SUBJECT: Authority of certain counties and local entities over transportation projects

COMMITTEE: County Affairs — committee substitute recommended

VOTE: 8 ayes — W. Smith, Naishtat, Bolton, Coleman, Harless, Heflin, Leibowitz, T. Smith

0 nays

1 absent — Farabee

WITNESSES: For — Joe B. Allen, Fort Bend County; Robert (Bob) M. Collie, Jr., Harris County Toll Road Authority; Ed Emmett, Harris County Commissioners Court; Donald Lee, Texas Conference of Urban Counties; El Franco Lee, County Commissioners Court and Harris County; *(Registered, but did not testify:* Jennifer McEwan, Greater Houston Partnership; Jim Short, Fort Bend County; Steve Stagner, Texas Council of Engineering Companies)

Against — None

On — Ted Houghton, Texas Transportation Commission; Steven Simmons, Texas Department of Transportation

BACKGROUND: Transportation Code, ch. 284 allows a county, acting through its commissioners court, to construct, acquire, improve, operate, maintain or pool a toll project in its county or adjacent counties and to levy bonds to pay for the construction, acquisition, or improvement of the project. Ch. 284 applies only to counties that:

- have a population of 50,000 or more and border the Gulf of Mexico or a bay or inlet opening into the gulf;
- have a population of 1.5 million or more;
- are adjacent to a county with a population of 1.5 million or more; or
- border Mexico.

The Harris County Toll Road Authority (HCTRA) was established under ch. 284.

Transportation Code, sec. 284.065 allows a commissioners court to pool an existing project with a new project constructed by the county in order to access revenues to pay bonds or to finance improvements, extensions, or enlargements of the new project or another segment of the existing project.

The 77th Legislature in SB 342 by Shapiro in 2001 created regional mobility authorities (RMAs). Any county or set of counties may petition the Texas Transportation Commission (TTC) to form an RMA. RMAs construct and manage transportation projects with the goal of improving mobility in a region. RMAs have the power of eminent domain, may issue bonds, and may enter into contracts with private entities for transportation projects.

Transportation Code, ch. 370 authorizes RMAs to develop the following types of transportation projects:

- toll or non-toll highways;
- freight rail facilities;
- passenger rail facilities;
- ferries;
- certain airports;
- pedestrian and bicycle facilities;
- inter-modal hubs;
- low traffic border crossing inspection stations;
- air quality improvement initiatives; and
- projects included in the State Implementation Plan for improving air quality.

Transportation Code, ch. 366 establishes regional tollway authorities. Acting through its board of directors, an authority may construct, acquire, improve, operate, maintain or pool a turnpike project in its jurisdiction and may levy bonds and collect tolls to pay for the construction, acquisition, or improvement of the project. The North Texas Tollway Authority (NTTA) was established under ch. 366.

A comprehensive development agreement (CDA) is a transportation tool used to accelerate completion of transportation projects. A CDA is a contract between a private entity and a government entity in which the private entity agrees to build and maintain a project for an up-front fee and a percentage of revenues over the life of the contract. This is in contrast to the traditional pay-as-you-go system.

A metropolitan planning organization (MPO) is a local decision-making body responsible for overseeing the metropolitan transportation planning process. An MPO is required by the federal government for each urban area with a population of more than 50,000 people.

DIGEST:

CSHB 1892 would identify counties operating under Transportation Code, ch. 284 as having the primary responsibility for the financing, construction, and operation of toll projects in their counties. While TxDOT and the TTC would not be limited in their authority to acquire, construct, maintain or operate a turnpike project of their own in those counties, TxDOT and the TTC would have to enter into an agreement with the affected counties and allow them to access the state highway system, use state-owned highway rights-of-way, and provide those counties with the first option to finance, construct, or operate the portion of the toll project located in that county without any payment owed to TxDOT or the TTC. Counties would not have to pay TxDOT or the TTC if a county toll project was on or directly connected to the state highway system. These agreements would not create a joint enterprise between TxDOT or the TTC and those counties in order to avoid liability.

This bill would allow counties operating under ch. 284 to use any county property, state highway right-of-way, or access to the state highway system, regardless of when or how the property, right-of-way, or access was acquired. TxDOT or the TTC could require the county to comply with any covenant, condition, restriction, or limitation that affected a specific right-of-way, but could not:

- deny the county the use of the right-of-way that the county had determined was necessary or convenient for a specific project, or
- require the county to pay for the use of the right-of-way or access, except to reimburse for actual third-party costs.

If a county project proposed using an improved state highway right-of-way, TxDOT and the TTC would have to enter into an agreement that included reasonable terms to accommodate the county's use of the right-of-way while protecting the interests of TxDOT and the TTC to use it for state highway operations. Neither TxDOT nor the TTC would be liable for any damages resulting from a county's use of the right-of-way or access to the state highway system as the result of such an agreement.

CSHB 1892 would require all payments received from a comprehensive development agreement in a particular TxDOT or TTC district to be used to finance the construction, maintenance, or operation of transportation or air-quality projects in only that district, with no exceptions or reductions in the overall allocation to that district.

The bill also would expand the authority under which a ch. 284 county could operate. A county operating under ch. 284 could exercise the powers of a regional mobility authority (RMA), which would allow it to enter into a comprehensive development agreement (CDA) with a private entity. In case of a conflict, counties operating under ch. 284 would supersede RMAs operating under ch. 370. Any project operated by a private entity as a result of a CDA would not be subject to taxation. In addition, if a ch. 284 county requested or was requested to participate in the development of a project that was part of the Trans-Texas Corridor, the county would be granted all the powers of TxDOT in developing that part of the project.

CSHB 1892 would require ch. 284 county projects to submit a project plan to TxDOT biennially but would not make the plan subject to the approval, supervision, or regulation of TxDOT or the TTC. Actions by these counties would not be subject to the approval, supervision, or regulation of its MPO, except as provided by federal law. The project plan would have to include a time schedule for the project and describe the use of project funds. It also could include information about the source of project funding.

This bill would allow the commissioners court of a county or a local government corporation, without state approval, supervision, or regulation, to authorize and use surplus toll project revenues to study, design, construct, maintain, repair, or operate other roads, streets, highways, or related facilities in its jurisdiction. In so doing, the county could enter into agreements with TxDOT, the TTC, a local government entity, or any political subdivision of the state, but the county could not take an action that violated or impaired a bond resolution, trust agreement, or indenture that governed the use of the revenue of a project.

CSHB 1892 would prevent a third party from paying off the bonds and bond interest of a ch. 284 county toll project, thus causing it to become part of the state highway system, without the consent of the entity that issued the bonds in the first place.

The bill would also allow the commissioner's court of a county operating under ch. 284 to pool other existing projects into its tolling authority.

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, 2007.

SUPPORTERS SAY:

Local control. CSHB 1892 would allow locally elected officials to exercise more control over toll road projects in their counties. If a state agency wants to build a toll project in a county with a tolling authority organized under ch. 284, it should have to give that county the right of first refusal so local decision-makers could weigh in on what was best for their constituents. Historically, local jurisdictions have been able to build toll roads without the approval, supervision, or regulation of a state agency like TxDOT and have been able to build these roads more quickly than the state because of bond financing. Now, the state is making agreements with private companies to build local toll roads, which has raised concerns about the potential ramifications of non-compete clauses.

While CDAs may pad state coffers with an initial up-front payment and a percentage of toll revenues throughout the life of the agreement, private companies do not have the same incentive as elected officials do to keep toll prices low. Bond rates currently are competitive and may be the most prudent course of action. Regardless of the financing method chosen, county toll road authorities want to be the partner of first resort, rather than last. To that end, should a CDA be considered the best funding option for a regional toll project, tolling authorities organized under ch. 284 should have the right to enter into them, just as RMAs can in other parts of the state, and CSHB 1892 would guarantee that right.

Access. CSHB 1892 would ensure that county toll road authorities continued to have access to state-owned rights-of-way. Gaining access to state-owned rights-of-way is essential to the construction of toll projects in local jurisdictions. These rights-of-way belong to state taxpayers, not any specific state agency, so charging local governments for this property is akin to double taxation. Still, county toll road authorities recognize a need to come to reasonable terms in acquiring an improved right-of-way from the state and have a long history of working with the state on right-of-way access. Now, the state is seeking an up-front payment and a percentage of toll revenues in exchange for rights-of-way, which treats taxpayers as though they are private entities seeking to enter a CDA. Local taxpayers

are not seeking to make a profit from the construction of bond-financed toll roads and neither should state agencies.

Revenue. CSHB 1892 would keep money generated by toll roads in one region from being spent in another region. Originally, toll roads were permitted in the state as a method of accelerating construction of a specific project through bond financing. In this scenario, tolls simply were collected to pay back the bonds, operate and maintain the roads, and pay for tollway feeder roads. Recently, toll revenues have been seen as a method for securing financing for additional non-tolled project construction, and RMAs have specifically been given the authority to use surplus revenue in this manner. By providing toll road authorities organized under ch. 284 with the powers of RMAs, the bill would allow surplus toll revenues to be spent on free non-tolled projects in the same district, such as roads, highways, transit systems, and bicycle and pedestrian projects. The bill also would prevent state agencies from using surplus toll revenues or funds generated from a CDA in a county operating under ch. 284 and then spending the proceeds on projects outside the district. Taxpayers should be guaranteed that money they generated would stay in the district to support the overall goals of mitigating traffic congestion and improving regional air quality.

Federal compliance. CSHB 1892 would not put federal funding for transportation projects at risk. County toll road authorities have proven themselves to be good working partners with state agencies. Collaborations have included project oversight, engineering planning, connectivity reviews, and environmental impact analyses in order to conform to federal guidelines. In all cases, the plans of the county toll road authorities have had to be approved by the MPO, which is a federally mandated entity that must take into consideration the impact a project will have on regional air quality and statewide federal funding. No county toll road authority would construct a project that was not federally approved and that could jeopardize future funding opportunities for the region. Ultimately, this bill would not take state authorities out of the planning process but instead would allow local tolling decisions to be made by locally elected officials, who are more accountable to their constituents.

OPPONENTS SAY:

State oversight. This bill would prevent a state agency like TxDOT from having oversight over county and regional transportation authorities within its jurisdiction. While MPOs have to approve transportation improvement projects (TIPs), they are operated by locally elected officials whose duties

and responsibilities are to their region first. TxDOT is responsible for planning, designing, building, operating, and maintaining the state's transportation system and is the state's point of contact with the federal government. This global perspective includes interpreting federal policy on issues such as air quality, environmental impacts, safety, and international trade corridors on behalf of local jurisdictions.

While this bill would require a ch. 284 county to file a project plan every other year, it would set a dangerous precedent in allowing a county commissioners court to plan a regional project without any state oversight. This bill would affect not only Harris and surrounding counties but every county along the Gulf Coast and the international border. Nearly three dozen counties would be allowed to ignore state authority, potentially resulting in a loss of federal funding statewide.

State liability. CSHB 1892 would not prevent state agencies from being liable for actions or damages that result from decisions made by county toll road authorities. If a county broke a federal law, funding would be withheld from the state no matter what Texas statutes said. One such way a county could inadvertently put statewide funding at risk is by exceeding its conformity budget, which is a limit on emissions in a region. Even if only one region exceeded its limit, it would put the entire state's federal funding in peril. To avoid such a scenario, projects usually are planned by a local jurisdiction with the help of TxDOT. Then, the area's MPO includes the project in its TIP and seeks the approval of the TTC. This two-tier approval process ensures that both regional and statewide considerations are taken into account.

Pooling. This bill could jeopardize the state's ability to build intrastate roadways. When constructing a statewide toll project, not every segment of a roadway is going to be revenue positive. Commuters may want to travel through rural areas to get to other metropolitan areas, but most of the toll revenues will be generated in the cities. In order to fund the construction of an entire statewide turnpike system, individual segments of the toll road would be pooled, so that surplus revenues generated in an urban area would enable the state to construct a segment in a rural area. If a state agency were to build a toll road segment in a city and then that city could seize that right-of-way for free, all funds generated from tolls in that district would have to stay in that district and would prevent the state from being able to build any other segment of the project.

Rights-of-way. CSHB 1892 would go too far by allowing counties operating under ch. 284 to seize any state-owned tolled or non-tolled project in their regions. State law now allows RMAs to keep all surplus toll revenue generated from projects they construct and to use these proceeds to support other transportation projects in their region. Likewise, if this bill passed, counties operating under ch. 284 also could retain surplus revenues generated in this manner. Yet, this bill would prevent the state from enjoying the same privileges the regional and county authorities have in re-allocating surplus toll revenues from projects it constructs by making all of its rights-of-way free and available to counties operating under ch. 284. While the bill would require county toll road authorities to come to an agreement and provide reasonable terms to protect the interests of state agencies in the use of rights-of-way, the bill further would require state agencies to provide all state-owned rights-of-way for free, which seriously hampers the state's ability to negotiate. State agencies certainly would continue to provide right-of-way access for county toll road authority projects, but the state should not simply cede all of its transportation projects to a county authority.

Comprehensive development agreements (CDAs). CSHB 1892 would jeopardize the state's ability to leverage CDAs. None of the CDAs with the state contain non-compete clauses that negatively would impact local governments. Instead, existing non-compete clauses have been designed to ensure that the state does not use proceeds from the agreement to build a free roadway that reduces traffic on that private partner's tolled road. These agreements do not prevent a county toll road authority or other government entity from building roadways that might compete with those toll roads in the district. Further, it does not prevent the state from repairing or improving existing thoroughfares. Rather, because state agencies may enter into CDAs, state rights-of-way have real market value that can be put to good use supporting transportation projects across the state. This value should not be squandered by allowing county toll road authorities to have free access to state rights-of-way to fund projects in only their own districts. Instead, county toll road authorities should have to take into consideration the fair market value of state assets.

NOTES:

The committee substitute would require TxDOT or the TTC to spend payments received from a CDA in the same district where the funds originated. The substitute also specified that a county toll road authority would have the right of first refusal for all toll projects in its county. The substitute differs in stating that a county must enter into an agreement with

TxDOT or the TTC in order to use state highway rights-of-way and specifies the conditions under which an agreement could exist. The substitute states the agreement would not create a joint enterprise for liability purposes. It also specified that it would not limit TxDOT or the TTC from contributing to the cost of a project in counties operating under ch. 284.

The committee substitute would allow a county to enter into a CDA with a private entity for projects in the county, and in so doing, those projects still would be tax exempt. It also specified that in case of a conflict, county toll road authorities operating under ch. 284 would supersede RMAs. It also would require counties with projects under ch. 284 to submit a bi-annual plan to TxDOT that was not subject to the approval of TxDOT or the TTC.

The substitute also differs from the original by allowing county toll road authorities to spend surplus toll revenues on other transportation projects in the county, without the approval of TxDOT or the TTC. The substitute specifies that if a county is requested or requests to participate in a project designated as part of the Trans-Texas Corridor, the county has the powers of TxDOT for the project's development. The substitute also differs from the original bill by stating that TxDOT and the TTC would not be liable for any damages resulting from a county's use of state rights-of-way.

The companion bill, SB 792 by Williams, was reported favorably, as substituted, by the Senate Transportation and Homeland Security Committee on April 2.

A related bill, SB 965 by Shapiro, which would allow regional tollway authorities organized under Transportation Code, ch. 366 to enter into CDAs and, if the authority requested or was requested to participate in the development of a project that is part of the Trans-Texas Corridor, the authority would be granted all the powers of TxDOT in developing that part of the project, was reported favorably, as substituted by the Senate Transportation and Homeland Security Committee on March 28.