

TEXAS TRANSPORTATION COMMISSION

ALL Counties

MINUTE ORDER

Page 1 of 1

ALL Districts

The Texas Transportation Commission (commission) finds it necessary to adopt new §§5.81-5.88, relating to private activity bonds, to be codified under Title 43, Texas Administrative Code, Part 1.

The preamble and the adopted new sections, attached to this minute order as Exhibits A and B, are incorporated by reference as though set forth at length verbatim in this minute order.

IT IS THEREFORE ORDERED by the commission that the new sections are adopted and are authorized for filing with the Office of the Secretary of State.

The executive director is directed to take the necessary steps to implement the actions as ordered in this minute order, pursuant to the requirements of the Administrative Procedure Act, Government Code, Chapter 2001.

Submitted and reviewed by:

Recommended by:

Chief Financial Officer

Executive Director

Minute Number Date Passed

1 Adoption Preamble

2 The Texas Department of Transportation (department) adopts Title
3 43, Chapter 5, new Subchapter G, §§5.81-5.88, concerning private
4 activity bonds. Sections 5.81, 5.87, and 5.88 are adopted with
5 changes to the proposed text as published in the February 9,
6 2007 issue of the *Texas Register* (32 TexReg 514). Sections
7 5.82-5.86 are adopted without changes to the proposed text as
8 published in the February 9, 2007 issue of the *Texas Register*
9 (32 TexReg 514) and will not be republished.

10
11 EXPLANATION OF ADOPTED SECTIONS

12 Transportation Code, §222.035, requires the department to
13 establish and administer a program for private activity bonds
14 issued for highway facilities or surface freight transfer
15 facilities in this state. The program is required to include a
16 process by which the department and the Texas Bond Review Board
17 receive and evaluate applications for issuance of private
18 activity bonds for highway facilities or surface freight
19 transfer facilities prior to submission of a request for private
20 activity bond allocation authorization to the United States
21 Department of Transportation (US DOT).

22
23 Section 5.81 describes the purpose of the new subchapter, which
24 is to establish a process and procedures governing applications
25 for the issuance of private activity bonds for highway or

1 surface freight transfer facility projects by any eligible
2 entity authorized to submit an application to the Texas
3 Transportation Commission (commission).

4
5 Section 5.81 provides that, pursuant to Transportation Code,
6 §222.035, the program established in the new subchapter provides
7 a method for processing applications submitted by eligible
8 entities other than the department. The department has
9 established a separate method for processing department
10 applications, which will be given priority due to department
11 projects being priority projects with statewide significance.
12 Applications for the issuance of private activity bonds for
13 highway or surface freight transfer facility projects of the
14 department are exempt from the requirements of new Subchapter G,
15 and shall be submitted to US DOT pursuant to procedures
16 established by the department in accordance with applicable law.
17 Transportation Code, §222.035(e) requires the establishment of a
18 program to "receive and evaluate" applications. The department
19 cannot "receive and evaluate" its own applications. Legislative
20 history related to Transportation Code, §222.035 indicates that,
21 as there is a limited amount of allocation authority, the
22 Legislature intended to create a mechanism for review of local
23 projects to ensure that only the most worthwhile applications
24 are considered by the US DOT.

25

1 Section 5.81 further provides that for eligible entities
2 authorized to submit an application for the issuance of private
3 activity bonds to the commission, the process and procedures
4 established under the proposed rules identify submission
5 requirements and criteria by which the commission will receive
6 and evaluate such applications.

7
8 Section 5.82 defines words and terms used in new Subchapter G.

9
10 Section 5.83 establishes general policies regarding the
11 consideration of applications, limitations on the obligations of
12 federal and state government, and access to records by
13 governmental entities. Section 5.83 clarifies that the act of
14 approving an application does not create a financial obligation
15 on the part of the federal government, the State of Texas, the
16 commission, or the department. In order to ensure compliance
17 with applicable legal requirements relating to the use of
18 private activity bonds for an eligible project, §5.83 provides a
19 right of access to any books, documents, papers, or other
20 records of an applicant approved for an allocation.

21
22 In order to assist an eligible entity in the submission of
23 applications, §5.84 provides that the executive director of the
24 department will designate a department contact for the purpose
25 of providing advice and assistance to potential applicants.

1

2 Section 5.85 prescribes application procedures and information
3 required to be submitted in an application. The submittal
4 requirements include the information the US DOT has requested to
5 be included in an application for an allocation submitted to US
6 DOT. Section 5.85 also requires an application to the
7 department to include a description of the need for the project
8 and its anticipated benefits, such as reducing congestion and
9 enhancing air quality. This information is required in order
10 for the commission to approve the most worthwhile projects for
11 purposes of applying for an allocation, as federal law caps the
12 available allocation amount.

13

14 Section 5.86 authorizes the commission to suspend the
15 application process if the cap on the available allocation
16 amount is reached or uncertainties exist warranting suspension,
17 such as uncertainties relating to the implementation of the
18 program.

19

20 Section 5.87 provides that the department will notify the Texas
21 Bond Review Board of all department applications to the US DOT
22 and when applications are received from other eligible entities.
23 The notifications will include copies of the applications. The
24 notification of a department application will be provided
25 concurrently with the submission of the application to the US

1 DOT. Section 5.87 also prescribes the process for the joint
2 review and assessment of applications by the Texas Bond Review
3 Board and the department, as required by Transportation Code,
4 §222.035. In order to develop the information and
5 recommendations considered by the commission in determining
6 whether to approve an application, §5.87 specifies what
7 provisions in an application will be assessed by the department
8 and the Texas Bond Review Board, and provides that department
9 staff will provide a memorandum to the commission on the
10 findings of the application review, including the results of the
11 Texas Bond Review Board's evaluation.

12
13 Section 5.88 provides that the commission may consider the
14 advice of department staff and their consultants that the
15 commission may choose regarding the sufficiency of the
16 information, the probable accuracy of projections, the
17 anticipated financial condition of the application and the
18 project, and any other information the commission determines
19 appropriate. Section 5.88 prescribes other information and
20 criteria that will be considered by the commission in
21 determining whether to approve an application. Those criteria
22 are intended to allow the commission to approve the most
23 worthwhile projects for purposes of applying for an allocation,
24 as federal law caps the available allocation amount.

25

1 COMMENTS

2 Comments on the proposed new sections were received from the
3 Texas Bond Review Board (Board).

4

5 Comment:

6 The Board commented that §5.81(b) states that department
7 applications will be exempt from Board review. The Board stated
8 that while not directly addressed in the proposed rules, it
9 appears that the department's program considers department
10 applications to have first priority and considers those
11 applications to be exempt from the process set forth in the
12 rules. The Board stated that Transportation Code, §222.035
13 contemplates a program that governs all applications. The
14 proposed rules do not provide for the processing of all
15 applications under the program or for the priority system that
16 appears to exist. The Board finally indicated that the proposed
17 rules do not provide legal justification for exempting the
18 department's applications from the Board's evaluation as
19 required under Transportation Code, §222.035(e).

20

21 Response:

22 Section 5.81 has been revised to provide that, pursuant to
23 Transportation Code, §222.035, the program established in the
24 new subchapter provides a method for processing applications
25 submitted by eligible entities other than the department. The

1 department has established a separate method for processing
2 department applications, which will be given priority due to
3 department projects being priority projects with statewide
4 significance. Applications for the issuance of private activity
5 bonds for highway or surface freight transfer facility projects
6 of the department are exempt from the requirements of new
7 Subchapter G, and shall be submitted to US DOT pursuant to
8 procedures established by the department in accordance with
9 applicable law. Transportation Code, §222.035(e) requires the
10 establishment of a program to "receive and evaluate"
11 applications. The department cannot "receive and evaluate" its
12 own applications. Legislative history related to Transportation
13 Code, §222.035 indicates that, as there is a limited amount of
14 allocation authority, the Legislature intended to create a
15 mechanism for review of local projects to ensure only the most
16 worthwhile applications are considered by US DOT. Section
17 5.87(a)(1) has been revised to provide that the notification to
18 the Board of a department application will include a copy of the
19 application and will be provided concurrently with the
20 submission of an application to the US DOT.

21
22 Comment:
23 The Board stated that §5.87(b) as drafted indicates a
24 coordinated review of applications, and the rules should provide
25 that the Board receives and evaluates the entire application,

1 not a portion thereof. The Board stated that the current Board
2 statute and Transportation Code, §222.035 do not allow the Board
3 to delegate the evaluation to staff. The rules should provide
4 that a letter would be provided to the department indicating the
5 results of the Board's evaluation and stating any Board
6 comments. The Board also stated that the proposed rules do not
7 specify the time period the Board will have for its evaluation.

8

9 Response:

10 Section 5.87(b) has been revised to provide that the department
11 and the Board will each review the entire application, and that
12 after Board action on an application, the department shall be
13 provided with a letter from the Board or Board staff indicating
14 the results of the Board's evaluation of the application,
15 including any comments on the application. The letter shall be
16 submitted to the department no later than 60 days after the
17 executive director of the Board receives a copy of the
18 application.

19

20 Comment:

21 The Board stated that §5.87(c) directs department staff to
22 provide a summary recommendation to the commission, and that the
23 summary should include the Board's evaluation, including any
24 comments.

25

1 Response:

2 Section 5.87(c) has been revised to provide that the summary
3 memorandum shall include a copy of the letter indicating the
4 results of the Board's evaluation.

5
6 Comment:

7 The Board stated that it should receive a copy of any
8 documentation regarding the commission's and the US DOT's
9 disposition of any application under the new statute.

10
11 Response:

12 Section 5.87(a)(1) has been revised to provide that the
13 notification to the Board of a department application will
14 include a copy of the application and will be provided
15 concurrently with the submission of an application to the US
16 DOT. Section 5.88(c) has been revised to provide that the
17 executive director of the department will notify the executive
18 director of the Board, in writing, upon completion of the review
19 and analysis of an application and whether an application has
20 been approved or disapproved by the commission. The department
21 shall also provide the executive director of the Board with a
22 copy of the US DOT disposition of an application.

23
24 STATUTORY AUTHORITY

25 The new sections are adopted under Transportation Code,

1 §201.101, which provides the commission with the authority to
2 establish rules for the conduct of the work of the department,
3 and more specifically, Transportation Code, §222.035, which
4 provides the commission with the authority to establish rules to
5 administer the private activity bond program established under
6 that section.

7

8 CROSS REFERENCE TO STATUTE

9 Transportation Code, §222.035.

1 SUBCHAPTER G. PRIVATE ACTIVITY BONDS

2 §5.81. Purpose.

3 (a) Transportation Code, §222.035, requires the Texas
4 Department of Transportation to establish and administer a
5 program for private activity bonds issued for highway facilities
6 or surface freight transfer facilities in this state that
7 includes a process by which the department and the Texas Bond
8 Review Board receive and evaluate applications for issuance of
9 private activity bonds for highway facilities or surface freight
10 transfer facilities prior to submission of a request for private
11 activity bond allocation authorization to the US Department of
12 Transportation (US DOT). This subchapter establishes a process
13 and procedures governing applications for the issuance of
14 private activity bonds for highway or surface freight transfer
15 facility projects by any eligible entity authorized to submit an
16 application to the Texas Transportation Commission.

17 (b) Pursuant to Transportation Code, §222.035, the program
18 established in this subchapter provides a method for processing
19 applications submitted by eligible entities other than the
20 department. The department has established a separate method
21 for processing department applications, which will be given
22 priority due to department projects being priority projects with
23 statewide significance. Applications for the issuance of

1 private activity bonds for highway or surface freight transfer
2 facility projects of the department are exempt from the
3 requirements of this subchapter, and shall be submitted to the
4 US DOT pursuant to procedures established by the department in
5 accordance with applicable law. The department shall provide
6 the Texas Bond Review Board with a copy of an application
7 submitted by the department pursuant to §5.87(a)(1) of this
8 subchapter (relating to Department Action).

9 (c) For other eligible entities authorized to submit an
10 application for the issuance of private activity bonds to the
11 commission, the process and procedures established in this
12 subchapter identify submission requirements and criteria by
13 which the commission will receive and evaluate such
14 applications.

15
16 §5.82. Definitions. The following words and terms, when used
17 in this subchapter shall have the following meanings, unless the
18 context clearly indicates otherwise.

19 (1) Board--The Texas Bond Review Board.

20 (2) Commission--The Texas Transportation Commission.

21 (3) Department--The Texas Department of Transportation.

22 (4) Eligible entity--An entity authorized by law to
23 finance an eligible project by the issuance of bonds.

1 (5) Eligible project--A qualified highway or surface
2 freight transfer facility.

3 (6) Executive director--The executive director of the
4 department or designee not below the level of assistant
5 executive director.

6 (7) Qualified highway or surface freight transfer
7 facility--Has the meaning assigned by Section 142(m)(1) of the
8 Internal Revenue Code (26 U.S.C. §142(m)(1)).

9

10 §5.83. General Policies.

11 (a) Consideration of all applications for private activity
12 bond issuance will be in accordance with applicable federal and
13 state law, and applicable rules and regulations.

14 (b) The federal government shall not be obligated by any
15 act of the commission or department under this subchapter.

16 (c) Favorable consideration of any application for private
17 activity bond issuance does not pledge the credit of the state,
18 commission, or department.

19 (d) The Federal Highway Administration, the Comptroller
20 General of the United States, the Texas State Auditor's Office,
21 and the department, or any of their authorized representatives,
22 shall have the right of access to any books, documents, papers,
23 or other records of an applicant approved for an allocation that

1 are pertinent to the application, in order to make audits,
2 examinations, excerpts, and transcripts.

3

4 §5.84. Department Contact. The executive director will
5 designate a contact within the department for the purpose of
6 providing information and assistance to potential applicants.
7 Assistance may include non-binding advice, counsel, and
8 consultation regarding all aspects of a possible application.
9 Any advice, assistance, or aid provided will not constitute a
10 commitment or liability on the part of the department or
11 commission. Potential applicants are encouraged to communicate
12 with the contact at the earliest possible date.

13

14 §5.85. Application Procedure. An eligible entity shall submit
15 an application to the executive director in a form prescribed by
16 the department. An original application and five copies are to
17 be delivered to the executive director. The application must,
18 at a minimum, include the following information:

19 (1) an overview of the project, which shall include a
20 description of the project (location and scope), the total cost
21 of the project, and the amount and proposed use of the requested
22 private activity bond allocation;

23 (2) a copy of the resolution authorizing the issuance of

1 bonds adopted by the eligible entity;

2 (3) financing and development team information, including
3 the proposed issuer of the bonds, the borrower, and any other
4 key participants (with prior experience in projects similar to
5 the project proposed listed);

6 (4) project development schedule, including timelines for
7 major financial milestones (particularly the date for issuance
8 of the private activity bonds) and major construction milestones
9 (permits, environmental, right of way, etc.);

10 (5) estimated project cost information, including a
11 summary of capital costs by category, table of all project costs
12 by category, identification of costs that are eligible for
13 private activity bond funding, and a project expenditure
14 schedule by category type;

15 (6) identification of other (in addition to private
16 activity bonds) project funding sources and a construction
17 period sources and uses table;

18 (7) assumptions used for private activity bond financing
19 (terms, rate, structure, reserves, legal provisions, etc.), as
20 well as other funding sources;

21 (8) cash flow operating pro forma, with a narrative
22 description of and assumptions on traffic and revenue (including
23 supporting documentation) and operating and maintenance costs;

1 (9) the proposed pledge of collateral or security,
2 including the priority of claim, for repayment of the private
3 activity bonds and other funding sources;

4 (10) identification of any financial assistance,
5 guarantees, or credit enhancement;

6 (11) draft bond counsel opinion letter;

7 (12) a description of the need for the project and how
8 the project will reduce congestion, enhance economic
9 opportunity, enhance safety, improve air quality, and increase
10 the value of transportation assets;

11 (13) identification of any revisions or changes to state
12 highway system facilities necessitated by the project;

13 (14) a description of Title 23 or 49, United States Code
14 funding received by the project, including the date (or
15 anticipated date) of receipt and types and amount of financial
16 assistance; and

17 (15) any additional information the department deems
18 necessary to fully consider the application.

19

20 §5.86. Suspension of Applications. If the commission
21 determines that private activity bond allocations from the US
22 DOT are fully committed or other uncertainties exist that
23 warrant suspension of acceptance of applications, the department

1 will publish a notice in the *Texas Register* providing that
2 applications will no longer be accepted. When conditions
3 change, as determined by the commission, the department will
4 publish a notice in the *Texas Register* that applications are
5 again being accepted.

6

7 §5.87. Department Action.

8 (a) Notification to Texas Bond Review Board.

9 (1) The department will notify the executive director of
10 the Board of all department applications to the US DOT for the
11 issuance of private activity bonds for highway or surface
12 freight transfer facility projects. The notification will
13 include a copy of the application. The notification will be
14 provided concurrently with the submission of an application to
15 the US DOT.

16 (2) The department will notify the executive director of
17 the Board once an application submitted by an eligible entity
18 under this subchapter is received. Two copies of the
19 application will be forwarded to the executive director of the
20 Board.

21 (b) Review of applications. The department will coordinate
22 its review of applications with the review carried out by the
23 Board. The department and the Board will each review the entire

1 application. After Board action on an application, the
2 department shall be provided with a letter indicating the
3 results of the Board's evaluation of the application. The
4 letter with any Board comments shall be submitted to the
5 department no later than 60 days after the executive director of
6 the Board receives a copy of an application. Applications will
7 be reviewed to assess if:

8 (1) the application submitted is from an eligible entity;

9 (2) the application submitted is for an eligible project
10 and is otherwise eligible under federal law; and

11 (3) the overall financial plan submitted in the
12 application is reasonable and supports the project's financing
13 (including the issuance of the private activity bonds),
14 including an assessment of:

15 (A) whether the proposed project funding sources are
16 sufficient to cover estimated project costs;

17 (B) whether projected revenues are sufficient to make
18 required debt service payments;

19 (C) the sufficiency of projected debt service coverage
20 ratios; and

21 (D) the capability of the proposed financing and
22 development team.

23 (c) Report to commission. Department staff will provide a

1 summary memorandum to the commission on the findings of the
2 application review by the department and the Board. The summary
3 memorandum shall include a copy of the letter indicating the
4 results of the Board's evaluation.

5

6 §5.88. Commission Action.

7 (a) Commission analysis. The commission may consider the
8 advice of department staff and their consultants regarding the
9 sufficiency of the information, the probable accuracy of
10 projections, the anticipated financial condition of the
11 application and the project, and any other information the
12 commission determines appropriate.

13 (b) Criteria. In determining whether to approve an
14 application, the commission will consider:

15 (1) the reasonableness of the financial plan submitted in
16 the application;

17 (2) the transportation need for and anticipated public
18 benefit of the project, including the impact of the project on
19 reducing congestion, enhancing economic opportunity, enhancing
20 safety, improving air quality, and increasing the value of
21 transportation assets;

22 (3) the analysis of the application by the Board; and

23 (4) the ability of the department to construct any

1 improvements to the state highway system required by the
2 project.

3 (c) Notification to applicant, the Board, and the US DOT.

4 The executive director will notify the applicant and the
5 executive director of the Board, in writing, upon completion of
6 the review and analysis and of the determination on whether the
7 application is approved for consideration by the US DOT or
8 disapproved. For approved applications, the executive director
9 will notify the US DOT and forward the application for US DOT
10 consideration. The department shall provide the executive
11 director of the Board with a copy of the US DOT disposition of
12 any application forwarded to the US DOT under this section.