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**ACCESS MANAGEMENT STRATEGY IN TEXAS:  
Legal and Policy Considerations \***

A Report to the Texas Transportation Institute  
by

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## **PREFACE**

Seeking solutions to managed access to our state highways and roads has been an evolutionary process. Modern highway policy and planning incorporate the concept of access management to protect the public's infrastructure investment as well as to protect the public's health, safety, and welfare. This investigation was a first step in determining the legal considerations and climate in Texas for developing and implementing its own access management program.

## EXECUTIVE SUMMARY

Drivers in Texas traveled approximately 394.8 million daily miles on state highways during 1998 and approximately 557.9 million miles on all roads in that year. Coupled with these volumes is the fact that arterial roadways can have seventy or more driveways (access points) per mile – each providing a set of conflict points with which the driver must contend. Little wonder, then, that the State of Texas and the Texas Department of Transportation (TxDOT) must have an effective strategy to respond to these traffic volumes. One solution is development and implementation of an access management program (AMP). Access management is part of a growing national trend in response to the realization that individual states and communities can no longer build their way out of congestion. An AMP:

- Is designed to integrate land use planning, engineering, and legal practices to maximize the operational efficiency and safety of all functional categories of roadways;
- Includes strategies to address access issues and implement techniques;
- Involves managing access to land development while simultaneously preserving the flow of traffic on the surrounding road system in terms of safety, capacity, and speed; and
- Provides a means of implementing a designated state system of arterial roadways that improves mobility while providing access to surrounding development.

As a result, multiple stakeholders have a vested interest in an AMP.

The purpose of this research was to look at the legal and policy dimensions of implementing an access management program in the state of Texas. This was accomplished by meeting three objectives:

1. Identification of policy and legal considerations in access control in general as well as specific policy considerations in targeted states – those that have implemented or are in the process of implementing an AMP;
2. Review of policy issues relating to highway transportation access control in general and delegation of powers to TxDOT in particular; and
3. Determination of what action, if any, is needed for TxDOT to develop and implement an AMP.

The study first identified and defined four legal methods of controlling access, each of which stems from increased competing interests of public and private rights. These included: police powers, eminent domain, the law of nuisance, and contractual agreements. Police power is the ability of a state (or community) to legislate general regulations on behalf of public health or safety including preventing a person from using

her/his property to the detriment of the general public welfare. Access control also involves eminent domain. This control confers on the government the right to acquire possession of property in the manner directed by the Constitution and the laws of the state whenever the public interest so requires. Two lesser-used mechanisms include nuisance, roughly described as the use of property by one party so as to obstruct free passage or use of highways and other public rights; and contractual agreements such as an agreement between a public agency and the owner of property abutting a highway for present or future access to a highway.

In addition to looking at specific legal means of access control, the study also investigated the legislative delegation of power to TxDOT. This investigation was done through review of the applicable statutes, rules, attorney general opinions, case law, legislative history, and interviews with key personnel.

TxDOT is governed by the Texas Transportation Commission (TTC), which, in turn, receives its authority from the Texas legislature. The TTC is the policy arm of TxDOT. The Department, on the other hand, is the management arm. TxDOT's mission is to provide safe, effective, and efficient movement of people and goods in the state. Among other duties, the TTC, with the advice and recommendations of the Executive Director, is required to:

- Plan and make policies for the location, construction, and maintenance of a comprehensive system of state highways and public roads;
- Lay out, construct, maintain, and operate a modern state highway system;
- Develop a statewide transportation plan that contains all modes of transportation;
- Adopt rules for the operation of the department; and
- Establish policy necessary to carry out the duties and functions of the department and the TCC.

TxDOT, and the TTC in particular, are given broad authority to make policies to provide a safe, effective, and efficient transportation system. Additionally, the Texas courts and Attorney General Opinions, in general, appear to give broad discretion to TxDOT decisions. However, interviews with key people in various areas of Texas transportation – inside and outside of governmental bodies – indicate that the unique characteristics of Texas, coupled with the wide, disparate, and cogent stakeholders' interests, mandate that TxDOT be given additional guidance from the legislature. In answering the question, "Does TxDOT have the authority to implement an access management program?" the majority of responses fell into this pattern: *The answer lies somewhere in between. It probably has the authority but would probably not initiate the program without a greater mandate from the legislature. Therefore, TxDOT would benefit by being given clear, legislative direction.*

Finally, the investigation looked at how other targeted states handled legal and policy issues. From this review of individual state departments of transportation (DOT), several areas clearly stood out as pivotal to successful AMP implementation:

1. Preference for clear, legislative direction;
2. That legislation is accompanied by the resources – financial and human – to implement the AMP;
3. That the benefits of an effective AMP are carefully considered and documented;
4. That considerable attention is given to all interested stakeholder groups including legislators, units within a DOT, utilities and other agencies, developers, environmental groups, concerned citizens, and other interested stakeholders;
5. That these stakeholders are educated as to the specific and practical benefits of developing and implementing an effective AMP, and that such education is specifically group-directed so that individual groups of stakeholders' concerns can be addressed; and
6. That input from interested stakeholder groups is encouraged and considered.

## METHODOLOGY

The purpose of this research was to look at the legal and policy dimensions of implementing an access management program in the state of Texas. This was accomplished by meeting three objectives:

1. Identification of policy and legal considerations in access control in general as well as specific policy considerations in targeted states – those that have implemented or are in the process of implementing an AMP;
2. Review of policy issues relating to highway transportation access control in general and delegation of powers to TxDOT in particular; and
3. Determination of what action, if any, is needed for TxDOT to develop and implement an AMP.

The first objective involved identifying general policy and legal considerations in access control. Then, in particular, the review looked at targeted states that have successfully implemented a system of access management controls and/or an access management program and determined how legal and policy issues were addressed. To meet this objective, an assessment was made of the legal and policy processes used by the targeted states – Colorado, Minnesota, New Jersey, Oregon, Montana, and Florida. Officials from these states' DOTs were interviewed and/or responded to a questionnaire focusing on policy issues related to their access management program. The research also ferreted out political commonalities among the states, implementation challenges, and how contentious issues were resolved.

The second objective focused on the state of Texas. Policy and legal issues that in general relate to highway transportation access control issues were analyzed. Then indices of the delegation of powers by the legislature to TxDOT were reviewed. To meet the first part of objective two, the research focused on literature review. The second part of the objective was met through literature review and discussion with key personnel. Literature covered specific topics: access controls, interpretation of scope, delegation of authority, and the mission of TxDOT. Relevant literature included statutes, rules, case law, Attorney General Opinions, law review articles, and other periodical literature. Interviews were conducted with key legislative players in Texas.

To meet objective three, determination of what action, if any, is needed for TxDOT to develop and implement an AMP, an analysis of the results from meeting the first two objectives was made. From this, suggestions for implementation of an access management program from both a practical and a policy perspective were developed.

# SECTION ONE: INTRODUCTION TO AN ACCESS MANAGEMENT PROGRAM

## Background

In 1999, over 16.7 million vehicles were registered in Texas. Texas travelers drove approximately 394.8 million *daily* miles on state highways during 1998 and approximately 557.9 million miles were traveled for all roads. The *total* vehicle miles for state highways were almost 144.1 billion at the end of 1998. For all roads, this number was over 203.6 billion. Texas has over 186,000 lane miles (mileage on unidirectional, single vehicle travel-way on state-maintained roadways) and over 79,000 centerline miles (corridor mileage on state-maintained roadways), serving a growing population of more than 20 million citizens. When these traffic volumes and highway miles are combined with the fact that arterial roadways can have seventy or more driveways (access points) per mile, the result is that drivers must contend with an alarming number of sets of conflict points.

As the demands on transportation infrastructure increase, so will the interest in ensuring that future decisions be based on sound economic, social, and environmental principles. With increased demand, the state has seen a decrease in the ability to provide new highway capacity through major construction projects because of burgeoning urban densities and air quality issues.<sup>1</sup> Even more critical, then, is the need to preserve and improve the integrity of existing highways as well as plan future highways with access management in mind.

## Transportation Observations on Access Management

In 1995, the *Urban Transportation Monitor* released a survey on traffic access management among city traffic engineers to obtain their opinions and information about traffic access management.<sup>2</sup> The results included these observations:

- Most traffic access policies focus on driveway location and design (91%); the second highest response was access management policies (59%);<sup>3</sup>
- The majority of policies have been legislated into legal codes and/or ordinances (76%);

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<sup>1</sup> A classic example of the competing interests of development and environmental interests is the Overton Park case (*Citizens to Preserve Overton Park, Inc. v. John Volpe*, 401 U.S. 402, 91 S.Ct. 814 [1971]). In this case, environmentalists fought successfully against the construction of a six-lane interstate highway through a 342-acre city park located near the center of Memphis, Tennessee.

<sup>2</sup> Questionnaires were sent to a random sample of 350 city traffic engineers. Altogether, 94 surveys were obtained for a 27% return rate.

<sup>3</sup> Respondents checked more than one type of policy.

- The most common weaknesses of the current policies are that they need upgrading (44%); they are only guidelines (42%), and they are open to interpretation (30%);<sup>4</sup>
- Most engineers characterize the strength of the current policies as flexible for judgment decisions (82%); uniform in control of access (76%); and a defensible administration rule (50%);<sup>5</sup>
- Access is managed or enforced through required access permits (69%); case by case (48%); and jurisdictional control (31%);<sup>6</sup>
- Policies vary by road classification (67%); by road speed, volume, and signalization (35%); and no variation (19%);<sup>7</sup>
- Design policies were standards (57%); policies (32%); and guidelines (24%);
- Access policies encourage shared access (72%) and driveway consolidation (70%), but some offer no incentive<sup>8</sup> (22%);<sup>9</sup>
- Access management policies were implemented as part of the roadway retrofit or reconstruction projects for 69% of the respondents while 31% said they were not part of these projects;
- Types of restraint to implementation that were encountered included: political (63%); economic (private) (48%); economic (government) (24%) and institutional (17%);<sup>10</sup>
- Access policies require traffic impact analysis on a case by case basis (54%); for developments that generate at least 100 vehicle trips during peak traffic hours (24%); are not required for 14% of the respondents; and are always required for 3% of the respondents;
- Access management policies are implemented in coordination with developers/owners for 69% of the respondents; with access permit review for 51% of the respondents;<sup>11</sup>
- An ideal access management policy would: include geometric design standards (92%); control spacing (90%); meet traffic impact analysis (TIA) requirements (79%); deny access (77%);<sup>12</sup> and
- Seventeen percent of the respondents listed other inclusions such as professional judgement; legal requirement that developers are responsible for construction of turn lanes, medians, etc.; advance review capability; crossover spacing criteria; fee for permits and inspections; restrictive covenants on title of property to notify new residents; variance procedures;

<sup>4</sup> Respondents selected more than one type of weakness. Others included: lost legal challenge, too rigid, does not provide sufficient access management, and not legislated into ordinance.

<sup>5</sup> Respondents selected more than one type of strength.

<sup>6</sup> Respondents selected more than one type of enforcement.

<sup>7</sup> Respondents selected more than one type of variation.

<sup>8</sup> Incentives are considered as a required resource under action items in Section Three of this study.

<sup>9</sup> Respondents could have selected both shared access and driveway consolidation.

<sup>10</sup> Respondents could have selected more than one restraint.

<sup>11</sup> Respondents could have selected more than one method of implementation.

<sup>12</sup> Respondents could have selected more than one item for inclusion.



stronger political support; and the treatment of cumulative impacts of small developments.

These statistics illuminate how varied access management policies and practices are around the United States and how little these policies are understood. At the same time, the increase in highway capacity demands a fresh look at how a state responds to the increasing demands. One alternative is the development and implementation of an access management program for the state. An AMP is designed to integrate land use planning, engineering, and legal practices to maximize the operational efficiency and safety of all functional categories of roadways.

Elements of an AMP include strategies to address access issues and implementation techniques and management of access to land development while simultaneously preserving the flow of traffic on the surrounding road system in terms of safety, capacity, and speed. Other AMP characteristics include policies as well as processes for variances/exceptions, warrants (i.e., when, where, how much, how far apart driveways and median openings should be); limiting the number of vehicular conflict points; separating conflict areas; removing turning vehicles from through travel lanes; and spacing of major intersections to facilitate progressive travel speeds along arterials, among other techniques.

### **The AMP Focus**

The focus on access management is part of a growing national trend, as individual states and communities realize that they can no longer build their way out of congestion.<sup>13</sup> Based on the research and experience of other states in developing their access management programs, coupled with the unique characteristics of highway planning and development in Texas, the following goals and policies suggest embodiments of the key elements for effective access management programs.

#### Goals:

- To integrate land use planning, engineering, and legal practices to maximize the operational efficiency and safety of all functional categories of roadways;
- To develop an effective access management program that addresses the unique socioeconomic, environmental, and political postures of the state of Texas including the varying stakeholder interests; and
- To include mechanisms in the program to allow for accurate predictions.

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<sup>13</sup> See, Major Findings, Access Management, Minnesota DOT Report, 1999.

Policies:

- Learn from other states' experiences;
- Ensure that local plans are compatible with state goals; and
- Promote participation, fairness, and equity in policy and management.

The AMP requires two areas of focus. The first is to develop an understanding of the basic characteristics and principles of the control access system – what patterns they exhibit and how they function in space and time. The second is to develop an ability to manage effectively the stakeholder interests in the system in such a way that is consistent with both the basic principles of an AMP and with societal, economic, and environmental goals concerning the kinds of patterns a Texas AMP should exhibit.

## **SECTION TWO: LEGAL AND POLICY CONSIDERATIONS**

### **General Legal Issues in Access Control: Competing Rights**

There are two conflicting issues that underlie the legal feasibility of access control. The first is the notion that the public has the right to safe and efficient movement on state highways regardless of ingress and egress at commercial access points. The second is that a property owner, by the nature of the property's position along the highway, is entitled to suitable and sufficient access. An AMP must effectively satisfy these two competing requirements.<sup>14</sup> Additional competition exists among retail objectives, engineering interests, and utility concerns, to name but a few. The state is legally entitled to control access. At the same time, a citizen has a right to due process of law. Thus, a potentially aggrieved citizen would be an abutting property owner who wants, for example:

- To be protected against private interference with her/his property;
- To be protected against any use of a highway for non-highway purposes such as utility lines;
- To be protected against interference by changes in highway design and structure;
- To have direct access to the public highways;
- To claim damages if traffic is diverted from her/his access point;
- To refuse to comply with restrictions or regulations necessary for the safe movement of traffic; and
- To seek access to new limited access highways.<sup>15</sup>

In general, access rights rest on the issue of "reasonable access." Reasonable access does not necessarily mean convenient access; nor does it mean unlimited access. A property owner must have reasonable access to the street system and the access granted must allow the property to be developed "for a use, which is appropriate and economically viable at that location."<sup>16</sup> Studies of access control legislation in Colorado, Ohio, Pennsylvania, and Oregon indicate that "states can control access in the public interest through their police powers. Compensation for, or acquisition of, abutting property is not needed as long as reasonable access is provided."<sup>17</sup>

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<sup>14</sup> See, J.C. Glennon, J.J. Valenta, B.A. Thorson, J.A. Asseh, and C.J. Wilton, "Evaluation of Techniques for the Control of Direct Access to Arterial Highways." Report No. FHWA-RD-76-85, Federal Highway Administration (August, 1975).bid

<sup>15</sup> See, C.F.J. Koepke and H.S. Levinson, "Legal Considerations." *Access Management Guidelines for Activity Centers*, NCHRP Report 348, 1992, at 34-35 [hereinafter Legal Considerations].

<sup>16</sup> *Id.* at 34-35.

<sup>17</sup> *Id.* at 34-35.

Legal means of access control have evolved through centuries of developing public and private rights. One of the earliest treatises is Blackstone's commentaries on the common law of England,<sup>18</sup> the concepts of which were used by early colonists to frame the U.S. Constitution. The concept of "due process"<sup>19</sup> was set forth in the U.S. Constitution and was meant to protect a person's property from unfair governmental interference or taking. From this beginning, and in tandem with increased competing interests of public and private rights, controlling access centered on four methods: police powers, eminent domain, the law of nuisance, and contractual agreements.

*Police Powers.* As part of their inherent sovereignty, states possess police powers that allow them to regulate private activities to protect or promote the public health, safety, or general welfare of their citizens. Under police powers, a governmental entity may prevent a person under its jurisdiction from using her/his property<sup>20</sup> to the detriment of the general welfare. States, for example, have a strong interest in keeping their local roads and highways safe for their residents. Still, the right of the property owner to suitable and sufficient access competes with this state right and often ends up in court. Because courts balance the interests involved, in general it is difficult to predict the outcome in a particular case. For example, in *Raymond Motor Transportation, Inc. v. Rice*,<sup>21</sup> the U.S. Supreme Court invalidated a Wisconsin administrative regulation limiting the length of trucks traveling on its highways. The court weighed the burden on interstate commerce against the benefits of the regulations and concluded that the challenged regulations placed a substantial burden on interstate commerce. The court stated: "[The regulations] cannot be said to make more than the most speculative contribution to highway safety."<sup>22</sup> On the whole, however, the courts accept these powers regarding access as they are widely used in covering traffic regulatory and operational controls, among others.

*Eminent Domain.* Access control also involves issues of eminent domain. This concept is sometimes referred to as the condemnation power of sovereignty to take land for public use. It gives a right to the government to acquire possession of property in the manner directed by the Constitution and the laws of the state whenever the public interest so requires. For example, when a new public highway is to be built, the government must decide where to build it and how much land to condemn. The process may involve taking a parcel of private property to widen an existing road or increasing

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<sup>18</sup> See, Sir William Blackstone, Commentaries on the Laws of England 296 (1776).

<sup>19</sup> Two due process clauses are found in the U.S. Constitution, one in the 5<sup>th</sup> Amendment pertaining to the federal government, and the other in the 14<sup>th</sup> Amendment that protects persons from state actions. Procedural due process guarantees fair procedures while substantive due process protects a person's property from unfair governmental interference or taking.

<sup>20</sup> The term *property* is used herein when discussing general property law and refers to real property rather than personal property. Real property consists of the land and everything permanently attached to the land. When structures are permanently attached to the land, then everything attached permanently to the structures is also real property, or realty. All other property is personal property, or personalty.

<sup>21</sup> 434 U.S. 429 (1978).

<sup>22</sup> *Id.* at 447.

the turning radius. The power of eminent domain is generally involved through condemnation proceedings. Again, in general, after the government determines that a particular parcel of land is necessary for public use, if a voluntary sale cannot be consummated, the state brings a judicial proceeding to obtain title to the land. Then, in a separate proceeding, the court determines the fair value of the land. Typically, the value is approximately equal to the market value.

In Texas, the state constitution provides that “[n]o person’s property shall be taken, damaged, or destroyed or applied to public use without adequate compensation being made.”<sup>23</sup> What constitutes “property” for purposes of compensation and as used in the constitutional provision relates to every species of property including personalty.<sup>24</sup> It has been construed to include not only a physical thing capable of ownership or possession but also any legal right that a person may have.<sup>25</sup> Property includes not only the thing owned but also every right that accompanies ownership and is incidental to it.<sup>26</sup>

At the same time, in Texas, a legislative declaration as to the necessity for condemning land for a certain purpose is not subject to review by the courts<sup>27</sup> if the use is public. The necessity and expediency of granting the power and determining the extent to which property may be taken thereunder are political or legislative questions.<sup>28</sup> Such determination becomes a question for judicial review only when abuse of their prerogative by the legislature or such agencies is apparent.<sup>29</sup>

Property owners have litigated this “taking” in Texas. For example, in *City of Tyler v. Likes*,<sup>30</sup> the court held that mere negligence on the part of a government entity which eventually contributes to the destruction of property is not a taking for which adequate compensation is required under the state constitution. In *City of Austin v. Avenue Corp.*,<sup>31</sup> owners of property close to public works projects such as street improvements that have been damaged or destroyed can recover damages for lost profits only if interference with access caused by the street repair was material and substantial.<sup>32</sup> In *State v. Schmidt*, the court denied recovery for diminution of the value of developed commercial property due to “diversion of traffic, an increased circularity of travel to the property, a lessened visibility to passersby, and the inconvenience of

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<sup>23</sup> Tex. Const. Art. I, §17.

<sup>24</sup> *Renault, Inc. v. City of Houston*, 415 S.W.2d 948 (Tex. Civ. App. Waco, 1967), *judgment rev’d on other grounds*, 431, S.W.2d 322 (Tex. 1968).

<sup>25</sup> *Ft. Worth Imp. Dist. No 1 v. City of Ft. Worth*, 106 Tex. 148, 158 S.W. 164 (1913).

<sup>26</sup> *Id.* at 164.

<sup>27</sup> *West v. Whitehead*, 238 S.W. 976 (Tex. Civ. App. San Antonio 1922), *writ refused*, (Apr. 5, 1922).

<sup>28</sup> *Housing Authority of City of Dallas v. Higginbotham*, 143 S.W.2d 79 (1940), answer to certified question conformed to, 143 S.W.2d 95 (Tex. Civ. App. Dallas 1940).

<sup>29</sup> *Schooler v. State*, 175 S.W.2d 664 (Tex. Civ. App. El Paso 1943), *writ refused w.o.m.*, (July 21, 1943).

<sup>30</sup> 962 S.W.2d 489 (Tex. 1997).

<sup>31</sup> 704 S.W.2d 11 (Tex. 1986).

<sup>32</sup> *Id.* at 12.

construction activities.”<sup>33</sup> The Texas Supreme Court noted: “The benefits which come and go from the changing currents of travel are not matters in respect to which any individual has any vested right against the judgement of public authorities. If the public authorities could never change a street or highway without paying all persons along such thoroughfares for their loss of business, the cost would be prohibitive.”<sup>34</sup> In the *City of Austin v. Teague*,<sup>35</sup> the Texas Supreme Court rejected the notion that all exercises of state police power are exceptions to the Texas takings clause. The court held that there is “perhaps no test and no single sentence rule that can resolve the varying problems that may arise by government’s interference with a property owner’s exercise of his rights,”<sup>36</sup> and that compensation is justified when there has been a physical taking, when property has been rendered wholly useless, or when the government has caused a disproportionate diminution in economic value or total destruction of property value.<sup>37</sup>

In *City of College Station v. Turtle Rock Corp.*,<sup>38</sup> the Texas Supreme Court upheld a city ordinance requiring parkland dedication as a condition to subdivision plat approval. Even though the court stated that the Texas constitution requires payment of adequate compensation when private property is taken for public use, it clearly emphasized: “[A]ll property is held subject to the valid exercise of the police power.” Similarly, in *Taub v. City of Deer Park*,<sup>39</sup> the Texas Supreme Court held that denial of a requested zoning change from single-family to multifamily is not a compensable taking even if the result is that the property cannot be profitably developed. Thus, it appears as if there is no compensable taking if acquisition of the property is substantially related to the health, safety, or general welfare of the people and is reasonable rather than arbitrary.<sup>40</sup>

*Nuisance and Contractual Agreements.* In access control, two lesser-used land-use controls include nuisance and contractual agreements. Although not as common, these still provide arrows in the quiver of access control. Nuisance can roughly be described as the use of property by one party so as to interfere substantially with the reasonable use, enjoyment, or value of another’s property. It is also defined as obstructing free passage or use of highways and other public rights. “Historically, the action of nuisance was the normal method of protecting the interest of the public in the use of the highway under the common law of England and in the statute law of eighteenth- and nineteenth-century America.”<sup>41</sup> Today, the law of nuisance may apply to “...twentieth-century laws enacted for the purpose of promoting positively the public

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<sup>33</sup> 867 S.W.2d 769, 770 (Tex. 1993), *cert. denied*, 115 S.Ct. 64 (1994).

<sup>34</sup> 867 S.W.2d at 773 (quoting *State Highway Comm’n v. Humphreys*, 58 S.W. 2d 144, 145 (Tex. Civ. App.—San Antonio 1933, writ ref’d).

<sup>35</sup> 570 S.W.2d 389, 392 (Tex. 1978).

<sup>36</sup> *Id.* at 392.

<sup>37</sup> *See id.* at 393.

<sup>38</sup> 680 S.W.2d 802 (Tex. 1984).

<sup>39</sup> 882 S.W.2d 824 (Tex. 1994).

<sup>40</sup> *See City of College Station v. Turtle Rock Corp.*, 680 S.W.2d at 804-05.

<sup>41</sup> *See* Legal Considerations at 36.

convenience through zoning, subdivision controls, building codes, set-back lines, and similar measures.”<sup>42</sup>

Access control can also involve contractual agreements such as restrictive covenants and conditional use agreements. A public agency and the owner of property abutting a highway may enter into a conditional use agreement to define a particular land use for which present or future access to a highway may be granted.

If a state has decided many cases involving control access, then there is precedent for future disputes. The disadvantage, however, is that a ruling has been established in one favor or another. That is, if leniency is shown to an abutting property owner, that leniency may be extended to property owners in future access control rulings. A state having little access control legislation will require the courts to decide access control issues on a case by case basis, something that takes time and money. Although the courts “tend to decide in favor of access control in most “reasonableness” cases,<sup>43</sup> a state transportation department has no advance guarantee that court action will uphold an untested access control technique. Bad facts can make bad law. In this type of scenario, access control legislation and rulemaking are preferable, of course, to litigation.

## **Legislative Delegation of Authority**

### Legislative Delegation of Power to Agencies: General

Because the scope of TxDOT’s regulatory authority is largely governed by administrative law principles, it is necessary to consider a brief overview of the general administrative framework. The overwhelming and voluminous nature of state administrative law has led some to call it “a headless fourth branch of government.” Keep in mind certain principles when looking at administrative law. Although the various agencies vary structurally, some characteristics are common to all agencies:

- Agencies are created by the legislature;
- All agencies have an appointed board or commission, and act to administer; and
- Courts play a role, in varying degrees, in supervising the conduct of agencies.

Agencies are legislative creatures. As such, their rulemaking abides by whatever is prescribed in their enabling statutes. Agencies have only such powers as the legislature considers it wise to delegate to them. Typically, legislatures give broad discretion to agencies in order to facilitate the necessary flexibility to make rules in

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<sup>42</sup> *Id.* at 36.

<sup>43</sup> *Id.* at 35.

highly technical or economic areas.<sup>44</sup> Agencies are equipped by their very design to accommodate and determine the daily decisions that flow from their rulemaking.<sup>45</sup> Problems arise when authority for making rules is poorly defined or specified by the legislature.<sup>46</sup>

Delegation of power by a legislature to an administrative agency comes into question because state governments are based on a separation of powers among the three branches of government: legislative, executive, and judicial. When rulemaking power is delegated by a legislature to an administrative agency and, in turn, the agency carries out the legislature's broad policy goals, the agency gains power to shape social and economic policy. In essence, the agency becomes a quasi-legislature. In response, rules and statutes have been negated in circumstances where the legislature has not provided "adequate standards" to guide an agency's discretion.<sup>47</sup>

Historically, most states have struck down statutes when their legislatures have delegated power to an agency without providing "adequate standards" to guide that agency's discretion<sup>48</sup> while the U.S. Supreme Court has upheld broad delegations of power. Recent case law indicates that many states have begun following the federal trend.<sup>49</sup> A state's Supreme Court decides "the circumstances under which it will allow, if at all, its state legislature to delegate lawmaking power to administrative agencies. This judicially created state delegation policy reflects the amount of power and discretion each state court has allowed unelected agency officials to wield."<sup>50</sup>

### Legislative Delegation of Power to Agencies: The State of Texas

The authority of TxDOT to establish and implement a statewide access management program requires review of state agencies' authority in general. A state agency's authority depends upon statutes specifically governing the agency. As well, the authority may be expressed or implied. Expressed authority occurs when an agency is expressly authorized to do a delegable act; this authority can be directly granted to or conferred upon an agency in express terms.<sup>51</sup> Implied authority is that which is necessary to accomplish or perform what has been expressly delegated to an agency.<sup>52</sup> State agencies may exercise only those powers that are specifically given to them by

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<sup>44</sup> See Alexander Dill, *Scope of Review of Rulemaking After Chadha: Case for the Delegation Doctrine?*, 33 *Emory L. J.* 953 (1984).

<sup>45</sup> See William F. Fox, Jr., *Understanding Administrative Law* 2 (1986).

<sup>46</sup> See, e.g., Joseph P. Tomain & Sidney A. Shapiro, *Analyzing Government Regulation*, 49 *Admin. L. Rev.* 377, 377-80 (1997); and E. J. Dionne, Jr., *Why Americans Hate Politics* (1991).

<sup>47</sup> See, e.g., Arthur Bonfield and Michael Asimow, *State and Federal Administrative Law* 432 (1989).

<sup>48</sup> *Id.* at 432.

<sup>49</sup> *Id.* at 432.

<sup>50</sup> Gary L. Greco, *Survey: Standards or Safeguards: A Survey of the Delegation Doctrine in the States*, 8 *Admin. L. J. Am. U.* 567 (1994) [hereinafter Greco].

<sup>51</sup> For a definition of express authority related to agents, see *Black's Law Dictionary*.

<sup>52</sup> For a definition of implied authority related to agents, see *Black's Law Dictionary*.



statute.<sup>53</sup> Agencies also have implied powers to do that which is necessary to carry out the specific powers delegated. The legislatures' intention is to have a workable and effective exercise of the powers expressly and specifically granted to the agency. For example, in *Sexton v. Mount Olivet*,<sup>54</sup> the court held that the full extent of power specifically granted an agency must be ascertained with due regard for rules that the legislature intends the agencies to have. By implication, this power is whatever authority is necessary to carry out specific delegated powers. Thus, in considering the validity of a state agency rule, the determinative factor as to whether the agency has exceeded its authority is whether the rule is in harmony with the general objectives of the statute.<sup>55</sup> Although administrative rules are presumed valid, courts may find them void if adopted without statutory authority.<sup>56</sup>

Texas administrative agencies make many major policy decisions in the form of rules. Section 5 of the Administrative Procedure and Texas Register Act (APTRA)<sup>57</sup> prescribes notice, comment, and reasoned justification procedures for agency rulemaking. Section 12 authorizes anyone threatened by an agency rule to sue over its validity and applicability.<sup>58</sup> Texas agencies make hundreds of rules every year. Many of the rules they make are as important as statutes. The legislature delegates to agencies in order to secure expert action on important, complex, uncertain, and controversial policy matters. Texas has a long record of embracing and overseeing administrative agencies. Texas created its first modern administrative agency, the Railroad Commission (RRC), more than a century ago. Texas enacted APTRA nearly a generation ago.

Section 5 states that unless adopted in substantial compliance with these specific procedures, a rule is invalid.<sup>59</sup> The procedures are:

- Give public notice of proposed rules and the legal and factual bases of those rules;
- Provide reasonable opportunity for all interested persons to comment;
- Consider comments; and

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<sup>53</sup> See *Neches v. Aldridge*, 992 S.W.2d 684, 687 (Tex. App.--Austin 1999, pet. denied); *Sexton v. Mount Olivet Cemetery Ass'n*, 720 S.W.2d 129, 137 (Tex. App.--Austin 1986, writ ref'd n.r.e.).

<sup>54</sup> 720 S.W.2d at 137-39.

<sup>55</sup> *Gerst v. Oak Cliff Savings & Loan Ass'n*, 432 S.W.2d 702, 706 (Tex. 1968).

<sup>56</sup> *Hollywood Calling v. Public Util. Comm'n*, 805 S.W.2d 618, 620 (Tex. App.--Austin 1991, no writ); see also *Brown v. Humble Oil & Ref. Co.*, 87 S.W.2d 1069 (Tex. 1935).

<sup>57</sup> Formerly Tex. Rev. Civ. Stat. Ann. art. 6252-13a (Vernon 1975) (repealed 1993), APTRA is now codified at Tex. Gov't Code Ann. §§ 2001.001-.902 (Vernon Supp. 1995). Section 5 is now codified at Tex. Gov't Code Ann. §§ 2001.023-.035.

<sup>58</sup> Tex. Gov't Code Ann. § 2001.038 (Vernon Supp. 1995).

<sup>59</sup> Tex. Gov't Code Ann. § 2001.035 (Vernon Supp. 1995).

- Write in its final order for adopting the rule a reasoned justification that openly and adequately explains the agency’s reasons for its final rulemaking decision.<sup>60</sup>

Thus, the rule must be adopted in “substantial compliance” with the procedural requirements of Section 5.<sup>61</sup> This would include steps to ensure that the notice-and-comment process was meaningful and fairly disclosed the issues, the agency’s proposed solution, and the important basis of the agency’s proposal.<sup>62</sup> For example, the agency cannot “hide the ball” from potentially interested persons, or not disclose its real proposal or key material upon which the proposal was based.<sup>63</sup> As well, the agency must respond meaningfully to substantial issues raised in the rulemaking, and give honest and reasoned explanations of how and why the agency resolved those issues as it did.<sup>64</sup>

In determining the extent to which a legislature delegates power to administrative agencies, one commentator focused on standards each state court uses to measure the constitutionality under the state’s constitution of a legislative delegation of power. The commentator set out three broad categories.

Category I states uphold delegations of lawmaking power to administrative agencies as long as the statute contains “adequate standards” of policy or an “intelligible principle” for the agency to follow.<sup>65</sup> This embodies the principle that the legislature “should not avoid its political responsibility by delegating its lawmaking power to agencies.”<sup>66</sup> Delegation of power to an agency must be accompanied by clear and definite standards. The result is that Category I states strike down broad grants of authority to agencies more readily than either Category II or Category III states. Because the legislature cannot delegate power to the agencies without definite standards, administrative agencies in Category I states have less discretion and, correspondingly, less power than agencies in the other states.<sup>67</sup> “When Category I courts allow a delegation, the legislature retains significant influence over the outcome of policy, and the administrative agency has less discretion to affect policy.”<sup>68</sup> The “strict” standards-and-safeguards states have decided that the influence over policy decisions should remain within the legislative branch even when the legislature

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<sup>60</sup> *Id.* §§ 2001.023, .029, .033.

<sup>61</sup> *See id.* § 2001.035.

<sup>62</sup> Pieter M. Schenkan, When and How Should Texas Courts Review Agency Rules?, 47 *Baylor L. Rev.* 989 (1995) at 1002.

<sup>63</sup> *See id.* at 1002.

<sup>64</sup> *Id.* at 1001.

<sup>65</sup> Greco, Survey: Standards or Safeguards: A Survey of the Delegation Doctrine in the States, 8 *Admin. L.J. Am. U.* 567, 579 (1994).

<sup>66</sup> *Id.* at 580.

<sup>67</sup> *Id.* at 580.

<sup>68</sup> *Id.* at 584.

delegates power to an agency. On the other hand, Category II and III states allow delegations where the legislature has less influence on policy than the agencies.

Category II states allow delegations of lawmaking power to administrative agencies if the statute contains a “general” rule to guide the agency such as procedural safeguards and/or standards. The impetus stems from the fact that legislatures lack the necessary expertise to deal with specific and complex problems in areas such as economics, industry, and general public health and safety so they must rely on administrative expertise.<sup>69</sup> This results in delegations of power to agencies with minimal legislative guidance.<sup>70</sup> Administrative agencies are given more power to determine policy.

In Category III states, delegations of lawmaking power to administrative agencies are upheld by the courts if the administrative agency has adopted adequate procedural safeguards. Thus, the courts look to what procedural safeguards – principle, rules, and standards – administrators have factored into their decision-making process. The result is that most legislative delegations of power to administrative agencies are upheld which, in turn, gives administrative agencies more discretion and power than state agencies in Category I and II states. In Category III states, administrative agencies have even more effect on policy.

Although the commentator included Texas in the list of Category I, it was quickly pointed out that there is an overlap:

In Texas, it is unclear whether the court requires the existence of both standards and procedural safeguards, or simply either one or the other. Therefore, Texas is a state whose standards may overlap into a different category. *Texas Antiquities Comm. v. Dallas County Community College Dist.* [554 S.W.2d 924 (Tex. 1977)], is an example of the ambiguous legal standard of the Texas delegation doctrine. In *Texas Antiquities*, the Texas Supreme Court struck down a portion of the state’s Antiquities Code, which gave the Texas Antiquities Committee, a state agency, the power to designate ‘all buildings and locations of historical interest’ [*Id.* at 927 (citing Tex. Rev. Civ. Stat. Ann. art. 614S-9, section 6)]. The court found the statute unconstitutionally vague. In its decision, the court noted that ‘depending upon the nature of the power, the agency, and the subject matter, varying degrees of specific standards have been required in testing the reasonable breadth of statutes’ [*Id.* at 927 (citing 1 Norman J. Singer, *Sutherland Statutory Construction*, section 4.05 (4th ed. 1975); *Jordan v. State Bd. of Ins.*, 334 S.W.2d 278 (1960))]. In addition to the

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<sup>69</sup> See Craig L. Taylor, Comment, The Fourth Branch: Reviving the Nondelegation Doctrine, B.Y.U. L. Rev. 619, 638 (1984).

<sup>70</sup> *Id.* at 638.

standards requirement, the Texas court suggested that safeguards to limit discretion would be important to the constitutionality of the delegation. The court stated: 'Upon the basis of the statute now before us, we are unconvinced that we should renounce the settled law of Texas that the legislature may not delegate its powers without providing some criteria or safeguards' [*Id.* at 927].<sup>71</sup>

The commentator also pointed out that there had been a "general demise" of the delegation doctrine in the states<sup>72</sup> and that states were more inclined than ever to uphold delegations to state agencies. Since the commentary was published in 1994, and assuming this general decline continued, then states, in general, would be even more inclined to uphold delegation of power given to agencies. Because of the complex nature of today's government, legislatures must delegate powers to agencies where appropriate. An example of an inappropriate delegation of power would be where it is clear that the legislature intended to avoid its own political responsibility. Otherwise, legislation should defer to agency experts. Argument could be made that implementing and maintaining an AMP appears to be an area that may be particularly suited to being within the purview of experts – not the legislature. At the same time, consideration should be given to factors such as:

- The purpose for which the power has been delegated;
- The protections against arbitrariness that have been set up;
- The complexity of the issue;
- The sensitivity of the issue; and
- The technical challenges involved with the issue.

The more complex, sensitive, and technical the issue, the more it demands being addressed by an agency. Appropriate legislative oversight hearings ensure that the agency is acting in accordance with legislative intent.

## Legislative Delegation of Power to Agencies: Texas Department of Transportation

### *Background*

TxDOT has a relatively long history of expanding powers. The agency's roots took hold in 1917 when the State Highway Department (SHD) was created to take advantage of federal funds made available by the Federal Highway Act of 1916.<sup>73</sup> Over time, the SHD's activities began to reflect a broader mission: addressing the state's

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<sup>71</sup> Greco at 603.

<sup>72</sup> Greco at 599.

<sup>73</sup> See Texas Department of Transportation, Staff Report, Texas Sunset Advisory Commission, 1996 at 95.

overall transportation needs.<sup>74</sup> In 1975, the SHD merged with the Texas Mass Transportation Commission to form the State Department of Highways and Public Transportation.<sup>75</sup> That same year, this department was assigned responsibility to find sites for the disposal of dredge material from the Gulf Intracoastal Waterway.<sup>76</sup> In 1976, the Governor's Office on Traffic Strategy was transferred to the department.

The Texas Department of Transportation was created by the Legislature in 1991. TxDOT was formed by the consolidation of the State Department of Highways and Public Transportation with the Texas Department of Aviation and the Texas Motor Vehicle Commission.<sup>77</sup> TxDOT continued to expand. In 1995, the Legislature transferred motor carrier regulation responsibility<sup>78</sup> and vehicle storage facilities regulation from the RRC to TxDOT. The Legislature also merged the Texas Turnpike Authority (TTA) with TxDOT.<sup>79</sup>

TxDOT adopted one principal goal in its strategic plan that reflects the department's major functions: "to provide the state of Texas with transportation services and systems that work together; are safe, comfortable, durable, and affordable; are environmentally sensitive; are efficient and effective; and support economic and social prosperity."<sup>80</sup>

#### *TxDOT's Policy-making and Management Structure*

TxDOT is governed by the Texas Transportation Commission.<sup>81</sup> This commission consists of three members appointed by the governor with the advice and consent of the senate. The governor designates one member of the commission to serve as the chair who is known as the Commissioner of Transportation. The TTC is the policy arm of TxDOT.<sup>82</sup> The department, on the other hand, is the management arm.

The department is headed by the executive director, appointed by the TTC. The department conducts its primary activities in twenty-five geographical districts. Varying climate and soil plus differing needs of local populations make decentralization of the department necessary. Each district, managed by a district engineer, is responsible for the design, location, construction, and maintenance of its area transportation systems. Local field offices within districts are known as area offices, and many districts also

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<sup>74</sup> *Id.* at 95

<sup>75</sup> *Id.* at 95.

<sup>76</sup> *Id.* at 95.

<sup>77</sup> *Id.*

<sup>78</sup> In 1995, the Legislature largely deregulated motor carriers. *Id.* at 95.

<sup>79</sup> *Id.* at 95

<sup>80</sup> *Id.* at 104.

<sup>81</sup> A separate Motor Vehicle Board regulates the motor vehicle distribution industry.

<sup>82</sup> *See, e.g.*, §201.102, Separation of Responsibilities: "The commission shall develop and implement policies that clearly separate the policy-making responsibilities of the commission and the management responsibilities of the director and staff of the department."

have separate maintenance offices. Functional divisions and offices headquartered in Austin provide administrative and technical support to the districts.

### *TxDOT's Responsibilities, Powers, and Authorities*

TxDOT's mission is to provide safe, effective, and efficient movement of people and goods in the state. As noted previously, the TTC develops and oversees policy. Among other duties, the TTC, with the advice and recommendations of the executive director, will:

- Plan and make policies for the location, construction, and maintenance of a comprehensive system of state highways and public roads;
- Lay out, construct, maintain, and operate a modern state highway system;
- Develop a statewide transportation plan that contains all modes of transportation;
- Adopt rules for the operation of the department; and
- Establish policy necessary to carry out the duties and functions of the department and the TTC.

Specifically, the Texas Transportation Code, §201.101, provides the TTC with the authority to establish rules for the operation of TxDOT. The Texas Transportation Code, §201.103, requires that TxDOT plan and make policies for the location, construction, and maintenance of a comprehensive system of state highways and public roads. Further, the Texas Transportation Code, §201.601, requires TxDOT to develop a statewide transportation plan that contains all modes of transportation (in cooperation with other agencies and political subdivisions that have responsibility for transportation).<sup>83</sup>

To promote, among other things, public safety and facilitate the movement of traffic, the Texas Transportation Code, §203.002, authorizes TxDOT to lay out, maintain, construct, and operate a modern state highway system with emphasis on the construction of controlled access highways, plan for future highways, and convert where necessary an existing street, road, or highway into a controlled access highway in accordance with modern standards of speed and safety.<sup>84</sup>

The necessity of and approval to develop a plan for future highway needs is evidenced by a proposed rule regarding a planned rural network of four-lane or better divided roadways that will serve as a principal connector of all Texas cities with over

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<sup>83</sup> See, e.g., 22 TexReg 12081, December 5, 1997, adopted rules.

<sup>84</sup> See Texas Transportation Code, §203.002. See, e.g., 2000 Reg. LEXIS 23106, June 9, 2000, concerning speed zone approval including requiring the TTC to adopt procedures that will be used to determine speed limits on the state highway system.

20,000 population as well as major ports and points of entry (with system mileage limits).<sup>85</sup> The rule's coverage is broad:

- Maximizing the use of existing four-lane divided roadways;
- Minimizing circuitous or indirect routing;
- Connecting with principal roadways from adjacent states;
- Connecting with principal deep water ports with channel depths of 40 feet or more;
- Connecting with principal Mexican ports of entry;
- Serving significant military or other national security installations;
- Serving tourism and/or recreational areas;
- Comprising major truck routes; and
- Applying to areas that are within 25 miles or less of cities of 10,000 population or greater.<sup>86</sup>

Federal law<sup>87</sup> requires TxDOT to carry out a continuing, cooperative, and comprehensive statewide intermodal transportation planning process, including the development of a statewide transportation plan and transportation improvement program that facilitates the efficient and economic movement of people and goods in all areas of the state. This Statewide Transportation Improvement Program (STIP) must be developed for all areas of the state in cooperation with the metropolitan planning organizations (MPOs) designated for metropolitan areas. Under federal law,<sup>88</sup> the governor is responsible for providing for public involvement in the STIP development process. The governor has delegated this responsibility to the TTC, which in turn has delegated the responsibility to the executive director. The TTC will approve the STIP if it finds the STIP has met the requirements including, among others:

- Developing, operating, and maintaining efficient and effective transportation systems and services;
- Improving public safety and security on transportation systems; and
- Facilitating economic and social prosperity through the efficient movement of people and goods.

Historically, the TTC and its predecessor have been given broad powers to adopt rules for governing the day-to-day operation of the state highway system and all portions thereof. For example, an Attorney General Opinion<sup>89</sup> held that the Texas

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<sup>85</sup> See 2000 Reg. LEXIS 23082.

<sup>86</sup> See 43 TAC §15.42.

<sup>87</sup> See, e.g., 43 TAC §15.8 (2000), incorporating 23 U.S. Code, §135, as implemented by 23 CFR Part 450, Subpart B.

<sup>88</sup> See 23 USC §135.

<sup>89</sup> Under provisions set out in the Texas Constitution, the Texas Government Code, and numerous statutes, the Texas Attorney General is authorized to write advisory opinions for state and local officials. Agencies request these advisory opinions when they confront unique or unusually difficult legal questions. The *Texas Register* publishes

Highway Commission may temporarily close a portion of an interstate frontage road for the purpose of allowing an inter-city “grand prix” race. The Attorney General stated that this was within their power. “The Texas Highway Commission is authorized by article 6674w-1, V.T.C.S., to ‘lay out, construct, maintain, and operate a modern State Highway System. . . .’ In the absence of indication of contrary legislative intent, we believe it is clear that this provision empowers the commission to adopt regulations governing the day-to-day operation of the state highway system, and all portions thereof.”<sup>90</sup> The opinion cites the Texas Supreme Court as declaring that “[t]he State has created a Highway Commission, and has placed under its direct and exclusive control the management of its highway system.”<sup>91</sup> The opinion continues to enumerate additional empowerment including, among others:

- To designate any existing or proposed state highway, of the designated state highway system, or any part thereof, as a controlled access highway;
- To deny access to or from any state highway, presently or hereafter designated as such . . . which may be hereafter duly designated as a controlled access highway, from or to any lands, public or private, adjacent thereto, and from or to any streets, roads, alleys, highways or any other public or private ways intersecting any such controlled access highway, except at specific points designated by the State Highway Commission; and to close any such public or private way at or near its point of intersection with any such controlled access highway;
- To designate points upon any designated controlled access highway, or any part of any such highway, at which access to or from such controlled access highway shall be permitted, whether such controlled access highway includes

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summaries of all opinions, requests for opinions, and open record decisions. The Attorney General responds to many requests for opinions and open records decisions with letter opinions. A letter opinion has the same force and effect as a formal Attorney General Opinion. It represents the opinion of the Attorney General unless and until it is modified or overruled by a subsequent letter opinion, a formal Attorney General Opinion, or a decision of a court of record. Only certain state and local officials are allowed to request an Attorney General Opinion. Sections 402.042 and 402.043 of the Government Code set out a list of those officials who are authorized to request formal Attorney General Opinions on questions of law. The Attorney General is prohibited by statute from giving a written opinion to anyone other than an authorized requestor. Authorized requestors include:

- the Governor;
- the head of a department of state government;
- the head or board of a penal institution;
- the head or board of an eleemosynary institution;
- the head of a state board;
- a regent or trustee of a state educational institution;
- a committee of a house of the Texas Legislature;
- a county auditor authorized by law; and
- the chairman of the governing board of a river authority.

<sup>90</sup> Opinion No. JM-507, 1986 Tex. AG LEXIS 95, June 25, 1986.

<sup>91</sup> *Texas Highway Commission v. El Paso Building and Construction Trades Council*, 234 S.W.2d 857, 859 (Tex. 1950).



any existing state highway or one hereafter constructed and so designated; and

- To control, restrict, and determine the type and extent of access to be permitted at any such designated point of access. . . .<sup>92</sup>

A more recent Attorney General Opinion<sup>93</sup> held that TxDOT is authorized to establish advisory committees, for example, the Statewide Transportation Policy Committee and the Bicycle Advisory Committee.<sup>94</sup> As well, case law upheld TxDOT's authority to place and maintain traffic-control devices on state highways to regulate and guide traffic on these highways.<sup>95</sup>

Specifically, section 201.601 of the Texas Transportation Code and 23 U.S.C. §135, federal law, require TxDOT to develop a statewide transportation plan that encompasses all modes of transportation.<sup>96</sup> State law requires the department to seek opinions and assistance from other state agencies and political subdivisions in developing the plan.<sup>97</sup> Federal law further provides that in developing the plan, the department must seek public input from interested parties. "In developing the long-range transportation plan, the State shall . . . provide citizens, affected public agencies, representatives of transportation agency employees, freight shippers, private providers of transportation, representatives of users of public transit, providers of freight transportation services, and other interested parties with a reasonable opportunity to comment on the proposed plan."<sup>98</sup>

The MPOs, noted previously, are an example of stakeholders who must be consulted. Texas is required by federal law<sup>99</sup> to designate an MPO in each urbanized area. Each metropolitan area must have a continuing, cooperative, and comprehensive transportation planning process that results in plans and programs that consider all transportation modes and support community development and social goals.

While federal law places responsibility for transportation planning on the states,<sup>100</sup> responsibility for statewide transportation planning and coordination has been delegated by the governor to the TTC, which in turn has delegated these responsibilities

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<sup>92</sup> V.T.C.S. art. 6674w-1, subdiv. 2(a)-(d).

<sup>93</sup> Opinion No. JC-0189, 2000 Tex. AG LEXIS 22, March 1, 2000.

<sup>94</sup> See Title 43, section 1.85(a)(2) and (8) of the Texas Administrative Code (RQ-0126-JC).

<sup>95</sup> See, e.g., *Hynes v. The State of Texas*, 855 S.W.2d 731; 1993 Tex. App. LEXIS 322 (1993), citing Tex. Rev. Civ. Stat. Ann. art. 6701d (Vernon 1977), §§ 29 and 30.

<sup>96</sup> See 43 Tex. Admin. Code §1.85(2)(A) (1999) (rule establishing purpose of Statewide Transportation Policy Committee); see also 23 U.S.C. §135(a) (West Supp. 1999); Tex. Transp. Code Ann. §201.601 (Vernon 1999).

<sup>97</sup> See Tex. Transp. Code Ann. §201.601(b) (Vernon 1999).

<sup>98</sup> See 23 U.S.C. §135(e)(3)(A) (West Supp. 1999).

<sup>99</sup> The United States Code, in Title 23, §134 and Title 49, §5303; see, Chapter 15, Subchapter A, Transportation Planning, Rule 15.1.

<sup>100</sup> 23 U.S.C. §135. Transportation plans and programs must lead to the development and operation of an integrated, intermodal transportation system that facilitates the efficient and economic movement of people and goods.

to the executive director of TxDOT. In order to define for the state how it will coordinate the various activities required by federal law,<sup>101</sup> involve the public in transportation decisions, and collaborate with the MPOs to ensure that state and regional plans and development programs are consistent, Texas law prescribes minimum standards for metropolitan transportation planning. The law also prescribes how the state and MPOs will develop transportation planning processes, plans, and programs, and ensure the effectiveness of statewide and metropolitan transportation planning and program development. The law also addresses eligibility requirements for continued receipt of federal transportation funds.<sup>102</sup>

Appeals from agency decisions are limited. In *Texas Department of Transportation v. T. Brown Constructors, Inc.*,<sup>103</sup> the Austin Court of Appeals held that a trial court erred by rendering judgment for a party in a different amount than the agency's decision. The court reasoned that although a trial court has the legislative authority to review an agency's decision, substituting its own discretion for that of the agency "usurps the agency's [statutory] authority and discretion" and "violates the separation-of-powers provision of the Texas Constitution."<sup>104</sup>

If express authority was not found, argument could be made that since state and federal law require TxDOT to develop a statewide transportation plan with the input of other governmental entities and the public, this, in turn, provides implied authority for the department to establish an AMP. This argument, however, is less than convincing.

#### *TxDOT's Requirement to Protect the Environment*

On both the policy side – the Texas Transportation Commission – and the management side – the department – there is a duty to protect and preserve the environment wherever practical. Specifically,

The commission and the department will protect, preserve and, when practicable, enhance the environment. Particular emphasis will be placed on avoidance, minimization, and compensation for adverse environmental impacts while balancing social and environmental concerns with economic growth. Environmental considerations will be fully integrated into department policies, procedures, and decision-making practices in a systematic, interdisciplinary manner. In implementing this policy, the department recognizes the need for effective communication and encourages coordination with the public, environmental or transportation interest groups, environmental agencies, resource agencies, businesses,

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<sup>101</sup> 23 USC §134 and §135, and 49 USC §§5303-5306.

<sup>102</sup> See Chapter 15, Subchapter A, Transportation Planning, Rule 15.1.

<sup>103</sup> 947 S.W.2d 655 (Tex. App. - Austin 1997, pet. denied).

<sup>104</sup> 947 S.W.2d 655 at 660 (Tex. App. - Austin 1997, pet. denied).

communities, and similar entities in the transportation policy setting, planning, and development processes.<sup>105</sup>

The environment is broadly defined by the Texas Administrative Code to include “the human environment that includes the earth’s system, which consists of water, air, land, plants, people, and animals and the interrelationships that exist among these, including ecological, socio-economic, and archaeological/cultural resources.”<sup>106</sup>

Before beginning the right-of-way acquisition process, TxDOT must complete a federal environmental review process under the National Environmental Policy Act (NEPA). NEPA imposes on each federal agency the obligation to prepare a comprehensive environmental impact statement (EIS) before undertaking a proposed major federal action. Major actions include, among others, federal construction projects. When federal funds are used in highway projects, the law applies in varying degrees to TxDOT activities depending on the severity of the environmental impact. Additionally, if the project is funded completely by state or local funds, TCC rules still require TxDOT to perform an environmental assessment that generally follows federal environmental requirements.<sup>107</sup> Thus, all projects, regardless of funding sources, receive an environmental analysis. For projects that are likely to have a significant impact on the environment, TxDOT must prepare an EIS. An EIS contains:

- A statement of environmental impacts (positive and negative) of the proposed action;
- Any unavoidable adverse environmental impacts should the proposal be implemented;
- Alternatives to the proposal (including taking no action);
- The relationship between short-term uses of the environment and enhancement of long-range productivity; and
- Any irreversible commitment of resources.

An environmental assessment is used when projects are anticipated to have no significant impact (a Finding of No Significant Impact [FONSI]) but require some review of alternatives. Categorical Exclusions (CEs) are granted “for projects that have an insignificant impact on the environment,” e.g., traffic signal placement and shoulder construction projects.<sup>108</sup> For non-federal aid projects and in accordance with the Texas Administrative Code, the Environmental Affairs Division of TxDOT certifies environmental clearance of projects.<sup>109</sup> For federal aid projects, environmental clearance is received from the Federal Highway Administration.<sup>110</sup>

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<sup>105</sup> Texas Administrative Code, Title 43, transportation, part 1, chapter 2, subchapter a, rule 2.2.

<sup>106</sup> *Id.* at 1.3 - Definitions.

<sup>107</sup> *See* Texas Department of Transportation, Staff Report, Texas Sunset Advisory Commission, 1996 at 108.

<sup>108</sup> *Id.* at 108.

<sup>109</sup> *Id.* at 108.

<sup>110</sup> *Id.* at 108.

TxDOT is also authorized to acquire or condemn property necessary for highway purposes.<sup>111</sup> Environmental clearances are the first step. Subsequent steps include appraisal of the fair market value of the necessary property<sup>112</sup> and offering that amount to the owner. If the property owner accepts the offer, TxDOT conducts the title transaction and proceeds with the project. If the property owner rejects the offer, TxDOT “may invoke its power of eminent domain” and condemn the property.<sup>113</sup> In a condemnation hearing, three special Commissioners appointed by a judge with eminent domain jurisdiction “hear evidence and determine the amount of the award to the property owner.”<sup>114</sup> Either party, the state or the property owner, can appeal the decision of the commissioners to a jury. “TxDOT has a right of possession to the property at the time a state warrant, in the amount of the special commissioners’ award, is deposited with the court.”<sup>115</sup>

### Relationship of Specific Delegated Powers with AMP Implementation Authority

TxDOT, and the TTC in particular, are given broad authority to make policies to provide a safe, effective, and efficient transportation system. Additionally, the Texas courts and Attorney General Opinions, in general, appear to give broad discretion to TxDOT plans and decisions. However, interviews with key people in various areas of Texas transportation – inside and outside of governmental bodies – indicate that the unique characteristics of Texas coupled with the wide, disparate, and cogent stakeholders’ interests mandate that TxDOT be given additional guidance from the Legislature. In answering the question, “Does TxDOT have the authority to implement an access management program?” the majority of responses fell into this pattern: *The answer lies somewhere in between. It probably has the authority but would probably not initiate the program without a greater mandate from the legislature. Therefore, TxDOT would benefit by being given clear, legislative direction.*

Assuming hypothetically that the authority for developing an AMP bears a similar weight to that of including high-speed rail in TxDOT’s plans, a former Commissioner’s statement may be telling. In discussing a long-range transportation plan that does not include high-speed rail, the Commissioner noted: “That issue is bigger than we are . . . that’s up to the State Legislature.”<sup>116</sup>

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<sup>111</sup> On average, TxDOT can acquire all of the necessary rights of way in 27 months from the time it issues the FONSI. *Id.* (citing Interview with Right of Way division staff, TxDOT, February 1996).

<sup>112</sup> The value includes the value of the property acquired as well as any damage to the remaining property. *Id.* at 109.

<sup>113</sup> *Id.* at 109. As discussed previously, eminent domain is the power to take private property for public use by the state or municipality. The power is found both within federal law (Fifth Amendment, the U.S. Constitution) and state law.

<sup>114</sup> *Id.* at 109.

<sup>115</sup> *Id.*

<sup>116</sup> John Williams, *Texans Face Growing Pains Down the Road; Transportation Plan’s Hearing Set for Today*, *Hous. Chron.*, Nov. 21, 1994, at A11 (quoting Texas Department of Transportation Commissioner Anne S. Wynne).

Indeed, an AMP integrates land use planning, engineering, and legal practices to maximize the operational efficiency and safety of all functional categories of roadways. As such, multiple stakeholders are potentially impacted. As one commentator stated: “Finding ways to maximize use of roads by restricting adjacent landowners or those traveling on streets, crossing at intersections, etc., those, I think are broad enough kinds of questions that perhaps should be asked at the commissioner level, even the legislative level. Those [kinds of activities] should be explicit and should be communicated to the public: for example, here’s what it’s all about; here’s what it means to you, and are those interests in improving the capability of infrastructure worth the restriction of people’s use of roads? If you envision the decisions on a matrix of a whole lot of competing interests, the interest of optimal use of infrastructure may take second place . . . . If you choose which is more important, people would come to the conclusion that sub-optimal use of what we have is ok.”<sup>117</sup>

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<sup>117</sup> Interview, Governor’s Office.



## **SECTION THREE: POLICY AND PLANNING – RECOMMENDATIONS OF ACTION ITEMS FOR IMPLEMENTING AMP POLICIES IN THE STATE OF TEXAS**

An effective access management strategy is an important complement to existing traffic management approaches. When managers understand the complex socioeconomic environment in which an access management program develops, they may be able to anticipate the effects that their own management plans will have. This investigation looked at how other targeted states handled legal and policy issues. From this review, as well as investigation of policy and legal considerations in Texas, several steps necessary for TxDOT to adopt an AMP became clear. Although this report presents them sequentially, several may be implemented simultaneously.

### **Steps Necessary for TxDOT to Adopt an AMP**

Step One. Benefits: Carefully consider and document the benefits of an effective AMP.

Several states such as Colorado, Florida, New Jersey, and Oregon have developed and implemented AMPs. These plans serve as models for determining what to do and what not to do. Many of these states have documented the benefits realized from AMP implementation including cost efficiency, increased safety, and maximization of operational efficiency.

Because of the significant air quality problems identified in Texas, keep in mind that an AMP may provide potential benefits in terms of reduced vehicle emissions. These benefits, if they exist, would come, for example, from reduced traffic congestion as well as reduced stop-and-go traffic patterns due to turning vehicles. Unlike other future research activities associated with development and implementation of an AMP, this one is most compelling because of the urgency of air quality problems in numerous Texas metropolitan areas.

Step Two. Workshops: Hold workshops throughout Texas to identify problem areas and to encourage dialogue.

This step should begin the collaboration process, bringing together divergent views. This particular step goes hand-in-hand with Steps Three and Four. Use of mediation skills by workshop facilitators would greatly enhance the process as many competing views may be represented in these workshops.

### Step Three. Education: Increase awareness about access management issues.

In the course of investigating what can be loosely described as the “political climate” in Texas, even those people most closely associated with Texas transportation issues had not heard of the term “access management program” or “access management plan.” This suggests that educating stakeholders will be no small task. First, identify who the stakeholders are and evaluate and prioritize the potential impacts an AMP may have on their interests. Then, give these people knowledge about the specific and practical benefits of developing and implementing an effective AMP. Such education should be “specific audience-directed” so that individual groups of stakeholders’ concerns can be addressed as per their own unique issues. Consideration should be given to each stakeholder group including its financial, social, and environmental concerns and the impact of implementing an AMP. Again, the use of mediation skills would facilitate the process.

Pamphlets describing what access management involves such as the use of medians, turn lanes, and traffic signals; the spacing and design of intersections and driveways; and the construction of frontage roads and supporting local streets can be tailored to the specific audiences. [Table 1](#) represents a template for creating a matrix of possible stakeholders and corresponding concern and impact rankings. [Table 2](#) illustrates some of the topical areas for information dissemination and exchange.

### Step Four. Input and Committees: Input from interested stakeholder groups is encouraged and considered; appropriate committees should be appointed.

Improving access management requires a collaborative approach because it involves coordinating land use and transportation. Appointment of a broad-based steering committee or its equivalent would provide policy direction. Technical committees would assist in analyzing engineering, land use, and legal issues. These groups should focus on ways to increase awareness about access management issues, assess the extent of the challenges in Texas, identify potential barriers to the implementation of access management policies, and develop strategies to overcome these barriers. To accomplish this, these groups in turn need to educate other stakeholders about access management issues so there is a continual feedback loop.

Mediation skills of TxDOT staff are particularly important when so many potentially disparate and conflicting interests are involved. The steering or other policy committees should make a recommendation as to the necessity for legislative input. [Figure 1](#) illustrates how information and education should interface.



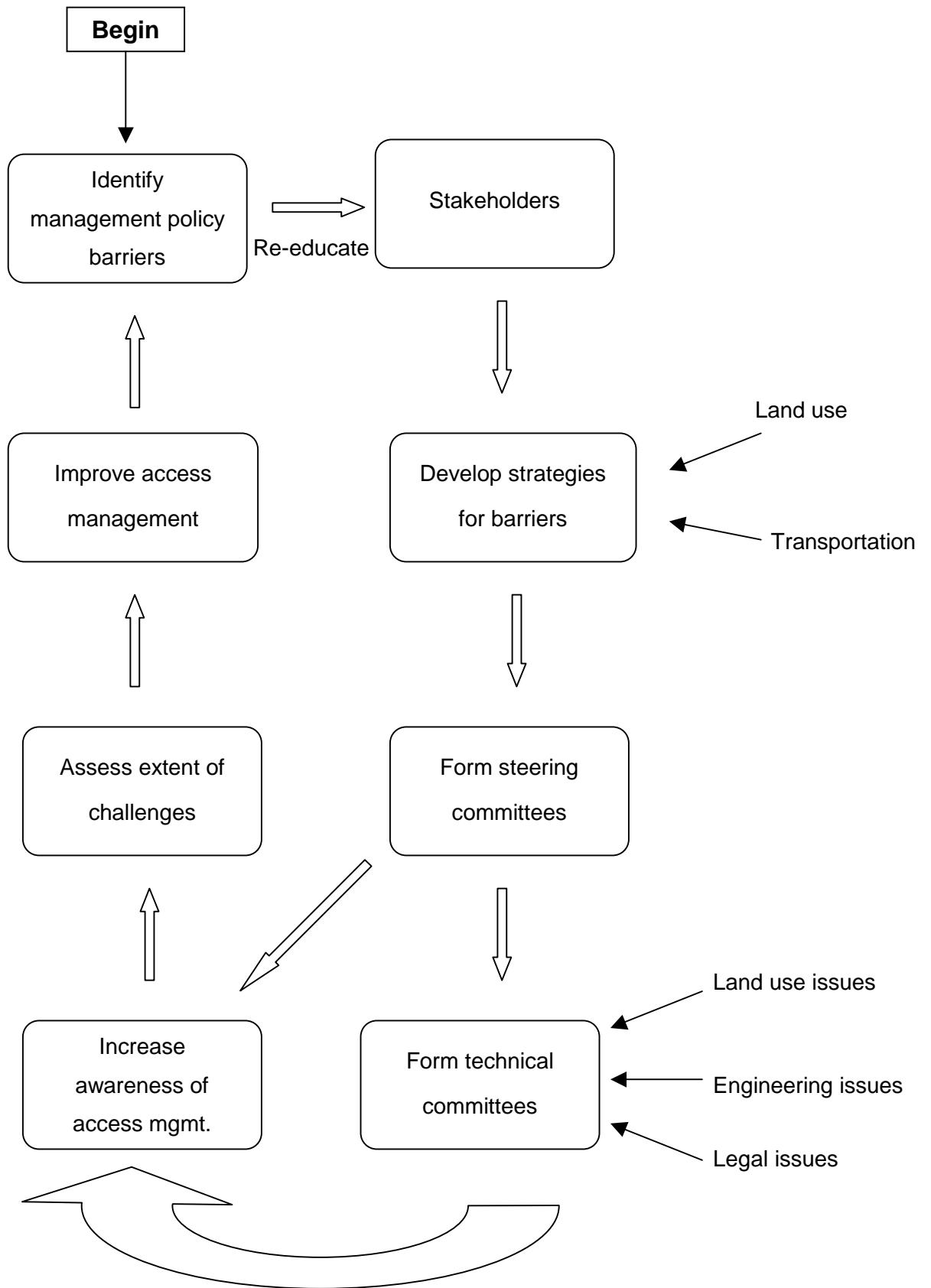
**Table 1. Matrix of Interested Stakeholders in Development and Implementation of an AMP: Concerns and Impacts**

Stakeholder Examples	Rating Scheme for Concern and Impact		
	Low	Medium	High
	<ul style="list-style-type: none"> <li>• Little or No Concern (NC)</li> <li>• Little Financial Impetus (LF)</li> <li>• Little Social Impact (LS)</li> <li>• Little Policy Impact (LP)</li> </ul>	<ul style="list-style-type: none"> <li>• Occasional Concern (OC)</li> <li>• Medium Financial Impetus (MF)</li> <li>• Medium Social Impact (MS)</li> <li>• Medium Policy Impact (MP)</li> </ul>	<ul style="list-style-type: none"> <li>• Frequent Concern (FC)</li> <li>• Significant Financial Impetus (SF)</li> <li>• Significant Social Impact (SS)</li> <li>• Significant Policy Impact (SP)</li> </ul>
<b>Legislators</b>			
<b>TTC</b>			
<b>TxDOT:</b>			
<ul style="list-style-type: none"> <li>• Administrators</li> <li>• District Engineer</li> <li>• Others</li> </ul>			
<b>Users:</b>			
<ul style="list-style-type: none"> <li>• Cars/Vans/Trucks</li> <li>• 18-Wheelers</li> <li>• Taxi</li> <li>• Mail Carriers</li> </ul>			
<b>Vehicle Insurers</b>			
<b>Environmentalists</b>			
<b>Utilities Industry</b>			
<b>Railway &amp; Intermodal Ind./Freight Shippers</b>			
<b>Other Agencies</b>			
<b>Ports &amp; Marine Intermod. Industries</b>			
<b>Local Gov'ts.</b>			
<b>Realtors</b>			
<b>Developers</b>			
<b>Adjacent/Near:</b>			
<ul style="list-style-type: none"> <li>• Businesses</li> <li>• Homes</li> </ul>			

**Table 2. Examples of Topical Information Dissemination and Exchange**

<b>TOPIC</b>	<b>FOCUS</b>
<i>Growth</i>	Describe how Texas growth and economic expansion puts tremendous pressure on our state highways particularly in metropolitan areas.
<i>Concentration</i>	Illustrate how the majority of travel throughout the state is concentrated on limited percentage of highways.
<i>Capacity</i>	Describe how uncoordinated and unplanned access accelerates the already strained capacity of existing major roadways.
<i>Safety</i>	Determine how access-related incidents cost lives, injure people, and damage property: <i>“Increased number of accesses = increased number of conflicts.”</i>
<i>Policy</i>	Police powers of state can be limited by competing rights of constitutionally protected abutting land owners; no clear guidelines for interpreting the right of access; case-by-case analysis. Access laws are complex; specific legislative guidelines may be needed.
<i>Costs</i>	Purchasing access control is cost-effective typically when done in the pre-development stage; costs are rapidly escalating as land values increase; purchasing access control is disruptive to already existing abutting landowners. Access management is cost-effective in long-term; perhaps not in the short-term.
<i>Local Government</i>	Local government land use decisions have major impacts on access conditions on highways and have broad authority to regulate through zoning and subdivision controls which can manage access; local governments should consider access management in their land use decisions and, to do that, they need to be educated about the problems resulting from poor access and the techniques for proper management.
<i>Shared Responsibility</i>	Access management requires sharing of responsibilities among TxDOT, cities, and counties.
<i>Pro-Active</i>	An access problem typically does not show up immediately; a proactive stance that anticipates and thereby corrects a potential problem is the most effective in terms of safety and cost.
<i>Stakeholders</i>	A myriad diverse group of other stakeholders have interest in access to highways.
<i>Competing Interests</i>	Developers and businesses want direct access because it is oftentimes cheaper; this short-term outlook needs to be reconsidered.

**Figure 1. Information and Education**



Step Five. Communication: If legislative delegation to TxDOT is needed or required, make certain the language provides clear guidance and direction.

From the workshops, committees, and other forms of input, a decision must be made whether cooperation should be a voluntary process or whether this cooperation should be mandated by the legislature. If guidance is requested, for example, the legislature could require a highway access management study under the direction of the TTC. The study's goal could be to gather information and consult with public officials of political subdivisions – TxDOT districts, towns, cities, counties, etc. – to consider views and proposals for establishing a comprehensive, statewide highway access management policy and program. Recommendations covering interrelated land use, engineering, and legal procedures to maximize operational efficiency and safety on roadways would be reported to the Texas Legislature.

Step Six. Resources: Legislation must be accompanied by the resources – financial and human – to implement the AMP.

Funding options should be expanded for access management planning and implementation including funding options related to highway and access improvements as well as incentives.

Step Seven. Collaboration: Develop a shared vision; form partnerships.

Since land use and transportation objectives are typically segmented, the AMP should provide for careful coordination between the two. As well, formal linking mechanisms should be developed to encourage coordination and partnerships among and between those entities responsible for managing highways and those entities responsible for land use. These people/functions should continue the education and dialogue interface with the goal of determining a vision that can be shared by most, if not all, stakeholders. This shared vision, in turn, will lead to consistency among all levels of government and jurisdictions.

Although collaboration was described above in specific steps, it may be more appropriate to break these methods down into even more incremental approaches to meet the overall objectives. Keep in mind that implementing an AMP does not require that everyone understand all things about all components of the program. There is simply not enough money or time to develop a completely unified and informed view of how to implement the most effective and flawless AMP that is acceptable to all stakeholders. There will always be unmeasured entities, random effects, and substantial uncertainties, but these challenges should not be used as the excuses to delay implementing an AMP.

## GLOSSARY

*Access management program* – program to reduce vehicle conflicts and improve traffic operation and safety.

*Contractual agreement* – conditional use agreement between a public agency and the owner of property abutting a highway.

*Eminent domain* – the condemnation power of sovereignty to take land for public use.

*Environment* – the sum of all external conditions affecting the life, development, and survival of an organism including humans and other animals.

*Expressed authority* – occurs when an agency is expressly authorized to do a delegable act.

*Implied authority* – that which is necessary to accomplish or perform what has been expressly delegated to an agency.

*Nuisance* – the use of property by one party so as to interfere substantially with the reasonable use, enjoyment, or value of another's property.

*Police powers* – the ability of governmental entities to regulate private activities to protect or promote the public health, safety, or general welfare of their citizens.

*Property* – used herein when discussing general property law and refers to real property rather than personal property. Real property consists of the land and everything permanently attached to the land. When structures are permanently attached to the land, then everything attached permanently to the structures is also real property, or realty. All other property is personal property, or personalty.

*Reasonable access* – access by a landowner to the street system and highways that allows property to be developed for a use that is appropriate and economically viable at that location.



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