Locke Lord

Texas Transportation Legislation Overviews

2003 - 2021

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MEMORANDUM

TO: Interested Parties

FROM: C. Brian Cassidy, Locke Liddell & Sapp, LLP

DATE: June 2, 2003

RE: H.B. 3588; Overview of Transportation Legislation

Despite significant differences between the House and Senate versions of HB 3588, many of which centered on regional mobility authorities, a conference committee was able to resolve the differences and deliver a plan which will significantly change the manner in which transportation projects are developed throughout the state. The compromise plan was brokered by Rep. Mike Krusee, Chair of the House Transportation Committee, and Sen. Steve Ogden, Chair of the Senate Infrastructure Development and Security Committee. It retains virtually all of what Rep. Krusee had initially proposed concerning RMAs, and added provisions to address Sen. Ogden's concerns that there would be adequate state and local oversight of RMAs exercising their newly granted powers.

As it relates to RMAs, Article 2 of the bill creates a separate, comprehensive chapter of the Transportation Code (new Chapter 370). Highlights include:

- Expansion of scope of projects RMAs may undertake, which now include: turnpikes, systems of facilities, passenger and freight rail, roadways, ferries, airports (but not on the former site of Robert Mueller Airport), pedestrian and bicycle facilities, intermodal hubs (a central location where cargo containers can be transferred between trucks, trains and airplanes), automated conveyors for freight movement, border crossing inspection stations, public utility facilities, and air quality improvement initiatives, including those related to any early action compacts.

- Preservation of system financing tools, including conversion of free roads to toll roads and use of toll revenues for other mobility improvements (though conversions and transfers must follow an approval process and receive the approval of the governor)

- Authorization to impose tolls on free roads transferred to the RMA

- Authorization to enter into Comprehensive Development Agreements (CDAs; previously referred to as exclusive development agreements) and establishment of procurement process for CDAs

- Granting of condemnation authority, *including quick take*

- Authorization to make "participation payments" (e.g., royalties) for interests in real property

- Granting of bonding authority (including issuance of interim bonds and maintenance of revolving fund)

- Authority to borrow, apply for grants or loans, and seek other sources of funds, *provided that any funds received from the general revenue fund or the state highway fund may only be used for turnpikes and roadways*

- Authorization for board meetings to be held by telephone conference call

- Establishment of six-year board terms for directors

- Ability to extend projects into adjacent counties (with the consent of those counties, including an offer for the county to join the RMA)

- Ability to construct, operate and maintain (but not own) projects in another county

- Authority to install, construct, or contract for the construction of public utility facilities (but not operate them) in a transportation project

- Authority to lease, franchise, rent, etc. RMA property for revenue enhancement provided the uses benefit the users of the transportation project

- Authority to conduct feasibility studies with funding from the RMA, other governmental entities (such as cities, counties, or TxDOT), and private individuals or entities

- Designation of RMA issued bonds as authorized investments for local governments under the Public Funds Investment Act

- Clarification that RMA bonds are not debts of the state or counties in the RMA (absent a county agreement to back RMA debt)

- Authorization to charge public utilities for locating new facilities in a transportation project

- Authorization to use surplus revenue for transportation projects in the counties of the RMA, including assisting with development of another governmental entity's projects or constructing projects and transferring them to local governments

- Authorization to advertise and otherwise promote the use of transportation projects

- Requirement to establish DBE goals and engage in outreach activities

- Requirement to establish procedures for environmental review of projects

- Establishment of minimum qualifications and conflict of interest requirements for directors

- Implementation of strategic planning process with counties forming an RMA

- Authorization for certain border cities to establish a RMA under the same processes and authority as counties may do; authorization for certain border RMAs to extend projects into adjacent states or Mexico

Other articles of the bill relate to the Trans-Texas Corridor, funding tools, and a myriad of other transportation related issues. These include:

- Article 1: Trans Texas Corridor- the bill implements the Trans Texas Corridor plan advocated by the Governor and TxDOT. Features include:

  - Authorization to construct highways, turnpikes, freight and passenger rail, high speed rail, commuter rail, and public utility facilities (but TxDOT employees may not operate a railroad)

  - Authority to use CDAs

  - System financing of projects within an MPO or adjacent TxDOT districts

  - Authority to offer landowners "corridor participation payments"

  - Condemnation powers for a broad array of purposes; authorization to acquire options for protective purchases

  - Requirements for public hearings in counties where corridor projects are to be built

  - Establishment of funding limitations:

- Cap on state highway fund contributions for right-of-way, construction, and grading for non-highway (i.e., rail) projects of 20% of obligation authority under federal-aid highway program

- $25 million maximum annual contribution of state and federal funds for non-highway (i.e., rail) projects

- No funds for a corridor facility unless the Commission finds that the project will reduce congestion in a comparable amount to the most reasonable alternative

- No state highway fund or Texas Mobility Fund money for corridor project unless it replaces or supplements a project in the UTP or a corridor in the state transportation plan

- No construction of rail facilities unless they will result in reduction in congestion or mobility improvements

- No constitutionally dedicated funds may be spent on corridor projects that would result in the state spending less on new capacity projects than it has on average during the previous 5 years (i.e., can't spend so much on the corridor that it will reduce amount typically spent on new capacity

➢ Article 3: Advance Acquisitions of Property- TxDOT can acquire options to purchase property on potential routes of new projects, but cannot condemn property for such purposes

➢ Article 4: TxDOT Rail Facilities- authorizes TxDOT to construct passenger and freight rail facilities.

- TxDOT can construct, own and maintain, but cannot operate rail (must contract for operation)

- TxDOT cannot own rolling stock

- Placement of rail in SH 130 corridor is "strongly encouraged", using Texas Mobility Fund money or excess bond proceeds from sale of CTTP bonds

- $12.5 million annual maximum use of state and federal funds for rail, excluding money spent on corridor rail projects, grading and bed preparation, and acquisition of certain abandoned rail facilities

- Article 5: Issuance of Bonds by TxDOT- authorizes the Commission to issue bonds payable from revenues deposited to the state highway fund (Note: will also need passage of a constitutional amendment)

    - Maximum of $3 billion; no more than $1 billion per year

    - Must be used to fund state highway improvement projects; of the total, $600 million must fund safety improvements

    - These funds cannot be used to fund corridor projects

- Article 6: Pass-Through Tolls- authorizes the use of pass-through ("shadow") tolls; per vehicle payments from TxDOT to an RMA, RTA or county toll road authority as payment for construction, maintenance, or operation of a tolled or non-tolled facility on the state highway system

- Article 7: Conversion of State Highways- authorizes conversion of free highways to toll roads and transfers to HCTRA and TTA; restricts use of toll revenues to converted project

- Article 8: Commercial Driver's Licenses- amends laws regarding penalties and revocation of commercial driver's licenses

- Article 9: Motor Vehicle Sales Tax- provides for counties to retain an increasing percentage of motor vehicle sales taxes they collect; also increases amount of vehicle registration taxes counties may retain and credit to county road an bridge fund

- Article 10: Driver Responsibility- establishes a series of fees and surcharges to be assessed for traffic violations (in addition to current fines)

    - 49.5% goes to trauma care; 49.5% goes to general revenues; 1% goes general revenue for DPS

    - Except- after amount deposited to general revenue hits $250 million per year, excess above that shall be split 49.5 % to trauma and 49.5% to the Texas Mobility Fund

- Article 11: Disposition of DPS Fees- various fees go to the Texas Mobility Fund, however during the first biennium $90 million goes to the general fund before any TMF funding occurs

- Article 12: Additional Court Costs- an additional $30 is assessed for certain traffic violation convictions. The municipality or county keeps 5%; remainder is

split 67% to general revenue; 33% to trauma, except that after the transfer to general revenue hits $250 million, the rest goes to the TMF

- Article 13: Statewide Coordination of Public Transportation- TxDOT is to coordinate the provision of various transportation services, and will provide services required under certain Health and Human Services programs

- Article 14: Conditional Grant Program- amends TxDOT grant program for engineering (or other professional) students to make selection based on need and other factors (rather than race or gender)

- Article 15: Texas Turnpike Authority- generally a cleanup bill for TTA. Substantive changes include:

    - Authorization to make "participation payments" for property interests

    - Authorization to continue tolling a project for which the bonds are paid off provided surplus revenues are used in the region where the project is located

    - Provides for transfers of turnpike projects to a RMA (subject to commission and gubernatorial approval)

    - Authorization to use CDAs (and delineation of process)- sunsets in 2011

    - Establishes limit on annual amount used for CDA projects to 40% of obligation authority under federal aid highway program for the same year

- Article 16: Commercial Motor Vehicle Safety Standards- establishes and amends processes concerning inspection of commercial motor vehicles and penalties for violations

- Article 17: Nonrepairable Salvage Motor Vehicles- addresses issues concerning certificates of title to salvage vehicles, dealings between insurance companies and salvage dealers, and rules concerning salvage motor vehicle facility operators

- Article 18: Funding of Port Security, Projects and Studies- adds provisions regarding port security improvements and oversight

- Article 19: Miscellaneous Provisions- addresses a variety of issues, including operation of electric vehicles and scooters, ownership and operation of TxDOT facilities, driver's license fees, and issuance of bonds by DART.

    - Requires that TxDOT develop a transportation plan that is not financially constrained and identifies congestion relief projects

- Plan must also include a component that describes projects based on performance measures, such as delay reductions or travel time improvements

- Limits toll equity *grants* to $800 million per year

➢ Article 20: General Provisions; Effective Date- several of the provisions, including Article 2, have immediate effective dates.

SUMMARY OF HB 2702

HB 2702 marks a major accomplishment of the 79th Legislative Session. It addresses a wide array of issues and makes important policy changes, such as defining when a "conversion" of a tax road to a toll road occurs and expanding TxDOT's authority to develop rail projects. The legislation also implements property owner protections for Trans-Texas Corridor ("TTC") development, eliminates the funding caps for rail and TTC projects, and increases the cap on permissible toll equity grants. As it relates to RMAs HB 2702 makes helpful changes to the RMA Act, including resolution of issues concerning permissible board terms and, as noted above, "conversions" of tax roads to toll roads.

Rep. Mike Krusee, Chair of the House Transportation Committee, Sen. Todd Staples, Chair of the Senate Transportation and Homeland Security Committee, their staffs, and members of each committee deserve tremendous credit for their tireless efforts to reach agreement on the numerous and diverse issues covered in the legislation.

Set forth below is a brief summary of issues addressed in HB 2702, with particular emphasis on issues affecting RMAs. Please note that this is only a summary, and only covers HB 2702. A comprehensive summary of other legislation affecting transportation issues will be available from the contact listed below.

1. RMA ISSUES – GENERAL.

HB 2702 provides for the following concerning RMAs:

- Authorizes six-year board terms if permitted by the Constitution (HJR 79 authorizes appropriate constitutional referendum); otherwise board terms are two-years.
- Clarifies that RMA directors are subject to Chapter 171 of the Texas Local Government Code (regarding disclosure of conflicts of interest and recusal from certain board actions).
- Provides that RMA boards may meet via telephone conference call without establishing an "emergency" under the Open Meetings Act.
- Clarifies that RMAs have the explicit authority to utilize evidence collected through automated enforcement technology for toll violation enforcement actions.
- Exempts transponder customer account information from the Public Information Act.
- Clarifies that if an RMA grants a concession it must also approve the methodology for setting and collecting tolls and approve any changes to that methodology; RMA-granted concessions cannot exceed 50 years.
- Facilitates the transfer of assets to RMAs from other transportation entities (RTAs, county toll road authorities) and vice-versa.

- Imposes a two-year moratorium on development of ancillary facilities to be used for commercial purposes within TxDOT and RMA projects; excludes projects in Travis and Williamson Counties for which a CDA or EDA was awarded prior to September 1, 2005 (i.e., SH 130 and 183-A).
- Authorizes RMAs to spend funds received from the Texas Mobility Fund on transit systems (in addition to toll projects).
- Adds transit systems to the scope of authorized transportation projects that an RMA may develop, provided that in areas where "another transit provide that has taxing authority and has implemented it anywhere in the service area," RMAs may provide transit service only pursuant to a written agreement with the existing transit provider.
- Provides extensive guidance on transfers of transit systems to RMAs, including possible vote of jurisdictions within a transit provider's service area and detailed processes for fare setting and route changes.
- Restricts an RMA from developing or operating a passenger rail facility within the boundaries of an intermunicipal commuter rail district (unless the district and the RMA agree in writing otherwise).
- Allows border cities with populations greater than 105,000 to form RMAs (previous population threshold was 500,000).

2. <u>RMA ISSUES – CONVERSIONS</u>

Provisions regarding conversions and transfers have been modified and consolidated. These provisions:

- Repeal current RMA provisions on conversions (370.035 and 370.163(b)).
- Permit TxDOT to transfer tolled or non-tolled projects converted to tolled projects (see below) to entities authorized to operate toll projects if approved by the Texas Transportation Commission and the Governor.
- Create a new section of the Transportation Code (Chapter 228, Subchapter E) governing all conversions and transfers
- Define when a conversion occurs, identify criteria for "grandfathered" projects, and detail the conversion process as follows:

➢ No conversion if:

  - The Commission by order designates a highway or segment as a toll project ***<u>before</u>*** the construction contract is awarded.
  - A highway or segment is reconstructed so that the number of non-tolled lanes on a highway or segment is greater than or equal to the number in existence before the reconstruction.

- A facility is constructed adjacent to a highway or segment so that the number of non-tolled lanes on the converted highway or segment and the adjacent facility together is greater than or equal to the number in existence on the converted highway or segment before the conversion.

➢ "Grandfathered" provision - projects meeting any of the following criteria will not be deemed conversions:

- A highway or segment was open to traffic as a toll road prior to September 1, 2005.
- A project that was designated as a toll project in an MPO plan or program prior to September 1, 2005.
- An HOV lane (open as such as of May 1, 2005) converted to an HOT lane if there is still an opportunity for higher occupancy vehicles (number of occupants to be specified) to travel free.
- A project for which a construction contract was awarded prior to September 1, 2005, but was not open to traffic before September 1, 2005, and was designated by the Commission as a toll project prior to the earlier of the date it was open to traffic or September 1, 2005.

➢ Conversion Process - for projects not meeting these parameters, a conversion requires:

- A public hearing conducted by TxDOT
- Approval of the Commissioners Court of each county in which the project or segment is located;
- Approval of the voters in municipalities and unincorporated areas of counties in which a portion of the project or segment are located (majority of all votes cast must approve).

3. <u>OTHER ISSUES- GENERAL TRANSPORTATION</u>

There are many other issues contained in HB 2702 that will affect various aspects of transportation infrastructure development. The legislation:

- Increases authorized amount of toll equity to $2 billion/year (based on a 4-year average).
- Removes the cap on the amount of state and federal funds that may be used on TTC projects (restricts GR funding).
- Removes restriction on spending of state highway funds for rail (restricts GR funding).
- Prohibits TxDOT from issuing Texas Mobility Fund bonds if TxDOT requires that toll roads be included in a regional mobility plan in order for a local authority to receive an allocation from the fund.

- Requires that surplus revenues from toll projects be spent within a department district in which any part of the project is located.
- Provides that a TxDOT district may not have its funding allocation reduced because of the availability of toll revenue bond proceeds or surplus revenue to be spent in the area.
- Provides that payments received by TxDOT under a CDA (i.e., concession payments) may be used within the region where the project is located.
- Authorizes TxDOT to do short-term borrowing (2 years or less).
- Authorizes TxDOT to develop rail projects, including through the use of CDAs.
- Transfers rail-related functions from the Texas Railroad Commission to TxDOT.
- Authorizes "pass-through" fares for rail projects.
- Authorizes public entities to assign the right to receive pass-through tolls payments to private entities.
- Authorizes "reverse pass-through" tolls (i.e., an RMA, RTA, or county may pay a pass-through toll to TxDOT).
- Permits delegation by TxDOT to an RMA, RTA, county, or city full responsibility for design, bidding, construction, and oversight of projects.
- Authorizes RMAs, RTAs, counties, or cities to contract with private entities to act as their agent in the design, financing, maintenance, operations, or construction of tolled or non-tolled facilities or maintenance of projects (pursuant to a project development agreement).
- Authorizes use of private activity bonds for transportation projects if federal legislation is changed accordingly.
- For TxDOT toll projects, provides that the costs of utility relocations are to be split between the department and the utility.
- Expands TxDOT's CDA authority to include projects with combined tolled and non-tolled facilities (including combined toll and rail facilities).
- Authorizes TxDOT to use design/build for tolled projects and to allow for "pre-qualification" of firms eligible to submit design/build proposals.
- TxDOT sovereign immunity waived as to certain obligations under a CDA.
- Establishes a 50-year limit (possibly 70 years if certain criteria are met) on TxDOT concession agreements; toll setting methodology and changes thereto must be approved by TxDOT.
- Requires TxDOT to prepare periodic reports on needs for modes of transportation in segments of the Trans Texas Corridor ("TTC").

- Restricts TxDOT from limiting access with the TTC with intent of benefiting an ancillary facility.
- Requires direct accessibility between the TTC and interstates, state highways, and US highways; reasonable efforts for other categories of roads.
- Restricts TxDOT extraction of groundwater from locations in TTC right-of-way to that required for its own use.
- TxDOT must provide notice of any water pipelines proposed to be placed within TTC right-of-way.
- "Non-compete" clauses related to TTC projects cannot limit or prohibit construction of safety projects, projects of local governments, or projects in the Unified Transportation Plan.
- Ancillary facilities in the TTC are limited to gas stations, convenience stores, and similar facilities.
- Ancillary facilities must be located within the median of TTC projects; cannot be located within 10 miles of an intersection with an interstate highway, and must benefit users of the TTC.
- TxDOT may allow owners of severed tracts acquired for TTC to build alternative access routes.
- Owners of property acquired or to be acquired in the TTC right-of-way may retain development rights provided property is developed consistent with TxDOT development plans.
- Consolidates many of TxDOT's toll road laws into a new chapter of the Transportation Code (Chapter 228).
- Authorizes TxDOT to enter into transactions regarding land, buildings and facilities related to its operations (facilitates consolidation of facilities, etc.)

The foregoing is merely intended as a summary of the provisions of HB 2702. Additional information concerning this or other transportation legislation can be obtained from: Brian Cassidy, Locke Liddell & Sapp LLP, 100 Congress Avenue, Suite 300, Austin, TX 78701; Phone: (512) 305-4855; email: bcassidy@lockeliddell.com

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Summary of Transportation Legislation
80th Legislative Session

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July, 2007

The 80th Legislative Session was a challenging one for transportation issues. Other than increases in certain bonding authority no new (or increased) funding for transportation was enacted, and no progress was made on ending "diversions" from the state highway fund to non-transportation purposes. The session was characterized by outward hostility toward TxDOT and the privatization of toll projects, and one major transportation bill (HB 1892) was even vetoed by Governor Perry well before the session ended. Ultimately SB 792 became the session's major transportation bill, and it made significant changes to the process and policy governing the development of toll projects. SB 792, as well as other bills of interest, are addressed below.

SB 792

Following the veto on May 18, 2007 of HB 1892, SB 792 became the vehicle for a legislatively engineered compromise between the Governor's office, TxDOT, and local toll authorities. Governor Perry signed the bill on June 11, 2007, and (with only minor exceptions) the provisions of the bill became effective when signed. Specific provisions include:

Concession CDA Moratorium

SB 792 places a moratorium on any CDA entered into on or after May 1, 2007 between a toll project entity (defined as TxDOT, RTAs, RMAs, or county toll authorities) and a private participant that allows the private participant to operate or collect revenue from the toll project. It also prohibits a toll project entity from selling a project to a private entity. Further, the legislation creates a legislative study committee to conduct public hearings and study the public policy implications of concession CDAs and prepare a written report by December 1, 2008. The moratorium provisions expire on September 1, 2009, which generally coincides with the scheduled review of TxDOT by the Sunset Advisory Commission.

There are exceptions to the moratorium for several projects, including:

- Projects associated with the Trinity Parkway in Dallas;

- Projects adding managed lanes to existing controlled access facilities in nonattainment or near nonattainment areas and for which an RFQ was issued prior to May 1, 2007;
- A project associated with Loop 9 (in Dallas)
- A project associated with any part of SH 99 (the "Grand Parkway" in Houston);
- A project associated with the portion of I-69 south of Refugio County;
- SH 161 in Dallas;
- A non-TTC project located in Grayson County;
- SH 121 in Dallas;
- A project located in a border county with a population of 300,000 or more (El Paso, Cameron, and Hidalgo Counties, provided that in El Paso the project must have been in an approved MPO plan prior to May 1, 2007).
- Projects for which a concession CDA was signed prior to May 1, 2007.

Market Valuation Process / Local Toll Project Entity ("LTPE") Primacy

SB 792 provides that LTPEs (RMAs, RTAs, and county toll authorities) are to have primary responsibility ("primacy") for toll project development within their areas. However, SB 792 contains a new procedure governing the development of toll projects called a market valuation ("MV") analysis.

Unless otherwise agreed to by the LTPE and TxDOT, a MV must be conducted for all toll projects except those for which an RFQ was issued prior to May 1, 2007 and those projects specifically exempted in the bill (generally extensions of certain existing toll roads). The MV is to be based on terms agreed to by the LTPE and TxDOT for development, construction, and operation of a toll project, including initial toll rates; toll rate escalation; project scope; traffic & revenue projections; estimated cost to finance, construct, maintain and operate; market research; and other factors. The objective of the MV appears to be the quantification of the economic potential of a toll project (based on various factors) and the imposition of a requirement that the economic potential be captured and used to fund other projects in the region.

Overview of MV Process

Set forth below is a step-by-step overview of the MV process:

1. LTPE or TxDOT determines that a project should be developed as a toll project.

2. LTPE and TxDOT mutually agree on business terms for development of the project (including initial toll rates and toll rate escalation methodology).
   - If LTPE and TxDOT are unable to mutually agree on terms, neither the LTPE nor TxDOT may develop the project as a toll project.

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3. LTPE and TxDOT mutually agree on a third party to develop a MV based on the agreed business terms (third party can be under contract with LTPE or TxDOT; but cannot have an investment in, or control or be controlled by, an entity that participates in the financing of the project subject to the MV).
    - If the LTPE and TxDOT are unable to agree on a third party to develop a MV, neither party may develop the project as a toll project.

4. LTPE and TxDOT have 90 days after receipt of draft MV to approve or negotiate a different valuation.
    - If the LTPE and TxDOT cannot agree on a valuation within 90 days, draft MV is deemed final and accepted.

5. ***RMA area only***: MPO shall determine whether toll project should be developed using the business terms in the MV.
    - If the MPO does not approve of development based on the business terms, neither party may develop the project as a toll project on those terms.

6. After MV is final (or MPO approves development in an RMA area under MV terms), LTPE has 6 months to exercise first option to develop project.

7. If option exercised and environmental review is not already underway, the environmental process must be started within 6 months of the exercise of the option.

8. If option exercised, within 2 years after completion of environmental LTPE must:
    - enter into a contract for construction of the project; and
    - either:

      (i) commit to make a payment equal to the MV to a subaccount (held by TxDOT) to be used for other projects in the region;

      (ii) commit to construct, within a period agreed to by TxDOT and the LTPE, projects in the region with construction costs equal to the MV amount; or

      (iii) ***if in an RMA area***, for a period to be agreed to by TxDOT and the RMA, commit to using surplus revenues from the project to build additional transportation projects in an amount equal to the MV

9. If LTPE does not exercise option to develop or does not enter into a construction contract and make other commitments within 2 years, TxDOT has 2 months to exercise option to develop.

10. If TxDOT exercises option to develop, within 2 years after environmental is complete TxDOT must:
    - enter into a construction contract; and
    - either:

(i) commit to make a payment to a subaccount in an amount equal to the MV to be used for projects in the regions; or
(ii) commit to construct, within a period to be agreed upon by the LTPE and TxDOT, additional projects in an amount equal to the MV.

11. If TxDOT does not exercise the option to develop or fails to execute a construction contract or meet other commitments within 2 years, TxDOT and LTPE may meet again to determine revised business terms and re-start the MV analysis.

Other Issues Associated with MV and Toll Project Development

- LTPE shall be allowed to use state-owned ROW and access to the SHS.
- TxDOT may not require LTPE to pay for access to or use of ROW except to reimburse actual costs to be reimbursed to third parties.
- Parties must enter into an agreement for use of ROW; assure compliance with federal laws.
- LTPE and TxDOT may issue 30 year bonds to pay costs for projects under this section and to make deposits of MV amounts into subaccounts.
- Subaccounts are to be created in the state highway fund for each project, system or region; TxDOT holds it in trust for the region and "may" assign responsibility for allocating money in the subaccount to an MPO.
- Several HCTRA-related and NTTA projects are excluded from the MV analysis, as are projects for which an RFQ was issued prior to May 1, 2007.
- Section expires August 31, 2011.

Additional Provisions

In addition to the moratorium and MV provisions of SB 792, there are several other provisions which will be affect toll project development. The bill:

- Provides that concession CDA authority for TxDOT and RMAs expires August 31, 2009, but design/build CDA authority extends to August 31, 2011.

- Establishes the maximum term for CDAs at 50 years from the later of the date of final acceptance of the project or the start of revenue operations by the private participant, not to exceed a total term of 52 years, and provides for the submission of alternative proposals having terms ranging from 10 to 50 years.

- Authorizes TxDOT to issue up to $6 billion in bonds in an amount not to exceed $1.5 billion each year (i.e., double the current authorization for "Ogden bonds").

- Adds a new Chapter 371 to the Transportation Code, which applies to all toll project entities (TxDOT, RTAs, RMAs, and county toll authorities) and creates certain requirements that must be complied with prior to or in connection with entering into a CDA, including:
  - requiring a toll project entity to submit a CDA to the attorney general for review;
  - requiring submission of the names of short-listed proposers, a copy of the CDA, a copy of the proposal submitted by the apparent best value proposer, and a financial forecast to the Legislative Budget Board;
  - requiring submission of a traffic and revenue report to the state auditor;
  - requiring development of a formula for making termination payments to terminate a concession CDA;
  - prohibiting a non-compete clause in a CDA (but permitting a CDA to provide for compensation for a loss of toll revenue attributable to development of certain projects and requiring payment by the concessionaire for an increase in revenue attributable to certain projects);
  - requiring disclosure of certain information and a public hearing on that information prior to entering into a contract;
  - permitting the issuance of bonds for purposes of making termination payments under a concession CDA.

- Makes the payment of a stipend by TxDOT or an RMA to an unsuccessful CDA proposer discretionary rather than mandatory.

- Provides that contract payments or revenue received by the commission or TxDOT from CDAs must be used to finance projects in the region of the project generating the payments/revenue and establishes a formula for allocation of funds among department districts when a project is located in more than one district.

- Requires MPOs to establish bylaws containing an ethics policy to prevent conflicts of interest among board members.

Provisions Affecting RMAs

Provisions of SB 792 affecting RMAs (many of which are discussed above) include:

- Concession CDA moratorium (except for specific projects listed).

- Primacy for development of toll projects.

- Access to state-owned ROW for projects without payment of compensation.

- MV required for toll projects.

- New Chapter 371 provisions requiring reporting, public hearings, restrictions and requirements for certain contract terms, etc.

- Statutory authority for concession CDAs expires August 31, 2009; design/build CDA authority preserved until August 31, 2011.

- CDA stipend payments become discretionary (rather than mandatory).

- Design-build procedures must not materially conflict with new procedures applicable to local governments.

Provisions Specific to TxDOT, RTAs, and County Toll Authorities

SB 792 contains several other provisions specific to TxDOT, RTAs, and county toll authorities, including:

- Requiring TxDOT to make public certain information related to the Trans-Texas Corridor.

- Provisions specific to particular projects undertaken by a county toll authority (exempting many from the MV process and establishing primacy for county toll authorities).

- Granting county toll authorities the right to exercise powers of RMAs and to enter into CDAs to the extent applicable to TxDOT or RTAs; authorizing the use of surplus revenues by county toll authorities for other road, street, or highway projects; granting county toll authorities the power of TxDOT with regard to participation in Trans-Texas Corridor projects; and granting county toll authorities the right to use state right-of-way.

- Provisions exempting several NTTA projects from the MV process (primarily extensions of existing projects)

- Granting RTAs the authority to enter into CDAs; authorizing the use of surplus revenues by RTAs for other road, street, or highway projects related to a toll project; permitting RTAs to procure a combination of engineering, design, and construction services in a single procurement and to let a contract for construction of a turnpike project by a construction manager-at-risk procedure; governing gifts and contributions to RTA directors; granting RTAs the right to use state right-of-way; and invalidating the TxDOT/NTTA Regional Protocol.

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Other Legislation of Interest

In addition to SB 792, the 80th Legislature passed a number of bills of interest relating to toll collection and enforcement, RTA/RMA governance, utility relocation, and finance. Below is a summary of additional relevant legislation.

Toll Collection & Enforcement

- **HB 570:** Provides that a toll project entity (defined to include TxDOT, RTAs, RMAs, and county toll authorities) may not use motor vehicle registration or other information derived from a license plate on a vehicle using a toll project, including information obtained though automated enforcement technology, for purposes other than those related to toll collection and enforcement and law enforcement purposes.

- **SB 369:** Provides that one-half or more of the name of the state in which a vehicle is registered or the letters or numbers of the license plate must be obscured before an offense of altering or obscuring a license plate is committed. This clarification allows for transponder placement on license plates.

RMA/RTA Governance

- **HB 3718**: Clarifies that RMA directors serve two-year terms, with as near as possible to one-half of the directors' terms expiring on February 1 of each year (clarifies a technical issue regarding the staggering of terms).

- **SB 1548:** Requires RMAs to post meeting notices and agendas on the authority's website.

- **SB 964:** Provides that in addition to the one director appointed by each county of a RTA, the commissioners court of each county that created the RTA or a county in which all or part of a turnpike project of not less than ten centerline miles in length is located and has been open for use for at least three years shall appoint one additional director. Further provides that if subsequent directors are appointed to the board of a RTA, the directors other than the new appointees shall determine the length of the new appointees' terms. (Recall also that, as described above, SB 792 imposes certain restrictions on RTA directors receiving gifts.)

Utility Relocation

- **SB 1209**: Provides that TxDOT and a utility shall share equally the cost of relocation required by the improvement of a nontolled highway to add one or more tolled lanes, the improvement of a highway that has been converted to a turnpike project or toll project, or the construction or expansion of a turnpike or toll project until September 1, 2013. It also allows

TxDOT and a utility to enter into a prepayment funding agreement upon a utility's request. That agreement would create a fund to which a utility would pay over time and from which the utility would ultimately be reimbursed for its relocation expenses.

Finance

- **SB 1266**: This bill was intended to provide a source for replenishing TxDOT's funds available for the popular "pass-through finance" program, while also funding local improvements through the reinvestment of certain proceeds. The bill grants municipalities the authority to create municipal Transportation Reinvestment Zones ("TRZs") and to dedicate a portion of the tax increment resulting from an increase in assessed property value in a TRZ to repayment of amounts owed to TxDOT under pass-through finance agreements (with the remainder available for use within the zone). For similar purposes it authorizes a county to designate a county TRZ, abate the increased taxes within the zone, and create a road utility district which can impose a tax in an amount equal to the abatement to be used for the same purposes as the municipal TRZ.

- **SJR 64:** This joint resolution calls for a constitutional amendment to authorize the issuance by TxDOT of up to $5 billion in general obligation bonds (backed by the full faith and credit of the State of Texas). There was no corresponding enabling legislation, so if the constitutional amendment passes it will still need implementing legislation. TxDOT has characterized this as the equivalent of a "pay day" loan, which suggests that it is not being viewed as a significant source of new money.

- **HB 3437**: Authorizes Hidalgo and Cameron Counties to increase vehicle registration fees by up $10, with the proceeds being directed to the regional mobility authority for the county for use in connection with long-term transportation projects.

- **SB 792:** As noted above, this bill also increased the amount of "Ogden Bonds" (bonds secured by the state highway fund) that TxDOT can issue to $6 billion (with no more than $1.5 billion being issued within a year).

Transportation Planning

- **HB 1857:** Provides that TxDOT and a county may enter into an agreement that identifies future transportation corridors within the county. Under certain circumstances a county may refuse to record a subdivision plat (i.e., if it affects property located within a project alignment as identified in a final environmental document) or may require certain notices and disclosures in connection with county platting and subsequent transactions.

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The foregoing is only a summary of the referenced legislation. Interested parties should consult the text of the legislation for specific issues. Questions may be directed to Brian Cassidy, (512) 305-4855 (bcassidy@lockeliddell.com) or Lori Fixley Winland (512) 305-4718 (lwinland@lockeliddell.com)

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81st Legislative Session Overview- Transportation Issues

(UPDATED THROUGH SPECIAL SESSION)

C. Brian Cassidy
Lori Fixley Winland

July 20, 2009

"… during the first quarter of 2012, projected expenditures will exceed expected revenue." April 23, 2009 correspondence from Texas Transportation Committee Chair Deirdre Delisi
*"The Texas Transportation Commission today adopted the 2030 Committee's Texas Transportation Needs Report, which concludes that meeting Texas' transportation needs between 2009 and 2030 will require **$315 billion**."* 2030 Committee Press Release, February 26, 2009
"… concern about [TxDOT] and the direction of State transportation policy is deep and undeniable. This suspicion casts doubt on virtually every transportation-related decision [TxDOT] makes, preventing it from most effectively meeting the state's transportation needs." Sunset Advisory Commission - Commission Decisions, p. 8-January, 2009

With these comments characteristic of the issues facing the state, expectations were high that the 81st Regular Legislative Session would produce significant changes in transportation policy and funding. Regrettably, expectations far exceeded results, as the legislature ended the 81st Regular Session on June 1, 2009 without accomplishing anything of significance for transportation. No new funding, no reforms for TxDOT, and ultimately nothing that even assured TxDOT's continued existence after September 1, 2010. For local toll project entities ("LTPEs", comprised of regional tollway authorities ("RTAs"), regional mobility authorities ("RMAs"), and county toll road authorities), as well as for anyone else who worked during the 81st Regular Session for improvements to transportation funding and policy, the session was a disappointment.

As a result of the dismal results from the Regular Session, and in particular the failure to pass legislation to authorize TxDOT's continued operations beyond September 1, 2010, attention quickly turned to the need for a Special Session. On June 25, 2009, Governor Perry issued a call for a Special Session (to begin on July 1) for the purpose of addressing three issues: (1) authorizing the

issuance of Proposition 12 bonds and the establishment of the Texas Transportation Revolving Fund; (2) extending the TxDOT "sunset" date; and (3) extending the expiration date of comprehensive development agreement ("CDA") authority for TxDOT and RMAs. The Special Session was held July 1-2, 2009, and some progress was made on issues identified in the "call" for the session. Legislation was passed authorizing the issuance of $2 billion in general obligation bonds to fund highway improvement projects and extending TxDOT's sunset date to September 1, 2011. However, results once again fell short of expectations, as efforts to pass legislation establishing the Texas Transportation Revolving Fund, extending the authority of RMAs and TxDOT to enter into CDAs, and ensuring primacy for LTPEs (as part of the CDA extension) were ultimately unsuccessful.

Set forth below is an overview of what bills passed in the Regular and Special Sessions, what bills almost passed, and what questions remain as a result.

Legislation Passed by the 81st Legislature During the Regular Session:

- SB 882: amends Chapter 366 to grant RTAs the same powers and duties as TxDOT, RMAs, and county toll road authorities regarding toll collection and enforcement and to give RTAs more flexibility in determining the amount of the stipend to be offered to an unsuccessful proposer in a design-build procurement for a contract exceeding $50 million.

- HB 2983: amends §366.178 (and corresponding provisions of statutes governing TxDOT and other LTPEs) to allow for use of electronic data related to lease of a vehicle in connection with prosecution or defense of toll violations.

- HB 3139: permits LTPEs to establish a discount program for electronic toll collection customers and requires that any such program include free or discounted tolls for vehicles registered to certain disabled veterans and Medal of Honor recipients.

- HB 2142: prohibits TxDOT from engaging in marketing and advertising activities to influence public opinion about the use of toll roads or use of tolls as a financing mechanism; allows TxDOT to provide information regarding the status of projects. (Note: this does not apply to LTPEs). Subsequently vetoed by the Governor.

- SB 646: authorizes the Governor to execute the "Southern High Speed Rail Compact" with MS, LA, and AL for purposes of conducting a study of the feasibility of rapid rail transit service between those states and establishing a joint interstate commission to assist in this effort.

- SB 883: prohibits TxDOT from pledging or encumbering money in the state highway fund to guarantee a loan obtained by a public or private entity for development of a toll project or to insure bonds issued by a public or private entity for a toll project. Multiple projects are exempted, including:

    1) SH 161 – Dallas County
    2) Southwest Parkway – Tarrant County
    3) Trinity Parkway – City of Dallas
    4) Grand Parkway – several counties
    5) Hidalgo Loop Project – Hidalgo County

6) US 290 E – Travis County
7) SH 71 East – Travis County
8) 183 South – Travis County
9) Loop 1 Added Capacity Project – Travis County
10) Acquisition by an LTPE from TxDOT of projects in existence and operating prior to September 1, 2009
11) Assumption by an LTPE from TxDOT of operations of a TxDOT toll project in existence and operating prior to September 1, 2009
12) Loop 49 – Smith County
13) US 281 – Bexar County

- SB 970: removes the requirement that the Executive Director of TxDOT be a professional engineer; provides that the Executive Director must be "experienced and skilled in transportation planning and development and in organizational management."

- SB 1382: requires TxDOT to coordinate activities regarding the planning, construction, operation, and maintenance of a statewide passenger rail system; requires TxDOT to prepare and update annually a long-term plan for a statewide passenger rail system.

Legislation that Did Not Pass During the Regular Session (and Reasons Why):

There were many bills filed which LTPEs were actively supporting throughout the Regular Session. Among these were:

- SB 17/HB 2929: primacy for LTPEs; repeal of market valuation procedures; reform of CDA "buy-back" and non-compete terms
- SB 404/HB 1557: extension of CDA authority for TxDOT and RMAs
- *SB 263/HB 2116: authorization for issuance of Prop. 12 bonds
- *SB 1350: establishment of revolving fund
- *SB 2378/HB 1810: TRZ clean-up; broadening use of TRZs for projects beyond pass-throughs
- *SB 502/HB 4203: allowing TxDOT and LTPEs to fund state and federal positions to help expedite environmental reviews
- *SB 294/HB 1716: expansion of use of optional vehicle registration fee; clean-up of financing language
- *HB 3932: authorizing road user fee pilot program (VMT study)
- SB 1383/HB 3917: establishment of supplemental fund for pass-through projects administered by the Comptroller
- SJR 9, SJR 22, HJR 13, HJR 54, HJR 89, HJR 113: elimination of diversions
- HJR 9, HJR 111, HB 3462: elimination of DPS diversion and authorization for gas tax indexing

* denotes bills included in the HB 300 CCR (see below)

Impact of Voter ID Legislation

Most of the bills listed above were voted out of the Senate and referred to the House Transportation Committee in April. However, only two of those Senate bills (SB 502 and SB 1383) were voted from the House Transportation Committee before May 18th. That is significant because once a bill is

voted out of a House committee it is reported to the House Calendars Committee, where it is considered for placement on the House calendar. The deadline for hearing a Senate bill in the House was May 26th. However, House Democrats began stalling tactics ("chubbing" as it is known legislative circles) on May 22nd, with the intent of preventing consideration of the Voter ID bill (SB 362) prior to the May 26th deadline. Unfortunately, all of the transportation bills referenced above (along with hundreds of other bills) were also on the House calendar (or waiting to be placed on the calendar), and none of them were reached by May 26th. Therefore, the tactics aimed at killing the Voter ID bill ended up killing all of the "stand-alone" transportation bills as well.

TxDOT Sunset Bill (HB 300) and the Local Option Tax Act ("LOTA)

All was not lost, however. The TxDOT sunset bill was reported from the House and referred to the Senate Transportation Committee on May 12th. The House version of the bill included in excess of 150 amendments made on the House floor. Some of those amendments incorporated legislation described above into the House version of HB 300. The Senate Transportation Committee voted out (and ultimately the full Senate passed) a version very different than the House version, though it also included many of the bills described above. As a net result of the House and Senate actions, HB 300 became a vehicle to pass many of the transportation bills which had died on the House calendar, but the differences between the House and Senate versions necessitated the appointment of a conference committee.

While there were significant differences between the House and Senate versions of HB 300, a preliminary working group, followed by conference committee appointees, were able to work through nearly all of those differences. Of significance to LTPEs is that nearly all of the bills listed above were included in the proposed conference committee report ("CCR") for HB 300. In other words, HB 300 had the potential to deliver nearly all of what LTPEs had been working to support throughout the session.

However, one issue proved difficult for the conference committee, and that was the inclusion of the LOTA. It had originated as SB 855 by Sen. Carona, and was borne out of efforts in north Texas to seek additional funding options for rail and transit. Several other regions sought to be included in the bill as well. It passed the Senate, but did not fare well in the House. It was significantly revised in committee, and like many other transportation bills was not voted out of committee until late May. Therefore it died (in its revised form) on the House calendar along with other casualties of the Voter ID fight. Sen. Carona then put a modified version of the LOTA in HB 300, which became a point of contention in the conference committee discussions.

House members of the conference committee argued that there was enough opposition in the House to LOTA that including it within HB 300 would kill the bill. Sen. Carona and others believed that there were enough votes in the House to pass the bill with LOTA included. Ultimately three of the Senate conferees (Hegar, Nichols, and Hinojosa) and all five of the House conferees (Isett, Pickett, W. Smith, Harper-Brown, and McClendon) signed a CCR that did not include any of the LOTA provisions. That left Sens. Carona and Watson as the only non-signatories.

Sen. Carona then vowed publicly to kill HB 300 through a filibuster in the Senate. That proved to be unnecessary, as procedural issues in the House resulted in the bill never being considered on the floor, in part because it was not eligible to be considered until shortly before a midnight deadline and because consideration was deferred until after the sunset "safety net" bill was considered. Delay tactics aimed at the sunset safety net bill lasted until the midnight deadline, which had the effect of

killing both the sunset safety net bill and HB 300. Therefore, the TxDOT sunset bill, as well as the bill which would extend TxDOT and other agencies in the event their sunset bills were not passed; both died in the House at midnight on May 31.

Proposition 12 Bonds, TxDOT Sunset, and Special Session

The budget passed by the House and Senate included debt service for up to $2 billion in Proposition 12 bonds, but the Legislature failed to pass enabling legislation to authorize the issuance of those bonds. A last-minute effort to secure authorization for the Proposition 12 bonds and the revolving fund, as well as an effort to revive the safety net provisions that would have assured the continued existence of TxDOT and other agencies whose sunset bills were not passed (including the Texas Department of Insurance), failed in a chaotic end to the Regular Session.

Immediately following the conclusion of the Regular Session, speculation began to mount that a Special Session would be called to address both issues (i.e., to extend the sunset dates for TxDOT and the other agencies whose sunset legislation failed to pass and to authorize issuance of Proposition 12 bonds). On June 25, 2009, the Governor announced that he would call legislators to a Special Session beginning July 1, 2009 to consider 1) legislation extending the existence of the five state agencies (including TxDOT) that were subject to sunset review and would otherwise be abolished without legislative action; 2) legislation authorizing TxDOT to issue the Proposition 12 bonds and creating a Texas Transportation Revolving Fund; and 3) legislation extending the authority of RMAs and TxDOT to enter into CDAs for transportation projects.

The Special Session commenced at 10:00 a.m. on July 1, 2009 and ended before 5:00 p.m. the following day. During the brief Special Session, the legislature passed two bills.

Legislation Passed by the 81st Legislature (Special Session):

- HB 1: authorizes TxDOT to issue $2 billion in Proposition 12 bonds, $1 billion of which may only be used for non-tolled projects. The other $1 billion is directed to the State Infrastructure Bank ("SIB") and may be used for toll projects (see discussion below). HB 1 also extends the maximum term for bonds issued for certain projects undertaken by LTPEs pursuant to SB 792 from 30 years to 40 years.

- SB 2: extends the sunset dates for the agencies that were subject to sunset review by the 81st Legislature, including extending the sunset date for TxDOT to September 1, 2011.

Legislation that Did Not Pass During the Special Session:

- SB 3/HB 3: extension of CDA authority for TxDOT and RMAs; improved safeguards for concession CDAs; primacy for LTPEs; repeal of market valuation procedures established by SB 792 during the 80th Legislative Session.

SB 3/HB 3 died amid a perceived lack of urgency regarding the need for extension of CDA authority and failure to reach a consensus on whether primacy and CDA reforms should be included in the legislation.

Texas Transportation Revolving Fund / Capitalization of State Infrastructure Bank

As filed HB 1 also would have created and provided for the administration of the Texas Transportation Revolving Fund (i.e., SB 1350 from the Regular Session), but the bill was significantly revised in the House to remove the revolving fund component and instead allocate $1 billion of the Proposition 12 bonds to the SIB. The SIB funds may be used to make loans to public entities, including LTPEs, and may be used for toll projects (but not for conversion of an existing non-tolled road to a tolled road). The difference between establishing the revolving fund and capitalizing the SIB are significant; estimates are that the revolving fund would have supported $7 billion in new construction, whereas the SIB will support $3 billion. Note: The $1 billion of Proposition 12 funds for the SIB will not be available until FY 2011, as the state budget does not appropriate funds for debt service until that time.

Where Does That Leave Us

As a result of the events described above, LTPEs are left to operate under the law as it existed prior to the Regular and Special Sessions. The changes resulting from SB 792 passed during the 80th Legislative Session therefore still have effect, though with some changes dues to deadlines included within that bill.

In general, this means that:

- $2 billion in new transportation funding is available, $1 billion of which will be used to capitalize the SIB and make loans to public entities, including LTPEs, for purposes including toll projects
- Primacy continues to be governed by SB 792
- The market valuation process remains in effect
- The moratorium on concession CDAs expires on September 1, 2009
- TxDOT and RMA authority to develop concession CDAs expires August 31, 2009
- Certain exempted projects may nevertheless be developed through concession CDAs through August 31, 2011, including:
    - Projects associated with the Trinity Parkway in Dallas;
    - Projects adding managed lanes to existing controlled access facilities in nonattainment or near nonattainment areas and for which an RFQ was issued prior to May 1, 2007;
    - A project associated with Loop 9 (in Dallas);
    - A project associated with any part of SH 99 (the "Grand Parkway");
    - A project associated with the portion of I-69 south of Refugio County;
    - SH 161 in Dallas;
    - A non-TTC project located in Grayson County;
    - SH 121 in Dallas;
    - A project located in a border county with a population of 300,000 or more (El Paso, Cameron, and Hidalgo Counties, provided that in El Paso the project must have been in an approved MPO plan prior to May 1, 2007); and
    - Projects for which a concession CDA was signed prior to May 1, 2007.
- TxDOT and RMA design/build CDA authority expires August 31, 2011
- The $2 billion in Proposition 12 bonds authorized during the Special Session are the only new source of funding – no gas tax indexing, no local option fees or taxes, and no required end to diversions

The foregoing is only intended to be a summary of results of the 81st Legislative Session. Interested parties should consult the text of specific legislation concerning scope and application of changes to law and provisions of previously enacted laws. Questions may be directed to Brian Cassidy, (512) 305-4855 (bcassidy@lockelord.com) or Lori Fixley Winland (512) 305-4718 (lwinland@lockelord.com)

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Texas Transportation Legislation
Overview of the 82nd Regular Legislative Session

C. Brian Cassidy
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June 21, 2011

While the 82nd Regular Session of the Texas Legislature was dominated by high profile issues such as the budget, redistricting, voter identification, and school finance, a considerable volume of important transportation legislation was passed and signed into law by Governor Perry. The "sunset" legislation for the Texas Department of Transportation ("TxDOT") received approval; regional mobility authorities ("RMAs") will experience the most significant change in governing legislation since the enactment of HB 3588 in 2003; and the immediate future of comprehensive development agreements ("CDAs" or public private partnerships) in Texas has been determined.

Entering the session the State was facing a budget deficit of $4.3 billion.[1] That did not bode well for any meaningful increases in transportation funding, and indeed little progress was made beyond the Legislature's authorization of the issuance of $3 billion in previously approved Proposition 12 (General Obligation) bonds. However, the fact that TxDOT's budget was not significantly impacted at a time when many other state agencies were hit with funding reductions was a positive sign for transportation advocates.

For a variety of reasons the tenor of the session with regard to transportation issues was much less contentious than the 81st Regular Session. Several bills approved by the Legislature were the same or similar to legislation considered in the previous session but which did not pass due to events unrelated to their content. In addition, TxDOT has implemented many of the changes recommended in HB 300 (the TxDOT sunset bill which did not pass in 2009), and has generally received high marks for beginning the process for change as suggested by the widely publicized Grant Thornton report.[2] Furthermore, SB 792 (passed by the 80th Legislature) calmed the waters of previous disputes between TxDOT and local toll project entities ("LTPEs")[3], and anti-toll sentiment seems to have given way to the realization that the state is facing estimated transportation infrastructure needs of $270 billion between 2011 and 2035[4], and there are few politically feasible alternatives to generate the funds needed to meet those needs.

As a result of the volume of legislation passed, this overview is divided into two parts. The first appears below and is a general summary of bills of particular significance. The second part consists of attached appendices which contains detailed summaries of individual pieces of legislation or topics.

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[1] Biennial Revenue Estimate 2012-2013, at 2 (Tex. Comptroller January 2011) available at http://window.state.tx.us/taxbud/bre2012/96-402_BRE_2012-13.pdf

[2] Grant Thornton Management and Organizational Review - Final Report (May 26, 2010) available at http://www.txdot.gov/about_us/commission/2010_meetings/documents/gt.pdf

[3] Local toll project entities, or LTPEs, are defined in Sec. 228.0111(a)(1), Transportation Code, as being comprised of RMAs, county toll road authorities (e.g., HCTRA), and regional toll authorities (e.g., NTTA).

[4] 2030 Committee, It's About Time: Investing in Transportation to Keep Texas Economically Competitive, (March 2011); (estimate is of amount needed to maintain 2010 conditions) available at http://texas2030committee.tamu.edu/documents/final_03-2011_report.pdf

Significant Legislation Passed

Primacy (SB 19)
(See Appendix "A" for a detailed summary)

Senate Bill 19 was the culmination of an extensive effort by Sen. Robert Nichols to define a process for determining which toll project entity (i.e., TxDOT or a LTPE) would have the first option to develop a toll project within a region. SB 792 enacted during the 80th Regular Session (now embodied in Section 228.0111 of the Transportation Code) provides a primacy process, but it is combined with a cumbersome and inefficient "market valuation" process, and its provisions are set to expire on August 31, 2011.

SB 19 generally grants a LTPE the first option to develop a project, but that option must be exercised, and certain project implementation steps taken, within prescribed time periods. In general, these are:

- A LTPE has 180 days from the initiation of the process[5] to exercise its right of primacy (i.e., its option to develop the project).
- If primacy is exercised, the LTPE has 180 days from that date to initiate the project development process by advertising the procurement of required services.
- A LTPE has 2 years from the date of exercise of its right of primacy (or the date that environmental clearance is achieved) to enter into a construction contract.
- If a LTPE declines to exercise its right of primacy (or fails to meet one of the other deadlines), TxDOT then has 60 days to exercise its option to develop the project.
- If TxDOT exercises its option, it is subject to the same implementation deadlines as a LTPE.

Note that there is no order of priority as to project delivery methods (as was the case in SB 17 filed in the 81st Legislative Session), which corresponds to the project specific-authorization for CDA projects (see discussion of SB 1420 below). As a result, an exercise of primacy can be made without regard to the anticipated procurement method. Furthermore, the exercise of primacy over a phase of a project is considered an exercise of primacy over the entire project, with additional phases to be built as the developing entity determines them to be financially feasible.

SB 19 replaces the market valuation process and several other procedural steps required under current law. For example, no agreement between a LTPE and TxDOT on terms and conditions is required, MPOs will not be required to approve terms and conditions, and there is no required financial commitment to a region that must be made in connection with an exercise of primacy. The bill makes other improvements as well, including defining the process for required access to, and use of, state highway system right-of-way; provisions requiring sharing of project related information; and provisions for valuing right-of-way in the event of a transfer of ownership.

SB 19 should foster a much more collaborative and efficient effort among toll project entities and TxDOT in the project implementation process.

Governor Perry signed SB 19 into law on June 17, 2011, effective immediately.

Design/Build and Design/Build/Finance Authorization – RMAs (SB 1420)
(See Appendix "B" for a detailed summary)

In Texas, the phrase "comprehensive development agreement" (or "CDA") generally means a contract which includes, at a minimum, design and construction elements, and may also include financing, operation, maintenance, extension, expansion and other features.[6] That means a CDA can be anything from a relatively simple design/build contract to a complicated "concession" agreement spanning 52 years (the

[5] The initiation of the process is tied to various actions- see description in Appendix "A".
[6] See, e.g., Sections 223.201(b); 366.401(b); 370. 305, Transportation Code.

maximum term allowed under Texas law).[7] The opportunity for confusion based on the generic use of the term CDA is obvious.

With a few project specific (or geographic) exceptions, the authorization for RMAs and TxDOT to enter into concession CDAs expired August 31, 2009, and authorization to enter into design/build CDAs is set to expire on August 31, 2011. For RMAs in particular the potential loss of design/build CDA authority is critical, as it has been the primary delivery method for RMA projects throughout the state.[8]

As a result Sen. Kirk Watson filed SB 1138, which (as filed) would have extended RMA design/build and design/build/finance CDA authority (but would not have affected, or extended, concession CDA authority). After concerns were voiced by representatives of the Texas Council of Engineering Companies ("CEC") and the Associated General Contractors ("AGC"), Sen. Watson facilitated discussions which resulted in a revised approach—a new chapter in the RMA Act providing design/build ("d/b") and design/build/finance ("d/b/f") authority for RMA projects, but completely independent of the CDA process. This marks a significant improvement over existing law, as association with the CDA process for design/build contracts had caused confusion with the more controversial concession agreements and saddled design/build CDAs with a myriad of procedural requirements that were intended to address issues raised by concession CDAs.

Rep. Larry Phillips, Chairman of the House Transportation Committee, was the House sponsor of the companion bill to SB 1138. Rep. Phillips was able to include the d/b and d/b/f process reflected in the revised SB 1138 in the TxDOT sunset bill (SB 1420) through a floor amendment. Therefore, while SB 1138 did not pass independently, its provisions should be enacted by virtue of passage of the TxDOT sunset bill.

The process for procuring a d/b or d/b/f project under this approach is generally similar to the process used in connection with design/build CDAs (and is described in more detail in Appendix "B"). Notable features of the d/b and d/b/f legislation include:

- A RMA is authorized to enter into a maximum of 2 d/b and d/b/f contracts in any fiscal year.
- There is a mandatory stipend requirement for unsuccessful proposers of 0.20% of the contract price.
- There is a permissive stipend provision for procurements terminated prior to contract execution.
- Awards must be based on a combination of technical and price proposals, with pricing weighted at least 70%.
- The d/b/f tool is available for all RMA "transportation projects"- a term defined broadly under the RMA Act.
- There is no expiration date for RMA d/b and d/b/f authority.

Design/Build – TxDOT (SB 1420)
(See Appendix "B" for a detailed summary)

Under current law TxDOT has authority to use d/b as a procurement process for tolled projects. One of TxDOT's objectives this session was to secure d/b authority for tolled *and* non-tolled projects. That authority was included in SB 1420, and in fact is modeled after the RMA d/b and d/b/f language described above and in Appendix "B". Highlights of the TxDOT d/b authority include:

- TxDOT is authorized to enter into 3 d/b projects per fiscal year through August 31, 2015 (which coincides with the next time that TxDOT will undergo sunset review).
- The d/b tool is available for TxDOT "highway projects" (i.e., tolled or nontolled).
- The minimum project size for a TxDOT d/b project is $50 million.

[7] A concession CDA is a CDA that, in addition to the design and construction elements of a project, also includes long-term finance, operations, and maintenance features coupled with a long-term contractual relationship.

[8] RMAs have relied on design/build CDAs because of the risk transfer inherent in design/build CDA contracts; financial market acceptance; and the lack of extensive financial resources to absorb delays, cost overruns, and other project risks.

- There is a mandatory stipend requirement for unsuccessful proposers of 0.25% of the contract price.
- There is a mandatory stipend requirement for procurements terminated prior to contract execution.
- Awards must be based on a combination of technical and price proposals, with pricing weighted at least 70%.

While similar in process, there are differences between the TxDOT and RMA d/b authority under SB 1420. Most notably, the RMA authority allows for the inclusion of financing in a d/b procurement; TxDOT (which has the resources of Fund 6 available) is limited to d/b only. TxDOT has a minimum project size requirement (RMAs do not), and the TxDOT stipend amount is slightly higher than the RMA stipend amount. Further, the TxDOT authority will be subject to review in 2015, whereas the RMA authority is not subject to expiration.

Comprehensive Development Agreements (SB 1420)
(See Appendix "B" for a detailed summary)

As noted above, subject to a variety of exceptions, general concession CDA authority for TxDOT and RMAs expired on August 31, 2009. Efforts were made during the regular and special sessions of the 81st Legislature to extend CDA authority, but those efforts failed.

The emphasis from early in the 82nd Regular Session was on authorizing CDAs on a project specific basis. This project-specific approach reflected the preference of Sen. Williams, Chairman of the Senate Transportation Committee, and was a concept that Rep. Phillips seemed to agree with, although the House and Senate differed in their approach to the required authorizing legislation (Sen. Williams wanted a series of "single-shot" project specific bills; Rep. Phillips preferred to combine projects within one or more bills). The compromise is reflected in SB 1420, which authorizes the following projects to be developed as concession CDAs:

TxDOT Authorized Concession CDA Projects
- State Highway 99 (Grand Parkway)[9]
- IH 35E Managed Lanes (from IH 635 to US 380)
- North Tarrant Express (Segments 2E, 3A, 3B, 3C, and 4)[10]
- SH 183 Managed Lanes (from SH 161 to IH 35E)
- SH 249 (from Spring-Cypress Road to FM 1774)
- SH 288
- US 290 Hempstead Managed Lanes (from IH 610 to SH 99).

TxDOT or RMA Authorized Concession CDA Projects
- Loop 1(MoPac Improvement) (from FM 734 to Cesar Chavez)
- US 183 (Bergstrom Expressway) (from Springdale Road to Patton Ave.)
- A project consisting of the Outer Parkway (from US 77/83 to FM 1847); and the South Padre Island Second Causeway (from SH 100 to Park Road 100).

Note that with the exception of the Grand Parkway all projects must have secured environmental clearance by August 31, 2013, and the authorization to enter into a concession CDA expires August 31, 2015 (except the Grand Parkway). In addition, for the projects authorized for development by a RMA, TxDOT may not provide financial assistance to support the CDA procurement process.

Governor Perry signed SB 1420 into law on June 17, 2011. The bill takes effect September 1, 2011 except for provisions relating to concession CDAs, which take effect immediately.

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[9] SB 1719 was also passed, which requires TxDOT to adhere to the terms and conditions agreed to in any previous market valuation waiver agreement for the Grand Parkway.

[10] Provisions were included to exempt facility agreements for the indicated segments from further competitive bidding so that they can be awarded to the previously selected CDA developer for the entire North Tarrant Express project.

RMA Clarification Bill (HB 1112)
(See Appendix "C" for a detailed summary)

Based on lessons learned from previous financing transactions, as well as requests from local governments for additional types of project authority, RMAs sought clarification to provisions of Chapter 370 of the Transportation Code (the "RMA Act") last session and, after those efforts proved unsuccessful due to reasons unrelated to the content of the proposed legislation, again during the 82nd Regular Session. The clarification language was embodied in HB 1112 sponsored by Rep. Phillips and Sen. Nichols. In general, HB 1112 does the following:

- Authorizes RMAs to develop and operate parking structures and to develop projects within a transportation reinvestment zone.
- Clarifies language authorizing expenditure of funds, computation of surplus revenues, expenditures of feasibility funds, and the ability to issue refunding bonds.
- Grants RMAs the ability to use the toll collection and enforcement powers available to other toll authorities.
- Expressly authorizes RMAs to develop projects in coordination with cities or counties that have created a transportation reinvestment zone or pledged an additional revenue source.

Governor Perry signed HB 1112 into law on June 17, 2011, effective immediately.

Transportation Reinvestment Zones (HB 563/HJR 63/SB 1420)
(See Appendix "D" for a detailed summary)

In 2007, legislation was passed authorizing the formation of transportation reinvestment zones ("TRZs"). In general, a TRZ can be established by a city or county by designating an area around a transportation project and capturing the increase in ad valorem tax revenue which can then be dedicated to the financing of the project. A TRZ operates somewhat like a tax increment reinvestment zone, but the formation process is streamlined, oversight is vested in the governing body which forms the TRZ, and the administration is simplified.

The initial TRZ legislation suffered from a variety of constraints, the biggest of which was that a TRZ could only be used in connection with a project which received pass-through funding from TxDOT. This session Rep. Joe Pickett and Sen. Nichols filed legislation (HB 563 and its companion, SB 538) to significantly improve the use of TRZs by, among other improvements, expanding the use of TRZs beyond pass-through projects. Rep. Pickett also filed legislation (HJR 63) authorizing a referendum to amend the Texas Constitution to allow counties to issue bonds secured by TRZ revenues (the existing constitutional language does not include this express authorization for counties). Both the legislation and the referendum language were passed by the Legislature. In addition, because HJR 63 passed later in the session (and HB 563 had already been passed), certain conforming language was also included in SB 1420. Between these three legislative actions, the utility of TRZs as a tool to generate local funding for projects should be greatly expanded.

Among the improvements made to the TRZ statutes are:

- De-coupling TRZs from the pass-through program.
- Authorizing TRZs to be used for *any* "transportation project" (as defined in the RMA Act).
- Improving the county collection mechanism.
- Improving flexibility for municipal use of a TRZ.
- Requiring delegation of project development authority in certain instances.
- Allowing TRZs to capture local sales tax increments for use in funding pass-through projects.

Several TRZs have already been formed (some in anticipation of the TRZ legislation described above being passed), and they are likely to become a more popular tool for local governments given the breadth of projects for which they can be used and the lack of available project funding from state and federal sources. Details concerning the combination of TRZ legislation are set forth in Appendix "D".

Governor Perry signed HB 563 into law on June 17, 2011. The bill takes effect September 1, 2011. HJR 63 will be presented to the voters at an election on November 8, 2011.

Environmental Review Process (SB 548/HB 630/SB 1420)
(See Appendix "E" for a detailed summary)

One of the most time consuming steps in the development of a transportation project is securing the necessary environmental clearance. The process for doing so can involve multiple agencies and an extraordinary amount of time. Senators Nichols and Watson, along with Rep. Pickett, responded to concerns about the process, including the impact it had on locally funded projects, by filing legislation which initially authorized TxDOT and local entities to provide funds to reviewing agencies in exchange for a commitment to expedite project reviews. However, through further work with TxDOT and local entities, including primarily representatives of Williamson County and RMAs, a much more detailed process was developed which allows a local government sponsor (including a LTPE) to prepare the environmental review documents for a project, subject to TxDOT review and approval, and includes specific time frames for completion of the review process. That legislation was repeated in several places in virtually identical form (SB 548, HB 630, and SB 1420) and each of the bills was passed by both the House and Senate.

Highlights of the new process include:

- TxDOT must, through rulemaking, adopt standards for the environmental review process.
- The standards are to include timelines, required content, and a process for resolving disputes.
- The expedited process will be available for projects: identified in the financially constrained portion of the STIP or UTP; identified by the Commission; or local projects (with local government sponsors) subject to review (provided that the local government sponsor must pay a fee).
- For projects qualified for the expedited review, deadlines for decisions (or responses) by TxDOT are imposed by statute.
- TxDOT and a local government sponsor may enter into an agreement to assign relative roles and responsibilities of the parties; FHWA may be a party as well.
- TxDOT, a county, or a LTPE may provide funding to a state or federal agency in order to expedite environmental reviews.

Once again, this is a fundamentally different approach aimed at expediting the environmental review process. Details are set forth in Appendix "E".

Governor Perry signed HB 630 and SB 548 into law on June 17, 2011. Both bills take effect September 1, 2011 with the exception of Transp. Code § 222.005 (authorization to provide assistance to expedite environmental review) in SB 548, which takes effect immediately.

TxDOT Sunset Bill (SB 1420)
(See Appendix "F" for a detailed summary)

Significant aspects of the TxDOT sunset bill have been discussed above (e.g., d/b and d/b/f; CDAs; TRZ language, and environmental reviews). Other major features of the sunset bill include:

- TxDOT is required to undergo sunset review again in 4 years (2015).
- The structure of the Transportation Commission remains the same (i.e., 5 gubernatorial appointees), but the "rural" member must now come from a county with a population of less than 150,000 (the current commissioner is grandfathered).
- TxDOT is required to adopt a compliance program.

- Modifications are required to the planning process and related documents.
- For certain TxDOT toll projects in which a private sector entity has an interest in performance, a committee comprised of representatives from TxDOT, the local MPO, each city and county which has contributed funding or ROW to the project, and the LTPE for the area (if any) must determine the tolling structure and methodology, distribution of financial risk, and method of financing for the project.

Other Bills of Interest
(See Appendix "G" for a detailed summary)

A variety of other legislation was also passed which might, directly or indirectly, impact tolling and transportation infrastructure development. *Some* of these are listed below; a more complete description appears in Appendix "G".

- SB 18- comprehensive reform of eminent domain. Among other changes, it requires that an entity authorize the initiation of a condemnation proceeding at a public meeting and by a record vote. Governor Perry signed SB 18 into law on May 19, 2011, effective September 1, 2011.
- HB 1201- removes references to the Trans Texas Corridor and authorizes the Transportation Commission to establish speed limits of up to 85 mph on certain parts of the state highway system. Governor Perry signed HB 1201 into law on June 17, 2011, effective immediately.
- HB 1274- defines military vehicles for purposes of exemption from paying tolls. Governor Perry signed HB 1274 into law on June 17, 2011, effective immediately.
- HB 2327- establishes a pilot program to allow bus-only use of shoulders of certain highways (in Bexar, El Paso, Tarrant and Travis Counties). Governor Perry vetoed HB 2327 on June 17, 2011.
- SB 731- requires payment of a non-refundable fee to the attorney general's office for legal sufficiency reviews of CDAs. Governor Perry signed SB 731 into law on June 17, 2011, effective immediately.
- SB 1048- authorizes governmental entities to enter into public-private partnerships for certain facilities and infrastructure (excludes projects on the state highway system). Governor Perry signed SB 1048 into law on June 17, 2011, effective September 1, 2011.
- HB 2729- authorizes local governments to select and designate a developer-agent for projects. Governor Perry signed HB 2729 into law on June 17, 2011, effective immediately.

Funding

House Bill 1 is the Appropriations Bill which establishes the state budget. As it relates to TxDOT, the Legislature appropriated approximately $10.5 billion for FY 2012 and $9.3 billion for FY 2013. The Legislature also authorized the issuance of $3 billion of Proposition 12 bonds, to be used as follows:

- $1.4 billion for rehabilitation and safety projects
- $600 million to fund metropolitan and urban mobility projects
- $500 million for nine specified bridge projects (any remaining funds can be used for other bridge projects)
- $300 million for planning and feasibility studies, outsourced engineering work, ROW acquisitions, etc. for the most congested roadway segments in the four most congested areas in the state
- $200 million for statewide connectivity projects

Note that none of the Proposition 12 bond proceeds have been directed for deposit into the State Infrastructure Bank. That was, based on previous legislation, the intended use for $1 billion of the Proposition 12 bonds, but none of that money has now been directed to the SIB.

Governor Perry signed HB 1 into law on June 17, 2011 without changes to the provisions referenced above. The bill takes effect September 1, 2011.

While HB 1 was passed by the House and Senate, the portion of the budget related to school finance was not adequately addressed in legislation. Therefore Governor Perry called a Special Session (which began

the day following the end of the Regular Session) to address school finance and also legislation related to healthcare cost containment. The "call" for the session has since been expanded to include legislation related to congressional redistricting, the operation of the Texas Windstorm Insurance Association, and the abolishment of "sanctuary cities". It is not expected that the legislature will address any transportation issues or the budget as it relates to TxDOT or the Proposition 12 bonds during the Special Session; however, it is not impossible that adjustments to one or both could be made.

Appendices

Appendix "A"- Summary of SB 19 (Primacy)
Appendix "B"- Summary of Design/Build, Design/Build/Finance and CDA Provisions of SB 1420
Appendix "C"- Summary of HB 1112 (RMA Clarification)
Appendix "D"- Summary of HB 563/HJR 63/SB 1420 (Transportation Reinvestment Zones)
Appendix "E"- Summary of SB 548/HB 630/SB 1420 (Environmental Review Process)
Appendix "F"- Summary of SB 1420 (TxDOT Sunset)
Appendix "G"- Summary of Other Bills of Interest

The foregoing and the attached appendices are only intended to be a summary of results of the 82nd Regular Legislative Session. Interested parties should consult the text of specific legislation concerning scope and application of changes to law and provisions of previously enacted laws. Questions may be directed to Brian Cassidy, (512) 305-4855 (bcassidy@lockelord.com), Lori Fixley Winland (512) 305-4718 (lwinland@lockelord.com), or Brian O'Reilly (512) 305-4853 (boreilly@lockelord.com).

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Appendix "A"

SUMMARY OF SB 19
(Primacy)

The passage of SB 792 in 2007 was intended, in part, to resolve disputes over which toll project entity (i.e., TxDOT or a local toll project entity or "LTPE") would have the first option—or right of "primacy"— to develop a toll project in a region. The process required under SB 792 included the preparation of a "market valuation" analysis of toll projects; financial commitments tied to the market valuation results; and additional procedural steps prior to an exercise of primacy rights. The SB 792 process was successful at resolving potential disputes over development rights, but the market valuation process proved to be cumbersome, costly, and inefficient.

Soon after the 80th Legislative Session Sen. Robert Nichols began an effort to streamline the primacy process. He worked with all types of toll project entities (i.e., TxDOT, RMAs, county toll road authorities, and the North Texas Tollway Authority) and ultimately developed a consensus proposal which delineated a process for determining primacy while eliminating the cumbersome market valuation process. The concepts developed by Sen. Nichols were embodied in SB 17 filed during the 81st Legislative Session. Despite having broad support SB 17 died on the House calendar (along with hundreds of other bills) behind the Voter ID bill.

Sen. Nichols furthered his effort following the 81st Legislative Session and continued working with the toll project entities and others to refine the primacy process and address related issues. The stakes were even higher at this point, as the process required under SB 792 was set to expire on August 31, 2011 (with the exception of some limited project specific protections). The result of Sen. Nichols efforts, in collaboration with the toll project entities, was SB 19 filed in the 82nd Legislative Session. It was co-authored by Senators Shapiro and Watson, and was sponsored by Rep. Wayne Smith in the House. Again this bill had broad support in the legislature, and ultimately passed unanimously in the full Senate and overwhelmingly in the House. SB 19 was sent to the Governor on May 26, 2011. Governor Perry signed SB 19 into law on June 17, 2011, effective immediately.

SB 19 does a number of important things, as set forth below:

Primacy Process

SB 19 describes the process by which the first option to develop a toll project is determined. In general, it provides that:

- A ***LTPE has the first option*** to develop, finance, construct, and operate a toll project.

- The ***primacy determination process may be initiated*** as follows:

    - A ***LTPE may initiate*** the process once an MPO approves the inclusion of a project in the MPO's transportation improvement program.

    - ***TxDOT may initiate the process*** once an MPO approves the inclusion of a project in the MPO's transportation improvement program and (i) if the project is subject to federal environmental approval, a Finding of No Significant Impact (FONSI) has been issued or the Final Environmental Impact Statement (FEIS) has been submitted for approval; or (ii) if the project is subject to state approval, TxDOT has issued a FONSI or has approved the FEIS.

- The ***time period for exercising an option*** to develop a project is determined as follows:
    - A ***LTPE has 180 days after initiation*** of the process to exercise its option to develop a project. (That period will be extended if a record of decision (ROD) has not been issued for a federal environmental approval within 60 days after the process has been initiated, in which case the period will be 120 days after the approval is issued).
    - If the LTPE declines the option or fails to act within the required time ***TxDOT will have 60 days*** in which to exercise its option to develop, finance, construct, and operate the project.
- The ***time period for developing a project*** after primacy rights have been exercised is determined as follows:
    - If a ***LTPE exercises its option*** to develop a project, it must:
        - ***Advertise for the initial procurement*** of required services (including design) ***within 180 days*** after the date the option is exercised or the date environmental clearance is achieved; and
        - ***Enter into a contract for construction of the project within 2 years*** of the later of the date the option is exercised or the date environmental clearance is achieved.
    - If ***TxDOT exercises its option*** to develop a project (after a LTPE has declined its option or fails to adhere to the time requirements) it must:
        - ***Advertise for the initial procurement*** of required services (including design) ***within 180 days*** after the date the option is exercised or the date environmental clearance is achieved; and
        - ***Enter into a contract for construction of the project within 2 years*** of the later of the date the option is exercised or the date environmental clearance is achieved.
- Other Primacy Related Issues:
    - An ***exercise of primacy over a phase of a project is an exercise of primacy over the entire project,*** with ***additional phases*** to be developed ***when*** the toll project entity determines them to be ***financially feasible***.
    - TxDOT and a LTPE may enter into an agreement prior to initiation of the primacy process allocating responsibilities for project development and may agree to an early initiation of the primacy process.
    - ***TxDOT and a LTPE may agree to waive, decline, or alter*** steps in the process.
    - After initiation of the primacy process, ***TxDOT must share project-related information*** (e.g., T&R estimates, plans, specifications, environmental studies, etc.) with the LTPE; if the ***LTPE*** declines its option or fails to act timely, it ***must share project-related information with TxDOT.*** If either entity enters into a construction contract, it must reimburse the other for shared project-related information that it uses.
    - ***Environmental reviews*** may begin before the initiation of the primacy process. If a LTPE exercises primacy for a project for which the environmental review process has not begun, it ***must start that process within 180 days*** of exercising its option.

- If a project is located in an area where more than one LTPE operates, the first entity to have constructed toll projects in the area is the one to exercise the option on its own behalf or at the request of the other entity.

Use of Right of Way ("ROW")

SB 19 also contains provisions addressing project implementation issues and use of ROW.

- ***TxDOT must assist*** a LTPE in implementing a project for which the LTPE has exercised its option ***by allowing the LTPE access to, and use of, state highway system ROW***.

  - TxDOT may not require payment for such use or access, except to ***reimburse third party costs*** actually incurred by TxDOT as a result of such use ***and*** to ***reimburse the actual (i.e., historical) cost*** of ROW transferred to the LTPE.

  - A ***LTPE may agree to pay a revenue share*** (for a time and amount to be determined) as reimbursement ***for the cost of ROW***.

  - Payments for ROW received by TxDOT must be spent for other projects in the district where the toll project is located.

  - ***TxDOT must reimburse a LTPE for its cost of ROW used by TxDOT*** for a project that will be developed by TxDOT.

  - All ***requirements for reimbursement may be waived*** by agreement.

- TxDOT and a LTPE must enter into an agreement of the use of state highway ROW which ensures that construction of the project complies with state and federal law and protects TxDOT from damages.

- ***TxDOT and a LTPE can agree to remove a toll project from the state highway system*** and transfer the ROW to the LTPE.

Other Provisions

Other issues addressed by SB 19 include:

- TxDOT must use surplus toll revenues for other projects in a "region" where the project is located (not within a department district, as provided in current law). A "region" is defined in Section 228.001(3), Transportation Code, as: (i) a metropolitan statistical area and any contiguous county; or (ii) two adjacent TxDOT districts.

- Where a region has multiple TxDOT districts, surplus revenues are to be allocated based on the percentage of toll revenue from users of the project or system in each district (based on recorded electronic toll collections).

- The ***market valuation requirement and requirement to submit T&R studies to the state auditor's office before executing a CDA are repealed***.

- Prior market valuation agreements, project agreements, waiver agreements, and similar documents are not affected by the repeal of Section 228.0111, Transportation Code (the existing primacy and market valuation provision).

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Appendix "B"

SUMMARY OF DESIGN/BUILD, DESIGN/BUILD/FINANCE & CDA PROVISIONS OF SB 1420

SB 1420, the TxDOT sunset bill, contains a section that gives RMAs design/build ("d/b") and design/build/finance ("d/b/f") authority. This is an improved alternative to what RMAs had initially requested, which was an extension of d/b and d/b/f CDA authority. Sen. Kirk Watson filed SB 1138 which would have granted this authority, but after concerns were voiced by certain industry associations, including the Texas Council of Engineering Companies ("CEC") and the Associated General Contractors ("AGC") (and Sen. Nichols), Sen. Watson brokered a revised approach developed through the efforts of RMAs, AGC, and CEC which removes the d/b and d/b/f authority from the CDA statutes and places that authority in an independent section of the RMA Act. In doing so the confusing (and politically-charged) association with concession CDA's is eliminated, along with procedural requirements associated with CDAs that were never really intended for design/build contracts (i.e., newspaper publications of CDA terms, public hearings, etc.). While SB 1138 did not pass as a stand-alone bill, Rep. Larry Phillips, the House sponsor of the companion bill to SB 1138, was able to amend the TxDOT sunset bill (SB 1420) to include the revised version of SB 1138. SB 1420 was sent to the Governor on May 31, 2011. Governor Perry signed SB 1420 into law on June 17, 2011. The bill takes effect September 1, 2011 except for provisions relating to concession CDAs, which take effect immediately.

RMA D/B and D/B/F Authority

The process set forth for d/b and d/b/f procurements by RMAs is very similar to the process currently used for d/b CDAs, with some additional refinements consistent with certain provisions of the Texas Local Government Code. In general, the key features of the d/b and d/b/f authorization include:

- ***Authorization to use the "design-build method" for the design, construction, financing, expansion, extension, related capital maintenance, rehabilitation, alteration, or repair of a "transportation project."***
    - A d/b (or d/b/f) contract ***may not grant a private entity a leasehold interest*** in a project ***or the right to operate or retain revenue*** from the project.
    - The d/b and d/b/f ***authorization extends to "transportation projects"***, which means it may be used for all projects defined in the RMA Act as transportation projects.
- A RMA is limited to entering into ***two d/b and/or d/b/f contracts in any fiscal year***.
- The authorized procurement process requires the ***issuance of a request for qualifications (RFQ);*** followed by a ***short-listing*** of teams; followed by ***issuance of a request for detailed proposals (RFDP)*** to the short-listed teams.
    - At least ***two, but no more than five***, firms must be ***short-listed***.
    - If ***only one proposal*** responsive to an RFQ is received, the ***procurement*** must be ***terminated*** (i.e., cannot proceed with one proposer).
    - A procurement may be terminated at any time.
- A RFDP must include a variety of project-related information, along with the scoring criteria and weighting to be given to each.
    - ***Cost proposals shall be given a weighting of at least 70%***, and must include:
        - the ***cost to deliver*** the project;

- the estimated ***number of days to complete the project***; and
- any ***terms for financing*** that the d/b/f developer plans to provide.

- A RFDP must ***also include a copy of the general form of d/b or d/b/f contract*** if the terms are subject to negotiation as part of the process.
  - A RMA will be deemed to assume certain risks unless otherwise provided in the final RFDP (including all supplements and addenda- which can include revision to the form of d/b or d/b/f contract).
  - The intent is to ***assure that all proposers are proposing based on the same allocation of risk.***

➢ The RFDP shall provide for ***payment of a stipend*** to unsuccessful proposers ***of not less than .2% of the contract amount*** (provided that the value of the work product is not less than the stipend).

- Payment of the stipend ***allows for use of the work product*** contained in an unsuccessful proposal (at the risk of the RMA).
- A RMA ***may*** (but is not required) to ***provide for payment of a partial stipend in the event a procurement is terminated*** prior to securing project funding and execution of the d/b or d/b/f contract.

➢ ***Performance and payment bonds*** must be provided in the amount of the contract, provided that:

- the RMA may determine that it is impracticable for a private entity to provide security in that amount and ***can determine an alternate amount***; and
- ***alternate forms of security may be used***, including cashier's checks, U.S. bonds or notes, letters of credit (drawn on federal or Texas chartered banks), or forms of security deemed suitable by the RMA.

Differences Between TxDOT and RMA D/B Authority

TxDOT also received d/b authorization in the sunset bill for any highway project (previously TxDOT was limited to using d/b only for toll projects). Procedurally the d/b processes for RMAs and TxDOT are almost identical. However, there are some important differences, including that:

➢ ***TxDOT*** may only enter into d/b contracts (and ***may not utilize d/b/f***).

➢ ***TxDOT d/b projects must have a value of at least $50 million***.

➢ ***TxDOT*** is limited to entering into a ***maximum of three d/b contracts in any fiscal year*** (this limitation expires in 2015—which is also the next time that TxDOT is scheduled to undergo sunset review).

➢ ***TxDOT may proceed*** with a procurement ***even if one only response is received*** to the request for proposals (subject to an independent review of the process).

➢ ***TxDOT must pay a stipend of .25%, and must pay a partial stipend*** in the event a procurement is terminated prior to signing a d/b contract.

Concession CDA Authority

With a few limited exceptions, concession CDA authority for TxDOT and RMAs expired on August 31, 2009, and all CDA authority (including design/build CDA authority) would have expired on August 31, 2011 (and still will for all put the projects discussed below).[11] Early in the session Sen. Tommy Williams expressed his preference that concession CDA projects be authorized on a project-specific basis, with each project being the subject of a separate bill and each project having the support of the local delegation. As a result some twelve project specific bills were filed in the Senate. On the House side, Rep. Larry Phillips agreed with the notion of project specific CDA authorization, but for procedural reasons preferred an approach that combined the authorized projects in to one bill (although ultimately a dozen project specific CDA bills were filed in the House as well). Various projects were included in House amendments to the TxDOT sunset bill, with sixteen projects ultimately being included in the bill passed by the House. Through the conference committee process the project specific approach was retained but the list of projects was reduced to include those listed below.

TxDOT CDA Projects

The following ***CDA projects*** are now specifically ***authorized by law to be developed*** as concession CDAs ***by TxDOT:***

- State Highway 99 (Grand Parkway)
- IH 35E Managed Lanes (from IH 635 to US 380)
- North Tarrant Express (Segments 2E, 3A, 3B, 3C, and 4)[12]
- SH 183 Managed Lanes (from SH 161 to IH 35E)
- SH 249 (from Spring-Cypress Road to FM 1774)
- Highway 288
- US 290 Hempstead Managed Lanes (from IH 610 to SH 99).

RMA or TxDOT CDA Projects

The following ***CDA projects*** are now specifically ***authorized by law to be developed*** as concession CDAs ***by TxDOT or a RMA***:

- Loop 1 (MoPac Improvement) (from FM 734 to Cesar Chavez)
- US 183 (Bergstrom Expressway) (from Springdale Road to Patton Ave.)
- A project consisting of the Outer Parkway (from US 77/83 to FM 1847); and the South Padre Island Second Causeway (from SH 100 to Park Road 100).

CDA Project Implementation Requirements

The following ***requirements and restrictions*** apply to all of the CDA projects described above (unless otherwise indicated):

[11] CDA authority for NTTA and county toll road authorities is not subject to expiration.

[12] Provisions were included to exempt the indicated segments from further competitive bidding so that they could be awarded to the CDA developer for the entire North Tarrant Express project.

- ***Authorization to enter into a CDA expires August 31, 2015*** (except for the Grand Parkway, for which there is no deadline).

- ***Environmental clearance must be obtained by August 31, 2013*** (except for the Grand Parkway, for which there is no deadline).

- A ***full financial plan*** for the project, including costing methodology and costing proposals, ***must be presented to the Transportation Commission*** before entering into a CDA.

- ***Prior to December 1, 2012, a report*** must be presented ***to the Transportation Commission on the project status***, including the status of environmental clearance, an explanation of project delays, and anticipated date for completion of any procurement.

- ***TxDOT may not provide financial assistance to a RMA*** for costs of procuring a CDA.

- For TxDOT CDA projects, ***proposers must indentify companies that will fill key project roles,*** and changes to those companies may only be made under limited circumstances. If changes are made in violation of this requirement, any resulting cost savings must accrue to the state (and not the private entity). This appears intended to address concerns that concessionaires were being awarded projects based on collective team qualifications, only to have those teams changed in order to save the concessionaire money.

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Appendix "C"

SUMMARY OF HB 1112
(RMA Clarification)

HB 1112, authored by Rep. Larry Phillips and sponsored in the Senate by Sen. Robert Nichols, is a clarification bill that makes several modifications to Chapter 370, Transportation Code (the "RMA Act") based on the experience that some RMAs have had in developing and financing projects. It also makes a small number of changes related to the powers and duties of RMAs and the composition of RMA boards. HB 1112, which is very similar to legislation considered during the 81st Session, maximizes the ability of RMAs to secure necessary project financing and to pledge and receive revenues; allows for more efficient use of RMA budgets; promotes statewide consistency with regard to toll collection and enforcement; and fosters local control by allowing RMAs to develop the projects needed most in their communities. HB 1112 was sent to the Governor on May 30, 2011. Governor Perry signed HB 1112 into law on June 17, 2011, effective immediately.

Below is a summary of the statutory changes reflected in HB 1112:

RMA Powers & Duties

- ***Amends the definition of "transportation project"*** to include a ***parking area, structure, or facility*** or a collection device for parking fees and ***improvements in a transportation reinvestment zone***.

- ***Grants RMAs the same toll collection and enforcement powers as TxDOT, county toll road authorities, and the NTTA***.

- ***Authorizes a RMA***, through its board of directors, ***to participate in the state travel management program*** administered by the comptroller for the purpose of obtaining reduced airline fares and reduced travel agent fees.

Project Financing

- ***Clarifies the ability of a RMA to borrow and repay money*** from TxDOT and other entities by:

    - Providing that ***payment obligations*** of a RMA under a contract or agreement ***are included as part of the cost*** of acquisition, construction, extension, or improvement ***of a transportation project and are considered in the computation of "surplus revenues"***;

    - Authorizing a contract or agreement between a RMA and another entity pursuant to which the RMA will plan, develop, operate, or maintain a transportation project;

    - Providing that a ***RMA may pledge all or part of its revenues and any other funds available to the payment of its obligations under a contract*** or agreement.

- ***Clarifies*** the permissible sources, uses, and reimbursement requirements for ***feasibility study expenditures***.

- Authorizes a RMA to ***pledge the proceeds from the sale of other bonds for*** the ***repayment of bonds or a loan agreement***. This clarifies the ability of RMAs to issue short term debt or bond anticipation notes to pay for initial project costs and then repay that debt with the issuance of longer term bonds.

- Clarifies that ***a governmental entity may*** enter into and ***make payments*** under agreements with RMAs ***in connection with the financing, acquisition, construction, or operation of a transportation project by a RMA***.

- ***Allows a governmental entity to*** agree with a RMA to ***create a transportation reinvestment zone and to collect and remit to the RMA taxes, fees, or assessments collected for purposes of developing transportation projects***. This change clarifies the ability of a city or county to establish a transportation

reinvestment zone and then dedicate the revenue from the zone to fund a transportation project developed by a RMA.

Governance & Board Composition

- Provides that the ***appointment of additional directors from a county*** that is added to a RMA ***shall be by a process unanimously agreed to by the commissioners court*** of all counties of the RMA, thereby giving RMAs greater flexibility to determine the composition of their boards upon the addition of a new county.

- Provides that the governing body of a municipality may, upon approval of at least 2/3 of the members, establish itself as the board of directors of a RMA that it created.

    - ***This provision applies only to the Camino Real RMA,*** as it is the only municipally created RMA in existence.

    - In the event that the governing body of the city does become the board of directors of a municipal RMA, the governor shall appoint one additional director, who serves as the presiding officer of the board. A RMA governed in this manner cannot be dissolved unless the dissolution is approved by at least 2/3 of the members of the governing body; all debts, obligations, and liabilities have been paid and discharged or adequate provision has been made for payment; there are no suits pending against the RMA or adequate provision has been made for the satisfaction of any judgment; and the RMA has commitments from other governmental entities to assume jurisdiction of all transportation facilities.

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Appendix "D"

SUMMARY OF HB 563/HJR 63/SB 1420
(Transportation Reinvestment Zones)

Transportation Reinvestment Zones ("TRZs") are an innovative tool for generating funding by capturing and leveraging the economic growth that results from a transportation project. A TRZ allows a city or county to designate a geographic area around a proposed transportation project and capture the incremental property tax revenue generated in the area for use in funding the development of that project. ***A TRZ does not result in a tax increase—***it merely allows for the dedication of the incremental increase in tax revenues generated within the boundaries of the TRZ.

Under the existing TRZ statutes (Sections 222.105-222.107, Transportation Code), a city or county wishing to establish a TRZ must determine that the area is unproductive and underdeveloped and that establishment of a TRZ will promote public safety; facilitate the development or redevelopment of property; facilitate the movement of traffic; and enhance the ability of the city or county to sponsor a pass-through project. The governing body of the city or county creates the TRZ by adoption of an ordinance, order, or resolution following a public hearing. In the case of a municipal TRZ, the city then pays the entire tax increment produced from taxes collected on property in the TRZ into a tax increment account, which may be used to fund a pass-through project. The collection mechanism for a county TRZ is slightly more complicated: The commissioners court may abate a portion of the ad valorem taxes imposed by a county on property in the TRZ. A road utility district may then be formed having the same boundaries as the TRZ, and the road utility district may impose taxes on property in the district in an amount equal to the amount of taxes abated by the county.

HB 563, authored by Rep. Joe Pickett and sponsored in the Senate by Sen. Robert Nichols, amends the TRZ statutes to de-couple TRZs from the pass-through program; provide an alternative collection mechanism for county TRZs; allow a city or county to capture the sales tax increment generated in a TRZ; prohibit reductions in traditional transportation funding as a result of a TRZ; and improve various provisions related to the establishment of TRZs and use of TRZ revenues.

Also passed during the session was HJR 63. Under current law counties do not have the express constitutional authority to issue bonds secured by tax increment revenues. That is one reason the prior TRZ statutes provide for the abatement of taxes followed by the formation of a road utility district (which can bond against the taxes it collects) to assess a tax in the same amount. HJR 63 authorizes the submission to the voters of a constitutional amendment which would allow counties to issue bonds secured by tax increment revenues. This amendment would make the TRZ tool much easier to fully implement at the county level.

In anticipation of HJR 63 being approved by the voters, the TxDOT sunset bill (SB 1420) contains implementation language to provide the required general law authorization to issue bonds. The language in SB 1420 will be helpful even if HJR 63 is not approved by the voters, as it will clarify the nature of the revenues collected in the event they are pledged or assigned to a third party.

HB 563 was sent to the Governor on May 20, 2011. Governor Perry signed HB 563 into law on June 17, 2011. The bill takes effect September 1, 2011. HJR 63 will be presented to the voters at an election on November 8, 2011.

Collectively, HB 563, HJR 63, and the implementing language contained in SB 1420 will significantly improve the scope and use of TRZs as a tool for funding transportation projects.

<u>Changes Applicable to Municipal and County TRZs</u>

While there is a separate process for establishing city and county TRZs, they are very similar. Changes made by HB 563/SB 1420 which are common to both include:

- ***De-coupling TRZs from the pass-through program*** by removing the requirements that a municipality or county intend to enter into a pass-through agreement with TxDOT in order to form a TRZ and that a TRZ promote a transportation project described in Section 222.104 (the pass-through statute).

- ***Authorizing a TRZ to be established for any transportation project***, with "transportation project" having the meaning assigned to it in the RMA Act, and requiring TxDOT to delegate authority over such projects (subject to certain limitations or agreements).

- ***Providing that that the base year*** for purposes of establishing the tax increment is the ***year of passage*** of the ordinance, order, or resolution creating the TRZ ***or some year in the future*** (and that the base year be identified in the ordinance, order, or resolution creating the TRZ).

- ***Recognizing*** that ***commitments established by pre-existing tax increment reinvestment zones or economic development agreements*** should be considered in determining the amount of the tax increment.

- ***Providing for amendments to TRZ boundaries*** due to changes in project scope, provided that property may not be removed from a zone if any part of the tax increment has been assigned or pledged to secure bonds or other obligations.

- ***Authorizing*** a municipality or county to ***contract with a public or private entity*** to develop, redevelop, or improve a transportation project in a TRZ; to ***pledge and assign*** all or a specified amount of ***money*** in the tax increment account or revenue received from assessments ***to that entity***; and ***prohibiting a municipality or county from rescinding that pledge or assignment*** once made if the entity that received the pledge or assignment has itself pledged or assigned the amount to secure bonds or other obligations.

- ***Prohibiting TxDOT from reducing*** traditional and/or committed transportation ***funding*** because of the designation or use of a TRZ.

- Assuring that existing TRZs have the benefit of the statutory improvements made by HB 563/SB 1420.

Changes Applicable to Municipal TRZs

Changes made by HB 563/SB 1420 which are unique to municipal TRZs include:

- Authorizing a municipality to ***issue bonds secured by*** a pledge of ***the tax increment***.

- Providing that ***a municipal TRZ terminates on*:**

    - ***December 31 of the year in which the municipality completes a contractual requirement,*** if any, that included the pledge or assignment of money deposited to a tax increment account or the repayment of money owed under an agreement for development, redevelopment, or improvement of the project for which the zone was designated; or

    - ***December 31 of the 10th year after the year the zone was designated***, if before that date the municipality has not entered into a contract with a public or private entity to develop a transportation project within the zone or otherwise not used the zone for the purpose for which it was designated.

- ***Removing the requirement that all*** of the ***money*** deposited to the tax increment account ***be used to fund a project*** and instead providing that ***a municipality may specify the portion*** of the tax increment ***that is to be used for project purposes*** (allowing the rest to be used for general fund purposes).

- Allowing any ***surplus remaining*** in a tax increment account ***on termination*** of a zone ***to be used for other purposes*** as determined by the municipality.

Changes Applicable to County TRZs

Changes made by HB 563/SB 1420 which are unique to county TRZs include:

- Authorizing a county to ***issue bonds secured by*** a pledge of ***the tax increment*** (provided the constitutional amendment is passed in November).

- Providing ***an alternative collection mechanism for a county*** TRZ (as an option to be used in place of abatement of taxes and creation of a road utility district) through the ***imposition of "assessments".***

- Providing that a ***TRZ terminates on December 31*** of the year in which the county ***completes any contractual requirement*** that ***included the pledge or assignment of assessments***.

Sales Tax Increment Financing

HB 563 also added the concept of a local sales tax TRZ to the existing TRZ framework. The concept is similar to the existing TRZ structure (which is based on ad valorem taxes), but allows a city or county to capture all or a portion of the incremental sales tax generated within a TRZ Note, however, that while HB 563 allows the ad valorem tax revenues captured by a TRZ to be used for any transportation project, sales tax revenue captured by a TRZ may only be used for pass-through projects.

With respect to the sales tax TRZ concept, HB 563:

- ***Defines the "sales tax base"*** for a TRZ as the amount of sales and use tax imposed by a municipality or county attributable to the zone for the year in which the zone was designated (note that this does not encompass the state portion of the sales tax).

- ***Allows a municipality or county to determine***, in the order or ordinance creating a TRZ or in a subsequent order or ordinance, ***the portion of the tax increment generated from sales and use taxes*** imposed by the municipality or county ***attributable to the zone*** above the sales tax base.

- ***Authorizes a municipality or county to enter into an agreement with the comptroller*** to provide for the withholding of the sales tax increment and deposit of the money into a tax increment account.

- ***Authorizes a municipality or county to use the sales and use tax*** deposited into the tax increment account ***to pay for pass-through projects*** and to satisfy claims of holders of tax increment bonds, notes, or other obligations issued or incurred for pass-through projects.

- ***Requires a public hearing*** on the designation of the sales tax increment.

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Appendix "E"

SUMMARY OF SB 548/HB 630/SB 1420
(Environmental Reviews)

The federal environmental review process can be a lengthy and complicated one, particularly for larger, more complex projects requiring the preparation of detailed environmental studies and extensive review by state and federal agencies. The agencies charged with completing these environmental studies have limited staff and resources, further adding to the length of time required to complete the environmental review process. As a result, the environmental review process can significantly delay a governmental entity's ability to deliver needed transportation improvements on a timely basis.

During the 81st Legislative Session, Sen. John Carona filed SB 502 which addressed the delays in project delivery (and associated costs) caused by prolonged review periods for environmental documents by allowing RMAs and other LTPEs to "fund" positions at various state and federal entities to help to expedite project reviews . SB 502 received unanimous support in the Senate and was then voted unanimously from Chairman Pickett's House Transportation Committee before ultimately dying on the House floor due to the delays caused by the Voter ID Bill. The provisions of SB 502 were also inserted into the TxDOT sunset bill (HB 300), further evidencing legislative support for this issue. The issue continued to garner the attention of legislators as evidenced in the Senate Transportation and Homeland Security Committee's interim charges which included a charge to study and make recommendations to expedite the environmental review process for transportation projects.

During the 82nd Legislative Session, Sen. Robert Nichols and Rep. Joe Pickett sponsored legislation (SB 548 & HB 630) to allow TxDOT and local toll authorities to enter into an agreement to provide funds to a state or federal agency to expedite the agency's performance of its duties related to the environmental review process; establish standards for environmental review; allow a local government sponsor ("LGS") to prepare an environmental review document for a highway project; and establish deadlines for TxDOT review and approval of an environmental review document prepared by a LGS. Both bills passed unanimously in the House and Senate, and the legislation was also included in an identical form in the TxDOT sunset bill (SB 1420).

SB 548 was sent to the Governor on May 27, 2011 and HB 630 was sent to the Governor on May 30, 2011. Governor Perry signed both HB 630 and SB 548 into law on June 17, 2011. Both bills take effect September 1, 2011 with the exception of Transp. Code § 222.005 (authorization to provide assistance to expedite environmental review) in SB 548, which takes effect immediately.

Standards for Environmental Review

SB 548/HB 630 require TxDOT to ***develop standards for the environmental review process for highway projects, including timelines***, by rule. The standards adopted:

- Must address:
    - issues and subject matter to be included in the project scope;
    - required content of a draft environmental review document;
    - the review process to be followed;
    - review deadlines; and
    - a process for resolving disputes (dispute resolution process must be concluded not later that the 60th day after the date either party requests dispute resolution).
- May also address a ***process and criteria for prioritization of projects*** if TxDOT faces constraints on adequate resources to timely process documents received.

- Will apply regardless of whether the document is prepared by TxDOT or a LGS.

Preparation of Environmental Review Documents by LGS

SH 548/HB 630 also establishes a process pursuant to which a LGS (which includes a RMA) may prepare the environmental review document for a highway project.

- The process is limited to highway projects that:
    - are in the financially constrained portion of the State Transportation Improvement Program ("STIP") or Unified Transportation Program ("UTP"); or
    - identified by the commission as being eligible to participate.
- A LGS ***may use the process for a highway project not identified in the UTP, STIP, or identified by the commission if the sponsor submits a fee with the required notice***. The commission will set the fee but it may not exceed the actual cost of reviewing the document. The fee must be deposited into the state highway fund and used to pay costs related to the environmental review process.
- For an environmental review document prepared by a LGS, the ***LGS must prepare a detailed scope of the project in collaboration with TxDOT*** before TxDOT may process the environmental review document.
- A ***LGS may submit notice to TxDOT proposing that the LGS prepare the environmental review document***. If this notice is submitted, it must include the project scope and a request for classification of the project.
- A ***LGS*** that submits a notice is ***responsible for preparing all materials for project scope determination; environmental reports; the environmental review document; environmental permits and conditions; coordination with resource agencies; and public participation***.
- TxDOT and a LGS may enter into an ***agreement defining the relative roles and responsibilities of the parties in the environmental review process***. FHWA may be a party to any such agreement if allowed by law.

TxDOT Review Deadlines

SB 548/HB 630 sets forth certain ***deadlines that TxDOT must adhere to*** when reviewing an environmental review document prepared by a LGS.

- Specifically, TxDOT must:
    - Make a determination as to whether an environmental document prepared by a LGS is ***administratively complete*** and ready for technical review within ***20 days*** from receiving the LGS's document. If TxDOT declines to confirm the document is complete, it must send a written response to the LGS specifying the basis for its conclusions.
    - Issue a classification letter ***30 days*** after the date it receives notices from the LGS.

- For a project classified as a ***programmatic categorical exclusion***, render an environmental decision not later than ***60 days*** after receipt of the supporting documentation.

- For a project classified as a ***categorical exclusion***, render an environmental decision not later than ***90 days*** after receipt of the supporting documentation.

- For a project requiring preparation of an ***environmental assessment*** ("EA"), provide all comments on a draft EA not later than ***90 days*** after receipt of the draft and render the decision on the project not later than ***60 days*** after the later of the date the revised EA is submitted or the public involvement process concludes.

- For a project requiring preparation of an ***environmental impact statement*** ("EIS"), render a decision not later than ***120 days*** after the draft final EIS is submitted.

- Render any decision on an ***environmental reevaluation*** not later than ***120 days*** after receiving the supporting documentation.

➢ The computation of review deadlines listed above does not begin until an environmental review document is determined to be administratively complete.

➢ The computation of ***deadlines will be suspended*** during any period which:

- the document is being revised by or on behalf of the LGS in response to TxDOT comments;

- the highway project is the subject of additional work, including a change in design of the project, and during the identification and resolution of new significant issues; or

- the LGS is preparing a response to any issue raised by legal counsel for TxDOT concerning compliance with applicable law.

Authorization to Provide Assistance to Expedite Environmental Review

SB 548/HB 630 also authorizes TxDOT, a county, NTTA, or RMAs to enter into an ***agreement to provide funds to a state or federal agency to expedite the environmental review process*** for the applicable entity's transportation projects.

➢ The agreement may specify projects the applicable entity considers to be priorities for review and must require the agency receiving money to ***complete the environmental review in less time than is customary*** for that agency's completion of the environmental review.

➢ An agreement does not modify the rights of the public regarding review and comment on transportation projects.

➢ An entity entering into an agreement must make it available on their website.

Additional Requirements

SB 548/HB 630 also requires TxDOT to:

➢ Submit a report to the commission identifying projects being processed under the new local environmental review process by June 30 and December 31 of each year.

- Submit the report to the House Transportation Committee and Senate Transportation & Homeland Security Committee by December 1 of each year.

- Post copies of the report on its website and provide the report to each member of the legislature who has at least one project covered by the report in their district.

- ***Establish a process to certify TxDOT district environmental specialists*** to work on all documents related to state and federal environmental review processes.

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Appendix "F"

SUMMARY OF SB 1420
(TxDOT Sunset Bill)

SB 1420, the TxDOT sunset bill, was authored by Sen. Juan "Chuy" Hinojosa and sponsored in the House by Rep. Linda Harper-Brown. SB 1420 is the culmination of four years of work, as TxDOT was up for sunset review during the 81st Legislative Session, but the sunset bill failed to pass. As previously mentioned, SB 1420 contains provisions providing RMAs with d/b/f authority, an expedited process for local environmental review, CDA authorization for specific projects for both TxDOT and RMAs, certain CDA implementation requirements, and, in anticipation of the approval of HJR 63, implementation language for county issuance of bonds backed by TRZ funds. In addition to these issues, SB 1420 contains provisions of interest to RMAs as follows:

TxDOT Governance, Ethics & Compliance

- The ***Texas Transportation Commission ("TTC") remains at 5 members*** appointed by the Governor.
- The ***rural member must be from a county with a population of less than 150,000*** (the current rural commissioner is grandfathered in).
- A commissioner is ***prohibited from accepting a contribution to a campaign*** for election to an elected office while serving as a commissioner.
- The TTC is required to ***establish a compliance program*** which must include a compliance office to oversee the program. The compliance office is responsible for acting to prevent and detect serious breaches of TxDOT policy, fraud, waste, and abuse of office, including any acts of criminal conduct within TxDOT. The compliance office has primary jurisdiction for oversight and coordination of all investigations occurring on TxDOT property or involving TxDOT employees.
- TxDOT is required to develop and implement a policy to encourage the use of ***negotiated rulemaking procedures*** for the adoption of TxDOT rules and appropriate ***alternative dispute resolution procedures*** to assist in the resolution of internal and external disputes under TxDOT's jurisdiction.
- TxDOT staff is required to deliver TxDOT's Legislative Appropriation Request ("LAR") to the TTC in an open meeting not later than the 30th day before the date TxDOT submits the LAR to the Legislative Budget Board.
- TxDOT will undergo ***review by the Sunset Advisory Commission in 2015*** (the standard review period for an agency is every 8 years).
- The TTC or a TxDOT employee ***may not use money under TxDOT's control or engage in lobbying*** (i.e., an activity to influence the passage or defeat of legislation). This provision does not prohibit the use of state resources to provide public information or information responsive to a request or to communicate with officers and employees of the federal government in pursuit of federal appropriations or programs.
- TxDOT is required to ***maintain a system to promptly and efficiently act on complaints*** filed with the department.
- TxDOT is required to d***evelop and implement a policy for public involvement*** that guides and encourages public involvement with TxDOT.

Transportation Planning

- The ***Statewide Transportation Plan ("STP") will now cover a period of 24 year***s, and TxDOT is required to update the STP every 4 years.

- The STP must contain specific, long-term transportation goals for the state and measurable targets for each goal; identify priority corridors, projects, or areas that are of particular concern to TxDOT in meeting those goals; and contain a participation plan to obtain formal input on the goals and priorities under the STP from other state agencies, political subdivisions, local transportation entities, and the general public.

- TxDOT is required to ***collaborate with MPOs*** to develop mutually acceptable assumptions for the purposes of long-range federal and state funding forecasts and use those assumptions to guide long-term planning in the STP.

- TxDOT is required to ***develop a Unified Transportation Plan ("UTP") covering a period of 10 years*** to guide the development of and authorize construction of transportation projects. The UTP must annually identify target funding levels and list all projects that TxDOT intends to develop or begin construction of during the program period. The TTC is required to adopt rules that specify the criteria for selecting projects to be included in the program; define program funding categories (including safety, maintenance, and mobility); and define each phase of a major transportation project. Further, the TTC must establish rules specifying the formulas for allocating funds in each category.

- TxDOT must ***annually develop and publish a forecast of all funds TxDOT expects to receive***, including funds from this state and the federal government, and use that forecast to guide planning for the UTP. The TTC by rule is required to establish criteria for designating a project as a major transportation project, develop benchmarks for evaluating the progress of a major transportation project and timelines for implementation and construction of a major transportation project, and determine which critical benchmarks must be met before a major transportation project may enter the implementation phase of the UTP.

- TxDOT is required to ***establish a project information reporting system*** and a transportation expenditure reporting system that makes information regarding all of TxDOT's transportation plans and the priorities of transportation expenditures for identified projects ***easily accessible and searchable on the TxDOT website***.

Transfer of Real Property No Longer Needed by TxDOT

- The TTC is permitted to ***waive payment for real property transferred to a governmental entity*** if the property is a highway right-of-way and the governmental entity assumes or has assumed jurisdiction, control, and maintenance of the right-of-way for public road purposes. This transfer must contain a reservation providing that if the transferred property ceases to be used for public road purposes, the real property shall immediately and automatically revert to this state.

Procurement & Comprehensive Development Agreements ("CDA"s)

- Requirements that notice of bids must be published in a newspaper are removed, and the TTC is permitted to determine the most effective method for providing the required notice.

- ***Surplus revenue of a CDA*** held in subaccounts of the state highway fund must be ***allocated for projects approved by TxDOT within the region***.

Determination of Financial Terms for Certain Toll Projects

- The distribution of a ***project's financial risk, the method of financing for a project, and the tolling structure and methodology*** must be ***determined by a committee*** for a proposed TxDOT toll project in which a private entity has a financial interest and for which funds dedicated to or controlled by a region will be used; right-of-way is provided by a municipality or county; or revenues dedicated to or controlled by a municipality or county will be used.

- The committee must consist of a representative of TxDOT; a representative of any local toll project entity for the area in which the project is located; a representative of the applicable MPO; and a representative of each municipality or county that has provided revenue or right-of-way.

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Appendix "G"

SUMMARY OF OTHER BILLS OF INTEREST

Below is a brief summary of some of the other bills of interest passed by the 82nd Legislature.

Other Transportation Bills

- **HB 1201 (Kolkhorst)** – Removes references to the Trans-Texas Corridor from statute; authorizes the Transportation Commission to establish a speed limit not to exceed 85 mph on certain parts of the state highway system and to designate exclusive lanes for oversize/overweight vehicles. Governor Perry signed HB 1201 into law on June 17, 2011, effective immediately.

- **HB 1274 (Pena)** – Amends a current provision requiring toll project entities to exempt military vehicles from payment of tolls to define "military vehicle" as including an unmarked military vehicle operated by military personnel conducting an emergency preparedness, response, or recovery operation or participating in a training exercise for an emergency preparedness, response, or recovery operation. The definition does not include a vehicle operated for personal use. Governor Perry signed HB 1274 into law on June 17, 2011, effective immediately.

- **HB 2327 (McClendon)** – Establishes a motor bus-only lane pilot program for highways in Bexar, El Paso, Tarrant, and Travis Counties that are part of the state highway system and have shoulders of sufficient width and structural integrity. The program must provide for the use by motor buses of highway shoulders as a low-speed bypass of congested highway lanes, subject to certain speed limits. The program must also include various safety, public awareness, and training measures. TxDOT is required to initiate the pilot program by December 31, 2011. Governor Perry vetoed HB 2327 on June 17, 2011.

- **SB 246 (Shapiro)** – Addresses tolling services agreements between the NTTA and other entities (including TxDOT). Provides that toll revenues are the property of the entity that is entitled to the revenues under a tolling services agreement for the toll project, regardless of who holds or collects the revenues; authorizes any public or private entity to agree to fund a cash collateral account to serve as a performance guarantee for tolling services; and requires the NTTA and TxDOT to enter into a written agreement regarding terms and conditions of tolling services prior to the provision of such services. Governor Perry signed SB 246 into law on June 17, 2011, effective immediately.

- **SB 469 (Nelson)** – NTTA toll collection and enforcement legislation. Requires the NTTA to use video recordings, photography, electronic data, transponders, or other tolling methods to permit the owner of a vehicle to pay a toll at a later date, sets forth procedures for collecting unpaid tolls, and specifies administrative fees to be charged. Governor Perry signed SB 469 into law on June 17, 2011, effective September 1, 2011.

- **SB 731 (Nichols)** – Requires a toll project entity to pay a nonrefundable examination fee when submitting a CDA to the attorney general's office for legal sufficiency review. The attorney general must set the examination fee by rule, and the fee may not be set in an amount that is determined by a percentage of the cost of the toll project and must cover only the usual actual costs incurred by the attorney general for conducting the legal sufficiency review. Further requires the attorney general to issue a legal sufficiency determination not later than the 60th day after the examination fee and transcript of proceedings are received. The toll project entity may seek reimbursement for the fee from the private participant under the CDA. Governor Perry signed SB 731 into law on June 17, 2011, effective immediately.

- **SB 959 (Wentworth)** – TxDOT toll collection and enforcement legislation. Authorizes TxDOT to use video billing or other tolling methods to permit the owner of a vehicle to pay a toll at a later date. Also allows TxDOT to enter into an agreement with another entity to allow a transponder

issued by TxDOT to be used to pay for parking services offered by the entity. Allows automated enforcement technology to be used to produce an image that shows the vehicle dimensions, including the presence of a trailer and the number of axles. Governor Perry signed SB 959 into law on June 17, 2011, effective immediately.

- **SB 1422 (Nelson)** – Authorizes the governing body of a municipality by ordinance to designate a contiguous geographic area in the jurisdiction of the municipality to be a public transportation financing area. The area must have one or more transit facilities. The municipality may capture ad valorem or sales and use tax generated in the area and deposit it in a tax increment account to be used to compensate a Coordinated County Transportation Authority for maintenance and operating expenses associated with public transportation services. The process is similar to that of a TRZ. Governor Perry signed SB 1422 into law on June 17, 2011, effective September 1, 2011.

- **HB 2396 (McClendon)** – Allows an advanced transportation district to issue bonds backed by a pledge of sales and use tax proceeds. Governor Perry signed HB 2396 into law on June 17, 2011, effective September 1, 2011.

- **HB 3030 (McClendon)** – Authorizes tax increment financing for transportation infrastructure zones created in certain intermunicipal commuter rail districts. Allows use of funds for transportation infrastructure, economic development projects, and affordable housing within the zone. Governor Perry signed HB 3030 into law on June 17, 2011, effective September 1, 2011.

- **SB 650 (Watson)** – Sunset review of Capital Metropolitan Transportation Authority. Governor Perry signed SB 650 into law on June 17, 2011, effective immediately.

- **SB 888 (Carona)** – Authorizes a regional transportation authority to create a local government corporation. Governor Perry signed SB 888 into law on June 17, 2011, effective immediately.

Eminent Domain

- **SB 18 (Estes)** – Comprehensive eminent domain reform bill. Creates a "Truth in Condemnation Procedures Act", which would require a bona fide offer and good faith negotiations with compensation for economic loss. Requires an entity to authorize the initiation of a condemnation proceeding at a public meeting by record vote and to submit a letter to the Comptroller identifying each provision of law that grants the entity eminent domain authority. Provides for compensation for a material impairment of direct access on or off the remaining property that affects the market value of the remaining property. Provides a property owner with a right to repurchase property acquired by eminent domain if no progress has been made toward the public use 10 years after acquisition. Governor Perry signed SB 18 into law on May 19, 2011, effective September 1, 2011.

Procurement

- **HB 628 (Callegari)** – Adds a new Chapter 2267 to the Government Code related to contracting and delivery procedures for construction projects. The chapter applies to a public work contract made by a governmental entity or quasi-governmental entity and sets forth requirements for contracts for facilities using competitive bidding, competitive sealed proposals, construction manager-agents, construction managers-at-risk, and design-build. RMAs, NTTA, TxDOT contracts, and projects receiving state or federal highway funds are expressly excluded from the new chapter. Governor Perry signed HB 628 into law on June 17, 2011, effective September 1, 2011.

- **HB 2729 (Callegari)** – Authorizes a local governmental entity (which could include a RMA) to contract with a private entity to serve as the local governmental entity's agent in the design,

development, financing, maintenance, operation, or construction of a civil works project or an improvement to real property. "Civil works project" is defined to include roads and streets and related facilities. Governor Perry signed HB 2729 into law on June 17, 2011, effective immediately.

- **SB 1048 (Jackson) –** Creates a new chapter in the Government Code providing governmental entities authority to enter into public-private partnerships for facilities and infrastructure. The bill does not apply to projects on the state highway system, but may apply to other RMA projects. But note that Rep. Davis (the House sponsor) stated on the House floor that the bill is not intended to apply to roadway projects. Governor Perry signed SB 1048 into law on June 17, 2011, effective September 1, 2011.

Public Information Act

- **HB 2866 (Harper-Brown)** – Provides that the submission of a request, notice, or document to the attorney general through the attorney general's designated electronic filing system satisfies a governmental body's requirement under the Public Information Act to submit the request, notice, or document by a specified time period. Also allows the attorney general to deliver a decision to a governmental body electronically. Governor Perry signed HB 2866 into law on June 17, 2011, effective immediately.

- **SB 1638 (Wendy Davis)** – Makes the emergency contact information provided by an employee or official of a governmental body confidential under the Public Information Act. Also makes driver's license numbers, license plate numbers, and other information related to a driver's license, permit, vehicle title, or registration issued by another state confidential (under current law this information is confidential only when issued by a Texas state agency). Governor Perry signed SB 1638 into law on June 17, 2011, effective immediately.

- **SB 602 (Rodriguez)** – Allows a governmental body to redact driver's license or personal identification information or credit card, debit card, charge card, or access device numbers when responding to an open records request without the necessity of first seeking a decision from the attorney general. The governmental body must provide to the requestor a description of the redacted information and instructions on how the requestor may seek a decision from the attorney general if desired. Also provides that if a requestor modifies a request in response to a requirement for a deposit or bond, the modified request is considered a new, separate request and that a request received by U.S. mail is considered to have been received by the governmental body on the third business day after the date of the postmark. Governor Perry signed SB 602 into law on June 17, 2011, effective September 1, 2011.

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Texas Transportation Legislation
Overview of the 83rd Regular Legislative Session and
First, Second & Third Special Sessions

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Updated: August 19, 2013

While the 83rd Texas Legislature addressed several important policy issues related to project development, toll operations, regional mobility authorities ("RMAs") and transportation reinvestment zones ("TRZs"), it struggled with addressing the serious funding challenges of meeting the transportation infrastructure needs of the state. Early in the Regular Session TxDOT Executive Director Phil Wilson identified the need for a $4 billion increase in annual funding − $3 billion for new construction and $1 billion for maintenance − to meet the demands of the state transportation system.[1] Despite the fact that those numbers demonstrated a significant need for funding, they came at a time the legislature was presented with an $11.2 billion (12.4%) increase in available budget revenues over the previous biennium,[2] a burgeoning Economic Stabilization Fund ("ESF") balance[3], and public statements by state leadership that transportation funding would be a priority during the session. In addition, there appeared to be a growing recognition that increased investment in the state's water and transportation infrastructure is vital to continuing the economic prosperity the state has experienced. Supporters of increased transportation funding were therefore cautiously optimistic that significant funding enhancements would occur.

That optimism was also fueled by the fact that a myriad of funding proposals were filed during the Regular Session, including proposals to increase vehicle registration fees, raise and/or index the gas tax, and direct vehicle sales tax proceeds to transportation (instead of general revenue). Several of the proposals were filed by House and Senate leaders on transportation issues, again signaling that there was support for fundamental changes in how roads are funded in Texas. However, raising taxes or fees was generally considered to be a political non-starter among many members and some state leaders (particularly in a session where there was a substantial budget surplus), so these more ambitious proposals received considerable attention but gained little traction. Ultimately, after the Regular Session and three Special Sessions, the Legislature only managed to address a fraction of the overall funding needs, and even that proved to be a difficult task to achieve.

Regular Session Funding

The final budget adopted by the Legislature during the Regular Session includes $450 million to be used for repair of state and county roads in areas where energy development is occurring and roads are being damaged by trucks carrying heavy equipment and supplies associated with hydraulic fracturing (see

[1] Testimony of Phil Wilson, House Transportation Committee Hearing (Feb. 12, 2013).
[2] Tex. Comptroller of Pub. Accounts, Biennial Revenue Estimate, 2014-2015 Biennium at 12 (Jan. 2013), *available at* www.window.state.tx.us/finances/Biennial_Revenue_Estimate/bre2014/BRE_2014-15.pdf .
[3] The Economic Stabilization Fund is also commonly referred to as the "Rainy Day Fund". It is a constitutionally required fund that is subject to a cap on the amount and strict procedures for when appropriations may be made from the fund. TEX. CONST. art. III, § 49-g.

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Appendix "C" below). The budget also provides for $400 million of general revenue to be used for Department of Public Safety ("DPS") funding, thereby reducing the diversion of some funds that previously came from Fund 6 (the State Highway Fund) to support DPS operations.

Special Session Funding

The *potential* for additional funding was the end-result of three Special Sessions, and that potential is reflected in a concept that was first advanced by Senator Robert Nichols near the end of the Regular Session. Recognizing that any proposal involving increased fees or taxes had little chance for success, he proposed directing a portion of growing oil and gas severance tax dollars that would otherwise go to the ESF to the State Highway Fund ("SHF"). While a consensus on that proposal could not be accomplished by the end of the Regular Session, the concept became the focal point for continued efforts during the three subsequent Special Sessions. The net result, finally agreed upon in the Third Special Session, is a proposed constitutional amendment (SJR 1, by Senator Nichols) which, if approved by the voters, will direct 50% of oil and gas severance taxes above a 1987 baseline level to the SHF, but only after a "sufficient balance" is accrued in the ESF. The proceeds will be restricted to use for construction, maintenance, and right-of-way acquisition for public roadways (i.e., not for rail or transit projects), and the funds cannot be used for toll roads. The process for establishing the "sufficient balance" was the subject of the implementing legislation (HB 1, by Representative Pickett), with the ultimate compromise being that it will be established by a select committee of five House and five Senate members (appointed by the presiding officer of each body). The determination of the "sufficient balance" must be made by December 1 prior to the beginning of each legislative session, and the Legislature as a whole will have the chance to modify the select committee's recommendation. Other features of HB 1 include a requirement that TxDOT identify and implement $100 million in "savings and efficiencies" prior to August 31, 2015; that the savings be used to offset principal and interest on previously issued SHF bonds; that select committees of the House and Senate (which may work jointly) be appointed to study transportation funding and make recommendations prior to the next legislative session; and that the permissible uses of proceeds in the Texas Mobility Fund be expanded to include port-related projects.

The election to consider SJR 1 will be in November, 2014. Deferring the vote until 2014 was an accommodation to those who were concerned that SJR 1 could have a detrimental effect on the water-related propositions that will be on the November, 2013 ballot. The implementing legislation (HB 1) is also contingent on passage of SJR 1 by the voters in November, 2014, although some of its provisions anticipate an earlier implementation. If approved by the voters in 2014, the result will be an approximately $878 million increase in funding beginning in fiscal year 2014-2015, and perhaps considerably more[4]. While it is anticipated that there will be a positive impact in future years, it is difficult to predict with certainty because the amount is dependent on two distinct variables: (1) the amount of oil and gas severance taxes expected to be generated; and (2) the determination by the select committee of the sufficient balance which must be in the ESF before money will flow to transportation.

[4] The initial fiscal note for SJR 1 estimated a $878 million increase in FY 2014-2015. *See* Fiscal Note, Tex. SJR 1, 83rd Leg. 3rd C.S. (2013). On July 31, 2013, the Comptroller issued an updated revenue estimate projecting that oil and gas production taxes would be $900 million above projections for the current fiscal year. *See* Letter from Susan Combs, Tex. Comptroller of Public Accounts, to The Hon. Rick Perry, Governor, et al. (July 31, 2013). Assuming similar revenues in FY 2014-2015, the SHF would actually receive $1.2 billion, a figure which has been widely circulated as the projected economic impact of SJR 1 in its first year.

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Importance of Local Funding

While the increased funding (if approved) will help to keep project planning moving forward and assist TxDOT with meeting other commitments, it only addresses a fraction of the identified needs. The failure to implement a more robust statewide funding solution will increase the pressure on local governments to generate funding for projects through user fees and other sources. In this regard the Legislature offered some help during the Regular Session by expanding the list of projects authorized to be developed through comprehensive development agreements ("CDAs"), clarifying the ability of RMAs to work with other governmental partners, and expanding the scope of projects that can be supported through certain types of TRZs. The authority to assess a local option vehicle registration fee for the purpose of funding transportation projects was also expanded to three more counties (bringing the total to five). While these measures are helpful, their very nature underscores the fact that the burdens of transportation funding are going to be increasingly borne at the local level.

In the sections that follow are summaries of significant transportation legislation which was enacted during the Regular Session; a more detailed overview of the funding approach finally agreed to during the Third Special Session; a general overview of various funding options that were advanced but which failed to pass; and a brief review of other bills of interest (some of which passed, some of which did not). For ease of reference these summaries are separated by bill number and/or topic as indicated.

Appendices

Appendix "A"	SB 1730 – Comprehensive Development Agreements
Appendix "B"	SB 1792 – Toll Enforcement Remedies
Appendix "C"	Transportation Reinvestment Zones (TRZs) SB 1110 – Municipal/County TRZs SB 971 – Port Authority TRZs SB 1747 – County Energy TRZs HB 2300 – County Energy TRZs
Appendix "D"	SB 1489 – Regional Mobility Authority Operations
Appendix "E"	SB 466 – Environmental Reviews of Federalized Projects
Appendix "F"	Summary of Transportation Funding Bills
Appendix "G"	Summary of Other Transportation-related Legislation of Interest

The foregoing and the attached appendices are only intended to be a summary of the results of the 83rd Legislative Session. Interested parties should consult the text of specific legislation concerning the scope and application of new laws, changes to laws, and provisions of previously enacted laws. Questions may be directed to: Brian Cassidy, (512) 305-4855 (bcassidy@lockelord.com); Lori Winland, (512) 305-4718 (lwinland@lockelord.com); or Brian O'Reilly, (512) 305-4853 (boreilly@lockelord.com).

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Appendix "A"

SB 1730 – Comprehensive Development Agreements
(Effective September 1, 2013)

The approach to CDA authorization developed during the previous (82nd) legislative session was to give TxDOT and RMAs project-specific CDA authority.[5] This was done as part of the TxDOT sunset bill.[6] The project-specific approach to CDA authority was continued this session in SB 1730 by Senator Nichols and Representative Phillips.

While the previous legislation gave TxDOT authority for 7 CDA projects, ***SB 1730 contains authorization for 12 TxDOT*** projects, 6 of which are new and 6 of which were previously authorized (or which may contain slight revisions to project limits). The previous legislation gave 2 RMAs (Central Texas Regional Mobility Authority ("CTRMA") and Cameron County Regional Mobility Authority ("CCRMA")) and/or TxDOT a total of 4 projects, while ***SB 1730 contains authorization for 10 RMA/TxDOT projects***, 6 of which are new and 4 of which were previously authorized. Among the added projects, authorization was given to the North East Texas Regional Mobility Authority ("NET RMA"), Camino Real Regional Mobility Authority ("CRRMA"), Alamo Regional Mobility Authority ("ARMA"), and Hidalgo County Regional Mobility Authority ("HCRMA") as noted below.

The projects authorized to be developed through CDAs under SB 1730 are:

TxDOT Projects

- State Highway 99 (Grand Parkway)
- IH 35E Managed Lanes (from IH 635 to US 380)
- IH 35W (from IH 30 to SH 114)
- SH 183 Managed Lanes (from SH 121 to IH 35E)
- IH 35E/US 67 "Southern Gateway Project" (including IH 35E from 8th Street to IH 20 and US 67 from IH 35E to FM 1382 (Belt Line Road))
- SH 288 (from US 59 to south of SH 6)
- US 290 Managed Lanes (from IH 610 to SH 99)
- IH 820 (from SH 183 to Randol Mill Road)
- SH 114 (from SH 121 to SH 183)
- Loop 12 (from SH 183 to IH 35E)
- Loop 9 (from IH 20 to US 67)
- US 181 Harbor Bridge (between US 181 at Beach Avenue and IH 37)

[5] NTTA and county toll road authorities take the position that they have unrestricted CDA authority.
[6] The TxDOT sunset bill also gave RMAs independent design/build/finance authority and gave TxDOT design/build authority in order to separate those procurement methods from the more controversial CDA process.

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The ***deadline for TxDOT to enter into a CDA*** for the above-referenced projects is ***August 31, 2017***, except for the Grand Parkway Project (no deadline) and SH 183 Managed Lanes Project (August 31, 2015). The deadline for securing environmental clearance (other than for Grand Parkway (no deadline) and SH 183 Managed Lanes Project (August 31, 2015)) for all or the initial scope of a phased CDA project is August 31, 2017.

TxDOT or RMA Projects (RMA noted)

- Loop 1 "Mopac Improvement Project" (from FM 734 to Cesar Chavez) - CTRMA
- US 183 "Bergstrom Expressway" (from Springdale Road to Patton Avenue) - CTRMA
- A project consisting of the Outer Parkway Project (from US 77 to FM 1847) and South Padre Island Second Access Causeway Project (from SH 100 to Park Road 100) - CCRMA
- Loop 49 (from IH 20 to US 69- the "Lindale Relief Route," and from SH 110 to US 259 ("Segments 6 and 7)) - NET RMA
- Loop 375 "Border West Highway Project" (from Race Track Drive to US 54) - CRRMA
- "Northeast Parkway Project" (from Loop 375 east of the Railroad Drive overpass to the Texas-New Mexico border) - CRRMA
- Loop 1604 - ARMA
- Hidalgo County Loop Project - HCRMA
- International Bridge Trade Corridor Project - HCRMA

The ***deadline for securing environmental clearance and for entering into a CDA*** for the above-referenced projects is ***August 31, 2017***. Note that this eliminates the separate environmental clearance and contracting deadlines that were part of the previous legislation.

Other Changes to CDA Provisions

In addition to the changes noted above to the list of authorized CDA projects, SB 1730 made several revisions to the statutes governing CDAs. These include:

- Granting TxDOT ***CDA authority over non-tolled state highway system projects*** authorized by the legislature;
- Granting TxDOT the ability to ***combine 2 or more of its CDA projects*** into 1 CDA; and
- Significantly ***revising the "termination for convenience" requirements*** for a CDA, so that a CDA proposer will be required to submit, as part of the procurement process, a breakdown (in 2 to 5 year intervals, as specified in the request for proposals) ***specifying the price at which their interest in a CDA project may be purchased***.
    - The breakdown must be assigned points and scored during the proposal evaluation process, and the schedule must be incorporated into a final CDA.
    - The required termination for convenience clause of a CDA must allow for the exercise of termination for convenience rights at the lesser of: the stated interval price corresponding to the termination date; or the greater of the fair market of the private interest (as adjusted pursuant to the CDA) or the amount of outstanding debt specified in the CDA (as adjusted pursuant to the CDA).

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Appendix "B"

SB 1792 – Toll Enforcement Remedies
(Effective June 14, 2013)

In February 2013, the Senate Committee on Transportation issued its "Interim Report to the 83rd Legislature" addressing the interim charges previously identified by Lieutenant Governor Dewhurst. Among the charges was a directive to study the potential for toll collection and enforcement tools to pursue toll scofflaws for toll authorities throughout the state. The Interim Report included a finding that: "There is little debate that toll entities need additional enforcement tools. Existing mechanisms are highly ineffective and do little to deter bad behavior."[7]

Among the reasons given for the finding contained in the Interim Report were the potential difficulty toll authorities may experience in accessing the capital markets,[8] the need for a more efficient process that will serve as a more effective deterrent to toll violators, and the significant volume of toll violators on existing systems. (NTTA reported more than $370 million in accumulated unpaid tolls and fees as of November 2012, and TxDOT reported a backlog of 374,000 cases seeking enforcement of toll violations.)[9]

As a result, multiple bills were filed addressing enhanced toll enforcement remedies. These included HB 3048 (TxDOT, RMAs, NTTA) by Representative Phillips; SB 1792 (initially RMAs) & SB 1793 (TxDOT) by Senator Watson; and SB 1329 (NTTA) by Senator Paxton. While bills were filed for different types of toll entities, it was the clear directive of the sponsors to create a single bill that would encompass toll enforcement remedies for all types of toll authorities, with a goal of increased consistency throughout the state. Senator Watson and Representative Phillips took the lead in this effort, and the vehicle was SB 1792.

SB 1792 contains the following features:

- Authorization for toll authorities to ***publish the names of registered owners (or lessees) of nonpaying vehicles*** who are liable for past due and unpaid tolls or administrative fees (note that there is no threshold level required before publication may occur);
- Authorization for toll authorities to enter into agreements providing for ***toll violation payment plans*** (with toll violators who are unable to satisfy accrued obligations in a single payment) and to file suit in district court to enforce the agreements;

[7] The Senate Transportation Committee, Interim Report to the 83rd Legislature at 21 (Feb. 2013), available at http://www.senate.state.tx.us/75r/senate/commit/c640/c640.InterimReport82.pdf.
[8] Investors and rating agencies consider the ability of toll entities to collect tolls on projects in assessing creditworthiness. *Id* at 15.
[9] *Id.*

- A ***process for determining "habitual violators"*** − generally a registered owner of a vehicle who was issued ***at least 2 written notices*** of nonpayment that contained an aggregate of 100 or more events of nonpayment within 1 year (subject to defenses of theft of the vehicle or a lease to a third party);
  - The 2 written notices must have contained a ***warning that the failure to pay*** could result in the exercise of ***"habitual violator remedies"***.
  - After a person fails to pay in response to the 2 written notices, a toll authority shall notify the person that they have been determined to be a habitual violator, and that they have ***30 days in which to request a hearing*** to contest that determination. If a hearing is requested:
    - the ***hearing will be before a justice of the peace*** in a county where at least 25% of the events of nonpayment occurred (note that a justice of the peace court is authorized to adopt administrative hearings processes to expedite these types of hearings);
    - the ***toll authority must pay a $100 filing fee***; the fee is subject to reimbursement to the toll authority by the habitual violator if the toll authority prevails (note that responsibility for initial payment of the filing fee by the toll authority was the subject of clarification through legislative intent on the Senate floor[10]);
    - the toll authority must show, by a preponderance of the evidence, that (1) the registered owner was issued at least 2 written notices of 100 or more events of nonpayment within a year (excluding those due to theft or leasing of the vehicle); and (2) that the total amount due for tolls and fees was not paid in full and remains not fully paid as of the date of the hearing; and
    - an ***adverse finding*** (confirming that a person is a habitual violator) ***is appealable***.
  - Failure to request a hearing, or the failure to appear for a hearing after one was requested, will result in the toll authority's determination of habitual violator status being deemed final and not appealable).

- Identification of ***"habitual violator remedies"***. Once a habitual violator determination has been made (and confirmed through a hearing, if requested), a toll authority may:
  - report the habitual violator determination to a county assessor collector or to the Texas Department of Motor Vehicles and ***request that the vehicle registration (or renewal) be refused*** (compliance with the request is not mandatory); and
  - adopt an ***order*** (by action of its governing body) ***prohibiting the operation of a vehicle on a toll project*** of the authority and mail notice of the order to the habitual violator.
    - A person commits an offense (***Class C misdemeanor***) if they operate a vehicle on a toll project in violation of the order of prohibition.
    - A person may have their ***vehicle impounded*** if the vehicle was previously operated on a toll project in violation of an order of prohibition and personal notice was given to the registered owner of the vehicle of the toll authority's intent to have the vehicle impounded for a second or subsequent violation of the order of prohibition at (i) the previous hearing (if any) on habitual violator status; (ii) at a previous traffic stop involving a violation of the order of prohibition; or (iii) by personal service. Prior to release of a vehicle all

[10] Senate Journal, 83d Reg. Sess., at 2002-05 (Tex. 2013).

impoundment, towing and storage fees must be paid, and the toll authority must make a determination that unpaid tolls and fees have been paid or have been otherwise addressed.

- A process for addressing ***nonresident violators***. A toll authority may serve written notice of nonpayment in person to an owner of a vehicle not registered in Texas. This can include a ***notice served by an employee of a governmental entity operating an international bridge*** as a vehicle seeks to enter or leave the state.
    - The notice must include a warning that failure to pay may result in the exercise of habitual violator remedies.
    - Each owner who receives a notice of nonpayment and fails to timely pay the toll and fee commits an offense (each failure to pay is a separate offense − a misdemeanor punishable by a fine not to exceed $250).
        - A toll authority may seek to exercise habitual violator remedies (including vehicle impoundment) against a nonresident vehicle if: (i) the person is served with 2 or more notices of nonpayment and the amounts remain unpaid; and (ii) notice of intent to seek habitual violator remedies was served on the person in the same manner as allowed for a notice of nonpayment.
        - A nonresident who receives a notice of intent to seek habitual violator remedies may request a hearing in the same manner as provided for a resident habitual violator.
        - A justice of the peace conducting a hearing against a nonresident violator must find that the person was served with 2 or more notices of nonpayment and the amounts remain unpaid, and that a notice of intent to seek habitual violator remedies was served.

- The provisions of SB 1792 are ***not applicable to county toll road authorities***, and are ***optional*** (and cumulative of other remedies available) ***for all other toll authorities***.

It was a difficult task to garner consensus among all of the affected toll authorities and other parties for a topic as potentially controversial as toll collection and enforcement. Senator Watson, Representative Phillips, and their respective staffs are to be commended for their efforts, as SB 1792 was passed easily (Senate vote: 28-1; House vote: 140-2). SB 1792 makes meaningful improvements to toll enforcement remedies and should address the issues identified in the Senate Interim Committee Report.

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Appendix "C"

Transportation Reinvestment Zones

SB 1110 – Municipal/County TRZs
SB 971 – Port Authority TRZs
SB 1747 – County Energy TRZs
HB 2300 – County Energy TRZs

Transportation reinvestment zones ("TRZs") are a concept that RMAs and others have championed for the past several legislative sessions. TRZs are an innovative tool for generating transportation project funding by capturing and leveraging the economic growth that results from a transportation project. Development of new projects, and the expansion or improvement of existing projects, often spurs increased economic development in areas around the project. This can be in the form of construction of new homes and businesses in previously undeveloped areas or through the redevelopment of existing areas which, as a result of a project, experience improved access to homes and businesses. As development or redevelopment occurs, property values in those areas increase. A TRZ allows a city or county to designate an area around a project and to capture the increase in ad valorem tax revenues resulting from the increase in property values for use in connection with the financing of the project. In this manner the economic growth attributable to the project is used to support the funding of the project.

It is important to note that a TRZ does not result in a tax increase- it is merely a specific dedication of the incremental tax revenues generated within the boundaries of a TRZ. A TRZ operates in a similar manner to a tax increment reinvestment zone ("TIRZ") and the related tax increment financing that is often used by local governments to support economic development within an area. However a TRZ is focused specifically on transportation project funding, and the process for forming and administering a TRZ is much simpler than for a TIRZ.

TRZs were first authorized in 2007. However, they were limited in that their use was specifically tied to projects receiving pass-through financing from TxDOT. Fortunately that limitation was eliminated as a result of legislation passed during the 82nd Regular Session. HB 563 (Representative Pickett/Senator Nichols) "de-coupled" TRZs that capture ad valorem tax increases from pass-through projects and provided for the formation of a TRZ for any transportation project identified in Section 370.003 of the Transportation Code.[11] Many other beneficial changes were made regarding procedure and implementation, and HB 563 also introduced the concept of a sales tax TRZ (capturing incremental sales tax in an area around a project instead of ad valorem taxes), although the sales tax TRZ remained linked to the pass-through program. Several TRZs have now been formed around the state (Locke Lord has been involved in most of those) and are supporting the development of transportation projects.

[11] Transportation projects authorized under Transportation Code, Sec. 370.003 include: tolled and nontolled roads, passenger or freight rail facilities, certain airports, pedestrian or bicycle facilities, intermodal hubs, parking garages, transit systems, bridges, certain border crossing inspection facilities, and ferries.

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The TRZ concept has proven to be popular. Several bills were filed this session addressing the existing TRZ legislation and making the TRZ model available for other projects. Those bills which passed are described below.

SB 1110 (Effective September 1, 2013)

SB 1110 (Senator Nichols/Representative Pickett) made additional improvements to the TRZ statutes. Specifically, SB 1110 included the following:

- Provides for the formation of a ***TRZ in an adjacent jurisdiction*** to support a project ***located outside of the TRZ boundaries*** (provided the project serves a public purpose and will benefit persons and property within the zone);
- ***De-couples*** the use of ***sales tax TRZs*** from the pass-through program (so that a sales tax TRZ may be used for any transportation project as defined in Sec. 370.003);
- Clarifies that a TRZ may be formed for ***"one or more" projects"*** within a zone;
- Clarifies language regarding the commitment of TRZ revenues to satisfy contractual obligations; and
- Provides for increased consistency between municipal and county created TRZs.

The ability to create a TRZ to support a project in an adjacent area is particularly significant and recognizes the reality that the benefits of a project do not stop at a city limit or county line. This should facilitate a more regional approach to project planning and development, and should also enhance the ability to generate local funding for a project with regional impacts.

SB 971 (Effective September 1, 2013)

The TRZ statutes described above authorize a city or county to form a TRZ. Those statutes do not refer to port authorities (which have taxing authority) or port improvements (although port improvements were added to the list of transportation projects in Sec. 370.003 by virtue of SB 1489 described in Appendix "D"). SB 971 (Senator Williams/ Representative Deshotel) amends the TRZ statutes by ***authorizing port authorities and navigation districts to form a TRZ*** after finding that the area within the TRZ is unproductive and underdeveloped and that forming the TRZ would ***"improve the security, movement, and intermodal transportation of cargo or passengers in commerce and trade"***. The TRZ revenue would be generated from the incremental ad valorem taxes collected by the port pursuant to the statutes. As a result, port facility improvements can be supported by a port-created TRZ and by municipal and/or county TRZs.

Procedurally, the formation and administration of a TRZ under this legislation is virtually identical to the existing TRZ process available for cities and counties (without some of the improvements made by SB 1110). In addition, SB 971 (in a similar fashion to, but different statutory location from, SB 1489) adds port security, transportation, or facility projects to the list of projects that can be supported by a city or county TRZ.

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SB 1747 (Effective September 1, 2013)

Much attention was given during the legislative session to the rapidly deteriorating conditions of roads in the areas of the state with shale reserves and active hydraulic fracturing activity caused by the oversized vehicles and overweight loads needed to pursue energy development. To address this issue HB 1025 (the "supplemental appropriations" bill) included $450 million to be used to fund repair and maintenance of roads and bridges in these areas. Of that total, $225 million is to be used by TxDOT for roads on the state highway system, and $225 million is to be transferred to a "Transportation Infrastructure Fund" for the purpose of assisting counties to fund the repair and maintenance of their roads damaged by energy-related activity.

SB 1747 is the implementing vehicle to this funding. Some of the features of SB 1747 are:

- Provides for the establishment of a ***"Transportation Infrastructure Fund"*** ("TIF"), to be administered by TxDOT;
- The purpose of the TIF is to make grants to counties for transportation infrastructure projects located in areas of the state affected by oil and gas production;
- ***Eligibility*** to receive a grant from the TIF ***is contingent on***:
  - a county ***establishing a "County Energy Transportation Reinvestment Zone"*** ("CETRZ");
  - ***creation*** by the county ***of an advisory board*** to advise the county on the establishment and administration of the CETRZ. The advisory board must be comprised of the following (appointed by the county judge and approved by the commissioners court):
    - up to 3 oil and gas company representatives who "perform company activities in the area and are local taxpayers"; and
    - 2 public members
  - a county providing ***matching funds*** of at least 20% of the grant (10% for economically disadvantaged counties):
    - county funds spent for road and bridge purposes may be counted as matching funds.
    - the tax increment collected in a CETRZ may serve as matching funds
- Grants from the TIF distributed during a fiscal year must be allocated among counties as follows:
  - 50% based on well completions (the ratio of well completions in the county to the total number, as determined by the Railroad Commission);
  - 20% based on weight tolerance permits (the ratio of weight tolerance permits issued in the preceding fiscal year for the county to the total number of permits issued in the state as determined by DMV);
  - 20% based on oil and gas production taxes (the ratio of taxes collected in the preceding fiscal year in the county to the total amount of taxes collected in the state for that fiscal year, as determined by the Comptroller);
  - 10% based on the oil and gas waste (the ratio of the volume of oil and gas waste injected in the preceding fiscal year in the county to the total volume of such waste injected in the state as determined by the Railroad Commission);
- 5% of grant funds received may be used for administrative costs (not to exceed $250,000);
- Various reporting requirements are imposed on grant recipients.

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As noted above, to be eligible for a TIF grant a county must have formed a CETRZ. The process for forming a CETRZ is identical in some respects, and similar in others, to the process for forming a municipal or county TRZ under existing statutes. There are, however, some differences in administration, including:

- A CETRZ requires a finding that an area is "affected because of oil and gas exploration and production activities";
- A CETRZ may be ***jointly administered with a contiguous CETRZ*** formed in an adjoining county for the same project (or projects);
- ***All of the tax increment*** collected in a CETRZ must be pledged to transportation infrastructure projects (in contrast to "all or a portion" of the increment in other TRZs);
- A CETRZ has a ***life of 10 years***, with a possible extension of up to 5 years. Any funds remaining at termination must be transferred to the county road and bridge fund; and
- The ***tax increment*** collected in a CETRZ ***may not be pledged to secure bond debt***, but it may be ***transferred to a road utility district*** which can issue bond and pledge the tax increment.[12]

TxDOT is required to adopt rules for the implementation of the grant program. Those rules will likely be proposed in the summer of 2013 so that they can be adopted shortly after the anticipated September 1, 2013 effective date of SB 1747.

HB 2300 (Effective September 1, 2013)

HB 2300 is, essentially, the House version of SB 1747, but was passed before the enactment of HB 1025 and the establishment of the TIF. The bulk of HB 2300 was the addition of Sections 222.1071 and 222.1072 (relating to the formation of CETRZs) to the Transportation Code, and the provisions generally tracked those of SB 1747 (except for the changes in SB 1747 necessary to incorporate the TIF). In order to avoid potential conflicts SB 1747 contains a provision which explicitly states that the amendment adding Sections 222.1071 and 222.1072 prevails over the HB 2300 and that Section 1 of HB 2300 has no effect.

That means that only Sections 2 and 3 of HB 2300 are effective, and they are largely duplicative (or are a subset) of what is contained in SB 1747. The bottom line is that although enacted, HB 2300 has little or no significance.

[12] It is unclear whether the pledge of a county-generated tax increment by a road utility district will satisfy constitutional issues previously raised by the Office of the Attorney General (see: Tex. Att'y Gen. Op. No. GA-0980 (2012); "2008 Economic Development Laws Handbook for Texas Cities" (Office of the Texas Attorney General), p. 117 (fn. 551)

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Appendix "D"

SB 1489 – Regional Mobility Authority Operations
(Effective May 18, 2013)

As RMAs have grown and RMA operations have expanded, issues have been raised as to the permissible geographic scope of those operations. RMAs have contracted with each other to facilitate a more efficient and economic approach to toll collection and transaction processing; RMAs have been asked by neighboring jurisdictions to develop projects outside of the RMA's boundaries; and in one instance an RMA operates a traveler motorist program which extends beyond the borders of the two counties which formed the RMA.[13] All of these efforts have raised questions as to the authority of an RMA to "operate" outside of its boundaries, and have highlighted certain ambiguities in statutory provisions which have been barriers to achieving the potential benefits of RMAs partnering with other governmental entities.

SB 1489, by Senator Watson and Representative Phillips, serves to resolve those issues. SB 1489 makes clear that ***an RMA may enter into an agreement*** (including an interlocal agreement) ***with another governmental entity*** to acquire, plan, design, construct maintain, repair, or operate a project ***on behalf of that entity*** if:

- the ***project is located in the RMA's jurisdiction or in a county adjacent*** to the RMA;
- ***the project is*** being acquired, planned constructed, designed, operated, repaired, or ***maintained on behalf of TxDOT or another tolling entity*** (including another RMA); ***or***
- ***TxDOT approves*** of the acquisition, planning, construction, design, operation, repair, or maintenance ***of a project*** by an RMA that is ***not in its jurisdiction or an adjacent county and is not a project of another toll entity.***

In short, SB 1489 allows an RMA to: operate a project of another toll entity anywhere in the state; partner with local governments within their jurisdiction and within a neighboring county; and operate a project in another area pursuant to an agreement with another governmental entity and with the approval of TxDOT. As a result of these changes, the former statutory requirement that an RMA give an adjacent county the chance to join the RMA if an RMA project was going to extend into the county has been eliminated, as all of the RMA's actions outside of its boundaries will have to be the subject of agreements with the other governmental entity (including an adjacent county into which a project may be extended).

SB 1489 also makes some additions to the definition of transportation projects that an RMA may pursue. The additions include:

- bridges (to clarify that non-tolled bridges are a permissible RMA project);

[13] CTRMA "Highway Emergency Response Operator " ("HERO") Program covering 55 miles of IH 35 and 12 miles of US 183; see http://www.mobilityauthority.com/information/hero-program.php

- border safety inspection stations located within 50 miles of an international border (to address a potential problem with trucks crossing into the US from Mexico but diverting away from international bridges in El Paso to a border crossing in New Mexico to avoid inspections conducted at Texas border crossings); and
- port security, transportation, or facility project (to allow RMAs to be a potential tool for developing port improvements and expansions, which is important as ports are facing increasing needs with the Panama Canal expansion).

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Appendix "E"

SB – 466 Environmental Reviews of Federalized Projects
(Effective May 18, 2013)

One of the most significant causes of delay in the development process for transportation projects is securing the necessary environmental approval. Most projects of any significant size are required to comply with a federally prescribed process under the National Environmental Policy Act of 1969 ("NEPA"), as administered by the US Department of Transportation (through the Federal Highway Administration ("FHWA")). Federal environmental approvals are typically required because a project receives some federal funding or because there is some other federal nexus that triggers a review under NEPA.

The process required under NEPA can be time-consuming and cumbersome, in part because of limits on federal resources available to devote to the projects. However, some hope for relief was made possible by provisions of the "Moving Ahead for Progress in the 21st Century Act" ("MAP 21") - the most recent federal highway funding reauthorization bill. MAP 21 includes a provision that, in effect, allows a state to step into the role of the FHWA in conducting environmental reviews.[14] As administered by a state the process would still need to follow all of the same federal regulations and requirements, but allowing states to assume the FHWA role could significantly reduce the time required to complete the environmental review process.

In order to implement the MAP 21 provisions states need to have adopted legislation providing for the assumption of certain duties and responsibilities. This was done in SB 466 by Senator Hinojosa/Representative Harper–Brown.

SB 466 provides that:

- ***TxDOT may assume*** the role of the US Department of Transportation with respect to ***duties under NEPA*** and other environmental laws;
- TxDOT may enter into agreements with the federal government regarding designation of categorical exclusions from federal requirements related to environmental assessments and environmental impact statements, and related to project delivery programs; and
- The ***sovereign immunity of the state*** from suit and liability in federal court ***is waived*** as it relates to ***claims in administering the environmental review process.***

The last referenced provision above is necessary to assure that the state can be sued, in the same manner that the federal government could be, for alleged violations of NEPA in conducting or granting environmental approvals. In order to fully step into the shoes of the federal government those seeking to challenge an action of the state, acting under the provisions of SB 466, must have the same remedies as they would against the federal government performing the same functions the state has assumed.

[14] 23 USC §327

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Appendix "F"

Transportation Funding Bills

Set forth below is a description of bills which did pass (addressing state and local funding), and a description of several of the funding bills which did not pass. There were many others which were filed but saw little movement – those described below are representative of the various concepts advanced by some legislators.

Adopted Statewide Transportation Funding Legislation (Regular Session)

- HB 1025 – Representative Pitts/Senator Williams (Effective June 17, 2013 (excluding items subject to line-item vetoes)) - This is the supplemental appropriations bill which was negotiated in the final days of the session. The bill includes $225 million for TxDOT for maintenance and safety, including repairs to roadways and bridges ***within the state highway system*** for damage caused by oversize vehicles or overweight loads used in the development and production of energy, and $225 million for ***county transportation projects***, including projects of CETRZs. See Appendix "C" (and discussion of SB 1747) for details of implementation and requirements for use of the funds by counties.

- SB 1 – Senator Williams/Representative Pitts (Effective September 1, 2013 (excluding items subject to line-item vetoes)) – This is the overall budget for the state. In addition to TxDOT's general budget provisions, the bill provides for a swap of $400 million of general revenue dollars to the State Highway Fund ("SHF") (thereby reducing the "diversion" of SHF dollars).

Adopted Statewide Transportation Funding Legislation (Special Sessions)

- SJR 1 – Senator Nichols/ Representative Pickett (Effective if approved by the voters in November, 2014) - This provides that oil and gas severance taxes above 1987 baseline levels and which would otherwise be directed to the Economic Stabilization Fund ("ESF", also known as the "Rainy Day Fund") will be split between the ESF and the SHF, provided that a certain minimum amount is maintained in the ESF before any transfers to the SHF can take place. This does not impose a floor on what must be maintained in the ESF, but rather requires the establishment of a trigger point for when funds may be directed to the SHF. The process for establishing that trigger point (or "sufficient balance"), is set forth in HB 1 discussed below. The amounts directed to the SHF under this provision are to be used *only* for the construction, maintenance, and right-of-way acquisition for public roadways (i.e., not rail or transit) other than toll roads.

- HB 1 – Representative Pickett/ Senator Nichols (Effective only if SJR 1 is approved by the voters in November 2014) - This is the implementing legislation for SJR 1, and contains a number of procedural and other requirements. Note that it requires some actions to be taken over the next several months, notwithstanding that the legislation is not effective until SJR 1 is approved by the voters. Features of HB 1 include:

  - Establishment of a Select Committee (5 members of each of the House and Senate) that will determine, before each legislative session begins, a "sufficient balance" for what should be

maintained in the ESF before funds may be directed to the SHF. The Select Committee determination must be finally approved by a majority of each chamber within 45 days of the beginning of a session, and it can be altered or amended by a vote of each chamber. However, if it is not amended, and even if not approved by a majority, the recommendation of the Select Committee will be used. In other words, the recommendation of the Select Committee is the default position, and will be used unless there is agreement in both the House and Senate to use a different number. HB 1 identifies a number of factors that the Select Committee must consider when establishing the sufficient balance amount. The provisions for the Select Committee sunset after 10 years.

- TxDOT must "identity and implement $100 million in savings and efficiencies" with respect to funding for the biennium ending August 31, 2015. These savings must be used to pay down principal and interest on SHF bonds, and the savings cannot come from reductions in amounts available for transportation projects.

- Ports may utilize money from the Texas Mobility Fund for port security, improvement, and other projects.

- Each of the House and Senate are required to establish a "Select Committee on Transportation Funding, Expenditures and Finance". The committees may meet separately or jointly, and are directed to study and make recommendations related to a variety of issues concerning transportation funding. They are to jointly adopt written recommendations and provide a written report by November 1, 2014. Presumably this will serve as guidance to the 84th Legislature on how to address funding on a more comprehensive basis.

For those of you interested in political theater, set forth below is a summary of how each of the First, Second and Third Special Sessions evolved. It is somewhat instructive of how conditions over the use of money that would otherwise go to the ESF funding were developed.

- <u>First Special Session</u>

Soon after adjourning *sine die* on May 27, 2013, Governor Perry called the Legislature back for the First Called Session of the 83rd Legislature (the "First Special Session"). The initial purpose of the First Special Session was to ratify and adopt certain judicially-developed interim redistricting maps. On June 10, 2013, the Governor added transportation infrastructure funding to the agenda, and the very next day he added a juvenile criminal justice issue and regulation of abortion procedures, providers and facilities to the scope of the First Special Session.

The funding option that advanced during the First Special Session was a proposed constitutional amendment ("SJR 2") to authorize a portion of oil and gas severance tax revenues that would otherwise be deposited into the ESF to be directed to the SHF. This approach was predicted to generate about $900 million per year-- nowhere near the $4 billion per year in TxDOT needs, but enough to keep some planning and other work ongoing in hopes of finding a broader funding solution during the next session. There was widespread acknowledgement (including statements by Senator Nichols and Representative Phillips, the Senate and House sponsors of SJR 2) that SJR 2 was not a permanent solution to the state's

transportation funding needs, and several legislators expressed frustration with what was perceived as only a partial solution (and one that might confuse the public into thinking that nothing else would be needed). SJR 2 required a 2/3 vote of both the House and the Senate since it was proposing to amend the Constitution, and that amendment would ultimately have to be approved by the voters in a November, 2013 election.

On June 18, 2013, the Senate easily passed SJR 2 (by a 30-0 vote), but not before the joint resolution was amended to assure that there would be a minimum of $6 billion in the ESF before any money went to transportation. The full House did not consider SJR 2 until June 24, 2013 (the day before the last day of the First Special Session). The joint resolution was amended on the House floor to replace the $6 billion ESF trigger point with a formula approach (i.e., the fund had to have a balance of 1/3 of the maximum authorized amount before directing money to transportation), and to provide that the funds could not be used for toll roads. SJR 2, as amended, passed the full House by a 105- 28 vote- just 5 votes more than the 100 votes needed to pass a proposed constitutional amendment.

Because the House amended the SJR it was required to be sent back to the Senate for concurrence with the amendments. On the last day of the First Special Session (June 25, 2013) the Lieutenant Governor elected not to bring SJR 2 up for a vote on concurrence prior to consideration of SB 5-- the highly controversial abortion regulation bill. The attempted filibuster and chaotic end to the First Special Session which killed SB 5 also doomed SJR 2, as there was no vote on SJR 2 before the clock expired on the First Special Session.

- Second Special Session

The Governor wasted little time in calling the Second Called Session of the 83rd Legislature (the "Second Special Session"). The Second Special Session began on July 1, 2013, and included the unfinished business from the First Special Session—regulation of abortions, juvenile criminal justice, and transportation funding. The first two issues were disposed of fairly quickly, leaving transportation funding as the sole issue to consider during much of the Second Special Session.

The version of SJR 2 as passed by the House during the First Special Session was filed as SJR 1 by Senator Nichols and HJR 1 by Representative Phillips in the Second Special Session. However, rather than simply picking up where they left off and quickly passing SJR 1/HJR 1, the House, in particular, displayed little sense of urgency, with some members expressing reservations over the plan that had appeared headed for approval and others expressing a desire to look for a more comprehensive solution. The sentiment that the proposal was only a partial solution to a much bigger problem that was voiced during the First Special Session seemed to grow, and that, coupled with concerns over appropriate uses of ESF proceeds, appeared to undermine the progress that had been made during the First Special Session.

The House, with the benefit of further time to reflect, decided to take a different course. They ignored SJR 1/HJR 1, and instead passed HJR 2 (by Representative Pickett) which would have ended the constitutional dedication of 1/4 of the gas tax to education (so that all gas tax money would go to support roads- a "truth in taxation" concept as it was described by Representative Pickett), and instead direct an amount of oil and gas severance taxes to education that would equal what would have been directed to education from the gas tax. The remainder of the severance taxes would be allocated 75% to the ESF (up

to the maximum) and 25% to general revenue. HB 16 (by Representative Pickett) was the implementing legislation for the HJR 2 proposal, and it also included an allocation of vehicle sales tax to transportation (1/3 of the amount above $3.6 billion). The House passed HJR 2 with 108 votes on 3rd reading (it only received 92 votes on second reading)- 8 votes more than the required 100 votes for a constitutional amendment.

HJR 2 was sent to the Senate where it received a chilly reception. Senator Nichols amended HJR 2 on the Senate floor by replacing it entirely with the text of SJR 1, thereby gutting the legislation. That set the stage for discussions between an informal working group appointed by Lt. Gov. Dewhurst and representatives of the House, and ultimately by a conference committee.

After tenuous discussions among the conference committee members as the end of the Second Special Session was approaching, the conference committee reached an agreement. The conference committee report for HJR 2 would have provided that the portion of oil and gas tax revenues currently transferred to the ESF would be split 50/50 between the SHF and the ESF (after a minimum ESF balance had accumulated). To address certain members' concern that there needed to be a floor set for the ESF, HB 16 included a requirement for the Legislative Budget Board ("LBB") to designate a minimum amount that would have to be in the ESF before revenues would be transferred into the SHF.

On July 29, 2013, the day before the end of the Second Special Session, the House and Senate both convened to vote on the conference committee reports for HJR 2 and HB 16. Both chambers passed HB 16, but the House failed to pass HJR 2 with the required 100 votes (there were 84 votes in favor with 40 against and 23 members absent). The provisions governing the LBB's baseline designation in HB 16 were contingent on the passage of HJR 2 so even though HB 16 passed, those provisions failed to take effect.

Following the failure of HJR 2 to pass, Speaker Joe Straus was critical of the measure and skeptical that another special session would accomplish anything. He issued a press release stating that:

"Diverting a capped amount of money from the Rainy Day fund to repair roads is much like using a Band-Aid to cover a pothole; in the end, you still have a pothole and you've spent a lot of money without solving the fundamental problem. Legislators know that Texas needs a much more comprehensive approach to funding our growing state's growing transportation needs, and another 30-day special session will not change that.[15]"

- Third Special Session

Ignoring the Speaker's skepticism, Governor Perry again wasted no time, and on July 30, 2013 (within hours of the end of the Second Special Session) he called the Third Called Session of the 83rd Legislature (the "Third Special Session") for the sole purpose of addressing transportation funding. On the same day the call was issued the Senate filed, referred to committee, voted out from committee, and passed SJR 1 and SB 1. Those measures were identical to the negotiated conference committee reports on HJR 2 and HB 16 from the Second Special Session.

[15] Press Release; Speaker Joe Straus, July 29, 2013, http://www.house.state.tx.us/member/press-releases/.

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Speaker Strauss appointed a Select Committee on Transportation Funding to handle the transportation finance bills filed in the House. The Select Committee met on August 1, 2013, and voted out HJR 1 and HB 1, both by Representative Pickett. Those measures were generally similar (in net economic effect) to his legislation in the Second Special Session, but without the change to the education diversion and without the vehicle sales tax transfer. Also, a provision was added that would require TxDOT to find $100 million in "savings and efficiencies" over the 2014-15 biennium and dedicate that money toward paying down debt service. And rather than have the LBB determine the minimum balance, or floor, for the ESF below which revenue could not be diverted to transportation, a select joint committee of five House members and five senators would make that determination.

Ultimately both chambers approved SJR 1 and HB 1 (SJR 1 was approved in the House by a vote of 106-20), with the provisions described in more detail above. They were able to adjourn less than one week after the Third Special Session began. Senator Nichols, Representative Pickett, and Representative Phillips all deserve great credit for their perseverance in pursuing, and ultimately securing passage of, initiatives that could help to address the challenge of funding the state's transportation infrastructure needs. It will now be up to the voters to decide if the approach is an acceptable one.

Adopted Local Transportation Funding Legislation

The following bills all amended Section 502.402, Transportation Code, which permits the Commissioners Courts of certain bracketed counties (currently Hidalgo and Cameron) to implement an optional $10 vehicle registration fee. By statute the optional fee is sent to the regional mobility authority of the county to fund long-term transportation projects.

- HB 1198 – Representative Raymond/Senator Zaffirini (Effective September 1, 2013) – Amends the population requirements for a county that is eligible to impose the optional county vehicle registration fee to include El Paso and Webb Counties. Originally, the bill only added Webb County but Senator Rodriguez amended it on the Senate floor to include El Paso County. The amendment also clarified that the revenue could be sent to the RMA "located in the county", rather than "of the county", since the CRRMA is a municipal RMA.

- HB 1573 – Representative McClendon/Senator Van de Putte (Effective September 1, 2013) – Amends the population requirements for a county that is eligible to impose the optional county vehicle registration fee to include a county that has a population of more than 1.5 million that is coterminous with a RMA (Bexar County). At the request of Senator Campbell (and with the support of Senator Nichols), a restriction was placed on the use of the fee so that is can only be used to fund long-term transportation projects consistent with the purposes permitted for the use of the motor fuels tax under the Texas Constitution. The restriction will apply to ***all*** counties operating under this section.

- HB 3126 – Representative Lucio/Senator Lucio (Effective September 1, 2013) – Permits Cameron County to increase the amount of the optional county vehicle registration fee to not more than $20, *subject to* approval of the increase by a referendum submitted to the voters. The fee imposed by the other counties operating under this section remains at the current amount of $10.

The collective result of the bills authorizing local option vehicle registration fees is that Bexar, Webb, and El Paso Counties are added to the list of counties previously authorized to adopt the $10 fee (Cameron and Hidalgo), and Cameron County can increase its fee to $20, but only pursuant to a referendum. Note also that the reference to a constitutional limitation on the use of the funds incorporated in HB 1573 will apply to the statute in its entirety. Therefore, the limitation, which has the effect of ***restricting the use of funds to acquiring right-of-way and constructing, maintaining, and policing public roadways***,[16] will apply to all counties. As noted above, discussion in the Senate Transportation Committee when this provision was included indicated that it was intended to assure that the funds were not used for rail or streetcar projects. It is unclear whether the restriction is applicable to previously authorized fees.

Failed Transportation Funding Legislation[17]

- SB 1632 – Senator Hinojosa/HB 3665 – Representative Darby – These bills would have amended various aspects of the state infrastructure bank related to a revolving fund and providing for credit enhancements. The hope of supporters was to have the credit enhancement supported by an allocation of a portion of the ESF. There was significant opposition to these bills in both the House and the Senate. Senator Nichols publically expressed his concern with the credit enhancement portion of the bill while many conservatives in the House saw the bill as a means for creating more debt. In a last minute push, SB 1632 was voted out of the Senate Transportation Committee, without the credit enhancement language, but was ultimately never called up on the Senate floor before the deadline.

- HB 782 – Representative Phillips/SB 287 – Senator Nichols – These bills would have provided for the reallocation of motor vehicle sales tax revenue from the general revenue fund to the state highway fund. Beginning in 2015, the allocation would equal 10% of the tax revenue collected for that year and would increase by 10% on an annual basis until 2024 when the allocation would be 100%. These funds could only be used for the purposes authorized for use of the motor fuels tax under the Texas Constitution or to repay the principal and interest on TxDOT general obligation bonds (Prop 12 bonds). HB 782 never received a hearing in the House Appropriations Committee while SB 287 did receive a hearing in Senate Finance but was left pending without ever receiving a vote.

- HB 2316 – Representative Pickett – The bill would have provided for the imposition of an additional $50 fee at the time of application for registration or renewal of registration of a motor vehicle that would be deposited into the Texas Mobility Fund.

- SB 1790 – Senator Watson – The bill would have provided for a $50 increase to the registration fee for a motor vehicle to be used to fund right-of-way acquisition, feasibility studies, project planning, engineering, construction, and reconstruction. TxDOT would have been authorized to issue bonds and other public securities secured by a pledge of and payable from revenue.

[16] TEX. CONST. art. VIII, § 7-a.
[17] With the exception of SB 1632 and HB 3665, these bills were either never heard in committee or received a hearing but were never reported out of committee.

- HB 1309 – Representative Guillen and HB 3836 by Rep Harper-Brown – These bills would have established a vehicle miles traveled fee.

- HB 3363 – Representative Callegari – The bill, also referred to as the "Century Bonds bill", would have permitted TxDOT to issue up to $3 billion in general obligation bonds, subject to passage of the accompanying constitutional amendment (HJR 139), to pay all or part of the costs of constructing, reconstructing, acquiring, and expanding state highways, including any necessary design and acquisition of rights-of-way; to provide participation by the state in the payment of part of the costs of constructing and providing publicly owned toll roads and other publicly owned transportation projects; and certain costs related to administering and issuing the bonds. They were referred to as Century Bonds because they could have had maturities of up to 100 years.

- SJR 47 – Senator Eltife – This joint resolution proposed a constitutional amendment that would increase the state sales tax by one-half of one percent more than the rates prescribed by general law to be used to repay the principal of and interest on general obligation bonds issued by or on behalf of TxDOT on or before January 1, 2013, or the principal of and interest on any refunding bonds issued to repay those bonds.

Numerous bills were filed at the beginning of session in response to Governor Perry's call his State of the State address for an end to diversions. To a limited degree the issue was addressed in SJR 1. Some of the stand-alone bills and resolutions filed to address the issue (but saw little movement) included SJR 25/SB 309 (Senator Paxton), SJR 31 (Senator Davis), SJR 46 (Senator Lucio), HJR 22 (Representative Pickett), HJR 29/HB 106 (Representative Larson), HJR 95/HB 1627 (Harper-Brown), and HJR 136/HB 3157 (Representative Harless).

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Appendix "G"

Other Legislation of Interest

Below is an overview of other transportation-related legislation, some of which passed, some of which did not.

Miscellaneous Enacted Legislation

While all of the major transportation bills which were passed by the Legislature are addressed in detail in the preceding appendices, there were a variety of other bills of interest which passed as well. These include:

HB 2585 – Representative Harper-Brown/Senator Paxton (Effective June 14, 2013) – The bill removes the current expiration date of Sept. 1, 2013 from the provisions stating TxDOT and a utility must share equally the cost of the relocation of a utility facility that is (i) required by the improvement of a nontolled highway to add one or more tolled lanes; (ii) required by the improvement of a nontolled highway that has been converted to a turnpike project or toll project, or (iii) is required by the construction on a new location of a turnpike project or toll project or the expansion of such a turnpike project or toll project. If this bill had not passed, utilities would have paid 100% of the relocation costs on TxDOT toll projects after September 1, 2013. Needless to say the utility companies lobbied hard for this bill. Senator Nichols and Representative Pickett each vocally opposed the bill, with Senator Nichols offering numerous amendments on the Senate floor which were each voted down. The bill ultimately passed by wide margins in both the House and the Senate.

SB 1029 – Senator Campbell/Representative Phillips (Effective June 14, 2013) – As originally filed, this bill would have prevented TxDOT from operating or transferring to another entity *any* nontolled state highway or segment as a toll road. The result would have been a significant limitation on the ability to add tolled capacity in existing corridors. The bill received a hearing in the Senate and was the subject of opposition from RMAs and others, as well as concerns expressed by committee members. The bill was left pending for over a month before it was significantly restructured and voted out. In its final form the bill does little except eliminate the ability to convert a non-tolled road to a tolled road after approval of a commissioners court and a vote of the public. This eliminated an exception to the conversion prohibition which had never been used. The remaining provisions of statute (allowing for the addition of tolled capacity in existing corridors) remain unaffected.

HB 1123 – Representative Herrero/Senator Rodriguez (Effective September 1, 2013) – As originally filed, the bill ***required*** that all toll project entities establish a discount program for electronic toll collection customers, which in turn would have triggered a provision stating that certain veterans must be given discounted or free use of toll projects under the program. The bill received harsh criticism from both members and witnesses when it was heard in the House Defense and Veteran's Affairs Committee who noted that in a session where transportation funding was scarce, there was little support in further reducing the funds that currently exist. In addition, concerns were expressed that this would lead to further requests for discounts or exemptions for additional groups in the future. After several months of negotiations, the bill was significantly amended. As finally passed, it now only amends the types of vehicle registrations which must receive a free or discounted use of toll entity's toll project ***if*** a discount program is created to include vehicles registered with specialty license plates for the Air Force Cross or Distinguished Service Cross, the Army Distinguished Service Cross, the Navy Cross, the Medal of Honor, and recipients of the Purple Heart.

SB 1757 – Senator Uresti/Representative Zedler (Effective June 14, 2013) – The bill creates an offense (Class B misdemeanor) for using, selling, offering to sell, purchasing, or even possessing a license plate flipper device. The device is defined as a mechanical device installed on a vehicle designed to switch between two or more license plates for the purpose of allowing the vehicle operator to change the license plate displayed on the vehicle or to flip the plate so that the numbers are not visible. While primarily an issue for law enforcement, this will also help toll authorities since flippers can be used to evade toll collection. The bill passed unanimously in both the House and the Senate.

SB 276 – Senator Watson/Representative Crownover (Effective June 14, 2013) – The bill permits a rapid transit authority or a coordinated county transportation authority to create a local government corporation ("LGC"). This bill was pushed by a partnership between the Denton County Transportation Authority and the Capital Metropolitan Transportation Authority as the use of a LGC would permit them to offer services to growing areas outside their jurisdictional boundaries. DART had previously secured this authorization.

SB 510 – Senator Nichols/Representative A. Martinez (Effective September 1, 2013) – The bill requires a motorists who sees a TxDOT vehicle on or near a busy roadway, to move over into the next nearest lane to safely pass the vehicle, or if unable to pass, to then slow down to 20 miles below the posted speed limit.

Miscellaneous Failed Legislation

There are a large number of transportation-related bills which did not pass. Below is a description of several which, had they passed, would have had an impact on transportation issues and on entities implementing transportation projects.

SB 449 – Senator Hinojosa/Representative Flynn – As originally filed, the bill would have prohibited a county, municipality, special district, school district, junior college district, or other political subdivisions (including toll authorities) from issuing capital appreciation bonds. The bill was amended in the Senate Intergovernmental Relations Committee to exclude transportation projects from this prohibition. It was passed by the Senate and voted favorably from the House Ways and Means Committee but was never set on the House Calendar.

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SB 1650 – Senator Campbell – The bill would have required a RMA, RTA, and MPO to broadcast any of its open meetings over the internet. An appropriation for the cost of implementing this technology was not provided, meaning these entities would be responsible for locating the funding to comply with the bill. The bill was amended on the Senate floor by Senator Eltife to exclude an RMA comprised of three or more counties (the NET RMA). The bill was passed by the Senate and voted favorably from the House Government Efficiency and Reform Committee but was never set on the House Calendar.

HB 3343 – Representative Kolkhorst - The bill would have provided that all toll projects become part of the state highway system and must be maintained by TxDOT without tolls when the costs of acquisition and construction have been paid and all bonds and interest secured by the revenues of the project have been paid or a sufficient amount for payment of all bonds and interest has been set aside. Further, the bill prohibited a toll project entity from amending a financing agreement in a manner that would extend the date by which bonds would be paid off and removed references to use of "surplus revenues" of toll projects in Chapters 228, 366, and 370 (thus precluding system financing). If passed this legislation would have had very significant adverse impacts on tolling authorities and regions of the state which have decided to adopt user fees as a way to address infrastructure needs. The bill received a hearing in the House Transportation Committee but was left pending without a vote.

SB 1253 – Senator Zaffirini – The bill would have prevented TxDOT from designing, constructing, or operating a toll project that, without a clear engineering justification, would incentivize the use of the project by discouraging the use of free adjoining roads through modification of speed limits or traffic signals on the adjacent free roads. This was directed at allegations that TxDOT had artificially lowered speed limits on frontage roads adjacent to SH 130 in order to encourage use of the road. The bill was problematic because of subjective language that would have made it difficult for TxDOT to make necessary changes to roadways for safety or congestion mitigation reasons without being subject to alleged violations of law. The bill passed out of the Senate on the local calendar and received a hearing in the House Transportation Committee but was left pending without a vote.

HB 3650 – Representative Harper-Brown – The bill would have authorized the use of availability payments which would permit TxDOT to enter into an agreement with a private entity for the design, development, financing, construction, maintenance, or operation of a toll or nontolled facility on the state highway system under which the private entity is compensated through milestone or periodic payments based on the private entity's compliance with performance requirements defined in the agreement. The bill was reported favorably from the House Transportation Committee but was not set on the House Calendar until May 9, the deadline for the House to consider House bills on 2nd reading. The bill was not brought up before the midnight deadline.

HB 2870 – Representative Capriglione – The bill would have repealed the provision which currently provides that before a CDA is entered into, financial forecasts and traffic and revenue reports prepared by or for a toll project entity for the project are confidential and are not subject to disclosure. The bill received a hearing in the House Transportation Committee but was left pending without a vote.

HB 1134 – Representative Darby/SB 638 – Senator Paxton – Would have amended the statutory provisions applicable to CDAs entered into by RMAs, RTAs, and TxDOT to provide that the performance and payment bond provided by a private entity entering into CDA must be issued by a corporate surety authorized to issue bonds in Texas. It would have eliminated the ability of those tolling entities to use alternative forms of security (e.g. parent guarantees) for projects less than $250 million. While compromise language was eventually agreed to, it was too late in the process to allow for passage of the legislation.

HB 116 – Representative Larson – The bill would have provided that RMAs are subject to review by the Sunset Advisory Commission as if the RMAs were a state agency. An RMA could not be abolished but would be required to pay the cost incurred by the Sunset Advisory Commission in performing the review. This bill was substantially similar to HB 2951 filed by Representative Larson in the previous legislative session. The bill was never set for a hearing by the House Transportation Committee.

SB 1794 – Senator Watson – The bill would have authorized the Capital Area Metropolitan Planning Organization ("CAMPO") to establish a revolving fund to loan or grant money to cities, counties, the State of Texas, regional mobility authorities, rail districts, or metropolitan transit authorities within the planning jurisdiction of CAMPO to pay expenses of planning, developing, acquiring right of way, constructing, implementing, and maintaining transportation projects approved by the metropolitan planning organization. The impetus for this legislation was the agreement between CAMPO and the CTRMA and the establishment of a Regional Infrastructure Fund to be maintained by CTRMA with revenues from the MoPac Improvement Project. The bill received a hearing in the Senate Transportation Committee but was left pending without a vote.

SB 1018 – Senator Carona/HB 2247 – Representative Harper-Brown – This bill would have amended numerous provisions in Chapter 366 of the Transportation Code, governing the operations of RTAs. Several of the changes were based on provisions in the RMA Act (Chapter 370 of the Transportation Code). The amendments included authorizing the transfer of revenue from one or more turnpike projects to a general fund of the RTA to be used for any purpose authorized under Chapter 366, payment of a property owner by means of a participation payment (a percentage of one or more identified fees related to a segment constructed by the authority) for an interest in real property, and allowing a RTA to enter into agreements with other governmental entities to pledge revenue for the issuance of bonds, whether inside or outside the RTA's jurisdiction. NTTA pushed this legislation but it was ultimately held up in the House Transportation Committee because of concerns by Representative Yvonne Davis.

SB 1333 – Senator Carona – The bill would have created the Cotton Belt Rail Improvement District, a municipal management district intended to facilitate the development of the $2 billion Cotton Belt Corridor commuter rail project in the DFW area. The bill appears to have failed because of a lack of local consensus among all of the cities in the corridor. It received a hearing in the Senate Intergovernmental Relations Committee but was left pending without ever receiving a vote.

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Texas Transportation Legislation
Overview of the 84th Legislative Session

C. Brian Cassidy
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Heading into the 84th Legislative Session the outlook for transportation issues, and tolling in particular, was uncertain. After 14 years under Governor Perry and 12 years under Lieutenant Governor Dewhurst, Texas had a new Governor and Lieutenant Governor. Both Governor Abbott and Lieutenant Governor Patrick ran on conservative platforms which included commitments to increase transportation funding, but without raising taxes, fees, or tolls. While this sentiment fell short of outright opposition to tolling, it marked a notable change from the previous administration which readily embraced tolling as a means of bolstering the state's transportation infrastructure.

The Texas Legislature had a new look as well. The House of Representatives welcomed 24 new members, and the Senate had 8 new members. This marked the largest legislative turnover in recent history. Many of the new members received backing from the "Tea Party" and other conservative groups, and while increased transportation funding was a commonly expressed objective among many, a handful of new members also brought with them a strident anti-toll road agenda. Hence the uncertainty heading into the Legislative Session—a widespread commitment to increase funding, but vocal opposition to tolling.

By the end of the Legislative Session significant progress was made on funding, and tolling was left relatively unaffected. However, while funding was increased, certain bonding authority was restricted and oversight of TxDOT was increased (even though the department is scheduled for Sunset Review during the 85th Legislative Session). And while no anti-toll legislation was passed, there was a continuation of the precedent set in the 83rd Legislative Session of prohibiting certain funds from being used for toll roads, and a study was authorized that will analyze the cost of removing tolls from projects around the state. A closer look at these issues, and legislation that pertains to each, appears below and in the attached Appendices.

Funding

The most significant development with respect to potential funding resulted from SJR 5, advanced by Senate Transportation Committee Chair Robert Nichols and House Transportation Committee Chair Joe Pickett. Sen. Nichols filed SJR 5, which initially called for a constitutional amendment to provide for a dedication of new vehicle sales tax proceeds in excess of $2.5 billion (the "Base Amount") to the State Highway Fund ("SHF") beginning in 2018. By the time SJR 5 was voted out of the Senate it had been revised to provide for a dedication of up to $2.5 billion in excess of the Base Amount, with further proceeds in excess of the Base Amount and the $2.5 billion (collectively $5 billion) being allocated 50% to the SHF, 30% to general revenue, and 20% to the Available School Fund. The Legislative Budget Board ("LBB") estimated that this approach would generate $2.7 billion in 2018, $2.9 billion in 2019, and $3.1 billion in 2020.[1] After Governor Abbott declared transportation funding an

[1] *See* Fiscal Note, Tex. SJR 5, Senate Comm. Report, Substituted, 84th Leg. (Feb. 27, 2015).

emergency item during his State of the State address on February 17, 2015[2], SJR 5 was quickly voted out of the Senate and was received in the House on March 5, 2015.

The House did not share the Senate's sense of urgency and took an alternative approach to using motor vehicle sales tax proceeds. Rep. Pickett filed HJR 13, which called for a constitutional amendment to authorize $3 billion of general sales tax proceeds to be deposited to the SHF, plus 2% of sales tax collections in excess of the $3 billion. The LBB's estimate was that this approach would generate $3.6 billion in 2018 and 2019, and $3.7 billion in 2020.[3] HJR 13 was heard and left pending in the House Transportation Committee until April 21, 2015, at which time SJR 5 was considered and Rep. Pickett amended it by substituting the language of HJR 13 for the text of SJR 5. SJR 5 was then passed by a vote of 138 to 3 in the House (with minor modifications) and returned to the Senate.

Not surprisingly the Senate did not concur in the changes made to SJR 5 by the House. That set the stage for a conference committee to resolve the differing approaches (general sales tax versus motor vehicle sales tax). After what were reportedly some fairly tense negotiations, the ultimate compromise was a blending of the two concepts. As passed, and subject to a constitutional amendment that will be on the November 3, 2015 ballot (as Proposition 7), SJR 5 provides for $2.5 billion in general sales tax proceeds in excess of $28 billion to be deposited to the SHF beginning in fiscal year 2018, along with 35% of motor vehicle sales tax proceeds in excess of $5 billion beginning in fiscal year 2020. The LBB estimates that (if passed by the voters) the impact will be $2.5 billion deposited to the SHF in 2018 and 2019, and close to $3 billion in 2020 (no estimates were provided beyond 2020).[4] Additional details regarding timing and limitations on the funding are discussed in Appendix "A".

One other funding measure was passed in addition to SJR 5, and this one is not contingent on a constitutional amendment. After several sessions of discussion (and some progress in 2013), the Legislature succeeded in ending the diversion of SHF proceeds to pay for the Department of Public Safety ("DPS") policing of public roadways, which will result in an increase in funding for road projects of approximately $600 million per year. This was accomplished in part by HB 20 (Rep. Ron Simmons/Sen. Nichols), which removes from statute the authority to fund these DPS activities from the SHF, along with an appropriation of general revenue in the budget to fund the DPS activities. In other words, the policing of roadways by DPS will be funded from general revenue rather than from TxDOT's budget, leaving that money for TxDOT to spend on roads.

[2] *See* H.J. of Tex., 84th Leg., R.S. 407 (2015). (Note that in the proclamation, Governor Abbott expanded on his conservative campaign pledge by calling for an increase in transportation funding without raising debt, in addition to taxes, fees, or tolls).
[3] *See* Fiscal Note, Tex. SJR 5, House Comm. Report, Substituted, 84th Leg. (April 22, 2015).
[4] *See* Fiscal Note, Tex. SJR 5, Conf. Comm. Report, 84th Leg. (May 27, 2015).

Aggregate Impact of Funding Measures

Assuming Proposition 7 passes, the combined funding increase from SJR 5 and ending the DPS diversion will be an annual amount of $3.1 billion in 2018 and 2019, and close to $3.6 billion in 2020. And in keeping with the campaign promises of both the Governor and the Lieutenant Governor, none of the increased funding is the result of increases in taxes, fees, or tolls; it is all derived from existing (and future) sources of revenue.

Tolling

While tolling received a considerable amount of attention, the most significant development may be what did not happen. A number of legislators filed anti-toll bills, aimed at everything from requiring the elimination and removal of tolls to precluding system financing. One bill would even have repealed the enabling legislation for regional mobility authorities ("RMAs"). Much of the anti-toll sentiment came from legislators in the Metroplex area, which has seen a proliferation of toll roads over the last decade and where passions were inflamed by a (now abandoned) proposal to re-designate an HOV lane on US 75 as a managed (toll) lane.

As the Legislative Session progressed two things happened which derailed much of the anti-toll agenda. First, political rhetoric collided with financial reality. In various committee hearings the financial needs analysis that started with the 2030 Committee report (first issued in 2009) received considerable attention. That report concluded that Texas would need an additional $4 billion per year in transportation funding to merely maintain the current congestion levels throughout the state. Since then the significant negative impacts of oil and gas exploration on state and county roads have increased that number to $5 billion per year. Although lawmakers made progress in closing the funding gap with Proposition 1 from the 83rd Legislative Session (dedicating a portion of oil and gas severance tax revenues to transportation), the 2030 Committee estimates were based *on the assumption* that toll roads would continue to be used to fund added capacity projects. TxDOT's CFO, James Bass, testified in one hearing that if tolling were eliminated as an option for developing projects, the amount needed to maintain current congestion might increase an additional $10 billion per year.[5] And that is just the amount required to maintain the status quo, a condition which in many areas is already viewed as unacceptable.

Second, lawmakers from areas around the state began to resist the notion of having tolling eliminated (or undermined) as an option for their regions. The anti-toll agenda being advanced by some lawmakers was largely the result of local issues of "toll fatigue" in the Metroplex, and the problem with solving local issues through statewide policy changes quickly became apparent. Several areas around the state have existing toll authorities which have proven successful at delivering projects, and many areas have plans for additional toll projects. Lawmakers in those areas balked at having that local option removed for their region simply because of discord in north Texas.

[5] Testimony of James Bass, House Transportation Subcommittee on Long Term Infrastructure Planning Hearing (March 24, 2015).

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For the present time tolling remains as a tool available to TxDOT and various local toll project entities around the state. No new projects were authorized to be developed through comprehensive development agreements ("CDAs"), meaning that currently authorized projects (except the Grand Parkway) have until August 31, 2017 to be procured and under contract by TxDOT or an RMA.[6]

Beyond the legislation discussed above, there were relatively few bills addressing transportation-specific issues passed by the Legislature and signed by the Governor. Nevertheless there are some bills worth noting, and others that, while not transportation specific, may affect the business of RMAs, other toll authorities, and those who do business with those entities. In addition, there are several bills of note which did not pass, meaning that certain outstanding issues were not resolved (e.g., county transportation reinvestment zones), and various threatened actions were not enacted (e.g., sunset reviews of local toll project entities). Those bills are described in the following appendices:

Appendices

Appendix "A"	Transportation Funding & Related Legislation (SJR 5; HB 122; HB 20, HB 1)
Appendix "B"	TxDOT Oversight & Required Studies (HB 20; HB 2612; HB 790)
Appendix "C"	Toll Operations and Other Related Legislation (SB 57; HB 2549; HB 565; SB 1467)
Appendix "D"	Open Government Legislation (HB 685; HB 283; HB 2134; HB 3357; SB 1237; HB 2633; SB 57)
Appendix "E"	Contracting, Procurement, and Other Legislation of Interest (HB 23; HB 2049; HB 1295; SB 408; SB 1281; SB 1812; HB 1378; HB 3683)
Appendix "F"	Legislation of Interest Which did Not Pass

The foregoing and the attached appendices are only intended to be a summary of the results of the 84th Legislative Session. Interested parties should consult the text of specific legislation concerning the scope and application of new laws, changes to laws, and provisions of previously enacted laws. Questions may be directed to: C. Brian Cassidy, (512) 305-4855 (bcassidy@lockelord.com); Lori Winland, (512) 305-4718 (lwinland@lockelord.com); or Brian O'Reilly, (512) 305-4853 (boreilly@lockelord.com).

[6] NTTA and county toll road authorities take the position that they have unrestricted CDA authority.

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Appendix "A"

TRANSPORTATION FUNDING AND RELATED LEGISLATION

Below is a brief summary of transportation funding legislation passed by the 84th Legislature.

- **SJR 5 (Nichols/Pickett)** – Proposes a constitutional amendment which, if passed, will:

  - dedicate to the State Highway Fund ("SHF") in each fiscal year:

    - ✓ ***$2.5 billion of the general sales tax revenue*** in excess of $28 billion beginning in FY 2018; and
    - ✓ ***35% of the revenue from motor vehicle sales taxes above $5 billion*** beginning in FY 2020.

  - include a restriction providing that the funds may only be used to:

    - ✓ ***construct, maintain, or acquire rights-of-way for public roadways other than toll road***s; or
    - ✓ repay the principal of and interest on Proposition 12 general obligation bonds (as authorized by Sec. 49-p, Art. III., Texas Const.)

  - provide a safeguard that future legislatures may, by a two-thirds vote of each house, direct the comptroller to reduce the transfers to the SHF by up to 50% in the state fiscal year in which the resolution is adopted or in either of the following two state fiscal years.

  - provide that the ***deposit of motor vehicle sales taxes will cease in 2029***, and the ***deposit of general sales tax revenue will cease in 2032***. However, either or both of these ***deadlines can be extended in 10 year increments*** by the legislature through the adoption of a resolution approved by a majority of the members of each house.

  The constitutional amendment approving SJR 5 will be submitted to the voters at an election to be held November 3, 2015 and will be identified as Proposition 7.

- **HB 122 (Pickett/Nichols)** *(Effective date: September 1, 2015)* – The Texas Mobility Fund ("TMF") was first authorized by the voters through a constitutional amendment approved in 2001. The Texas Transportation Commission was authorized to issue debt supported by the TMF to finance the development and construction of roads on the state highway system, publicly owned toll roads, and other public transportation projects. The TMF is one of the more flexible sources of money available for use by TxDOT.

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HB 122 imposes significant restrictions on the use of the TMF. Specifically:

- The TTC is ***prohibited from issuing any additional TMF debt***, except to refund outstanding obligations (to provide savings), refund outstanding variable rate obligations, and to renew or replace credit agreements relating to variable rate obligations.

- Additional funds on deposit in the TMF in excess of what is needed to satisfy existing obligations or credit agreement requirements may be used for any of the statutory purposes ***other than for toll roads***.

As a consequence, the TMF will cease to function as a revolving fund in the nature that it has since 2001, and available funds will not be available for use on toll projects.

- **HB 20 (Simmons/Nichols)** *(Effective immediately)* – In addition to the various oversight provisions described in further detail under Appendix "B", ***HB 20 removes the statutory authority for SHF revenues to be used by the Department of Public Safety*** ("DPS") to police the state highway system and to administer state laws relating to traffic and safety on public roads. By ending this diversion, ***approximately $600 million per year*** of TxDOT's budget that was previously allocated to DPS funding ***will now be available for SHF purposes.*** Note that the constitutional authorization for the use of SHF revenues by DPS has not been changed; the removal of authority for the DPS diversion was accomplished by a statutory change (which could be revised again by future legislatures).

- **HB 1 (Otto/Nelson)** *(Effective date: September 1, 2015)* – Various riders to the TxDOT budget approved for the 2016-2017 biennium contain provisions which affect funding and operations. These include:

  - Rider 44- prescribes the manner in which Proposition 1 funds included in the budget are to be allocated. Specifically, funds are to be allocated as follows:

    - ✓ 45% for mobility and added capacity projects in urban areas;
    - ✓ 25% for projects that improve regional connectivity along strategic corridors in rural areas
    - ✓ 20% for statewide maintenance and preservation projects; and
    - ✓ 10% for safety and maintenance projects in areas affected by energy sector activity.

  Note that these percentages vary somewhat from those previously announced by TxDOT.

  - Rider 49- provides that from funds collected from TxDOT's sale of surplus property:

    - ✓ discounts are to be funded for qualified veteran's using the Central Texas Turnpike System and other toll projects operated and maintained by TxDOT; and
    - ✓ toll discounts are to be funded for large trucks using Segments 1-4 of SH 130 and SH 45 Southeast.

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Appendix "B"

TxDOT OVERSIGHT AND REQUIRED STUDIES

There were several bills filed during the 84th Legislative Session that were intended to increase oversight of TxDOT and certain of the decision-making processes of the Texas Transportation Commission ("TTC"). In general there were two justifications offered for this: First, that with significantly increased funding it was appropriate to increase oversight; and second, that previous decisions of the TTC with respect to changes to the Unified Transportation Plan ("UTP") were made without adequate scrutiny and public notice.

HB 20 (Simmons/Nichols) *(Effective immediately)* was the principal oversight bill, although it incorporated other subjects as well (i.e., TxDOT design/build authority, planning procedures of metropolitan planning organizations ("MPOs"), and repeal of the DPS diversion language (see Appendix "A")). It is summarized by the different subject-matter areas below:

TTC Rulemakings

The bill requires the TTC to conduct rulemakings ***on 6 different enumerated topics***, some of which could have a ***significant impact on project selection, approval, and funding*** processes. Given the potential impacts, local planners, project implementers, and other stakeholders should be prepared to participate in the rulemakings. It is unclear how and when the rulemakings will be conducted and whether some or all of the rulemaking subjects will be combined or addressed in different processes.

- HB 20 requires the ***TTC to adopt and implement rules relating to***:
  - the ***prioritizing and approval of projects in the State Transportation Improvement Program ("STIP")*** in order to provide financial assistance.
  - establishment of a ***performance-based process for setting funding levels*** in the UTP.
  - establishment of a ***scoring system for prioritizing projects for*** which ***financial assistance*** is requested by an MPO (or TxDOT district for an area without an MPO). Note that:
    - ✓ the criteria must consider TxDOT's strategic goals as approved by the TTC in accordance with federal law; and
    - ✓ the scoring system must account for the diverse needs of the state to fairly allocate funding to all regions.
  - a performance-based ***planning and programming process*** which:
    - ✓ includes indicators that "quantify and qualify" progress toward attaining TxDOT goals and objectives established by the TTC and the Legislature; and
    - ✓ provides this information to the executive and legislative branches of government.

- performance ***metrics and performance measures*** as part of the:

  - ✓ review of strategic planning in the Statewide Transportation Plan, UTP, and Rural Transportation Plan;
  - ✓ ***evaluation of the decision-making on project funding selections*** under the STIP and UTP; and
  - ✓ evaluation of project delivery in TxDOT's letting schedule.

- performance ***metrics and measures*** that will:

  - ✓ assess how well the transportation system is performing under federal law;
  - ✓ provide TxDOT, the legislature, stakeholders, and the public with accessible and understandable information supporting TTC decisions;
  - ✓ assess the ***effectiveness and efficiency of transportation projects*** and services;
  - ✓ demonstrate ***transparency and accountability***, and
  - ✓ address other issues as determined by the TTC.

In addition to the required rulemakings, HB 20 also ***limits the TTC's discretionary funding decisions*** to no more than 10% of TxDOT's biennial budget.

MPO Requirements

In addition to the myriad of requirements imposed on TxDOT, HB 20 requires certain actions by MPOs (and by TxDOT districts in areas where there is not an MPO). The planning organizations are required to:

- ***develop a 10 year plan for the use of funding*** allocated to the region:

  - the first 4 years of the plans should be developed to meet the Transportation Improvement Program requirements of federal law.

  - TxDOT must assist in the effort by providing information reasonably requested by the MPO.

  - for areas not in an MPO, the TxDOT district shall prepare the plan with input from city and county elected officials and other transportation officials in the area (e.g., officials in a political subdivisions responsible for project planning and implementation).

- ***develop project recommendation criteria*** (note that "project", as used in this context, refers only to connectivity or new capacity projects; not safety, bridge, maintenance, or preservation projects). The ***criteria must consider***:

  - projected ***improvements to congestion and safety***;

- projected ***effects on economic development*** opportunities;
- available ***funding***;
- ***environmental*** (including air quality) ***impacts***;
- ***socioeconomic effects***, including adverse health or environmental effects on minority or low-income neighborhoods; and
- other factors deemed appropriate by the planning organization.

TxDOT Design/Build Impacts

HB 20 also became a vehicle for certain ***changes to TxDOT's design/build authority***. Specifically, the bill:

- ***retains the limit of 3 design/build projects per fiscal year*** for TxDOT (the limit was set to expire on August 31, 2015; HB 20 repealed the expiration date, thus retaining the 3 per year project limit).
- ***increases the minimum project size*** for a TxDOT design/build project ***to $250 million*** (up from $50 million). (Note that HB 20 actually states a $150 million minimum project size, however rider 47 to TxDOT's budget (HB 1) establishes a $250 million minimum project size, which TxDOT has indicated it is bound by for the duration of the biennium.).
- ***authorizes the inclusion of a maintenance agreement*** in a design/build contract, provided that such agreements do not exceed 5 years (but those agreements may be renewed in up to 5 year option periods with no limit on the number of renewal terms).
- ***defines a project which may be the subject of a design/build contract*** to be a single highway between two defined points in a corridor or two or more contiguous highway facilities, and ***precludes including more than one project in a design/build contract.*** This was apparently in response to concerns that TxDOT had bundled multiple projects into one design/build contract.
- ***precludes TxDOT from using design/build for a project which is "substantially designed***" by TxDOT or another entity other than the design/build contractor. ***"Substantially designed"*** appears to mean ***in excess of a schematic design more than approximately 30% complete***.
- Note that the ***foregoing changes only apply to TxDOT's design/build authority***; not to the authority of regional mobility authorities ("RMAs") or any other entities. Also, rider 47, referenced above, provided for a 10 project per biennium limit on TxDOT design/build projects; however, as to this aspect the general law provisions of HB 20 described above prevail over the rider language.

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Appointment of Special Legislative Committees

As an additional element of the oversight being implemented through HB 20, the legislation calls for the ***appointment of Select House and Senate Committees to review*** various aspects of ***TxDOT's planning and operations functions***. The Committees are required to submit a report in advance of the 85th Legislative Session, which may be an indication of the types of legislation which may be pursued. Details of the committee process include:

- Appointment of Committees:
  - The Speaker will appoint a ***9 member House Select Committee on Transportation Planning*** and will designate the chair.
  - The Lt. Governor will appoint a ***5 member Senate Select Committee on Transportation Planning*** and will designate a chair.
  - The committee appointments should consider diverse constituencies with respect to:
    - ✓ geographic areas;
    - ✓ urban and rural areas; and
    - ✓ ethnicity.
  - The committees may meet separately or jointly.
  - The committees shall prepare a written report on the subject matter of their review, to be completed by November 1, 2016.
- Scope of Committee Reviews: The committees are directed to ***review, study and evaluate***:
  - ***TxDOT financial projections*** of amounts needed to ***maintain*** current maintenance, congestion, and connectivity conditions.
  - the ***development of funding categories***, and with respect to those categories:
    - ✓ the allocation of funding to the categories by formula;
    - ✓ project selection authority for each category; and
    - ✓ development of project selection criteria for the TTC, TxDOT, and TxDOT district selected projects.
  - TxDOT rules and policies for development and implementation of performance-based scoring for project prioritization and selection of projects.
  - utilization of previously authorized ***alternative methods of financing.***

- performance metrics and measures being used by TxDOT to evaluate the performance of TxDOT projects.

- TxDOT's collaboration, when adopting rules or formulating policies, with:

  - ✓ state elected officials;
  - ✓ local governments;
  - ✓ MPOs;
  - ✓ RMAs;
  - ✓ government trade associations; and
  - ✓ other entities.

- proposed rules, policies, programs, or plans of TxDOT or the TTC of statewide significance.

- possible benefits of using zero-based budgeting.

- any other matters deemed appropriate by the committees.

There is clearly a wide range of subject matter to be considered by the Select Committees. RMAs and other toll authorities will likely be called upon for input on some items and should be prepared to participate in committee hearings when requested or when the subject matter is of significance to funding and operational issues.

HB 2612 (Pickett/Hall)[1] *(Effective date: September 1, 2015)* - Perhaps in response to the myriad of anti-toll road legislation that was filed, and in an effort to ***put into context the idea of eliminating tolls on roads*** in Texas, Rep. Pickett filed a bill requiring a study of just what that would entail.

- ➢ The study is to be completed by TxDOT before September 1, 2016, with a report to be presented to the House and Senate Transportation Committees. The report is required to:

  - identify the ***amount of debt service on bonds*** issued ***for each toll project*** in the state.

  - ***identify bonds*** that would be appropriate (based on TTC-adopted criteria) ***for accelerated or complete lump sum payment*** of debt service.

  - ***propose a plan to eliminate all toll roads***, excluding those constructed, operated and maintained with proceeds from the issuance of bonds by a toll project entity other than TxDOT, by methods including:

    - ✓ accelerated or complete lump sum payment of debt service on bonds; or

[1] *See also*, Tex. H.B. 1, 84th Leg., R.S. (2015) (Rider 46 to TxDOT's budget providing for an identical requirement.).

- ✓ requiring a toll project entity to commit to eliminate tolls on a project for which financial assistance is requested.

The study raises several questions in terms of scope. By requiring identification of debt service for "each" toll project in the state, the scope is not limited to TxDOT projects—it appears to cover all toll projects. However, for the plan to eliminate tolls, the scope applies only to TxDOT projects and any others which have received financial assistance from TxDOT, and may include any others which are not 100% bond financed. While most RMA and several North Texas Tollway Authority ("NTTA") projects have received some form of financial assistance from TxDOT, projects in the Harris County Toll Road system have largely been built without TxDOT support.

HB 790 (Burkett/Hancock) *(Effective immediately)* - As noted in the overview section, many of the anti-toll bills stemmed from disputes in the Metroplex area. ***One of those disputes involves a sound wall*** (or more precisely, the absence of a sound wall) on an NTTA project. This bill, as filed, was limited to NTTA and would have required a study to be conducted, a sound wall to be constructed if the study showed certain noise levels, and a set aside of 5% of tolls collected to address traffic noise on projects. That clearly would have had negative implications for NTTA and would have established an untenable precedent for other projects and entities. Therefore HB 790 was modified significantly to merely require a study as follows:

- By November 1, 2016, ***the Texas Transportation Institute ("TTI") is required to complete a study relating to the implementation and effectiveness of sound mitigation*** measures on highways that are part of the state highway system and toll roads developed by any toll project entity. The study is to include:
  - an analysis of ***how sound mitigation measures are selected***, and an evaluation of how effective the selection process and actual mitigation measures are in reducing traffic noise levels on neighboring properties.
  - an analysis of ***whether live testing is conducted*** to determine noise levels for neighboring properties.
  - an evaluation of the ***effectiveness of implemented sound mitigation measures***.
- The TTI report is to be presented to the Governor, Lieutenant Governor, Speaker, and Chairs of the House and Senate Transportation Committees.

Note that projects which receive federal funding must follow fairly strict Federal Highway Administration guidelines for sound mitigation. It is unclear how this study will interact with those requirements.

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Appendix "C"

TOLL OPERATIONS AND OTHER RELATED LEGISLATION

Below is a brief summary of toll operations legislation passed by the 84th Legislature.

- **SB 57 (Nelson/Simmons)** *(Effective immediately)* – ***Extends the current protection of certain customer information*** collected by a regional tollway authority ("RTA"), regional mobility authority ("RMA"), regional transportation authority, metropolitan rapid transit authority, or coordinated county transportation authority from disclosure under Chapter 552, Government Code (the Public Information Act). The ***newly protected information includes contact, payment and other account information, and trip data pertaining to vehicles receiving a toll exemption***, which generally encompasses emergency vehicles.

- **HB 2549 (Davis/Hancock)** *(Effective date: September 1, 2015)* – Establishes that:

  - ***a toll project for which an RTA provides tolling services*** under a tolling services agreement ***is considered a toll project of the RTA*** for the purposes of ***applying toll enforcement rights and remedies.***

    - ✓ This addresses scenarios where an RTA may be providing tolling services for TxDOT or a CDA developer, and ***makes clear that the same toll enforcement remedies are available to the RTA as those which may be exercised for the RTA's own projects***.
    - ✓ This ***should also extend to RMAs and other local toll project entities*** by virtue of "most favored nations" clauses in their enabling legislation.

  - The bill also adjusts customer toll payment periods to allow for monthly billing (25-day billing cycles) and creates paperless, electronic-only billing notification options for customers.

  - Further, it aligns the due date of an RTA's annual report to its member counties with the availability of audited financials.

- **HB 565 (Burkett/Kolkhorst)** *(Effective date: September 1, 2015)* – This was a fairly high profile bill dealing with the ability of a ***private toll road corporation*** (operating under a franchise granted under laws which have since been repealed) to ***exercise the power of eminent domain***. As filed the bill would have stripped that right; as passed, it provides that:

  - ***a private toll road corporation may not exercise the power of eminent domain***, but it may ***enter into an agreement with a public toll project entity*** to finance, construct, maintain, or operate a toll road (i.e., so that a public toll project entity is the one exercising eminent domain authority).

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- before the TTC approves a private turnpike or toll project, they must hold a public meeting concerning the project in the region in which the project will be located.

- **SB 1467 (Watson/Gonzalez)** *(Effective date: September 1, 2015)* – States that a person that enters into an agreement with TxDOT to provide services for a customer to pay their toll bill at a location other than a TxDOT office may collect from the customer a service charge in addition to the amount paid on their toll bill. TxDOT will determine the amount of the service charge, but it may not exceed $3.00 for a payment transaction. This will ***facilitate the ability to pay toll bills at remote locations,*** such as participating grocery stores, and avoid having to go to a TxDOT facility.

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Appendix "D"

OPEN GOVERNMENT LEGISLATION

Below is a brief summary of open government legislation passed by the 84th Legislature.

Open Meetings Bills

- **HB 3357 (Lucio/Eltife)** *(Effective date: September 1, 2015)* – Allows a ***district or political subdivision (including a regional tollway authority ("RTA"), regional mobility authority ("RMA"), or other local toll project entity***) to provide notice of its meetings on the district or political subdivision's website instead of providing notice to the county clerk(s). Specifically:

  - A political subdivision extending into ***fewer than four counties*** is ***required to post notice*** of its meetings:

    - ✓ at a place ***convenient to the public in the administrative office of the entity***; and
    - ✓ either with ***county clerk of each county*** in which the entity is located ***or on the entity's website.***

  - A political subdivision extending into ***four or more counties*** is ***required to post notice*** of its meetings***:***

    - ✓ at a place ***convenient to the public in the administrative office of the entity***;
    - ✓ with the ***Secretary of State; and***
    - ✓ ***either*** with ***county clerk of the county in which the administrative office*** of the entity is located ***or on the entity's website***.

  The effect of this legislation is to ***simplify and ease the burdens of posting*** notices of open meetings. For RMAs and other local toll project entities with less than four counties, posting at the administrative office and on the entity's website is all that will be required. If the RMA or other entity has more than four counties, posting will be required at those same places plus the Secretary of State's office.

- **SB 1237 (V. Taylor/Sanford)** *(Effective date: September 1, 2015)* – ***Requires a metropolitan planning organization*** ("MPO") that serves one or more counties with a population of 350,000 or more ***to broadcast the live video and audio of each open meeting*** held by the MPO policy board ***on the Internet*** and to ***make the archived video and audio available on the MPO's website***.

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- **HB 283 (Fallon/Creighton)** *(Effective date: January 1, 2016)* – Requires various governmental bodies[1](***excluding RMAs and RTAs***) to:

  - make a ***video and audio recording of each regularly scheduled open meeting.***
  - make an ***archived copy*** of the recording ***available*** on the Internet ***not later than 7 days after*** the recording was made.
  - ***maintain the archived recording*** on the Internet for ***not less than 2 years*** after the date the recording was first made available.

  Note that while HB 283 does not apply to RMAs or RTAs (but does apply to a county toll authority to the extent it is a department of the county), it is similar to other bills that were filed this session that would have encompassed RMAs and RTAs. It is worth watching as possible precedent for future legislation.

Pubic Information Bills

- **HB 685 (Sheets/Hancock)** *(Effective date: September 1, 2015)* – Provides that:

  - a political subdivision ***complies with the*** production requirements of the ***Public Information Act ("PIA") by referring a requestor to an exact Internet location*** or a uniform resource locator (URL) ***on a website maintained by the political subdivision and accessible to the public*** if the requested information is identifiable and readily available on that website.
  - if the person requesting the information prefers a manner other than access through the Internet location or URL, the political subdivision must supply the information as otherwise required by the PIA.
  - if the political subdivision provides the Internet location or URL by e-mail, ***the e-mail must contain a statement in a conspicuous font clearly indicating that the requestor may nonetheless access the requested information by inspection or duplication*** or by receipt through United States mail.

- **HB 2134 (Burkett/Hall)** *(Effective date: September 1, 2015)* – Provides that:

  - if a request for public information is sent by e-mail and ***the governmental body requests clarification*** by sending an e-mail to the same e-mail address (or to another e-mail address provided by the requestor), ***the request may be considered to have been***

[1] Governmental bodies subject to the requirement include a transit authority or department subject to Chapter 451, 452, 453, or 460, Transportation Code; an elected school district board of trustees for a school district that has a student enrollment of 10,000 or more; an elected governing body of a home-rule municipality that has a population of 50,000 or more; or a county commissioners court for a county that has a population of 125,000 or more.

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withdrawn if the governmental body ***does not receive a written response*** to its e-mail ***within 60 days***.

- HB 2134 has the effect of amending the previous requirement that a governmental body send its request for clarification to the requestor's physical or mailing address by certified mail in order for the request to be considered withdrawn due to lack of a response.

- **HB 2633 (Hernandez/Perry)** *(Effective immediately)* – Amends the Transportation Code to provide that TxDOT ***or another governmental entity*** must, upon written request and payment of any required fee, provide a motor vehicle accident report or accident report information to:

  - the ***law enforcement agency*** that employs the peace officer who investigated the accident;

  - ***the*** **court** in which a case involving a person involved in the accident ***is pending*** if the report is subpoenaed; or

  - any person "directly concerned in the accident or having a proper interest therein"[2]

  Also requires TxDOT or the governmental entity to create a redacted report with all personal information removed. ***The redacted report may be requested by any person***. This bill is intended to address issues arising from attorneys making use of access to motor vehicle accident reports to solicit potential clients by amending a provision of the law that previously allowed anyone who provided two of three pieces of information about an accident to receive an accident report containing the personal information and contact information of those involved.

- **SB 57 (Nelson/Simmons)** *(Effective immediately)* – Amends laws regarding disclosure of toll customer account information. See description in Appendix "C".

[2] Those individuals include a driver or any person involved in the accident; the authorized representative of someone involved in the accident; an employer, parent, or legal guardian of a driver involved in the accident; the owner of a vehicle or property damaged in the accident; a person who has established financial responsibility for a vehicle involved in the accident; an insurance company that issued a policy to cover a vehicle or person involved in the accident; a person under contract to provide claims or underwriting information to a person described above; a radio, television station, or newspaper; or any person who may sue because of death resulting from the accident.

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Appendix "E"

CONTRACTING, PROCUREMENT AND OTHER LEGISLATION OF INTEREST

Below is a brief summary of legislation related to contracting and procurement passed by the 84th Legislature, as well as other bills of interest to regional mobility authorities ("RMAs"), local toll authorities and those who do business with those entities.

Contracting and Procurement Bills

- **HB 2049 (Darby/Eltife)** (*Effective date: September 1, 2015*) – This bill pertains to ***contracts for engineering or architectural services*** to which a governmental agency is a party and ***prohibits a governmental agency from imposing a "duty to defend"*** upon an architect or engineer. "Governmental agency" is defined for purposes of this legislation to include a city, county, school district, conservation and reclamation district, hospital organization, or other political subdivision of the state. ***These new limitations to and requirements for engineering and architectural services contracts therefore apply to RMAs, regional tollway authorities ("RTAs"), and other local toll project entities.***

  This legislation contains some ***significant reforms to contracting for architectural and engineering services*** and will likely require modifications to the forms of contracts currently being used RMAs, RTAs, and other toll authorities for such services.

  Specifically, the bill:

  - provides that a covenant or promise in connection with a contract for engineering or architectural services is ***void and unenforceable if it requires the engineer or architect to defend a party***, including a third party, against a claim based wholly or partly on the negligence of, fault of, or breach of contract by the governmental agency, its agent, or its employee or another entity over which the governmental agency exercises control.

  - allows for a covenant or promise that provides for the ***reimbursement of a governmental agency's reasonable attorney's fees*** in proportion to the engineer or architect's liability.

  - provides that a contract for engineering or architectural services ***may require that the engineer or architect name the governmental agency as an additional insured*** under the engineer's or architect's general liability insurance policy and provide any defense provided by the policy.

- establishes a standard of care that must be required under a contract for engineering or architectural services such that the services must be performed:

  ✓ ***with the professional skill and care ordinarily provided by competent engineers or architects practicing in the same or similar locality*** and under the same or similar circumstances; and

  ✓ as ***expeditiously as is prudent*** considering the ordinary professional skill and care of a competent engineer or architect

Note that these changes in the law apply only to a contract for which a request for proposals or a request for qualifications is first issued on or after September 1, 2015.

➢ **HB 23 (S. Davis/Huffman)** *(Effective date: September 1, 2015)* – This bill includes several significant changes to Chapter 176 of the Local Government Code regarding the disclosure of certain relationships between local government officers or agents and vendors. Note that Chapter 176 applies to any county, municipality, school district, charter school, junior college district, or other political subdivision of this state. ***RMAs, RTAs, and other local toll project entities*** therefore need to familiarize themselves with the revised disclosure requirements and ***ensure that their officers, agents, and vendors are aware of their obligations and file the appropriate disclosures***.

Among other changes, HB 23:

- extends the disclosure requirements for local government officers to ***any agents of the governmental body who exercise discretion*** in the planning, recommending, selecting, or contracting of a vendor.

- requires the disclosure of the receipt of one or more ***gifts with an aggregate value of more than $100*** (lowered from $250 previously), ***including lodging, transportation, and entertainment accepted as a guest*** (but not including a benefit offered on account of kinship or a personal, professional, or business relationship independent of the official status of the recipient). Food accepted as a guest and political contributions do not have to be disclosed.

- requires the ***disclosure of a "family relationship" with a vendor***, defined to mean a relationship within the third degree by blood[1] and second degree by marriage[2].

- includes analogous changes to the disclosure requirements for vendors.

[1] Generally: children, parents, brothers, sisters, grandparents, grandchildren, uncles, aunts, nephews, nieces, great grandparents, great grandchildren.
[2] Generally: spouse, mother-in-law, father-in-law, son-in-law, daughter-in-law, stepson, stepdaughter, stepmother, stepfather, brother-in-law, sister-in-law, spouse's grandparent, spouse's grandchild, grandchild's spouse, spouse of grandparent.

- requires a local governmental entity to ***maintain a list of officers of the entity*** and make that list available to the public and any vendor who may be required to file a conflict of interest questionnaire.

- creates ***new penalties*** for non-compliance including:

  ✓ making failing to comply with the disclosure requirements of Chapter 176 within 7 business days after the date on which the officer or vendor becomes aware of the facts that require filing a conflict disclosure statement or questionnaire a Class C - Class A misdemeanor (depending on the amount of the contract at issue);

  ✓ providing that a local governmental entity may reprimand, suspend, or terminate an employee who knowingly fails to comply with the requirements of Chapter 176; and

  ✓ providing that a local governmental entity ***may, declare a contract void*** if the governing body determines that a vendor failed to file a conflict of interest questionnaire.

➢ **HB 1295 (Capriglione/Hancock)** *(Effective date: September 1, 2015)* – Provides that a governmental entity (defined to include a municipality, county, public school district, or ***special-purpose district or authority***):

- is prohibited from entering into a contract with a value of $1 million or more with a business entity unless the business entity submits ***a disclosure of interested parties***[3] to the governmental entity at the time the business entity submits the signed contract.

- must ***submit a copy of the disclosure of interested parties to the Texas Ethics Commission not later than the 30th day*** after the date that the governmental entity receives the required disclosure.

Note that while it is not entirely clear whether an RMA or RTA is a "special-purpose district or authority" for purposes of HB 1295 (as that phrase is not defined in the bill), those entities at least ***arguably fall within the scope of this legislation and should therefore require their contractors to submit disclosures of interested persons*** on the form prescribed by the Texas Ethics Commission (to be made available by December 1, 2015). The bill is only applicable to contracts entered into on or after January 1, 2016.

[3] "Interested party" is defined as a person who has a controlling interest in the business entity or who actively participates in facilitating the contract or negotiating the terms of the contract between the business entity and the governmental entity, including a broker, intermediary, adviser, or attorney for the business entity.

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Other Bills of Interest

- **SB 1281 (Zaffirini/Coleman)** *(Effective immediately)* – Permits a local government (defined to include a county, municipality, special district, school district, junior college district, regional planning commission, or other political subdivision of the state—therefore ***including RMAs, RTAs, and other local toll project entities***) to participate in a cooperative purchasing program with another local government in another state.

- **SB 1812 (Kolkorst/Geren)** *(Effective immediately)* – SB 1812 concerns the creation of an eminent domain database and related reporting requirements. Specifically, it:

  - requires the comptroller to create, annually update, and make available online a database containing information regarding all entities having eminent domain authority.

  - requires ***an entity with eminent domain authority*** to, ***not later than February 1*** of each year, ***submit to the comptroller a report*** containing records and other information for the purpose of providing information to maintain the eminent domain database.

    - ✓ The report must be submitted in a form and in the manner prescribed by the comptroller.
    - ✓ Failure to submit the required report can result in fines, but does not affect the entity's authority to exercise the power of eminent domain.
    - ✓ An entity in existence for at least 180 days on September 1, 2015 ***must submit its initial report by February 1, 2016.*** An entity in existence for less than 180 days on September 1, 2015, must submit its initial report not later than the later of the 180th day after the date of the entity's creation or February 1, 2016.

  Note that this legislation will ***require RMAs, RTAs, and other toll project entities with eminent domain authority to file the required report***. Those entities should watch for the adoption of rules and/or establishment policies and procedures by the comptroller regarding the implementation of this new requirement.

- **HB 1378 (Flynn/Bettencourt)** *(Effective date: January 1, 2016)* – Requires ***political subdivisions*** (***including RMAs, RTAs, and other local toll project entities***) to annually compile and ***report information concerning their debt obligations to the comptroller***, including information concerning:

  - the amount of authorized debt;

  - the principal of all debt outstanding;

  - the principal of each outstanding debt obligation;

  - the principal and interest payments needed to repay all outstanding debt;

- the principal and interest payments needed to repay each obligation;
- the issued or unissued amount, spent or unspent amount, maturity date, and purpose of each debt obligation; and
- the political subdivision's credit rating.

Instead of replicating in the annual report information that is posted separately on the political subdivision's website, the political subdivision may provide in the report a direct link to, or a clear statement describing the location of, the separately posted information. The political subdivision must ***make its annual report available for inspection and post it on their website*** until the political subdivision posts the next annual report. Alternatively, the political subdivision may provide all required debt information to the comptroller and have the comptroller post the information on the comptroller's official website.

RMAs, RTAs, and other local toll project entities will need to comply with these new reporting requirements. Note that the reporting requirement ***applies only to a fiscal year ending on or after January 1, 2016.***

- **HB 3683 (Geren/Zaffirini)** *(Effective date: September 1, 2015)* – ***Requires a personal financial statement filed with the Texas Ethics Commission to be filed electronically*** (either by computer diskette, modem, or other means of electronic transfer, using computer software provided by the commission or computer software that meets commission specifications for a standard file format). Note that this requirement applies to all persons currently required to file personal financial statements with the Ethics Commission, including ***directors of RMAs*** (with the exception of directors of RMAs for which each member county has a population of less than 200,000).

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Appendix "F"

LEGISLATION OF INTEREST WHICH DID NOT PASS

Below is a brief summary of legislation of interest which was not passed by the 84th Legislature.

Toll Entity Oversight & Operations

- **SB 1150 (Hall)** – Would have ***repealed the regional mobility authority ("RMA") enabling act*** (Chapter 370 of the Transportation Code).

- **HB 528 (Larson)/SB 721 (Burton)/HB 572 (Burkett)**[1] –

  - Would have ***subjected regional tollway authorities ("RTAs") and RMAs to review by the Sunset Advisory Commission*** as if they were a state agency (but they could not have been abolished through the review).

  - RTAs and RMAs would have been ***responsible for paying the cost of the sunset review***.

- **SB 1184 (Huffines)/HB 3114 (Dale)** – Would have ***subjected RMAs to audit*** by the state auditor's office.

- **HB 1837 (Sanford)** – Would have required a local toll project entity ("LTPE") or metropolitan planning organization ("MPO") ***to obtain, by a three-fifths vote, approval of the commissioners court*** of the county in which a toll project is proposed to be located ***before*** the LTPE or MPO could conduct a feasibility study for the project; develop a design for the project; or enter into a construction contract for the project. Separate approval would have been required before each of these three actions.

- **HB 1183 (Shaheen)** – Would have required TxDOT, RMAs, and RTAs to ***obtain an order approving a proposed comprehensive development agreement ("CDA") from the county commissioners court of each county containing a portion of the project*** that is the subject of the CDA.

- **HB 2620 (Burkett)/SB 939 (Kolkhorst)/SB 1046 (Hall)** – Would have made ***financial studies and reports associated with a toll project***, including financial forecasts and traffic and revenue reports, subject to disclosure under the Public Information Act ***regardless of whether a final contract for the project has been entered into***.

[1] An effort was made in the final days of the Legislative Session to include the provision subjecting RTAs to Sunset review under the conference committee report on HB 3123 (the sunset catch-all bill). Ultimately the resolution to authorize the conference committee to go outside the bounds failed in the House and the provision was not adopted.

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- **HB 1257 (Shaheen)/SB 711 (Burton)/SB 1862 (Burton)** – Would have prohibited certain political subdivisions, specifically including RMAs and other toll road authorities from ***spending public money to directly or indirectly influence or attempt to influence the outcome of any legislation*** pending before the legislature.

- **HB 650 (Isaac)/HB 894 (Miller)/HB 1056 (Rodriguez)/HB 1985 (Capriglione)** – Proposed various amendments to the optional veteran toll discount program currently in statute so that it would have become a ***mandatory veteran toll waiver program*** or expanded the group of people qualifying to participate in the program.

- **HB 1835 (Sanford)/SB 937 (Kolkhorst)** – Intended to ***prohibit TxDOT from developing managed lanes*** and from using state right-of-way for added capacity toll projects.

  - SB 937 stated that TxDOT could ***only consider a general-purpose lane that is part of the highway*** and may not include a lane of a frontage road when determining the number of nontolled lanes when converting a nontolled highway to a toll project.

- **HB 1838 (Sanford)** – Would have required TxDOT to provide each member of the legislature with a ***plan to eliminate all toll roads in Texas by 2046***, including 23 specific projects listed in the bill.

Restrictions on Uses of Funds

- **HB 2611 (Pickett)** – Would have ***required an LTPE to repay to TxDOT*** any funds contributed by TxDOT for the development of a turnpike project.

- **HB 3674 (Anchia)/SB 1182 (Huffines)** – Attempted to place ***restrictions on the use of the State Highway Fund for toll projects.*** HB 3674 would have allowed TxDOT to provide financial assistance for a turnpike project ***only if the project is on the state highway system*** and designed, constructed, operated, repaired, or maintained by the LTPE ***on behalf of TxDOT***.

- **HB 1350 (Burkett)/HB 1734 (Shaheen)/SB 485 (Kolkhorst)/HB 1834 (Sanford)/HB 3725 (Sanford)** – These bill sought to:

  - repeal and amend various statutory provisions applicable to LTPEs allowing for the ***use of surplus revenues on other projects***.

  - require that either ***tolls be removed*** when bonds are paid off, or allow ***tolls to remain but only for operations and maintenance***.

  - HB 1834 would have required ***county approval of toll projects***.

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- The following bills would have dedicated money to transportation but contained ***explicit restrictions against using the funds for toll roads***:

  - HB 202 (Leach)
  - HB 203 (Leach)
  - HB 1031 (Leach)
  - HB 1836 (Sanford)
  - HB 2686 (Shaheen)
  - SB 341 (Huffines)
  - HB 373 (Simmons)
  - HB 1370 (Phillips)
  - HJR 13 (Pickett)
  - SJR 62 (Nichols)
  - HB 395 (McClendon)
  - HB 401 (Harless)
  - HJR 24 (Harless)
  - HB 1673 (Guillen)

Transportation Reinvestment Zones

- **HJR 109 (Pickett)** – Proposed a constitutional amendment authorizing the legislature to permit a ***county to issue bonds or notes to finance transportation and infrastructure projects*** in a defined area to be repaid from increases in revenue from ad valorem taxes in the area. This would have addressed and clarified issues raised in various Attorney General Opinions regarding the use of TRZs by counties.

- **HB 4025 (Keffer)/SB 1788 (Uresti)** – Sought to resolve the issue which HJR 109 attempted to address but through a statutory change rather than a constitutional amendment.

  - Revised the County Energy Transportation Reinvestment Zone ("CETRZ") statute so that a CETRZ could be created and be used for projects ***not just within the CETRZ but within the entire county***.

  - HB 4025 was passed by both the Senate and House, but ***Governor Abbott vetoed the bill*** on June 20.

  - In objecting to the bill, Governor Abbott stated that "[HB] 4025, in part, is an attempt to do what the Texas Constitution and multiple Attorney-General opinions prohibit. If the Legislature wants counties to have the authority to create tax-increment reinvestment zones, it must again ask the voters to amend the Constitution."[2]

[2] Veto Message of Gov. Abbott, Tex. HB 4025, 84th Leg., R.S. (2015).

Texas Transportation Legislation Overview of the 85th Regular Legislative Session

Authored by: C. Brian Cassidy, Lori Fixley Winland, Brian O'Reilly and Sarah Lacy
June 15, 2017

The 85th Texas Regular Legislative Session[1] was a challenging one for transportation issues and advocates. The Legislature succeeded in passing a Sunset bill for the Texas Department of Transportation ("TxDOT") extending the agency for 12 more years, but that bill included provisions that will make toll project development more difficult. The Legislature also declined to reauthorize the use of public private partnerships ("P3s") for highway projects. The failure to do so removes an important tool at a time when there are critical projects around the state that lack the necessary funding, and when the Trump administration reportedly will pursue a national infrastructure program based, in part, on private sector investment.[2] Aside from these issues there were no significant policy changes related to transportation funding or project development, although there were a number of bills passed that will be of interest to toll agencies and others interested in transportation issues.

Set forth below is an overview of the process leading to passage of the TxDOT Sunset bill (and the inclusion of one particular anti-toll amendment), the failed effort to reauthorize comprehensive development agreements ("CDAs"), and a general discussion of the circumstances which may have contributed to both. A more detailed discussion of the TxDOT Sunset bill and other legislation is contained in the Appendices.

SB 312— The TxDOT Sunset Bill

The Sunset Advisory Commission ("SAC") Staff Report for TxDOT, released in November 2016, opened with the following passage:

> The Texas Department of Transportation (TxDOT) has reached another pivotal moment in its long and often turbulent history. After a decade of intense legislative scrutiny including multiple Sunset reviews, frequent leadership changes, and continuing organizational flux, TxDOT is now embarking on another high-stakes transition as it prepares to spend billions of dollars in new funding.[3]

This description succinctly captures much of what TxDOT has faced in recent years. The agency underwent contentious sunset reviews in 2009 and 2011, and while last session (the 84th Legislative Session) was not a sunset year, HB 20 was similar to a sunset bill due to the prescriptive manner in which it addressed TxDOT's planning and prioritization procedures.[4]

The SAC Staff Report focused primarily on TxDOT's contracting procedures and oversight, continuing progress toward performance-based transportation planning and the implementation of HB 20, and overall readiness to effectively manage the influx of new funding expected to come from Propositions 1 and 7. The statutory aspects of the SAC recommendations were embodied in SB 312, sponsored by Senator Robert Nichols (a SAC member and Chair of the Senate Transportation Committee) and Representative Larry Gonzales (SAC Chair). In general, and in contrast to previous TxDOT Sunset bills, SB 312 (as filed) was relatively non-controversial and focused primarily on project planning and contracting issues along with various administrative functions of the agency.

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[1] On June 6, 2017, Governor Abbott issued his call for a special session of the 85th Texas Legislature to address 20 different issues. None of the enumerated issues are directly related to transportation.

[2] *See, e.g.*, Office of Mgmt. & Budget, Exec. Office of the President, *Budget of the U.S. Government: A New Foundation for American Greatness, Fiscal Year 2018*, at 19 (2017), *available at* https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/budget/fy2018/budget.pdf

[3] Sunset Advisory Comm'n, *Sunset Staff Report: Texas Department of Transportation* (2016–2017), *available at*: https://www.sunset.texas.gov/public/uploads/files/reports/Texas%20Department%20of%20Transportation%20Staff%20Report_11-15-2016_0.pdf.

[4] Act of May 29, 2015, 84th Leg., R.S., ch. 314, § 2, 2015 Tex. Gen. Laws 1449 (filed and enacted as HB 20).

Senate and House Consideration of SB 312
SB 312 was passed by the full Senate on March 21st with only three amendments. Thus, the bill continued to closely mirror the recommendations in the SAC Staff Report when it passed the first chamber. However, SB 312 was not considered by the House until May 16th, almost two months after Senate passage. By then it was relatively late in the session, and the deadline for House bills to be reported out of committees had passed. SB 312 therefore became a vehicle to advance other House bills which were dead because they had not yet received a committee hearing or had been heard but had not made it through the committee process. These so-called "zombie" bills needed another vehicle to come back to life, and SB 312 served that purpose for many. There were 52 pre-filed amendments, many of which were attempts to revive zombie bills, by the time SB 312 was heard on the House floor.

When Chairman Gonzales presented SB 312 on the House floor he stated his preference that amendments which had not been vetted through the committee process not be added to the bill. That preference was not shared by his House colleagues, and the result was that 15 amendments were added to SB 312. Several of those amendments were zombie bills with significant policy implications, and they were poised to become law without ever having received committee hearings and an opportunity for public input.

Conference Committee
Following passage by the House of SB 312 (as amended), it was up to the Senate to decide whether to concur in the amendments or request the appointment of a conference committee. If no conference committee had been requested, SB 312 would have passed without any revision to the House amendments. Fortunately, Senator Nichols requested a conference committee, although he left open the possibility of concurring in the House amendments if necessary to assure the bill passed before the session ended.[5]

The Senate appointed its conferees on May 22nd. They were Senators Nichols, Watson, Hinojosa, Hancock, and Van Taylor. The House appointed its conferees on May 24th, only three days before the deadline for each chamber to consider conference committee reports. The House conferees were Representatives Gonzales, Morrison, Burkett, Raymond, and Senfronia Thompson. Led by Senator Nichols and Representative Gonzales, the conferees were able to quickly reach agreement on several key issues, and a conference committee report was adopted by each chamber on May 27th, the last day to do so.

Amendment No. 12— Prohibition on Grants of TxDOT Funds for Toll Projects
For regions that support tolling as an option to deliver projects, the most significant and potentially damaging provision of SB 312 (as finally passed) was "Amendment No. 12", which was added by Representative Joe Pickett. That amendment changes existing law by precluding TxDOT from granting funds for toll projects. In contrast to previous practice (and constitutional authority[6]), all funds directed to a toll project that flowed from or through TxDOT will have to be repaid—even funds allocated to a metropolitan planning organization ("MPO"). Amendment No. 12 was similar to Representative Pickett's HB 303, which had never received a committee hearing in the House, and its Senate companion SB 812 by Senator Lois Kolkhorst, which passed the Senate but was never considered in a House committee. Amendment No. 12 narrowly passed on the House floor by a vote of 73 to 65.[7]

Toll projects around the state are typically financed through a combination of toll revenue bonds and funds allocated to a project by an MPO. Toll revenue bonds represent a form of local funding, as the bonds are issued by a local entity (e.g., a regional mobility authority ("RMA"), the North Texas Tollway Authority ("NTTA"), or a county toll road authority). Repayment is supported solely by user fees generated from the project. This money does not come from TxDOT or the state highway fund.

The MPO-allocated funds come from the portion of funds that TxDOT directs to an MPO through the statewide, formula-based allocation of state funds. MPOs (and the elected officials on MPO boards) make decisions locally regarding how to utilize funds to support projects in their region, which may include dedicating funds to support a toll project. Doing so may accelerate an important project for the region by many years (even decades) as a result of not having to wait on traditional state funding. However, even though the decision to dedicate funds to a toll project is made locally, the funds originate from the state highway fund which is administered by TxDOT. That means notwithstanding the local decision-making process, MPO-allocated funds are considered a "grant" of funds from TxDOT and will be subject to Amendment No. 12 and its repayment requirement.

[5] *See* Ben Wear, *TxDOT sunset bill's fate remains unclear as session ebbs,* Austin Am. Statesman, May 24, 2017.
[6] See p. 7 below.
[7] "Statements of Vote" in the House Journal indicated that four members who voted "yes" had intended to vote "no", which, had the votes been cast that way, would have resulted in a tie vote and the amendment failing. H.J. of Tex., 85th Leg., R.S. 3507 (2017).

The long-term implications of Amendment No. 12 will likely be to delay projects or render them financially infeasible to develop as regional toll projects. The repayment requirement simply adds more debt to a project—beyond the maximum debt capacity that has already been determined in assessing the amount of toll revenue bonds that can be issued. Projects that cannot be developed at the local level will then rely on state funding which is already inadequate to meet the state's growing needs. Trading local funding of projects for an increase to the state's burden of doing so hardly seems like a wise trade-off in a state struggling to address the impacts of congestion on mobility, economic development, and quality of life for its citizens.

Exceptions to Amendment No. 12

Because of the potential for negative impacts of Amendment No. 12 on pending projects, discussion during the conference committee process included ways to mitigate those impacts. Several major projects have been in the development phase for many years, and those projects have been advanced on the assumption that grant funding would be available. Suddenly precluding grants could have undermined that work and delayed (or killed) those projects. Led by Senators Nichols and Watson and Representative Gonzales, the conference committee revised the language of Amendment No. 12 to exempt projects from the repayment requirement if the environmental review process had commenced prior to January 1, 2014. This revision protects several pending RMA projects[8] and may benefit certain projects in the Houston and Dallas–Fort Worth areas as well.

Comprehensive Development Agreements

CDAs are the Texas form of public-private partnership for roadway projects. Generally a CDA involves a contract with a private sector entity to design, construct, finance, operate, and maintain a project for some period of time (up to a maximum of 52 years).[9] CDAs transfer financing, revenue, and construction risk to the private sector. In some instances there is an up-front payment received from the private sector entity for the right to develop and operate the project, and often there is an agreement to share revenues between the private sector and the public entity as well. Ownership of any roadway subject to a CDA must, by law, remain with the public sector, so there is never any private ownership of public roadways under a CDA.

The CDA delivery method has been used for five projects in Texas with an aggregate capital cost of $8.5 billion. One project (SH 130, Segments 5 & 6) went into bankruptcy after several years of operation; however, the restructuring process for that project is nearly complete. Notwithstanding the bankruptcy, the roadway has continued in operation. The state has not been forced to assume any financial obligations, demonstrating that even in the worst-case scenario the risk transfer inherent in CDAs worked and the public was protected. Two of the five CDAs included up-front payments for the rights to develop and operate the projects, and that money has been used by the regions where the projects are located to support the financing of additional projects. All five CDA projects also provide for revenue sharing, which provides further funding for additional projects.

Beginning with their initial authorization in 2003, CDAs have had a tumultuous legislative history. There was considerable political and local government resistance to early efforts by the Texas Transportation Commission to force regions and local tolling entities to consider CDAs (instead of conventional financing) for proposed toll projects. This resistance was exacerbated by the role of CDAs in the controversial (and now dead) Trans-Texas Corridor. The progression of CDA authorization has taken the following path:

- 2003: CDAs were authorized for TxDOT and RMAs[10] as part of HB 3588.[11]
- 2005: Statutorily required CDA terms were modified; CDAs could have a maximum term of 52 years and must include a requirement to include a toll rate setting methodology in the agreements.
- 2007: A moratorium was imposed on further CDAs, although several projects were exempted and were granted development authority through August 31, 2011.
- 2009: CDA authorization was not extended, but the previously authorized projects continued to have CDA authority through August 31, 2011.

[8] RMA projects exempted from the repayment requirement include: Oak Hill Parkway, Loop 1 South, and 183 North (CTRMA); Second Causeway, Outer Parkway and SH 550 (CCRMA); and Loop 1604 (Alamo RMA).
[9] This discussion does not include "design/build CDAs", which include only the design and construction elements and do not involve financing or operation of projects by private entities.
[10] NTTA and county toll road authorities take the position that they have unrestricted CDA authority.
[11] Act of June 1, 2003, 78th Leg., R.S., ch. 1325, §§ 2.01, 15.57, 2003 Tex. Gen. Laws 4884, 4922, 4969 (filed and enacted as H.B. 3588).

- 2011: CDAs were authorized for various projects specifically identified in statute. That authority was granted through August 31, 2015.

- 2013: The list of authorized CDA projects was revised, and development authority was extended through August 31, 2017.

- 2015: CDAs were not considered, but the previously authorized projects continued to have CDA authority through August 31, 2017.

- 2017: CDAs were not re-authorized.

With the expiration of CDA authority set for August 31, 2017, several House bills were filed in the 85th Legislative Session to identify new projects eligible for delivery through a CDA. Those bills were ultimately consolidated into one omnibus CDA bill: HB 2861 by Representative Larry Phillips. HB 2861 included a total of 18 projects with an aggregate cost of $30 billion, including several critical projects on congested interstate corridors. HB 2861 would have extended CDA authority through August 31, 2021.

The debate on the House floor over HB 2861 was fairly contentious. Representative Phillips emphasized that even with the progress made through Propositions 1 and 7 there was not nearly enough funding for transportation; that CDAs were a permissive tool (not a requirement); and that CDA authority might be necessary in order to access federal programs under the Trump administration infrastructure plan. Representatives Pickett and Jonathan Stickland were the most vocal opponents of the bill, with Representative Pickett arguing that the expansive list of projects was creating false hope for regions with projects on the list that would likely never see a CDA, and Representative Stickland invoking the specter of foreign investment (a tactic widely used during the Trans-Texas Corridor debates) and warning his Republican colleagues that they might well face a primary challenge if they supported the bill. Neither offered any alternatives as to how to fund the projects identified in HB 2861.

Ultimately HB 2861 was defeated by a vote of 79 to 52. Even if the bill had passed the House it would have faced an uphill battle in the Senate, as there appeared to be little appetite among Senate leadership to even consider CDAs (only one project-specific bill was filed, and it was not given a hearing).

While private sector investment has been successfully utilized to deliver significant projects in Texas, the current political climate has forced a retreat from use of the CDA tool. As congestion worsens in areas where there is inadequate funding for major projects, it will be interesting to see how the state's leadership responds. Likewise, if a federal program is implemented which rewards use of the P3 model, leadership will have to decide if it is willing to forgo those opportunities while project needs go unmet.

Contributing Factors to Legislative Actions

The actions described above, and further reflected in certain other amendments to the TxDOT Sunset bill (see Appendix "A"), evidence a turn away from tools which have helped to address the state's significant transportation infrastructure needs. It is difficult to see how eliminating or restricting the ability to use these tools will not hamper the state's ability to meet the growing demand for roads to accommodate growth, particularly in the urban areas and in the Rio Grande Valley. Although there is no single reason for this trend, some potentially contributing factors are discussed below.

Funding— Perception and Reality

The actions of the legislature in undermining tolling and refusing to authorize CDAs may, in part, be explained by a ***perception*** among some members (and their constituents) that Propositions 1 and 7 have addressed the state's funding needs, and therefore P3s and tolling are no longer necessary or desirable tools. Evidence of this view lies in the fact that there were no bills filed to increase the gas tax, index the gas tax, or otherwise raise new funds at the state level for transportation. In past years, and based on a study by the "2030 Committee"[12], TxDOT had indicated it needed $4 billion in additional funding per year–$3 billion for new capacity and $1 billion per year for maintenance.[13] During his campaign and shortly after his election in 2014, Governor Abbott committed to finding that $4 billion "without raising taxes, fees, tolls or debt."[14] Propositions 1 and 7 were intended to address the $4 billion need and appear to have gone a considerable way toward doing so. The FY 2019 budget (SB 1) passed by the Legislature[15] indicates that Proposition 1 will account for

[12] 2030 Committee, *It's About Time: Investing in Transportation to Keep Texas Economically Competitive* (March 2011), *available at* http://texas2030committee.tamu.edu/documents/final_03-2011_report.pdf; *see also* Tex. Dep't of Transp., *2015–2019 Strategic Plan* 25 (July 7, 2014), *available at* http://ftp.dot.state.tx.us/pub/txdot-info/sla/strategic-plan-2015-2019.pdf.
[13] Later that number was increased by $1 billion in annual funding needs to address roads affected by energy sector activity.
[14] H.J. of Tex., 84th Leg., R.S. 407 (2015) (Proclamations by the Governor of the State of Texas).
[15] FY 2019 is the first year that funding from Proposition 7 takes effect.

$739 million in additional funding[16], and Proposition 7 will account for more than $2.5 billion. Propositions 1 and 7 have therefore come close to meeting the $4 billion target, and are likely to exceed that number in future years. The impacts have already been noticed, and there has been much fanfare surrounding the fact that TxDOT's 10 year Unified Transportation Plan ("UTP") accounts for $70 billion, which includes $38 billion in additional funding.[17]

The ***reality*** is that Propositions 1 and 7 were never intended to solve the state's funding needs without tolling or P3s.[18] The 2030 study from which the $4 billion number was derived assumed that toll roads and P3s would continue to be used to develop projects. TxDOT's current Executive Director (then CFO) testified in 2015 that if toll roads and P3s were not available, the $4 billion annual need would increase to up to $10 billion annually.[19] As a result, the Legislature's actions in precluding P3s and creating impediments to tolling may have exacerbated a problem that many thought had been solved. Unfortunately that may manifest itself in critical projects being deferred, local toll entities facing challenges in securing project funding, and an inability to access potential federal funding programs.

Anti-toll Sentiment

The perception among some members that the state's funding problem has been solved may have also fueled already growing anti-toll sentiment. The previous (84th) Legislative session saw a large turnover in the House and Senate. Several of the new members received the backing of "Tea Party" groups, many of which have expressed strident anti-toll views (though few, if any, have articulated any policy for increasing transportation funding). In light of the perception of adequate funding described above, anti-toll rhetoric resonates more loudly. Additionally, some members have voiced strong anti-toll positions as a result of being, in their view, overburdened with toll roads in their areas. Yet tolling is an option, not a requirement, and the Dallas (and Houston) areas have developed robust roadway networks which rely heavily on tolled facilities. Given that tolling is a local decision, it is difficult to understand why Austin, San Antonio, Brownsville, McAllen, and other areas of the state should be denied the opportunity to develop projects with local support just because some believe there are too many toll roads in another part of the state.

Moreover, while it may be politically expedient to be opposed to toll roads, that opposition leaves unanswered the question of how to fund projects without using tolls and/or CDAs. It is highly unlikely that the same political constituency that so vocally opposes tolling will advocate for raising the gas tax or imposing other fees to fund new infrastructure. As tools for funding transportation projects are removed from the toolbox, the state will be forced to find other solutions or risk seeing its infrastructure decline to the detriment of its citizens, to public safety, and to the economy.

Contravening Voter-Approved Actions

The 85th Legislative Session also saw a continued trend of legislative action contrary to the expressed will of Texas voters. In 2001, voters approved Proposition 15, which created the Texas Mobility Fund (the "TMF") and authorized grants of funds for toll roads. The TMF was one of the more flexible sources of money available for use by TxDOT; however, with the passage of HB 122 in the 84th Legislative Session, the TMF lost the ability to function as the revolving fund contemplated at the time Proposition 15 was approved.[20]

The erosion of voter-approved authority from Proposition 15 continued in the 85th Legislative Session under Amendment No. 12 to the TxDOT Sunset bill. Prior to Proposition 15, the Constitution required the repayment of funds advanced for the use of toll projects. In addition to creating the TMF, Proposition 15 amended Art. 3, sec. 52-b of the Texas Constitution by:

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[16] The Proposition 1 funds are dependent on oil and gas severance tax collections, and that number has been variable in recent years due to a downturn in the energy industry.

[17] The Chair of the Texas Transportation Commission wrote a widely published op-ed that articulated this opinion. *See, e.g.,* Tyron Lewis, *Historic transportation plan gets another boost*, Austin Am. Statesman, May 8, 2017; Tyron Lewis, *Historic transportation plan gets a boost*, Rockdale Reporter, May 4, 2017; Tyron Lewis, *More funds coming for Texas roads*, San Antonio Express News, April 24, 2017.

[18] On the House floor, Representatives Phillips and Pickett shared the following exchange:

> Rep. Pickett:. . . [Y]ou said Prop 1 and Prop 7 is not enough. Do you agree with that?
> Rep. Phillips:Yes.
> Rep. Pickett:I do too.

See Debate on Tex. H.B. 2861 on the Floor of the House, 85th Leg., R.S. (May 5th, 2017), *available at* http://www.house.state.tx.us/video-audio/chamber/85/ (tape available from the House Video/Audio Services Office).

[19] Hearing on Tex. H.B. 20 Before the House Transportation Subcommittee on Long Term Infrastructure Planning, 85th Leg., R.S. (March 24, 2015) (statement by TxDOT Executive Director James Bass).

[20] Act of May 19, 2015, 85th Leg., R.S., ch. 387, § 1, 2015 Tex. Gen. Laws 1613, 1613–1614 (filed and enacted as HB 122) (codified at Tex. Transp. Code § 201.943).

> authorizing **grants** and loans of money and issuance of obligations for financing the construction, reconstruction, acquisition, operation, and expansion of state highways, turnpikes, toll roads, toll bridges, and other mobility projects.[21]

At the time, the House Research Organization noted that the amendment "would repeal the constitutional requirement to repay Fund 6 from tolls or other turnpike revenue."[22] In other words, by approving Proposition 15, the voters specifically approved allowing grants. Yet, Amendment No. 12 precludes exactly what the voters authorized.

While these departures from voter-approved policies could be dismissed as merely isolated actions related to initiatives pursued 15 years ago, it should be noted that the more recently expressed will of the voters was in the crosshairs as it relates to Proposition 7 funds (which are specifically prohibited from being used on toll projects). House Appropriation Chair John Zerwas filed HCR 108 on March 31st which, subject to a two-thirds vote of the members in each of the House and Senate, would have reduced Proposition 7 revenues that would be deposited in the state highway fund by 50% for FY 2018 and 2019. In other words, Proposition 7 funds, notwithstanding overwhelming voter approval for highway use in 2015, would have instead been used to balance the state's budget. HCR 108 sparked a significant outcry from various transportation industry stakeholders who had supported Proposition 7, and ultimately it was dropped as a potential tool in the House and Senate budget debates.

In the sections that follow are summaries of transportation-related legislation which was enacted during the 85th Regular Legislative Session, as well as summaries of other legislation possibly impacting toll authority operations. For ease of reference these summaries are separated by bill number and/or topic as indicated.

Appendices

Appendix "A"SB 312- TxDOT Sunset Legislation
Appendix "B"Contracting and Procurement Legislation
Appendix "C"Open Government & Ethics Legislation
Appendix "D"Other Bills of Interest (TNCs, Texting, Rail/Transit P3, etc.)
Appendix "E"Legislation Which Did Not Pass

The foregoing and the attached appendices are only intended to be a summary of the results of the 85th Regular Legislative Session. Interested parties should consult the text of specific legislation concerning the scope and application of new laws, changes to laws, and provisions of previously enacted laws. Questions may be directed to: Brian Cassidy, (512) 305-4855 (bcassidy@lockelord.com); Lori Winland, (512) 305-4718 (lwinland@lockelord.com); Brian O'Reilly, (512) 305-4853 (boreilly@lockelord.com); or Sarah Lacy, (512) 305-4780 (slacy@lockelord.com).

[21] Tex. Const. art. III, § 52-b (emphasis added).
[22] House Research Organization, *Focus Report: Amendments Proposed for November 2001 Ballot* 45 (Aug. 13, 2001), *available at* http://www.hro.house.state.tx.us/pdf/focus/amend77.pdf.

Appendix "A"

SB 312- TxDOT Sunset Legislation

The TxDOT Sunset bill becomes effective on September 1, 2017 (although there are varying transition provisions for different areas), and it extends TxDOT for 12 years. There are several provisions in SB 312 which will have an impact on tolling and project development or might otherwise be of interest to project planners and implementers. These are described below (section references are to SB 312).

In addition, SB 312 covers a wide variety of other topics, including project planning and reporting measures, highway naming, accident reporting, management of the state aircraft pool, and other administrative functions. These more routine provisions are beyond the scope of the summary below.

- **Sections 39-42**: Prohibitions Against Grants of TxDOT Funds for Toll Roads:

  - amends Chapter 366 (NTTA) and Chapter 370 (RMAs) to ***require repayment of funds contributed*** by the Texas Transportation Commission ("TTC") or TxDOT;

  - provides that the TTC or TxDOT ***may*** require ***funds to be repaid from tolls or other revenues from the project*** on which the funds were spent;

  - amends Chapter 372 (***applicable to all toll project entities***) to reflect the repayment requirement;

  - requires TxDOT to allocate to a district the same amount of money that was received from repayments from a project in the district for use on other transportation projects; allows TxDOT to "reasonably allocate" between districts if a project is in more than one district;

  - ***exempts*** from the repayment requirement any ***projects for which a toll project entity commenced the environmental review process prior to January 1, 2014.*** Note that a technical correction to SB 312 clarified that ***any*** toll project entity (including TxDOT) ***could have commenced the environmental review process*** even if that is not the entity developing the project; and

  - exempts from the repayment requirement funds that are held in a subaccount under Sec. 228.012 of the Transportation Code (for CDA payments).

  Note: As described in the introductory portion of this overview, the prohibition against grants has the potential to negatively impact project financing by local toll project entities. The prohibition includes funds allocated to MPOs which have, in many instances, been the source of grant funds. There is no guidance in the statutory changes regarding repayment terms and whether the terms can be flexible so as to ease the impacts of adding more debt to projects. The changes do require that repayments received be used for other projects in the TxDOT district where the project receiving the loan is located, and funds held by TxDOT in subaccounts (i.e., up front CDA concession payments) for the benefit of a region and disbursed to support a toll project are exempt from the repayment requirement. Per Section 76, the repayment obligation applies only to loans, grants, or other TxDOT contributions made after September 1, 2017.

- **Sections 28-35**: Limits on TxDOT Toll Collection Administrative Fees:

  - TxDOT must send an invoice to collect tolls for the use of a TxDOT toll project, stating the amount due, the due date, and that failure to pay will result in assessment of an administrative fee;

- ***TxDOT*** can add an administrative fee (to be determined by rule), but ***can charge no more than $6 in administrative fees for each invoice*** and ***no more than $48 in administrative fees during a 12 month period;*** and

- retains previous law providing that a person who receives ***2 or more invoices*** from TxDOT for unpaid tolls that are ***not paid*** within 30 days of the date of the second invoice can be ***charged with a misdemeanor punishable by a fine of no more than $250. A person may not be convicted of more than one offense during any 12 month period.***

Note: These changes severely restrict the amount of administrative fees that TxDOT may charge for failure to pay invoices for toll road use (i.e., pay-by-mail charges) when received. This has the potential to undermine a disincentive for non-payment of tolls. While this change only applies to TxDOT toll roads, other tolling entities may be affected by the confusion and inconsistency concerning the rules related to use of roads operated by different tolling entities, as well as the assumption by some users that they have limited financial exposure for the non-payment of tolls on any toll road. This is also a change that may be of concern to the credit markets as they see a state action that undermines effective toll enforcement. ***The change is not effective until March 1, 2018*** (presumably to give TxDOT time to re-program its systems accordingly. These changes were the result of an amendment on the House floor, and the conference committee actually moderated their impact as the adopted version would have "de-criminalized" toll violations (making them only a civil offense) and would have precluded TxDOT from using the habitual violator remedies set forth in Chapter 372. The conference committee refused to accept these changes and retained previous statutory provisions as noted above

- **Section 37**: Prohibitions on Conversions:

  - adds Sec. 228.201(c) to provide that for purposes of reconstructing a highway and adding tolled capacity, ***frontage roads may not be considered in determining the amount of non-tolled capacity existing before or after the reconstruction***; and

  - ***removes Secs. 228.201(a)(5) and (b) and the authority to convert a high occupancy vehicle ("HOV") lane existing prior to May 1, 2005 to a high occupancy toll ("HOT") lane***; however the following are ***excluded*** from this prohibition (and will remain governed by the prior law):

    - ✓ projects ***operated by TxDOT*** or an entity under contract with TxDOT prior to September 1, 2017; and

    - ✓ projects ***included in the state's air quality state implementation plan*** prior to September 1, 2017.

Note: The addition of Sec. 228.201(c) simply removes frontage roads from the computation of non-tolled capacity before and after the reconstruction of a corridor where existing lanes are "converted" to toll lanes. In general this is intended to preclude displacing general purpose lanes with frontage roads. It will have little practical effect on existing practice. The repeal of Sec. 228.201(a)(5) and (b) precludes the conversion of pre-existing HOV lanes to HOT lanes. Since there are existing projects for which that is a possibility as part of air quality programs in non-attainment areas (primarily in the Houston area), transition language in Section 78 sets forth the exclusions described above.

- **Section 38**: Removal of Tolls— Cesar Chavez Freeway (El Paso):

  - ***allows*** the Camino Real RMA to ***"convert" the portion of the Cesar Chavez project that is tolled to non-tolled***

    - ✓ provides that any funds advanced by TxDOT for construction or maintenance that are unexpended shall be transferred to the Border Highway West Project; and

    - ✓ TxDOT shall be required to maintain the Cesar Chavez project as part of the state highway system if tolls are removed.

Note: This permits, but does not require, the Camino Real RMA to remove tolls from the Cesar Chavez project. That project has no outstanding bonded indebtedness. Removing tolls from this project would accomplish a long-term goal of Representative Joe Pickett.

- **Section 37**: Removal of Tolls— Camino Colombia:

  - ***precludes*** TxDOT from operating SH 255 (the Camino Colombia project in Laredo) ***as a toll facility***.

  Note: This requires TxDOT to remove tolls from the Camino Colombia bridge. That project has no outstanding bonded indebtedness.

- **Section 24**: E-verify Requirements:

  - amends Sec. 223.051 to ***require that TxDOT contractors and subcontractors participate in the E-verify program*** to verify employee information; and

  - TxDOT is required to develop procedures for administration and enforcement of the requirement.

- **Section 23**: Contractor Performance

  - Sec. 223.012 is amended to require the TTC to adopt rules to:

    - ✓ establish contract remedies to be included in all ***low-bid*** highway improvement contracts, including criteria for ***precluding contractors*** with significant project completion delays ***from bidding on new projects***;

    - ✓ implement a schedule for liquidated damages; and

    - ✓ develop performance evaluation tools that contain criteria for ***modifying a contractor's bidding capacity***.

  - in developing the rules the TTC is required to consult with industry contractors, other state agencies, and other state departments of transportation;

  - the rules must include criteria for identifying projects with a significant impact on the public and require that ***project-specific liquidated damages be developed*** to reflect the true cost of travel delays; and

  - the rules must also provide a process for contractor appeals of evaluation criteria for TxDOT's use of the evaluations and require TxDOT to consider events outside of the contractor's control before assessing penalties.

- **Section 14**: UTP Transparency and Reporting:

  - the TTC is required to adopt rules that explain TxDOT's approach to public involvement and ***transparency related to the UTP***; and

  - the rules must ***require TxDOT to make a report on any change to the UTP*** and to make it available on TxDOT's website as well as be the subject of a report to the TTC in a public meeting.

- **Section 20**: Roles and Responsibilities of TxDOT and MPOs:

  - the TTC is required to adopt rules governing:

    - ✓ the ***alignment of TxDOT's funding forecasts with MPO funding forecasts***;

    - ✓ the ***alignment of statewide project recommendation criteria with project recommendation criteria developed by MPOs*** that relate to statewide goals, particularly for major mobility projects;

    - ✓ TxDOT's timelines and review process for 10-year plans;

    - ✓ TxDOT's process for allowing MPOs direct access to TxDOT information systems, software, etc.; and

- ✓ TxDOT's process for collaborating with MPOs to evaluate the quality of the data and information needed to develop a performance-based planning and project selection system.

➢ **Section 21**: Hearing Requirement for Project Impacts:

- the TTC must adopt rules that ***require a hearing for projects that substantially change the layout or function of an existing roadway***, including the addition of ***managed lanes, HOV lanes, bicycle lanes, bus lanes, and transit lanes***.

Appendix "B"

Contracting and Procurement Legislation

Below is a brief summary of contracting and procurement legislation passed by the 85th Legislature.

- **HB 53 (Romero/Huffman)** *(Effective date: September 1, 2017)* – Prohibits an attorney representing a governmental unit (including political subdivisions, RMAs, and regional tollway authorities ("RTAs")) from entering into a settlement for more than $30,000 ***if a non-disclosure agreement is a condition of the settlement***. This prohibition applies when the money used to pay the settlement is derived from taxes, state funds, or insurance proceeds with a premium paid with taxes or state funds.

  Note: This law is intended to dissuade governmental units from entering into settlement agreements (which are generally subject to disclosure under the Public Information Act) that do not contain sufficient detail to ensure transparency. The change does not affect information that is privileged or confidential under other law.

- **HB 89 (King/Creighton)** *(Effective date: September 1, 2017)* – Prohibits a governmental entity (defined to include a state agency or political subdivision, which includes RMAs and other local toll entities) from entering into a contract for goods or services without first obtaining written verification in the contract that the vendor:

  - ***does not boycott Israel***; and
  - ***will not boycott Israel*** during the term of the contract.
  - A boycott of Israel means refusing to deal with, terminating business activities with, or otherwise taking any action that is intended to penalize, inflict economic harm on, or limit commercial relations specifically with Israel, or with a person or entity doing business in Israel or in an Israeli-controlled territory, but does not include an action made for ordinary business purposes.

  Note: This provision could potentially impact the vendors with which a toll authority or other governmental entity may contract. Under a separate provision of the law, the comptroller will maintain a list of all companies that boycott Israel. However, a more obvious impact of this legislation is the ***required change in government contracting practices. To comply with this law, government contracts must now include a provision complying with this new law***.

- **HB 3021 (Phelan/Hughes)** *(Effective date: September 1, 2017)* – This bill pertains to ***contracts for engineering or architectural services*** to which a ***state agency*** is a party and ***prohibits the state agency from imposing a "duty to defend"*** upon an architect or engineer. A law enacted in the 84th Legislature (HB 2049) previously imposed this prohibition on a city, county, and other entities, including RMAs, RTAs, and other local toll project entities. HB 3021 now extends the prohibition to state agencies.

  In addition, HB 3021 ***modifies*** the law that now applies to both state agencies and local government entities (including RMAs, RTAs, and other local toll project entities) by ***clarifying that a governmental agency is not prohibited from including and enforcing conditions that relate to the scope, fees, and schedule*** of a project ***in a contract for engineering or architectural services***.

  Note: These changes in the law apply only to a contract for which a request for proposals or a request for qualifications is first issued on or after September 1, 2017.

- **SB 1289 (Creighton/Paddie)** *(Effective date: September 1, 2017)* – Requires that the bid documents and contracts for certain ***state government projects*** mandate the use of American-produced iron or steel in the project. This new provision in the Government Code is called a "Buy America" law, and many highway projects are already subject to similar requirements.

- The new Buy America provision applies to any ***iron or steel product*** used in a project. (SB 1289 also amends the existing Buy America law that applies to TxDOT-awarded state highway system projects to include an iron preference in addition to the steel preference.)

- The Buy America requirement ***applies to state entities*** that:

  - ✓ contract to construct, remodel, or alter a building, structure, or infrastructure (including a road or highway);

  - ✓ contract to supply material for such projects; or

  - ✓ ***contract with a political subdivision to provide state funding for such projects***.

- The bill permits exceptions to the Buy America requirement if:

  - ✓ these products are not produced in sufficient quantities, reasonably available, or of satisfactory quality in the United States;

  - ✓ the use of products produced in the United States will increase the total cost of the project by more than 20 percent; or

  - ✓ complying with the requirement is inconsistent with the public interest.

Note: While TxDOT projects and highway projects using federal funds are required to comply with existing Buy America laws, those existing laws do not apply to projects undertaken by local entities using non-federal funds. SB 1289 changes the law by ***requiring a local entity to include a Buy America provision in bid documents and contracts for projects that utilize state funding under an agreement with TxDOT***. A local entity developing a project ***using only local funding*** may continue to forgo inclusion of a Buy America provision for state highway system projects.

The requirements imposed in this bill only apply to bid documents submitted or contracts entered into on or after September 1, 2017.

Appendix "C"

Open Government & Ethics Legislation

Below is a brief summary of open government legislation passed by the 85th Legislature.

Open Meetings Bills

- **HB 3047 (Dale/Schwertner)** *(Effective date: September 1, 2017)* – Clarifies that under the Open Meetings Act ("OMA"), a member of a governmental body who participates in a meeting by videoconference call is ***considered absent from any portion of the meeting for which audio or video communication is lost*** or disconnected. A governmental body ***may only continue the meeting if a quorum remains*** without the disconnected member.

  Note: This bill is intended to address confusion under existing law, which provides that a governmental body conducting a meeting with one or more members participating via videoconference must recess until the problem is resolved if a problem occurs that causes a meeting to no longer be visible and audible to the public. HB 3047 clarifies that that if one member's connection is lost, a quorum of the governmental body may continue to meet; however, if a quorum does not remain without the disconnected member, the meeting cannot continue.

- **HB 8 & SB 564 (Nichols/Capriglione)** *(Effective date: September 1, 2017)* – Provides that the governing body of a governmental entity is ***not required to conduct an open meeting*** to deliberate certain information related to ***information technology security practices***, including:

  - security assessments or deployments relating to information resources technology;
  - network security information; or
  - the deployment, or specific occasions for implementation, of security personnel, critical infrastructure, or security devices.

  Note: The effect of this bill is to make an exception to the open meeting requirement that was previously available only to the Department of Information Resources applicable to all governmental bodies. (Note that HB 8, a more extensive bill known as the Texas Cybersecurity Act, was amended on the Senate floor to incorporate the same open meeting provision found in SB 564.)

- **SB 1440 (Campbell/Larson)** *(Effective date: September 1, 2017)* – Clarifies that the ***attendance by a quorum*** of a governmental body at a ***candidate forum, appearance, or debate to inform the electorate does not constitute a meeting*** for the purposes of the OMA.

Pubic Information Bills

- **HB 1861 (Elkins/Watson)** *(Effective date: June 18, 2017 unless acted upon by the Governor at an earlier date)* – Makes ***information directly arising from a governmental body's routine efforts to prevent, detect, investigate, or mitigate a computer security incident***, including information contained in or derived from an information security log, ***confidential under the Public Information Act*** ("PIA") and requires a state agency to redact such information from contracts posted online.

  Note: Under existing law, (1) computer network vulnerability reports, (2) other computer vulnerability assessments, and (3) copies of government employee ID badges are protected from disclosure under the PIA. HB 1861 adds a fourth category to the IT security exception under the PIA to protect routine IT security reports and logs.

- **HB 3107 (Ashby/Nichols)** *(Effective date: September 1, 2017)* – Amends provisions governing the production of information in response to a PIA request to:

- provide that a PIA request is ***considered withdrawn if a requestor fails to copy or inspect the responsive documents within 60 days*** of the date that they are made available;

- allow ***multiple PIA requests*** received from an individual requestor on the same calendar day to be ***treated as a single request*** for purposes of calculating costs;

- allow for the establishment of ***monthly limits on the amount of time*** that a governmental body is required to spend producing information for a single requestor without recovering personnel costs with the monthly limit required to be no less than 15 hours (existing law allows for the establishment of a yearly limit of no less than 36 hours);

- provide that a governmental body is not required to respond to a new request from a requestor who has an ***unpaid statement*** issued in connection with a previous request; and

- allow a requestor to file a complaint under the PIA with the attorney general on or after the 90th day after the date the requestor files the complaint with a district or county attorney if the district or county attorney has not brought an action or returned the complaint by that time.

Note: The monthly and yearly limits on the amount of time a governmental body is required to spend responding to requests must be established by the governmental body and do not apply to journalists or others seeking information for dissemination by a news medium or communication service provider.

- **SB 705 (Birdwell/Price)** *(Effective date: May 29, 2017)* – Excepts from disclosure under the PIA the home address, home telephone number, and social security number of an ***applicant for appointment by the governor***.

- **SCR 56 (Watson/Lucio III)** – Asks that the Lieutenant Governor and the Speaker of the House create a ***joint interim committee to examine all state open-government laws, including the PIA***, and that the committee submit its findings and recommendations to the 86th Texas Legislature before it convenes in January 2019. This resolution came about after the failure of efforts to close perceived "loopholes" in the PIA, particularly with respect to the exceptions to disclosure applicable to third parties doing business with the government.

  Note: This resolution resulted from the failure of several significant PIA bills, including SB 407/HB 792 (Watson/Capriglione) (limiting protections applicable to third-party information), SB 408/HB 793 (Watson/Capriglione) (expanding the definition of "governmental body" for purposes of the PIA), and SB 1347/HB 2328 (Watson/Lucio) (proposing an expedited review process that would allow governmental bodies to withhold information under certain circumstances without first seeking a determination from the attorney general). It is likely that efforts will be made to address these issues in the next legislative session.

Other Transparency and Ethics Bills

- **HB 501 (Capriglione/Button/M. González /Fallon/V. Taylor)** *(Effective date: January 8, 2019)* – Requires that a ***Personal Financial Statement ("PFS")*** filed with the Texas Ethics Commission ("TEC") include disclosure of:

  - any ***business entity*** in which the officer held, acquired, or sold ***five percent or more of the outstanding ownership***; and

  - ***contracts that an officer, his/her immediate family member, or a business entity of which the officer or his/her family member has at least a 50% ownership interest has with a governmental entity*** for the sale of goods or services in the amount of at least $2,500, if the aggregate cost of goods or services sold under one or more applicable contracts exceeds $10,000 in the year covered by the report.

  Note: This bill also creates a ***process by which an officer may amend his or her PFS after initial submission to the TEC***, provided that the amendment is made within 14 days of the date that the officer learns of the error or omission and that the original PFS was made in good faith. The new requirements would apply only to PFSs filed on or after January 8, 2019.

- **SB 622 (Burton/Rodriguez)** *(Effective date: June 9, 2017)* – Requires a political subdivision (including RMAs, RTAs, and other local toll entities) to include a ***line item in its budget for expenditures for notices*** required to be published in newspapers ***and a year-to-year comparison of these expenditures***.

Note: This bill is intended to make it easier to distinguish between expenditures for statutorily required notices and general advertising expenses.

- **SJR 34 (Birdwell/Geren)** – Proposes a constitutional amendment to ***limit the service of gubernatorial appointees*** such that an appointee would cease to perform the duties of office on the last day of the first regular session of the Legislature that begins after the expiration of the appointee's term. The amendment would only apply to officers appointed by the Governor with the advice and consent of the Senate and who do not receive a salary, which would include RMA board chairs and gubernatorial appointees to the NTTA board. The proposed constitutional amendment will be submitted to the voters at an election to be held ***November 7, 2017***.

  Note: If passed, this would limit the permissible term for holdover appointees (i.e., those serving in appointed positions after their terms have expired while awaiting reappointment or appointment of a successor). If the officer is not re-appointed and no new appointment is made prior to the end of the next legislative session, the position would become vacant.

Appendix "D"

Other Bills of Interest

- **HB 377 (Oliverson/Campbell)** (*Effective date: September 1, 2017*) – Entitles the surviving spouse of a person who would be eligible for certain ***specialty license plates for veterans*** to register one vehicle for use of the plates as long as the spouse remains unmarried.

- **SB 441 (Rodriguez/Blanco)** (*Effective date: September 1, 2017*) – Allows the surviving spouse of a person who had been entitled to ***specialty plates for veterans with disabilities*** to be eligible to register for use of the plates, regardless of whether the deceased spouse was issued plates.

  Note: A surviving spouse meeting the criteria in the two bills above would then be included in a toll project entity's toll discount program, if any.

- **HB 2646 (Martinez/Hinojosa)** (*Effective date: June 18, 2017 unless acted upon by the Governor at an earlier date*) – Allows for the ***advance acquisition*** by the TTC of real property or an interest in real property for possible use in a transportation facility ***before*** a final decision has been made as to whether the transportation facility will be located on the property or ***environmental clearance*** has been issued for the facility. In the event the TTC disposes of property acquired by advance acquisition that is no longer needed for a transportation facility, the bill requires the property first be offered for sale to the person from whom the TTC acquired the property at the lesser of the price the TTC originally paid the person or the current fair market value.

- **HB 62 (Craddick/Zaffirini)** *(Effective date: September 1, 2017)* – Bans "texting while driving" by making it a misdemeanor offense for the operator of a motor vehicle to use a portable wireless communication device to read, write, or send an electronic message while operating a motor vehicle unless the vehicle is stopped. A first offense is punishable by a fine of $25 to $99, with subsequent offenses punishable by a fine of $100 to $200. An offense for which it is shown at trial that the defendant caused the death or serious injury of another person is punishable by a fine not to exceed $4000. The statute establishes a number of affirmative defenses to prosecution that allow a portable wireless communication device to be used for certain purposes, including:

  - with a hands-free device;
  - to navigate using GPS;
  - to report illegal activity or summon emergency help;
  - to read a message concerning an emergency;
  - to relay information to a dispatcher or a digital network or software application service in the course of the operator's occupational duties; or
  - to activate a function that plays music.

  Note: The statute also requires TxDOT to post highway signs regarding the ban and makes knowledge of the effects of texting while driving and distracted driving a part of the driver's license examination. Clarifies that ***cities, counties, and other political subdivisions*** that prohibit the use of wireless communication devices while operating a motor vehicle ***are required to state whether use of a hands-free device is allowed***.

- **HB 100 (Paddie/Schwertner)** (*Effective date: May 29, 2017*) – Requires Transportation Network Companies ("TNCs") to register with the Texas Department of Licensing and Regulation ("TDLR"). The bill also ***preempts***

local law, creating a state-wide regulatory framework for the operation of TNCs. To receive a permit from the TDLR, the TNC must:

- pay an annual fee in an amount determined by TDLR rule;
- maintain a $1,000,000 commercial auto liability policy; and
- comply with state-wide regulations that:
  - ✓ require drivers to undergo a local, state, and national criminal background check;
  - ✓ require TNCs to provide a driver's name, picture, vehicle information, and license plate number to the consumer before each ride;
  - ✓ require TNCs to provide electronic receipts to passengers;
  - ✓ enforce a zero-tolerance intoxication standard for drivers;
  - ✓ prohibit discrimination based upon location, destination, race, color, national, origin, religious beliefs, sex, disability, or age;
  - ✓ require TNCs to accommodate service animals; and
  - ✓ prohibit additional charges because of a passenger's disability.

➢ **SB 1524 (Nichols/Morrison)** (*Effective date: January 1, 2018*) – Allows heavyweight trucks weighing up to 100,000 pounds to pay a $6,000 annual permit fee to haul loads through certain Texas coastal counties.

The permit authorizes the movement of a sealed intermodal shipping container moving in international transportation ***not more than 30 miles from an applicable port authority or port of entry***. The transport is allowed ***only in a county contiguous to the Gulf of Mexico or with a bay opening to the gulf.*** The truck must operate only on highways and roads approved by TxDOT. Additionally, the law explicitly excludes the transport of heavy loads in a county that borders Mexico. The truck and semitrailer must have six to seven axles, be equipped with a roll stability support safety system, and, in certain circumstances, a truck blind spot system.

The permit must designate the specific county and municipality in which the permit will be used. Improper display and evidence of the permit results in a misdemeanor offense. The $6,000 permit fee is to be:

- ***deposited into the state highway fund*** (50%);
- distributed to the county (30%);
- distributed to the municipality (18%); and
- deposited to the credit of the Texas Department of Motor Vehicles fund (4%).

In 2028, the fee can be increased by TxDOT after consultation with entities that are studying the effect of damage to the roads. The law also instructs TxDOT to study other impacts of this law on mobility.

Note: While the fees required under this law may minimally increase transportation funding to the state highway fund, the harmful impact on infrastructure could be substantial.

➢ **SB 2205 (Hancock/Geren)** (*Effective date: September 1, 2017*) – Seeks to implement a statutory framework to implement minimum safety requirements related to automated motor vehicles ("AMVs").

Provides for the ***exclusive governance*** of AMVs, ***including any commercial use or operation*** of automated motor vehicles. A political subdivision or a state agency is ***precluded from imposing a franchise or other regulation*** related to the operation of an automated driving system ("ADS") or the AMV on which it installed.

The ADS is defined to mean the hardware and software that, when installed on a motor vehicle and engaged, are collectively capable of performing, without any intervention or supervision by a human operator:

- all operational and tactical aspects of operating a vehicle on a sustained basis; and
- any fallback maneuvers necessary to respond to a failure of the system.

When the ADS is engaged, the owner of the ADS is considered the operator of the AMV solely for the purpose of assessing compliance with applicable traffic or motor vehicle laws, ***regardless of whether the person is physically present in the vehicle*** while the vehicle is operating. Further, a licensed human operator is not required to operate a motor vehicle if an ADS installed on the vehicle is engaged.

An AMV ***may not operate on a highway with the ADS engaged unless*** the vehicle is:

- capable of operating in compliance with applicable traffic and motor vehicle laws;
- ***equipped with a recording device*** installed by the manufacturer of the AMV or ADS for the purpose of retrieving information from the vehicle after an accident;
- equipped with an ADS in ***compliance with applicable federal law and federal motor vehicle safety standards***;
- registered and titled in accordance with state law; and
- covered by ***motor vehicle liability coverage or self-insurance*** in an amount equal to the amount of coverage that is required by law.

The legislation further specifies that in the event of an accident involving an AMV, the AMV or any human operator of the AMV shall comply with all legal duties applicable to the operator of a vehicle involved in an accident under current law.

- **SB 28 (Creighton/Deshotel)** (*Effective date: May 26, 2017*) – Permits the TTC to use money from the Texas Mobility Fund to provide funding for a ***port access improvement project*** which is defined as "the construction or improvement of public roadways that will enhance connectivity to ports." The number of members on the Port Authority Advisory Committee is increased from seven to nine, with the additional two members consisting of one member to be appointed by the Lieutenant Governor and one by the Speaker of the House.

  The bill also provides for the creation of the ***Ship Channel Improvement Revolving Fund***, which will be used for a revolving loan program to finance qualified projects for navigation districts, including to deepen or widen a ship channel but not for maintenance dredging.

- **SB 1305 (Nichols/Darby)** (*Effective date: December 31, 2017*) – Repeals the statutory authorization for county energy transportation reinvestment zones ("CETRZs"). Changes the funding allocations in the grant program using money from the Transportation Infrastructure Fund to remove the requirement that money go only to counties that have designated a CETRZ.

- **SB 1523 (Nichols/Y. Davis)** (*Effective date: June 1, 2017*) – In response to certain requirements in recent federal surface highway transportation legislation, SB 1523 requires TxDOT to implement a ***State Safety Oversight Program*** for rail fixed guideway public transportation systems. These systems include rail, monorail, and trolley projects not subject to the jurisdiction of the Federal Railroad Administration. TxDOT is permitted to enter into an agreement with a contractor to act on behalf of TxDOT in carrying out its duties in the creation of this program.

High Speed Rail

There were approximately two dozen bills filed this session aimed at placing various restrictions on a proposed high-speed rail ("HSR") project between Houston and the Dallas–Fort Worth ("DFW") area. It was a similar dynamic seen in the fight against the Trans-Texas Corridor in that legislators representing landowners in the rural areas between Houston and DFW voiced the loudest opposition to HSR. Ultimately only two bills were adopted. In both pieces of legislation the term

"high-speed rail" was defined to mean "passenger rail service that is reasonably expected to reach speeds of at least 110 mph."

- **SB 975 (Birdwell/Schubert)** (*Effective date: June 18, 2017 unless acted upon by the Governor at an earlier date*) – Requires an operator of HSR to implement certain security measures and to coordinate with federal, state, and local law enforcement agencies. The Department of Public Safety is authorized to administer, enforce, and adopt rules to implement the safety provisions.

- **SB 977 (Schwertner/Ashby)** *(Effective date: September 1, 2017)* – Except as provided by federal or other state law, prohibits the Legislature from appropriating, or a state agency from accepting or using, state money to pay for the planning, facility construction or maintenance, security, promotion, or operation of a privately operated HSR. State agencies are required to report each expense related to a HSR to the TTC, the Comptroller, the Legislature, the Speaker, the Lieutenant Governor, and the Governor. The bill was revised in the Senate to clarify that it does not preclude or limit TxDOT's existing legal responsibilities pertaining to regulation, oversight, environmental review, policy development, communication with public officials, and coordination with a private operator of a HSR.

  Note: Similar provisions limiting expenditures for HSR were included as a rider in TxDOT's budget in SB 1.

Public-Private Partnership Legislation

Despite the strong opposition to comprehensive development agreements discussed in the Introduction above, the legislature adopted two pieces of legislation amending Chapter 2267 of the Government Code which allows for the use of P3s on infrastructure projects developed by Houston Metro and the Brazoria-Fort Bend County Rail District.

- **HB 2557 (Miller/Kolkhorst)** (*Effective date: June 18, 2017 unless acted upon by the Governor at an earlier date*) – Authorizes Brazoria and Fort Bend Counties, acting through their commissioners court or a local government corporation, to adopt an order authorizing the county and a navigation district to ***develop a rail facility under Chapter 2267*** and to issue bonds for rail facilities, secured by a pledge of the revenues of the facilities. Further, the bill allows the Brazoria-Fort Bend Rail District to exercise these powers if both the Brazoria and Fort Bend County Commissioners Courts authorize such action.

  - HB 2557 provides for considerable revisions to the ***definition of a "rail facility"*** under Chapter 172 of the Transportation Code so that is now includes:

    - ✓ ***passenger*** or freight rail facilities;
    - ✓ an intermodal hub;
    - ✓ an automated conveyor belt for the movement of freight;
    - ✓ an intelligent transportation system that operates with or as part of these types of facilities; or
    - ✓ a system of these types of facilities.

  - The newly (and broadly) defined term "***intelligent transportation system***" means:

    - ✓ an innovative or intelligent technological transportation systems, infrastructure, or facilities, including elevated freight transportation facilities in proximity to, or within, an existing right-of-way on the state highway system or that connect land ports of entry to the state highway system;
    - ✓ communications or information processing systems that improve the efficiency, security, or safety of freight movement on the state highway system, including improving the conveyance of freight on dedicated intelligent freight lanes; or
    - ✓ a transportation facility or system that increases truck freight efficiencies in the boundaries of an intermodal facility or hub.

  Note: The significantly broadened definition of a rail facility under HB 2557 (and incorporated in Transportation Code Chapter 172) is not among the list of permissible projects under Chapter 2267. Therefore, it appears that ***Brazoria and Fort Bend Counties in partnership with a navigation district located wholly or partly in those***

counties, or the Brazoria-Fort Bend Rail District are the only governmental entities with the authority to develop this newly defined type of rail facility as a P3 under Chapter 2267. Note that Chapter 2267 does allow for development of other types of rail projects such as a mass transit facility.

- **SB 255 (Zaffirini/Simmons)** (*Effective date: September 1, 2017*) – This bill primarily addresses purchasing and contract management training for certain state governmental entities and vendors. On the final day the House could consider Senate bills on 3rd reading (May 24), Representative Senfronia Thompson amended SB 255 with the text of her HB 3252 which had stalled in the Senate. The amendment ***allows Houston Metro to utilize the P3 authority under Chapter 2267***. Transit entities are otherwise specifically excluded from the applicability of Chapter 2267.

Appendix "E"

Legislation of Interest Which Did Not Pass

Below is a brief summary of legislation of interest which was not passed by the 85th Legislature.

Restrictions on System Financing

- **HB 772 (Burkett)** – Would have repealed and amended various statutory provisions applicable to local toll project entities ("LTPEs") allowing for the use of surplus revenues on other projects. Provided that after all outstanding bonds and other obligations secured by toll revenue of a toll project have been repaid or otherwise satisfied, tolls collected for use of the project could be used only for the operations and maintenance ("O&M") of the portion of the project for which the tolls were collected. Tolls would have been set at an amount which provides revenue sufficient, but not more than necessary, to pay for O&M costs and the principal of any interest on any outstanding bonds issued for the transportation project.

- **HB 1282/ SB 668 (Shaheen/(Kolkhorst)** – Would have repealed and amended various statutory provisions applicable to LTPEs allowing for the use of surplus revenues on other projects. Provided that after all outstanding bonds and other obligations secured by toll revenue of a toll project have been repaid or otherwise satisfied, the toll project would be transferred to the state highway system and will be maintained by the TTC. Further, an LTPE would have been prohibited from amending a financing agreement in order to extend the date at which the toll project would become part of the state highway system.

- **HB 1518/SB 639/SB 1909 (Leach/Huffines/Campbell)** – Would have prohibited use of money in the state highway fund for the construction, maintenance, or acquisition of right-of-way for toll projects or systems. Limited the use of general obligation bonds issued by the TTC for the improvement of a toll road. Repealed and amended various statutory provisions allowing for the use of surplus revenues on other projects. Further, limited the use of money an RMA receives from the state highway fund so that it may only be used for a roadway with a functional classification greater than a local road or rural minor collector.

- **SB 1555 (Kolkhorst)** – Would have required the TTC to adopt procedures to require TxDOT to consider financing and operating each state highway system toll project as financially independent and not part of a system.

Toll Entity Oversight & Operations

- **SB 1643 (Watson)** – Would have allowed a toll project entity to provide ***customer account information*** to another toll project entity by contract. After concerns raised in the Senate Transportation Committee hearing it was amended to require a contract for customer account data to ensure confidentiality, exclude information related to account payment arrangements or banking information, and not allow for use of the information for commercial purposes.

- **SB 637 (Huffines)** – Would have prohibited TxDOT from making a grant or loan to an RMA unless the RMA agrees to allow state audits as if it were a state department at any time until the completion of the transportation project for which the funds are granted or loaned. The audit would have been completed at the discretion of the legislative audit committee.

- **HB 766 (Burkett)** – Would have subjected NTTA to review by the Sunset Advisory Commission as if they were a state agency. NTTA would have been responsible for paying the cost of the sunset review, as determined by the Sunset Advisory Commission. However, the bill would have prohibited the abolishment of a the NTTA through the sunset review process.

- **HB 2368 (Muñoz)** – Would have subjected RMAs to review by the Sunset Advisory Commission as if they were a state agency. The RMA would have been responsible for paying the cost of the sunset review, as determined by

the Sunset Advisory Commission. However, the bill would have prohibited the abolishment of a RMA through the sunset review process.

- **SB 493 (Hall)** – Would have subjected all RMAs to review by the Sunset Advisory Commission as if they were state agencies. Unless continued in existence by the Sunset Advisory Commission, all RMAs could have been abolished and Chapter 370, Transportation Code, could have expired September 1, 2019. The RMA would have been responsible for paying the cost of the sunset review.

Lobby Prohibitions

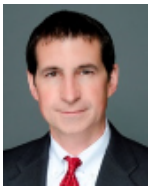
- **SB 241 (Burton)** – Would have prohibited a political subdivision that imposes a tax, or a RMA, toll road authority, or transit authority from spending public money to directly or indirectly influence or attempt to influence the outcome of any legislation. The bill would have also required that a political subdivision only spend public money on membership fees for associations and organizations that benefit the local government and not on association or organizations that lobby or support political campaigns.

- **SB 445 (Burton)** – Would have required the governing body of various political subdivisions, including a RMA or RTA, to approve the use of money for lobbying activities by a majority vote in an open meeting. The bill would have also required a political subdivision to report to the Texas Ethics Commission and post on the political subdivision's website:

    - ✓ the amount of lobby expenditures;
    - ✓ the names of the lobbyists;
    - ✓ the contracts for lobby services; and
    - ✓ the amount of memberships fees in associations that lobby.

  If the political subdivision did not comply with these requirements, a party could have sought an injunction to prevent further lobbying activities. Senator Burton attempted to add a similar provision to HB 2305 (Guillen). The amendment was successfully added to the bill in the Senate; however, the bill later died on the House floor.

ABOUT THE AUTHORS



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Texas Transportation Legislation Overview of the 86th Regular Legislative Session

Authored by: C. Brian Cassidy, Brian O'Reilly and Sarah Lacy
September 23, 2019

The 86th Texas Legislative Session was relatively uneventful with respect to transportation-related initiatives. The Session was dominated primarily by school finance reform and limitations on the ability of local governments to increase property taxes. A few social issues received attention, such as religious freedom and abortion-related issues, but otherwise the Session was generally free of the major polarizing issues of previous sessions.

For transportation advocates in general, there was good news in the form of a 10-year extension of the expiration date on the dedicated transportation funding provided under Proposition 1 from December 31, 2024, to December 31, 2034, as well as a simplification of the process for determining the "sufficient balance" required to be maintained in the "economic stabilization fund" to allow for the continued deposits of Proposition 1 proceeds into the state highway fund. For advocates of tolling and additional means for funding transportation infrastructure, it was a mix of small gains, damage averted, and missed opportunities:

Gains: In addition to the Proposition 1 extension referenced above, legislation passed which will clarify the obligations of toll authorities related to malfunctioning transponders and which will facilitate better information sharing among toll entities. Legislation was also passed to address abuses in the veteran's toll discount programs implemented by some toll authorities.

Damage Averted: Several bills were filed which would have adversely affected tolling, including bills that would have precluded the use of system financing (an essential tool for development of regional infrastructure systems), imposed crippling fee limitations on local toll authorities dealing with toll violators, required the removal of tolls when project-related bonds were paid, and eliminated regional mobility authorities. None of these initiatives advanced significantly in the legislative process.

Missed Opportunities: Despite facing enormous funding shortfalls for major projects in urban areas, the Legislature again failed to reauthorize comprehensive development agreements ("CDAs"), which are the form of public-private partnerships ("P3s") previously used for transportation projects in Texas. Also missed was an opportunity to expand the use of optional vehicle registration fees beyond the five counties currently authorized to implement these fees. Bills on both subjects advanced to varying degrees in the House of Representatives, but none even received a hearing in the Senate.

The failure (again) to re-authorize CDAs was particularly disappointing, given the acute need for funding to improve major corridors in the State. While states like Virginia, Florida, and Maryland have strategically used P3s to deliver major enhancements to their transportation systems, Texas is falling further behind in the quality of its infrastructure and the ability to keep up with the demands of a growing economy. Major corridors in Austin, Dallas-Fort Worth, and Houston need multi-billion dollar improvements and expansions. Yet, TxDOT can, at best, only fund piecemeal improvements that fall far short of meeting the overall need. Absent the ability to use P3s, the Texas Transportation Commission is left to balance the needs for major projects in urban areas against the needs of less populated areas of the State. There is simply not enough money to go around. This is likely to intensify debates between rural and urban areas, and those debates will not likely subside unless the State significantly increases funding or allows for more private sector investment, as Texas once did and other states are successfully doing.

TxDOT's budget for the next biennium increased by approximately $5 billion, primarily due to increases in Propositions 1 and 7 funding. However, it is noteworthy that $250 million was specifically directed to the Transportation Infrastructure Fund to be spent on energy-sector roads. Of the $250 million, one-half is earmarked to come from the Economic Stabilization Fund, and the other one-half from TxDOT's budget. Some see the latter allocation as a diversion of state highway fund money and a return to a practice that many thought had ended in 2013 (when the diversion of funds to the Department of Public Safety from TxDOT's budget ceased).

One other unique aspect of the 86th Session was the almost complete turnover of the composition of the House Transportation Committee. Nine of the thirteen members had not previously served on the committee, including Chairman Terry Canales. Gone were some of the venerable and vocal members of past committees, including Rep. Joe Pickett, Rep. Larry Phillips, Rep. Ron Simmons, and Rep. Cindy Burkett. Notwithstanding the relatively new composition, the Committee did an admirable job of quickly learning key policy issues, advancing legislation, and proceeding in an efficient manner. Much credit goes to Chairman Canales and his staff for quickly organizing and getting off to an impressive start. The Senate Transportation Committee saw far less turnover, although Sen. Bob Hall, no fan of tolling or toll entities, was not on the committee for the 86th Session. As noted at the outset, this was not a session of big initiatives related to transportation policy, although Chairman Robert Nichols did shepherd through the important extension of the Proposition 1 authorization.

Appendices

Appendix "A" Toll Operations Legislation
Appendix "B" Transportation Funding Legislation
Appendix "C" Contracting and Procurement Legislation
Appendix "D" Open Government Legislation
Appendix "E" Other Legislation of Interest

The foregoing and the attached appendices are intended only to be a summary of the results of the 86th Regular Legislative Session. Interested parties should consult the text of specific legislation concerning the scope and application of new laws, changes to laws, and provisions of previously enacted laws. Questions may be directed to:

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Appendix "A"

Toll Operations Legislation

- **HB 803 (Patterson/Paxton)** (*Effective date: September 1, 2019*) – HB 803 requires a toll project entity to publish on its website a ***report on its annual financial data*.**
  - The report must be published not later than the 180th day after the last day of the entity's fiscal year.
  - The report must include:
    - the ***final maturity of all bonds*** issued by the entity for a toll project or system;
    - ***toll revenue for each toll project*** for the previous fiscal year;
    - an ***accounting of total revenue collected and expenses incurred*** by the entity for the previous fiscal year, such as debt service, maintenance and operation costs, any other miscellaneous expenses, and any surplus revenue; and
    - a ***capital improvement plan*** with proposed or expected capital expenditures over a period determined by the entity.
  - As an ***alternative to publishing the report***, a toll project entity ***may publish graphs or tables from the entity's certified audited financial report*** or annual continuing disclosure report to comply with the reporting requirements.
  - A link to the report must be prominently displayed on the entity's website and the report must be posted separately from the entity's certified audited financial report.
  - For a toll project that is subject to a comprehensive development agreement ("CDA"), the toll project entity is only required to publish the name and cost of the toll project and the termination date of the CDA.
  - Note: Any toll project entity with a fiscal year end date on or after March 5, 2019 (180 days before the effective date of HB 803), should note the time period in which they must comply with the bill as their obligations will be triggered sooner than an entity with a fiscal year end date closer to the effective date. Additionally, the scope of the report is only required to be on a system basis, not by individual projects, unless a particular project has not been designated as part of an entity's system.

- **SB 198 (Schwertner/Canales)** (*Effective date: September 1, 2020*) – SB 198 codifies various operational practices related to electronic toll collection ("ETC").
  - Since the 85th Legislative Session, Sen. Schwertner has expressed concerns with situations in which an individual has a funded ETC customer account but his or her transponder is not read when traveling through a toll gantry, resulting in an invoice being sent to the address registered with his or her vehicle.
    - SB 198 addresses this concern by requiring a toll project entity to first determine whether there is an active and sufficiently funded ETC customer account corresponding to a transponder for the vehicle prior to sending notice of unpaid tolls and to satisfy an outstanding toll from the account at the standard rate.
    - However, the toll project entity is not subject to these obligations if:
      - the ETC customer failed to activate and mount the transponder ***in accordance with the procedures provided by the toll project entity*** and failed to provide ***accurate license plate and customer contact information*** to the toll project entity, including updating that information as necessary; or
      - the ETC customer account is insufficiently funded.
    - If the entity determines that a transponder issued to an ETC customer did not work correctly more than 10 times in a 30-day period and that it must be replaced, the entity must send a notice informing the customer that his or her transponder is not working and must be replaced. The entity is not required to send further notices if the customer fails to replace the transponder after the entity sends the notice.

- The bill permits a toll project entity to provide an invoice or notice to a person by first class mail ***or email*** (if the person has provided an e-mail address to the entity and has elected to receive notice electronically).
- A notice or an invoice of unpaid tolls must clearly state that the document is a bill and the recipient is expected to pay the amount indicated.
- TxDOT is required to provide ETC customers with the option to authorize automatic payment of tolls through withdrawals from the customer's bank account.
- A ***toll project entity is permitted to share ETC customer account information to another toll project entity*** for the purposes of customer service, toll collection, enforcement, or reporting requirements, so long as the confidentiality of the information is ensured.
- Finally, SB 198 states that a contract between toll project entities for the collection of tolls must specify which entity is responsible for making the determinations, sending notices, and taking of other actions described above, as well as include terms to ensure that customers do not receive invoices from more than one entity for the same transaction.
- Note: The effective date is September 1, 2020, to allow TxDOT and NTTA to complete their current procurements and implementation of their new back office systems, which are part of the ETC process.

- **SB 1311 (Bettencourt/Raney)** (*Effective date: September 1, 2019*) - SB 1311 permits tolling entities to send an invoice or notice by e-mail if the recipient of the information agrees to the transmission of the information as an electronic record and on terms acceptable to the recipient.

- **SB 1091 (Nichols/Ashby)** (*Effective date: June 14, 2019*) - SB 1091 seeks to limit abuse of veteran toll discount programs by creating an additional option for toll project entities to administer their programs using transponders, while also maintaining the option of operating a license plate-based program.
  - SB 1091 now permits a toll project entity ***to limit to no more than two*** the number of transponders issued to a participant in the entity's waiver program for which free or discounted use of the entity's toll projects is provided.
  - Any limit related to a participant's transponder must allow a participant to be issued ***one extra transponder on a demonstration of hardship*** by the participant, as determined by the toll project entity.
  - Note: Based on the language of this legislation, this new option is available only to toll project entities ***that issue transponders***. An entity that does not issue transponders does not have a mechanism to allow a participant to be issued one extra transponder. However, it appears the intent of the legislation was to allow all toll entities to limit participants in its waiver program to registering no more than two transponders to receive the free or discounted use of the entity's toll projects.

- **HB 1 (Nelson/Zerwas)** (*Effective date: September 1, 2019*) - Rider 39 in TxDOT's budget states that it is the intent of the Legislature that TxDOT, to the extent permitted by law, consider including in its contracts for processing and billing of toll transactions ***provisions to provide incentives to encourage accurate assessing and billing of tolls, which may include compensated tolls per billing error*** to each recipient of improperly sent notices or bills.

Appendix "B"

Transportation Funding Legislation

- **SB 69 (Nelson/Capriglione)** (*Effective date: September 1, 2019*) – In 2013, the Legislature passed SJR 1[1] by Senator Nichols (also known as "Proposition 1" for its designation on the ballot for the November 4, 2014 constitutional amendment election), which directed 50% of oil and gas severance taxes above a 1987 baseline level to the state highway fund ("SHF"), but only after a "sufficient balance" is accrued in the economic stabilization fund ("ESF"). The implementing legislation for SJR 1 created the statutory framework for a select committee of five House and five Senate members to determine the sufficient balance.[2] This statutory framework was set to expire on December 31, 2024.
  - SB 69 repealed the process by which a select committee must determine the sufficient balance. The Comptroller will now determine when the transfer occurs by adopting for the state fiscal biennium an amount equal to 7% of the certified general revenue-related appropriations made for that state fiscal biennium.
  - The bill extends the date on which this Comptroller-determination framework will expire to December 31, 2034.
  - The bill also extends the date on which the transfer of severance tax revenue to the SHF would expire to December 31, 2034.

- **SB 962 (Nichols/Zerwas)** (*Effective date: September 1, 2019*) – SB 962 did not revise the sufficient balance framework as was done in SB 69, but it did provide for the same 10-year extension of the expiration date for the transfer of severance tax revenue to the SHF and the determination of the sufficient balance of the ESF.

- **Transportation Infrastructure Fund Grants**
  - **HB 4280 (Morrison/Flores)** (*Effective date: September 1, 2019*) – In 2013, the 83rd Legislature adopted SB 1747[3], which created the Transportation Infrastructure Fund ("TIF"), to be administered by TxDOT, for the purpose of assisting counties to fund the repair and maintenance of their roads damaged by energy-related activity. Based on various criteria in the legislation, 191 counties were deemed eligible to receive grants from the TIF, a much broader number than was intended by the Legislature.[4]
    - HB 4280 ***narrows the criteria for counties to be eligible to receive grant funds from the TIF*** so that the funding is only for transportation infrastructure projects located in areas of the state affected by increased oil and gas production.
    - The bill requires a county to spend a TIF grant not later than the fifth anniversary of the date of the award of the grant.
    - Certain obligations are imposed on counties regarding ***competitive bidding of projects funded with a TIF grant***, including requirements to:
      - prepare a request for competitive bids that includes construction documents, estimated budget, project scope, estimated project completion date, and other information that a bidder may require to submit a bid;
      - advertise for bids for the contract in a manner prescribed by law;
      - receive competitive bids for the contract, publicly open the bids, and read aloud the names of the bidders and their bids;

[1] *See* Tex. SJR 1, 83rd Leg., 3rd C.S. (2013).
[2] *See* Tex. HB 1, 83rd Leg., 3rd C.S. (2013).
[3] *See* Tex. SB 1747, 83rd Leg., R.S. (2013).
[4] *See* Aman Batheja, *Road Funding Allocations Surprise Some Counties, for Better or Worse*, Tex. Tribune, Dec. 12, 2013, *available at* https://www.texastribune.org/2013/12/12/road-funding-surprises-some-better-or-worse/.

- award the contract to the lowest responsible bidder; and
- document the basis of its selection and make the evaluations public not later than the seventh day after the date a contract is awarded.

- **SB 500 (Nelson/Zerwas)** (*Effective date: June 6, 2019*) – SB 500, the supplemental appropriations bill, appropriates ***$125 million from the ESF*** to TxDOT to provide TIF grants.

- **HB 1** (*Effective date: September 1, 2019*) - Rider 47 in TxDOT's budget directs that ***$125 million from any available sources*** of revenue be allocated to provide TIF grants. The rider explicitly states that the allocation of funds is a one-time allocation for the fiscal biennium ending August 31, 2021.

Appendix "C"

Contracting and Procurement

- **HB 1542 (Martinez/Hinojosa)** (*Effective date: September 1, 2019*) – HB 1542 prohibits a contractor selected for a TxDOT or RMA design-build contract from making changes to companies identified as part of the design-build team in a response to a request for proposals ("RFP").
  - This ***prohibition would not apply*** if the identified company:
    - is no longer in business, is unable to fulfill its legal, financial, or business obligations, or can no longer meet the terms of the teaming agreement proposed for the project with the design-build contractor;
    - voluntarily removes itself from the team;
    - fails to provide a sufficient number of qualified personnel; or
    - fails to negotiate in good faith in a timely manner in accordance with provisions established in the teaming agreement proposed for the project.
  - Any ***cost savings resulting from the changes in violation of this prohibition accrue to TxDOT or the RMA*** and not to the design-build contractor.
  - Note: Current law allows TxDOT and RMAs to reject as nonresponsive any proposer that makes a significant change to the composition of its design-build team as initially submitted during the procurement process that was not approved by TxDOT or the RMA as provided in the RFP.[5]

- **HB 2830 (Canales/Hancock)** (*Effective date: September 1, 2019*) – HB 2830 revises the restriction on the number of design-build contracts TxDOT is permitted to enter into from three per year to six per biennium. The change is intended to provide more flexibility for TxDOT in scheduling design-build procurements.
  - The bill also revises the requirement that an RFP for a TxDOT design-build contract include a schematic design approximately 30% complete by deleting the term "schematic" so that now "a design approximately 30% complete" must be included.
  - Note: The RMA Act requires RMAs to include "a schematic design approximately 30 percent complete" in its design-build RFPs.[6]

- **HB 2899 (Leach/Hinojosa)** (*Effective date: June 2, 2019*) – HB 2899 creates a significant shift in a contractor's exposure to liability in certain contracts with a governmental entity.

  Applicability:
  - The scope of the bill is ***limited to contracts with certain governmental entities, defined to include:***
    - a corporation formed under the Texas Transportation Corporation Act;
    - a regional mobility authority;
    - a regional tollway authority (e.g., NTTA);
    - a county toll road authority (e.g., HCTRA); or
    - TxDOT.

[5] *See* Tex. Transp. Code §§ 223.246(i), 370.406(h).
[6] *See id.* at § 370.406(a)(5).

- The types of contracts subject to the bill are ***contracts for the construction or repair of a road or highway*** of any number of lanes, with or without grade separation, owned or operated by a governmental entity and any improvement, extension, or expansion to that road or highway, including:
  - an improvement to relieve traffic congestion and promote safety;
  - a bridge, tunnel, overpass, underpass, interchange, service road ramp, entrance plaza, approach, or tollhouse; and
  - a parking area or structure, rest stop, park, or other improvement or amenity the governmental entity considers necessary, useful, or beneficial for the operation of a road or highway.

Restriction on Contractor Liability:

- HB 2899 provides that a ***contractor is not civilly liable or otherwise responsible*** for the accuracy, adequacy, sufficiency, suitability, or feasibility of any project specifications (plans, reports, designs, or specifications) which were prepared by a governmental entity or by a third party retained by a governmental entity under a separate contract.
- Additionally, a ***contractor is not liable for any damage*** to the extent caused by:
  - a defect in those project specifications, or
  - the errors, omissions, or negligent acts of the governmental entity, or of a third party retained by the governmental entity under separate contract, in the rendition or conduct of professional duties arising out of or related to the project specifications.
- Note: Affected governmental entities should review the provisions of contracts entered into on or after June 2, 2019, and ***revise any covenant or promise that conflicts with this standard of liability, as they are deemed void and unenforceable*** under HB 2899.
- HB 2899 also restricts a governmental entity from requiring that engineering or architectural services be performed to a level of professional skill and care beyond the level that would be provided by an ordinarily prudent engineer or architect with the same professional license and under the same or similar circumstances in a contract for engineering or architectural services or contains such services as a component part.
- Note: This may also require revisions to existing forms of certain professional services agreements.

- **SB 282 (Buckingham/Buckley)** (*Effective date: September 1, 2019*) – SB 282 requires TxDOT to establish a system to track liquidated damages, including road user costs, retained by TxDOT associated with delayed transportation project contracts.
  - The system must allow TxDOT to correlate the liquidated damages with the project that was the subject of the damages and each TxDOT district in which the project that was the subject of the damages is located.
  - On an annual basis, TxDOT is required to allocate the amount of money associated with the liquidated damages that was retained in the previous year that is attributable to projects located in the applicable TxDOT district to be used for transportation projects in that district.

- **SB 65 (Nelson/Geren)** (*Effective date: September 1, 2019*) – SB 65 primarily addresses issues related to state contracting and procurement, which are not within the scope of this legislative overview. An overriding theme during the 86th Session was the use of paid lobbyists by local governmental entities to advocate on their behalf at the Capitol. In an effort to address these concerns, the House adopted a floor amendment on May 22nd that mandated disclosure of certain contract information.
  - The amendment applies to a ***political subdivision that enters or has ever entered into a contract for consulting services with a state agency***. It is unclear what contracts this is intended to apply to as political subdivisions do not typically enter into consulting agreements with state agencies.
  - For ***contracts for services that would require a person to register as a lobbyist, a political subdivision is required to prominently display the following on its website:***
    - the execution dates;
    - the contract duration terms, including any extension options;
    - the effective dates;
    - the final amount of money the political subdivision paid in the previous fiscal year; and

- a list of all legislation advocated for, on, or against by all parties and subcontractors to the contract, including the position taken on each piece of legislation in the prior fiscal year.

- The political subdivision must also include a line item in its budget indicating expenditures for directly or indirectly influencing or attempting to influence the outcome of legislation or administrative action.
- While arguably already required by law, the amendment also states that a Form 1295 must be submitted to the Texas Ethics Commission for a contract for lobby services.

- **HB 1495 (Toth/Creighton)** (*Effective date: June 14, 2019*) – HB 1495 requires political subdivisions to include a ***line item in its proposed budget indicating expenditures for directly or indirectly influencing or attempting to influence the outcome of legislation or administrative action*.**
  - The bill also directs the form of the line item, stating that it must be provided in a manner allowing for ***as clear a comparison as practicable*** between those expenditures in the proposed budget and actual expenditures for the same purpose in the preceding year.
    - The section of code amended by HB 1495 requiring budget line items also required an itemization of expenditures for notices required by law to be published in a newspaper by the political subdivision. This line item is also subject to the clear comparison posting standard created by HB 1495.
  - As noted above in SB 65, HB 1495 clarifies that a Form 1295 must be submitted to the Texas Ethics Commission for a contract for lobby services.
  - Note: While it is likely that a contract with a person required to register as a lobbyist would be subject to this line item posting requirement, it is not as clear how to account for other expenditures related to influencing the outcome of legislation or administrative action, such as staff time spent on such efforts.

- **HB 793 (P. King/Creighton)** (*Effective date: May 7, 2019*) – HB 793 narrows the applicability of the ***prohibition against contracts with companies that boycott Israel*** so that it ***only applies to a contract that is between a governmental entity and a company with ten or more full-time employees and has a value of $100,000 or more*** that is to be paid wholly or partly from public funds of the governmental entity. A ***sole proprietorship is excluded*** from the types of companies that are subject to the prohibition.

- **HB 2826 (G. Bonnen/Huffman)** (*Effective date: September 1, 2019*) – HB 2826 sets forth various contracting and procurement requirements a political subdivision must follow when selecting an attorney or law firm to enter into a ***contingent fee contract for legal services***.
  - HB 2826 prohibits a political subdivision from requiring an attorney or law firm providing legal services under a contingent fee contract to indemnify, hold harmless, or defend the political subdivision for claims or liabilities resulting from negligent acts or omissions of the political subdivision or its employees. The attorney or law firm could defend the political subdivision or its employees in accordance with a separate contract for the defense of negligent acts or omissions of the political subdivision or its employees.
  - The bill requires that before or at the same time as posting the notice of the open meeting at which the political subdivision will consider approval of a contingent fee contract for legal services, ***a separate public notice*** with certain details related to the reasons for entering into the contract and the qualifications of the selected provider of the services.
  - Additionally, the ***governing body of a political subdivision must make certain findings*** upon approving a contingent fee contract supporting the decision to enter into a contingent fee contract as opposed to a legal services contract providing for payment of hourly fees.
  - A contingent fee contract for legal services is ***not effective and enforceable until the political subdivision receives approval from the Attorney General*** ("AG").
    - The contract is considered approved if by the 90th day after receiving the contract, the AG does not approve the contract or notify the political subdivision that the AG is refusing to approve the contract.
    - The AG ***may refuse to approve*** the contract because:
      - the requirements set forth in HB 2826 were not fulfilled; or
      - the legal matter that is the subject of the contract presents one or more questions of law or fact that are in common with a matter the state has already addressed or is pursuing and the political subdivision's pursuit of the matter will not promote the just and efficient resolution of the matter.

- A political subdivision may contest the AG's refusal to approve a contract through a contest case hearing with the State Office of Administrative Hearings.

- Note: Certain provisions of HB 2826 appear to apply to the ***procurement and selection of bond counsel services***. While bond counsel agreements are not generally considered contingent fee services, their structure may subject them to these new requirements.

Appendix "D"

Open Government Legislation

During the 85th Legislative Session, bi-partisan legislation failed to pass that would have addressed concerns of open government advocates stemming from two 2015 Texas Supreme Court decisions: *Boeing Company v. Paxton*, 466 S.W.3d 831 (Tex. 2015) and *Greater Houston Partnership v. Paxton*, 468 S.W.3d 51 (Tex. 2015). In *Boeing*, the Court held that a private party may assert the exception under Section 552.104(a) of the Public Information Act ("PIA") to protect its competitively sensitive information, which enabled third parties to protect from disclosure information that would, in most instances, have been made public prior to *Boeing*. In *Greater Houston Partnership*, the Court held that to be a "governmental body" under the PIA, an entity must be "sustained" by public funds, rather than "supported in all or in part", which resulted in a narrower scope of entities being subject to the PIA and its disclosure requirements.

The bi-partisan efforts to amend the PIA law were renewed in the 86th Legislative Session, resulting this time with the passage of SB 943 by Senator Kirk Watson and Representative Giovanni Capriglione, which seeks to scale back the impacts of *Boeing* and *Greater Houston Partnership*, as described in further detail below.

- **SB 943** (**Watson/Capriglione**) (*Effective date: January 1, 2020*) – SB 943 addresses Boeing by ***preventing the use of the exception to disclosure under Section 552.104 by third parties*** (i.e., vendors or potential vendors) and by requiring that a *governmental body* demonstrate that the release of information it is seeking to protect from disclosure would harm its interests in a particular ongoing competitive situation or in a particular competitive situation in which *the governmental body* establishes the situation at issue is of a recurring nature. SB 943 therefore essentially codifies the interpretation of Section 552.104 that was used by the Office of the Attorney General prior to *Boeing*.
  - Third parties are not left without any means of protecting their competitive information, as they can still avail themselves of the exceptions under Section 552.110 of the PIA for trade secrets and commercial or financial information, the disclosure of which would cause substantial competitive harm. Additionally, SB 943 creates a ***new exception under the PIA for certain information submitted to a governmental body*** by a current or potential vendor or contractor. This exception, codified in Section 552.1101 of the PIA, applies to information that:
    - would reveal an individual approach to work, organizational structure, staffing, internal operations, processes, or pricing related information (discounts, methodology, cost data, or other pricing information that will be used in future solicitation or bid documents); and
    - give advantage to a competitor.
  - The new exception in Section 552.1101 does not apply to information in a voucher or contract relating to the receipt or expenditure of public funds by a governmental body or communications sent between a governmental body and a vendor or contractor related to the performance of a final contract. Neither Section 552.110 nor the new exception in Section 552.1101 can be asserted for certain contract or offer terms such as:
    - the overall or total price the governmental body will or could potentially pay;
    - delivery or service deadlines;
    - remedies for breach of contract;
    - items or services to be delivered with the total price for each;
    - identities of contracting parties and all subcontractors;
    - execution and effective dates and contract duration; or
    - information indicating whether a vendor or contractor performed its duties under a contract, including information regarding breach of contract, contract variances or exceptions, remedial actions, amendments, liquidated damages, progress reports, and final payment checklists.

- ***Revised Definition of "Governmental Body": Greater Houston Partnership***
  - SB 943 addresses the *Greater Houston Partnership* decision by specifying that certain types of entities are now considered a "governmental entity" subject to the PIA (for example, certain privately run jail facilities, civil commitment housing facilities, and an entity that manages the daily operations or restoration of the Alamo). Additionally, the bill specifically excludes from the definition of "governmental entity" an economic development entity whose mission or purpose is to develop and promote the economic growth of a state agency or political subdivision with which the entity contracts, but only if the entity does not receive $1 million or more in public funds from a single state agency or political subdivision in the current or preceding state fiscal year or does not provide particular services set forth in the legislation. The implication is that economic development entities that do not fall within that exclusion are governmental bodies for purposes of the PIA.
- ***New Defined Terms: "Contracting Information" and "Trade Secret"***
  - SB 943 revises the existing exception to the release of a trade secret under Section 552.110(a) of the PIA so that the term "trade secret" is now defined in statute, whereas previously the term was construed based upon the definition of a "trade secret" found in section 757 of the Restatement of Torts and adopted by the Texas Supreme Court in *Hyde Corp. v. Huffines*, 314 S.W.2d 763, 776 (Tex. 1958). SB 943 defines "trade secret" to mean all forms and types of information, including a list of nearly two dozen specific examples, if (1) the owner of the trade secret has taken reasonable measures under the circumstances to keep the information secret and (2) the information derives independent economic value, actual or potential, from not being generally known to, and not being readily ascertainable through proper means by, another person who can obtain economic value from the disclosure or use of the information. Additionally, the bill codifies the standard historically followed by the Attorney General's office that it must be demonstrated, based on specific factual evidence, that the information is a trade secret.
  - SB 943 also includes as a new defined term "contracting information," which is defined to include the following information maintained by a governmental body or sent between a governmental body and a current or potential vendor or contractor:
    - information in a voucher or contract ***relating to the receipt or expenditure of public funds*** by a governmental body;
    - ***solicitation or bid documents*** relating to a contract with a governmental body;
    - ***communications*** sent between a governmental body and a current or potential vendor or contractor during the solicitation, evaluation, or negotiation of a contract;
    - documents, showing the ***criteria by which a governmental body evaluates each potential vendor or contractor*** responding to a solicitation and, if applicable, an explanation of why the vendor or contractor was selected (notably "bid tabulations" are specifically listed here); and
    - communications and other information sent between a governmental body and a vendor or contractor ***related to the performance of a final contract*** with the governmental body ***or work performed*** on behalf of the governmental body.
- ***New Procedures Regarding Information in the Custody of Contractors***
  - Finally, SB 943 includes a new procedure applicable to requests for "contracting information" (as that term is now defined as set forth above) in the custody or possession of a government contractor and not maintained by a governmental entity. The procedure applies if a ***contract has a stated expenditure of at least $1 million or results in the expenditure of at least $1 million in a fiscal year.***
  - A governmental body must ***send the PIA request to the contracting entity that maintains the requested information within three business days*** of receipt and request that the entity provide the responsive information to the governmental body. The deadlines for seeking a decision from and submitting information to the Attorney General under the PIA are pushed back by three business days to allow time to obtain information from the contractor.
  - The bill also provides a grace period if a governmental body is unable to obtain information from a contractor in a timely fashion despite a good faith effort, provided that the governmental body complies with statutory requirements within eight business days of receipt of the information from the contractor.
  - A contract to which these new procedures apply must include provisions requiring a contracting entity to preserve contracting information and promptly provide it to the governmental body upon request, and a governmental body is prohibited from contracting with an entity that has knowingly or intentionally failed to comply with these requirements.

- A contract may be terminated for failure to comply with these new requirements following required notice to the contracting entity.

- SB 943 does not take effect until January 1, 2020, and applies only to requests for public information received on or after that date.

Other Public Information Act Legislation

- **SB 944 (Watson/Capriglione)** (*Effective date: September 1, 2019*) - SB 944 includes several amendments related to PIA procedures. First, the bill seeks to ensure that public information maintained by current or former officers and employees on ***privately-owned devices*** is subject to disclosure under the PIA, by requiring the individual to ***forward or transfer*** the public information to the governmental body or to ***preserve the public information in its original form*** in backup or archive on the privately-owned device for the required retention period. An officer for public information is required to make ***reasonable efforts to obtain public information*** that is subject to a PIA request from an officer or employee who maintains such information on a privately-owned device.

  - SB 944 also provides that a current or former ***officer or employee of a governmental body does not have a personal or property right to public information*** the person created or received while acting in an official capacity and requires surrender or return of such information upon request by the governmental body. An officer or employee must surrender or return the information no later than the tenth day after receiving a request for the information from the officer for public information. Further, the bill provides that a PIA request is considered to have been received on the date that the officer or employee surrenders or returns the information for purposes of calculating deadlines for seeking a decision from and submitting information to the Attorney General under the PIA.

  - Additionally, the bill:

    - Creates a new exception to disclosure under the PIA for sensitive healthcare information provided to a governmental body by an out-of-state healthcare provider.

    - Permits a governmental body to ***designate one e-mail address and one mailing address for receiving written requests for public information***. If these addresses are posted on the governmental body's website or on the required PIA sign, the governmental body is ***not required to respond to a written request for public information that is not received at one of those addresses***, via hand delivery, or by another method approved by the governmental body (which could include fax or website submission).

    - Directs the ***Attorney General to create a public information request form*** that provides a requestor the option of excluding from a request information that the governmental body determines is 1) confidential or 2) subject to an exception to disclosure that the governmental body would assert if the information were subject to the request. If a governmental body allows requestors to use the request form created by the Attorney General, the governmental body must post the form on its website.

  - SB 944 takes effect on September 1, 2019, and does not apply to a request for information that is received prior to that date. The bill requires the Attorney General to create the public information request form no later than October 1, 2019.

- **HB 81 (Canales/Hinojosa)** (*Effective date: May 17, 2019*) – HB 81 provides that certain information relating to the receipt or expenditure of public or other funds by a governmental body for a ***parade, concert, or other entertainment event*** paid for in whole or part with public funds may not be excepted from disclosure under Section 552.104. The bill specifies that a provision may not be included in a contract for these events that would prohibit or otherwise prevent the disclosure of the information.

  - HB 81 has been referred to as "*Boeing*-light" or "mini-*Boeing*" given its narrow scope in comparison to SB 943. Note that this legislation was effective immediately upon signature by the Governor, unlike SB 943. As a result, until January 1, 2020, the *Boeing* decision applies to all public information with the exception of information covered by HB 81 (parade, concert, or other entertainment event).

- **SB 988 (Watson/Capriglione)** (*Effective date: September 1, 2019*) – SB 988 prohibits a court from assessing costs of litigation or reasonable attorney's fees incurred by a plaintiff or defendant who substantially prevails in an action brought by a governmental entity seeking to withhold information from a requestor under the PIA, unless the court finds the action or the defense of the action was groundless in fact or law.

- **SB 494 (Huffman/Walle)** (*Effective date: September 1, 2019*) – SB 494 addresses procedures related to both the PIA and the Open Meetings Act (see below) in the event of an emergency, urgent public necessity, or catastrophic event. With respect to the PIA, SB 494 allows for the ***temporary suspension of certain PIA requirements during a catastrophe***.
  - A "catastrophe" means a condition or occurrence that interferes with the ability of a governmental body to comply with the requirements of PIA, including:
    - fire, flood, earthquake, hurricane, tornado, or wind, rain, or snow storm;
    - power failure, transportation failure, or interruption of communication facilities;
    - epidemic; or
    - riot, civil disturbance, enemy attack, or other actual or threatened act of lawlessness or violence.
  - To effectuate a suspension of PIA requirements, a governmental body must submit notice to the Attorney General on the prescribed form (which the Attorney General is directed to create as soon as practicable after September 1, 2019) and must provide notice to the public in a readily accessible place and in each location where the governmental body is required to post meeting notices. The Attorney General is required to post the notice on its website for a year.
  - The initial suspension period may not exceed seven consecutive days, but can be extended once for an additional seven-day period.
  - A request for public information received by a governmental body during a suspension period is considered to have been received by the governmental body on the first business day after the date the suspension period ends.
  - PIA requirements related to a request for public information received by a governmental body before the date an initial suspension period begins are tolled until the first business day after the date the suspension period ends.

Open Meetings Act ("OMA") Legislation

- **SB 1640 (Watson/Phelan)** (*Effective date: June 10, 2019*) – SB 1640 is intended to address the Texas Court of Criminal Appeals decision in *State v. Doyal*, No. PD-0254-18, 2019 WL 944022 (Tex. Crim. App. Feb. 27, 2019), which struck down the OMA's prohibition against a "walking quorum" (meeting of less than a quorum to evade the OMA) as unconstitutionally vague.
  - The statutory provision prohibiting a walking quorum was revised so that a member of a governmental body commits an offense if the member:
    - ***knowingly*** engages in at least one among a series of communications that each occur ***outside of an open meeting*** and ***concern any public business*** of the governmental body where individual communications are among fewer than a quorum of members but the members engaging in ***the series of communications constitute a quorum***; and
    - ***knew at the time*** that the member engaged in the series of communications that the series involved or would involve a quorum and would constitute a deliberation once a quorum of members engaged in the series of communication.
- **HB 2840 (Canales/Hughes)** (*Effective date: September 1, 2019*) – HB 2840:
  - Requires a governmental body to allow each member of the public who desires to address the body regarding an item on an agenda for an open meeting to address the body regarding the item at the meeting ***before or during*** the body's consideration of the item.
  - Permits a governmental body to ***adopt reasonable rules*** regarding the public's right to address the body, including time limits.
  - Provides that, unless a governmental body uses simultaneous translation equipment, a person who addresses the body through a translator must be given at least twice as much time to testify as a person who does not use a translator in order to ensure that non-English speakers receive the same opportunity to address the body.
  - States that a governmental body ***may not prohibit public criticism*** of the governmental body, including criticism of any act, omission, policy, procedure, program, or service.

- **SB 494 (Huffman/Walle)** (*Effective date: September 1, 2019*) – As noted above, SB 494 sets forth procedures related to both the PIA and the OMA in the event of an emergency, urgent public necessity, or catastrophic event. With respect to the OMA, the bill:
  - Broadens the situations in which an emergency or urgent public necessity exists beyond simply when there is an imminent threat to public health and safety or there is a "reasonably unforeseeable situation" to specify that it can include:
    - fire, flood, earthquake, hurricane, tornado, or wind, rain, or snow storm;
    - power failure, transportation failure, or interruption of communication facilities;
    - epidemic; or
    - riot, civil disturbance, enemy attack, or other actual or threatened act of lawlessness or violence.
  - Allows a governmental body to meet to ***deliberate or take action on an emergency or urgent public necessity with one hour notice***. A governmental body may not deliberate or take action at a meeting posted in compliance with the emergency meeting requirements except with respect to matters directly related to responding to the emergency or urgent public necessity identified in the notice, and the Attorney General may bring suit to stop, prevent, or reverse a violation of that provision.

Appendix D was prepared with the assistance of Lori Fixley Winland with Ogletree, Deakins, Nash, Smoak & Stewart, P.C., who can be reached at (405) 546-3759 (lori.winland@ogletree.com).

Appendix "E"

Other Legislation of Interest

- **Camino Real RMA/ Texas Parks and Wildlife - Wyler Aerial Tramway**
  - **SB 2248 (Rodriguez/Ortega)** (*Effective date: June 14, 2019*) – SB 2248 permits a city-created regional mobility authority ("RMA") to develop an aerial cable car or aerial tramway for the transportation of persons or property, or both. This legislation was intended to allow the Camino Real RMA to work with Texas Parks and Wildlife to rehabilitate the Wyler Aerial Tramway at Franklin Mountains State Park in El Paso. The bill also clarifies that all RMAs are permitted to enter into an agreement with a state agency.

  - **SB 500 (Nelson/Zerwas)** (*Effective date: June 6, 2019*) – SB 500, the supplemental appropriations bill, appropriates ***$5 million from the ESF*** to the Texas Parks & Wildlife Department for overhaul and necessary construction related to the Wyler Tramway in El Paso.

- **SB 604 (Buckingham/Paddie)** (*Effective date: September 1, 2019*) – SB 604 was the Sunset legislation for the Texas Department of Motor Vehicles ("TxDMV"). The House adopted an amendment which ***requires TxDMV to adopt rules by December 31, 2020, governing the use of digital license plates***.
  - The rules must allow the owner of a vehicle to attach the digital license plate to the rear of the vehicle but require a physical license plate to be attached to the front of the vehicle.
  - A vehicle may be equipped with a digital license plate only if the vehicle is ***part of a commercial fleet***, is ***owned or operated by a governmental entity***, or is ***not a passenger vehicle***.
  - The rules adopted by TxDMV may:
    - allow for the ***display of a vehicle's registration insignia*** on the digital license plate in lieu of attaching it to the windshield;
    - preclude a digital license plate provider from contracting with TxDMV for the marketing and sale of personalized or specialty license plates;
    - authorize the ***use of a digital license plate for electronic toll collection or to display a parking permit***; and
    - establish procedures for displaying emergency/public safety alerts, vehicle manufacturer safety recall notices, static logo displays (e.g., an entity's logo on their fleet vehicles), or advertising approved by TxDMV.
  - TxDMV must set the specifications and requirements for digital license plates, including that the digital license plates must have wireless connectivity capability and provide benefits to law enforcement that meet or exceed the benefits provided by physical license plates as of the time of enactment of SB 604 and as determined by the Department of Public Safety ("DPS").
  - DPS has the ***ability to prevent the rules from taking effect*** if it timely submits a notice invalidating the rule within 30 days of it being posted.
  - TxDMV is authorized to contract with digital license plate providers for the issuance of digital license plates, including any services related to the issuance. These services could include the sale, lease, and installation of and customer service for a digital license plate.
  - A digital license plate provider with whom TxDMV contracts:
    - must make available a digital version of each specialty license plate;
    - may contract with the private vendor who has the contract with TxDMV for the marketing and sale of personalized license plates in order to make available a digital version of a personalized license plate;

- must promptly update the display of a vehicle registration insignia to reflect the current registration period for the vehicle and, on request of TxDMV, suspend the display of the registration insignia or indicate on the license plate that the registration insignia for the vehicle is expired.

- **HB 1631 (Stickland/Hall)** (*Effective date: June 2, 2019*) – HB 1631 prohibits the use of photographic traffic signal enforcement systems, also known as "red light cameras".

- **HB 71 (Martinez/Lucio)** (*Effective date: May 24, 2019*) – HB 71 allows for the ***creation of a regional transit authority*** by Cameron, Hidalgo, or Willacy Counties. Generally, these authorities would be able to acquire, construct, develop, plan, own, operate, and maintain a public transportation system.

- **HB 799 (Landgraf/Nichols)** (*Effective date: September 1, 2019*) – HB 799 provides that, except in certain limited situations set forth in the bill, the ***owner of a vehicle is strictly liable for any damage to a bridge or underpass that is caused by the height of the vehicle***.
  - The bill also creates a Class C misdemeanor offense if a person operates or attempts to operate a vehicle over or on a bridge or through an underpass if the height of the vehicle, including load, is more than the vertical clearance of the structure.
  - The offense is increased to a Class B misdemeanor if it is shown that the person was not in compliance with all applicable license and permit requirements for the operation of the vehicle. The Class B misdemeanor is punishable by a fine not to exceed $500 and/or confinement in county jail for a term not to exceed 30 days.

- **SB 969 (Hancock/Landgraf)** (*Effective date: June 10, 2019*) – In 2017, the 85th Legislature adopted SB 2205[7] in order provide a statutory framework of minimum safety requirements for automated motor vehicles. Similarly, SB 969 was passed to create a regulatory framework for a new technology: the operation of personal delivery and mobile carrying devices.
  - The bill defines a "***mobile carrying device***" as a device that transports cargo while remaining within 25 feet of a human operator to actively monitor the device.
  - A ***"personal delivery device***" is defined as a device that is manufactured primarily for transporting cargo in a pedestrian area (a sidewalk, crosswalk, school crosswalk, school crossing zone, or safety zone) or on the side or shoulder of a highway and is equipped with automated driving technology, including software and hardware, that enables the operation of the device with the remote support and supervision of a human.
    - A person is ***authorized to operate a personal delivery device only if that person is a business entity*** (a legal entity, including a corporation, partnership, or sole proprietorship, that is formed for the purpose of making a profit).
    - The bill states that the business entity is considered the operator of the device unless an agent of the business entity controls the device in a manner that is outside the scope of the agent 's office or employment, in which case the agent is considered to be the operator.
  - A personal delivery or mobile carrying device may be ***operated only in a pedestrian area at a speed of not more than 10 mph or on the side of a roadway or the shoulder of a highway at a speed of not more than 20 mph***. However, a local authority may establish a maximum speed of less than 10 mph (but not less than 7 mph) in a pedestrian area if it determines that a maximum speed of 10 miles per hour is unreasonable or unsafe for that area.
  - A business entity that operates a personal delivery device must maintain an insurance policy that includes general liability coverage of not less than $100,000 for damages arising from the operation of the device.

[7] *See* Tex. SB 2205, 85th Leg., R.S. (2017).

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Texas Transportation Legislation Overview of the 87th Regular Legislative Session

Authored by: C. Brian Cassidy, and Brian O'Reilly
June 28, 2021

Due to the COVID-19 pandemic the 87th Texas Legislative Session began under a cloud of uncertainty. When the Session convened in January there was confusion and inconsistency in how the House and Senate would conduct their business and what COVID-related protocols would be required. Expectations for the Session were generally modest given the initial procedural constraints and uncertainty as to the impact of the pandemic on the economy and the projected revenues that would be available to fund the state budget. It seemed likely that the breadth of issues to be considered during the Session would be limited.

With respect to transportation, there was no reason to believe that any major policy issues would be addressed, such as new revenue sources or re-authorization of public-private partnerships. The impacts of COVID-19 had been felt during the interim, where the Senate Transportation Committee was not able to conduct any interim hearings and did not issue a report on interim charges. The House Transportation Committee was only able to conduct one in-person hearing on its interim charges before COVID-19 protocols precluded "live" proceedings. The House committee conducted the remainder of its work by inviting written submissions (without any further live hearings), and issued its Report on Interim Charges[1] based on that input. Funding the State's transportation infrastructure needs was one of the primary issues addressed in the report, and one of the key findings was that the State continues to fall significantly short on needed funding, particularly when factoring in the needs associated with megaprojects like I-35 in Central Texas and improvements to I-45 /I-69 in Houston.[2] The Report noted that:

> "…pre-COVID-19, the shortfall in transportation investment for 2021 is $7.2 billion, increasing about $1.8% each year due to inflation. Between 2019 and 2030, Texas will underfund transportation by $111 billion – averaging $9.3 billion per year." [3]

These figures are striking, and are likely to increase even more given the unprecedented growth the State is experiencing. While there were two noteworthy funding-related initiatives that advanced this Session (see below), more will clearly be needed to avoid falling further behind in the State's efforts to sustain, much less grow, its transportation infrastructure.

In mid-February, and just as the Legislature was seeming to adapt to conducting a limited amount of business in a COVID environment, things got even more complicated as a result of Winter Storm Uri. The storm began on February 13th and exposed major vulnerabilities in the Texas power grid. The storm resulted in prolonged power outages throughout the state, hundreds of deaths, and billions of dollars in damages. The failures in grid operations placed the Electric Reliability Council of Texas and the Public Utility Commission of Texas in the Legislature's crosshairs. Investigations of the actions of both entities and the financial ramifications for consumers and market participants became a major focus of the Legislature and the subject of some significant disagreement among House and Senate leadership and the Governor's office, particularly as to the "repricing" of wholesale energy that was sold during the crisis.

With the exception of work on the budget and the winter storm issues, activity in the Capitol was relatively slow through March. However, as the rollout of vaccines accelerated (particularly in April and May), the pace increased. Previously established protocols were relaxed for hearings and other activity in the Capitol, and hearings were held more frequently and with longer agendas than in previous weeks. Certain more divisive issues, such as

[1] The House Transportation Committee, Interim Report to the 87th Legislature (Dec. 2020), available at https://house.texas.gov/_media/pdf/committees/reports/86interim/Transportation-Committee-Interim-Report-2020.pdf.
[2] *Id*. at p. 25.
[3] *Id*.

election integrity, constitutional carry, "fetal heartbeat" limitations, and transgender issues began to be pursued in earnest. Consideration of transportation bills accelerated as well - during the period between the first week of April and the middle of May the House Transportation Committee held 9 hearings and considered 105 bills, and the Senate Transportation Committee held 7 hearings and considered 90 bills.

Many of the transportation bills that became law deal with operational issues for transportation entities, such as contracting and procurement requirements, toll operations, eminent domain procedures, etc. In addition, one Joint Resolution (HJR 99) and one bill (HB 2219) were passed which have the potential to provide additional project funding opportunities.

HJR 99

HJR 99 was sponsored by House Transportation Committee Chair Terry Canales and Senate Transportation Committee Chair Robert Nichols. It carries forward one of the recommendations contained in the House Interim Report, which recognized the limited utility of transportation reinvestment zones ("TRZs") due to issues impacting a county's ability to create such zones. HJR 99 authorizes an item to be placed before the voters in November that would give counties the same constitutional authority to engage in tax increment financing that cities currently have, subject to certain limitations.

This is important for transportation projects because it will significantly expand the potential for use of transportation reinvestment zones ("TRZs") by counties. TRZs were first authorized in 2007[4], and have evolved over several legislative sessions. In essence, a TRZ allows a city or county to designate an area around a transportation project and to capture all or part of the incremental sales or ad valorem tax revenue that is generated within the zone for use in funding the project. In that way, the growth that results from the development of the project helps to pay for the project itself. A TRZ does not require a tax increase; it is merely a specific dedication of incremental tax revenues that may be generated from growth resulting from the development of a project.

Initially, it was believed that either a city or a county could form a TRZ, but that only a city could engage in tax increment financing (i.e., issue debt secured by the tax increment to raise funds for a project more quickly). Counties were left to use TRZ revenues to fund projects as the revenues became available on an annual basis. However, in 2015 an attorney general opinion was issued which indicated that the mere formation by a county of a TRZ to collect a tax increment to be used on a "pay-as-you-go" basis would likely be considered unconstitutional.[5] The reasoning generally related to the fact that counties did not have the same constitutional authority as cities to engage in tax increment financing.[6] HJR 99 therefore not only authorizes counties to engage in tax increment financing (provided the required enabling legislation is in place), it paves the way for counties to use TRZs and other tools for capturing funds for project purposes. Note that unlike the authorization granted to cities, HJR 99 restricts counties to using a maximum of 65% of a tax increment to secure county-issued bonds, and does not allow any county-issued bond proceeds to be used for toll roads. However, those restrictions are limited to county-issued bonds and bond proceeds; they do not restrict the ability to use up to 100% of an increment to support a project or to assign the entire increment to another entity (e.g., a regional mobility authority ("RMA")[7]) to use in connection with project funding needs.

A similar constitutional initiative was pursued in 2011[8], but the item failed when placed before the voters. HJR 99 should have better prospects for passage, as there is an increased awareness of the importance of the tool, funding needs across the state are becoming more acute, and the ballot language is clearer and less likely to be confused as authorizing an increase in taxes.

HB 2219

HB 2219 was also sponsored by Chairmen Canales and Nichols, and it relates to the Texas Mobility Fund ("TMF"). The TMF was created pursuant to a constitutional amendment passed by voters in 2001. It authorized

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[4] *See* Tex. SB 1266, 80th Leg., R.S. (2007).
[5] Tex. Att'y Gen. Op. No. KP-0004 (2015).
[6] In general, constitutional provisions related to equal and uniform taxation (art. VIII, sec. 1(a)) require that all ad valorem taxes paid by property owners in a county go toward the general support of the county. However, explicit constitutional authority to engage in tax increment financing provides authorization to utilize a tax increment from a zone to benefit only the property within that zone. By providing tax increment financing authority for counties (by amending art. VIII, sec. 1-g(b)) in HJR 99 (if passed), the use of a TRZ or other zone by a county should be permissible just as it is for cities.
[7] *See* Tex. Transp. Code § 370.303(b)(2)(B).
[8] *See* Tex. HJR 63, 82nd Leg., R.S. (2011).

the Texas Transportation Commission to issue bonds secured by revenues deposited into the fund. Proceeds could be used for various types of transportation projects, and the ability to issue debt allowed for more transportation funds to become available. In essence, the TMF was intended to serve as a revolving fund to provide a method of financing for the construction of state highways and other public transportation projects, including publicly-owned toll roads.

However, in 2015 the Legislature repealed the enabling legislation authorizing the issuance of bonds secured by the TMF (except for refunding bonds related to then-existing debt).[9] At the time of the repeal more than $7 billion in TMF bonds had been issued to support transportation projects. HB 2219 re-authorizes the ability to issue TMF bonds, although it carries a restriction that the bond proceeds cannot be used for toll roads and that bonds cannot be issued in an amount that exceeds 60% of the principal amount of bonds outstanding on May 1, 2021.

According to a fiscal note for HB 2219 issued by the Legislative Budget Board, TxDOT projects that it could issue $1.5 billion in TMF bonds in FY 2022, and another $1.5 billion in FY 2024. That means there is the potential for another $3 billion in transportation funding over the next three fiscal years. The bill was signed by Governor Abbott on June 18th and has immediate effect.

Both HJR 99 (if approved by the voters) and HB 2219 provide opportunities for increases in transportation funding options, without raising new revenues. Both carry a restriction against using bond proceeds for toll roads, although the restriction in HJR 99 is fairly limited in scope. While these are noteworthy tools, much more will be needed to address a funding shortfall of $7.2 billion per year (and growing). Further, the continued efforts to restrict sources of funding that can be used to support publicly owned toll roads will continue to undermine a tool that various regions of the State have successfully used to help address needs at a local level. Ironically the anti-toll sentiment seen in past sessions was relatively non-existent, with only a handful of bills filed that would have negatively impacted tolling entities. Yet the amendments to HJR 99 and HB 2219 purporting to restrict the use of funds for toll roads were adopted pursuant to Senate floor amendments in the final days of the Session and were never vetted in a public hearing. There was no indication that there was widespread opposition to tolling, but these restrictions nevertheless found their way into legislation.

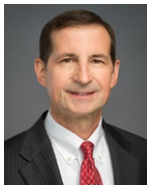
Details about HJR 99 and HB 2219 are covered in Appendix "A". Other bills of interest are addressed in the appendices as well. Overall, it was a modest Session for transportation, which is probably not surprising given the outside forces impacting the Session and the absence of a critical focus on the still-significant funding deficit. Hopefully, that focus can return in future legislative sessions. Otherwise, a State that prides itself on a business friendly environment will risk being viewed as having an inferior transportation network.

APPENDICES

[9] *See* Tex. HB 122, 84th Leg., R.S. (2015).

The foregoing and the attached appendices are intended only to be a summary of the results of the 87th Regular Legislative Session. Interested parties should consult the text of specific legislation concerning the scope and application of new laws, changes to laws, and provisions of previously enacted laws. Transportation Legislation Overviews from prior legislative sessions may be viewed here.

Questions may be directed to:



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- **HJR 99 (Canales/Nichols)** (*Constitutional Amendment Election: November 2, 2021*) – HJR 99 authorizes submission to the voters of a proposed constitutional amendment that, if passed, will provide ***counties the constitutional authority to engage in tax increment financing*** (e.g., Transportation Reinvestment Zones ("TRZs") or Tax Increment Reinvestment Zones ("TIRZs")) to fund the development or redevelopment of transportation or infrastructure in undeveloped, underdeveloped, or blighted areas.

    - This authority is limited in two respects in that ***a county*** that has ***issued tax increment bonds*** cannot:

        - (1) dedicate more than 65% of the tax increment generated each year to repayment of the bonds; and

        - (2) use the bond proceeds to finance costs of the development or operation of a toll road.

    - Counties will be able to use ***all or a portion*** of tax increment revenues generated within a TRZ or TIRZ to fund projects on a pay-as-you go basis (i.e., the 65% limitation would not apply under a pay-as-you go scenario since it would not involve the issuance of tax increment bonds by the county).

    - The restriction on using county-issued bond proceeds for a toll project does not preclude the use of TRZ or TIRZ revenues for a toll project. The restriction only applies to the use ***by a county*** of bond proceeds for a toll project.

    - Counties will also be able to partner with public or private entities and pledge or assign all or a portion of tax increment revenues for use in infrastructure development.[10]

- **HB 2219 (Canales/Nichols)** (*Effective date: June 18, 2021*) – In 2001, voters approved a constitutional amendment authorizing the creation of the Texas Mobility Fund ("TMF") and the Texas Transportation Commission was authorized to issue debt supported by the TMF to finance the development and construction of roads on the state highway system, publicly owned toll roads, and other public transportation projects. The TMF was one of the more flexible sources of money available for use by TxDOT. However, in 2015 the legislature prohibited further issuances of debt from the TMF.[11]

    - HB 2219 allows for the further issuance of debt, but only until January 1, 2027.

    - A restriction was put in place on the aggregate principal amount of obligations that may be issued under the TMF, after May 31, 2021, and before January 1, 2027, other than refunding obligations, to an amount not exceed 60% of the outstanding principal amount of TMF bonds existing on May 1, 2021.

    - The bill removed the term "publicly owned toll roads" from the section describing the purposes for which TMF debt may be issued.

[10] *See* Tex. Transp. Code § 222.107(h-2); Tax Code § 311.010(b).
[11] *See* Tex. HB 122, 84th Leg., R.S. (2015).

- **HB 1698 (Raney/Schwertner)** (*Effective date: September 1, 2021*) – The Transportation Code permits the Commissioners Courts of certain bracketed counties (Bexar, Cameron, Hidalgo, El Paso, and Webb) to adopt an order implementing an optional $10 vehicle registration fee.[12] Two counties (Hidalgo and Webb) may increase the additional fee to an amount that does not exceed $20 if approved by a majority of the qualified voters of the county.

    - HB 1698 adds Brazos County to the list of counties eligible to implement the optional $10 vehicle registration fee.

    - As opposed to the other five counties eligible to implement the fee by order of its Commissioners Court, the fee provided for under HB 1698 must be approved by a majority of the qualified voters of Brazos County.

    - The bill did not provide for Brazos County to be eligible to increase the additional fee to an amount that does not exceed $20.

- **HB 2223 (Canales/Nichols)** (*Effective date: June 4, 2021*) – HB 2223 requires TxDOT, in consultation with TTI, The University of Texas Center for Transportation Research, and transportation industry representatives, to conduct a study on the impact on the roads and bridges by motor vehicles classified as (1) passenger vehicles; (2) commercial motor vehicles; and (3) oversize or overweight vehicles.

    - The study will recommend changes to existing tax or fee structures to ensure that vehicles of each classification contribute revenue to fund the construction and maintenance of the roads and bridges in an amount at least equal to the financial impact of the vehicles of that classification on those roads and bridges.

    - TxDOT must submit a report to the governor, the lieutenant governor, and the legislature on the findings of the study no later than December 1, 2022.

- **SB 1727 (Nichols/Ashby)** (*Effective date: June 7, 2021*) – SB 1727 prohibits Harris County from creating a local government corporation (LGC) to develop, construct, operate, manage, or finance a toll project or system. This was an apparent response to reported efforts by Harris County to use funds generated by HCTRA for flood control and other purposes indirectly related to transportation.

    - The bill prohibits any existing LGC created by Harris County from undertaking any new bonds, notes, or other obligations or extending the terms of any existing bonds, notes or other obligations or entering into any new contracts or extending the terms of any existing contracts.

    - Any existing LGC created by Harris County must be dissolved when all bonds, notes, and other obligations and contracts of the LGC have been satisfied.

    - The use of revenue earned by such an LGC is limited to paying the costs of a turnpike project, or for a road, street, or highway project.

[12] *See* Tex. Transp. Code § 502.402.

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Appendix "B"

Toll Operations Legislation

- **HB 1116 (Thompson/Alvarado)** (*Effective date: May 15, 2021*) – HB 1116 provides that a toll collected pursuant to an agreement for tolling services with a toll project entity other than TxDOT is governed by the fee and fine structure of the entity issuing the initial toll invoice. This was primarily intended to address the SH 288 concession comprehensive development agreement for which the Harris County Toll Road Authority ("HCTRA") is providing tolling services for the developer, Blueridge Transportation Group.

- **HB 2048 (Krause/Powell)** (*Effective date: September 1, 2021*) –The Move Over/Slow Down law requires motorists to move out of the lane closest to a protected vehicle when possible or reduce their speed to 20 mph below the posted limit.[13] The list of protected vehicles includes emergency vehicles, TxDOT vehicles, tow trucks, utility services vehicles, and solid waste collection trucks.[14]

    - HB 2048 expands the types of vehicles subject to the Move Over/Slow Down law to include protections for ***a vehicle operated by or pursuant to a contract with a toll project entity*** (i.e., TxDOT, RMAs, regional toll authorities, and county toll road authorities).

- **SB 15 (Nichols/P. King)** (*Effective date: June 18, 2021*) – SB 15, referred to as "the Texas Consumer Privacy Act Phase I", addresses privacy protections for certain personal information collected by governmental entities. Of importance to toll project entities, the bill revises various provisions in the Motor Vehicle Records Disclosure Act related **to** access of motor vehicle records.

    - SB 15 provides that personal information obtained by an agency in connection with a motor vehicle record must be disclosed to a requestor who is the subject of the information.

    - The statutory authorization which toll project entities have historically relied on to access motor vehicle records for the purpose of sending a notice of nonpayment of a toll to the registered owner of the vehicle remains unchanged.[15]

    - The bill authorizes the use of personal information in connection with the operation of a toll facility or other type of transportation project, as the term is defined in Chapter 370 of the Transportation Code;

    - SB 15 provides for certain ***requirements that must be included in a contract*** under which an agency provides a requestor ***access to personal information in motor vehicle records in bulk***, including:

        - a requirement that the requestor post a performance bond in an amount of not more than $1 million;

        - a requirement that the requestor provide proof of general liability and cyber-threat insurance coverage in an amount specified by the contracting agency that is at least $3 million and reasonably related to the risks associated with unauthorized access and use of the records;

[13] *See* Tex. Transp. Code § 545.157(b).
[14] *See id.* at § 545.157(a).
[15] *See id.* at § 730.007(a)(2)(A) (An early version of SB 15 removed this authorization, as well as the provisions under which many other types of entities relied on the access motor vehicle records.)

- a requirement that if a requestor experiences a breach of system security that includes information from the motor vehicle records, the requestor must notify the agency of the breach not later than 48 hours after the discovery of the breach;

- a requirement that the requestor include in each contract with a third party that receives the personal information from the requestor that the third party must comply with federal and state laws regarding the records;

- a requirement that the requestor and any third party receiving the personal information from the requestor protect the personal information with appropriate and accepted industry standard security measures for the type of information and the known risks from unauthorized access and use of the information; and

- a requirement that the requestor annually provide to the agency a report of all third parties to which the personal information was disclosed and the purpose of the disclosure.

- Note: The ***performance bond and insurance requirements*** noted above ***do not apply to a contract between governmental entities***, such as those between a toll project entity and TxDMV used to access motor vehicle records.

- An agency that discloses any motor vehicle records in bulk must include at least two records that are created solely for the purpose of monitoring compliance with the requirements associated with the use of such records.

- The sale of personal information obtained in connection with motor vehicle records is prohibited and subject to a criminal fine and civil damages.

- The criminal fine for re-disclosure of information obtained in connection with motor vehicle records to a person who is not an authorized recipient is increased to an amount not to exceed $100,000.

➢ **SB 876 (Hancock/Thompson)** (*Effective date: March 1, 2022*) – SB 876 permits the owner or seller of a motor vehicle to apply for a title and registration to ***any*** county assessor-collector who is willing to accept the application.

- The bill clarifies that the ***vehicle owner 's county of residence is the recipient of all taxes, fees, and other revenue collected***, except that the county processing the application may retain the portion of the title application fee and the processing and handling fee.

- Note: Toll project entities utilizing the authority under the habitual violator remedies to block vehicle registration will need to monitor the impacts of this legislation to determine whether violators attempt to avoid registration blocks by registering their vehicle in a county in which they are not a designated habitual violator.

- **HB 2116 (Krause/Powell)** (*Effective date: September 1, 2021*) – HB 2116 voids any covenant or promise in a construction contract for engineering or architectural services which provides that a registered architect or licensed engineer must defend a party, including a third party, against a claim based wholly or partly on the negligence of, fault of, or breach of contract by the owner, the owner's agent, the owner's employee, or another entity over which the owner exercises control.

    - This prohibition does not apply to (1) a design-build contract; or (2) a covenant to defend a party, including a third party, for a claim of negligent hiring of the architect or engineer.

    - The bill permits a covenant or promise in a contract for engineering or architectural services which provides for the reimbursement of an owner's reasonable attorney's fees in proportion to the engineer's or architect's liability.

    - An owner is permitted to require in the contract that the engineer or architect name the owner as an additional insured (to the extent additional insureds are allowed under the policy) and provide any defense to the owner provided by the policy to a named insured.

    - HB 2116 states that a contract for engineering or architectural services must require that the architectural or engineering services be performed with the professional skill and care ordinarily provided by competent architects or engineers practicing under the same or similar circumstances and professional license. A contractual provision establishing a different standard of care is void and unenforceable.

- **SB 219 (Hughes/Leach)** (*Effective date: September 1, 2021*) – The 86th Legislature passed legislation which limited a contractor's civil liability under contracts for construction or repair of a road or highway with TxDOT and certain political subdivisions.[16] SB 219 expands upon the scope of that legislation, addressing ***civil liability for construction and improvement under a contract for the construction or repair of an improvement to real property***.

    - The bill provides that a contractor is not responsible for the consequences of design defects in, and may not be required to warranty the accuracy, adequacy, sufficiency, or suitability of plans, specifications, or other design documents provided to the contractor by a person other than the contractor's agents, contractors, fabricators, or suppliers, or its consultants.

    - A contractor may be liable for the consequences of defects the contractor discovers in design documents but fails to disclose within a reasonable time, or for defects that reasonably should have been discovered by the contractor using ordinary diligence, before or during construction.

    - The limitation of liability provided by SB 219 ***does not apply to***:

        - a contract entered into by a person for the construction or repair of certain ***critical infrastructure facilities***[17] and related structures;

[16] *See* Tex. HB 2899, 86th Leg., R.S. (2019).
[17] *See* Tex. Bus. & Comm. Code § 59.001(3) (defining "critical infrastructure facility" as a list of 24 specific types of facilities).

- the portion of a contract between a person and a contractor under which the contractor agrees to provide input and guidance on design documents to the extent that the contractor's input and guidance are provided as the signed and sealed work product of a licensed engineer, architect, or land surveyor and the work product is incorporated into the design documents used in construction; or

- a ***design-build contract*** or an ***engineering, procurement, and construction contract***, if the part of the design documents for which the contractor is responsible under the contract is the part alleged to be defective.

    - Note: SB 219 provides a definition for a "design-build contract"[18] and "engineering, procurement, and construction contract"[19] both of which contemplate that the contractor is responsible for the design documents or engineering activities for the project. Therefore, it would appear that any alleged defect under either type of contract would be the responsibility of the contractor.

- The bill includes the same provision related to an architect's or engineer's standard of care outlined in HB 2116 above.

- SB 219 clarifies that the provisions adopted in the 86th Legislature relating to the responsibility for defects in plans and specifications under contracts for construction or repair of a road or highway ***do not apply to a design-build contract***. This change is intended to clarify existing law and ***apply to a contract entered into before, on, or after the effective date*** of SB 219.

➢ **HB 1476 (K. Bell/Nichols)** (*Effective date: September 1, 2021*) – HB 1476 requires a governmental entity to ***notify a vendor of a disputed amount in an invoice*** submitted for payment by the vendor not later than the 21st day after the date the entity receives the invoice, and include in the notice a detailed statement of the amount of the invoice which is disputed. A governmental entity may withhold from payments required no more than 110% of the disputed amount.

➢ **HB 692 (Shine/Creighton)** (*Effective date: June 15, 2021*) – HB 692 sets forth various retainage requirements for certain public works construction projects.

- The bill requires a governmental entity to include a contractual provision that establishes the circumstances under which the public works project that is the subject of the contract is considered substantially complete and when the governmental entity may release the retainage for substantially completed portions of the project.

- A governmental entity must maintain an accurate record of accounting for the retainage withheld on periodic contracts payments and for the retainage released to the prime contractor.

- For a competitively awarded contract with a value of $10 million or more, and for a contract that was awarded using a method other than competitive bidding, the governmental entity must pay any remaining retainage on periodic contract payments, and the interest earned on the retainage, to the prime contractor on completion of the contract.

- If the total value of a public works contract is less than $5 million, a governmental entity may not withhold retainage in an amount that exceeds 10% of the contract price and the rate of retainage may not exceed 10% for any item in a bid schedule or schedule of values for the project, including materials and equipment delivered on site to be installed.

[18] *See Id*. at § 59.001(5) (defining "design-build contract" as "a contract in which a contractor agrees to: (A) construct, repair, alter, or remodel an improvement to real property; and (B) be responsible for the development of plans, specifications, or other design documents used by the contractor to construct, repair, alter, or remodel the improvement.)

[19] *See Id*. at § 59.001(6) (defining "engineering, procurement, and construction contract" as "a construction contract where the contractor is responsible for all of the engineering, procurement, and construction activities to deliver the completed project.")

- If the total value of a public works contract is $5 million or more, a governmental entity may not withhold retainage in an amount that exceeds 5% of the contract price and the rate of retainage may not exceed 5% for any item in a bid schedule or schedule of values for the project, including materials and equipment delivered on site to be installed.

- The prime contractor is prohibited from withholding from a subcontractor a greater percentage of retainage than the percentage that may be withheld from the prime contractor by the governmental entity under the contract. A similar prohibition is extended to a subcontractor who enters into a contract with another subcontractor to provide labor or materials under the contract.

- A governmental entity is prohibited from withholding retainage after completion of the work required to be performed under the contract by the prime contractor, including during the warranty period; or for the purpose of requiring the prime contractor, after completion of the work, to perform work on manufactured goods or systems that were specified by the designer of record and properly installed by the contractor.

- The governmental entity may withhold retainage if there is a bona fide dispute between the governmental entity and the prime contractor and the reason for the dispute is that labor, services, or materials provided by the prime contractor failed to comply with the express terms of the contract or if the surety on any outstanding surety bond executed for the contract does not agree to the release of retainage.

- If there is no bona fide dispute between the governmental entity and the prime contractor and neither party is in default under the contract, the prime contractor is entitled to cure any noncompliant labor, services, or materials or offer the governmental entity a reasonable amount of money as compensation for any noncompliant labor, services, or materials that cannot be promptly cured.

- The bill expands the scope of TxDOT project exempted from the retainage requirements to all public works contract under Chapter 223 of the Transportation Code (previously the exemption applied to only those TxDOT public works contract competitively bid under that chapter).

➢ **SB 1270 (Seliger/Thompson)** (*Effective date: June 7, 2021*) – SB 1270 permits TxDOT to forgo competitive bidding for the award of contracts for (1) materials to be used in the construction or maintenance of a highway; (2) traffic control or safety devices to be used on a highway; or (3) privatized maintenance contracts.

- The authorization only applies to contracts that TxDOT (1) estimates will be within an amount for which purchasing authority has been delegated to state agencies by the comptroller; and (2) determines that the competitive bidding procedure is not practical.

- In the case of a contract for materials to be used in the construction or maintenance of a highway, TxDOT must award to the lowest responsive bidder.

- TxDOT must post the bid tabulation for a contract awarded pursuant to the authority provided under SB 1270.

➢ **SB 19 (Schwertner/Capriglione)** (*Effective date: September 1, 2021*) – SB 19 prohibits a governmental from entering into a contract with a company (except for a sole proprietorship) for the purchase of goods or services unless the contract ***contains a written verification from the company that it does not have a policy that discriminates against a firearm entity or firearm trade association*** based solely on its status as a firearm entity or firearm trade association.

- The prohibition only applies to a contract that is between a governmental entity and a company with at least 10 full-time employees and has a value of at least $100,000 that is paid wholly or partly from public funds of the governmental entity.

- The prohibition would not apply if a governmental entity does not receive any bids from a company that is able to provide the written verification or to contracts with a sole-source provider.

- **SB 58 (Zaffirini/Turner)** (*Effective date: June 3, 20201*) – Revises the definition of "personal property" to include ***cloud computing services*** for purposes of the Public Property Finance Act. This revision allows a governmental agency to finance cloud computing services which are increasingly more desirable than using traditional computer hardware for data storage, cybersecurity enhancements, and processing.[20]

[20] Bill Analysis, Tex. SB 58, House Committee Report, 87th Leg., R.S.

Appendix "D"

Open Government & Oversight Legislation

Open Government Legislation

- **SB 858 (Johnson/Davis)** (*Effective date: May 28, 2021*) – SB 858 adds to the list of personal identifying information collected by certain transit entities that is confidential and not subject to disclosure under the Public Information Act ("PIA").

    - The additional items include ***trip data, including the time, date, origin, and destination of a trip, and demographic information collected when a person purchases a ticket or schedules a trip, and other personal information, including financial information***.

    - An exception is provided so that ***personal identifying information may be disclosed to a governmental agency or institution of higher education*** if the requestor confirms in writing that the information will be strictly limited to use in research or in producing statistical reports, but only if the information is not published, redisclosed, sold, or used to contact any individual.

    - The transit entities subject to SB 858 include:

        - ***Metropolitan Rapid Transit Authorities*** (Capital Metro; Corpus Christi Regional Transportation Authority; Metropolitan Transit Authority of Harris County; VIA Metropolitan Transit);

        - ***Regional Transportation Authorities*** (Dallas Area Rapid Transit; Trinity Metro);

        - ***Coordinated County Transportation Authorities*** (Denton County Transportation Authority); and

        - ***Municipal Transit Departments*** (Sun Metro (El Paso); El Metro Transit (Laredo)).

            - The confidentiality of personal identifying information collected by transit entities that was in effect prior to the enactment of SB 858 did not exist in the statute governing municipal transit departments. Therefore, in addition to the new categories of information noted above, SB 858 also provided for the confidentiality of personal identifying information collected by municipal transit departments to mirror that of other transit entities.

- **SB 1225 (Huffman/Paddie)** (*Effective date: September 1, 2021*) – The 86th Legislature adopted legislation addressing a governmental body's compliance with both the PIA and the Open Meetings Act in the event of an emergency, urgent public necessity, or catastrophic event, including provisions allowing for the temporary suspension of certain PIA requirements during a catastrophe.[21] This authority was quickly utilized at the onset of the COVID-19 pandemic.[22] While many governmental entities utilized this authority in a responsible manner, "[c]ertain governmental bodies abused the temporary suspension process, requesting multiple, consecutive catastrophe notices."[23] SB 1225 seeks to address these instances of abuse by amending the procedures

[21] *See* Tex. SB 494, 86th Leg., R.S. (2019).
[22] *See* Catastrophe Notices Submitted to the Office of the Attorney General by Government Bodies, available at https://www.texasattorneygeneral.gov/open-government/governmental-bodies/catastrophe-notice/catastrophe-notices.
[23] Bill Analysis, Tex. SB 1225, Enrolled, 87th Leg., R.S. (May 24, 2021).

related to the suspension of a governmental body's compliance with both the PIA during a catastrophe as follows:

- A period when the staff of a governmental body is required to work remotely and can access information is excluded from the definition of "catastrophe" for purposes of suspending the requirements of the PIA.

- The bill clarifies that for the requirements under the PIA not to apply during a suspension, a catastrophe must ***significantly*** impact a governmental body such that it ***directly causes the inability to comply with the PIA***.

- The number of times that ***a governmental body may suspend the PIA is limited to once per catastrophe***, plus one extension, for a total suspension period of no more than 14 consecutive calendar days with respect to any single catastrophe.

- A governmental body must make a good faith effort to comply with the PIA when its physical offices are closed but staff are required to work remotely, to the extent staff have access to the information subject to a request.

Oversight Legislation

- **HB 1118 (Capriglione/Zaffirini)** (*Effective date: May 18, 2021*) – The 86th Legislature adopted legislation which required certain state and local government employees and state contractors to complete an annual cybersecurity training program certified by the Department of Information Resources ("DIR").[24] HB 1118 seeks to apply the training requirements on a uniform basis for state agencies and local governments and will likely impact most toll project entities and transit agencies.

  - HB 1118 ***extends the obligation*** to complete annual cybersecurity training program to ***local government elected and appointed officials***.

  - The bill clarifies that the employees or officials required to complete the cybersecurity training is limited only to those who have access to a local government computer system or database **and** use a computer to perform ***at least 25% of the employee's or official's required duties***.

  - The ability of a local government that employs a dedicated information resources cybersecurity officer to offer to its employees a cybersecurity training program is repealed under HB 1118 (i.e., only cybersecurity training programs certified by DIR are permitted).

  - The bill ***requires DIR to develop a form*** for use by state agencies and local governments in ***verifying completion of cybersecurity training program requirements***.

  - The requirement to complete the training does not apply to employees and officials who have been (1) granted military leave; (2) granted leave under the federal Family and Medical Leave Act; (3) granted leave related to a sickness or disability covered by workers' compensation benefits or any other type of extended leave or authorization to work from an alternative work site if that employee no longer has access to the state agency 's or local government 's database and systems; or (4) an employee who has been denied access to a local government's computer system or database by the governing body of the local government for a previous determination that the individual was noncompliant with the requirement to complete cybersecurity training.

[24] *See* Tex. HB 3834, 86th Leg., R.S. (2019).

Appendix "E"

Eminent Domain Legislation

- **HB 2730 (Deshotel/Kolkhorst)** (*Effective date: January 1, 2022*) – HB 2730 makes numerous revisions to eminent domain laws, including:

    - a requirement that the Attorney General evaluate and update the Landowner's Bill of Rights every two years;
    - the Texas Landowner's Bill of Rights must include the terms required for an instrument of conveyance of an easement;
    - sets forth additional items that must be included in an initial bona fide offer and the format of certain notices contained within the offer; and
    - creation of a timeline under which a judge must appoint special commissioners to assess the damages of the owner of the property under a condemnation petition.

- **SB 721 (Schwertner/Leman)** (*Effective date: September 1, 2021*) – SB 721 requires a condemnor to ***disclose to the property owner appraisals relating specifically to the owner's property and used in determining the entity's opinion of value***, if an appraisal report is to be used at special commissioner's hearing. This disclosure must occur ***not later than the third business day before the date of the hearing***.

- **SB 726 (Schwertner/Leman)** (*Effective date: September 1, 2021*) – A person from whom a real property interest is acquired by an entity through eminent domain for a public use is entitled to ***repurchase the property*** if, by the 10th anniversary form the date which the property was acquired, ***no actual progress is made toward the public use for which the property was acquired***.[25] The Property Code provided for a list of ***seven actions***, of which a condemning entity must ***complete two or more*** to ***constitute "actual progress"*** for purposes of the right to repurchase.[26]

    - SB 726 ***reduces the list of seven items to five*** by removing (1) the acquisition of a tract or parcel of real property adjacent to the property for the same public use project for which the owner's property was acquired; and (2) a governmental entity's adoption of a development plan for a public use project that indicates that the entity will not complete more than one action before the 10th anniversary of the date of acquisition of the property.
    - The bill increases the number of ***actions the condemning entity must complete*** to constitute actual progress from ***two to three***.
    - An ***exception is provided for navigation district or port authority, or a water district implementing a project included in the state water plan*** adopted by the Texas Water Development Board where completion of only one of the five possible actions is required but the entity must also adopt a development plan for the project that indicates that the entity will not complete more than one action before the 10th anniversary of the date of acquisition of the property.

[25] *See* Tex. Prop. Code 21.101(a)(2).
[26] *Id.*

Appendix "F"

Emerging Mobility Technologies

- **HB 3026 (Canales/Alvarado)** (*Effective date: September 1, 2021*) – Since the adoption in 2017 of the regulatory framework governing autonomous vehicles in Texas, "multiple manufacturers now build purpose-built autonomous vehicles that contain no space for human occupants and have no useful application for manual controls or other equipment needed on traditional vehicles."[27] In order to address this issue, HB 3026 exempts autonomous vehicles operated exclusively by an automated driving system from vehicle equipment laws and regulations that relate to or support motor vehicle operation by a human driver and are not relevant for an automated driving system.

- **SB 763 (Powell/Cook)** (*Effective date: June 14, 2021*) – SB 763 requires the TTC to appoint an advisory committee to assess current state law and any potential changes to state law that are needed to facilitate the development of ***urban air mobility operations and infrastructure***.

    - The bill does not explicitly set forth what encompasses "urban air mobility operations and infrastructure" but the bill analysis describes urban air mobility as "a new, innovative mode of transportation that will streamline and modernize the future of mobility for passengers and cargo by relying on underutilized aerial transit routes."[28]

    - The committee is required to report to the TTC and to the members of the legislature the committee's findings and recommendations not later than September 1, 2022.

- **SB 1202 (Hancock/Paddie)** (*Effective date: September 1, 2021*) – SB 1202 clarifies that an electric vehicle charging station is not an electric utility or a retail electric provider and permits the Public Utility Commission of Texas to exempt a provider who owns or operates equipment used solely to provide electricity charging service for a mode of transportation from being subject to existing retail electric policies.

- **SB 1308 (Blanco/Canales)** (*Effective date: June 18, 2021*) – SB 1308 directs TxDOT and TxDPS, in consultation with TTI and the appropriate federal agencies, to jointly study the potential benefits of using automated driving systems, connected driving systems, and other emerging technologies to alleviate motor vehicle traffic congestion at ports of entry between Texas and Mexico.

    - The scope of the study will also include the overall impact of using automated driving systems, connected driving systems, and other emerging technologies on the transportation industry workforce and the broader Texas economy, including the effects on driver and public safety.

    - TxDOT and TxDPS must jointly submit to the governor, the lieutenant governor, and the legislature a report on the results of the study, not later than January 1, 2023.

[27] Bill Analysis, Tex. HB 3026, Engrossed, 87th Leg., R.S. (May 17, 2021).
[28] Bill Analysis, Tex. SB 763, Enrolled, 87th Leg., R.S. (May 17, 2021).

- **SB 1334 (Hinojosa/Canales)** (*Effective date: May 18, 2021*) – SB 1334 is intended to address an issue where local governments were unable to donate certain property to the federal government through programs such as the United States Customs and Border Protection's Donations Acceptance Program which is intended to explore, foster, and facilitate partnerships for port of entry infrastructure and technology improvements.[29] Specifically, SB 1334:

  - permits a county bordering the Rio Grande to lease, rent, or donate to the United States property or a building, structure, or other facility acquired, constructed, improved, enlarged, or equipped in whole or in part with proceeds from the sale of bonds;

  - expands the existing authority of a county bordering the Rio Grande to use the proceeds of the sale of bonds to acquire a toll bridge to also allow the use of such proceeds for the construction, improvement, enlargement, or equipment of a toll bridge or a related building, structure, or other facility; and

  - clarifies that a municipality located within 15 miles of a section of the Rio Grande may donate to the federal government (in addition to existing authority to lease or rent) certain property related to bond-financed toll bridges for use in performing a federal governmental function in the municipality, or at or near and relating to a toll bridge of the municipality.

- **SB 2243 (Hinojosa/Canales)** (*Effective date: June 18, 2021*) – SB 2243 allows a political subdivision to ***forgo the requirement of obtaining TTC approval*** for the reconstruction, improvement, expansion, or maintenance of ***an existing bridge over the Rio Grande*** if the project has received certain federal approvals.

- **SB 1907 (Blanco/Martinez)** (*Effective date: September 1, 2021*) – SB 1907 directs the Texas A&M Transportation Institute ("TTI"), in consultation with TxDOT and TxDPS, to conduct a ***feasibility study on erecting and maintaining a co-located federal and state inspection facility at each port of entry for the inspection of motor vehicles***. TTI must submit to the legislature a report on the results of the study and any recommendations for legislative or other action not later than December 1, 2022.

[29] Bill Analysis, Tex. SB 1334, Enrolled, 87th Leg., R.S. (May 24, 2021).

Appendix "H"

Other Legislation of Interest

- **HB 3282 (Canales/Nichols)** (*Effective date: June 15, 2021*) – HB 3283 authorizes a TxDOT district engineer to ***temporarily lower a prima facie speed limit*** for a highway or part of a highway if the district engineer determines that the prima facie speed limit is unreasonable or unsafe because of highway maintenance activities at the site.

- **HB 3390 (Thompson/Blanco)** (*Effective date: May 24, 2021*) – HB 3390 permits TxDOT to purchase insurance coverage that TxDOT considers necessary to protect against liability, revenue, and property losses that may result from a data breach or cyber-attack.

- **HB 3399 (Ortega/Blanco)** (*Effective date: September 1, 2021*) – HB 3399 permits TxDOT to enter into an agreement with the United States Department of Defense or another federal entity to allow TxDOT to assist with the provision of road maintenance, improvement, relocation, or extension services for military installations. State funds are prohibited from being used under such an agreement and the payment for services may not come from the portion of federal funds otherwise allocated to Texas for public roads.

- **SB 507 (Nichols/Anderson)** (*Effective date: June 14, 2021*) – SB 507 requires the TTC to adopt rules establishing an accommodation process that authorizes broadband-only providers to use state highway rights-of-way for installing and maintaining broadband facilities.

- **SB 941 (Buckingham/Morales)** (*Effective date: September 1, 2021*) – SB 941 requires TxDOT to establish a program for designating highways as State Scenic Byways.

    - The program must include a process by which TxDOT receives proposals from political subdivisions or other community groups approved by TxDOT and sets forth various requirements related to applying for grants from the federal scenic byways program.

    - The only highways that may be designated as a State Scenic Byway are those enumerated under Section 391.252, Transportation Code as a highway on which a commercial sign is prohibited.

    - The bill allows TxDOT to use money from the state highway fund for a project for the limited purpose of satisfying matching funds requirements for the grant received under the federal scenic byways program.

- **SB 1474 (Perry/Price)** (*Effective date: June 14, 2021*) – SB 1474 creates the I-27 Advisory Committee to advise TxDOT on transportation improvements impacting the Ports-to-Plains Corridor and information on concerns and interests along the Corridor.