



Texas Department of Transportation

DEWITT C. GREER STATE HIGHWAY BLDG. • 125 E. 11TH STREET • AUSTIN, TEXAS 78701-2483 • (512) 463-8585

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OPINION COMMITTEE

OPEN RECORDS DIVISION

The Honorable John Cornyn
Attorney General
P.O. Box 12548
Austin, Texas 78711-2548

RE: Whether under the Texas Constitution the Texas Department of Transportation may provide funds for a toll road project without a requirement for repayment.

FILE # ML-41772-00

Dear General Cornyn:

I.D. # 41772

As Executive Director of the Texas Department of Transportation (TxDOT), I respectfully request an opinion on the captioned question.

TxDOT is called upon to address the transportation requirements of a state population growing by approximately 30,000 people per month, as well as impacts from NAFTA related truck traffic. Vehicle registrations in the state have increased to 17.4 million. Nearly 80% of all U.S.-Mexico truck traffic crosses at one of the state's ports of entry. Traffic volume on all roads has tripled over the past 30 years. Because of population growth, increased truck volume resulting from the implementation of NAFTA, and other factors, in many parts of the state, more and more vehicles are traveling on congested highways or on roads in need of upgrading or expansion. One fourth of the interstate highways in Texas' urban and metropolitan areas are at 95% of traffic capacity.

Congestion on the highway system adversely affects economic development, quality of life, public safety, and air quality. Unfortunately, TxDOT lacks the resources to maintain or expand the existing highway system. Currently, only approximately 36% of identified needs can be funded. There are too many pressing needs for the available resources. With such a dearth of available funding, many important projects will be delayed for a number of years, assuming they are built at all. In short, there is a transportation problem in the State of Texas, what some would call a transportation crisis.

One proposed method of alleviating this crisis and leveraging existing highway revenues is to increase the state's equity in toll roads. Toll roads are financed with revenue bonds and generally are supposed to be self-supporting from user fees (toll revenue). The use of revenue bonds and toll revenue to finance toll road projects has historically provided another means of dealing with high demand and limited resources by accelerating important projects. However, given the high cost of projects, it is now difficult to find projects that would generate enough toll revenue to pay for themselves in a reasonable amount of time.

The investment of state highway revenues in a toll road project without a requirement for repayment will make feasible some toll road development that otherwise would be financially unfeasible. These projects may otherwise be developed with state highway revenue but over a longer period of time due to revenue constraints. Providing for state equity in toll road projects would leverage existing state highway revenue by attracting new revenue from tolls that may otherwise not be available for needed highway development in the state. The leveraging of state highway funds in toll road projects would both reduce the time necessary to construct important projects, as well as making more money available for other projects.

However, the investment of state highway revenues in a toll road project without a requirement for repayment must not violate Article 3, Section 52-b of the Texas Constitution. That section states:

Sec. 52-b. The Legislature shall have no power or authority to in any manner lend the credit of the State or grant any public money to, or assume any indebtedness, present or future, bonded or otherwise, of any individual, person, firm, partnership, association, corporation, public corporation, public agency, or political subdivision of the State, or anyone else, which is now or hereafter authorized to construct, maintain or operate toll roads and turnpikes within this State except that the Legislature may authorize the Texas Department of Transportation to expend money, from any source available, for the costs of turnpikes, toll roads, or toll bridges of the Texas Turnpike Authority, or successor agency, provided that any monies expended out of the state highway fund shall be repaid to the fund from tolls or other turnpike revenue.

(Emphasis added)

The federal-aid highway act passed by the 64th Congress in 1916, 39 Stat. 355, required each state to assent to its terms, and envisioned a "state highway department" as the single channel for fiscal and operational responsibilities. In order to take advantage of those federal funds, Texas enacted Chapter 190, Acts of the 35th Legislature, Regular Session, 1917 (the "1917 act"), which created the State Highway Department and State Highway Commission, called for all federal funds for public road construction to be expended by and under the department's supervision, provided state funds through the imposition of vehicle registration fees, and ordered all funds the commission derived from those registration fees or from other sources be deposited in the state highway fund.

Pursuant to various current statutory provisions, including Transportation Code, §201.002, §202.002, §221.003, §222.001, and §502.051, derived from the 1917 act, all funds, federal and state, appropriated to TxDOT for highway improvements go into the state highway fund. Accordingly, while the exception to Section 52-b refers to expending money from any source available, with money expended out of the state highway fund required to be repaid, I seek an opinion whether or not the exception requires the repayment of money that is not expended from the state highway fund or constitutionally required to be deposited into such fund. *See also* the interpretive commentary to Section 52-b, which states that it was the intent of this section to make certain that the obligations of a toll road authority shall never become a charge against the state.

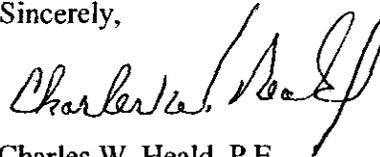
We would also direct your attention to Article 3, Section 52-a of the Texas Constitution. That section, which was adopted in 1987, arguably overrides any inconsistent provision in the constitution, such as Section 52-b, which amended the Constitution in 1954. Section 52-a states:

Sec. 52-a. Notwithstanding any other provision of this constitution, the legislature may provide for the creation of programs and the making of loans and grants of public money, other than money otherwise dedicated by this constitution to use for a different purpose, for the public purposes of development and diversification of the economy of the state, the elimination of unemployment or underemployment in the state, the stimulation of agricultural innovation, the fostering of the growth of enterprises based on agriculture, or the development or expansion of transportation or commerce in the state. Any bonds or other obligations of a county, municipality, or other political subdivision of the state that are issued for the purpose of making loans or grants in connection with a program authorized by the legislature under this section and that are payable from ad valorem taxes must be approved by a vote of the majority of the registered voters of the county, municipality, or political subdivision voting on the issue. An enabling law enacted by the legislature in anticipation of the adoption of this amendment is not void because of its anticipatory character. (Emphasis added)

However, "pertinent commentary preceding the adoption of section 52-a by the voters makes clear that it was intended to authorize the legislature to enact laws that created governmental programs furthering economic growth or that authorized governmental loans or grants of public funds to assist private businesses." See Tex. Att'y Gen. Op. No. JM-1255 (1990) at 8. That opinion also indicates that the commentary preceding the adoption of Section 52-a states that those against the adoption of the new section argued that the proper role of government was the financing of public educational facilities and other infrastructure improvements such as highways and airports, and not the provision of public funds to private businesses.

My staff and I are available to assist your office. Assistance on this issue is also available from Mr. Robert Randolph of Vinson & Elkins L.L.P., and Mr. Robert Collie of Mayor, Day, Caldwell & Keeton, L.L.P. If you have any questions concerning this matter, please call Mr. Richard Monroe, General Counsel of TxDOT, at 463-8630.

Sincerely,



Charles W. Heald, P.E.
Executive Director