money for distribution.

³ Cal. Dept. Of Transportation., *Comprehensive Ann. Fin. Rep.: Fiscal Years Ended June 30, 2020 and 2019*, 4 (2020), (describing that "[a]t June 30, 2020, the JPB's assets exceeded its liabilities by \$2,355.7 million (net position) . . . [and] "[a]t June 30, 2019, the JPB's assets exceeded its liabilities by \$2,071.3 million.").

- a. **If funds are not sufficient to cover contractual obligations, member agencies are not liable for the debt and bondholders will probably be paid before other creditors**

Section 15 of the JPA provides:

The debts, liabilities and obligations of the JPB shall not be debts, liabilities and obligations of any of the parties to this Agreement unless and to the extent specifically provided by agreement in writing with any of such parties.

We are not aware of any agreements with any outside parties that would make the member agencies responsible for any of the JPB's obligations, although we have not undertaken a study of the JPB's contracts that might contain such a claim, such as bond covenants. This requires additional review.

The question remains, however, whether a contracting party could hold the member agencies responsible for the JPB's debts under an alter ego theory. Under current law, they could not. California Government Code section 6508.1(a) provides:

If the agency is not one or more of the parties to the agreement but is a public entity, commission, or board constituted pursuant to the agreement, the debts, liabilities, and obligations of the agency shall be debts, liabilities, and obligations of the parties to the agreement, *unless the agreement specifies otherwise*. However, the parties to the agreement may not agree otherwise with respect to the retirement liabilities of the agency if the agency contracts with a public retirement system. Cal. Gov't Code § 6508.1(a) (West) (emphasis added).⁴

The 1991 JPA clearly provides that the member agencies are not responsible for the debts of the JPB, and at least one court of appeal has upheld such a provision against a challenge based on a strained reading of Section 6508.1 and under a common law alter ego theory. *Tucker Land Co. v. State of California*, 94 Cal. App. 4th 1191, 1193 (2001).

Assuming that the JPB's creditors have no recourse against the member agencies or anyone else, there will still be the issue of the order in which the contractual obligations would be paid. The Government Code provisions governing joint powers authorities do not

⁴ The exception for public retirement obligations in Government Code section 6508.1(a) would not apply to Caltrain currently because it has no employees. However, if the JPB were to decide to proceed under either Option 2 or 3, both of which contemplate that there will be employees of the JPB, then the retirement obligations of the JPB would adhere to the member agencies if the JPB were to be dissolved in the future.

address this issue, but there are analogous provisions that governed the dissolution of redevelopment agencies a decade or so ago. California Health and Safety Code section 34183(a)(2) provides that a dissolved redevelopment agency's revenues would be used to pay its debts in the following order of priority:

(A) Debt service payments scheduled to be made for tax allocation bonds.

(B) Payments scheduled to be made on revenue bonds, but only to the extent the revenues pledged for them are insufficient to make the payments and only if the agency's tax increment revenues were also pledged for the repayment of the bonds.

(C) Payments scheduled for other debts and obligations listed in the Recognized Obligation Payment Schedule that are required to be paid from former tax increment revenue. Cal. Health & Safety Code § 34183(a)(2) (West).

This order would give bondholders priority over other obligors, which is what we would expect to happen if there were litigation over the order of distribution.

b. If there are more than sufficient funds to pay creditors, distribution of surplus will depend on interpretation of Section 10 of the RPOA

As noted above, Section 10 of the 1991 RPOA provides that after payment of creditors, surplus funds from sale of the ROW shall then be used as follows:

. . . to pay to any Member Agency any amount it has contributed to the principal of the Additional Contribution which has not been reimbursed previously, with interest on said amount from the date of said principal contribution at the rate provided in Section 3.3 above. The remainder of the sales proceeds, if any, shall be shared among CCSF, SAMTRANS and SCCTD in accordance with the Mileage Formula.

The provision that any surplus will be used next to repay any unreimbursed amount a member agency has contributed to the Additional Contribution, with interest, was written before the 2008 amendment to the RPOA. Under the 2008 Amendment, the parties agreed that the payment of a total of \$53.3 million to SamTrans (\$2 million by San Francisco, \$8 million by VTA, and \$43.3 million by MTC on behalf of VTA and San Francisco) would satisfy the member agencies' obligations under Sections 3.3 and 3.4 of the 1991 RPOA with respect to SamTrans' Additional Contribution. The projected funding by which these payments were to be made disappeared, however, and although SamTrans did receive a substantial amount of what it was

owed, there is still approximately \$19.8 million outstanding, most of which was intended to come from the Metropolitan Transportation Commission.

Thus, under Section 10's disbursement formula, SamTrans is still entitled to receive \$19.8 million. It is not clear, however, whether or how interest should be calculated and added to that amount or, if it is due, when interest should have started to accrue. That is because although Section 10 of the 1991 RPOA says that SamTrans is entitled to interest ". . . at the rate provided in Section 3.3 above . . .," the 2008 RPOA amendment provides that "Section 3.3 of the Agreement (Reimbursement of Additional Contribution) is *amended in its entirety to read as follows*," and the new Section 3.3 makes no mention of interest at all. This was apparently not an oversight. Although Part C of new Section 3.3 recognizes that the amounts may not be paid even a decade later, it contains no reference to interest:

If circumstances arise that would preclude allocation of the funds in full within ten (10) years, the parties acknowledge and agree that MTC will be authorized to identify alternative sources of non-local funds to effect full reimbursement of the Additional Contribution to SAMTRANS at the earliest practicable date.

Recent events have made clear that the parties have different interpretations of how much SamTrans is owed under these agreements. The mediation required under the JPA before withdrawal or termination may be able to resolve these differences.

There are two other questions that may require further study:

1. What happens to the state transferred properties if the railroad is sold? Because the state transferred ownership of these properties to the JPB, presumably they would be disposed of in the same way as the rest of the JPB's assets. However, we note that Section 7.1 of the 1991 RPOA provides that if SamTrans exercises its equity conversion option, title to the state transferred properties remains in the JPB, which could suggest that the State imposed some kind of restriction on transfer or sale. Before drawing a firm conclusion, it would be best to review the documents that accompanied transfer of the properties from the State.
2. Are there restrictions on any of the capital projects that were completed using federal funds that would affect sale, particularly to a private entity? For example, federal law requires reimbursement of Federal Transit Administration grants when real property that has been improved

through the use of federal funds is sold.”⁵ We understand there are other similar requirements that could have implications for sale of the ROW, particularly if the assets are not used for transit purposes.

3. Measure RR Funds

Measure RR money can only “be used by the board for the operating and capital purposes of the Caltrain rail service.” Cal. Rev. & Tax. Code § 7286.65(a)(West). If one member of the JPA withdraws and the other two members continue operations, Measure RR funds could continue to flow to Caltrain, because JPB Resolution No. 2020-40, which put the sales tax on the ballot, provides that the JPB or a successor agency shall administer the tax.⁶ Presumably, even if two members withdraw and the JPA is dissolved, an original member could continue to run the ROW and claim a right to the proceeds as the successor agency and use the funds to run the railroad.

If the railroad is sold, however, the outcome is not clear, and it probably depends on the nature of the buyer. We doubt that a private railroad would qualify as a “successor agency,” which contemplates a public body, not a private one. There is also the issue of whether sending sales tax revenues to a private entity would constitute a gift of public funds, even if the private party used them to perform a public function. *See Cal. Hous. Fin. Agency v. Elliott*, 17 Cal. 3d 575, 583 (1976) (finding that public funds can be “disbursed if a direct and substantial public purpose is served and nonstate entities are benefited only as an incident to the public purpose.”).

If rail service is discontinued, however, the tax can no longer be used to serve its stated purpose. In that event, it would be subject to legal challenge and would either have to be repealed or replaced by another measure that must be approved first by the Legislature and then by the voters to change the permitted use of the tax revenues. *See* Cal. Const. art. XIII C, § 1(d) (“special tax’ means any tax imposed for specific purposes . . .”); Cal. Gov’t Code § 53724(e)(West) (“The revenues from any special tax shall be used only for the purpose or service for which it was imposed, and for no other purpose whatsoever.”).

CONCLUSION

As the preceding discussion demonstrates, the provisions for withdrawal and termination of the JPA must be read in light of the 1991 RPOA, which leaves their meaning

⁵ *See, e.g.*, Fed. Transit Admin., *FTA Circular 5010.1E* at pp. IV-17 to IV-20 (U.S. Dep’t Transp. 2018), <https://www.transit.dot.gov/sites/fta.dot.gov/files/docs/regulations-and-guidance/fta-circulars/58051/5010-1e-circular-award-management-requirements-7-16-18.pdf>; U.S. Dept. of Transportation, Fed. Transit Admin., *Award Mgmt. Requirements*, 74, 2017 WL 1063570.

⁶ Resolution No. 2020-40, § 1(c) (Aug. 6, 2020).

Peninsula Corridor Joint Powers Board
September 22, 2021
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quite unclear. Ideally, any issues caused by the ambiguity would be worked out in the mediation required by the JPA.

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Attachment 8: A detailed legal memo from Olson Remcho regarding arbitration and mediation for the member agencies

MEMORANDUM

TO: Peninsula Corridor Joint Powers Board

FROM: James C. Harrison, Thomas A. Willis, and Anna Myles-Primakoff

DATE: September 22, 2021

RE: Options for Mediation or Arbitration for Member Agencies Regarding Governance Structure

INTRODUCTION

The member agencies of the Peninsula Corridor Joint Powers Board (“JPB”), the City and County of San Francisco, the Santa Clara Valley Transportation Authority, and the San Mateo County Transit District, are currently considering changing the governance structure of the JPB. We have been asked to identify the process(es) by which the member agencies may enter into mediation and/or arbitration as a means to reach agreement about future governance structures.

As discussed in more detail below, the member agencies may not use binding arbitration to determine future policy decisions but may enter into mediation on those issues. If the member agencies decide to pursue mediation as a mechanism to facilitate an agreement regarding the governance structure of the JPB, they should be mindful of the public meeting and records disclosure laws that will govern such discussions.

ANALYSIS

I. Authority to Determine the Governance of Joint Powers Agencies

The Joint Exercise of Powers Act, as codified in California Government Code section 6500, governs the formation of joint powers agencies. The governing bodies of the member agencies of a joint powers agency must approve the joint exercise power common to the contracting parties through the execution of an agreement that states the purpose of the joint powers agreement (“JPA”) or the manner in which the power will be exercised. *Id.* §§ 6502, 6503. Because the Joint Exercise of Powers Act does not require a particular governance structure or composition for joint powers agency governing boards, the parties may determine the governance structure of a new joint powers agency or they may amend the governance structure of an existing joint powers agency. The governing bodies of all the parties to a JPA must approve a new or amended agreement. *Id.* § 6502.

As a joint powers agency, the JPB itself does not have the authority to determine its governance structure; that authority resides with the member agencies. Under the 1996 Joint Powers Agreement (“1996 JPA”), the member agencies’ governing bodies must reach an agreement on any new structure and then separately pass resolutions to approve an amendment to the JPA. 1996 JPA, § 17 (“This Agreement may be amended at any time by agreement of all of the parties.”).

II. JPB Member Agencies May Not Engage in Binding Arbitration to Reach Agreement on JPB Governance Structure

Arbitration is a means of dispute resolution that allows parties to a dispute to settle their disagreement without going to court. Generally, any controversy that may be the subject of a civil suit may be submitted to arbitration. Parties select a neutral arbitrator or panel of arbitrators, usually pursuant to a process outlined in an existing agreement regarding dispute resolution and submit evidence in similar form to what would be presented in a court proceeding but without application of the rules of evidence. The arbitrator issues a decision regarding the dispute, and depending upon the parties’ agreement, that decision is either binding or non-binding. If the parties have agreed that the arbitration decision is binding and waived their right to a trial, then the decision will be enforced by the courts. If the decision is non-binding, then the parties may request trial by court or jury both as to law and facts if they disagree with the arbitrator’s decision.

The California Code of Civil Procedure defines an arbitrable controversy as covering any legal or factual questions arising between the parties to an agreement. Cal. Code Civ. Proc. § 1280(d). Written agreements to submit an existing controversy to arbitration are valid, enforceable and irrevocable, save upon such grounds as exist for the revocation of any contract. *Id.* § 1281. Legislative bodies, including joint powers authorities, may agree when contracting with one another to submit disputes regarding their agreement to arbitration.¹ However, the 1996 Joint Powers Agreement does not contain an arbitration clause; therefore, even in the event of an arbitrable dispute, the parties would have to agree to submit the dispute to arbitration.

¹ See *E. San Bernardino Cty. Water Dist. v. City of San Bernardino*, 33 Cal. App. 3d 942, 955 (1973), remanding for arbitration a dispute between the appellant water district and respondent city because the parties had agreed to use arbitration as the method to be used for settling their disputes and that the arbitrators had the task of defining the issues for arbitration and of interpreting the parties’ agreement. Appellant water district and respondent city had entered into a JPA which provided for the sewer rate to be paid to the city and an agreement to arbitrate. The city increased the sewer rate and the water district paid under protest, serving the city with a notice to arbitrate. Arbitrators decided that a court should determine the issues and the trial court agreed; the court of appeals reversed and remanded for arbitration.

Even if the member agencies of the JPB were to agree now or in the future to arbitration as a means of resolving disputes about the JPA, submission of a decision about the governance structure to a private arbitrator would likely be considered an improper delegation of legislative authority. Courts in California have consistently held that local legislative bodies, such as city councils and boards of supervisors, may not delegate legislative authority or the power to make legislative decisions absent express statutory authority to do so.²

In this instance, there is no express statutory authority that would permit the member agencies of the JPB to submit disagreements regarding the governance structure of the JPB to binding arbitration. Thus, JPB member agencies may not use binding arbitration to reach an agreement on a new governance structure. A new governance structure would require a new or amended agreement which, pursuant to the Joint Exercise of Powers Act, must be approved by the governing bodies of the members. Cal. Gov't Code § 6502. Furthermore, arbitration is meant to settle questions of fact and law, e.g., a dispute over whether parties to an agreement have fulfilled their obligations thereunder, rather than questions of public policy such as the optimal governance structure for the JPB.

III. JPB Members May Engage in Mediation to Facilitate Agreement on a New Governance Structure

Generally, government agencies and legislative bodies may use mediation, which is non-binding, to facilitate agreement on a wide range of issues. Mediation is less formal and adversarial than arbitration; it allows parties to engage with a neutral moderator to resolve disputes and is generally intended to foster communication and cooperation rather than encourage adversarial postures. The mediator may hear information about the dispute from the parties but will not render a decision on the merits of the parties' arguments or evidence.

The 1996 JPA contemplates mediation as a method of dispute resolution. Section 12, which addresses the withdrawal from the JPA of one or more members, provides that upon notice of withdrawal from one of the agencies, the member agencies shall jointly request that the Metropolitan Transportation Commission ("MTC") mediate the issues giving

² See, e.g., *Bagley v. Manhattan Beach*, 18 Cal. 3d 22, 24 (1976). In this case, firefighters appealed a trial court decision denying a writ of mandate to compel placement of a ballot initiative on the ballot; the initiative required disputes between the firefighters and the city to be resolved in binding arbitration. The California Supreme Court affirmed the denial of writ of mandate, holding that existing state law, and the Legislature's repeated refusal to enact any law permitting general law cities to fix salaries by arbitration, evidenced an intent that the city council of a general law city, and not an arbitrator, fix compensation. See also *Taylor v. Crane*, 24 Cal. 3d 442, 452-53 (1979) (distinguishing grievance arbitration from arbitration of public policy decisions as described in *Bagley v. Manhattan Beach*).

rise to the withdrawal notice, as well as any further issues related to disbursement of regional funds if withdrawal occurs despite MTC's mediation efforts. 1996 JPA, § 12.

A. Ralph M. Brown Act ("Brown Act") Requirements

If the member agencies choose to engage in mediation, they must carefully choose representatives and a process that avoids any violations of the Brown Act. The Brown Act requires that local governing bodies hold meetings open to the public, except in a very limited range of circumstances. According to the Brown Act, a meeting is defined as "[a]ny congregation of a majority of the members of a legislative body at the same time and location . . . to hear, discuss, deliberate, or take action on any item that is within the subject matter jurisdiction of the legislative body." Cal. Gov't Code § 54952.2. Although the JPB's governance structure is not technically within the JPB's authority, the JPB has effectively treated it as falling within the JPB's jurisdiction by holding a series of public meetings to consider governance options. Therefore, we recommend that any mediation involving the future governance structure of the JPB involve less than a quorum of JPB members.

Mediation involving less than a quorum of each member agencies' governing body would not be subject to the Brown Act.³ Participating members would still need to be careful to avoid discussions with their colleagues outside of a noticed meeting in order to prevent a prohibited serial communication under the Brown Act.⁴

B. Public Records Disclosure Considerations

The California Public Records Act provides that public records, defined as any writing containing information relating to the conduct of the public's business prepared, owned, used, or retained by any state or local agency regardless of physical form or characteristics, are open to inspection at all times during the office hours of the local agency and every person has a right to inspect any public record except as specifically provided by statute. Cal. Gov't Code §§ 6252, 6253.

This poses a challenge for public agencies wishing to engage in mediation, as total transparency may hinder efforts to reach resolution of sensitive issues. Depending on the nature of a document, however, the agencies may be able to rely on certain exceptions to the

³ See, e.g., Cal. Gov't Code § 66032(b) (providing mediation involving less than a quorum of a legislative body conducted pursuant to the chapter providing for mediation of land use disputes is not considered meeting of a legislative body for purposes of the Brown Act).

⁴ The Brown Act expressly prohibits serial meetings between members that are conducted through direct communications, personal intermediaries, or technological devices for the purpose of developing a concurrence as to action to be taken. Cal. Gov't Code § 54952.2(b).

California Public Records Act (“the Act”) to avoid disclosure of sensitive drafts and other confidential documents not ordinarily subject to disclosure.

First, the Act exempts from disclosure (1) “[p]reliminary drafts, notes, or interagency or intra-agency memoranda,” (2) “that are not retained by the public agency in the ordinary course of business,” (3) “if the public interest in withholding those records clearly outweighs the public interest in disclosure.” Cal. Gov’t Code § 6254(a). Draft documents prepared for the sole purpose of mediation may fall under this exception if all the criteria in the Act are met.

There is also an exemption for sharing documents with any other governmental agency who agrees to treat the disclosed material confidential. Cal. Gov’t Code § 6254.5(e). Under this exemption, only persons authorized in writing by the person of the agency shall be permitted to obtain the confidential information. *Id.* Depending on the nature of documents being used in mediation, it is possible that the member agencies might be able to share documents not otherwise subject to disclosure under this exemption without waiving the disclosure exemptions.

Lastly, under the Act, agencies do not have to disclose records if the disclosure is exempted or prohibited pursuant to federal or state law, including the Evidence Code. Cal. Gov’t Code § 6254(k). California’s Evidence Code specifies that anything said or any writing for the purpose of, in the course of, or pursuant to, a mediation or a mediation consultation is not admissible or subject to discovery. Cal. Evid. Code § 1119. Therefore, if the member agencies prepare documents specifically for mediation or mediation consultation, these materials may be exempt from public disclosure requirements (though note that merely exchanging documents at mediation will not suffice for this exemption to apply if the documents were not specifically prepared for mediation).

1. To Optimize Likelihood of Success, Mediation Goals and Parameters Should be Clearly Established

If the member agencies decide to pursue mediation in order to resolve their differences over Caltrain’s governance structure, we recommend that they consider the following issues:

- (a) Goals of Mediation:** The member agencies’ governing bodies should reach agreement regarding the goals of mediation, including the issues in controversy and areas where professional assistance may be helpful in moving beyond an impasse, and provide this to the mediator.
- (b) Process for Selecting a Mediator:** The member agencies should develop a proposed list of qualifications for mediators, and using this list, develop

a pool of potential candidates. Once a list of qualified mediators has been developed, staff members from each agency should interview the candidates and make a joint recommendation for an approval to their respective boards. The mediator should be an impartial professional, ideally with significant expertise with mediating disputes between public agencies.

- (c) **Sharing of Costs:** The member agencies should determine how they will allocate the costs of mediation among them. Parties to mediations often choose to share costs equally to ensure that there is equal motivation to reach an agreement.

- (d) **Authorization for Specific Representatives to Participate in Mediation:** Representatives must be selected by the respective governing bodies of the member agencies, and may be either staff members of the agencies or members of the governing bodies (with attention to the Brown Act requirements described above). For mediation to be successful, the representative(s) should have sufficient authority to be able to represent that they are negotiating in good faith and to recommend the adoption of any agreement reached in mediation by the governing body.

The member agencies may wish to consider passing a resolution covering the agreement reached on the issues described above, including the appointment of the mediator, authorization of individuals participating in mediation on behalf of the agency, the issues to be mediated, and authorization to share any privileged documents.⁵ The resolution should also include a statement that any agreement reached in mediation will not be binding, and is contingent on a vote of approval by the full board.

CONCLUSION

Mediation is a viable option for the JPB member agencies to resolve any disputes about future governance options with a neutral and impartial moderator. The agencies will need to work closely before engaging in mediation to determine the parameters and key issues. Mediation requires significant political will to resolve a dispute and any attempts to engage in mediation without that precondition are unlikely to be successful.

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⁵ See Institute of Local Government, *Alternative Dispute Resolution: Navigating Special Legal Issues in Public Agency Disputes* (2009).