

SENATOR JEFF WENTWORTH
SENATE DISTRICT 25



CHAIRMAN
SOUTHERN LEGISLATIVE CONFERENCE
2008 - 2009

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The Senate of

OPINION COMMITTEE

The State of Texas

PRESIDENT PRO TEM
OF THE TEXAS SENATE
2004 - 2005

COMMITTEES

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March 26, 2012

COUNTIES IN
SENATE DISTRICT 25

Bexar (north)	Hays
Comal	Kendall
Guadalupe	Travis (south)

The Honorable Greg Abbott
Attorney General of Texas
Attn: Opinion Committee
Post Office Box 12548
Austin, TX 78711-2548

FILE # MU-46995-12
I.D. # 46995
RQ-1048-CA

RE:

1. Whether the City of San Antonio and VIA Metropolitan Transit (VIA) entered into a contract with voters when they promised that Advanced Transportation District (ATD) funds would not be used for light rail.
2. Whether VIA and Bexar County (County) may use the ATD sales tax proceeds to fund the proposed downtown streetcar project, free from public assurances by VIA that only half of the tax revenue would be allocated to public transit.
3. Whether VIA and Bexar County may use 25 percent of the ATD sales tax proceeds for the streetcar project that is designated in Chapter 451 of the Texas Transportation Code "as the local share of the state or federal grants. . . ."

Dear General Abbott:

As Chairman of the Senate Select Committee on Open Government, I respectfully request a formal opinion from you on legal issues regarding the use of ATD funds by the City of San Antonio's VIA Metropolitan Transit for a downtown streetcar project after City officials and VIA Board of Trustees members publicly committed to voters not to use the funds for light rail.¹

¹ There is a presumption that, although there may be technical differences between streetcars and light rail, the voters do not account for those quibbling differences.



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As background, the 78th Legislature passed Senate Bill 769, which amended Chapter 451 of the Texas Transportation Code, allowing for the creation of ATDs. ATDs are formed by local elections conducted by the board of authority and permit the imposition of the local sales and use tax for advanced transportation within the district. In 2003, Senate Bill 404 amended the definition of ATDs in Section 451.701(1) to include "mobility enhancements" and amended requirements in Section 451.702 regarding the rates set by the governing body of the district.

In 2004, with voter approval, the City of San Antonio created its own ATD. The election to create the district was called by VIA, San Antonio's board of authority, as required by Section 451.702. The ballot stated:

The question presented is whether VIA Metropolitan Transit will be authorized to create an Advanced Transportation District within the City of San Antonio, Texas. The District would be funded by sales and use tax of one-fourth of one percent (1/4 of 1¢) to be allocated as follows:

One-half (50%) of the tax proceeds will be used for projects including advanced transit services, operations, passenger amenities, equipment and other advanced transportation purposes.

One-fourth (25%) would be used to contract, improve and maintain streets, sidewalks and related infrastructure designed to improve mobility, and other advanced transportation or mobility enhancement purposes within the District; and

One-fourth (25%) would be used as the local share for state and federal grants for improved highways, transportation infrastructure designed to improve mobility, and other advanced transportation or mobility enhancement purposes within the District.

The creation of an Advanced Transportation District and the imposition of a sales and use tax for advanced transportation and mobility enhancement with the District at a rate to be set by the governing body of the Advanced Transportation District at one-fourth of one percent (1/4 of 1¢).

Voters could vote "For" or "Against" the proposition. **A copy of the ballot is attached.**

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Preceding the vote, VIA and public officials committed to citizens that ATD funds would not be used for light rail. VIA distributed an election brochure titled "Keeping San Antonio in Motion" which specifically states that the ATD funds would be used for "[b]asic project plans for the first ten years" as outlined in the brochure in four separate charts and that "**[b]ased on input from the community, and resolutions passed by the VIA Board of Trustees, these funds would not be used for light rail or for toll road projects.**" A copy of the brochure is attached.

At the time of the election, light rail and streetcars were synonymous. In the National Transit Authority's *2004 Annual Urbanized Area Reporting Manual* that lists different modes of transportation, light rail was defined as "an electric railway that operates in mixed traffic with automobiles or has grade crossings with automobiles. Typically, light rail (LR) trains are short and consist of one to two cars." Streetcars were not a recognized mode of transportation.² VIA sponsored a local study in 2004 that was published in 2005 which included streetcars as a form of light rail.³ Today, a number of other federal entities define streetcars as a type of light rail.⁴

Various community leaders publicly assured voters that ATD funds would not be used for this purpose. A *San Antonio Express-News* article from October 18, 2004, reads: "VIA board members, who also would serve as the board of the advanced transportation district, have adopted resolutions that say none of the district's tax could be spent on toll roads or light rail." Then VIA Board Chairman Tim Tuggey, further commenting on the **commitment not to spend ATD funds on toll roads or light rail, stated, "It's about as binding as I think you can make it."**⁵

² National Transit Database, *2006 Annual Urbanized Area Reporting Manual* 42 (2006), available at http://www.ntdprogram.gov/ntdprogram/pubs/ARM/2006/html/2006_Reporting_Manual_Table_of_Contents.htm. (The definitions of light rail were the same in 2004 and 2006, but only the 2006 manual is available online).

³ Lockwood, Andrews, and Newman, Inc., and Nygaard, Suisman Urban Design Ximenes and Associates, *Northwest Corridor Alternatives Final Report*, Feb. 2005, available at <http://www.sametroplan.org/Studies/NorthwestCorridor/NW%20Corridor%20AA%202.pdf>.

⁴ American Public Transportation Association, *2011 Public Transportation Fact Book*, (62d ed. 2011) ("Light Rail is a mode of transit service (also called streetcar, tramway, or trolley . . ."); Federal Highway Administration, Planning Glossary (Mar. 21, 2012), available at http://www.fhwa.dot.gov/planning/glossary/glossary_listing.cfm?TitleStart=L ("A streetcar-type vehicle operated on city streets, semi-exclusive rights-of-way, or exclusive rights-of-way. Service may be provided by step-entry vehicles or by level boarding.").

⁵ Patrick Driscoll, *Transportation Tax Idea is Splitting Advocates in San Antonio Region*, SAN ANTONIO EXPRESS-NEWS, Nov. 16, 2011.

There is no question that Chapter 451 of Texas Transportation Code permits ATDs to pursue light rail, commuter rail and other similar projects. In fact, "advanced transportation" is defined as "light rail, commuter rail, fixed guideways, traffic management systems" as well as "other advanced transportation facilities, equipment, operations . . . and services." TEX. TRANSP. CODE ANN. 451.701 (Vernon Supp. 2009-10).

It seems, however, that VIA and the City of San Antonio did contract with voters by making specific representations, both verbally and in writing, which can limit the ATD's funding scope. See *Barrington v. Cokinos*, 338 S.W.2d 133, 142 (Tex. 1960) (stating that the proceeds of bonds voted by the people must be expended for the purposes for which they were voted); Tex. Att'y Gen. Op. Nos. GA-0156 (2004) at 7-8 (summarizing law on "contract with voters"), JC-0400 (2001) (explaining that "[r]epresentations of the governing body outside of its formal election orders or resolutions may also give rise to a contract with voters regarding the use of funds"). In this case, the representations are the voter education brochure language and the statements by the VIA Chairman of the Board. See *Inverness Forest Improvement Dist. v. Hardy St. Investors*, 541 S.W.2d 454, 460 (Tex. Civ. App.—Houston [1st Dist.] 1976, writ ref'd n.r.e.) (letter reflecting water district improvements had effect of pledging to voters that those improvements would be made with bond proceeds). Therefore, if VIA and the City of San Antonio later propose to do exactly what they promised not to do, then the contract with the voters is breached. See *Devorsky v. La Vega Indep. Sch. Dist.*, 635 S.W.2d 904, 908 (Tex. App.—Waco 1982, no writ) (explaining that statements of school representatives regarding specific school building sites made before election bound school district notwithstanding that it was not "formal" action).

The second related issue is whether Bexar County and VIA may use the ATD sales tax proceeds to fund the proposed downtown streetcar project, free from public assurances by VIA that only half of the tax revenue would be allocated to public transit. **VIA's campaign literature further pledges in wording, as well as a pie chart showing, that 50 percent of the ATD taxes will be allocated to "Streets, Highways and Related Infrastructure" and the other 50 percent to "Public Transportation."** In 2005, after the ATD was established, Senate Bill 1434 was passed, allowing for a portion of ATD funds used for local or federal matching funds to be transferred to a county or municipality within the district or local government corporation. The purpose was to allow the ATD funds to be used by Bexar County for roadway construction projects.⁶

⁶ Texas Department of Transportation San Antonio, Advanced Transportation District White Paper 3 (Feb. 7, 2012) (stating that "[l]etters were sent from TxDOT to Bexar County specific to each of the

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Letters were written from the Texas Department of Transportation (TxDOT) to the County and VIA, outlining the specific projects where the ATD funds would be used.⁷ To date, only the Blanco and Culebra Roads projects have been completed. Now, the County has committed its ATD funds to the streetcar project.⁸ In a meeting with stakeholders on January 28, 2012, Bexar County Commissioner Kevin Wolff said that approximately \$92 million in Bexar County ATD funds over the next 10 years will be allocated for the streetcar project. The County's funds, in addition to VIA's one-half ATD funds, will cause the overall share of ATD funds going to public transportation to exceed one-half. VIA's later contract, if any, to pledge TxDOT's ATD share to the County would not change the County's derivative status. Moreover, the voters approved the creation of the ATD and understood that the funds would be allocated in a specific manner. See Tex. Att'y Gen. Op. No. JC-0400 (2001) at 8 (citing *Fletcher v. Ely*, 53 S.W.2d 817, 818 (Tex. Civ. App.—Amarillo 1932, writ ref'd)) (explaining that when voters approve specific projects, bond proceeds may not be diverted to another purpose or project).

The last issue is whether VIA and the County may use 25 percent of the ATD sales tax proceeds for the streetcar project that is designated in Chapter 451 of the Texas Transportation Code "as the local share of the state or federal grant" and on the ballot language to be "used as the local share for the state and federal grants." The 2004 ATD ballot states, "[o]ne-fourth (25%) would be used as the local share for state and federal grants for improved highways, transportation infrastructure designed to improve mobility, and other advanced transportation or mobility enhancement purposes within the District." See attached ballot. The fourth page of the "Keeping

above agreements allowing the funds to be transferred from TxDOT ATD allocation to Bexar County for the purposes of leveraging the pass-through program funds.").

⁷ Letter to John Milam, President and CEO of VIA Metropolitan Transit, from David B. Casteel, Texas Dep't. of Transportation (Jan. 29, 2007) (stating [TxDOT's] concurrence to use [ATD] funds for Bexar County Pass-through [projects]), Letter to Judge Nelson Wolff, Bexar County Judge, from David Casteel, District Engineer, Texas Dep't. of Transportation (Aug. 9, 2006) (stating "it appears that the following plan will allow for all the projects identified in the ATD election guide to be implemented AND operational several years ahead of what was planned. . .").

⁸ John W. Gonzalez, *\$5 Million Youth Soccer Complex Heading to South Side*, SAN ANTONIO EXPRESS-NEWS, Nov. 16, 2011, available at http://www.mysanantonio.com/news/local_news/article/5-million-youth-soccer-complex-heading-to-South-2670788.php; Vianna Davila, *Local Funds for Streetcar Found*, SAN ANTONIO EXPRESS-NEWS, Nov. 10, 2011, available at http://www.mysanantonio.com/news/local_news/article/Local-funds-for-streetcar-found-2660933.php; Vianna Davila, *Streetcar Visions Decidedly Different*, SAN ANTONIO EXPRESS-NEWS, Sept. 29, 2012, available at http://www.mysanantonio.com/news/local_news/article/Streetcar-visions-decidedly-different-2194202.php#ixzz1pmhr2Zee.

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San Antonio in Motion" voter brochure explicitly states that: "[o]ne fourth of the money collected by the ATD will be used by the Texas Department of Transportation to leverage federal matching funds." The \$92 million that the County is allocating is not purported to match any state or federal grant. In fact, the project is touted as funded entirely with "local funds" from VIA, the County and the City of San Antonio.⁹ VIA's commitment to the voters not to fund light rail and not to allocate more than half of the funds to public transportation should be binding—on VIA, the City of San Antonio and Bexar County. Even if the County could disavow VIA's commitment to voters, the County cannot elude the binding effect of the ballot and statutory language restricting use of the TxDOT portion of ATD funds to matching state and federal grants.

Moreover, VIA plans to finance its portion of the streetcar project with ATD funds. VIA will "supply \$70 million in bonded funds" that are backed by ATD tax revenues and with \$14 million in ATD funds reallocated from another account.¹⁰ In addition, VIA is complicit with the County's misuse of ATD funds by accepting them to support the project. The excessive percentage and reallocation of funds appear to me a breach of a contract with voters, and furthermore, a violation of Chapter 451.702 of the Texas Transportation Code. TEX. TRANSP. CODE ANN. 451.702 (Vernon Supp. 2009-10); see *Fletcher*, 53 S.W.2d 817 at 818.

It is my hope that your reiteration of the Texas law on this topic will demonstrate that there is a contract with San Antonio voters, and I respectfully request an opinion on the following questions:

1. Whether the City of San Antonio and VIA Metropolitan Transit (VIA) entered into a contract with voters when they promised that Advanced Transportation District (ATD) funds would not be used for light rail.
2. Whether VIA and Bexar County may use the ATD sales tax proceeds to fund the proposed San Antonio downtown streetcar project, free from public assurances by VIA that only half of the tax revenue would be allocated to public transit.

⁹ Vianna Davila, *Local Funds for Streetcar Found*, SAN ANTONIO EXPRESS-NEWS, Nov. 10, 2011, available at http://www.mysanantonio.com/news/local_news/article/Local-funds-for-streetcar-found-2660933.php ("County and VIA Metropolitan Transit officials have identified enough local funds to build the city's first two streetcar lines without the help from the federal government.").

¹⁰ *Id.*

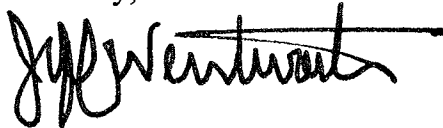
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3. Whether VIA and Bexar County may use 25 percent of the ATD sales tax proceeds for the streetcar project that is designated in Chapter 451 of the Texas Transportation Code "as the local share of the state or federal grant" and on the ballot language to be "used as the local share for the state and federal grants."

Sincerely,

A handwritten signature in black ink, appearing to read "Jeff Wentworth", with a horizontal line extending from the end of the signature.

Jeff Wentworth

Chairman

Senate Select Committee on Open Government

JW/sk