

Requirements Applicable to the Allocation and Use of Regional Toll Revenue (RTR) Funding

- Section 228.0055, Transportation Code (added by H.B. 2702, 79th Legislature, Regular Session, 2005, and amended by S.B. 792, 80th Legislature, Regular Session, 2007)
 - Payments, project savings, refinancing dividends, and any other revenue received by the Texas Transportation Commission (commission) or the Texas Department of Transportation (department) under a comprehensive development agreement (CDA) shall be used by the commission or the department to finance the construction, maintenance, or operation of transportation projects or air quality projects in the region
 - The department is required to allocate the distribution of funds to department districts in the region that are located in the boundaries of the metropolitan planning organization in which the project that is the subject of the CDA is located based on the percentage of toll revenue from users from each department district of the project
 - To assist the department in determining the allocation, each entity responsible for collecting tolls for a project shall calculate on an annual basis the percentage of toll revenue from users of the project from each department district based on the number of recorded electronic toll collections
 - Section 228.001, Transportation Code (added by H.B. 2702, 79th Legislature, Regular Session, 2005) defines air quality project and transportation project
 - “Air quality project” means a project or program of the department or another governmental entity that the commission determines will mitigate or prevent air pollution caused by the construction, maintenance, or use of public roads
 - “Transportation project” means:
 - a tolled or nontolled state highway improvement project;
 - a toll project eligible for department cost participation under Section 222.103, Transportation Code;
 - the acquisition, construction, maintenance, or operation of a rail facility or system under Chapter 91, Transportation Code;

- the acquisition, construction, maintenance, or operation of a state-owned ferry under Subchapter A, Chapter 342, Transportation Code;
 - a public transportation project under Chapter 455 or 456, Transportation Code;
 - the establishment, construction, or repair of an aviation facility under Chapter 21, Transportation Code; and
 - a passenger rail project of another governmental entity
- Section 228.006, Transportation Code (transferred from Chapter 361, Transportation Code and redesignated by H.B. 2702, 79th Legislature, Regular Session, 2005, and amended by S.B. 19, 82nd Legislature, Regular Session, 2011)
 - The commission is required to use 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 in which any part of the toll project is located
 - The department is required to 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 228.012, Transportation Code (added by S.B. 792, 80th Legislature, Regular Session, 2007, and amended by S.B. 19, 82nd Legislature, Regular Session, 2011)
 - The department is required to create a separate account in the state highway fund to hold payments received by the department under a CDA and the surplus revenue of a toll project or system
 - 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

- The Attorney General, in Opinion No. GA-0687, held that Section 228.012 does not provide authority for the department to transfer monies held in trust in a particular subaccount to a regional transportation authority, such as the NCTCOG
- The department is required to 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
 - Generally, money in a subaccount is required to be allocated to projects authorized by Section 228.0055 or Section 228.006, as applicable
- The department and the Regional Transportation Council (RTC) entered into a memorandum of understanding (MOU) concerning the administration, sharing, and use of surplus toll revenue and CDA concession payments within the region served by the NCTCOG
 - Under the MOU, the selection of projects to be financed with regional surplus toll revenues and CDA concession payments shall be made by the RTC, subject to commission concurrence
 - Projects funded with concession payments and surplus toll revenues are to be selected in a cooperative TxDOT/RTC selection process that considers the desires of the cities and counties in which the revenue generating project is located
 - The RTC has developed a plan for regional sharing of surplus toll revenue and CDA concession payments, based on the location of the toll project from which these revenues are derived and the residential location of toll users in the region served by the NCTCOG
 - In Minute Order 112015, dated October 29, 2009, the commission clarified that commission concurrence in projects selected by the RTC to be financed with surplus toll revenue and CDA concession payments is limited to ensuring the funds are allocated to projects authorized by Transportation Code, §228.0055 or §228.006
 - Minute Order 112015 requires the department to disburse such funds in accordance with directions from the RTC to pay the costs of qualified projects

MEMORANDUM OF UNDERSTANDING
REGIONAL REVENUE SHARING FUND
FOR SURPLUS TOLL REVENUES
AND CDA CONCESSION PAYMENTS

THIS MEMORANDUM OF UNDERSTANDING ("MOU") dated as of (date) is entered into by and between TEXAS DEPARTMENT OF TRANSPORTATION, an agency of the State of Texas ("TxDOT") and the REGIONAL TRANSPORTATION COUNCIL ("RTC"), the transportation policy council of the transportation department of the NORTH CENTRAL TEXAS COUNCIL OF GOVERNMENTS ("NCTCOG") and a federally designated Metropolitan Planning Organization. The purpose of this MOU is to set out the understanding of TxDOT and the RTC regarding sharing of surplus toll revenue and concession payments within the region served by the NCTCOG.

WHEREAS, pursuant to Section 228.0055, Texas Transportation Code, payments received by TxDOT under a comprehensive development agreement ("CDA") may be used to finance the construction, maintenance, or operation of a transportation project or air quality project in the region, defined as a metropolitan statistical area and any county contiguous to that metropolitan statistical area, or two adjacent TxDOT districts;

WHEREAS, pursuant to Section 228.006, Texas Transportation Code, surplus revenue of a toll project or system may be used to pay the costs of a transportation project, highway project, or air quality project within a TxDOT district in which any part of the toll project is located;

WHEREAS, to promote regional equity, the Texas Transportation Commission ("Commission") has devolved the responsibility for the majority of regional project selection decisions to the RTC, subject to Commission concurrence;

WHEREAS, pursuant to that devolution, the RTC has developed a plan for regional sharing of surplus toll revenue and concession payments received under a CDA, based on the location of the toll project from which these revenues are derived and the residential location of toll users in the region served by the NCTCOG;

NOW THEREFORE, in consideration of these premises, TxDOT and the RTC agree as follows:

1. In accordance with the restrictions of Sections 228.0055 and 228.006, Texas Transportation Code, TxDOT will account for surplus toll revenue and CDA concession payments derived from projects located in the region served by the NCTCOG, along with interest earned on those revenues, separately from toll revenues and CDA concession payments derived from projects located outside the region.
2. To provide ease of record keeping and assurance to the region, TxDOT intends, provided the Texas Legislature provides the necessary statutory authority, to create a regional revenue sharing account separate from the State Highway Fund that will allow all interest earned on revenue in that account to remain in the account. Until the necessary legislation is enacted, the regional surplus toll revenues and CDA concession payments, along with accrued interest, will remain in the State Highway Fund, but will be accounted for separately.
3. TxDOT will provide the RTC a monthly accounting of the balance by project along with interest earned.

4. Pursuant to the Commission's previous devolution, the selection of projects to be financed using funds in the account shall be made by the RTC, subject to Commission concurrence.

5. Projects funded with concession payments and surplus toll revenue should be selected in a cooperative TxDOT-RTC selection process which considers the desires of the cities and counties in which the revenue-generating project is located.

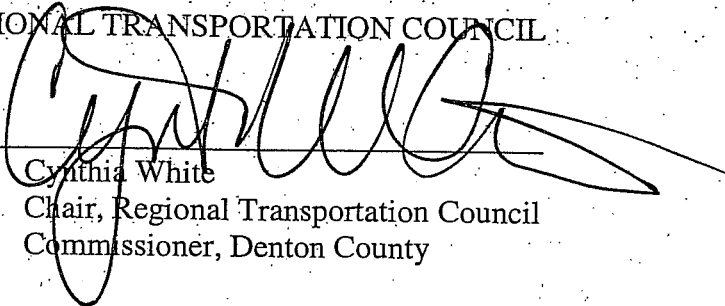
6. The RTC will work with TxDOT and the local entities to incorporate this project selection process into the formal transportation planning process.

7. TxDOT will, in accordance with applicable laws, regulations, and policies, continue to oversee the procurement of contracts to develop projects that are financed with funds in the regional revenue sharing account, the payout of contractor payments from the regional revenue sharing account according to the schedule contained in those contracts, and all other project responsibilities not outlined in this MOU. To the extent allowed by law and subject to Commission concurrence, and in order to streamline the implementation of projects in the region, TxDOT will transfer a portion of funds in the revenue sharing account to the RTC to implement air quality projects through an RTC administered contracting process. If transportation planning projects are determined to be an eligible use of surplus toll revenue and concession payments under applicable law, such projects will also be implemented through an RTC administered contracting process.

IN WITNESS WHEREOF, the parties to the MOU have caused this MOU to be executed by their duly authorized representatives to be effective as of date first set forth above.

RTC:

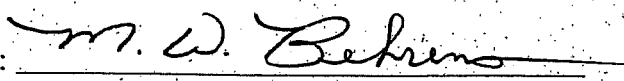
REGIONAL TRANSPORTATION COUNCIL

By: 
Cynthia White
Chair, Regional Transportation Council
Commissioner, Denton County

Date: _____

TxDOT:

TEXAS DEPARTMENT OF TRANSPORTATION

By: 
Michael W. Behrens, P.E.
Executive Director

Date: 1-3-07

TEXAS TRANSPORTATION COMMISSION

VARIOUS Counties

MINUTE ORDER

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VARIOUS Districts

In Minute Order 110727, dated October 26, 2006, the Texas Transportation Commission (commission) authorized the executive director of the Texas Department of Transportation (department) to enter into a "Memorandum of Understanding Regional Revenue Sharing Fund for Surplus Toll Revenues and CDA Concession Payments" (MOU) with the Regional Transportation Council (RTC), the transportation policy council of the North Central Texas Council of Governments (NCTCOG), a federally-designated metropolitan planning organization.

The MOU established procedures for the administration and use of surplus toll revenue and comprehensive development agreement (CDA) payments (NCTCOG funds) within the region served by the NCTCOG, and the selection of projects to be financed with the NCTCOG funds.

Under Minute Order 110727 and the MOU, the selection of projects to be financed with the NCTCOG funds is to be made by the Regional Transportation Council, subject to commission concurrence.

Transportation Code, §228.012, enacted subsequent to the effective date of the MOU, requires the department to hold CDA payments and surplus toll revenue, such as the NCTCOG funds, in a subaccount in trust for the benefit of the region in which a project or system from which those funds are derived is located, and authorizes the department to assign the responsibility for allocating money in a subaccount to a metropolitan planning organization in which the region is located. Those funds are required to be allocated to projects authorized by Transportation Code, §228.0055 or §Section 228.006, as applicable.

Transportation Code, §228.0055 requires revenue received by the commission or the department under a comprehensive development agreement to be used to finance the construction, maintenance, or operation of transportation projects or air quality projects in the region. Transportation Code, §228.006 requires surplus revenue of a toll project or system to 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.

This minute order clarifies the process for commission concurrence in projects selected by the RTC that are financed with the NCTCOG funds in light of the enactment of Section 228.012.

The metropolitan planning organization in the region where the surplus toll revenues and CDA concession payments originate, if any, will determine the qualified projects to be financed with such surplus toll revenues and CDA concession payments, but such projects must be qualified projects pursuant to Transportation Code, §228.0055 and §228.006. The department has no authority to direct the purpose for which such funds are expended.

TEXAS TRANSPORTATION COMMISSION

VARIOUS Counties

MINUTE ORDER

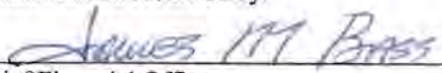
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VARIOUS Districts

IT IS THEREFORE ORDERED by the commission that commission concurrence in projects selected by the RTC to be financed with the NCTCOG funds is limited to ensuring the funds are allocated to projects authorized by §228.0055 or §228.006. The department shall disburse such funds in accordance with directions from the RTC to pay the costs of qualified projects.

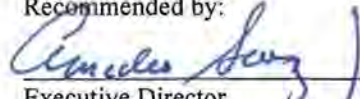
IT IS FURTHER ORDERED that the executive director of the department take all steps as may be necessary to ensure the processes administered by the department clearly confirm the status of any surplus toll revenues and CDA payments as trust funds held for the benefit of the region in which a project or system is located and the legal authority of the metropolitan planning organization, as applicable, and not the department, in allocating any such funds toward qualifying projects, including entering into any necessary agreements to carry out the provisions of this order, including agreements with a metropolitan planning organization necessary to assign the responsibility for allocating such funds to qualified projects.

Submitted and reviewed by:



Chief Financial Officer

Recommended by:



Executive Director

112015 OCT 29 09

Minute
Number

Date
Passed



ATTORNEY GENERAL OF TEXAS
GREG ABBOTT

December 17, 2008

Mr. Amadeo Saenz, Jr., P.E.
Executive Director
Texas Department of Transportation
125 East Eleventh Street
Austin, Texas 78701-2483

Opinion No. GA-0687

Re: Whether monies held in trust in a certain subaccount of the state highway fund may be transferred to a regional transportation authority (RQ-0721-GA)

Dear Mr. Saenz:

You ask whether monies held in trust in a certain subaccount of the state highway fund may be transferred to a regional transportation authority, i.e., a fund outside the state treasury.¹

You state that in November 2007, the North Texas Tollway Authority paid the Texas Department of Transportation (“TxDOT”) approximately \$3.2 billion under a comprehensive development agreement. *See* Request Letter at 1–2. TxDOT has determined that the payment “is surplus toll revenue” derived from “the State Highway 121 project in Denton and Collin counties.” *Id.* Consistently with Transportation Code sections 228.005 and 228.012, we assume that TxDOT deposited the payment in a subaccount of the state highway fund for the State Highway 121 (“SH 121”) project. *See* TEX. TRANSP. CODE ANN. §§ 228.005, .012 (Vernon Supp. 2008).

You also state that TxDOT “has entered into an agreement with the Regional Transportation Council (RTC) of the North Central Texas Council of Governments,” which you indicate is the metropolitan planning organization for the Dallas-Fort Worth region. Request Letter at 2. That 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.” *Id.*

Section 228.012 of the Transportation Code provides in relevant part:

- (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
- (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

¹Request Letter (*available at* <http://www.texasattorneygeneral.gov>).

and may assign the responsibility for allocating money in a subaccount to a metropolitan planning organization in which the region is located. . . .

TEX. TRANSP. CODE ANN. § 228.012(a)–(b) (Vernon Supp. 2008). These provisions clearly demonstrate that TxDOT is required to hold the funds in question “in a subaccount in trust for the benefit of the region.” *Id.* And as we have noted, section 228.005 mandates the deposit of these funds “in the state highway fund.” *Id.* § 228.005. A brief we have received argues that, because the RTC is assigned the responsibility to *allocate* the money, it may also determine the time at which that money shall be *distributed*.² But “allocate” and “distribute” are not equivalent terms.

No judicial decision of which we are aware recognizes the distinction between the terms “allocate” and “distribute.”³ One dictionary equates the two terms. *See* NEW OXFORD AMERICAN DICTIONARY 43 (2001) (“allocate” defined as “distribute . . . for a particular purpose”). Another standard dictionary, while including the meaning of “distribute according to a plan,” also defines the term “allocate” to mean “set apart for a special purpose; designate.” *See* AMERICAN HERITAGE DICTIONARY 48 (4th ed. 2000). The latter dictionary declares that the synonyms for “allocate” include the words “appropriate,” “designate,” and “earmark.” *Id.*

Other portions of the Transportation Code, however, appear to recognize a distinction between the words “allocate” and “distribute.” One provision states that “[t]he department shall *allocate* the *distribution* of funds to department districts in the region that are located in the boundaries of the metropolitan planning organization.” TEX. TRANSP. CODE ANN. § 228.0055(b) (Vernon Supp. 2008) (emphasis added). Another provision of the code, relating to the distribution of the county and road district highway fund, is even more instructive:

(a) The comptroller shall *distribute* to the counties on or before October 15 of each year the money appropriated from the county and road district highway fund for that fiscal year.

(b) The money appropriated under Subsection (a) shall be *allocated* among the counties as follows: . . .

Id. § 256.002 (emphasis added). Finally, a provision of the Transportation Code that was repealed in 2003, stated that “[o]f the money *allocated* under Section 456.022(1), the commission shall

²*See* Brief from Rider Scott, Strasburger & Price, LLP, on behalf of the North Central Texas Council of Governments, to Honorable Greg Abbott, Attorney General of Texas, at 3–4 (Aug. 8, 2008) (on file with the Opinion Committee).

³The highest court of another state has recognized the distinction between the words “allocation” and “appropriation.” In *State ex rel. Haynes v. District Court*, 78 P.2d 937, 943 (Mont. 1938), the court said that the word “allocation” refers to an apportioning of funds, while the word “appropriation” refers to an authorization to spend those funds. That case was specifically cited by this office in Letter Advisory No. 102 (1975).


distribute: . . .” Act of May 19, 1997, 75th Leg., R.S., ch. 588, § 5, 1997 Tex. Gen. Laws 2052, 2053, *repealed by* Act of June 1, 2003, 78th Leg., R.S., ch. 312, § 79(b), 2003 Tex. Gen. Laws 1310, 1330 (emphasis added). These statutes indicate that the Legislature knows the distinction between the words “allocate” and “distribute,” and that, by its use of the term “allocate” in section 228.012 of the Transportation Code, it did not thereby intend to equate the word “allocate” with the word “distribute.” Thus, while section 228.012(b) authorizes a metropolitan planning organization to “allocate” money in a subaccount of the state highway fund, that authority does not extend to a “distribution” of the funds.

We conclude that section 228.012 of the Transportation Code does not provide authority for the Texas Department of Transportation to transfer monies held in trust in a particular subaccount of the state highway fund to a regional transportation authority.

S U M M A R Y

Section 228.012 of the Transportation Code does not provide authority for the Texas Department of Transportation to transfer monies held in trust in a particular subaccount of the state highway fund to a regional transportation authority.

Yours very truly,


GREG ABBOTT
Attorney General of Texas

ANDREW WEBER
First Assistant Attorney General

JONATHAN K. FRELS
Deputy Attorney General for Legal Counsel

NANCY S. FULLER
Chair, Opinion Committee

Rick Gilpin
Assistant Attorney General, Opinion Committee