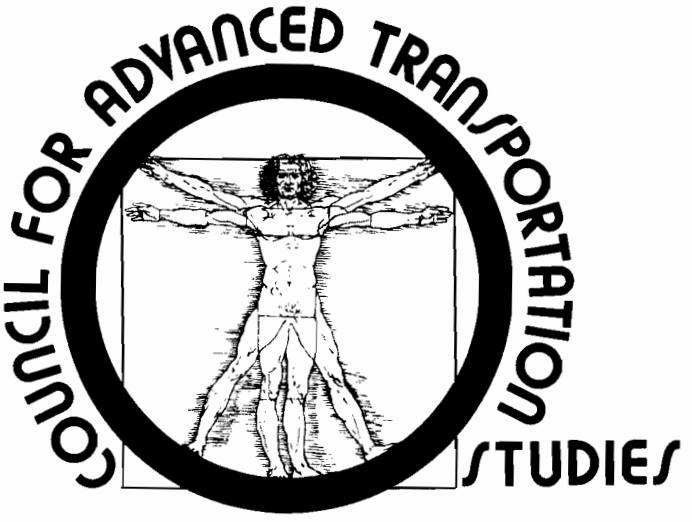
LEGAL OBSTACLES TO THE USE OF TEXAS SCHOOL BUSES FOR PUBLIC TRANSPORTATION

Robert Means
Ronald Briggs
John E. Nelson
Alan J. Thiemann

Research Memo 19

January 1975



The University of Texas at Austin

LEGAL OBSTACLES TO THE USE OF TEXAS SCHOOL BUSES FOR PUBLIC TRANSPORTATION

ROBERT MEANS
RONALD BRIGGS
JOHN E. NELSON
ALAN J. THIEMANN

RESEARCH MEMO 19

JANUARY 1975

PREPARED FOR

COUNCIL FOR ADVANCED TRANSPORTATION STUDIES
THE UNIVERSITY OF TEXAS AT AUSTIN
AUSTIN, TEXAS 78712

IN COOPERATION WITH

DEPARTMENT OF TRANSPORTATION
OFFICE OF UNIVERSITY RESEARCH
WASHINGTON, D.C. 20590

NOTICE

This document is disseminated under the sponsorship of the Council for Advanced Transportation Studies and the Department of Transportation, Office of University Research, in the interest of information exchange. The United States Government, and the University of Texas assume no liability for its contents or use thereof.

LEGAL OBSTACLES TO THE USE OF TEXAS SCHOOL BUSES FOR PUBLIC TRANSPORTATION

Legal obstacles to the use of public school buses for public transportation are created by three types of legal regulation:

(1) Texas Education Code provisions make it difficult to employ school buses for purposes other than the transportation of pupils.

(2) The authority operating the school buses may be required to obtain a certificate of public convenience and necessity or franchise before it can lawfully use them to offer public transportation.

(3) The use of school buses for public transportation probably will make the vehicles subject to additional safety standards, which may in some respects be more rigorous than those applicable to school buses alone.

The implications of these three types of regulation are discussed in more detail in Appendices A and B of this Research Memorandum. The appendices referred to in Appendices here are on file in the office of Professor Ronald Briggs.

TEXAS EDUCATION CODE

The core of the problem is Article 16.55 of the Education Code, which prohibits the "unauthorized use" of school buses. The statutory context and discussion with a Texas Education Agency official suggest that any use of school district-owned school buses for public transportation would be an unauthorized use and therefore unlawful.

Two courses of action are open for dealing with this problem. The first and preferable alternative is to amend the Education Code to permit reasonable sharing of school bus cost and use between a school district and appropriate public transportation authority. The second alternative is for the public transportation authority to own the school buses and to lease them on reasonable terms to the school district for use during the hours when they are required for the transportation of pupils. This second alternative probably is lawful under existing statutory provisions, but an Attorney General's Opinion on its

legality should be obtained before embarking on such an undertaking.

CERTIFICATION

Texas law gives home rule cities the power to franchise and regulate urban transportation.[1] If, on the other hand, the authority operates beyond the limits of the city and its suburbs or adjacent areas, it becomes subject to the jurisdiction of the Texas Railroad Commission and may have to obtain a certificate of public convenience and necessity from the Commission. Both the franchising power conferred on home rule cities and the requirement of Railroad Commission certification are limited to transportation "for hire." This last phrase is likely to be interpreted broadly, but if the transportation authority were supported wholly from general tax revenues, with no direct or indirect user charges, its operations presumably would not be considered to be "for hire" and would therefore be exempt from both city franchising and Railroad Commission certification.[2] This exemption would, however, have little or no practical significance in the case of a home rule city, since the city's permission would in any event be required before the authority could use city streets.[3]

In sum, the operations of the authority will require city approval if it provides intracity transportation and will require Railroad Commission certification if:

(1) The authority operates beyond the city and its suburbs and adjacent areas and

(2) is supported wholly or in part by user charges.

---

[1] TEXAS REVISED CIVIL STATUTES Art. 1175(21). The attached memorandum incorrectly cites Art. 1118W, sec. 1.

[2] In this respect the present report disagrees with the attached memorandum. The case cited in the memorandum, involving the joint purchase of a station wagon for use in a car pool, did involve user charges, since all of the users share in the cost of purchasing and, presumably, maintaining the vehicle. The case does illustrate, however, how broadly the phrase "for hire" is likely to be interpreted.

[3] TEXAS REVISED CIVIL STATUTES art. 1175(12).

As a practical matter there should be little or no difficulty in obtaining the necessary franchise or certificate if the authority will not compete with existing carriers. If competition is involved, however, the authority can expect its request for a franchise or certificate to be opposed before the city or Railroad Commission and, if granted, to be challenged in the courts.

SAFETY REGULATIONS

School buses are subject to the Joint Agency Safety Regulations. These are revised annually, but a bus is only required to comply with the regulations current at the time of its manufacture or most recent remodeling. Formally, safety regulations governing buses used for public transportation depend on the geographical scope of the buses' operations. Buses operating only intra-city are subject to municipal safety regulation; buses operating outside a city but still intrastate are subject to safety regulations promulgated by the Railroad Commission; buses operating interstate are subject to United States Department of Transportation safety regulations.

This formal jurisdictional structure is somewhat misleading, however. A more realistic way to describe the regulatory framework would be to begin with the DOT regulations, which apply in their own right to buses used in interstate transportation. Next, the Railroad Commission in fact has no safety regulations of its own but incorporates by reference the DOT regulations and the Joint Safety Regulations. Finally, municipal safety regulation varies from city to city, but most Texas cities appear to have adopted some combination of the DOT regulations and the Railroad Commission regulations.

Thus, there appear to be only two independent sets of safety regulations: the Joint Agency Safety Regulations and the DOT regulations. Since school buses must in any event comply with the former, the question comes down to this: To what extent are the DOT regulations more rigorous than the Joint Agency Safety Regulations? It appears that compliance with the Joint Agency Safety Regulations should go far towards meeting the DOT regulations as well, but what additional steps, if any, would be required by the DOT regulations is something on which the writers of this report are not qualified to speak.

APPENDIX A

M E M O R A N D U M

To: Professor Robert C. Means

From: John E. Nelson and Alan J. Thiemann

Re: Use of School Buses for Public Transportation--II; Requirements for Certification and Applicable Safety Regulations (With Appendices and Exhibits).

QUESTION PRESENTED AND INTRODUCTION

The initial memorandum discussed the statutory impediments to operation of a dual-purpose transit authority under existing law and suggested steps to be taken, both as to changes in the law and as to operation within its boundaries if legislation cannot be obtained. The present memo is directed to the following question:

> Once a Local Transit Authority has been established, the transfer of assets from school district to Authority has been completed, and a contract for carriage of school children acceptable to the reviewing authorities has been agreed upon, what must the Authority do in order to qualify to operate the public transportation portion of the system?

This question has a two-part answer: "obtain a certificate of authority to operate from the appropriate governmental body," and"demonstrate compliance with applicable safety regulations." These steps will be fully analyzed in the Discussion below.

Other questions of law are present, and will be identified as checkpoints for further research but will not be discussed in detail herein. One such question is the organizational format of the Authority. Certain policy decisions - whether or not to attempt to make a profit, for example - will determine whether incorporation of the

of the Authority should be sought under the Texas Business Corporations Act, the Texas Non-Profit Corporations Act, or the Texas Miscellaneous Corporations Act. It is suggested that, since local needs will determine the policy guidelines to be followed, and therefore the choice of corporate structure, local counsel be retained to assist in actual charter formulation.

DISCUSSION

I. Certification

Governmental units on several levels possess the power to certify transportation authorities to carry the public. One or more of these units may have jurisdiction over the application of an Authority, depending upon the geographical and political characteristics of the area to which the Authority seeks to provide service.

A. Authority for Intracity Operation

The Texas Legislature has delegated authority to franchise and regulate intracity street transportation to the duly constituted government. See TEX.REV. CIV.STAT.ANN. Art. 1118W, §1 (1957). An Authority desiring to operate a system carrying passengers for hire within a single city, its suburbs and adjacent areas must first obtain a franchise from the city.

The guidelines which Texas cities follow in approving franchise operation are formulated as city ordinances. The provisions of such ordinances may be expected to vary widely according to local conditions, although it is relatively certain that each ordinance will prescribe, in some form: procedures for application;

the burden of showing public convenience and necessity; and observance of safety and periodic re-registration regulations. For example, Austin requires: filing with the City of proposed routes, fee schedules, proof of insurance, proof of driver qualification and compliance with certain specific safety regulations, including placement of fire extinguishers on all buses. Interview with Staff Member, City Legal Department, Austin, Texas, June 20, 1974. It is also clear from the history of the TEI (UT shuttle) certification process that it is more difficult to obtain operating authority where a franchise has already been granted or a municipally-owned and -operated service exists. Id.It may be worthwhile, therefore, for an Authority seeking to provide combined service to seek an accomodation with existing transportation services.

The foregoing discussion pertains only to a local transportation authority operating wholly within the corporate limits of a home city rule, or its suburbs or adjacent areas. See Villalobos v. Holguin, 146 Tex. 474, 208 S.W.2d 871. Transportation Authorities providing services beyond these limits provide not "intracity" but "intrastate" transportation subject to regulation by the Texas Railroad Commission.

B. Authority for Intrastate Operations

The Texas Railroad Commission (hereinafter RRC) has jurisdiction of all public transportation in Texas not exempt as "intracity." TEX.REV.CIV.STAT.ANN. art. 911a (1964), as amended, (Supp. 1974) (Texas Motor Bus Act). Thus, service between cities or between a single city and rural

points outside the exempted area requires a Motor Bus Certificate issued by the RRC.

Strictly speaking, an Authority may carry passengers under either a Motor Bus Certificate (authorizing carriage of passengers and luggage only) or a Motor Carrier Certificate (authorizing packages, and baggage not accompanying a passenger). It is suggested, however, that in most cases, application for the more limited authority will serve the desired purpose without attracting unnecessary opposition from present certificate-holders.

Both certificates require the applicant to demonstrate the "public convenience and necessity" of the proposed service. TEX.REV.CIV.STAT.ANN. art. 911a,§3(1964). This requirement imposes upon the applicant the burden of proving by substantial evidence: 1) that existing passenger service and facilities in the designated service area are inadequate; 2) that public convenience and necessity require the designation of adequate service; and 3) that the public convenience will be promoted by granting certification to the present applicant. Id.§§3,6.

In the basic outline, the procedure for obtaining certification is as follows: First, a written application for certification is filed with RRC. Second, the application is docketed for public hearing; notice of this hearing is sent to all carriers currently serving the relevant area or any portion thereof. Third, the hearing is held; whether or not the application is contested, applicant or its representatives must attend. Id.§§9,10. At the hearing, the applicant will be expected to show: the ability of proposed routes

to support such traffic; the ability to do so without unreasonable interference with the use of these highways by the general public; the probable permanence and quality of the proposed service; the financial ability and responsibility of the applicant; its organization and personnel; the character of vehicles and the character and location of termini and depots proposed to be utilized; the experience of the applicant in the transportation of passengers; and the nature or proposed insurance coverage. Id.§7. A further prerequisite to authorization is the filing with and approval by the RRC of the fee schedule, routes, and time schedule for service. After receiving authorization, the Authority must file notice of any and all changes in its service, routing or facilities as well as any potential agreement for sale of certificate, which must be approved by the RRC before such sale may be executed.

Sanctions for failure to comply with statutory requirements and/or RRC orders are set out in §14a of art. 911a; they include fines, jail sentences for individual violators, and suspension of certification.

RRC jurisdiction applies to all non-exempt carriage of "passengers for hire." However, it should be noted that the RRC construes this term in a manner designed to protect its regulatory prerogatives. For example, the RRC recently held that ten businessmen who jointly purcased a station wagon to use in their car pool were engaged in carriage of passengers for hire. Interview with T. Paul Bulmahn, Hearing Examiner, RRC, Austin, Texas, June 6, 1974.

The basis for decision appeared to be the joint ownership of the vehicle, which was sufficient to take the plan out of the "private" sector. Apparently, then, it is impossible to elude RRC regulation by providing free service. Since there is no legal benefit in providing free transportation, local transit authorities should in most cases plan to defray the costs of operation by charging some fee for non-school pupil transportation, particularly in light of the observation (noted in Memo I) thatit will be difficult for a separate transportation service to provide pupil transportation at a lower cost than an ISD-operated system.

Mechanics of Application - Rules of practice and procedure in the RRC are set out in RAILROAD COMMISSION OF TEXAS, RULES OF PRACTICE AND PROCEDURE FOR THE TRANSPORTATION DIVISION (1972). This manual is enclosed as Appendix A to this memorandum.

The application for Motor Bus Certificate (Form 2) appears as Appendix C; it has been annotated for the convenience of planning officials. Note that the back page of this form sets out three additional requirements with which the local Authority must comply before beginning operations. First, the vehicle tax must be paid according to the computation schedule shown. Second, the Authority must provide proof of liability and property damage insurance for each vehicle to be operated. Required coverage amounts are determined by the seating capacity of each bus; again, the computation scale appears on the back of Form 2. Third, the Authority must demonstrate compliance with the Workmen's Compensation Law of Texas, TEX.REV.CIV.STAT.ANN. art. 8306 et seq. (1973), by filing a

a copy of an appropriate Workmen's Compensation Insurance policy. These items may be furnished after the certification hearing but must be furnished before the Authority begins operation.

As noted above, carriers currently serving the relevant area may oppose certification. A local combined-service Authority should not proceed to the certification hearing without having marshalled available support and identified potential opposition. To assist in this effort, a list of Motor Bus certificate holders serving selected Texas communities has been compiled from RRC files and is enclosed as Appendix D. This list should not, however, be regarded as exhaustive, as there are indications that not all carriers have complied with their statutory obligation to notify the RRC of changes in ownership and service and that the RRC files themselves have not been completely cross-referenced.

C. Authority for Interstate Operation

Unless exempt, an Authority providing interstate passenger and/or freight service will be subject to the regulatory jurisdiction of the Interstate Commerce Commission (ICC). Operating authority may be sought in the form of a certificate of public convenience and necessity issued by that body. See 49 U.S.C. § 306(a)(1) (1970); I.C.A. § 206(a)(1).

The exemption most likely to be available is the "commercial zone" exemption, which provides that no part of the Interstate Commerce Act, except the provisions relative to qualifications and maximum work hours of employees and safety of equipment operation, shall apply to

the transportation of passengers or property in interstate

> or foreign commerce wholly within a municipality or within a zone adjacent to and commercially a part of any such municipality or municipalities, except when such transportation is under a common control, management or arrangement for a continuous carriage or shipment to or from a point without such municipality, municipalities, or zone, and provided that the motor carrier engaged in such transportation of passengers over regular or irregular routes in interstate commerce is also lawfully engaged in the intrastate transportation of passengers over the entire length of such interstate route or routes in accordance with the laws of each state having jurisdiction.

49 U.S.C. § 303(6)(8) (1970); I.C.A. § 203(b)(8). For a sample determination of the limits of the municipality exemption, see Yellow Transit Freight Lines, Inc. v. United States, 121 F.Supp. 465 (N.D. Tex. 1963). Basically, the exemption extends 2 miles beyond the city limits of a base municipality whose population is less than 2500; 3 miles where the population is 25,000-100,000 and 5 miles where the population exceeds 100,000. Commercial Zones and terminal Areas,46 MCC 665, 1946.

Note, however, that the exemption only applies if the operation is lawful under the laws of each state having jurisdiction. This problem is exacerbated by the fact that there is no reciprocity between any of the local, state or federal decision-makers; an RRC determination is not binding on the ICC or the Public Service Commission of any neighboring state. Two examples will serve to illustrate this point. (1) A local transit authority seeking to

provide combined school/public transportation throughout the Texarkana, Tex.-Ark. Zone, but no more than 5 miles outside corporate limits on either side of the state line, must obtain a franchise from both cities, the RRC, and the Arkansas PSC. If it operated only within the corporate limits, the city franchises would suffice. (2) A similar program for Sherman-Denison-Durant, Okla., would require franchises from each city, the RRC, the Oklahoma PSC, and the ICC (because, despite a fair amount of Sherman-Denison traffic toand from the teachers' college at Durant, the latter town is beyond the 4-mile territory that would be exempted).

The lack of reciprocity means that, at best, one body's determination of public convenience and necessity will be evidence admissible before another authorizing body. Here, again, however, it would undoubtedly strengthen an Authority to present amicus briefs from a previously-authorizing body where such procedure is permitted.

Further, any local Authority expecting to provide interstate service should familiarize itself with the provisions of 49 U.S.C. 302 et seq. (1970), and regulations promulgated thereunder by the ICC. These statutory provisions and regulations govern all forms of motor carriage. While the relevant portions have been summarized in this memorandum, an Authority should review these provisions and regulations regularly to keep abreast of any changes which may affect its operations.

II. Safety Regulations

Buses used in a combined-service program must meet the safety requirements for carriage of school children as well as those of the applicable agency which regulates its public transportation aspects. While there is statutory language that indicates that buses owned by a local Authority and providing pupil carriage under contract with a school district might not be subject to school-bus safety regulations, we do not believe such language to be determinative in this instance. Presumably, such language was intended to cover those cases where the contract carrier was using buses of the "Dreamliner" or "Highway" body style, not the light-frame "yellow school bus"type which most of the combined-service Authorities may be expected to employ. We therefore believe that standard school-bus safety regulations will apply to buses of a type customarily used for pupil carriage but not to those ordinarily used for intercity highway carriage. See TEX.REV.CIV.STAT.ANN. art. 6201d (1970) (Texas Uniform Act Regulating Traffic on Highways) (see Appendix G). Even if Article 6701d is construed to exempt Authority buses from such regulations, school districts may insist on their observation as a condition of the contract for service. All things considered, Authorities should plan to comply with the Joint Agency Safety Regulations issued annually by a committee of representatives from the Texas Education Agency, the State Board of Control, and the Department of Public Safety, under authority granted by Section 105 of Article 6701D.

These joint regulations take the form of specifications for every physical component of the bus, focussing on body and

chassis characteristics. Appendices E & F contain applicable specifications for the current year. The specifications are revised each year, but a bus is required to meet only the specifications in force at the time of its manufacture, except that a bus which is remodeled must possess all features required as of the year of remodeling. Annual revisions to joint minimum specifications may be obtained from the Specifications and Standards Section, State Board of Control,Austin, Texas.

All school buses must be equipped with convex mirrors or other devices which give the driver a clear view of the area immediately in front of the vehicle that would otherwise be hidden from view. TEX.REV.CIV.STAT.ANN. art. 6701d §105(c)(Supp.1974) (Appendix G, p.44). Further stiff penalties are prescribed for use of flashing warning lights or "School Bus" markings or "wing signs" (extendable to an angle perpendicular to the side of the bus by driver activation) except when the vehicle is stopped on a highway for the purpose of permitting school children to board or alight from the bus. Interview with Inspector W. Hale, Department of Public Safety, Austin, Texas, June 20, 1974; see TEX.REV.CIV.STAT.ANN. art.6701d, §105(b) (Supp.1974). According to Inspector Hale, there is a possibility that Texas might refuse to permit an Authority to operate buses painted in the traditional yellow color. However, it is our belief that an Authority using buses in a combined-service Program will be able to argue successfully for the retention of the color on the grounds of pupil safety and the hardship to the Authority of repainting its vehicles.

Because of the comprehensiveness of the Joint Agency

Regulations and the lack of precise definition of the regulations issued by governmental units, we suggest that in most cases, compliance with the Joint Agency Regulations will be more than sufficient to meet local, state and Federal standards.

Local Standards. - Municipal safety regulations may be expected to vary from city to city. Most Texas cities have adopted some combination of RRC and U.S. Department of Transportation (DOT) regulations. Interview with Michael Sampson, City Legal Department, Austin, Texas, June 20, 1974. Local counsel or city officials should be contacted to determine what ordinances apply in the relevant service area.

State Standards. - As noted in Part I, service is subject to state regulation whenever it is provided outside a municipality. The relevant RRC safety regulations are set out in the Commission's Motor Transportation Regulations (Appendix B). These regulations purport to set safety standards in three ways: (1) Part 13.1 of the regulations admonishes carriers to operate vehicles safely. This general exhortation appears as a practical matter to have no independent force; no case has been found in which decertificatoin or other penalty has been imposed for violation of this provision alone, without some violation of some more specific standard. (2) Part 13.1 also requires carriers to comply with all provisions of the Equipment Article (Art. XIV) of Article 6701(d). This requirement is much more specific, but it should already have been complied with if the Joint Agency regulations, discussed above, have been observed. [A summary

of the appropriate sections applicable to an Authority is attached to Appendix G. See generally Part 13, Appendix B.] (3) Part 11.1 of the regulations incorporates by reference all applicable DOT regulations. See 49 C.F.R. Ch. 11, §§ 390-98 (1973). This appears to be the only new safety requirement imposed by state regulation, that is, the only requirement which the Authority would not otherwise have to meet. However, a comparison between the DOT requirements and the Joint Agency Regulations indicates substantial similarities - even, on occasion, greater stringency in the JAR's. Though we lack the engineering expertise to offer an authoritative conclusion, we suggest that compliance with the Joint Agency Regulations will assure compliance with DOT standards in most, if not all cases.

To summarize - the net legal effect of operating a service subject to RRC regulation will be to subject it to the safety minima prescribed in the DOT regulations. Compliance with the Joint Agency Regulations should assure substantial compliance with DOT standards, but the JAR's serve only as guidelines in this context. The DOT regulations are the legal benchmark here.

Federal Standards. -- When involved in interstate service, a local transit Authority must comply with DOT regulations promulgated under authorization of the Interstate Commerce Act. 49 U.S.C. §304 (1970); § 204, I.C.A. See 49 CFR, Subchapter B, "Motor Carrier Safety Regulations under Chapter 111" - Federal Highway Administration, DOT. (See Appendix H for a summary and annotation). Copies of Motor Carrier Safety Regulations, updated annually, may be obtained

from the Bureau of Motor Carrier Safety, DOT; the DOT office in San Antonio; or purchased at a nominal charge from the U.S. Government Printing Office.

Of course, as pointed out in the preceding section, the Authority will already be subject to these regulations if it operates in non-municipal areas and thus is subject to RRC regulation.

[N.B.: Interviews with safety officials indicated a universal dissatisfaction with the quality and training of school bus drivers. Deficiencies inthis area were thought to be a major cause of bus accidents and injuries to children outside the bus; the officials traced much of the difficulty to hiring of women and the elderly who seek to supplement other incomes. Local transit Authorities would be well-advised to make driver positions full-time jobs; require comprehensive training and periodic requalification; and offer pay commensurate with the responsibilities involved. Such a plan would result not only in safer service, but would apparently be a strong selling point in terms of "public convenience and necessity."]

APPENDIX B

MEMO: Prof. Robert Means

FROM: John E. Nelson

RE: Use of School Buses for Public Transportation

QUESTION PRESENTED

May a school district permit its school buses to be used to provide public transportation during the hours they are not in use for transporting pupils?

BRIEF ANSWER

At present, such an arrangement is expressly prohibited by the Texas Education Code. It would therefore be preferable to obtain repeal of the obstructing sections and replace them with enabling legislation. If this is not feasible it may be possible to accomplish the desired objectives under existing law by sale of buses to independent transit authorities who would in turn contract to provide pupil transportation.

DISCUSSION

Article 16.55 of the Texas Education Code prohibits the use of school buses on unauthorized routes:

> "School buses shall be operated to and from school upon approved school bus routes and no variations shall be made therefrom. The penalty for varying from authorized routes and for unauthorized use of buses shall be the withholding of transportation funds from the offending county or school district. In the event the violation is committed by a district which receives no Foundation School Program Funds, the penalty provisions of Section 4.00 (sic; should read 4.02) of this code shall be applied."

S 4.02 proscribes misappropriation of funds and/or misrepresentation of local board use of them; such misfeasance is considered a felony punishable by a 1-5 year prison term.

In light of such a stringent potential penalty, it will be necessary to devise a program that will clearly give rise to a good faith claim of right on the part of local school officials if they are to be persuaded to participate in a joint school/public transit program. The Foundation School Program is the heart of public school financing, especially where local property taxes are least adequate because of low bases or inefficient administration. See generally, C. BARTLETT, PROPERTY TAXES IN TEXAS SCHOOL DISTRICTS: A STUDY FOR THE GOVERNOR'S COMMITTEE ON PUBLIC SCHOOL EDUCATION (1969). Even wealthier districts regard the state funds as indispensable, for they allow locally-assessed monies to be diverted to building improvements and upgraded programs. In short, no responsible county or district board can be expected to risk losing its Foundation School funds.

Therefore, it is recommended that an effort be made to repeal Article 16.55 and substitute for it a provision expressly authorizing multipurpose use of buses. If the customary pattern repeats itself, such a provision can be expected to take the form of an enabling provision requiring that the plan be approved by the Texas Education Agency. In view of the need for accurate appropriations estimates and efficient use of both state and local funds, such a requirement should not be unduly burdensome.

Chapter 21 of the Code contains general provisions governing purchase, sale, operation and service of school buses. Ch. 16, Subch.F, TEX. EDUC. CODE ANN. (1972). Some of its sections may require amendment if Art. 16.55 is so altered as to change the proration between state and local authorities of depreciable costs.

Generally, school buses must be purchased by and through the State Board of Control. CODE, Art. 21.161. Purchasing procedures and financing methods are set out in Art. 21.165-66, Sale of buses is also supervised by the Board of Control. CODE, Art. 21.167. Such sale must be made by the Board of Control, or by the county/district trustees pursuant to regulations promulgated by the Board of Control. Id.; CODE, Art. 21.168. Failure to comply with such procedures may result in exclusion of the district from the Foundation School Fund for one year. CODE, Art. 21.169. The clear intent of the Legislature is that best use be made of state funds, both in terms of purchase cost and resale

A program for altered use of buses must take this state interest into account.

The same rationale underlies the definition of "authorized route" set forth in the Code. TEX. EDUC. CODE ANN. Art. 16.56 (Supp. 1973). This definition takes into account the number of miles each bus must travel, the percentage of paved road on the route, and the "pupil capacity," a term of art which refers to actual number of pupils served, not the physical capacity of the bus. This article is apparently re-enacted frequently in order to adjust the formula for greatest efficiency in allocation of bus funds. It would seem that this task could be better performed by the Agency under a general grant of authority by the Legislature,hence, Recommendation No. 2: Repeal or amendment of Art. 16.55 should be accompanied by amendment of Art. 16.56 to provide for promulgation of route standards by the Texas Education Agency, subject to periodic reformation and limited judicial review under customary administrative law criteria. Such a change would result in greater administrative flexibility in general and would facilitate the joint bus use project.

If it proves impossible to obtain legislative action, existing law suggests one course of action which would avoid the prohibition contained in Art. 16.55 Art. 16.63 allows school districts to contract with public transportation authorities for provision of necessary transportation services if the cost of such contract would be less than the cost of maintaining a school bus transportation system. Contract provisions and price are subject to the approval of the State Board of Education. At present, no school district is under such a contract, and the Texas Education Agency has neither established guidelines for review nor assigned to any official the responsibility for making it. In a telephone conversation on April 19, 1974, an official in the Agency's Transportation Section stated that he believed the provision to be a "source of flexibility," but went on to surmise that he could not foresee any circumstances under which the primary condition for approval--lower cost under the contract--could be met.

However, it is suggested that such condition could be met by the following plan:

(1) Organization and charter of a Local Transit Authority under laws applicable to such entities.

(2) Sale of school buses and maintenance equipment and transfer of all bus-related personnel to the Authority.

(3) Negotiation of a contract meeting the conditions of Art. 16.63, and submission of that contract for approval to the State Board as required.

(4) Use of the buses for public/pupil transportation.

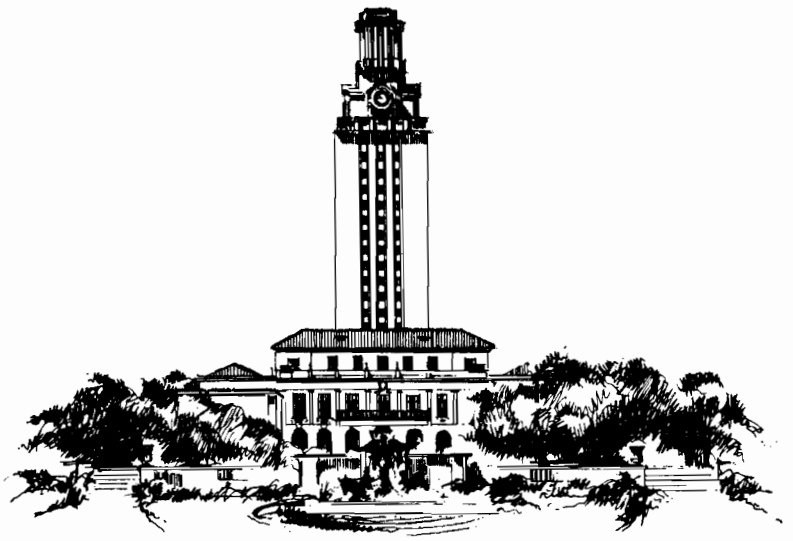
This method lacks the advantages of operation under a clear grant of authority. The primary disadvantage is that all cost-sharing problems must be resolved in favor of the school system; it is clear, for example, that the Board of Control would demand an arm's length, full-price transaction of Step Two. The uneven financial burden created by the need to assure approval by the relevant bonds and agencies should be regarded as partially offset by the substantial bloc of "guaranteed business" represented by the pupil transportation contract. The degree of such offset will depend, of course, on the efficiency of route planning and material utilization by the Authority. Further, legislative authorization and enlightened administrative supervision would be preferable for review of policy decisions that may become necessary as the plan becomes operational. Under the suggested "improvisation," failure to observe the statute would result in loss of Foundation School funds; therefore, refusal to approve the sale or the Art. 16.63 contract would effectively prevent the plan from becoming operational--possibly at a time when reconversion to the school-operated system would be expensive and unwieldy.

If contract approval is withheld, it may be possible to sue for a declaratory judgment declaring the contract legal. Art. 16.63 sets out only the "best price" condition; in the absence of other express conditions, it should be argued that satisfaction of the cost requirement is sufficient and approval is therefore a ministerial act which can be compelled by suit. However, Art. 16.63 has not yet been construed, and challenges to agency action have not been regarded with favor by Texas courts.

A preferable strategy would be to interest a school district and/or local government official in the plan and have him request an Attorney General's Opinion through the county auditor as to the legality of such a plan before any action is taken. Any county auditor may request such an opinion, and Texas

courts have taken into account reliance on such opinions where litigation has later become necessary. Art. 4399, TEX. REV. CIV. STAT. ANN. (1966). See comment, Contracting with the State of Texas, 44 TEXAS L. REV. 56, 124-5 (1965). Such a request would therefore be invaluable as a planning guide.

Further comment is rendered difficult by the dearth of reported decisions construing the relevant Code sections and the apparent absence of internal agency guidelines. A brief overview of applicable rules may be found in HANDBOOK FOR LOCAL SCHOOL OFFICIALS (1973).



Council for Advanced Transportation Studies

THE UNIVERSITY OF TEXAS AT AUSTIN