

SENATOR JEFF WENTWORTH
SENATE DISTRICT 25



CHAIRMAN
SOUTHERN LEGISLATIVE CONFERENCE
2008 - 2009

AUSTIN

Capitol Building, Room 1E.9
P. O. Box 12068
Austin, Texas 78711
(512) 463-0125
Toll-Free (888) 824-6984
FAX (512) 463-7794
Dial 711 for Relay Calls

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INTERNET E-MAIL

jeff.wentworth@senate.state.tx.us

SAN ANTONIO

1250 N. E. Loop 410, Suite 925
San Antonio, Texas 78209
(210) 826-7800
FAX (210) 826-0571

November 6, 2009

COUNTIES IN
SENATE DISTRICT 25

Bexar (north) Hays
Comal Kendall
Guadalupe Travis (south)

RQ-0838-GA

The Honorable Greg Abbott
Attorney General of Texas
Attn: Opinion Committee
Post Office Box 12548
Austin, Texas 78711-2548

FILE # ML-46240-09
I.D. # 46240

Re: Whether the transfer of responsibilities and funding from the Texas Department of Transportation (TxDOT) to the newly created Texas Department of Motor Vehicles in Section 17.30(b) of Senate Bill 1 constitutes an "appropriation" or is merely language directing and qualifying the use of funds appropriated elsewhere in Senate Bill 1.

Dear General Abbott:

As Chair of the Senate Committee on Jurisprudence, I respectfully request a formal opinion from you on a legal issue regarding the Appropriations Act.

The 81st Texas Legislature acted to fund rail relocation efforts in order to further one important facet of needed transportation solutions in Texas. Now it appears that the Texas Department of Transportation (TxDOT) is using an accounting gimmick and an invalid legal argument in an attempt to thwart the will of the Legislature, and to obtain for TxDOT a higher level of funding than the Legislature appropriated to that agency.

I respectfully request a formal opinion answering the following legal question:



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According to Texas Supreme Court precedent and past Texas Attorney General opinions, does the transfer of responsibilities and funding from TxDOT to the newly created Texas Department of Motor Vehicles in Section 17.30(b) of Senate Bill 1 constitute an "appropriation," or is Section 17.30(b) merely language directing and qualifying the use of funds appropriated elsewhere in Senate Bill 1?

As background, the Texas Rail Relocation and Improvement Fund (the "Fund") was authorized in 2005 when the voters of Texas approved Article 3, Section 49-o of the Texas Constitution. The 81st Legislature provided funding for the Fund in Article IX, Section 17.10 of Senate Bill 1. Section 17.10 appropriates a total of \$182 million to the Fund, contingent upon a finding by the Comptroller that the Legislature appropriated at least \$182 million more to the State Highway Fund and TxDOT in the 2010-2011 biennium than it did in the 2008-2009 biennium. Specifically, Section 17.10 provides:

"The allocations under subsection (a) of this rider may be made only if the comptroller issues a finding of fact that the following items result in a net increase for the 2010-2011 state fiscal biennium of at least \$182 million over the 2008-2009 state fiscal biennium:

- (1) the net impact of enacted revenue measures on incoming revenue of the State Highway Fund that is not dedicated under Article 8, Section 7-a of the Texas Constitution;
- (2) as a gain, any reduction in appropriations made from State Highway Fund No. 0006 to state agencies other than the Department of Transportation; and
- (3) as a loss, any reduction in appropriations made to the Department of Transportation from the General Revenue Fund." [emphasis added]

Application of this formula reveals that in Senate Bill 1 the Legislature appropriated \$187,464,855 more to the State Highway Fund and TxDOT in 2010-2011 than it had in 2008-2009. Thus, the contingency test under Section 17.10 has been met, and the Comptroller should certify the appropriation to the Fund.

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However, TxDOT is apparently unwilling to accept the will of the Legislature to appropriate this small amount of funding for rail infrastructure efforts in Texas, and has apparently thrown up a feeble accounting and legal argument in an attempt to block the appropriation. Although they have declined to put their arguments in writing, we understand that TxDOT has argued to the Comptroller that the future transfer of responsibilities and funding from TxDOT to the newly created Texas Department of Motor Vehicles (DMV) in Article IX, Section 17.30(b) of Senate Bill 1 should be considered a reduction in appropriations to TxDOT.

Section 17.30(b) provides:

"Contingent on the enactment of House Bill 300 or House Bill 3097, or similar legislation relating to the creation of the Department of Motor Vehicles and the transfer of certain programs to the Department of Motor Vehicles from the Department of Transportation, and subject to approval by the Legislative Budget Board, the Department of Transportation shall, in the time and manner prescribed by the legislation, transfer to the Department of Motor Vehicles all funds and full-time-equivalent (FTE) positions appropriated to the Department of Transportation for fiscal years 2010 and 2011 that are directly associated with the programs and responsibilities required to be transferred under the provisions of the legislation (estimated to be \$103.7 million in All Funds and 622.0 FTEs each year) plus any additional FTE positions (not to exceed 75.0 FTEs) and associated funding for personnel that primarily support the programs to be transferred to the Department of Motor Vehicles. The Legislative Budget Board is authorized to resolve any disputes concerning the transfers identified in this rider." [emphasis added]

TxDOT argues that this \$103.7 million transfer from TxDOT to DMV, accompanied by the transfer of all associated responsibilities from TxDOT to DMV, should be considered a reduction in appropriations to TxDOT.

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This TxDOT argument is inappropriate as an accounting and policy position. The Legislature did not reduce appropriations for TxDOT functions in Section 17.30(b). What the Legislature did in Section 17.30(b) was to mandate a future transfer of an entire function (motor vehicle licensing) away from TxDOT because of legislative concerns that TxDOT was not administering that function in an efficient manner. This transfer could not occur until November 1, 2009, at the earliest. And after this transfer, TxDOT will have exactly the same level of appropriations as before to fund its remaining functions.

This TxDOT argument is also legally specious. Section 17.30(b) is not an appropriation. As you know, Texas law makes a clear distinction between an "appropriation" and a "transfer" in an Appropriations Act. In *Jessen Associates, Inc. v. Bullock* (531 SW 2nd 593), the Texas Supreme Court held that a particular section of the Appropriations Act was not subject to veto by the governor because it was not an appropriation. The Court held that the section of the Appropriation Act at issue was "...not an item of appropriation, but is merely language qualifying an appropriation, or directing its uses...." The Court explained that:

"Of special significance in determining the legislative intent in this case is the fact that the funds mentioned in subdivision (1) of the rider are appropriated elsewhere in the General Appropriations Act. By its terms, the rider involves only bond proceeds and other available monies. Clearly such language cannot be construed as making an independent appropriation, but refers only to funds which have otherwise been made available."

Your office followed the ruling in *Jessen* in Opinion MW-51 in 1979, when your predecessor was asked to interpret certain sections of the Appropriations Act. The facts of that opinion involved, among other issues, the transfer of certain property from one agency to another. The section of the Act provided that "the Board of Mental Health and Mental Retardation is hereby authorized and directed to transfer to the State Board of Control record title to [describing the tract]." [emphasis added] The attorney general held:

"These two paragraphs do not constitute an 'item' of appropriation under the test established in *Jessen*. They do not set aside or dedicate funds. Instead, the language directs and qualifies the use of funds appropriated elsewhere."

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Hence your office held that that the use of the term "transfer" within an Appropriations Act signified not an appropriation, but rather mere direction on the use of funds appropriated elsewhere. Similarly, the transfer of responsibilities and fund from TxDOT to DMV in Section 17.30(b) is not an appropriation, but rather mere direction on the use of funds appropriated to TxDOT elsewhere in the Act.

It is my hope that your reiteration of the clear Texas law on this topic will demonstrate the speciousness of TxDOT's arguments, so that the Comptroller may proceed to certify this important appropriation for rail infrastructure in Texas in accordance with the will of the Legislature.

Thank you in advance for your attention to this request.

Sincerely,

A handwritten signature in black ink, appearing to read "Jeff Wentworth", with a horizontal line striking through the middle of the signature.

Jeff Wentworth
Chairman
Senate Jurisprudence Committee

JW/kko/jm