



November 14, 2014

The Honorable Lois W. Kolkhorst
Chair, Committee on Public Health
Texas House of Representatives
Post Office Box 2910
Austin, Texas 78768-2910

Via E-Mail

Re: Construction of article III, section 49-k of the Texas Constitution, related to the Texas Mobility Fund, in light of the 2001 ballot language proposing the constitutional amendment (RQ-1229-GA)

Dear Representative Kolkhorst:

We have received your request for an attorney general opinion dated November 6, 2014 and have designated it as Request No. 1229-GA. Section 402.042 of the Government Code provides that the Attorney General shall issue an opinion not later than the 180th day after the date that an opinion request is received, unless before that date the Attorney General notifies the requesting person in writing that the opinion will be delayed. TEX. GOV'T CODE ANN. § 402.042(c)(2) (West 2013). We received your request on November 12, 2014, setting a due date for your opinion of May 11, 2015.

By copy of this letter we are notifying those listed below of your request and asking them to submit briefs if they care to do so. If you are aware of other interested parties, please forward this request for briefing to them or let us know, so that we may notify them as soon as possible. We ask that the briefs be submitted by December 8, 2014 to ensure that this office will have adequate time to review and consider arguments relevant to the request from all interested parties. Briefs may be submitted by e-mail to opinion.committee@texasattorneygeneral.gov. Please note that briefs and other correspondence are subject to the Public Information Act.

Subsection 402.042(c) of the Government Code requires that requests for an attorney general opinion be submitted by certified or registered mail, with return receipt requested, or by electronic mail. Because you have submitted this request through other means, we understand that you desire to waive the submission requirements, as permitted by subsection 402.042(d), and we hereby agree to do so.

If you have any questions about this request, please do not hesitate to contact me.

Sincerely,

A handwritten signature in cursive script that reads "Virginia K. Hoelscher".

Virginia K. Hoelscher
Chair, Opinion Committee

VKH/mma

Attachment: Request No. 1229-GA

cc: The Honorable Wes Suter, President, Texas Association of Regional Councils
Mr. Joe Weber, Executive Director, Texas Department of Transportation
Mr. Jeff Graham, General Counsel, Texas Department of Transportation
Ms. Terri Hall, Executive Director, Texans Uniting for Reform & Freedom
Mr. Darrell Davila, Governor's Appointment Director, Governor's Office

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OPINION COMMITTEE

P.O. BOX 2910
AUSTIN, TEXAS 78768-2910
(512) 463-0600
Fax: (512) 463-5240

E-mail: lois.kolkhorst@house.state.tx.us

STATE OF TEXAS
HOUSE OF REPRESENTATIVES



LOIS W. KOLKHORST
DISTRICT 13

FILE # ML-47665-14
I.D. # 47665

P.O. BOX 1867
BRENHAM, TEXAS 77834
(979) 251-7888
FAX: (979) 251-7968

RQ-1229-GA

November 6, 2014

Honorable Greg Abbott
Attorney General of Texas
Attention: Opinions Committee
P.O. Box 12548
Austin, Texas 78711-2548

Re: Whether the Texas voters authorized gas taxes to be used to support toll roads with the passage of Prop 15 in 2001

Dear General Abbott:

Pursuant to Section 402.042 of the Texas Government Code, this is a letter requesting that the Attorney General of Texas issue an opinion addressing whether Texas voters were properly informed that approval of The Mobility Fund/Toll Equity Act of 2001 (Prop 15) involved more than just the establishment of the Texas Mobility Fund and the uses of that fund, but also included the use of any available revenue, including gas taxes, by TxDOT to grant money to toll roads without the requirement that it be repaid.

There is a dispute among lawmakers and voters as to what Prop 15 exactly authorized. Some contend voters gave the state permission to use gas taxes to build, support, and/or retire the debt of toll projects. However, the constitutional amendment only speaks of authorizing debt and grants of money from the Texas Mobility Fund and not the State Highway Fund.

Prop 15 that appeared on the November 6, 2001 ballot said:

The constitutional amendment creating the Texas Mobility Fund and authorizing grants and loans of money and issuance of obligations for financing the construction, reconstruction, acquisition, operation, and expansion of state highways, turnpikes, toll roads, toll bridges, and other mobility projects.¹

TxDOT's website says the following about Prop 15:

¹ *Analysis of Proposed Constitutional Amendments: November 6, 2001, Election.* Texas Legislative Counsel, 2001. (page 121)



Voter approval in 2001 of Proposition 15 (Texas constitutional amendment) and enactment of legislation by the 77th Legislature in 2001 created the Texas Mobility Fund. In particular, Article III, Section 49-k of the Texas Constitution (the "Constitutional Provision") created the Texas Mobility Fund within the treasury of the State of Texas...Moneys in the Mobility Fund may also be used to provide state participation in the payment of a portion of the costs of constructing and providing publicly owned toll roads and other public transportation projects in accordance with procedures, standards and limitations established by law.²

S.J.R. 16 of the 77th Legislature was the resolution that proposed the relevant constitutional amendment. The following is from the fiscal note of S.J.R. 16:

The resolution would *allow the TxDOT to spend, grant, or loan money from any available source* for the acquisition, construction, maintenance, or operation of turnpikes, toll roads, and toll bridges *and would remove the requirement that any expenditures from the State Highway Fund be repaid to the fund from tolls or other turnpike revenues* (emphasis ours).³

The bolded, italicized portion seems to have been purposefully left off the ballot measure voters approved. Voters were not properly informed that approval of Prop 15 meant more than the establishment of the Texas Mobility Fund and uses of that fund. The voters had no way of knowing that approval of Prop 15 also included the use of *any* available revenue—including gas taxes—by TxDOT to grant money to toll roads without the requirement that it be repaid. Such language is nowhere to be found in the ballot language.

Even the wording of the amendment is sufficiently confusing to call into question whether or not the voters actually gave permission to use the State Highway Fund—particularly gas tax revenues—to build and/or otherwise support toll roads. For example, SECTION 2 of S.J.R. 16 states:

SECTION 2. Section 52-b, Article III, Texas Constitution, is amended to read as follows:

² "Texas Mobility Fund." *Government: Reports*. Texas Department of Transportation, *n.d.* Web. 14 October 2014.

³ Fiscal Note, Tex. S.J.R. 16, 77th Leg., R.S. (2001).

Sec. 52-b. The Legislature shall have no power or authority to in any manner lend the credit of the State or grant any public money to, or assume any indebtedness, present or future, bonded or otherwise, of any individual, person, firm, partnership, association, corporation, public corporation, public agency, or political subdivision of the State, or anyone else, which is now or hereafter authorized to construct, maintain or operate toll roads and turnpikes within this State except that the Legislature may authorize the Texas Department of Transportation to expend, grant, or loan money, from any source available, for the acquisition, construction, maintenance, or operation [eəsts] of turnpikes, toll roads, and [œf] toll bridges [~~of the Texas Turnpike Authority, or successor agency, provided that any monies expended out of the state highway fund shall be repaid to the fund from tolls or other turnpike revenue~~].⁴

The ballot language only explicitly states the Texas Mobility Fund—comprised primarily of traffic fines/fees—can grant or loan money to toll roads, making it appear only the Texas Mobility Fund will be giving grants and loans of money to highways and toll projects, not their tax revenues. TxDOT now routinely uses gas taxes to construct toll projects, as well as to pledge it for repayment of bonds if toll revenues fall short. TxDOT used \$100 million in gas taxes to cover the debt service on its turnpike system in Austin in 2011.⁵ Dallas-managed lane toll projects on I-635 and I-820 used \$1 billion in gas tax revenues.⁶ TxDOT provided combined loan guarantees of up to \$8 billion in gas taxes for Hwy 161 in Dallas and Grand Parkway around Houston.⁷ The Transportation Commission also recently forgave a \$55 million loan for the Loop 49 toll road in Tyler.⁸ Yet, the ballot language makes no direct connection for the authorization of the State Highway Fund—i.e. gas tax and vehicles registration fees—to be used for toll projects.

Going back to S.B. 4, the bill analysis of the enrolled version of the bill provided to lawmakers for this enabling legislation, under ‘Digest and Purpose’ section states the following: “S.B. 4

⁴ Tex. S.J.R. 16, 77th Leg., R.S. (2001).

⁵ Hall, Terri. (2011, August 2). Austin Toll Requires Massive Taxpayer Bailout. *Texas TURF*. Retrieved from http://www.texasturf.org/TURF/index.php?option=com_content&task=view&id=1126&Itemid=2; Wear, Ben. (2011, July 18). Central Texas Toll Roads Need More State Subsidies Than Expected. *Austin American Statesman*. Retrieved from http://www.statesman.com/news/news/local/central-texas-toll-roads-need-more-state-subsidi-1/nRcJB/?_federated=1

⁶ Project Profiles: North Tarrant Express Segments 3A and 3B. *U.S. Department of Transportation: Federal Highway Administration*. Retrieved from http://www.fhwa.dot.gov/ipd/project_profiles/tx_north_tarrant_3a3b.aspx (North Tarrant Express Segments 3A and 3B); Project Profiles: IH 635 Managed Lanes. *U.S. Department of Transportation: Federal Highway Administration*. Retrieved from http://www.fhwa.dot.gov/ipd/project_profiles/tx_ibj635.aspx

⁷ Kaske, Michelle. (2013, July 10). Houston Toll Debt Sells Amid Biggest Loss Since '94: Muni Credit. *Bloomberg*. Retrieved from <http://www.bloomberg.com/news/2013-07-11/houston-toll-debt-sells-amid-biggest-loss-since-94-muni-credit.html>

⁸ Tex. Dept. of Transportation. Item 10. Toll Equity. (July 31, 2014). Retrieved from <http://ftp.dot.state.tx.us/pub/txdot/commission/2014/0731/minutes.pdf>

establishes the Texas Mobility Fund which is a fund supplementary to the ‘pay-as-you-go’ system that allows the Texas Transportation Commission to issue bonds on a limited basis for transportation construction and improvement.”⁹ There is no mention in the bill analysis about allowing tax money to be used to build, support, or otherwise forgive the loans of toll roads—in more blunt terms, a double tax.

Furthermore, the enabling legislation for S.J.R. 16, S.B. 4 was also tied to the passage of S.B. 342, which was not made clear in the analysis. This notice was given as the very end of S.B. 4’s bill analysis and appeared at the very end of the bill itself.¹⁰ The following is from the bill analysis for S.B. 342:

TxDOT and the Texas Transportation Commission are also authorized to participate in the cost, construction, maintenance, and operation of toll facilities of various entities provided that funds expended are repaid. TxDOT is precluded from advancing funds for turnpike project development without an obligation of repayment. Entities that construct toll facilities seek federal and state highway funds to leverage their own funds and complete financing for high-cost facilities, but repayment obligations may make construction infeasible. S.B. 342 removes the requirement for repayment from public entities and authorizes TxDOT to expend funds for the cost of toll projects of public and private entities (emphasis ours).¹¹

However, the constitutional amendment does not inform the voters of this marked shift to tax-supported toll roads, particularly for private toll roads, in the confusing and misleading ballot language for Prop 15. The ballot language addresses the establishment and uses of the Texas Mobility Fund, but does not explicitly tell the voters that voting in favor of the amendment also approved any and all tax money available to TxDOT for the support toll roads, both public and private, and the creation of Regional Mobility Authorities.

S.B. 342 goes on to allow the creation of Regional Mobility Authorities, yet neither the bill’s caption—“AN ACT relating to the participation of the Texas Department of Transportation in the acquisition, construction, maintenance, and operation of toll facilities”—nor the ballot language cited above reveals this either to the lawmakers or the voters.

A mere 666,940 votes, or 6.6% of Texas voters approved prop 15. However, the implications are far reaching. This same amendment was also used to justify voter approval of the now

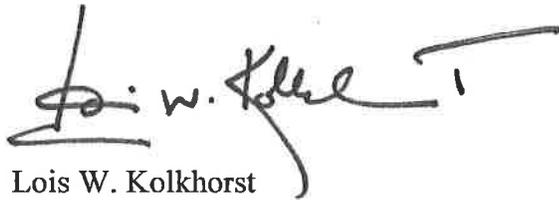
⁹ Enrolled, Bill Analysis, Tex. S.B. 4, 77th Leg., R.S. (2001).

¹⁰ Enrolled, Bill Analysis, Tex. S.B. 4, 77th Leg., R.S. (2001); Tex. S.B. 4, 77th Leg., R.S. (2001).

¹¹ Enrolled, Bill Analysis, Tex. S.B. 342, 77th Leg., R.S. (2001).

defunct and tremendously unpopular Trans-Texas Corridor under the vague language "...and other mobility projects." Voters rejected any and every form of the Trans-Texas Corridor once they were truly informed. So the interpretation of this ballot language has already been the subject of much controversy. Taxpayers must know whether this ballot language indeed properly informed the voters of the full implications of this amendment's potential effects and allows TxDOT to use every source of revenue available to subsidize toll projects. With road funding scarce, what little tax revenue is still available for traditional non-toll roads is a vital question taxpayers and lawmakers alike need answered as both contemplate funding solutions for the upcoming 84th legislative session.

Respectfully submitted,

A handwritten signature in black ink, appearing to read "Lois W. Kolkhorst". The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Lois W. Kolkhorst
Chair, Texas House Committee on Public Health

LWK/cm