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Texas Transportation Legislation Overview of the 82nd Regular Legislative Session

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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 2035⁴, 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.

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 process⁵ 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.

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).

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).

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 but 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.

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.

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.

Changes Applicable to Municipal and County TRZs

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.

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 than 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.

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 *develop 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 years, 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.

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.