

Texas Department of Transportation

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June 19, 2008

JUN 23 2008

OPINION COMMITTEE

The Honorable Greg Abbott
Attorney General
Office of the Attorney General
P.O. Box 12548
Austin, Texas 78711-2548

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OFFICE OF THE
ATTORNEY GENERAL
TRANSPORTATION DIVISION

FILE # ML-45742-08
I.D. # 45742

RE: Whether the Texas Department of Transportation Has the Authority to Transfer Certain Money in the State Highway Fund to a Bank Account Outside the State Treasury

RQ-0721-GA

Dear General Abbott:

I am writing to request your opinion as to whether the Texas Department of Transportation (TxDOT) has the authority to transfer funds deposited in a project subaccount pursuant to Section 228.012, Transportation Code to a metropolitan planning organization (MPO) assigned the responsibility to allocate those funds to eligible projects, as authorized under that section. The funds would be deposited in a bank account of the MPO and administered by the MPO.

On November 29, 2007, the North Texas Tollway Authority (NTTA) made payments to TxDOT in the approximate amount of \$3.2 billion. Those payments were made in exchange for the right to develop, design, construct, finance, operate, and maintain the State Highway 121 project in Denton and Collin counties.

The NTTA payments were made to TxDOT pursuant to the requirements of a project agreement TxDOT entered into with the NTTA under Sections 228.002-228.003, Transportation Code. Those sections authorize TxDOT to enter into an agreement with a public entity that permits the entity to design, develop, finance, construct, maintain, repair, or operate a toll project on the state highway system.

Section 404.094, Government Code requires all funds collected or received by a state agency to be deposited in the state treasury. Under Section 228.005, Transportation Code, except for certain circumstances not applicable here, all toll revenue or other revenue derived from a toll project on the state highway system that is collected or received by TxDOT under [Chapter 228] must be deposited in the state highway fund. The payments from the NTTA are derived from the State Highway 121 project.

Section 228.012, Transportation Code requires TxDOT to create a separate account in the state highway fund to hold payments received by TxDOT under a comprehensive development agreement, the surplus revenue of a toll project or system, and payments received under Sections 228.0111(g)(2) and (i)(2). TxDOT has determined that the approximate \$3.2 billion payment from the NTTA is surplus toll revenue, as there are no other SH 121 project costs, such as debt service, that have to be made from the payment.

TxDOT is required to 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. TxDOT has deposited the SH 121 payments into such a subaccount. Section 228.012 requires TxDOT to hold money in a subaccount in trust for the benefit of the region in which a project is located, and authorizes TxDOT to assign the responsibility for allocating money in a subaccount to the metropolitan planning organization in which the region is located.

Under Section 228.012, Transportation Code, TxDOT is required to 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.

TxDOT has entered into an agreement with the Regional Transportation Council (RTC) of the North Central Texas Council of Governments (NCTCOG), the MPO of the Dallas-Fort Worth region. The agreement assigns the responsibility for allocating the money in the SH 121 subaccounts to the RTC, subject to the concurrence of the Texas Transportation Commission (Commission).

Those funds are being allocated to projects authorized under Section 228.006, Transportation Code, which provides that surplus revenue of a toll project on the state highway system may only be used to pay the costs of a transportation project, highway project, or air quality project within a department district in which any part of the toll project is located.

In summary, I request your opinion as to whether the funds in the SH 121 subaccounts in the state highway fund may be transferred to a bank account outside the state treasury that is administered by the RTC, to be allocated by the RTC to eligible projects as authorized under Section 228.012, Transportation Code. The RTC and the Dallas-Fort Worth region have requested that the funds be transferred. The Commission and TxDOT want to transfer the funds if legal authority exists to do so.

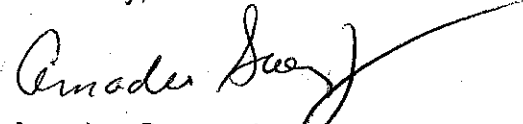
The Honorable Greg Abbott

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June 19, 2008

If you have any questions or need further information, please contact our General Counsel, Bob Jackson, at (512) 463-8630. Your assistance in this matter is appreciated.

Sincerely,

A handwritten signature in cursive script, appearing to read "Amadeo Saenz, Jr.", with a long horizontal flourish extending to the right.

Amadeo Saenz, Jr., P.E.
Executive Director

cc: Texas Transportation Commission
Bob Jackson, Office of General Counsel, TxDOT