



Texas Department of Transportation

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July 23, 2003

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OPINION COMMITTEE

The Honorable Greg Abbott
Attorney General
PO Box 12548
Austin, Texas 78711

FILE # ML-43194-03
I.D. # 43194

RE: Whether Article VIII, Section 7, of the Texas Constitution Allows the General Revenue Fund To Be Granted Revenue from the Sale of Property Purchased with Revenues That Are Constitutionally Dedicated to Another Purpose

Dear General Abbott:

The Texas Department of Transportation (TxDOT) asks for your opinion on the permissible use of revenues derived from the sale of property that was purchased with constitutionally dedicated revenues.

Article VIII, Section 7, states that the legislature may not "in any manner divert" constitutionally dedicated revenues. Certain state revenues are dedicated to the construction, maintenance, and policing of roads under Article VIII, Sections 7-a and 7-b. TxDOT uses these constitutionally dedicated revenues to purchase a wide range of equipment and other personal property used in the course of highway construction and maintenance and associated administration. From time to time TxDOT must upgrade or replace personal property and sell off other property that is no longer needed. Historically, when state property has been sold, revenues have been returned to the fund or account from which the property had originally been purchased so that the sale of property does not become a method of reallocating expenditures. The 78th Legislature, however, directed in House Bills 7 and 3042 that revenues from all sales of state personal property, including constitutionally dedicated property, are to be deposited into the general revenue fund.

As explained more fully in the enclosed memorandum from Richard Monroe, TxDOT's General Counsel, this procedure does not seem to be consistent with the constitution for two reasons. First, House Bills 7 and 3042 were improperly implemented before they became law. Second, revenues from the sale of constitutionally dedicated property should be considered constitutionally dedicated; the alternative would provide a conduit for the diversion of constitutionally dedicated revenues in violation of Article VIII, Section 7, of the constitution.

Thank you for your attention to this matter. If we may be of any assistance, please contact Richard Monroe, General Counsel, at (512) 463-8630.

Sincerely,

Michael W. Behrens, P.E.
Executive Director

Enclosure



OFFICE OF GENERAL COUNSEL

MEMORANDUM

TO: Michael W. Behrens, P.E.

DATE: July 18, 2003

FROM: Richard D. Monroe
General Counsel

A handwritten signature in black ink, appearing to read "Richard D. Monroe", is written over the "FROM:" line.

SUBJECT: Diversion of Constitutionally Dedicated Property to General Revenue

You asked me to review the constitutionality of the diversion to general revenue of proceeds from the sale of constitutionally dedicated property. In my view, this procedure is invalid. It was implemented improperly before the bill was signed by the governor, and it diverted constitutionally dedicated revenues in violation of Article VIII, Section 7, of the state constitution. This issue is now ripe for the Texas Department of Transportation (TxDOT) to ask for an opinion from the Attorney General.

Implementation Date of House Bill 7

The General Appropriations Bill passed by the 77th Legislature in 2001 provided:

Receipts to any agency of the state government specified in this Act received from the sale of surplus property, equipment, livestock, commodities, or salvage pursuant to the provisions of Chapter 2175, Government Code, are hereby appropriated to the state agency for expenditure during the fiscal year in which the receipts are received. Receipts from such surplus and salvage sales shall be credited to the appropriation item from which like property, equipment, livestock, or commodities would be purchased.

General Appropriations Act, 77th Leg., R.S., S.B. 1, art. IX, §8.04, at IX-67 (2001), available at <http://www.lbb.state.tx.us>. This appropriation was consistent with Government Code, §2175.185(a), which read:

Proceeds from the sale of surplus or salvage property, less the cost of advertising the sale, the cost of auctioneer services, and the amount of the fee collected under Section 2175.182, shall be deposited to the credit of the appropriate appropriation item of the state agency for which the sale was made.

On March 14, 2003, House Bill 7 was introduced in the Texas Legislature. As eventually passed, Section 20(a) of the bill stated:

Notwithstanding Section 8.04, page IX-67, Chapter 1515, Acts of the 77th Legislature, Regular Session, 2001 (the General Appropriations Act), all receipts from the sale of surplus property, equipment, livestock, commodities, or salvage pursuant to the provisions of Chapter 2175, Government Code, that are received by a state agency during the state fiscal year ending August 31, 2003, shall be deposited to undedicated general revenue, and the amounts deposited are available for general governmental purposes.

Section 7.29 of House Bill 3042 amended the Government Code, §2175.134, to the same effect. House Bill 7 was signed into law by the governor on June 22, 2003, and became effective immediately under Section 22 of the bill, while House Bill 3042 became effective June 18, 2003.

The Texas Building and Procurement Commission notified TxDOT on May 27, 2003, that it would deposit the proceeds from the April auction of state personal property, including purchases made with constitutionally dedicated revenues, into the general revenue fund in accordance with House Bills 7 and 3042.

The action by the Texas Building and Procurement Commission violated the substantive law that was then in effect and the General Appropriations Act, which was also still in effect. It implemented a bill that had not been signed by the governor or allowed to become law without the governor's signature, and this violated Article IV, Section 14, of the state constitution, which specifies the manner in which bills become law, as well as Article I, Section 16, which prohibits any retroactive or ex post facto law. All proceeds from sales conducted before the effective date of House Bill 7 should have been deposited into the appropriate account, including the proceeds from sales of property that was purchased with money from the state highway fund.

The Redirection of Proceeds Diverted Constitutionally Dedicated Revenues

The above resolves the question of diversion for the period before June 22, 2003. It does not, however, resolve the question for the period between those dates and the end of fiscal year 2003. To resolve that issue, it is necessary to consider in more detail the legal principles designed to preserve constitutionally dedicated revenues.

Background

Article VIII, Section 7, of the state constitution provides:

The Legislature shall not have power to borrow, or in any manner divert from its purpose, any special fund that may, or ought to, come into the Treasury; and shall make it penal for any person or persons to borrow, withhold or in any manner to divert from its purpose any special fund, or any part thereof.

Two constitutional provisions provide funding for TxDOT's purchases of property relating to the construction and maintenance of highways. Article VIII, Section 7-a, provides:

Subject to legislative appropriation, allocation and direction, all net revenues remaining after payment of all refunds allowed by law and expenses of collection derived from motor vehicle registration fees, and all taxes, except gross production and ad valorem taxes, on motor fuels and lubricants used to propel motor vehicles over public roadways, shall be used for the sole purpose of acquiring rights-of-way, constructing, maintaining, and policing such public roadways, and for the administration of such laws as may be prescribed by the Legislature pertaining to the supervision of traffic and safety on such roads; and for the payment of the principal and interest on county and road district bonds or warrants voted or issued prior to January 2, 1939, and declared eligible prior to January 2, 1945, for payment out of the County and Road District Highway Fund under existing law; provided, however, that one-fourth (1/4) of such net revenue from the motor fuel tax shall be allocated to the Available School Fund; and, provided, however, that the net revenue derived by counties from motor vehicle registration fees shall never be less than the maximum amounts allowed to be retained by each County and the percentage allowed to be retained by each County under the laws in effect on January 1, 1945. Nothing contained herein shall be construed as authorizing the pledging of the State's credit for any purpose.

Article VIII, Section 7-b provides:

All revenues received from the federal government as reimbursement for state expenditures of funds that are themselves dedicated for acquiring rights-of-way and constructing, maintaining, and policing public roadways are also constitutionally dedicated and shall be used only for those purposes.

Revenues received under these provisions may be spent on any of the constitutionally dedicated purposes. The state highway fund has received the overwhelming bulk of

constitutionally dedicated revenues under these provisions, and this money is used to fund the construction and maintenance of highways, construction and maintenance of buildings TxDOT needs to administer highways, and purchase and maintenance of equipment and other personal property used in connection with the constitutionally dedicated purposes. In addition, the state highway fund receives some revenues that are not constitutionally dedicated. Some of this undedicated portion has been used to further the same purposes as the dedicated revenues, and some has been used for other TxDOT functions. The vast majority of the state highway fund, and thus the vast majority of all direct and indirect expenditures on state highways for the last half century, has been funded with constitutionally dedicated revenues, and this includes the vast majority of personal property purchased by TxDOT for use in connection with the constitutionally mandated purposes.

Obviously, under these constitutional provisions, constitutionally dedicated revenues can only be expended in the constitutionally permitted manner. The question presented by House Bills 7 and 3042 is whether the constitutional dedication is restricted to the actual money received or whether it extends to property purchased with that money.

Article VIII, Section 7

The direct expenditure of constitutionally dedicated revenues is addressed in Article VIII, Sections 7-a and 7-b. Those provisions mandate that the expenditure of money from the specified sources may only be made for specified purposes.

Article VIII, Section 7, goes beyond the limitations of Sections 7-a and 7-b. While the latter provisions address the direct expenditure of money, Section 7 does not say anything about direct expenditures. Rather, the focus of Section 7 is on ways in which constitutionally dedicated revenues can be indirectly siphoned off to other uses. The one specific example cited by Section 7 is that the legislature cannot borrow from constitutionally dedicated revenues.

The provision does not stop there. The reach is extended in two key phrases. First, it applies not only to dedicated revenues that are deposited in the Treasury, but also to revenues that "ought to" be deposited in the Treasury to a dedicated purpose. Second, it states—twice—that the legislature may not "in any manner divert from its purpose" constitutionally dedicated revenues. These two phrases make it plain that Section 7 is designed to go beyond the language of Sections 7-a and 7-b and to prohibit not just the inappropriate expenditure of constitutionally dedicated revenues, but also to prevent the use of indirect means to drain those revenues.

Legal Authorities Addressing Diversion

For the most part, courts and the attorney general have acted decisively to prevent diversion of funds from constitutionally dedicated purposes.

The lead case in this area is *Lawson v. Baker*, 220 S.W. 260 (Tex. Civ. App.—Austin 1920, writ ref'd). The case involved the constitutionality of an act that required state funds to be deposited in a single account and directed the interest on that account to general revenue. *Id.* at 262.

The court ruled that interest on a constitutionally dedicated account cannot be separated legally from the funds in that account:

Interest, according to all the authorities, is an accretion to the principal fund earning it, and, unless lawfully separated therefrom, becomes a part thereof. We think it clear that the interest earned by deposit of special funds is an increment that accrues to such special fund, and any attempt of the legislature to make such interest a part of the general revenue is futile, in the face of the constitutional provisions creating or dedicating these funds to special purposes.

Id. at 272. To avoid a conflict with the constitution, the opinion went on to construe the statute so that it would not apply to constitutionally dedicated revenues. *Id.* at 272-73.

A similar question was resolved in the same way in Tex. Att'y Gen. Op. No. JM-321 (1985): "We conclude that the legislature lacks authority to enact a statute diverting to the general revenue fund interest on the motor vehicle fees and motor fuel taxes dedicated to highway purposes by article VIII, Section 7-a of the Texas Constitution." *Id.* at 3; see also Tex. Att'y Gen. Op. No. JM-593 (1986) at 2 ("If the constitution earmarks money for specific purposes, that money can be dedicated to no other purpose. . . . The prefatory language in article VIII, section 7-a gives the legislature the right to control the 'appropriation, allocation and direction' of the proceeds of a sales tax on gasoline. Neither this nor any other portion of this constitutional provision, however, permits the legislature to dedicate those proceeds to any purpose other than those enumerated therein.")

In Tex. Att'y Gen. Op. No. DM-370 (1995), Attorney General Dan Morales addressed a related issue and concluded that the facts did not amount to unconstitutional diversion. The issue involved whether payments for oil and gas located under state highway property must be credited to the constitutionally dedicated portion of the state highway fund. The opinion concluded that the oil and gas payments were not constitutionally dedicated.

The opinion noted first that the particular state highway property had been purchased in the 1920s and 1930s, before the passage of Article VIII, Section 7-a, of the constitution, and therefore could not have been purchased with constitutionally dedicated revenues.

Although this finding resolved the issue, the opinion went on to discuss the question as though constitutionally dedicated revenues were involved. The opinion next distinguished *Lawson v. Baker* by noting that while an accretion to a special fund is part of that fund, the sale of oil and gas interests do not represent an accretion. Rather, they are funds received for the depletion of real property. Moreover, it noted that royalties do not naturally adhere to real property.

Having resolved the actual question several times over, the opinion went on to say that the legislature, by requiring that proceeds from the sale of highway right of way be deposited in the state highway fund, determined by statute that the proceeds from the sale of highway right of way need not be disposed of in accordance with Article VIII, Section 7-a. This seems to reflect a misunderstanding of the nature of the state highway fund. The state highway fund is a statutory fund that includes both constitutionally dedicated revenues and revenues that are not constitutionally dedicated. Depositing the proceeds from the sale of right of way into the state highway fund does not change their character; proceeds from right of way purchased with constitutionally dedicated funds remain constitutionally dedicated, while proceeds from right of way purchased with other funds are not. Cf. Tex. Att'y Gen. Op. No. JC-250 (2000) (excess motor vehicle registration fees may be deposited to a county's general fund, but must still be used for purposes to which they are constitutionally dedicated).

Based on this apparent misunderstanding, the opinion went on to note that Article VII, Sections 4 and 11, made specific reference to proceeds from the sale of land dedicated to the Permanent University Fund and the Public Free School Fund, but the provisions relating to state highways did not.

While the wording of this opinion seems to suggest in places that proceeds from the sale of land purchased with constitutionally dedicated highway money might not be constitutionally dedicated, the opinion itself stops short of reaching this conclusion. Rather, it concludes only that royalties for oil and gas interests are not constitutionally dedicated.

The DM-370 opinion resolved the issue before it with its conclusion that the right of way in question was not purchased with constitutionally dedicated revenues. It also resolved the issue with the conclusion that royalties do not normally adhere to real property.

The broader dictum of DM-370, relating to proceeds from the sale of real property, rests on a misconception of the nature of the state highway fund, which consists primarily (though not exclusively) of constitutionally dedicated revenues. The reference to Article VII, Sections 4 and 11, overlooks the fact that those provisions are primarily aimed at the investment and reinvestment of two unique funds whose main purpose is to preserve and enhance capital. The constitutionally dedicated highway revenues are not designed to preserve or enhance capital, but rather to allow the building of roads; it is thus unsurprising that they do not have detailed provisions relating to investment and reinvestment. Therefore, the dictum in DM 370 does not resolve the question concerning proceeds from the sale of personal property purchased with constitutionally dedicated revenues.

Analysis

Against this background several points stand out and seem to be crucial to resolving this issue. The starting point must be the language of Article VIII, Section 7, of the constitution. That language is aimed directly at preventing not merely the inappropriate expenditure of constitutionally dedicated revenues, but also the diversion of those funds "in any manner." The litmus test must therefore be whether a course of action would permit the diversion of constitutionally dedicated revenue. In the case of the sale of property, it would.

The legislature has the power through the appropriations process to require TxDOT to sell property, including property purchased with constitutionally dedicated revenues. For example, TxDOT has a large fleet of vehicles, including passenger cars, trucks, and specialized construction equipment, that might be sold if so required by the legislature.

The simple fact is that if the legislature can order the sale of property purchased with constitutionally dedicated revenues, and if the legislature can then redirect the proceeds to general revenue, the purposes of Article VIII, Sections 7-a and 7-b, can be thwarted. The constitutionally dedicated purposes can be undermined and the funds depleted merely by ordering TxDOT to replace its current fleet with new vehicles so that currently owned vehicles had to be sold (and the proceeds delivered to general revenue) and new vehicles purchased (from constitutionally dedicated revenues). Moreover, if the proceeds from the sale of property may be diverted, why not the property itself? Could the legislature simply direct that TxDOT turn over property purchased with constitutionally dedicated revenue to another agency for use in a manner that is inconsistent with the constitutional purpose?

In conclusion, Article VIII, Sections 7-a and 7-b, direct that certain state revenues may only be used for building, maintaining, and policing roads. Article VIII, Section 7, prohibits any legislative action that would "in any manner divert" funds from a

constitutionally dedicated purpose. *Lawson v. Baker* established that a constitutional dedication includes not only the actual money collected, but also interest and any other accretions.

DM-370's conclusion concerning oil and gas royalties was resolved by its conclusion that no constitutionally dedicated revenues were involved. Had constitutionally dedicated revenues been at issue, the same issue might have been resolved by the conclusion that royalties do not necessarily adhere to real property. Moreover, the oil and gas interests were not intentionally purchased for highway purposes and were never put to that use; the same cannot be said for personal property purchased specifically for and used in connection with the construction and maintenance of highways and attendant administrative functions.

The essential problem with the diversion of property proceeds is that it misses the point of a constitutional dedication. The purpose behind Article VIII, Sections 7-a and 7-b, is not to collect money or to make investments; it is to build, maintain, and police roads. It therefore makes little sense to suggest that the money is protected until it is actually used for its intended purpose, but that property purchased with that money can be sold as soon as it is bought and the proceeds then diverted to other uses. That kind of approach simply reads Article VIII, Section 7, out of the constitution by concluding that it only protects what is already protected by Article VIII, Sections 7-a and 7-b.

Therefore, Article VIII, Sections 7-a and 7-b, must be seen as protecting not only the listed revenue streams, but also equipment and other personal property that is acquired with constitutionally dedicated revenues for the purpose of serving the purpose mandated by the constitution. Article VIII, Section 7, prevents the undermining of the constitutional dedication through diversion, in any manner, to purposes other than those specified in the constitution.

For these reasons, it would violate Article VIII, Sections 7, 7-a, and 7-b, if property is purchased with constitutionally dedicated revenues and is then sold so that the proceeds are diverted to purposes other than those to which the revenues are dedicated by the constitution.