

SUBJECT: Revising processes for developing toll road projects and CDAs

COMMITTEE: Transportation — committee substitute recommended

VOTE: 9 ayes — Pickett, Phillips, Callegari, Y. Davis, Guillen, Harper-Brown, McClendon, T. Smith, W. Smith

0 nays

2 absent — Dunnam, Merritt

SENATE VOTE: On final passage, April 6 — 30-1 (Davis)

WITNESSES: (*On House companion bill, HB 2929:*)
For — Mike Heiligenstein, Central TX RMA; (*Registered, but did not testify:* Brian Cassidy, Alamo RMA, Central Texas RMA, North East Texas RMA, Camino Real RMA, Grayson County RMA, Cameron County RMA; Robert M. Collie, Jr., Harris County, Harris County Toll Road Authority; Norman Garza, Texas Farm Bureau; Lawrence Olsen, Texas Good Roads/ Transportation Association; Carrie Rogers, Victor Vandergriff, North Texas Tollway Authority; Vic Suhm, North Texas Commission, Tarrant Regional Transportation Coalition)

Against — Terri Hall, Texas TURF; Jack Finger, T.U.R.F. Supporter; Robert Throckmorton; (*Registered, but did not testify:* Mary Anderson, Pamela Dickinson, Bruce Burton, Texans Against Tolls.com; James Micklethwait, TURF; Deborah Parrish, TURF Supporter; SueAnn Campbell; Woodrow Curd; Patrick Dossey; Alicia Drgac, on behalf of Harris P. Harrell; Virginia Faubion; Barbara Migl; Richard Reeves; Ron Schumacher)

BACKGROUND: SB 792 by Williams, enacted by the 80th Legislature in 2007, placed a limited, two-year moratorium on the state's ability to enter into contracts that would authorize private entities to operate or collect revenue on toll roads. With some exceptions, the bill also accelerated the expiration date, from August of 2011 to August of 2009, for TxDOT's authority to enter into comprehensive development agreements (CDAs), which are contracts with private entities to finance, construct, maintain, operate, or expand a

tolled highway project. It also limited the spending of revenue from these agreements to the geographic area in which the revenue was collected.

SB 792 also provided that a local toll project entity — certain counties, a Regional Tollway Authority (RTA), or a Regional Mobility Authority (RMA) — must reach an agreement with TxDOT to build a toll project. The agreement must contain provisions governing the initial toll rate and escalation methodology and requiring that the project undergo a market valuation study. The Texas Department of Transportation (TxDOT) and the local tolling authority must select an independent party, which cannot have a financial stake in the actual project, to appraise the value and corresponding upfront concession fees a project would realize on the private market.

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

DIGEST: CSSB 17 would repeal current provisions requiring a market valuation process for toll projects developed by a local tolling authority and establish a development review process for toll projects. The bill also would modify other provisions governing comprehensive development agreements (CDAs).

Toll road development review process. CSSB 17 would add Transportation Code, ch. 373, which would establish a development review process for toll projects located in the territory of a local toll authority — defined as an entity, not including TxDOT, authorized by law to acquire, design, construct, finance, operate, and maintain a toll project, including certain counties, a Regional Tollway Authority (RTA), or a Regional Mobility Authority (RMA). The bill would not apply to certain toll roads listed in the bill nor to specific exceptions listed in sec. 228.011. A toll project obtained by TxDOT or a local tolling authority would be owned in perpetuity, unless it was sold or otherwise transferred.

The bill would establish a process to determine an entity, either a local tolling authority or TxDOT, to develop, finance, construct, and operate a toll project. After a Metropolitan Planning Organization (MPO) approved the inclusion of a toll project in its metropolitan transportation plan, a local tolling authority could notify TxDOT of its interest to initiate the tolling project review process. TxDOT also could notify a local toll project entity of the department's intent to initiate the tolling project review process after approving the final environmental impact statement for the project.

Development review process. CSSB 17 would establish a process for determining which entity would have the right to develop a toll project and whether a toll project would be developed as a publicly owned or privately owned facility. Each entity that received notification of a possible toll project would have a specific timeframe in which to exercise the option to develop the project. If the entity chose to develop the project, it would have to advertise for procurement of services for the project within 180 days of receiving notice or securing necessary environmental approvals. The entity would have to enter into a contract for constructing the project within two years of securing necessary environmental approvals. The option to develop a toll project would be offered for development in the following order, moving to the next choice if an entity failed or declined to exercise its option to develop a toll project:

- a local tolling authority could develop the project as a publicly owned and operated facility, with 180 days to exercise the option after receiving notice; and if not, then
- TxDOT could develop the project as a publicly owned and operated facility, with 60 days to exercise the option after receiving notice; and if not, then
- a local tolling authority could develop the project as a privately owned and operated facility, with 60 days to exercise the option after receiving notice; and if not, then
- TxDOT could develop the project as a privately owned and operated facility, with 60 days to exercise the option after receiving notice.

If the process concluded without a contract for development, either a local tolling authority or TxDOT could re-initiate the process. TxDOT or a local tolling authority could, at any time during the process, decline to exercise an option to develop a toll project. If TxDOT declined to exercise its

option to develop a project as a publicly funded toll project, then the local tolling authority would have to determine simultaneously whether to develop the project as a publicly or privately funded toll project within 180 days of receiving notice.

An entity that declined to enter into a construction contract for a toll project would have to make available to the other entity its traffic and revenue estimates, plans, surveys, appraisals, and other work developed for the toll project. The Texas Transportation Commission (TTC) and the local tolling authority could agree to remove a toll project from the state highway system and transfer ownership to the local tolling authority.

An entity could begin an environmental review process before initiating the tolling review process. A local toll entity that initiated a process for developing a toll project would have to begin the environmental review within 180 days of exercising the option to develop. If a local project was in the territory of more than one local toll project authority, only the entity that was first authorized to construct toll projects could exercise the option to develop.

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

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

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

Comprehensive development agreements. The bill would revise current provisions governing the right to repurchase a private interest in a toll project. Under the bill, a comprehensive development agreement (CDA) would have to contain a provision authorizing a local tolling authority to

purchase the interest of a private participant in a toll project and related property maintained under the agreement under agreed terms. The provision would include a schedule over the term of the agreement stating a specific price for the purchase of the toll project at certain intervals up to five years from the date the project opened.

The local tolling authority could repurchase a private entity's interest for no more than the lower of the price stated for the interval or the governing fair market value or outstanding debt of the time, whichever was greater. A contract would have to include the calculation used to determine the repurchase value based on these conditions. The repurchase provision in the bill would not apply to certain highway developments listed in the bill, including portions of the IH-69 corridor.

The bill would place a 30-year maximum on a clause in CDAs that authorized compensation to a private party for loss of toll revenues attributable to a competing highway facility. An agreement for compensation for lost toll revenues could not apply to an interstate highway.

General provisions. TxDOT would allocate surplus toll revenue to districts in the region that were located within the boundaries of the MPO in which the toll project or system producing the surplus revenue was located based on the percentage of toll revenue from users in each district. An entity responsible for collecting tolls would calculate the annual percentage of toll revenue from project users in each TxDOT district.

The TTC or TxDOT could take any action that reasonably was necessary to comply with any federal requirement to enable the state to receive federal-aid highway funds.

The bill would remove a provision requiring a toll project entity to provide the state auditor with the traffic and revenue report of a project and certain time restrictions on entering into a CDA.

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, 2009.

SUPPORTERS
SAY:

CSSB 17 would provide an alternative to the much-maligned market valuation process established in 2007 by SB 792. The process established

in that bill has been implemented in such a way as to make an it inordinately complicated and drawn-out, and it needs to be overhauled or eliminated. Flexible language establishing the process has been interpreted as authorizing what amounts to a “concession fee” on local tolling authorities for the right to develop and manage a toll road. Imposing this fee on public local tolling authorities merely substitutes one pot of public funding for another, as local entities must recover the cost of upfront bond issuances through increased toll fares.

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

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

CSSB 17 would present a balanced approach to public and private toll road development in the state. The bill would retain primacy for local tolling authorities over private entities while still allowing the private entities to develop toll projects in the event that local tolling authorities were not interested in or able to develop eligible projects. The bill also would split the authority to develop toll roads between local tolling authorities and TxDOT, subject to the established development system. Specific timelines restricting option periods would prevent the process from slowing project development inordinately.

**OPPONENTS
SAY:**

CSSB 17 would place private financiers and developers of toll road projects at a distinct disadvantage and would reduce competition for toll projects. Private financiers can bring to toll projects abundant resources

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

Selling the rights to develop and operate toll projects to private entities shields the public from the unavoidable risks associated with their development. These risks are inherent in every aspect of toll development. Estimates of initial construction costs, maintenance and operation costs, the number of drivers willing to pay tolls, and the price drivers would pay to use toll roads all are unknown values that determine the ultimate profitability of a project. Miscalculations in project planning and market studies could cause revenue forecasts to fall short, creating risks of project failure and bankruptcy. Leasing toll projects to private developers eliminates such risks for the state and provides revenue in the form of concession fees and other contractually specified returns.

Private developers often maintain and operate toll facilities more efficiently and consistently. Private entities have a vested interest in maintaining toll roads because deteriorating road quality affects the number of drivers using the road and the amount of revenue collected by the tolling authority. Public sector maintenance of roads, by contrast, is subject to the vagaries of politics. Money may be directed to new road construction and away from maintenance and operation, and such diversions from maintenance could result in declining road quality over time.

The bill would create a structural bias against private entities in favor of public tolling authorities, irrespective of the nature of a particular toll project. This bias could hinder the optimal development of toll roads in the state and thereby could result in worsened congestion over time in major metropolitan areas. The state cannot afford to restrict available tools to promote the accelerated development of critical highway infrastructure.

**OTHER
OPPONENTS
SAY:**

SB 17 would preserve the misdirected option of developing toll roads for local tolling authorities or by private entities through CDAs. Toll roads are an unfair form of double-taxation, and impose exorbitant fees on users who are compelled by worsening congestion on public non-tolled roads to

pay for toll road use. Recent policies pushing the construction of most or all new highways as toll projects are resulting in reduced choices for Texas consumers. The bill would be one more measure that avoids addressing the core issue facing the state — a motor fuels tax that has been declining in relative value since 1991. The state needs to address the core issue facing highway funding and increase or index to inflation the motor fuels tax, preferably both. Continuing the flawed policy of developing new roads as tolled roads at every opportunity has troubling implications for future mobility and the long-term economic health of the state.

This bill would leave vulnerabilities that TxDOT likely would use to continue its policy of pushing privately funded and operated toll roads. Under the bill, TxDOT automatically could decline the option to develop a project as a public toll project, which would force a local tolling authority to review at once the possibility of developing the road publicly and privately. The bill would leave open the possibility for TxDOT to “wait out” or obstruct actively a local authority’s ability to develop the project until the statutory period expired, at which point the agency could turn over the rights to develop toll roads to the private sector.

NOTES:

The House companion bill, HB 2929 by W. Smith, was heard and left pending by the Transportation Committee on March 31.

The committee substitute added provisions that:

- a local tolling authority would have to determine simultaneously whether to develop the project as a publicly or privately-funded toll project if TxDOT declined to develop a project as a publicly-funded toll project; and
- if a local toll project was in the territory of more than one local toll project authority, only the entity that was first authorized to construct toll projects could exercise the option to develop.

SB 404 by Carona, which would change the termination date for the authority of the state to enter into competitive development agreements (CDAs), would take effect only if SB 17 were enacted and also is on the May 22 General State Calendar.