

# Meeting the Texas Transportation Challenge

**Legislative Strategies Addressing the Goals of:**

**Reducing Congestion,**

**Enhancing Safety,**

**Expanding Economic Opportunity,**

**Improving Air Quality and**

**Increasing the Value of Transportation Assets**



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## INTRODUCTION

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SB 409 from the 78th Texas Legislature provided the Chairman of the Texas Transportation Commission (commission) the authority to issue a report to the Legislature on recommendations pertaining to the operations of the Texas Department of Transportation (TxDOT). This provision was codified as Transportation Code, Section 201.0545 and reads as follows:

§ 201.0545. RECOMMENDATIONS TO LEGISLATURE.

(a) The commission shall consider ways in which the department's operations may be improved and may periodically report to the legislature concerning potential statutory changes that would improve the operation of the department.

(b) On behalf of the commission, the chair shall report to the governor, the lieutenant governor, the speaker of the House of Representatives, and the presiding officers of relevant legislative committees on legislative recommendations adopted by the commission and relating to the operation of the department.

The commission undertook an effort to develop ideas and concepts from three main sources: the department, interested stakeholders, and local leaders. This process began in late 2005 and included successive discussion items during commission meetings from January through the end of 2006. Additionally, department staff has traveled the state, soliciting input from local leaders, professional associations, and the business community. Their interest and involvement in this process has been critical to ensuring a package of legislative recommendations that will further the department's ability to expedite the delivery of transportation infrastructure.

Contained in this report is a brief overview of the transportation issues the commission recommends the 80th Texas Legislature consider. With each issue contained in this report, the reader will find a brief summary of pertinent information on the subject followed by the recommendation and some background.

Questions regarding this report should be directed to Coby Chase ([cchase@dot.state.tx.us](mailto:cchase@dot.state.tx.us)) or Jefferson Grimes ([jgrimes@dot.state.tx.us](mailto:jgrimes@dot.state.tx.us)) in the department's Government and Business Enterprises Division at 512-463-6086 or in writing to 125 East 11th Street, Austin, Texas 78701.

## THE ROAD TO SUCCESS IS UNDER CONSTRUCTION

Texas is facing enormous and rapidly increasing transportation needs, with no quick and easy solutions to meet them. Increases in population, vehicles, and travel in the state have placed unprecedented demands on an underinvested system. The current state gas tax (last raised in 1991) and Texas' allocation of federal highway funds now fall woefully short of current needs and dangerously short of projected needs. Not only will the quality of life for travelers be endangered, but so will Texas business. We must not allow our transportation system to handicap our domestic industry in an era of global competition. Tackling the state's needs will require a long-term program of investment in our transportation system, carefully planned and adequately financed.

Texas has experienced significant increases in population, vehicles owned, and vehicle miles traveled, with these trends projected to continue. When the interstate system was being built in the late 1950s and early 1960s, needs estimates at that time did not anticipate the population growth and distribution that took place over the next 40 years. As a result, some highways, such as I-35, are overwhelmed by capacity not expected when they were designed. Since 1970, as people have moved away from urban work centers, vehicle miles traveled have tripled. Over the next 25 years, population is projected to increase 64 percent, vehicle registrations are projected to increase 214 percent, and vehicle miles traveled are projected to increase 173 percent. Rather than planning for the short-term alone, we now have the tools to plan out to 2030 and are determining our needs based on those projections.

Texas transportation planning can be divided into three categories, based on the type of region: metropolitan (i.e. Dallas-Fort Worth, El Paso, Houston); urban (i.e. Waco, Temple); and rural (i.e. Childress, Abilene). Local leaders and transportation planners have identified an \$86 billion gap (in 2005 dollars) between the cost of infrastructure needed by 2030 and the level of available funds.

### ***Our Plan for Texas Transportation***

The mission of the Texas Department of Transportation (TxDOT) is to provide the highest quality transportation system for the state. While the responsibilities of the agency are many, there are five areas of pivotal importance identified by the Texas Transportation Commission for special attention. These five goals are:

1. **Reduce congestion.** Growth in population, vehicle miles traveled, and trade has put a tremendous strain on the state highway system. Congestion

impacts the economy and quality of life for all Texans. A recent study by the Governor's Business Council found that meeting the mobility gap over the next 25 years would produce a net economic benefit of \$18.4 billion per year, or over \$750 annually for each person in the metro areas.

2. **Enhance Safety.** Safety challenges increase with more motorists on the roads and greater congestion. TxDOT works to provide the safest and most secure conditions possible in order to avoid and prevent collisions.

3. **Expand Economic Opportunity.** Timely delivery of goods is critical to the success of many industries, and some large companies have already indicated plans to move outside the state because of transport delay concerns. TxDOT works to improve mobility so that we remain competitive.

4. **Improve Air Quality.** The state is required to meet federal air quality standards but is non-compliant or approaching non-compliance in some metropolitan areas. Highway congestion contributes to poor air quality in urban areas. Transportation planning involves a multi-modal approach that includes consideration of air quality impacts.

5. **Increase Asset Value.** The Texas transportation system is an asset and can be quantified by the cost of development, cost of preservation, and the tax or toll revenue derived from it. Protecting and strengthening the value of highway infrastructure is essential to the future of efficient transportation in Texas.

*The department will focus on the following four strategies to achieve these goals:*

1. **Use all available financial options to build transportation projects.** The governor and the Legislature have authorized new revenue tools, including the Texas Mobility Fund, toll equity, and toll debt to build projects. We are using these new tools and leveraging existing tax revenues to build projects sooner at a lower cost. We are also inviting the private sector to participate in financing our transportation projects. We are matching private-sector capital with public-sector capital to pay for long-term solutions.

2. **Empower local and regional leaders to solve local and regional transportation problems.** We are partnering with local and regional leaders in the use of Pass-Through Toll Financing, the creation of Regional Mobility Authorities (RMAs), and the flexibility of the Texas Metropolitan Mobility Plan. To protect the public's interest, we are developing indices to

measure results and basing authority to plan and approve projects on the success of these results. We are separating planning and execution of local projects, regional projects, and state projects, and reaching out to local and regional leaders to be partners in this effort.

3. **Increase competitive pressure to drive down the cost of transportation projects.** The private sector will play a major role in developing Texas' future transportation system. A public-private partnership can open the door to accelerate the finance, design, construction, operation and maintenance of a project, all of which help to keep costs down and prices competitive.

4. **Demand consumer-driven decisions that respond to traditional market forces.** Toll roads, new corridors, and consumer-friendly commuter rail systems all create new mobility solutions, giving travelers an alternative to increasingly congested roads and highways. We are making our asset-investment decisions based on short-, mid-, and long-term solutions. We are considering transportation solutions other than roads and highways, again giving consumers a choice between increasingly congested roads and dependable commuter rail service.

With the demand for transportation increasing faster than the state's ability to build infrastructure, the continuing transfers of transportation-related revenue, the unreliability of federal funding, and the steady erosion of the purchasing power of the State Highway Fund, it is critical that Texas look to innovative financing methods to improve mobility in this state as quickly and efficiently as possible. The following proposals are designed to enhance our ability to meet our five goals.

## CAPITALIZING THE TEXAS RAIL RELOCATION AND IMPROVEMENT FUND

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### *The Issue*

The Relocation and Improvement Fund, established by the Legislature and confirmed by voters in 2005, must now be capitalized. Rail relocation and improvement has substantial public benefits. It provides:

- Enhanced public safety by decreasing the number of train/vehicle grade crossings;
- Greater economic opportunity by encouraging more freight movement through the state;
- Improved air quality by decreasing the number of idling vehicles and trains;
- Increased value to our transportation assets by slowing the wear (and thus the ever-increasing maintenance costs) on our highways by encouraging freight movement by rail;
- Increased mobility due to added freight rail line capacity, which helps to free up traffic congestion in city centers;
- Opportunities for multiple modes of transportation because the remaining right-of-way left over after rail relocation could be used for public transportation or added highway capacity.

Rail relocation also has obvious private benefits. When trains no longer have to travel through busy city centers, freight can move more efficiently throughout the state. That enables goods to travel faster, and brings increased economic opportunities to the state and to the rail companies moving the freight.

The problem lies in the high cost of capital improvements to rail facilities. Private rail companies cannot afford to make many needed improvements to their rail infrastructure on their own. The Rail Relocation and Improvement Fund was created by the Legislature and approved by voters to help offset this high cost on projects where there is a public benefit.

However, this fund remains to be capitalized. Now is the time the Legislature should look to capitalizing the Rail Relocation and Improvement Fund.



## **Proposed Remedy**

Although there may be many different options for capitalizing the rail fund, three are recommended here.

1. Rededicate the business and/or sales taxes the rail industry currently pays to the Rail Relocation and Improvement Fund.
2. Provide a direct appropriation from General Revenue to capitalize the rail fund.
3. Allow TxDOT and local governments to enter into an exchange of assets for the purpose of relocating rail lines. Any fees arising from this arrangement can be deposited into the Rail Relocation and Improvement Fund.

Regardless of how the Rail Relocation and Improvement Fund is capitalized, each rail project will have both public and private benefits. Private benefits should be paid by the private sector and public benefits should be paid by state and local governments.

## **Background**

Over the next 20 years, a major increase in freight movements from Asia into the western United States' ports is anticipated. The western ports are not equipped to handle such an increase in freight, and thus more and more freight will begin to move through the Texas Gulf ports.

Freight tonnage on Texas highways is projected to increase 85 percent, and freight tonnage on the Texas rail system is expected to increase 68 percent over the next 20 years. Based on these projected increases, Texans will need an inter-modal transportation system capable of adapting to all the various transportation demands.

Rail is a very important mode of transportation throughout Texas that cannot be neglected. The Rail Relocation and Improvement Fund has given Texas a tremendous opportunity to enhance its rail system, reduce congestion on our highways and railways, improve air quality within city centers, enhance safety with less vehicle/train crossings, expand economic opportunity, and increase the value of our transportation assets.

A secondary benefit to making rail improvements is increased mobility for the traveling public. Once a rail line is relocated, the remaining right of way would be available for other mobility projects such as commuter rail or highway projects. Such projects could stimulate economic opportunity and increase the

tax base in these communities. In areas where rail improvements rather than relocations are needed, economic and trade opportunities will also be improved through increased efficiency of freight movement.

Despite all these benefits, the high cost of rail improvements and relocations warrants multiple funding sources from private and public entities. Approximately \$17 billion worth of needed projects have been identified in Texas.

One project in a major metro area costs many billions of dollars. As such, it will take money from state, federal and local sources, private rail companies, and even private industries that want rail improvements. Other states that have undertaken major rail projects have used all of these sources in order to build projects.

The Rail Relocation and Improvement Fund will be leveraged to issue bonds. It is estimated that \$100 million per year could generate \$1 billion in bond proceeds to be used for the relocation or improvement of rail lines. The state can choose to capitalize the rail fund with an existing revenue source, or choose to create a new one.

Both Union Pacific and Burlington Northern Santa Fe, the two largest rail carriers operating in Texas, have signed a Memorandum of Understanding (MOU) with Governor Perry stating that making improvements to the rail system is very important. The MOUs say that the public contribution to rail projects will match the public benefits and private contribution will match the private benefits. In addition, the MOU with Union Pacific requested that the state source of money for rail relocation projects be funded with an existing source of revenue.

The rail relocation effort began during the 79th legislative session with Representative Ruth Jones-McClendon, Representative Mike Krusee, and Senator Todd Staples' foresight and leadership on this issue. HB 1546 and HJR 54 were created and passed during that session. Then, in November of 2005, voters approved the Rail Relocation and Improvement Fund as a constitutional amendment. The next step is to capitalize the fund. The final step will be to build projects that improve the rail system of Texas.

## **RAIL RELOCATION AND IMPROVEMENT LOANS**

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### **The Issue**

The Texas Rail Relocation and Improvement Fund, established in 2005, is designed to provide a method for financing the relocation and improvement of privately and publicly owned passenger and freight rail facilities for the purposes of relieving congestion on public highways, enhancing public safety, improving air quality, and expanding economic opportunity. However, this fund has not been capitalized with a revenue stream. Once it is capitalized, the Transportation Commission can use this fund to make rail improvements. Nevertheless, the framework does not exist in law for low interest loans to be made available to rail companies from the fund. This flexibility would be very helpful to the state of Texas and to the rail industry.

### **Proposed Remedy**

Change statute to allow the Transportation Commission to issue low-interest loans to rail companies wishing to borrow money to make rail improvements. Loans can be made from a portion of the Texas Rail Relocation and Improvement fund once this fund is capitalized. TxDOT will develop program eligibility requirements, an application procedure, evaluation criteria, and a process for award.

### **Background**

Low-interest loans to railroads are attractive to states for several reasons. First, loans provide an effective way to leverage available funds, allowing states to encourage a broad array of improvements to the rail system with relatively minimal initial capital investment. Second, by requiring repayment over a relatively short term (typically 10–15 years), these programs also encourage railroad beneficiaries to make improvements that most significantly improve their market share or effectiveness.

Increasing congestion on the roadway system is leading many states to consider the rail network as a source of additional capacity for the movement of both people and freight. Rail freight use is forecast to increase by 65–70 percent nationwide by 2020, but it is unclear whether the rail system will have sufficient capacity to handle this growth. Many railroads find it difficult to make significant capacity improvements, as they often manage and maintain large national and regional networks and have difficulty raising sufficient capital to make the kinds of large-scale investments that are often needed to boost performance. This is

particularly true of short line and regional railroads, which often need substantial financial support and assistance to remain competitive and solvent.

Unlike the Class I railroads, regional and short line railroads regularly serve locally generated traffic, oftentimes gathering or consolidating smaller blocks of traffic from individual shippers for transfer to the larger national or regional rail system. This is a critical service in Texas and other states, as many of these smaller shippers or manufacturers do not generate the volumes of traffic that would be attractive to the Class I railroads. Without the ability of the regional and short line railroads to provide this service, many of these shipments would likely occur by truck.

Many states have developed similar low interest loan programs which make the total financial outlays made by state governments relatively low. Typical loans range in value from \$400,000 to \$2 million, depending on how large an impact the project is expected to make to the local or regional economy and the amount of funding available within the program. Some states, such as Indiana and New York, also designate the amount of funding that is available to each class of railroad to ensure that the smaller lines are not neglected. Because of their size and revenue streams, many short line and regional railroads are dependent on these types of funding programs to maintain their viability.

Wisconsin's Freight Rail Infrastructure Improvement Program provides a good example of a self-sustaining loan program. The state has awarded \$58 million in loans since 1992, with \$11.1 million available in the 2003–2005 budget supported entirely by successful repayments of prior loans. The Wisconsin program provides up to 100 percent loans for rail projects that connect an industry to the national railroad system; make improvements to enhance transportation efficiency, safety, and intermodal freight movement; accomplish line rehabilitation; and develop the economy. The program's loans enable the state to encourage a broad array of improvements to the rail system, particularly on privately owned lines, with minimal further funding.

## PLANNING FOR AND BUILDING NON-TXDOT RAIL FACILITIES

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### *The Issue*

The mission of the Texas Department of Transportation (TxDOT) is to provide safe, effective, and efficient movement of people and goods across all modes. Because improving the efficiency of the rail system in the state can help enhance the mobility of people and goods statewide and can also have important economic development and vitality impacts, TxDOT involvement in addressing rail issues is consistent with its overall mission and should be encouraged.

However, TxDOT's ability to study, build, finance, or maintain the statewide rail system is limited by the fact that it is not clear in existing statute whether the department has the authority to build, finance, or maintain rail infrastructure that is not owned by the department. Although the state does own some rail infrastructure, the vast majority of the state's rail system is owned, operated, and maintained by the private-sector rail carriers.

Several states have determined that public investment in the freight rail system is the most effective use of transportation resources, as improving rail efficiency can have the important public benefits of enhanced mobility, safety, and economic competitiveness. In addition, states that have the ability to invest in the freight rail system often find it easier to attract private-sector equity for rail investments as it creates an environment where both the public and private sectors can pool resources more effectively, share risks and rewards more equitably, and distribute costs and benefits more efficiently. This further enhances transportation efficiency and economic vitality.

However, the lack of clear guidance on whether TxDOT can invest in the construction, maintenance, or operation of rail systems not owned by the state hinders the ability of the department to comprehensively address transportation needs and deficiencies across all modes and limits its ability to make comprehensive, system-wide improvements.

### *Proposed Remedy*

Amend or revise the Texas Transportation Code to specifically authorize the department to study, build, operate, finance, or maintain rail infrastructure not owned by the department.

Section 91.004 of the Transportation Code should be amended to specifically authorize TxDOT to plan for, fund, build, improve, or maintain rail infrastructure on both TxDOT-owned and non-TxDOT-owned rail facilities.

This remedy would allow the department to more comprehensively address transportation needs and deficiencies and target investments in the rail system that have quantifiable public benefits. Several states have similar authority.

### **Background**

Prior to 2005, the rail oversight powers of TxDOT were limited by the existence of the Railroad Commission of Texas, the agency previously responsible for planning and regulating railway safety. The transfer of the rail program from the Railroad Commission of Texas to TxDOT by the 79th Legislature, effective October 2005, greatly increases TxDOT's role in rail system planning and centralizes all railroad planning and regulatory functions within the department.

The mission of TxDOT is to work at the statewide, intermodal level to provide safe, effective, and efficient movement of people and goods. In order to do this, it must also have the ability to assess the efficiency and performance of all transportation modes, identify needs and deficiencies across the entire transportation system, and target its resources on the types of transportation improvements that most significantly benefit the mobility of people and goods statewide. It must also retain the ability to invest in elements of the transportation system that have impacts on the mobility of people and goods statewide.

## USING THE TEXAS ENTERPRISE FUND ON TEXAS RAIL PROJECTS

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### *The Issue*

Increased use of the state's freight rail system, much of which was designed and built several decades ago, can contribute to congestion concerns in urban areas, access concerns in rural areas, and safety, reliability, and quality of life concerns statewide. Relocating rail facilities away from these key areas would help mitigate these concerns and would also allow the railroads to operate more efficiently.

Planning and regulatory authority over the freight railroads operating in the state, including the authority to plan, construct, maintain and operate rail facilities or systems, was formally provided to the Texas Department of Transportation (TxDOT) in 2003. In addition, the Texas Rail Relocation and Improvement Fund, which will provide a method of financing the relocation and improvement of freight rail facilities throughout the state once capitalized, was established in 2005.

While these factors have allowed TxDOT to become more active in identifying freight rail improvement projects, the total amount of funding available for rail-specific improvements is still limited. If Texas Enterprise Funds are ever awarded to help pay for a specific rail improvement, it is important that TxDOT have the ability to spend those funds without a line-item appropriation from the Legislature.

### *Proposed Remedy*

Although investing in the freight rail system would have the joint benefit of improving mobility for freight movements in the state while simultaneously reducing the need for additional highway capacity expansions, existing statutes regarding the use of appropriated monies for rail limit the department's ability to access all available sources of revenue. This should be remedied in statute.

Statute currently stipulates that TxDOT may not use general revenue (the funding source of the Texas Enterprise Fund) for rail projects, except pursuant to a line-item appropriation by the legislature. The delays that result from having to wait for a line-item appropriation is a burden that other Texas Enterprise Fund projects do not incur, making rail transportation improvement projects less attractive than other competing proposals.

## **Background**

As the nation struggles with congestion on its highways and the traditional pay-as-you-go method of financing highway projects struggles to keep up with demand for new capacity, Texas has moved ahead and developed policies and plans for reversing this trend. The state has introduced new tools, goals and strategies to complement the pay-as-you-go traditional system of building and improving facilities.

Furthermore, the Texas Enterprise Fund (TEF), which was established in 2003 and reauthorized in 2005, is a critical tool that helps the state bring jobs and employers to Texas. The funds are used primarily to attract new businesses or assist with the substantial expansion of an existing business as part of a competitive recruitment situation. The governor may award these funds only with the approval of the lieutenant governor and the speaker of the House of Representatives. Applications for TEF grants may be processed as quickly as six to eight weeks.

The TEF would make it possible to complete strategic improvements, such as expanding the capacity of a rail yard, which would not occur otherwise. Such a project would yield benefits, such as cost savings and the capacity to expand for distributors, manufacturers, and logistics companies, and better poise the \$925 billion Texas economy to accommodate future growth. However, in the event that Texas Enterprise funds were awarded to TxDOT to build rail improvements, the project would have to wait until the Legislature was in session to make a line-item appropriation.



## COMPREHENSIVE DEVELOPMENT AGREEMENT REVISIONS

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### *The Issue*

A Comprehensive Development Agreement (CDA) is an agreement with a private entity that, at a minimum, provides for the design and construction of certain transportation projects and may also provide for the financing, acquisition, maintenance, or operation of a certain projects. There are opportunities to enhance the ability of the department to enter into CDAs that will expedite the delivery of needed transportation projects.

1. The sunset date for entering into CDAs is 8/31/2011. The department needs several years of lead time to plan for a project, enter into an agreement with a private entity, and build it. Our program can proceed for a couple more years without extending the sunset date, but a negative connotation surrounds it because private developers are not sure that we are committed to the process. In short, having a 2011 sunset date limits our future project options.
2. There may be circumstances in which the state would like to terminate a CDA. However, TxDOT may not have sufficient funds to conduct such a transaction.
3. The law limits the department's ability to enter into CDAs for projects that are not tolled or have non-tolled sections. CDAs allow for projects to be design-build, which often results in an earlier completion date, making them desirable for a variety of projects.
4. The law sets a cap on the term of a CDA at 50 years, or 70 years when particular conditions are met. This cap limits the agency's ability to negotiate the most favorable terms for the contracts.
5. The amount of money that TxDOT spends on CDAs may not exceed 40% of the obligation authority under the federal-aid highway program for that year. In the future, this cap may limit the amount the department may spend on CDAs and create uncertainty as to the amount available to spend.
6. TxDOT uses an administrative dispute resolution process whereby the executive director of the agency has final say on the outcome of the dispute. CDA developers, and especially their financiers, will not enter into

long-term agreements if disputes are resolved under this procedure rather than an independent arbitration process.

### **Proposed Remedy**

1. Remove the 8/31/2011 sunset date for CDAs. Removing the CDA sunset date would make CDAs a longer term option for transportation project delivery and would signal stability to the transportation industry, including potential contractors.
2. Authorize TxDOT to issue bonds to pay for all or part of the cost to terminate a CDA. In addition, authorize the department to assume obligations of a private participant in lieu of making a payment to purchase the private entity's interest in the CDA.
3. Allow TxDOT to enter into CDAs for projects that are not a part of the Trans-Texas Corridor and are non-tolled. Allowing TxDOT to enter into CDAs for non-tolled and partially-tolled projects would provide a procurement alternative (design-build) that expedites the completion of needed projects.
4. Remove the statutory cap of 50/70 years on the term of a CDA. Removing the cap on the term of a CDA would allow TxDOT greater flexibility in negotiating contracts, which could result in more favorable economic terms.
5. Remove the statutory cap on the amount of state highway funds and Texas mobility funds that TxDOT may spend on CDAs. Removing the funding cap for CDAs would enable TxDOT to enter into agreements without uncertainty as to whether the funds will be available.
6. Clarify that the department may enter into a CDA under which contract claims and other disputes that might arise under the CDA may be resolved through binding arbitration. An independent dispute resolution process is needed to encourage private entities to submit proposals and enter into contracts for CDAs.

### **Background**

1. Sunset date: HB 3588, 78th Legislature, Regular Session, 2003, authorized the department to enter into CDAs for toll and Trans-Texas Corridor (TTC) projects. The bill provided that TxDOT's authority to enter into CDAs expires on August 31, 2011.

2. Funding for termination: A concession-type CDA provides for the developer to finance the development of a project and pay a concession fee in exchange for the right to retain all or a portion of the toll revenue for a period of time. These types of CDAs will include termination provisions allowing TxDOT to end the CDA upon receipt of termination payments or to purchase the interest of the developer in the CDA. TxDOT lacks the explicit statutory authority to enable/fund the termination through the assumption of the developer's private debt or through the issuance by TxDOT of bonds to pay for the purchase or termination payments.

3. CDAs for non-tolled highways: HB 3588, 78th Legislature, Regular Session, 2003, authorized TxDOT to enter into CDAs for toll projects and TTC projects. HB 2702, 79th Legislature, Regular Session, 2005, added authority to enter into CDAs for: state highway improvement projects that include both tolled and non-tolled lanes and may include non-tolled appurtenant facilities; state highway improvement projects in which the private entity has an interest in the project; state highway improvement projects financed in whole or in part with private activity bonds (PABs); rail projects; or joint rail/highway projects. TxDOT may not enter into a CDA for a highway improvement project that is not on the TTC, is not tolled, and is not financed with PABs or private equity. These are the majority of TxDOT's highway projects.

4. Cap on CDA Terms: HB 2702, 78th Legislature, Regular Session, 2005, amended the CDA statute to provide, for non-TTC projects, that a CDA with a private participant that includes the collection by the participant of tolls may be for a term not longer than 50 years. The term may be for as long as 70 years if the CDA contains an explicit mechanism for setting the price for the purchase by TxDOT of the interest of the participant in the CDA and related property, and if the CDA outlines the benefit the state will derive from having a term longer than 50 years.

5. Funding cap: HB 3588, 78th Legislature, Regular Session, 2003, authorized TxDOT to enter into CDAs for toll projects and TTC projects, but limited TxDOT's financial participation in CDAs. The bill provided that the amount of money disbursed by TxDOT from the State Highway Fund and the Texas Mobility Fund (TMF) during a federal fiscal year to pay the costs under CDAs may not exceed 40 percent of the obligation authority under the federal-aid highway program that is distributed to this state for that fiscal year.

6. Dispute resolution: When there is a claim under a construction contract, the traditional method used to process the claim is under Transportation Code, Section 201.112 and 43 TAC Section 9.2. The contractor files a claim with the department's contract claim committee. The committee gathers and reviews reports from department staff and from the claimant, and then holds an informal settlement meeting. After the meeting, the committee makes a written settlement proposal. If the claimant accepts the proposal then that settlement is processed and the case is concluded. But if the claimant rejects the settlement proposal, the claimant is entitled to a contested case hearing before the State Office of Administrative Hearings. After a hearing, the administrative law judge makes a written proposal, and submits it to the department's executive director. The executive director has broad authority to accept or change the Administrative Law Judge's recommendation. The executive director then issues a final order in the case.

A claimant who is still not satisfied with the decision may appeal the executive director's decision. The court reviews the decision under the substantial evidence rule, reversing the executive director's decision only if he made errors of law. If the department agrees to, or is ordered to make a payment on the claim, the department makes the payment from construction funds from the already-authorized project.

The department's private-sector partners expressed some dissatisfaction with this process, particularly with regard to contract termination. It may be argued that they could pay TxDOT a concession fee, construct highways at their expense, and then TxDOT could terminate the contract with little recourse for the developer.

## REGIONAL TOLL ROAD ISSUES

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### **The Issue**

Toll roads stretch limited state dollars, and in so doing, build the infrastructure needed to accommodate the expected growth in population and use of our highways. There are opportunities to coordinate state and regional efforts to improve mobility in Texas by explicitly authorizing certain transactions among the Texas Department of Transportation, other toll road entities and their private-sector partners. Generating efficiencies in the state's method of planning and building toll roads is an important tactic in meeting TxDOT's goals of reducing congestion, improving safety, expanding economic opportunity, improving air quality, and increasing the value of our transportation assets.

#### *Regional Tollway Authorities*

There is no legal mechanism by which a county can withdraw from a Regional Tollway Authority (RTA).

#### *State Acquisition of Toll Roads*

There has been some discussion among regional toll authorities about the idea of selling their assets. Should these entities decide to move forward on such a sale, the state may want to compete for these assets.

#### *Leasing State Highways*

State law does not explicitly authorize TxDOT to lease or license state highway right of way to an RMA so that the RMA can construct a toll project on that property. Additionally, state law does not currently authorize TxDOT to lease an existing state toll project to a private entity so that entity can operate the project and retain all or a portion of the toll revenue in exchange for lease payments to TxDOT.

### **Proposed Remedy**

#### *Regional Tollway Authorities*

Amend state law to authorize a county to withdraw its membership in an RTA.

#### *State Acquisition of Toll Roads*

Amend state law to: (1) explicitly authorize TxDOT to acquire county toll projects and regional tollway authority projects and vice versa; (2) provide

additional funding options for doing so, if necessary; and (3) authorize counties to convey their toll projects to TxDOT if they so choose.

#### *Leasing State Highways*

Authorize TxDOT to: (1) lease or license state highway right of way to an RMA so that the RMA could construct a toll project on that property; and (2) lease an existing TxDOT toll project to a private entity so that entity could operate the project and retain all or a portion of the toll revenue in exchange for lease payments to TxDOT.

### **Background**

#### *Regional Tollway Authorities*

In the past, there have been some discussions of a county withdrawing from NTTA. If this is the course local leaders decide to pursue, they would have the option to form an RMA. The mobility challenges that face Texas require a multi-modal approach that integrates a variety of strategies to improve transportation, including: new highway infrastructure, expanded capacity on existing highways, passenger and freight rail services, intermodal freight hubs, and transit. These strategies will be most effectively deployed when they are coordinated by one body that is focused on the entire area it serves.

#### *State Acquisition of Toll Roads*

There has been discussion about the North Texas Tollway Authority and the Harris County Toll Road Authority selling or leasing their toll projects. While these entities have not signaled any impending action on this matter, if they decide to pursue such transactions in the future, the state may want to compete for these projects.

#### *Leasing State Highways*

For many years, TxDOT has had the authority to lease its real property; however, it must first determine that the property is no longer needed for highway purposes. This determination prevented TxDOT from leasing highway right of way for the purpose of another entity operating a highway facility.

The Central Texas Regional Mobility Authority is interested in leasing or licensing from TxDOT right of way along US 290 for the purpose of constructing added capacity in the form of toll lanes.

## TOLL ENFORCEMENT PROVISIONS

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### **The Issue**

There are opportunities to improve the Texas Department of Transportation's (TxDOT) toll operations system through enhancements to current administrative and enforcement activities. Toll roads stretch limited state dollars to build the necessary infrastructure to accommodate the expected growth in population and use of our highways. Generating efficiencies in the state's method of ensuring the proper payment of tolls is an important tactic in meeting TxDOT's goals of reducing congestion and increasing the value of our transportation assets.

### **Proposed Remedy**

1. Authorize a driver's license suspension for individuals who are convicted of toll violation offenses and fail to pay the outstanding tolls and administrative fees.
2. Authorize denial of renewal of vehicle registration for individuals who fail to pay outstanding tolls and corresponding administrative fees.
3. Authorize the department to enter into agreements with local governments or other political subdivisions to allow TxTag<sup>®</sup> customers to pay for airport and other parking facilities using their transponders.
4. Clarify that developers who enter into Comprehensive Development Agreements have the same powers and duties as the department with regard to toll violation enforcement activities.
5. Clarify the department's authority to implement post-billed video tolling.

### **Background**

1. & 2. Enhanced Enforcement Activities: The department previously released a Request for Information related to the facilitation of open road tolling in the state of Texas. One of the issues addressed in the document relates to violation enforcement and procedures for engaging the court. Although driver's license suspension and denial of vehicle registration were identified as potential enforcement tools, these options are not available to either the department or the courts at this time.

3. Parking: The use of toll tags or transponders to facilitate airport parking is not a novel idea. SunPass<sup>®</sup> customers in Florida can use their transponders to park at Orlando International Airport and E-ZPass<sup>™</sup> users in New York can park at Kennedy, LaGuardia or Newark International Airports. In addition, this concept is used on a regional basis in Texas as the North Texas Tollway Authority has a similar agreement that allows customers to pay for parking at DFW Airport with their toll tag accounts.

4. Private Toll Operators: Some developers are concerned about the ability to take enforcement action against toll violators, including utilizing the services of a collection agency and engaging the court. Although the authority of a private operator to collect tolls is implicitly authorized with respect to the authority granted to TxDOT, a specific statutory reference may provide a certain level of security for developers.

5. Video Tolling: Under this concept, customers are allowed to drive on a toll road without paying the toll at the time the road is used. The license plate of the vehicle is captured on video and a bill is sent to the registered owner at the end of the month. While the department believes there is sufficient statutory authority for such a method of toll collection, the statute should be made more explicit.



## AUTHORITY TO CONDUCT ENVIRONMENTAL REVIEWS AND APPROVALS

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### *The Issue*

The recent federal highway reauthorization bill, SAFETEA-LU, authorized the Federal Highway Administration (FHWA) to establish a pilot program that allows certain states to assume the responsibilities held by the Secretary of Transportation under the National Environmental Policy Act (NEPA) and other environmental laws. In the first three years of this program, only five states—Texas, Ohio, Alaska, California, and Oklahoma—may participate. In addition to this pilot program, another provision of SAFETEA-LU allows state departments of transportation to assume these responsibilities in perpetuity under a Memorandum of Understanding for Categorical Exclusions, which is the type of environmental review required when a project has no significant impact.

If the Texas Department of Transportation took part in these two programs, the environmental process on transportation projects could be expedited. Time is lost when documents must travel between agencies, and FHWA lead times prevent efficiency in the process. The Secretary of Transportation (FHWA) is responsible for environmental reviews, consultation, and environmental approvals. TxDOT has in place a multi-disciplinary staff with substantial environmental expertise. FHWA, on the other hand, does not have a similar staff, so TxDOT has traditionally provided the necessary environmental expertise and serves as the joint lead agency (with FHWA) on many projects. Although FHWA is currently responsible for the review, consultation, and approval of environmental documents, TxDOT has traditionally conducted most of the environmental reviews and consultations on Texas transportation projects.

If FHWA delegates its authority under SAFETEA-LU, TxDOT will be able to conduct environmental approvals as well as reviews and consultations. That TxDOT could issue environmental approvals in-house would not mean less environmental review because the same laws apply to either entity making the approval. It simply means that environmental reviews and approvals would happen closer to home, and lead times could be reduced by months, depending on the project. As such, keeping the environmental process at the state level would reduce project development time by improving efficiency, and allow transportation projects to be built faster. Reduced congestion, improved air quality, and enhanced safety could be realized more quickly as well.

## **Proposed Remedy**

In order for Texas to participate in this program, the Legislature must authorize TxDOT to assume certain responsibilities held by the Secretary of Transportation. In addition to authorizing TxDOT to assume these responsibilities, the Legislature must provide, in statute, a limited waiver of sovereign immunity that allows persons to challenge in federal court the actions TxDOT takes pursuant to the delegation.

The Legislature should also clarify TxDOT's authority concerning Transportation Enhancement projects and Congestion Mitigation and Air Quality improvements, to make more explicit TxDOT's authority to expend funds and to contract for non-highway work on projects such as these.

This proposal will allow Texas to participate in these new and innovative programs, and participation will expedite completion of needed transportation projects.

## **Background**

The environmental process, depending upon the complexities of each transportation project, can take multiple years to complete. However, generally this process must be finished before any other work, such as right-of-way acquisition or utility relocation, can take place on a highway project. Given the rising costs of transportation construction materials, every day counts when it comes to finalizing the environmental documentation on a highway project.

Recognizing this situation, Congress established these programs in order to expedite the environmental process. In order for Texas to begin participating in these programs, four things must happen. First, a state must certify that it has laws in effect that authorize the state to carry out the responsibilities being assumed. Second, the state must also show that it has made a limited waiver of sovereign immunity. Third, a Memorandum of Understanding must be in effect between the US Department of Transportation and the state department of transportation that ensures the same review and approval process will be followed at the state level that is being shared between state and federal agencies now. Fourth, for the pilot program only, the state must complete an application to FHWA.

SAFETEA-LU dictates that Categorical Exclusion documents, which are basic environmental reviews, Environmental Assessment documents, which are more sophisticated, and Environmental Impact Statement documents, which are complicated environmental documents, be included with the responsibility of environmental reviews under the pilot program. Each state may take over

environmental review and approval of Transportation Enhancement projects, Recreational Trail projects, Congestion Mitigation and Air Quality improvements, as well as projects on the state highway system. The second program allows TxDOT to take over the approval of Categorical Exclusion documents from now on, through a memorandum of understanding with FHWA.

The Legislature should also address TxDOT's authority concerning Transportation Enhancement projects and Congestion Mitigation and Air Quality improvements, both federal programs. TxDOT currently is not explicitly authorized to expend funds and to contract for non-highway work relating to these programs. An application seeking delegation of authority must show the applicant's authority to assume the responsibilities held by the Secretary of Transportation. In the instance of these two programs, TxDOT's authority to implement the federal programs should be made more explicit.

TxDOT is well equipped to review and approve environmental documentation on its own. The agency's environmental staff possesses multi-disciplinary credentials and substantial environmental expertise. Congress has recognized Texas' ability by choosing TxDOT as one of the state departments of transportation to test this pilot program.

If TxDOT reviewed and approved environmental documents on its own, Texas would see a time savings on each transportation project. For instance, even a routine environmental review on a categorical exclusion can take FHWA about one month to review and approve it. These lead times could be reduced by approximately two weeks if the review and approval took place at TxDOT. These time savings are tremendous, not only for project development time cycles, but also for cost savings related to financing, and the purchasing of land, equipment, and materials sooner. Since the bulk of TxDOT projects require categorical exclusions, if two weeks were saved on each of these projects, it would add up to 12,000 man-hours saved in one year. (100 categorical exclusions normally sent to FHWA per year x 15 days saved = 1500 days spent waiting x 8 hours per day).

Resource agencies such as the Texas Commission on Environmental Quality, the Texas Historical Commission, Texas Parks and Wildlife, and the US Fish and Wildlife Service are aware of this pilot program in SAFETEA-LU. These agencies have indicated that they support TxDOT taking over environmental review and approvals, and TxDOT has committed to keeping them informed throughout the process.

### **The Issue**

When it becomes known that a highway is planned for a certain route, speculators will often purchase adjacent properties and subdivide them. Although there may be several reasons for this, what is clear is that state law prevents counties from regulating development around future transportation corridors. This problem costs state and local governments considerable money in increased right-of-way costs, and will become an even more significant problem as the state undertakes new initiatives to address Texas' mobility challenges.

If legislation is passed to remedy this issue, the time to develop projects could decrease and therefore the Texas Department of Transportation (TxDOT) would be able to improve congestion, air quality, safety, and economic opportunity in the state in less time. In addition, it would increase the value of Texas' transportation assets because time and money could be saved when space is set aside for needed capacity improvements on existing transportation facilities.

### **Proposed Remedy**

There are a few ways to remedy the problem that has been described:

First, if the department and counties had express authority to enter into agreements for the purpose of identifying future transportation corridors within the county, then many of the planning problems discussed here could be remedied. The corridors identified in the agreement must be derived from existing transportation and major thoroughfare plans adopted by the county or a metropolitan planning organization in concert with TxDOT.

Second, a proposed subdivision plat must state whether the subdivision is located on land within a future transportation corridor as identified in such an agreement. This will ensure that everyone, county officials, developers and future property owners will be aware that the land may be used for such a purpose in the future.

Third, each purchase contract or lease made between a developer and a purchaser or lessee of land in the subdivision needs to contain a statement that the land is within a future transportation corridor. Again, a better informed buyer is the purpose here.

Finally, commissioners' courts would have the permissive ability to refuse to approve a plat if an environmental study of a project in a future corridor had begun.

### **Background**

When a developer prepares to subdivide land, he or she must file a request to record a plat with the proper jurisdiction. However, if a plat is located in a future transportation corridor, most counties do not have the ability to disapprove that plat. Furthermore, there is currently no requirement that a purchaser or lessee be notified that their land has been identified as part of a future transportation corridor.

Cities have the ability to create development plans and restrict development where they deem necessary, and thirty-seven counties also have this ability. These are the counties in some of the more metro areas that are either adjacent to an international border with a population of 150,000 or more, have a population of 700,000 or more, or are adjacent to a county with a population of 700,000 or more within the same metropolitan statistical area or seen a population growth of 40% within a ten year time period (Local Government Code Section 232.100).

The other 217 counties in this state do not have the authority to regulate development and there have been many examples in Texas where this has proven to be a problem when developing transportation facilities.

## **JURISDICTION IN EMINENT DOMAIN CASES**

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### ***The Issue***

County courts at law and most state district courts have concurrent jurisdiction in eminent domain cases. However, condemning authorities are required to file eminent domain petitions with the county clerk in counties that have one or more county courts at law. Because the most populated counties in Texas have county courts at law; and because most large public improvement projects that are underway or in development are in populated areas, it would be more efficient to allow the district courts, in addition to the county courts at law, to process eminent domain cases.

### ***Proposed Remedy***

In order to establish uniformity throughout the state and to ensure that eminent domain cases are processed as expeditiously as possible, the provisions of 21.013 of the Property Code should provide that a party initiating a condemnation proceeding shall file with the clerk of any court with jurisdiction in eminent domain cases. And Section 21.001 of the Property Code should establish that all district courts and county courts at law have concurrent jurisdiction in eminent domain cases. This latter provision would ensure that the 25 district courts in Harris County would be able to process eminent domain cases in addition to the four county courts at law that currently have exclusive jurisdiction.

### ***Background***

Section 21.001 of the Property Code provides that district courts and county courts at law have concurrent jurisdiction in eminent domain cases. However, in 1999, legislation was enacted requiring condemnors to file in county courts at law in the approximately 80 counties where a county court at law exists. In 1985, the Government Code was amended to provide that in Harris County, the county courts at law had exclusive jurisdiction over eminent domain cases.

## ADVANCED ACQUISITION OF RIGHT OF WAY

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### **The Issue**

Current state law restricts TxDOT's ability to acquire real property prior to selecting the location or alignment of the project. This can increase the cost of right of way and the length of time to deliver highway projects, which in turn increases overall project costs. The restrictions also inhibit the ability of TxDOT to compete for readily developable land. In addition, the restrictive nature of Texas statutes prevents TxDOT from benefiting from the opportunities to use federal funds for advance acquisition. The federal government has recognized the state interest in advance right-of-way acquisition to streamline project delivery and reduce costs.

### **Proposed Remedy**

TxDOT seeks the authority for advance acquisition to allow more business-like practices and reduce right-of-way acquisition costs. The proposed remedy would provide TxDOT the authority to acquire property within identified areas that will be needed for a preferred alignment from willing sellers. Under this authority, property would be purchased within such areas when it becomes available on the open market. The remedy would be targeted to areas where private development might adversely affect lands needed for planned improvements. This authority is not intended to be applied to all projects, since not all future projects are located in areas where further private development would impact land required by the preferred alignment.

### **Background**

With annual expenditures on right of way at approximately \$650 million and construction expenditures of over \$3 billion, there are many examples of projects in high-growth areas where the acquisition of property from willing sellers in advance of final alignment will result in cost savings. These cost savings can reduce overall project costs and speed project delivery in corridors expected to be impacted by high rates of growth and associated economic development. There are many projects for which, prior to final alignment, there is high level of certainty about which parcels will fall within the final project limits. Without prejudicing public involvement or the requirements of the environmental process, the advance acquisition of this property will save money and preserve the public opportunity to develop the project in best location possible.

The federal government has recognized the state interest in advance right-of-way acquisition to streamline project delivery and reduce costs. In 1998, changes in federal law enabled FHWA participation in advance acquisition. The expenditure of state funds, subject to a number of conditions, can be used as a credit toward a state's matching funds requirement.



## **BILLBOARD RELOCATION**

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### ***The Issue***

Highway improvements made by the Texas Department of Transportation (TxDOT) often require the relocation of outdoor advertising. Relocating billboards is advantageous to the department as well as the outdoor advertising industry because the department pays only for the relocation cost of the sign rather than the value of the sign itself which can be substantially more expensive. Meanwhile, billboard owners maintain a long-term revenue generating asset. However, for signs needing relocation within incorporated city limits, municipalities are increasingly blocking the relocation of these signs via local ordinances, potentially forcing the department to pay for the value of the sign itself rather than moving them. This can amount to 10 to 25 times the cost of relocation.

### ***Proposed Remedy***

Chapter 361 of the Transportation Code should be altered to allow the state to relocate outdoor advertising structures in cities that currently have a ban, unless the municipality chooses to enforce its ban by paying the fair market value of the structures that were not allowed to relocate.

The benefits to the department will be the savings realized by paying relocation costs rather than the value of outdoor advertising structures. Benefits to the structure owner will be the retention of an income-generating asset. An intangible benefit to both would be certain and rapid resolution when highway projects require the relocation of outdoor advertising structures. If a sign must be purchased, often the department must initiate condemnation proceedings which draw the process out further as the value of the sign is determined.

### ***Background***

As cities become sensitive to scenic issues, a popular method thought to improve aesthetics is the banning of new outdoor advertising structures. These cities view the erection of any outdoor advertising structure as “new” even though it may be the relocation of an existing structure.

Historically, these cities have worked with the department to allow relocations made necessary by highway improvements; however, this spirit of cooperation has begun to erode. Some cities are changing their policies and building codes in such a way as to disallow relocations. Under current law the state may have to

purchase the signs in order to improve highways. TxDOT's rules are consistent with federal guidelines allowing outdoor advertising structures to be relocated. There are no federal regulations or penalties that would preclude consideration of this proposal.

## UTILITY RELOCATION

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### **The Issue**

When relocation of utilities is necessary for the improvement of a part of the National System of Interstate and Defense Highways, the Transportation Code, Section 203.092(a), requires the state to reimburse the utilities for their relocation expenses, regardless of the nature of their property interests. However, to be eligible for reimbursement of relocation expenses to all other state highways, a utility must have a superior property interest.

### **Proposed Remedy**

Amend Transportation Code, Section 203.092(a) to remove the requirement that the state pay the expense of relocating a utility on an interstate highway, regardless of the nature of the utility's property interest.

An exception to this proposal would be when a utility has entered into an agreement with the department that includes a fee paid to the state for the right to access state right of way. Under such a program, utility relocation expenses would be borne by the state regardless of the utility's property interest.

### **Background**

Under existing state laws, various utility firms and agencies have a right to install their lines along and/or across TxDOT right of way. This includes those firms which are authorized by state laws to transport and/or distribute natural gas, water, electric power, and telephone. Since 1957, when relocation is necessary for the improvement of a part of the National System of Interstate and Defense Highways, Transportation Code 203.092(a) requires the state to reimburse the utilities for their relocation expenses, regardless of the nature of their property interests.

Conversely, if a utility is located on state highways other than interstates, state law limits reimbursement to those utilities possessing a compensable property interest. If the utility possesses no compensable property interest, the cost of the relocation is borne by the utility. And yet, by virtue of the state law, there is an automatic 100 percent eligibility for reimbursement to the utility industry for interests along the interstate system.

This was never intended to be a perpetual free ride for the utility companies on interstate system right of way, but today, with the interstate system mostly built,

a utility can come in by statutory authority, occupy interstate right of way, and then be automatically reimbursed by TxDOT for their costs when improvement to that portion of interstate requires the utility to move. The argument ultimately boils down to who should be held responsible for the cost of the utility adjustment: the rate-payers and shareholders that receive the benefit of free right of way, or the general public who pays for the gas tax. The I-10 (Katy Freeway) Project in Houston now represents the state's largest interstate system project. The 26-mile project includes more than \$300 million for adjustments to public utilities. These expenses have been paid out over the last several years and continue to be paid today as work is completed.

## QUALIFICATIONS BASED–BEST VALUE ENGINEERING

### **The Issue**

Governmental entities in Texas that procure architectural, engineering or land surveying services are prohibited by law from considering price and value when selecting a provider for these services.

Current Texas law (Subchapter A, Chapter 2254, Government Code) specifies that governmental entities in Texas that procure architectural, engineering, or land surveying services must adhere to specific procedures. First, governmental entities must select the most highly qualified provider of those services on the basis of demonstrated competence and qualifications, and then attempt to negotiate with that provider a contract at a fair and reasonable price. If the provider does not agree to a price deemed fair and reasonable, price is negotiated with the second most qualified provider. If an agreement is not made with the second most qualified provider, at this point the governmental entity is prohibited by law from going back to the first selected provider and renegotiating.

This process is lengthy and may not always provide the best value to taxpayers.

### **Proposed Remedy**

State law should be amended to provide an alternate procurement procedure that allows for the consideration of price and value when procuring professional architectural, engineering, and land surveying services.

Once a list of qualified providers has been determined, then it should be statutorily permissible for the agency to solicit proposals from among the qualified providers to assist in selecting the firm that would provide the best value for the state. It should not be a requirement to simply accept the lowest bid. The agency should be able to consider all factors to ensure a high quality product that is delivered efficiently and that offers the best value. Qualifications based–best value (QBBV) procurement of professional services would be a complementary alternative to current procurement practices and would not eliminate any of the current methods.

### **Background**

The United States General Accounting Office examined the consultant engineering community view, which holds that competition adversely impacts quality. Prepared at the request of the House Committee on Public Works Subcommittee

on Surface Transportation, the briefing report concludes that there is no evidence to support the contention that quality suffers when one firm underbids another.

In fact, the report contends that the most qualified firm may be able to underbid its competitors because they have invested in advanced techniques and technologies that make them more efficient. The most qualified firms may have the most experienced staff, thereby requiring fewer staff-hours. Additionally, there is no evidence to prove that low bidders are invariably awarded contracts, top-quality firms are not awarded contracts, or that top-quality firms do not submit low bids.

When the qualifications of different firms are scored, the difference between the highest score and the lowest score may be very narrow. In these cases, the only significant difference among the firms is which one offers the best value.

Another report to Congress, entitled “Better Compliance with the Competition in Contracting Act is Needed,” lays out the benefits of competition in government procurement:

“The benefits of competition go beyond short-term price advantage. The competitive process provides a means for finding out what is available to meet a particular government need and choosing the best solution. The most important benefits of competition can often be the improved ideas, designs, technology, delivery, or quality of products and services that potential contractors are motivated to produce or develop to obtain government contracts. When competition is restricted, the government loses opportunities not only to obtain lower prices but also to increase the productivity and the effectiveness of its programs.”

The market forces that establish the true market value of a given service are substantially diminished when the buyer can only negotiate with one provider at a time and may not return to providers with whom they have previously negotiated. Additionally, competition spurs innovation.

Texas State Practices: The purpose of instituting a QBBV procurement process is to provide TxDOT with an alternative procurement option for architectural, engineering, and land surveying services in order to provide the best value for project delivery in the most efficient manner. The QBBV procurement process would be a complementary alternative to TxDOT’s existing Quality Based Selection (QBS) procurement process and would not replace it. TxDOT already uses QBBV procurement for other types of services, including scientific services, landscape architecture services, appraisal services, and right-of-way acquisition services, and believes it would be appropriate for other professional services.

As described above, Texas currently procures architectural, engineering, and land surveying services using a QBS process prescribed in the Professional Services Act. TxDOT proposes an alternative procedure containing the following steps:

- a. As an alternative to the (current) procurement method (prescribed by Section 2254.004), a governmental entity may procure architectural, engineering, or land surveying services using the procedure provided by this section.
- b. The governmental entity shall prepare and issue a request for qualifications.
- c. The governmental entity shall evaluate statements of qualifications and rank a reasonable number of the most highly qualified providers of architectural, engineering, or land surveying services on the basis of demonstrated competence, qualifications, and estimated delivery date.
- d. The governmental entity shall solicit competitive proposals from the providers selected under Subsection (c). The governmental entity shall include with the solicitation the information necessary for the solicited providers to submit a responsive competitive proposal.
- e. The governmental entity shall select the provider that submits the competitive proposal offering the best value for the entity on the basis of price, demonstrated competence, qualifications, and estimated delivery date.
- f. The governmental entity shall first attempt to negotiate a contract with the provider selected under Subsection (e). If the entity is unable to negotiate a satisfactory contract with the selected provider or if the selected provider is released from the contract during the first three months of the contract, the entity shall proceed to negotiate a contract with the next provider in the order of the ranking established by the entity under Subsection (e) if that provider agrees to the terms of its original proposal.
- g. A rule of a professional licensing board prohibiting an architect, engineer, or land surveyor from submitting a competitive bid or proposal does not apply to a competitive proposal submitted under this section.

## **AUTOMATED CAMERA ENFORCEMENT**

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### **The Issue**

Resources for traffic law enforcement are limited. The technology exists for effective automated enforcement for intersections, highway/rail crossings and high-occupancy vehicle lanes, thereby enhancing safety on Texas roadways through perceived consequences for actions. The recent Attorney General Opinion (GA-0440, June 23, 2006) allows for the placement of such cameras, granting local jurisdictions the specific authority to use automated enforcement technology through administrative and civil penalties. While these cameras will provide law enforcement with a valuable tool to target problem areas, the law needs to be further clarified as to the use of automated cameras and the enforcement of violations.

### **Proposed Remedy**

Create enabling legislation to provide local jurisdictions and the Texas Department of Public Safety (DPS) the authority to use automated enforcement technology for traffic offenses. Allow for the imposition of civil and administrative penalties for offenses captured through this technology. This would require an addition to the Transportation Code, Chapter 707. Public education combined with consequences for actions would create a heightened awareness of the serious traffic problems caused by driving behaviors.

### **Background**

Numerous bills have been filed during the last four or five legislative sessions regarding automated enforcement. No specific legislation has ever been passed. However, during the 78th Legislature, an amendment was added in the House to SB 1184 by Deuell, which revised Transportation Code §542.202 as it relates to the powers of local authorities. The language added the term “regulating” to mean a criminal, civil, and administrative enforcement against a person, including the owner or operator of a motor vehicle, in accordance with a state law or a municipal ordinance.

Some municipalities understood this revision to allow for the use of cameras at signaled intersections to assist with the enforcement of violations. TxDOT received several inquiries from municipalities on the legality of placing such cameras on state highway rights of way and requested a Texas Attorney General opinion on the statute. The Attorney General responded as referenced above,



stating TxDOT may install automated cameras on state highway rights of way to monitor compliance with traffic-control signals for the purpose of enforcing traffic laws on state highways. The opinion also states the department may permit local authorities to install camera equipment in connection with traffic-control signals on state highway rights-of-way for the same purpose.

However, the Attorney General's opinion was general and did not specify how such violations could be enforced. Clarification from the Legislature on enforcement of violations as a result of automated cameras is needed. Local law enforcement agencies currently cover the enforcement of violations in urban areas where automated cameras have already been placed or are scheduled for placement. DPS covers rural areas of the state and currently has no plans to enforce such violations.

While the inquiries to TxDOT have related to automated camera enforcement at signaled intersections, amendments to current statute could also allow for enforcement of highway/rail crossing signals and high occupancy vehicle violations. The enforcement of these violations would require DPS authority depending on the location of the automated cameras.

## **TRANSFER OF CRASH RECORDS BUREAU**

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### **The Issue**

Information on crash records is essential to enhancing safety conditions on roadways across the state. The Crash Records Bureau (CRB) currently resides under the authority of the Texas Department of Public Safety (DPS). This bureau maintains and provides records and crash data to the public and also to TxDOT to assist with maintaining safe conditions on current and future roadways. An interagency cooperation contract (IAC) is currently in place between TxDOT and DPS to further define this relationship as well as the management of crash data.

In July 2006, DPS expressed interest in transferring responsibility for the crash records function to TxDOT, including associated CRB personnel. Although DPS is the primary custodian of crash records in Texas, TxDOT uses this data to evaluate the effectiveness of safety programs and obtain funding to support traffic safety.

### **Proposed Remedy**

Modify existing statutes to transfer the crash records function to TxDOT. Crash data is critical for state and local transportation project planning and prioritization, highway and railroad-crossing safety evaluation, identification of target areas for enhanced law enforcement, and for traffic-safety studies.

### **Background**

CRB is the state repository for motor vehicle traffic crash records and is charged with the responsibility of maintaining motor vehicle traffic crash reports, classifying crashes in accordance with national standards, collecting data from each report, and entering the information into computer files. The Crash Records Information System (CRIS) is the single most comprehensive information system regarding traffic crashes in Texas.

CRB also analyzes the data and provides reports to the public, including regional data, DWI reports, and crashes involving motorcycles, pedestrians, school buses, military drivers and more. All records are subject to the Public Information Act and are not considered confidential.

The resources available through TxDOT would greatly benefit the support and functions of CRIS, including improvements to the current reporting process. The largest user of CRB data is TxDOT, comprising more than 80 percent of the bureau's current workload. In fact, many state DOTs have the responsibility

for maintaining crash records. Additionally, CRB does not regularly interact with other bureaus within DPS.

The Fatality Analysis Reporting System (FARS) is a section of the National Highway Traffic Safety Administration (NHTSA) with representatives nationwide collecting and maintaining data on traffic fatalities. CRB currently houses five full-time employees through a contract with NHTSA that is up for renewal on December 31, 2006. The system, separate from CRIS, contains data on a census of fatal traffic crashes within the 50 states, the District of Columbia and Puerto Rico, and provides an overall measure of highway safety through crash analysis. FARS helps suggest solutions and provides an objective basis to evaluate the effectiveness of motor vehicle safety standards and highway safety programs.

NHTSA provides funds to CRB to ensure the proper and timely reporting of fatal crash records. To be included in FARS, a crash must involve a motor vehicle traveling on a roadway customarily open to the public and result in the death of a person (occupant of a vehicle or a non-occupant) within 30 days of the crash. FARS has been operational since 1975 and has collected information on over 989,451 motor vehicle fatalities and 100 different coded data elements that characterize the crash, the vehicle and the people involved.

CRB works closely with NHTSA on reporting criteria for data and provides them with vital information on crash records. TxDOT has a long history and affiliation with NHTSA, which will further assist the department in an endeavor to improve CRIS and the reporting process.

Current statutes requiring amendment include Government Code §411.0175 and Transportation Codes §§550.061–068, §550.081 and §601.004. While the Transportation Code defines report content for crash data, the Government Code requires a report to the governor and the Legislature each biennium, including conclusions and recommendations for decreasing highway accidents and increasing highway safety.

## EXCLUSIVE TRUCK LANES

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### **The Issue**

Separating trucks from daily vehicle traffic enhances safety and provides expanded economic opportunities through the expeditious delivery of goods. Lanes constructed exclusively for the use of trucks (separating them from passenger vehicles) would reduce congestion and thereby improve air quality. The Transportation Code, Chapter 224, authorizes the commission to designate one or more lanes of a state highway facility as an exclusive lane. An “exclusive lane” is defined as a lane of a highway or segment of a highway in which the use is restricted to one or more designated classifications of motor vehicle.

The statute governing the Trans-Texas Corridor, Transportation Code Chapter 227, authorizes TxDOT to dedicate one or more lanes of highway on the Trans-Texas Corridor to the exclusive use of designated classes of vehicles. Chapter 224 has none of the limitations of Chapter 227. The law is not clear as to whether the limitations in Chapter 224 would apply to the Trans-Texas Corridor. Also, the law is not clear as to whether an entire state highway facility can be dedicated solely for the purpose of one type of vehicle, such as trucks.

### **Proposed Remedy**

Seek to amend statute to allow the commission to designate, on or off the Trans-Texas Corridor, exclusive truck lanes without a requirement that there be adjacent lanes for passenger vehicles.

There appears to be a significant demand for the construction of exclusive truck lanes. The separation from passenger vehicles would provide a great safety benefit. Trucks utilizing lanes on the Trans-Texas Corridor can travel up to 85 miles per hour and the commission could increase vehicle size and weight limitations.

### **Background**

Highways are designed to serve many vehicle types, though the impacts of these different vehicles are not uniform and therefore pose special problems in highway operations. The increase in both the physical dimensions and the number of trucks, coupled with the increase in the number of passenger cars on the roadways, have added to existing problems related to traffic operations, safety, and roadway structures. One common approach to reducing the impact of truck traffic on freeways has been to impose restrictions on truck operations in order to

reduce the interaction between trucks and other vehicles, and to compensate for their differences in operational characteristics.

The use of restricted truck lanes has been an ongoing concept in project planning for some time and an important department goal. In fact, HB 1208, 78th Legislature, Regular Session, 2003, amended Transportation Code § 224.1541 and authorized the commission to designate exclusive truck lanes. This legislation included limitations as described below. HB 3588, 78th Legislature, Regular Session, 2003, amended Transportation Code § 227.031 and authorized the department to designate exclusive lanes on the Trans-Texas Corridor. This legislation did not include any of the limitations described below.

Currently, the commission may designate exclusive lanes only if it determines that: (1) There are two or more lanes or a multilane facility adjacent to the proposed exclusive lanes which are available for vehicles other than the vehicles intended for the restricted lanes; and (2) The use or operation of the exclusive lane is likely to enhance safety, mobility, or air quality.

The law further provides that for vehicles prohibited from traveling in the exclusive lane facility, the adjacent lanes or facility may be designated exclusive for those particular vehicles.

## **SOBRIETY CHECKPOINTS**

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### ***The Issue***

Driving drunk is not an accident. Impaired driving and alcohol-related crashes constitute two of the nation's leading health problems and result in more deaths each year than do total homicides. On average, an alcohol-related traffic crash claims a life every half-hour.

The Texas Department of Transportation is the leader for highway safety in the state and has made improving safety one of its five agency goals, striving to eliminate alcohol-related fatalities and injuries. For the agency to successfully reach that goal, it should explore all available enforcement tools at its disposal, including sobriety checkpoints.

### ***Proposed Remedy***

Sobriety checkpoints are temporary roadblocks that allow law enforcement officers to stop all or a predetermined sequence of drivers to both detect impaired drivers currently on the road and deter potential impaired drivers by increasing their perceived risk of arrest. With their constitutionality upheld by the U.S. Supreme Court, 39 states currently allow the use of sobriety checkpoints. As a result of a 1994 state court ruling, Texas is one of the 11 states that do not.

A part of the remedy is to amend Title 1 of the Texas Code of Criminal Procedure to permit sobriety checkpoints in Texas and to standardize checkpoint policies and procedures to ensure that sobriety checkpoints are used legally, effectively, and safely. Sobriety checkpoints, in and of themselves, are not a complete solution. They should also be integrated with a continuing, systematic, and aggressive anti-drunk driving program, including vigorous enforcement, public information, and education.

### ***Background***

According to the most recent study by the National Highway Traffic Safety Administration (NHTSA), of the 42,636 total traffic fatalities reported in the United States in 2004, 16,694 (39 percent) were alcohol-related, down from the previous year's total of 17,105 deaths. This was only a 2 percent decrease. Of those 16,694 deaths, more than half (8,256), were from crashes where the driver registered a blood alcohol content (BAC) level at or above 0.08, currently the legal limit in all states.

At the state level, Texas has one of the nation's worst drunk driving records, in terms of deaths and injuries. This is despite various legislative measures over the last 20 years meant to reduce alcohol-related crashes. The U.S. Department of Transportation Fatality Analysis Reporting System (FARS) shows that 1,642 people were killed in alcohol-related crashes in Texas in 2004. At 46 percent of the state's total traffic fatalities, this is well above the 39 percent national average.

Historically, Texans have had a very tolerant attitude toward drinking and driving. In the past, proposed changes in law that advocated potential restrictions on personal freedom were met with strong opposition by some legislators, the criminal defense community, the liquor industry, and special interest groups representing bars and restaurants. Over the last two decades, however, awareness of the problems associated with driving while intoxicated (DWI) has increased dramatically in response to statistics released by NHTSA and the advertising and publicity efforts by groups such as MADD and the Insurance Institute for Highway Safety.

The department has not previously taken a public position on sobriety checkpoints. Since 2003, the TxDOT Executive Director, designated as the Governor's Highway Safety Representative, has coordinated highway safety efforts statewide, including:

- Provided \$23 million in annual funding to law enforcement agencies statewide through the Selective Traffic Enforcement Program (STEP) to increase mobile enforcement patrols;
- Increased anti-DWI public information and education campaigns such as local community media events, and statewide media campaigns such as On the Road in Texas, Save a Life, and Shattered Dreams;
- Provided training to judges, prosecutors, and law enforcement officials to improve the adjudication process of DWI cases;
- Set the goal of reducing the rate of DWI-related fatalities from .81 per million vehicle miles traveled (MVMT) traveled in 2003 to .69 per MVMT by the year 2010.

Over the last 20 years, the Texas Legislature has taken positive steps to make Texas roads and highways safer by passing tough laws.

- 1980s – Passed mandatory seatbelt laws.
- 1995 – Approved Administrative License Revocation (ALR) program allowing the Texas Department of Public Safety (DPS) to temporarily suspend the licenses of drivers who refuse to take a chemical test for

alcohol (HB 63). Also moved DWI laws from civil statutes to the Penal Code and increased penalties.

- 1997 – Passed “zero tolerance” law prohibiting drivers under age 21 from operating a vehicle with any amount of alcohol in their bloodstream.
- 1999 – Lowered the legal blood alcohol content (BAC) limit for adult drivers from 0.10% to 0.08%, (SB 114).
- 2001 – Passed “open container” laws outlawing open containers of alcohol in vehicle passenger areas and increased the period of license suspension for drunk driving from three to six months (HB 5). Also created graduated licensing system for young drivers, setting out the conditions under which they may drive during their first six months.

Over the last 10 years, however, every legislative attempt to authorize sobriety checkpoints in Texas has failed. Most recently, bills introduced in 2003 and 2005 met the same fate.

In the 2003 Legislative Session, two bills relating to the authority of DPS and certain law enforcement agencies to establish a checkpoint on a highway or street to determine whether persons are driving while intoxicated were defeated:

- HB 226 (Smith) – status: 4/7/03 – failed to receive an affirmative vote in Law Enforcement Committee. This is the furthest sobriety checkpoint legislation has ever gone in Texas.
- SB 44 (Zaffirini) – status: 1/27/03 – never left Criminal Justice Committee.

In the 2005 Legislative Session, three bills relating to the authority of DPS and certain local law enforcement agencies to establish a checkpoint on a highway or street to determine whether persons are driving while intoxicated were also defeated:

- HB 50 (Smith) – status: 2/3/05 – never left the Law Enforcement Committee.
- HB 309 (McClendon) – status: 2/3/05 – never left the Law Enforcement Committee.
- SB 25 (Zaffirini) – status: 1/31/05 – never left the Criminal Justice Committee.

The stopping of an automobile and detaining the occupants at a roadblock constitutes a seizure under the 4th Amendment of the U.S. Constitution. A search



and seizure is presumptively unreasonable and the government has the burden of proving the legitimacy of the seizure.

In the case of the Michigan Department of State Police v. Sitz (1990), the U.S. Supreme Court ruled that sobriety checkpoints are constitutional. The Court found that the government interest in reducing drunk driving, the extent to which checkpoints can advance that interest, and the degree of intrusion on drivers weighed in favor of the checkpoint program. On remand, however, the Michigan Supreme Court found the checkpoint program unconstitutional under its state constitution.

In the case of Holt v. State (1994), the Texas Court of Criminal Appeals ruled that, because the checkpoint program upheld by the U.S. Supreme Court in the Sitz case was authorized by the Michigan state government, without similar authorization by the Texas Legislature, checkpoints in Texas would be unconstitutional under the U.S. Constitution. However, no specific language in the Sitz case required such an interpretation, and the Texas Court of Criminal Appeals did not address the constitutionality of checkpoints under the Texas state constitution.

There are many benefits to sobriety checkpoints. When well publicized, sobriety checkpoints deter impaired persons from driving by increasing the “perception of risk” of arrest. Sobriety checkpoints provide a greater chance of interaction between drunk drivers and law enforcement than roving patrols. Sobriety checkpoints reduce alcohol-related traffic fatalities by 20 percent on average, according to a 2002 study by the Centers for Disease Control (CDC). This corresponds with several studies in the 1990s that showed decreases between 18–24 percent. Sobriety checkpoints can be effectively operated with three to five officers.

Even if authorized, law enforcement agencies are not required to conduct sobriety checkpoints. They can be used if a community deems them necessary to reduce a problem with impaired driving.

There are also many challenges to face. For instance, checkpoints might remind people of the unpopular Texas Alcohol and Beverage Commission (TABC) program where undercover officers arrested those who were publicly intoxicated in bars. Texas law defines public intoxication as “not having the normal use of mental or physical faculties because of alcohol or drug use.” Although the TABC program was halted because of poor public perception, the purpose was to deter individuals who may behave irresponsibly before they got behind the wheel. However, when impaired persons make the decision to drive, they become an even greater danger to themselves and to others and create a public safety issue, making sobriety checkpoints even more necessary.

## VARIABLE SPEED LIMITS

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### **The Issue**

Enhancing safety is a top priority at TxDOT, and allowing for variable regulatory speed limits when warranted by roadway conditions would assist in this endeavor. If given statutory authority, the department could use dynamic message signs to implement a variable speed limit system to address fluctuations in roadway conditions such as inclement weather, traffic crashes and work zones.

Motorists who exceed posted speed limits or drive too fast for road conditions are responsible for injuries, deaths, and massive property damage. Allowing the department greater flexibility in changing speed zones to fit actual field conditions could help reduce potentially hazardous driving situations. This initiative could also assist in reducing the congestion often caused by these conditions.

### **Proposed Remedy**

Under current state law, regulatory speed limits must be set by the Texas Transportation Commission and adopted through a formal minute order process. Although the department determines construction speed limits, each must be presented and approved by the commission in the form of a minute order. Modifying existing state law to allow the Executive Director or designee to set variable speed limits based on current conditions will allow great flexibility in changing speed zones to fit actual field conditions.

### **Background**

While regulatory speed limits can be changed with commission approval, it is more difficult to adapt them for rapidly changing conditions. Technology exists that allows speed limits to be modified quickly as necessary for the safety of the traveling public.

Law enforcement and local jurisdictions could be in support of this initiative due to the potential benefits of lessening traffic during inclement weather or other adverse conditions. However, since this would expand the legal authority of the state to regulate speed, it may be opposed by some.

There is no current statute allowing for the creation of variable speed limits, however the alteration of speed limits on the state highway system is allowed by the commission under Transportation Code §§ 545.353, 545.3531 and 545.3535.

Most highways and motor vehicles are designed and built for safe operation at the speeds traveled by most motorists. Speeds exceeding posted limits or driving too fast for conditions involves many factors, including public attitudes, personal behavior, vehicle performance, roadway characteristics, enforcement strategies and speed zoning (a safe and reasonable limit for a given road section or zone). Variable speed limits are one option utilized by other countries and states to address the issue of excessive speeding on roadways.

## NON-RIGHT-OF-WAY PROPERTY ACQUISITION, EXCHANGE, AND SALE

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### *The Issue*

The Texas Department of Transportation could operate more efficiently and effectively if statutory changes were made affecting TxDOT's ability to acquire, manage, and dispose of non-right-of-way property. The General Land Office (GLO) is required to review all properties owned by the state, including property owned by TxDOT. One conflict lies in the difference between "highest and best use" in a commercial real estate sense and the needs of TxDOT as we attempt to meet the current and future needs of the transportation system.

There are three distinct issues with non-right-of-way property which need attention: 1) The authority to designate and require the sale of TxDOT-owned non-right-of-way properties; 2) TxDOT's lack of authority to negotiate the same types of land and building agreements for non-right-of-way property with other public entities that have been successfully negotiated with private property owners; 3) The deposit of proceeds from the sale of surplus personal property purchased through State Highway Funds into the State General Revenue Fund. While a rider from Article IX of the General Appropriations Act from the 79th Legislature redirects these funds to State Highway Fund 006, the process could be simplified through direct allocation.

### *Proposed Remedy*

To enhance authority over designation and sale of underutilized properties, amend Natural Resources Code, Section 31.155, Special Status of Certain Agencies subsection (7) to include all other non-right-of-way property to the exempted list. Currently, the GLO has the authority to classify TxDOT properties as underutilized and recommend to the governor the sale of such properties at any time, regardless of needs of the transportation system as expressed by TxDOT.

For acquisition and exchange of non-right-of-way property (Land and Building Agreements), amend the Transportation Code, Section 201.1055 Agreements with Private Entities to allow agreements with other governmental units to be negotiated to include sales, exchanges and financing of land, buildings and facilities. This would expand the department's authority to enter into an agreement with a private or public entity that offers the best value to the state and would remedy the omission of the word "public" in the current statute, thereby including the ability to establish land agreements with a greater number of partners. Also, by

amending Section 201.1055 of the Transportation Code to allow for the exchange of realty for real property, TxDOT would acquire additional flexibility in agreements.

For surplus property sales and the deposit of proceeds, amend Government Code, Section 2175.134 Proceeds of Sale to include specific language which would exempt the proceeds from the sale of TxDOT surplus property from being deposited into the General Revenue Fund and instead deposited into State Highway Fund 006.

### **Background**

TxDOT purchases properties for department operations and management functions on a four to five year time horizon. The department classifies unused or underutilized non-right-of-way property and determines if and when those properties should be sold. However, the GLO has become more active in disposing of TxDOT lands after it became apparent that TxDOT was retaining real property for long periods of time for a number of legitimate business reasons. These include pending litigation, environmental issues, and district uses that affect the holding of real properties.

The GLO has the authority to classify property as underutilized and recommend property for sale. This definition of underutilized by the GLO does not always provide for the best benefit in relation to the operation of the department. It complicates the sale of TxDOT non-right-of-way property and creates capital facility planning and implementation uncertainty that could increase costs if property that was being held for a future facility is not available. TxDOT must then purchase new property at a higher cost. There may be some objections raised by the GLO regarding any loss of current authority to determine unused or underutilized properties, including the determination of whether or when to sell non-right-of-way property. TxDOT is unable to control the sale of any agency property identified as “unused or underutilized” by the GLO.

Current law authorizes TxDOT to enter into agreements with private entities that offer the best value to the State regarding the exchange or acquisition of land, and related creative financing approaches to the design and construction of buildings and facilities necessary to support department operations. TxDOT lacks the authority to leverage, acquire, or exchange land with respect to governmental agencies, including the ability to design and construct buildings through creative approaches by agreement with other governmental units. Authorizing TxDOT to negotiate agreements with such entities would yield benefits at the state and local

levels of government. Local governments also have limited resources and negotiating land agreements with TxDOT to acquire existing maintenance offices and facilities will assist with efficient operations of their functions. The Comptroller of Public Accounts, the Legislative Budget Board (LBB), the Texas Public Finance Authority (TPFA), and the GLO support this approach to maximizing state transportation resources. This program of work allows TxDOT to relocate from properties situated in areas with high commercial value and to exchange them for real property (land) and new construction with no or limited capital funding or by issuing bonds through TPFA.

Historically, the revenues generated from the sale of TxDOT surplus properties (mainly highway equipment such as bulldozers, trucks etc.) were deposited in State Highway Fund 6. A 2003 statutory change redirected the sale proceeds from the sale of TxDOT surplus properties to the State's General Revenue Fund. This equipment was initially purchased with appropriations out of the State Highway Fund and the proceeds from the sale of surplus equipment should be returned to this fund for the support of the Texas transportation system.

## PAYMENT OF COMPENSATORY TIME

### **The Issue**

The option to incentivize employees by paying them for compensatory time provides additional means for TxDOT to meet its stated goals of reducing congestion, enhancing safety, expanding economic opportunity, improving air quality and increasing the value of transportation assets. Rider 27d to TxDOT's current appropriations authorizes TxDOT "to the extent permitted by law" to pay FLSA exempt and non-exempt employees for compensatory hours when the taking of regular compensatory time off would be disruptive to normal business hours. The Government Code, however, prohibits an FLSA exempt employee from being paid for any unused compensatory time.

### **Proposed Remedy**

Seek legislation to amend state law authorizing TxDOT to pay employees for unused comp time. This would reward state employees for overtime in a way that does not disrupt department operations, plus provide employees the incentive to work overtime to achieve the goals of the department.

### **Background**

TxDOT has had a rider for many years that allowed for payment of comp time. Though there has also always been an Article IX rider prohibiting payment, until fairly recently, TxDOT's rider overrode the Article IX rider. However, in 1999, the Legislature codified many of the Article IX riders in the Government Code, including the provision prohibiting payment of comp time. Since Government Code § 659.016(i) prohibits the payment of unused comp time to exempt employees and an appropriations bill rider may not override a statute, exempt employees of TxDOT could not be paid for unused comp time.

After the hurricanes last summer, there was great interest in paying FLSA exempt employees for their many overtime hours worked during and immediately after the hurricanes. TxDOT had to inform all parties that, unlike other agencies, TxDOT could not pay for comp time.

The Employee Retirement System of Texas (ERS), the Texas Department of Health (only for employees giving shots) and the State Preservation Board (SPB) all have statutory authority to pay exempt employees for overtime. Both the ERS and SPB have the authority in the Government Code, while the Texas Department of

Health provision is outlined in the Health and Safety Code. Other agencies in the same situation as TxDOT, with an appropriations rider but no authority in the Government Code to pay for comp time, include the Department of State Health Services, the Department of Aging and Disability Services, the Texas Engineering Extension Service (part of the Texas A&M System) and the Texas Forest Service. However, the Texas Forest Service provision only allows for this payment when such time is worked in connection with an emergency.



## ADMINISTRATION OF TRANSPORTATION SERVICES FOR HUMAN SERVICES AGENCIES

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### *The Issue*

House Bill 2702 was filed on March 10, 2005, during the 79th Legislative Session. Floor Amendment 8 to HB 2702 was filed and passed on May 20, 2005. Floor Amendment 8 contained amendments to the Health and Safety Code, Labor Code, Human Resources Code and the Transportation Code, with the purpose of making it clear that the role of TxDOT, in providing public transportation services to health and human services (HHS) agencies and the Texas Workforce Commission (TWC), and particularly the Medical Transportation Program (MTP), is limited to the actual delivery of a needed public transportation service for clients of eligible programs administered by the HHS agencies and TWC.

However, the enrolled version of HB 2702 passed on May 30, 2005 did not contain the full text of Floor Amendment 8. That portion of Floor Amendment 8 that amended the Transportation Code was inadvertently left out of the enrolled version of the bill. The amendments to the Transportation Code are needed to be consistent with the other statutory changes made in Floor Amendment 8 to HB 2702.

Provisions in Transportation Code Chapter 461 also need to be amended in order to be consistent with the statutory changes already made and to clarify that TxDOT is responsible for providing transportation services for eligible clients of programs administered by the Texas Health and Human Services Commission (HHSC) and the HHS agencies under its jurisdiction, as well as TWC. The amendment is needed to clarify that TxDOT does not have the authority or responsibility for client case review, case management, or coordination or authorization of benefits.

### *Proposed Remedy*

State law should be amended to make the Transportation Code consistent with the other codes to make it clear that the role of TxDOT, in providing public transportation services to HHS agencies and TWC, and particularly under MTP, is limited to the actual delivery of a needed public transportation service for clients of eligible programs.

## Background

Funding of transportation services provided by the HHS agencies and TWC was mandated by the 78th Texas Legislature in 2003 in HB 3588 and HB 2292, and amended by the 79th Legislature in 2005 in HB 2702. The stated goal was to achieve efficiencies in transportation services for HHS/TWC program clients, to increase availability of transportation services to benefit HHS/TWC program clients, and to achieve cost efficiency and effectiveness of transportation services.

To carry out the requirements in HB 3588 and HB 2292, TxDOT entered into interagency agreements with TWC and HHSC, both of which were renewed as of September 2006.

The agreement with HHSC supports eligible transportation services provided through programs administered by the Health and Human Services Commission, the Department of Aging and Disability Services, the Department of Assistive and Rehabilitative Services, and the Department of State Health Services. The agreement with TWC supports transportation services provided through programs administered by TWC.

In addition, employees performing MTP functions were transferred from the Texas Department of Health to TxDOT when TxDOT assumed operations of MTP in March 2004. The MTP is responsible for arranging transportation services for eligible clients of Texas Medicaid, Children with Special Health Care Needs and Transportation for Indigent Cancer Patients.

During the first year that TxDOT assumed funding responsibility of TWC and HHSC transportation services programs, it became clear that transportation services provided under these programs include services that are beyond the scope of TxDOT's public transportation responsibility; for example, purchasing batteries and tires; advancing funds to assist with purchasing gasoline for personal vehicles; arranging and authorizing clients to travel to specialized health care services out of town or out of state; securing commercial airline tickets; and providing funds for meals and lodging while traveling, and providing services which constitute client case review, case management, or coordination or authorization of program benefits. HB 2702, Article 4 was enacted to clarify TxDOT's role in the delivery of public transportation services, and specifically states that TxDOT does not have authority to perform those functions.

As a result, HB 2702 as amended contained revisions to the following statutory provisions:

Section 4.02 amends Health and Safety Code §461.012(g) (TCADA)

Section 4.03 amends Health and Safety Code §533.012(b) (MHMR)

Section 4.04 amends Human Resources Code §22.001(e) (HHSC)

Section 4.05 amends Human Resources Code §40.002(f) (DPRS)

Section 4.06 amends Human Resources Code §91.021(g) (Commission for the Blind)

Section 4.07 amends Human Resources Code §101.0256(b) (Dept. on Aging)

Section 4.08 amends Human Resources Code §111.0525(d) (Tx Rehabilitation Comm)

Section 4.09 amends Labor Code §301.063(f) (Tx Workforce Comm)

Each of these statutory provisions was amended in exactly the same way. In each provision, the words from HB 3588, [the Texas Department of Transportation shall] “...assume all the responsibilities of the department relating to the provision of transportation services for...”, were struck, and the words [the Texas Department of Transportation shall] “...deliver public transportation services to....[...clients of eligible programs...]...except that the Texas Department of Transportation may not assume responsibility for client case review, case management, or coordination of or authorization of benefits....” were substituted.

Clearly, it was not the intent of the 78th Legislature that TxDOT should perform and/or fund social services related to the delivery of transportation services. The 79th Texas Legislature enacted provisions in HB 2702, Article 4 that were intended to clarify the intent of laws passed by the 78th Legislature. The fact that the Transportation Code was not amended along with all of the other codes is simply an administrative oversight that should be corrected.

Similarly, Transportation Code § 461.003 states that the commission by rule may require a state agency that is responsible for ensuring the provision of public transportation services to contract with the department to “...assume the responsibilities of that agency relating to the provision of public transportation services...” In order to be consistent with statutory changes already made, this section needs to be amended to state that the commission by rule may require a state agency that is responsible for ensuring the provision of public transportation services to contract with the department to “...deliver public transportation services to[...clients of eligible programs,...]...except that the Texas Department of Transportation may not assume responsibility for client case review, case management, or coordination of or authorization of benefits.”

Additionally, Transportation Code §461.002(1) and (2) need to be amended in order to clarify that the term “public transportation provider” includes an entity that receives funding from a governmental entity. The definition of “public transportation services” includes services provided by a governmental entity or an entity that receives governmental funding. These amendments are needed because TxDOT routinely works with entities that provide intercity rail or bus service, commercial air transportation, water transportation and nonstop service to or from a point located outside the state. To the extent that such entities receive governmental funding, TxDOT will be able to carry out the requirements stated in §461.004, which mandates that TxDOT improve the cost efficiency and effectiveness in the provision of public transportation services to eligible clients of programs administered by the HHS agencies and TWC.

In summary, the purpose of the amendments is to clarify the roles and responsibilities that the Texas Legislature assigned to state agencies and to clarify that TxDOT should not perform or fund, and is not responsible for, any functions of the social services agencies, except the delivery of public transportation services as defined in the Transportation Code, when a public transportation service is necessary for an HHS or TWC program client.

## LEMON LAW ELIGIBILITY

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### **The Issue**

The Lemon Law, which is administered by the Texas Department of Transportation (TxDOT), helps consumers who buy or lease new motor vehicles from licensed Texas dealers or lease companies and that have repeated problems getting their vehicle properly repaired. The Lemon Law requires manufacturers to repurchase or replace vehicles proven to be “lemons.” Lemon vehicles are those that contain a defect or condition that creates a serious safety hazard or substantially impairs the use or market value. The relief available to used-motor-vehicle buyers is limited to repairs only, if the repairs were originally covered under the manufacturer’s warranty.

Since the law was amended in 1999, military personnel, long-term “transient” residents and newcomers to Texas do not have access to the Texas Lemon Law program. It is believed that this change was made inadvertently. Prior to 1999, the Lemon Law applied to any vehicle under warranty, regardless of whether it was titled in Texas or some other state. The proposed remedy would ensure that Texas-based members of the military and newcomers with vehicles registered in Texas would have access to the state’s Lemon Law, thereby enhancing safety by helping people to own a safe and reliable vehicle.

### **Proposed Remedy**

Change the definition of “owner” in the Occupations Code to mean a person whose new vehicle is registered in Texas, in addition to a person who purchased a new vehicle from a licensed dealer. Add a provision to expand Lemon Law coverage to vehicles that belong to active duty non-resident members of the armed forces in Texas.

### **Background**

The Texas Lemon Law was first enacted into statute in 1983 through the passage of SB 1141, 68th Regular Session. Prior to 1983, several states had already passed such a law and actually coined the phrase “Lemon Law.” After the law was passed, Chrysler challenged the constitutionality of the law in federal court, but the law was upheld in 1985 by the Fifth Circuit.

Prior to 1999, the Texas Lemon Law applied to any vehicle under warranty, regardless of whether it was titled in Texas or another state. In 1999, the 76th

Legislature passed House Bills 2357 and 3092 to limit the law to vehicles purchased from licensed Texas dealers. It is believed that the intent was to prevent people who spend winters in Texas and own expensive motor homes and travel trailers from using the Lemon Law in Texas. In addition to protecting recreational vehicle manufacturers from the cost of repurchasing expensive motor homes and travel trailers, the effect of the bills' passage was to deprive newcomers, short-term residents and the non-resident military personnel stationed in Texas the protections afforded by the Lemon Law.

To provide Lemon Law coverage to people who defend our country and who relocate to Texas, the definition of "owner" would need to be changed in Section 2301.601 (2) of the Occupations Code. It is believed that their exclusion in 1999 was an inadvertent consequence and that it would be appropriate to extend the law to these groups of people.

## TEMPORARY DEALER TAGS

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### **The Issue**

Currently, there is no accounting for how many temporary cardboard tags a dealer issues and no provision to compel printers to identify who they deliver the temporary tags to. The tags are not secure, are easily duplicated and counterfeited, and provide for wide-spread abuse of the tags. This results in millions of dollars in lost government revenue, contributes to a lack of safety for law enforcement, facilitates criminal activity and promotes motorist non-compliance with insurance laws. This initiative meets one of the department's five goals by enhancing safety and allows a mechanism for temporary tags to be tracked.

### **Proposed Remedy**

Amend current law to allow the department to issue or contract to issue secure temporary buyer, dealer and converter tags, and remove the requirement that the tags be made of cardboard. Authorize a system whereby dealers issue temporary tags electronically, ideally through an Internet-based interface.

### **Background**

Temporary cardboard buyer's tags are issued by Texas dealers when they sell a motor vehicle. The tag is valid for 21 calendar days from the date of sale. The purpose of the tag is to give temporary registration to the buyer of the vehicle while the dealer applies for title, registration and metal plates. The Texas Department of Transportation is allowed by statute to prescribe the specifications and form of temporary tags, but prohibits it from issuing or contracting to issue buyer's temporary tags.

Texas dealers buy the tags directly from printers. There is no accounting for how many tags a dealer issues and there is no provision under the law to compel printers to identify to whom they deliver tags. The tags are not secure in any way and are easily duplicated and counterfeited. Widespread abuse of the tags causes millions of dollars in lost government revenue, contributes to a lack of safety for police officers, facilitates criminal activity and promotes uninsured motorists.

For decades, the design of the original temporary tag given to buyers of motor vehicles was red in color and featured the dealer license number or "P-number." The tag had blanks for the vehicle identification number, the buyer's name, and the date sold, which the selling dealer would complete.

One problem that became evident with this tag was that dealers often left the required information blank. The expiration date, even when filled in properly, was very difficult for law enforcement to see or determine the exact date of expiration. In 1997, the Texas Motor Vehicle Board changed the specifications of the tag, requiring the expiration date be more visible to law enforcement, the salesman's name be present, and that two-inch clear tape be applied over the expiration date. In an effort to add some security, the TxDOT logo was added as a screen, and TxDOT issued permits allowing printers to use the logo when printing the tags. The printer's name and a job number were also added to the design to allow for some tracking of the tags. Despite the changes in 1997, and even with the enhanced printing abilities of many office copiers, little, if any, reduction in the amount of abuse has occurred. In addition, even though the law requires a dealer to issue only one red tag and to apply for title and registration within 21 working days, dealers can and do issue more than one red tag to a buyer.

In this day and age of increased security, perhaps the most disconcerting fact is that criminals can also buy temporary cardboard tags from flea markets or print their own. Multiple law enforcement jurisdictions around the state and federal prosecuting attorneys maintain numerous crimes are being committed daily and that the current Texas temporary tag facilitates the commission of these crimes.

The criminal advantage of these tags is the inability of law enforcement to trace ownership of the vehicles displaying temporary cardboard tags. Law enforcement efforts are hampered by the tags because the current TxDOT Registration and Title System contains only registration information for the standard metal plates. Officers have no way to verify the driver's identity or tie them to the vehicle. The current temporary tag system aids a criminal's ability to commit crimes without detection and allows drivers to operate a vehicle with expired registrations or no insurance without fear of detection.

Another aspect of the issue is an increase in instances where consumers receive parking tickets or notices from toll authorities for running toll booths on a vehicle they have traded in because the dealer did not transfer title when the trade-in vehicle was sold. An electronic temporary registration system would reduce this problem because the new owner would be immediately identified, even if title is not transferred.

Two companion bills, House Bill 2394 and Senate Bill 1073, were introduced during the 79th Regular Session which would have authorized the department to issue temporary tags. Both bills failed to pass. Instead, a provision was added to House Bill 2702 (79th Regular Session) that required TxDOT to conduct a study



of systems for issuing temporary tags for use on unregistered motor vehicles and provide it to the governor, lieutenant governor, and speaker of the House of Representatives by November 1, 2006.

Arizona and Montana have implemented electronic temporary tags and both report success. Florida, Virginia, Ohio and Missouri are studying the issue.

## DEALER LICENSE TERM INCREASES

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### **The Issue**

Because of increasing legislative requirements over the years to process dealer applications, a backlog exists in processing dealer applications. This backlog is likely to increase unless a different approach is taken.

### **Proposed Remedy**

Amend statute so that the Transportation Commission can determine the appropriate length of term for dealer licenses and the license plates that are issued under those licenses. This would allow the commission to extend the time between renewals and to cut the renewal workload in half. The fee language in statute would also need to be amended to make it clear that the fee required would be for the full license term.

### **Background**

Licenses issued by TxDOT to new and independent motor vehicle dealers, new motor vehicle manufacturers, distributors, converters, their representatives and lessors and lease facilitators have, by statute, expired one year from date of issuance. The department renews approximately 20,000 licenses on an annual basis. Complaints received regarding the time it takes to process these licenses are frequent.

Various legislative requirements since 1995 have cumulatively increased the time it takes to process applications for new and renewal licenses. As a result, there is a backlog in processing these licenses. This backlog is expected to increase since the licensing personnel struggles to keep up with the quantity of license applications and renewals coming into the office each day.

The Motor Vehicle Division assumed responsibility for the independent dealer program in 1995. In addition, new requirements passed by the Legislature since 1995 have resulted in increased scrutiny required to review the application and a longer time to process the application. Although each of the new requirements has only marginal impact, the cumulative effect is great. In the past, large numbers of temporary workers were utilized to help process licenses. Since temporary workers now count as FTEs under the legislative appropriations process, that avenue of relief is no longer available to the department.

The bulk of TxDOT's license processing relates to new applications and would not be affected by this proposal. Only renewal applications would be affected. While the Transportation Commission would have the flexibility to set the appropriate license term, it is envisioned that a two-year license term would be appropriate. By having two-year license terms, half of the licensees could receive two-year licenses during the first year of implementation. This would enable the workload to be balanced from year to year by reducing the number of license renewals processed each year. The renewal backlog and the call volume would be reduced. Most calls to the licensing section pertain to inquiries on whether a license has been issued. Licensees would receive their renewed licenses in a timelier manner.

Since many licensees do not update their license records until their license is due for renewal, the accuracy of the department's licensee data could potentially suffer if the records are only updated every two years. Should this become an issue, the commission would have the flexibility to return to an annual licensing period under this proposal.

It is believed that at least half a dozen states allow a multi-year license term, such as a two-year term.

## MOTOR CARRIER AND VEHICLE STORAGE FACILITY ENFORCEMENT AUTHORITY

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### *The Issue*

Ensuring the safety of the traveling public is TxDOT's primary mission. This mission and therefore the public's safety is compromised by commercial vehicles that travel on Texas' highways in violation of permitting and motor carrier registration laws, rules and regulations.

TxDOT has authority to investigate and assess penalties for motor carrier registration violations. However, it has no authority to revoke or deny renewal of registrations or to revoke active oversize/overweight (OS/OW) permits to collect the penalties assessed for motor carrier registration violations. TxDOT currently has no authority to investigate, assess administrative penalties, nor revoke, suspend, or deny permits or registrations for OS/OW permit violations. In addition, the administrative hearing process for uncontested motor carrier and vehicle storage facility (VSF) cases before the State Office of Administrative Hearings (SOAH) is inefficient and costly to TxDOT, SOAH and the Office of the Attorney General (OAG).

This limited authority and cumbersome administrative process for uncontested cases undermine our ability to enforce motor carrier statutes and rules and to deter motor carriers from future violations. This compromises TxDOT's ability to ensure the safety of the traveling public, protect our transportation infrastructure, and to collect revenue for reinvestment into our transportation system.

### *Proposed Remedy*

State law should be amended to give TxDOT the authority to revoke or deny renewal of registrations and to revoke active OS/OW permits to collect the penalties assessed for motor carrier registration violations. State law should also be amended to give TxDOT full authority to investigate alleged violations of the OS/OW permitting laws, rules and regulations, to assess administrative penalties, and to revoke, deny, and suspend OS/OW permits and motor carrier registration certificates for permitting violations. These administrative penalties should be deposited to the State Highway Fund to be reinvested into the transportation system. Additionally, provisions should be added to the law which provide for injunctions, civil remedies or criminal charges in cases of severe, persistent or grievous violations of permitting and motor carrier registration regulations. And

finally, the hearing process for uncontested motor carrier and VSF cases should be streamlined and made more efficient and cost-effective.

### **Background**

Enforcement by TxDOT of registration violations. While TxDOT does have authority to investigate alleged motor carrier registration violations and to assess administrative penalties when violations are substantiated, we do not have the authority to suspend, revoke or deny a motor carrier registration or to revoke any active OS/OW permits if a penalty goes unpaid or for repeated violations.

Commercial motor carriers, including bus operators, tow truck operators, and household goods carriers are required to obtain a motor carrier certificate of registration from TxDOT. An important component of this registration process is ensuring that motor carriers maintain liability and cargo insurance as required by law and comply with consumer protection laws. As long as they maintain proof of insurance on file and pay the associated filing fees, TxDOT cannot revoke their motor carrier certificate of registration or active OS/OW permits. However, at the same time, a motor carrier could have numerous substantiated complaints filed against it, penalties assessed and uncollected, and be a habitual violator. Continuing to have an active motor carrier registration under such circumstances gives the public a false sense of safety and consumer protection because the carrier appears to have the TxDOT “seal of approval.”

TxDOT registers an average of 41,000 carriers that operate over 325,000 vehicles on Texas roadways. An average of 1,300 complaints is processed annually regarding motor carriers. Of these complaints, on average, 40 result in administrative penalties being assessed against a carrier. TxDOT’s inability to deny, suspend or revoke motor carrier registrations significantly affects the ability to obtain compliance with the law.

The proposed amendments will give motor carriers a greater incentive to comply with applicable rules and regulations, and increase TxDOT’s ability to protect the public and maintain the value of our transportation assets.

TxDOT has no authority to investigate alleged violations of oversize/overweight laws and regulations, nor to assess administrative penalties or revoke, deny or suspend OS/OW permits or motor carrier registrations against motor carriers who fail to comply with OS/OW permitting requirements. Although the driver of an OS/OW vehicle is subject to being ticketed by law enforcement, there are currently limited repercussions for the motor carrier owner who violates the OS/OW permitting rules and regulations. Under particular permit provisions, a person

is subject to a violation for “directing” the operation of a vehicle in violation of statute. However, this provides only limited authority to ticket the motor carrier.

TxDOT issues approximately 500,000 permits annually to transport OS/OW vehicles and loads that exceed statutory size and weight limits and cannot reasonably be dismantled. While roadside enforcement is conducted by commissioned law enforcement officers, there are too few of them to adequately enforce existing rules and regulations. According to the Texas Transportation Institute, each Department of Public Safety weight-enforcement trooper is responsible for 45 million vehicle-miles traveled by trucks in Texas.

Additionally, law enforcement authorities are hesitant to stop OS/OW loads due to the difficulties and safety factors involved with parking these vehicles. Clearly, the probability of a particular OS/OW load being subject to roadside enforcement activities is slim. To supplement roadside enforcement, the commission recommends seeking legislation that would allow TxDOT the ability to investigate and to assess administrative penalties against violators of OS/OW permit rules and statutes and to enforce the laws and rules by being able to revoke, deny, and suspend OS/OW permits and motor carrier registrations for these violations.

Based on the risks OS/OW loads pose to the traveling public and the transportation infrastructure, encouraging carriers to operate in a legal and safe manner is of the utmost importance. Increased enforcement will result in a greater level of compliance with OS/OW permitting rules and regulations. This increased level of compliance will assist TxDOT in protecting the safety of the traveling public, and accomplishing its goal to maintain our transportation assets by minimizing damage to roadways and structures, ensuring that appropriate permit fees are collected, and providing significant financial and permitting/registration disincentives to motor carriers who habitually violate OS/OW permitting laws, rules and regulations.

This remedy also proposes to streamline the uncontested hearing process. Right now, the statutory process for holding hearings before SOAH for motor carriers and VSFs required to be licensed by TxDOT is inefficient, resulting in an average time delay of 166 days from the time a case is sent to the OAG to the time a penalty is officially assessed.

Currently, the OAG must notify the carrier or VSF of the hearing date and pursue the matter as if it were a contested case, even if the carrier or VSF does not respond to the notice. Approximately 90% of cases fall under this scenario. The commission recommends that instead, a carrier or VSF be required to respond to the notice and request an administrative hearing. If the carrier or VSF does not

respond to the notice and request a hearing, then TxDOT would proceed with the penalties proposed in the notice. This process eliminates the OAG and SOAH from involvement in these particular cases. If the carrier or VSF responds to the notice and requests a hearing, then the case would go directly to SOAH for resolution as currently provided in law.

Each motor carrier hearing before SOAH costs TxDOT an average of \$520 in hearing costs, which include court reporter fees, filing fees and process service fees. This amount does not include TxDOT personnel time lost or travel and lodging expenses to the state. Handling uncontested cases administratively at the agency level would decrease costs significantly and utilize personnel resources more efficiently. Additionally, allowing TxDOT personnel to handle unopposed actions would free up the attorneys at OAG and TxDOT to concentrate on contested cases and other legal proceedings.

SOAH judges have expressed concerns that most of the cases from TxDOT could be handled in a more efficient manner. Comments from administrative law judges at SOAH indicate that other agencies treat cases where the alleged violator does not respond to violation notices as uncontested cases at the agency level, and only pursue an actual hearing at SOAH when an alleged violator contests the proposed action. The OAG has asked TxDOT to consider enhancement of our statutes and rules and regulations to facilitate and streamline our enforcement procedures. Additionally, a recent internal TxDOT audit determined that the current process was "...a lengthy, resource-expending process that results in a back log of cases and little return; meanwhile the violators continue to operate without having to pay the penalty."

This streamlining process should also include obtaining injunctive relief in Travis County. Currently TxDOT has no specific statutory authority to pursue injunctive relief to prevent a carrier from operating in violation of the law. TxDOT, through the OAG, has tried to obtain injunctions and enforcement utilizing other existing general laws, but this process takes place in the county of the violator's residence. This process is not specific to the law TxDOT enforces and is cumbersome and not cost effective. TxDOT needs specific authority to obtain injunctions against these violators and this injunctive relief should be sought in Travis County where it is most cost effective and efficient for the state.

All of these actions will result in a more efficient process for protecting consumers, the traveling public, and our transportation infrastructure.

## FUEL TAX COLLECTION ADMINISTRATIVE FEE

### **The Issue**

Currently, the state pays licensed motor fuel distributors and importers an administrative fee of 1.75 percent of motor fuel tax revenues collected, even though the administrative duties have been moved to the terminal (“rack”) suppliers.

### **Proposed Remedy**

Texas should grant the distributors an allowance of 0.1 percent for both gas and diesel, the same as our closest terminal-rack state, Oklahoma. Reducing the present administrative fee of 1.75 percent down to 0.1 percent would result in some additional \$39 million accruing to the State Highway Fund and \$13 million to the Available School Fund.

### **Background**

As part of the negotiation of HB 2458 (78th Regular Session of the Texas Legislature; moving the point of fuel tax collection from the distributors to the terminals), the original 2 percent administrative fee (paid to distributors for the duties of record keeping and remitting the state fuel taxes collected to the Comptroller) was decreased to 1.75 percent, with nothing going to the suppliers at that time. The fiscal benefit was a savings to the state of 0.25 percent of the taxes collected, or about \$7 million per year. [Note: The motivation for changing the point of collection was not to retain some of the administrative fee, but rather to increase fuel tax collections, which it did, greatly.] Suppliers accepted the new responsibility of collecting and remitting the tax and were granted no administrative fee to do so, while the distributors were allowed to retain the 1.75 percent despite no longer having this administrative responsibility. The reason for this at the time was to make sure that they were “held harmless” and they would cease to oppose the legislation.

The issue has two aspects:

- ♦ Is there any real remaining administrative burden on the distributors since the tax collection, record keeping, and remittance to the Comptroller are all now the responsibility of the terminals (essentially the major petroleum companies)? While the fuel tax law does require the distributors to keep records (of all physical receipts, sales, and inventories), the critical



question is whether these are requirements over and above normal prudent business recordkeeping that a business would do anyway.

- Is the 1.75 percent fee intended for anything other than for administrative duties? The distributors have alleged in the past that it was also to compensate them for taxes they paid on fuel that evaporated or shrank thermally, i.e. “working losses.”

It does not appear that the distributors have any administrative recordkeeping over and above what is required for business operations and IRS requirements. However, when they were the tax collectors, distributors were able to deduct their working losses from the amount on which they would have to pay taxes, and now they cannot. It appears that on the statewide average, evaporation and thermal expansion almost cancel; however, this is only a rough estimate and it is not possible to calculate the actual physical and thermal changes fuel undergoes throughout the marketing chain throughout the state. So to prevent distributors in special situations from being harmed, it would be prudent to provide them some allowance.

## MOTOR FUEL TAX ALLOCATION

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### **The Issue**

Prompt and immediate access to funds for projects is essential to TxDOT achieving all goals, including reducing congestion, enhancing safety, improving air quality, expanding economic opportunity and increasing the value of transportation assets. Under current statutes (Texas Tax Code §§ 162.501 – 162.505), gasoline and diesel motor fuel taxes are allocated by the Comptroller of Public Accounts to the Available School Fund (1/4), and the State Highway Fund (3/4) “on or before the fifth workday after the end of each month.”

Historically, this transfer has predominately occurred on the last working day available to the Comptroller, earning the General Revenue Fund (GR) up to 35 days of interest on varying amounts of motor fuel tax collections. Additionally, this allocation method deprives the State Highway Fund (as well as the Available School Fund) of the timely use of constitutionally dedicated funds. This could mean an approximate gain of \$865,000 to the State Highway Fund annually.

### **Proposed Remedy**

Seek legislation to amend the current monthly allocation process to a daily allocation process. In today’s electronic environment it would seem viable and reasonable for the Comptroller to allocate motor fuel tax collections directly to the appropriate fund (State Highway, Available School Fund) on a daily basis. Any deductions, such as refunds and administrative costs, could be deducted from the appropriate fund by the 5th working day of the next month.

Not only would this method provide the State Highway Fund with additional interest revenue, it would also allow the department more timely access to constitutionally dedicated funds as well as improved cash flow. However, GR will lose interest revenue to the State Highway Fund, though the General Revenue earning interest on the motor fuel tax seems to violate AG Opinion No. JM-321 (1985) at 3–4. The Comptroller will also have to amend the current allocation process, likely requiring programming and other procedural changes.

### **Background**

Texas Tax Code § 162, Subchapter F, regarding Allocation of Taxes, describes the process in which funds are allocated. In particular, § 162.503–505 describe the day on which funds will be allocated. Each day the motor fuel taxes sit in the

General Revenue Fund earning interest, constitutionally dedicated funds are being withheld from important transportation projects.

For more than 25 years, the current process of allocating funds on the fifth working day of each month has been in place. With advances in information technology occurring every day, it seems plausible to institute a system allocating funds daily.