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82R6605 JTS-D

By: Nichols

S.B. No. 19

A BILL TO BE ENTITLED
AN ACT

relating to the development, financing, construction, and operation of toll projects.

BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

SECTION 1. Subtitle G, Title 6, Transportation Code, is amended by adding Chapter 373 to read as follows:

CHAPTER 373. TOLL PROJECTS LOCATED IN TERRITORY OF LOCAL TOLL PROJECT ENTITY

SUBCHAPTER A. GENERAL PROVISIONS

Sec. 373.001. DEFINITIONS. In this chapter:

(1) "Local toll project entity" means an entity, other than the department, that is authorized by law to acquire, design, construct, finance, operate, and maintain a toll project, including:

(A) a regional tollway authority under Chapter 366;

(B) a regional mobility authority under Chapter 370; or

(C) a county acting under Chapter 284.

(2) "Toll project" means a toll project described by Section 201.001(b), regardless of whether the toll project is:

(A) a part of the state highway system; or

(B) subject to the jurisdiction of the department.

Sec. 373.002. APPLICABILITY. This chapter does not apply to:

(1) a toll project described in Section 228.011; or

(2) Phase 4 extension of the Dallas North Tollway in Collin and Denton Counties from U.S. 380 to the Grayson County line to be developed by North Texas Tollway Authority.

Sec. 373.003. PROJECT OWNED IN PERPETUITY. Unless a toll project is leased, sold, conveyed, or otherwise transferred to another governmental entity in accordance with applicable law, including Sections 228.151, 284.011, 366.036, 366.172, and 370.171, a toll project procured by the department or a local toll project entity determined by the process under Subchapter B is owned by that entity in perpetuity.

Sec. 373.004. GOVERNMENTAL AND NOT COMMERCIAL TRANSACTIONS. A transaction involving a local toll project entity under Section 228.011 or this chapter is not primarily commercial in nature but is an inherently governmental transaction whose purpose is to determine governmental jurisdiction, ownership, control, or other responsibilities with respect to a project.

Sec. 373.005. LEGAL CHALLENGES CONCLUDED. For the purposes of this chapter, all legal challenges to development of a toll project are considered concluded when a judgment or order of a court with jurisdiction over the challenge becomes final and unappealable.

Sec. 373.006. TOLL PROJECT AGREEMENT. (a) Before initiating the primacy determination process under Subchapter B for a toll project, the department and the local toll project entity may

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enter into a toll project agreement that:

(1) identifies the responsibilities of each party for project-related activities, which may include the performance of environmental work and traffic and revenue studies; and

(2) includes an agreement that the primacy determination process under Subchapter B may be initiated earlier than as provided by Section 373.051.

(b) A toll project agreement may provide an alternative to the primacy determination process under Subchapter B for toll project development, including an alternative timeline for the development of toll project phases.

Sec. 373.007. EXERCISE OF PRIMACY FOR TOLL PROJECT PHASES. Unless otherwise provided by a toll project agreement under Section 373.006 or other agreement, an exercise of primacy under Subchapter B over a phase of a toll project is an exercise of primacy over the entire project, with additional phases to be developed as the entity determines the phases financially feasible.

[Sections 373.008-373.050 reserved for expansion]

SUBCHAPTER B. PROCESS TO DETERMINE ENTITY TO DEVELOP, FINANCE, CONSTRUCT, AND OPERATE TOLL PROJECT

Sec. 373.051. INITIATION OF PROCESS. (a) At any time after a metropolitan planning organization approves the inclusion in the metropolitan transportation improvement program of a toll project to be located in the territory of a local toll project entity, the local toll project entity may notify the department in writing of the local toll project entity's intent to initiate the process described in this subchapter.

(b) The department may notify the local toll project entity in writing of the department's intent to initiate the process described in this subchapter at any time after a metropolitan planning organization has approved the inclusion in the metropolitan transportation improvement program of a toll project to be located in the territory of a local toll project entity and:

(1) the department has issued a finding of no significant impact for the project, or for a project for which an environmental impact statement is prepared, the department has approved the final environmental impact statement for the project; or

(2) for a project subject to environmental review requirements under federal law, the United States Department of Transportation Federal Highway Administration has issued a finding of no significant impact, or for a project for which an environmental impact statement is prepared, the department has submitted a final environmental impact statement to the Federal Highway Administration for approval.

Sec. 373.052. LOCAL TOLL PROJECT ENTITY OPTION. (a) The local toll project entity has the first option to develop, finance, construct, and operate a toll project. The local toll project entity must exercise its option not later than the later of:

(1) the 180th day after the date on which notification under Section 373.051(a) is provided or notification under Section 373.051(b) is received; or

(2) if the United States Department of Transportation Federal Highway Administration issues a record of decision for an environmental impact statement submitted by the department under Section 373.051(b)(2) more than 60 days after the date the department provides notice under Section 373.051(b), the 120th day

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after the date the record of decision is issued.

(b) The option period under Subsection (a) may be extended an additional 90 days by agreement of the department and the local toll project entity.

(c) If the local toll project entity exercises the option under Subsection (a), the local toll project entity after exercising the option must:

(1) within 180 days after the later of the date of exercising its option or the date on which all environmental approvals necessary for the development of the toll project are secured and all legal challenges to development are concluded, advertise for the initial procurement of required services, including, at a minimum, design services, for the project; and

(2) within two years after the later of the date of exercising its option or the date on which all environmental approvals necessary for the development are secured and all legal challenges to development are concluded, enter into a contract for the construction of the toll project.

Sec. 373.053. DEPARTMENT OPTION. (a) If the local toll project entity fails or declines to exercise the option to develop, finance, construct, and operate a toll project under Section 373.052(a), or fails or declines to advertise for procurement or enter into a construction contract as required by Section 373.052(c), the department has the option to develop, finance, construct, and operate the toll project. The department has not more than 60 days after the date the local toll project entity fails or declines to exercise its option under Section 373.052(a) or fails or declines to advertise for procurement or enter into a construction contract as required by Section 373.052(c) to exercise its option.

(b) If the department exercises its option under Subsection (a), the department after exercising the option must:

(1) within 180 days after the later of the date of exercising its option or the date on which all environmental approvals necessary for the development of the toll project are secured and all legal challenges to development are concluded, advertise for the initial procurement of required services, including, at a minimum, design services, for the project; and

(2) within two years after the later of the date of exercising its option or the date on which all environmental approvals necessary for the development are secured and all legal challenges to development are concluded, enter into a contract for the construction of the toll project.

Sec. 373.054. REINITIATION OF PROCESS. If the process described by Sections 373.051, 373.052, and 373.053 concludes without the local toll project entity or the department entering into a contract for the construction of the toll project, either entity may reinitiate the process under this subchapter by submitting notice to the other entity in the manner provided by Section 373.051.

Sec. 373.055. WAIVER OF OPTION; ALTERATION OF STEPS OR TIME LIMITS. (a) The department or the local toll project entity may at any time before or during the process established by this subchapter waive or decline to exercise any option, step, or other right under this subchapter that solely benefits that entity by notifying the other entity of its decision in writing.

(b) The department and the local toll project entity may, by

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written agreement, alter any other step or time limit under this subchapter, including the timing of or conditions for initiating the process under Section 373.051.

Sec. 373.056. SHARING OF PROJECT-RELATED INFORMATION.

(a) In this section, "project-related information" includes traffic estimates, revenue estimates, plans, specifications, surveys, appraisals, environmental studies, and other work product developed for a toll project.

(b) On initiation of the process under Section 373.051, the department shall make its project-related information available to the local toll project entity.

(c) If the local toll project entity fails or declines to exercise an option or fails or declines to advertise for procurement or enter into a construction contract under Section 373.052, the local toll project entity shall make its project-related information available to the department.

(d) On entering into a contract for the construction of the toll project, the department or the local toll project entity, as applicable, shall reimburse the other entity for shared project-related information that it uses.

(e) Use by an entity of project-related information received by the entity under this section is at the sole risk of the receiving entity and does not confer liability on the entity that furnished the information.

Sec. 373.057. PROGRESS REPORTS. After the department or the local toll project entity exercises an option under this subchapter, the department or the local toll project entity, as applicable, shall issue a semiannual report on the progress of the development of the toll project. The report shall be made available to the public.

Sec. 373.058. ENVIRONMENTAL REVIEW. (a) The department or the local toll project entity may begin any environmental review process that may be required for a proposed toll project before initiating the process under this subchapter.

(b) If the local toll project entity initiates the process for development of a toll project under Section 373.051(a) and has not begun the environmental review of the project, the local toll project entity shall begin the environmental review within 180 days of exercising the option.

(c) The department or the local toll project entity may begin development of a toll project before the project receives environmental clearance but may not begin construction of the project before the project receives that clearance.

Sec. 373.059. PROJECT LOCATED IN TERRITORY OF MORE THAN ONE LOCAL TOLL PROJECT ENTITY. If a toll project is in the territory of more than one local toll project entity, only the local toll project entity that first constructed toll projects may exercise the options and other rights under this subchapter. The local toll project entity exercising an option or other right under this section:

(1) may do so only with respect to the portion of the project located in the territory of that local toll project entity; and

(2) shall do so on behalf of another local toll project entity in whose territory the project will be located on request by the other entity.

[Sections 373.060-373.100 reserved for expansion]

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SUBCHAPTER C. USE OF RIGHT-OF-WAY BY LOCAL TOLL PROJECT ENTITY

Sec. 373.101. USE OF STATE HIGHWAY RIGHT-OF-WAY.

(a) Consistent with federal law, the commission and the department shall assist a local toll project entity in the development, financing, construction, and operation of a toll project for which the local toll project entity has exercised its option to develop, finance, construct, and operate the project under Subchapter B by allowing the local toll project entity to use state highway right-of-way and to access the state highway system as necessary to construct and operate the toll project.

(b) Notwithstanding any other law, a local toll project entity and the commission may agree to remove the toll project from the state highway system and transfer ownership to the local toll project entity.

Sec. 373.102. REIMBURSEMENT FOR USE OF RIGHT-OF-WAY.

(a) The commission or the department may not require a local toll project entity to pay for the use of state highway right-of-way or access, except:

(1) to reimburse the department for actual costs incurred by the department that are owed to a third party, including the federal government, as a result of that use by the local toll project entity; and

(2) as required under Subsection (b).

(b) A local toll project entity shall reimburse the department for the department's actual costs to acquire a right-of-way transferred to the local toll project entity. If the department is not able to determine that amount, the reimbursement must be in an amount equal to the average actual historical right-of-way acquisition values for comparable right-of-way located in proximity to the project on the date of original acquisition of the right-of-way.

(c) In lieu of reimbursement, and at the local toll project entity's sole option, the local toll project entity may agree to pay to the department a portion of the revenues of the project, in the amount and for the period of time agreed to by the local toll project entity and the department.

(d) Money received by the department under this section shall be deposited in the state highway fund and, except for reimbursement for costs owed to a third party, used to fund additional projects in the department district in which the toll project is located.

(e) The department shall reimburse a local toll project entity for any cost of right-of-way acquired by the entity for a toll project that will be developed, financed, constructed, and operated by the department.

(f) The commission or department or the local toll project entity may waive the requirement of reimbursement under this section.

Sec. 373.103. AGREEMENT FOR USE OF RIGHT-OF-WAY. A local toll project entity and the department shall enter into an agreement for any toll project for which the entity has exercised its option to develop, finance, construct, and operate the project under Subchapter B and for which the entity intends to use state highway right-of-way. The agreement must contain provisions necessary to:

(1) ensure that the local toll project entity's construction, maintenance, and operation of the project complies

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with the requirements of applicable state and federal law; and
(2) protect the interests of the commission and the
department in the use of right-of-way for operations of the
department, including public safety and congestion mitigation on
the right-of-way.

Sec. 373.104. LIABILITY FOR DAMAGES. (a) Notwithstanding
any other law, the commission and the department are not liable for
any damages that result from a local toll project entity's use of
state highway right-of-way or access to the state highway system
under this subchapter, regardless of the legal theory, statute, or
cause of action under which liability is asserted.

(b) An agreement entered into by a local toll project entity
and the department in connection with a toll project that is
developed, financed, constructed, or operated by the local toll
project entity and that is on or directly connected to a highway in
the state highway system does not create a joint enterprise for
liability purposes.

Sec. 373.105. COMPLIANCE WITH FEDERAL LAW. Notwithstanding
an action taken by a local toll project entity under this
subchapter, the commission or department may take any action that
in its reasonable judgment is necessary to comply with any federal
requirement to enable this state to receive federal-aid highway
funds.

SECTION 2. Section 228.006, Transportation Code, is amended
by amending Subsection (a) and adding Subsection (a-1) to read as
follows:

(a) The commission shall authorize the use of surplus
revenue of a toll project or system to pay the costs of a
transportation project, highway project, or air quality project
within a region [~~department district~~] in which any part of the toll
project is located.

(a-1) The department shall allocate the distribution of the
surplus toll revenue to department districts in the region that are
located in the boundaries of the metropolitan planning organization
in which the toll project or system producing the surplus revenue is
located based on the percentage of toll revenue from users in each
department district of the project or system. To assist the
department in determining the allocation, each entity responsible
for collecting tolls for a project or system shall calculate on an
annual basis the percentage of toll revenue from users of the
project or system in each department district based on the number of
recorded electronic toll collections.

SECTION 3. Section 228.011(a), Transportation Code, is
amended to read as follows:

(a) This section applies only to a county acting under
Chapter 284 for:

(1) the widening, expansion, reconstruction, and
continued operation of existing toll projects of the county; or

(2) [~~and~~] the development, construction, and
operation of all or a portion of any of the following toll projects,
a component of that project, or the functional equivalent of that
project:

(A) [~~(1)~~] Beltway 8 Tollway East, between US 59
North and US 90 East;

(B) [~~(2)~~] Hardy Downtown Connector, consisting
of the proposed direct connection from the Hardy Toll Road southern
terminus at Loop 610 to downtown Houston;

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(C) [~~3~~] State Highway 288, between US 59 and Grand Parkway South (State Highway 99);

(D) [~~4~~] US 290 Toll Lanes, between IH 610 West and the Grand Parkway Northwest (State Highway 99);

(E) [~~5~~] Fairmont Parkway East, between Beltway 8 East and Grand Parkway East (State Highway 99);

(F) [~~6~~] South Post Oak Road Extension, between IH 610 South and near the intersection of Beltway 8 and Hillcroft in the vicinity of the Fort Bend Parkway Tollway;

(G) [~~7~~] Westpark Toll Road Phase II, between Grand Parkway (State Highway 99) and FM 1463;

(H) [~~8~~] Fort Bend Parkway, between State Highway 6 and the Brazos River; and

(I) [~~9~~] Montgomery County Parkway, between State Highway 242 and the Grand Parkway (State Highway 99), and if the Grand Parkway project has not begun construction, a nontolled extension of the Montgomery County Parkway to allow a connection to Interstate Highway 45.

SECTION 4. Section 228.012, Transportation Code, is amended to read as follows:

Sec. 228.012. PROJECT SUBACCOUNTS. (a) The department shall create a separate account in the state highway fund to hold payments received by the department under a comprehensive development agreement and [~~7~~] the surplus revenue of a toll project or system [~~7~~ and payments received under Sections 228.0111(g)(2) and (i)(2)]. The department shall create subaccounts in the account for each project, system, or region. Interest earned on money in a subaccount shall be deposited to the credit of that subaccount.

(b) The department shall hold money in a subaccount in trust for the benefit of the region in which a project or system is located and may assign the responsibility for allocating money in a subaccount to a metropolitan planning organization in which the region is located. Money [~~Except as provided by Subsection (c), money~~] shall be allocated to projects authorized by Section 228.0055 or Section 228.006, as applicable.

(c) [~~Money in a subaccount received from a county or the department under Section 228.0111 in connection with a project for which a county acting under Chapter 284 has the first option shall be allocated to transportation projects located in the county and the counties contiguous to that county.~~]

[~~d~~] Not later than January 1 of each odd-numbered year, the department shall submit to the Legislative Budget Board, in the format prescribed by the Legislative Budget Board, a report on cash balances in the subaccounts created under this section and expenditures made with money in those subaccounts.

(d) [~~e~~] The commission or the department may not:

(1) revise the formula as provided in the department's unified transportation program or a successor document in a manner that results in a decrease of a department district's allocation because of the deposit of a payment into a project subaccount [~~or a commitment to undertake an additional transportation project under Section 228.0111~~]; or

(2) take any other action that would reduce funding allocated to a department district because of the deposit of a payment [~~received from the department or local toll project entity~~] into a project subaccount [~~or a commitment to undertake an additional transportation project under Section 228.0111~~].

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SECTION 5. Section 284.004(b), Transportation Code, is amended to read as follows:

(b) In addition to authority granted by other law, a county may use state highway right-of-way and may access state highway right-of-way in accordance with Sections 228.011, 373.101, and 373.102 [~~228.011~~].

SECTION 6. Section 284.061(d), Transportation Code, is amended to read as follows:

(d) Subject to the reimbursement requirements of Section 373.102, a [A] county has full easements and rights-of-way through, across, under, and over any property owned by this state that are necessary or convenient to construct, acquire, or efficiently operate a project under this chapter.

SECTION 7. Section 366.170(c), Transportation Code, is amended to read as follows:

(c) An authority has full easements and rights-of-way through, across, under, and over any property owned by the state or any local governmental entity that are necessary or convenient to construct, acquire, or efficiently operate a turnpike project or system under this chapter. This subsection does not affect the obligation of the authority under other state law, including Section 373.102, to compensate or reimburse the state for the use or acquisition of an easement or right-of-way on property owned by or on behalf of the state. An authority's use of property owned by or on behalf of the state is subject to any covenants, conditions, restrictions, or limitations affecting that property.

SECTION 8. Section 370.169(c), Transportation Code, is amended to read as follows:

(c) An authority has full easements and rights-of-way through, across, under, and over any property owned by the state or any local government that are necessary or convenient to construct, acquire, or efficiently operate a transportation project or system under this chapter. This subsection does not affect the obligation of the authority under other law, including Section 373.102, to compensate or reimburse this state for the use or acquisition of an easement or right-of-way on property owned by or on behalf of this state. An authority's use of property owned by or on behalf of this state is subject to any covenants, conditions, restrictions, or limitations affecting that property.

SECTION 9. Section 371.002, Transportation Code, is amended to read as follows:

Sec. 371.002. APPLICABILITY. This chapter does not apply to:

- (1) a project for which the commission selected an apparent best value proposer before May 1, 2007; or
- (2) a publicly owned and operated toll project in which a private entity does not have a leasehold interest or right to operate and retain revenue from the toll project.

SECTION 10. Subchapter A, Chapter 371, Transportation Code, is amended by adding Section 371.003 to read as follows:

Sec. 371.003. VALUATION DETERMINATION. Any determination of value, including best value, under applicable federal or state law for a comprehensive development agreement or other public-private partnership arrangement involving a toll project must take into consideration any factors the toll project entity determines appropriate, including factors related to:

- (1) oversight of the toll project;

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- project;
- (2) maintenance and operations costs of the toll
 - (3) the structure and rates of tolls;
 - (4) economic development impacts of the toll project;
- and
- (5) social and environmental benefits and impacts of the toll project.

SECTION 11. The heading to Section 371.052, Transportation Code, is amended to read as follows:

Sec. 371.052. NOTIFICATION TO LEGISLATIVE BUDGET BOARD [~~AND STATE AUDITOR~~].

SECTION 12. Sections 228.0111 and 371.052(c), Transportation Code, are repealed.

SECTION 13. Section 228.012, Transportation Code, as amended by this Act, applies only to payments received by the Texas Department of Transportation under that section on or after the effective date of this Act. Payments received by the department under Section 228.012, Transportation Code, before the effective date of this Act are governed by the law in effect immediately before the effective date of this Act, and that law is continued in effect for that purpose.

SECTION 14. The repeal of Section 228.0111, Transportation Code, by this Act does not affect any project agreement, agreement regarding a negotiated value, market value agreement, market valuation waiver agreement, memorandum of understanding regarding market valuation, letter agreement regarding market valuation analysis, advance funding agreement, or other agreement entered into between the Texas Department of Transportation and a local toll project entity, or any resolution or minute order adopted by the department or a local toll project entity, under that repealed section. If a waiver of market valuation or waiver of first option to develop, finance, construct, or operate a toll project is withdrawn or terminated subsequent to the effective date of this Act, the department and the local toll project entity have the rights regarding the applicable project as exist under Chapter 373, Transportation Code, as added by this Act.

SECTION 15. This Act takes effect immediately if it receives a vote of two-thirds of all the members elected to each house, as provided by Section 39, Article III, Texas Constitution. If this Act does not receive the vote necessary for immediate effect, this Act takes effect September 1, 2011.