

SUBJECT: Revising processes for developing toll road projects

COMMITTEE: Transportation — favorable, without amendment

VOTE: 10 ayes — Phillips, Darby, Bonnen, Y. Davis, Fletcher, Harper-Brown, Lavender, Martinez, McClendon, Rodriguez

0 nays

1 absent — Pickett

SENATE VOTE: On final passage, March 29 — 31-0

WITNESSES: For — James Hernandez, Harris County (*Registered, but did not testify*: Leroy Alloway, Alamo Regional Mobility Authority; Victor Boyer, San Antonio Mobility Coalition, Inc; Brian Cassidy, Alamo RMA, Camino Real RMA, Cameron County RMA, Central Texas RMA, Grayson County RMA, North East Texas RMA; Mike Heiligenstein, Central Texas Regional Mobility Authority; Trey Lary, Fort Bend County Toll Road Authority; Richard Ridings, HNTB; Victor Vandergriff, North Texas Tollway Authority)

Against — Bruce Burton, Texas TURF, Texans Against Tolls; Don Dixon; Hector Medina (*Registered, but did not testify*: Mel Borel, Texas TURF; Terri Hall, Texas TURF, Texans for Accountable Government, Central Texas Republican Liberty Caucus; Pat Dossey; Jack Finger; Randall Peterson)

On — Amadeo Saenz, Texas Department of Transportation

BACKGROUND: SB 792 by Williams, enacted by the 80th Legislature in 2007, provided that a local tolling entity — certain counties, a Regional Tollway Authority (RTA), or a Regional Mobility Authority (RMA) — must reach an agreement with TxDOT to build a toll project. The agreement must contain provisions governing the initial toll rate and escalation methodology and requiring that the project undergo a market valuation study. The Texas Department of Transportation (TxDOT) and the local tolling authority must select an independent party, which cannot have a

financial stake in the actual project, to appraise the value and corresponding upfront concession fees a project would realize on the private market.

The local entity in general has a first option to build the project. If the local authority cannot raise the up-front payments or follow certain procedures within six months, TxDOT may proceed with a private entity. If the local authority develops the project, it must commit to using the surplus revenue from the toll project to build additional road projects or deposit that money into an account to be used for road projects in the geographic area around the project. Both TxDOT and a local authority may issue bonds to pay any costs associated with a toll project. If TxDOT and the local entity cannot agree on the terms and conditions of an agreement, neither the entity nor the agency may develop the toll project.

With some exceptions, SB 792 also accelerated, from August of 2011 to August of 2009, the expiration date for TxDOT's authority to enter into comprehensive development agreements (CDAs), which are contracts with private entities to finance, construct, maintain, operate, or expand a tolled highway project. It also limited the spending of revenue from these agreements to the geographic area in which the revenue was collected.

DIGEST:

SB 19 would repeal current provisions requiring a market valuation process for toll projects developed by a local tolling authority and establish a development review process for toll projects. The bill also would modify provisions governing CDAs. It would add Transportation Code, ch. 373, governing toll projects located in the territory of a local toll project entity, but would not apply to certain county toll road authority projects governed by existing law and two other projects listed in the bill.

Prior to initiating the process for determining who had the privilege to develop a toll project (primacy), TxDOT and a local tolling entity could enter into an agreement that identified the responsibilities of each party for project-related activities and allowed the primacy process to be initiated earlier than otherwise provided. A toll project agreement could be an alternative to the primacy determination process.

Toll road development review process. SB 19 would grant a local tolling entity the first option to finance, develop and operate a toll project. The bill would establish a process to determine whether a local tolling entity or TxDOT could develop, finance, construct, and operate a toll project.

TxDOT could take any action with regard to a local tolling authority that in its reasonable judgment was necessary to comply with requirements to ensure the state received federal-aid highway funds. Unless otherwise specified, an exercise of primacy would cover the entire toll project, with additional phases to be developed as the entity determined this to be feasible.

Initiation. After a Metropolitan Planning Organization (MPO) approved the inclusion of a toll project in its metropolitan transportation improvement program, a local tolling authority could notify TxDOT of its intent to initiate the tolling project review process. TxDOT could notify a local tolling entity of its intent to initiate the tolling project review process after meeting benchmarks in the bill for final approval of environmental impact statements for the project. TxDOT would have to make its project-related information available to a local tolling entity upon initiation of the project.

First option for local tolling entities. A local tolling entity that received notification of a possible toll project would have a specific timeframe in which to exercise the option to develop the project. If the entity chose to develop the project, it would have to advertise for procurement of services for the project within 180 days of receiving notice or securing necessary environmental approvals. The entity would have to enter into a contract for constructing the project within two years of securing necessary environmental approvals.

If a local project was in the territory of more than one local tolling authority, only the entity that was first authorized to construct toll projects could exercise the option to develop. A local tolling entity could develop a portion of a toll project only in its own territory, except at the request of a neighboring local tolling entity for a project in its jurisdiction.

The Texas Transportation Commission and TxDOT would assist a local tolling entity in developing a toll project by allowing the entity to use state highway right-of-way and to access the state highway system as necessary to construct and operate the toll project. The bill would include provisions governing reimbursement, use, and liability for damages related to the use of right-of-way.

Second option for TxDOT. TxDOT would have the right to finance, develop, and operate a toll project if the local entity declined or failed to

do so. TxDOT would have 60 days to enter into a construction contract to exercise this option. TxDOT similarly would have to advertise for the project within 180 days and enter into a construction contract within two years of exercising its options or when all approvals were secured and all legal challenges were concluded.

Reinitiation of process. If the process concluded without a contract for development, either a local tolling authority or TxDOT could reinitiate the process. TxDOT or a local tolling authority could, at any time during the process, decline to exercise an option to develop a toll project. TxDOT and a local tolling entity also could agree to alter any other step or time limit.

Data sharing and cooperation. An entity that declined to enter into a construction contract for a toll project would have to make available to the other entity its traffic and revenue estimates, plans, surveys, appraisals, and other work developed for the toll project. An entity would have to reimburse another for shared project-related information that it used. An entity that used shared information would be solely liable for that information. An entity that exercised an option to develop a project would have to issue a semiannual report on the progress of development.

Environmental review process. An entity could begin an environmental review process before initiating a tolling review process. A local tolling entity that initiated a process for developing a project would have to begin the environmental review within 180 days of exercising the option to develop. An entity could not begin construction of a project before receiving necessary environmental clearance.

Determination of value. A determination of value or best value for a comprehensive development agreement or other public-private partnership would have to take into account factors determined appropriate by a local tolling authority, including:

- oversight of the toll project;
- maintenance and operations costs of the toll project;
- the structure and rates of tolls;
- economic development impacts of the toll project; and
- social and environmental benefits and impacts of the toll project.

General provisions. The bill would affirm that a toll project procured by TxDOT or a local tolling entity would be owned in perpetuity unless it were leased, sold, or otherwise transferred. For the purposes of the bill, all legal challenges to development of a toll project would be considered concluded when judgment or order of an appropriate court became final and unappealable. The bill would provide that a transaction involving a local toll project entity would be an inherently governmental transaction for the purposes of determining jurisdiction, ownership, control, and other responsibilities over a project.

SB 19 would amend current law to allow the commission to authorize the use of toll project revenue in a region, as opposed to a TxDOT district. TxDOT would allocate surplus toll revenue to districts in the region that were located within the boundaries of the MPO in which the toll project or system producing the surplus revenue was located based on the percentage of toll revenue from users in each district. An entity responsible for collecting tolls would calculate the annual percentage of toll revenue from project users in each TxDOT district. The bill would make conforming amendments to laws restricting toll funds to designated geographic areas.

The bill would repeal provisions requiring a toll project entity to provide the state auditor with a traffic and revenue report prior to entering into a CDA. It also would extend the application of current laws governing county toll road authorities so that they applied to widening, expansion, and continued operation of existing toll projects of the county.

Effective date. The bill would take immediate effect if finally passed by a two-thirds record vote of the membership of each house. Otherwise, it would take effect September 1, 2011. Provisions governing payments would apply only after the bill's effective date. Repealed provisions would not affect any existing agreements between TxDOT and a local tolling entity.

**SUPPORTERS
SAY:**

SB 19 would provide an alternative to the much-maligned market valuation process established in 2007 by SB 792. The process established in that bill has been implemented in such a way as to make it inordinately complicated and drawn out, and it needs to be overhauled or eliminated. Flexible language establishing the current process has been interpreted as authorizing what amounts to a "concession fee" on local tolling authorities for the right to develop and manage a toll road. Imposing this fee on public local tolling authorities merely substitutes one pot of public funding

for another, as local entities must recover the cost of upfront bond issuances through increased toll fares.

Without the massive upfront payments that have become associated with the market valuation process, public toll entities could direct more revenue to other local projects rather than pay off bond obligations that accrue substantial interest over time. The market valuation process does not account for the long-term value inherent in publicly owned and operated toll roads, and it mistakenly applies the same standards of value to public and private resources.

Primacy should be given to local public entities that retain equity in toll road projects over time and then reinvest proceeds into the transportation infrastructure in communities that pay for the facilities. Local, public tolling entities and private interests share pressures to maintain toll roads as time passes, and they have more flexibility and self-determination in decision-making than does the state. Local, public tolling authorities also provide for the recirculation of revenue from toll roads into maintaining local transportation infrastructure. Successful public toll roads become future engines of transportation funding, while privately funded toll roads export revenue to shareholders internationally.

SB 19 would present a balanced approach to public and private toll road development in the state. The bill would split the authority to develop toll roads between local tolling authorities and TxDOT, subject to the established development process. Specific timelines restricting option periods would prevent the process from significantly slowing project development.

The bill, in contrast to what some have claimed, would not allow tolls in perpetuity. Ownership and tolling in perpetuity are not equivalent, and there are currently means to adjust tolls depending on project revenue and debt service requirements. In addition, current law requires the attorney general to fully review all CDAs prior to their execution and requires the submission of various contract documents to the Legislative Budget Board for review. The attorney general is in a better position to review these agreements than the state auditor, as they are legal and contractual agreements that attorney general's staff is accustomed to reviewing.

Claims that the bill would not adequately address private CDAs are misplaced. CDA authority is not specifically covered in the bill but is instead contained in separate chapters of law. The bill would not bar TxDOT from entering into a private CDA, provided the Legislature opted to renew this authority through separate legislation.

OPPONENTS
SAY:

SB 19 would add provisions that would boost the development of toll roads in the state over public, non-tolled roads. Toll roads are an unfair form of double-taxation and impose exorbitant fees on users who are compelled by worsening congestion on public non-tolled roads to pay for toll road use. The bill would be one more measure that avoids addressing the core issue facing the state — insufficient funding for transportation projects. The state needs to address the core issue facing highway funding and take affirmative action to secure the funding for roads that the state needs.

Recent policies pushing the construction of most or all new highways as toll projects are resulting in reduced choices for Texas consumers. New major projects that MPOs have identified in their programs overwhelmingly include tolls but could still be re-designated as non-tolled public roads. Allowing a local tolling entity to immediately begin developing any project that an MPO designated could result in the vast majority of new road projects being developed as toll roads. Continuing the flawed policy of developing new roads as tolled roads at every opportunity has troubling implications for future mobility and the long-term economic health of the state.

Allowing a tolling entity development control over all phases of a toll project — many of which have multiple phases that are developed over the course of many years — would give these entities too much influence over massive toll projects with little opportunity for other entities or the public to push for altering those development plans over time. Further, a tolling entity should not be allowed to conduct its own environmental review for a road project. Granting tolling entities this authority would allow them to manipulate the review to ensure that a tolled project would be the preferred alternative to other options. In addition, granting primacy to local entities, as opposed to the state, could fracture toll development into a disjointed network of separately developed and operated toll projects.

The bill also would grant to local tolling entities ownership in perpetuity. This would completely remove any incentive to cease charging user tolls

and would render the roads a mechanism for generating revenue and not satisfying the development and maintenance costs. Removing state auditor oversight of CDA agreements would remove one of the few meaningful reviews of these agreements. In one recent example, the auditor found a flaw in a traffic and revenue study for an RMA tolled project that undermined the financial viability of the project. Removing this oversight would eliminate a valuable safeguard in the public's interest.

OTHER
OPPONENTS
SAY:

SB 19 would not include private financiers and developers in the process for selecting toll road development. This omission would create a structural bias against private entities in favor of public tolling authorities, irrespective of the nature of a particular toll project.

Private financiers can bring to toll projects abundant resources that are unavailable to the public sector. Private toll road developers have international asset and capital bases that they may leverage to finance the initial acquisition and construction of toll facilities. Private toll road development agreements may bring the state more initial income in the form of concession agreements, provide the state a portion of ongoing revenue collections, and relieve the state or public tolling entities of the responsibility of building or maintaining the road.

The omission and resulting bias against private tolling entities in SB 19 could hinder the optimal development of toll roads in the state and thereby result in worsened congestion over time in major metropolitan areas. The state cannot afford to restrict available tools to promote the accelerated development of critical highway infrastructure.

NOTES:

The House adopted floor amendments to the TxDOT Sunset bill, SB 1420, to authorize TxDOT to enter into a CDA to develop specific projects listed in the amended bill.