

" . . . may recommend necessary
legislation to advance the interests of the
state in public mass transportation. . ."

V.A.T.S. 4413 (34),
Section 8(c)

LEGISLATIVE RECOMMENDATIONS
TO THE
64TH LEGISLATURE

TEXAS MASS TRANSPORTATION COMMISSION



**TEXAS
MASS TRANSPORTATION
COMMISSION**

Russell Cummings, Executive Director
510 S. Congress, Suite 312, Austin, Texas 78704 (512) 475-3639

COMMISSIONERS

Chairman, Albert W. Rollins, Arlington
Alfredo Villalobos, Jr., El Paso
J. W. (Jack) Ward, Amarillo
C. E. Long, San Antonio
James W. Porter, Dallas
Joe. P. Cain, Houston


January, 1975

TO THE MEMBERS OF THE SIXTY-FOURTH LEGISLATURE:

The Mass Transportation Commission Act that created this agency authorized the Commission to ". . . recommend necessary legislation to advance the interests of the state in public mass transportation. . .".

The Commission, in accepting that responsibility, has considered the issues most likely to be faced by the regular session of the 64th Legislature, and the following legislative recommendations are advanced for your consideration.

This session of the Legislature will make the critical decisions on the State's role in public and mass transportation matters. Texas Mass Transportation Commission stands ready to assist you in any way possible.


Albert W. Rollins, Chairman

APR 10 2013

TABLE OF CONTENTS

Summary

Part I: Background

Part II: Legislative Recommendations
(discussed in more detail)

Conclusion

Summary

In support of its legislative mandate to ". . . recommend necessary legislation to advance the interests of the state in public mass transportation. . ." [V.A.T.S. 4413 (34) Sec. 8(c)], the Texas Mass Transportation Commission (TMTC) met on December 9, 1974, to consider the issues and alternatives.

Fragmentation within the various transportation agencies, and within the actual regions in need of transportation, as well as fiscal constraints caused by lack of state involvement, appeared to be formidable barriers to the effective planning and development of public and mass transportation in Texas. To remove those obstacles, the Texas Mass Transportation Commission approved the following legislative recommendations for your consideration:

1. TMTC's Authority to Receive Federal and Other Grants

The Commission recommends specific legislation drafted by the Legislative Council clarifying TMTC's authority to accept federal and other grants for public and mass transportation on behalf of the state, and to accept similar grants on behalf of political subdivisions when authorized to do so by such subdivisions. This bill (See Appendix II) corrects the confusing language in Section 8 (h) of the Texas Mass Transportation Act, V.A.T.S. 4413 (34).

2. Regional Transit Authority Legislation

The Commission recommends that:

1. Regional transit authorities should

be authorized by the Legislature in urban areas where the multiplicity of local governments makes inter-governmental contracting for public and mass transportation service difficult or impossible, and when requested by responsible local officials.

2. Responsibility for the initiation, creation and operation of regional transit authorities should be vested in the people and their elected officials.
3. For information purposes only, the Texas Mass Transportation Commission should be officially advised of each step in the process of initiation, creation and operation of regional transit authorities.
4. If possible, enabling legislation should be comprehensive, including a variety of methods of creating a regional transit authority; should leave the determination of the membership

of the governing body to the people effected and their locally elected officials; and should provide alternative means of financing such an authority.

3. Reorganization of State's Transportation Agencies

The Commission recommends that the existing Interagency Transportation Council (ITC) be established statutorily; appropriately staffed and funded; and report annually to the Governor and the Legislature, to provide coordination between state transportation agencies, and between the various local, state or federal transportation agencies.

4. State Financial Support for Public and Mass Transportation

The Commission recommends legislation that would create a state fund to provide planning and capital grant assistance for public and mass transportation from one-fourth of the revenue of the state's sales and use tax on motor vehicles.

PART I: BACKGROUND

Most Texas cities grew up in the automobile age, for it was the car that helped to open up the cities economically and spatially and spring them loose from the constraints that had molded cities of the northeastern United States. For example, with the advent of the street car, and later the automobile there was no longer a need to tie residential location to the proximity of employment. Likewise, Texans had the option for living space rather than crowded tenements. Texans chose single family dwelling units and escaped the confines of the central city. They were able to lead urban lives while living away from the centers of employment.

A man's single family dwelling unit was his castle and the car became an extension of the castle. Texas metropolitan areas and Texas lifestyles are created in the car's image. Recreation is regional in scope. In our car-dominated state to drive at constant speeds within the city and from one city to another is almost considered an inalienable right. Mobility is the name of the game.

It is no coincidence then that those cities whose growth paralleled the emergence of the automobile had low population densities. Today, with the outward thrust of urbanization to the suburbs, the trend is toward even lower population densities. The population density for the Houston area, for example, according to the 1970 Census of Population

was 2,841 persons per square mile as compared to 5,000 persons per square mile in 1940.

The low density figures would seem to defy mass transportation implementation. If you connect the origins and destinations of urban trips with lines on a map of a Texas city, you don't come up with high density travel corridors. While the central business district or some other center of activity might have a high population during working hours, there is still the problem of low residential densities.

One suggested criterion for rail rapid systems is a population density of twelve to twenty-thousand people per square mile. The average of 3,000 people per square mile in Texas is thus not a strong argument for rail rapid transit. For this reason although street cars were widely used at one time, no Texas city has ever had a significant rail rapid system. Yet there is a need for mass transit to provide for the rapid movement of large numbers of people during peak travel times.

Given the population densities of Texas, the automobile is the most flexible and convenient mode of passenger transportation to move the population. Texans have overwhelmingly chosen this individualized form of transportation, to the point of neglecting the other principal mode of passenger transit.

It is an urban paradox that as metropolitan areas have been growing, transit usage has been decreasing. Whereas in 1915 three

in every four urban trips were made by transit, less than 5 percent are by transit today.¹ The decrease is directly attributable to, among other factors, the increase in availability of automobiles. "Automobile ownership increased from one car for every 13 persons in 1920 to one auto for every 2.3 persons in 1970."²

Another factor contributing to the decline in transit ridership is deteriorating transit service. As people's income increases, there is a decrease in transit ridership. Figure I (See Appendix 1) shows trends in transit ridership for the U.S. and three Texas cities. This decline in ridership and revenues has brought about increased fares and curtailment of services. Transit operations have accordingly become progressively less profitable. As a result of deficit operations many privately owned transportation companies have gone out of business. In 1954, 37 cities in Texas had private transit systems. By 1974 the number of cities with transit systems had dwindled to 18 and only 4 of those systems were privately owned, and unsupported by local taxes. In the other 14 cities that still retained transit systems, they were either municipally owned or received assistance from local governments. Figure 2 (See Appendix 1) gives the cities with current or recent transit service.

¹Texas Transit Development Plan 1975-1990, (Texas Mass Transportation Commission, Austin, 1975), Chapter 1, p.8.

²Ibid., Chapter 1, p.10.

Before the early 1970's, most cities tended to view bus companies as they would any other business in the private enterprise system - if they weren't making a profit, they deserved to go out of business. Survival of the fittest. Fortunately today cities are beginning to understand bus transit as a public service that needs to be encouraged and maintained.

With decreased transit service in some cities, or no service at all, the automobile has emerged as the nearly uncontested mode of urban passenger transportation. "The automobile, notwithstanding its shortcomings, is at the top of the list of what most people want, whoever they are and wherever they live."³

The people of Texas having committed themselves to the most appropriate and most popular mode of transportation, should have lived happily ever after. This, however, is not the case, for while the average population density may be low, fluctuations in land-use intensity within the city can create sudden eruptions of high population density. For example, in some downtown areas population densities exceed 100,000 persons/square mile during working hours.⁴ This fact is emphasized during

³Wilfred Owen, The Accessible City, The Brookings Institution, Washington, D.C. 1972, p.21.

⁴The Role of the Texas Mass Transportation Commission, (Texas Transportation Institute), p.5.

peak traffic periods when home-to-work and work-to-home trips pile up on the arterial streets and freeways of our cities. Ingress and egress to the city at such times becomes a major problem. During peak travel times some freeways carry traffic at horse and buggy speeds with drivers held in suspended animation within their individual cars.

Since other forms of transportation have withered away from disuse or have been allowed to die fiscally, many Texas cities are totally dependent on the automobile. And so what had begun as a matter of choice has become a necessity. Urban development, creating low population densities and sprawl, maximizes the need for the automobile and the reliance on a freeway system to connect the places where people live to the places where they work. This total allegiance to the automobile is rife with problems not the least of which is the temporary loss of mobility.

Transportation has been described as "the means by which a whole city functions and human aspirations are furthered. The freedom to move will determine whether or not it will be possible to participate in the activity and diversity of the city."⁵ The way Texas cities are developing, a dichotomy is shaping up between the "haves" and the "have-nots", those with cars and those without. The latter are positively penalized since the metropolitan area and its services are often not

⁵Wilfred Owen, The Accessible City, The Brookings Institution, Washington, D.C. 1972, p. 52.

accessible to them. Especially vulnerable are the poor. To break out of the poverty cycle, transportation is often essential. Without a car, and without reasonable alternative public transportation, employment opportunities are severely narrowed.

Since only half the population in Texas are licensed drivers, public transportation should have the objective of providing at least a minimal level of mobility within an urban area in keeping with the goals and standards set forth by the community. In addition to the poor, the ranks of the immobile minority include the young, the aged, the physically and mentally handicapped, those without access to a car, those temporarily without a drivers license, tourists, travelers, and those converts to public transportation who are disenchanted with the car. Transportation has become everyone's problem, not just the poor but the affluent as well.

Cities without sufficient public transportation foster an addiction to cars, mainlining them on their arterial streets, spending millions on the habit, devoting much of their energy resources to it; and using valuable city space for massive parking. The ill-effects of this dependency are air pollution episodes, traffic conjection, and in severe cases, additional deaths due to automobile accidents. The symptoms of this addiction are already visible in some of the larger cities of Texas. However, the disease, in its early stages, can be treated with improved public transportation. Since 4 in every 5

Texans now live in an urban area, it is a problem of statewide proportions.

Population growth is outdistancing transportation capabilities and therefore will intensify the problem. There now are 27 urbanized areas in Texas, each containing 50,000 or more persons. These areas had a total population of 7,150,000 in 1970. By 1990 the state is expected to have 32 such urbanized areas. They will have a population of 10,200,000 and will contain 71 percent of the state's 1990 population. The total state population is estimated to increase from the 1970 figure of 11.2 million persons to 14.3 million persons by 1990.⁶ What is significant is not only that the population will increase, but where it will increase. The concentration of residential growth in outlying areas of cities will add to the regiments of daily commuters. With this new outward thrust of urbanization, the freeways that are experiencing difficulties now will probably be wholly insufficient under the new population stress. (Table I in Appendix I gives population projections for Texas urbanized areas.)

In the end, sole dependency on the automobile is self-defeating. Without some expanded public and mass transit system, the freeway system will deteriorate under the onslaught of additional cars, and

⁶Transit Development Plan, Chapter 5, p.4.

travel times intercity and intracity will increase. In order for the automobile to remain an effective mode of transportation, it must be supplemented by other modes of public and mass transportation.

Texas is at a turning point. It can either duplicate the freeway system or supplement it with some form of public mass transportation. Bus fleets and cars share the same streets. As transit improves, the congestion problem is alleviated. The fate of public and mass transportation and the automobile are interdependent.

Faced with the approaching transportation dilemma, the Texas Legislature and other bodies have studied and restudied mass transit problems. (The names and synopses of some of these studies are given in Appendix I.) Regional and city transportation studies have been underway in Texas urbanized areas since the mid 1960's. The federal government has continually increased its planning requirements and conditioned its financial assistance programs on compliance. Yet, despite all these stimulants and studies, a technically correct and final solution to transportation problems has evaded the planners.

There is no magic available to solve transit problems. Solutions require feasibility studies, and engineering, and systems analyses to supply base data, forecasts and criteria with which to continually evaluate and develop alternative modes of transportation. But, in the end, there is no magic, no technically correct final solutions.

Texas has now come to a time of political decision. With it, Texas can accelerate its progress toward improved public and mass transportation systems. Without it, no orgy of new hardware will save the day. Personal rapid transit, people movers, tracked air cushioned vehicles, linear induction and magnetic levitation are all technical pies in the sky if there is no public commitment. The 64th Legislature is the proper forum for such deliberations. The Texas Mass Transportation Commission is seeking through its four legislative recommendations to facilitate the political decisions that need to be made. The long lead-times from planning stage to implementation of transportation improvements suggest that the State should no longer delay. There is a need for legislative action. What is at stake is the mobility and economy of the citizens of Texas.

PART II: LEGISLATIVE RECOMMENDATIONSTMTC's Authority to Receive Federal and Other Grants

The ambiguity of the wording in Section 8 (h) of the enabling legislation creating the TMTC [V.A.T.S. 4413 (34)] makes it unclear whether TMTC can accept a grant if not continually reauthorized to do so by the State. An Attorney General's Opinion (H-120 in Appendix II) and a subsequent explanatory letter (in Appendix II) discuss the need to differentiate between TMTC's authorization to receive grants for the State, and its authority to receive such grants for "any political subdivision thereof", only when authorized to do so by such subdivision.

The Legislative Council has drafted a bill (see Appendix II) which corrects the confusing language of the original Act. It authorizes TMTC to accept federal and other grants for public and mass transportation on behalf of the state; and to accept similar grants on behalf of political subdivisions when authorized to do so by such subdivisions. This new wording communicates more clearly the original intent of the Act and will eliminate continuing paper work required to accomplish the same result under the existing language. This will not affect the Governor's authority in any way to "designate" any agency he chooses to receive any particular grant.

In the new bill draft the word "study" has been added to the list of purposes for which TMTC is authorized to accept grants.

"Study" is implied in the inclusion of the word "improvement", but this addition will make it clear that TMTC can accept grant funds for studies.

In the bill draft, language deleted is in parenthesis and crossed out and new language is underlined. The Commission recommends adoption of the new legislation.

Regional Transit Authority Legislation

Texas cities have been able to expand spatially as their needs dictate, but the jurisdictional process is limited. Urban transportation is a service sometimes bigger in scale than the cities or metropolitan areas making up a region. As suburbs populated with urban employees proliferate on the outskirts of urban areas, the need to provide mass transportation across political boundaries becomes apparent. Transportation needs seldom recognize city or county lines.

The suburbs themselves with relatively low density development and/or non-industrial tax bases will be constrained by lack of funding to supply such services. The counties lack mass transportation authority altogether. When challenged with rapid urban growth and a corresponding need for services, the affected local governments often cannot respond with adequate services because of legal and fiscal restraints.

If a central city wants to expand its service beyond city limits, it may attempt intergovernmental contracts. In large urban areas such as Houston, San Antonio and the Dallas-Fort Worth area, the inter-local contract structure may become quite cumbersome. For example, in the Dallas-Fort Worth area, for the central city to provide expanded transportation services, to, from and between the many smaller cities, may involve contracts with and between as many as 8 or 9 cities. Such contracts are susceptible to renegotiation after local elections and would

therefore have a limited guarantee of continuity. Also some legal authorities maintain that the inter-governmental contract is not available to county governments, or to cities in different counties, for constitutional reasons.

There is no existing political subdivision with authority to develop and operate transportation on a regional basis. While Council of Governments (COG) are multi-county centers of regional information and planning strategy, they are limited, being planning, not governing bodies. As such they have no powers of taxation, rule making or enforcement.

Recognizing the need for territorial flexibility in implementing a transportation system, the 63rd Legislature, in 1973 passed S.B. 642 which authorized the Houston-Harris county area to create a special purpose government to plan and operate a public transportation system. The proposal has since been defeated at the polls for a variety of reasons, but many elected officials from the state's largest urban areas still believe such enabling legislation is needed.

Some legal authorities question whether a county can participate in an inter-local contract for public transportation, since counties have no existing authority over public transportation. If sustained, that view might leave inhabitants of unincorporated areas out of any regional transit authority. An Attorney General's Opinion on the Houston-Harris County proposal (H-119, in Appendix III) answers some questions, but other issues may still be in doubt.

To deal adequately with the regional magnitude of the urban transportation problem, there may be a need for an agency with multi-city or multi-county authority, including an appropriate financial base, that could plan and operate systems of passenger transportation. Another advantage to such an authority is that it would spread the cost of the transportation services more equitably over the participating cities and counties rather than forcing the central city to bear the total cost.

To assist in developing a concensus, the TMTC has hosted two workshops on regional transit authority legislation at the request of the North Central Texas Council of Governments. Representatives of mayors, county judges and councils of government in the state's seven largest urban areas (Dallas, Fort Worth, Houston, San Antonio, Austin, El Paso and Corpus Christi) were invited, and most were represented. There was agreement that authority for expanding transportation systems was needed, however, there was no consensus as to what provisions of regional transit authority legislation would be acceptable to the elected officials in the different areas. Regional differences made it difficult to agree on one comprehensive bill that would fit all the various interests and varieties of transportation needs. As the 64th Legislature convened, work continued on model regional transit authority legislation and an accompanying constitutional amendment to meet this need. The alternatives are no legislation, or a series of local bills with different definitions, procedures and characteristics.

The National Mass Transportation Assistance Act of 1974 may precipitate more interest in the regional transit authority legislation. Some \$140 million is apportioned over the next six years to the seven largest urban areas of Texas by this Act. The guidelines do not require a single recipient in each area, but planning and operation of service in such areas would be simplified if it were accomplished by a single entity.

Regional transit authorities have been utilized in other states to solve the problems discussed above. Examples include the Southeastern Michigan Transport Authority, the Southeastern Pennsylvania Transit Authority, the Twin Cities Area Metropolitan Transit Commission, the Washington Metropolitan Area Transit Authority, and the Chicago Regional Transit Authority.

The Intergency Transportation Council made up of the state's transportation agencies held a series of hearings on the subject, and the staff summary indicates support for regional transit authority legislation, but again, with few specifics as to method of creation, governance and finance.

The Texas Mass Transportation Commission, in lieu of specific recommendations, decided that flexibility should be the keynote of any enabling legislation. Therefore, the Commission proposed these general principals as appropriate to any enabling legislation.

Regional Transit Authority Legislation

1. Regional transit authorities should be

authorized by the Legislature in urban areas where the multiplicity of local governments makes intergovernmental contracting for public and mass transportation service difficult or impossible, and when requested by responsible local officials.

2. Responsibility for the initiation, creation and operation of regional transit authorities should be vested in the people and their elected officials.
3. For information purposes only, the Texas Mass Transportation Commission should be officially advised of each step in the process of initiation, creation and operation of regional transit authorities.
4. If possible, enabling legislation should be comprehensive, including a variety of methods of creating a regional transit authority; should leave the determination of the membership of the governing body to the people effected and their locally elected officials; and should provide alternative means of financing such an authority.

Reorganization of State's Transportation Agencies

Since 1964 the possible reorganization of the state's various transportation agencies has been debated and studied. In these debates among interested parties, it has generally been agreed that a coordinated attack on transportation problems is what is needed. There is no such concensus, however, on what government structure could facilitiate the communication and coordination.

Ten years of studies and hearings, beginning with a study done by the Legislative Council and followed by studies done by interim committees of the Legislature, special commissions and private interest groups, have produced a wide range of recommendations. Proposals include establishment of one agency that would combine transportation and land use planning; a State Department of Transportation (DOT); a merger of the Highway Department and TMTC; and other variations.

The Interagency Transportation Council (ITC) held a series of four hearings in Austin during August and September of 1974 on transportation related questions. Seventy-five witnesses including elected officials from many levels of government and representatives of planning agencies and transportation-user organizations testified. Those hearings exemplify the diversity of opinions which surround any reorganization strategy.

The Governor's Division of Planning Coordination, which provides staff to the ITC has prepared summaries of each meeting. Summaries of

testimony by witnesses on the Organization, Structure and Duties of State Transportation Agencies are available for each hearing respectively and for the entire series.

The summaries indicate: (1) There is no general agreement (by those witnesses who testified) on whether or not any changes are needed in the state's transportation agencies; and (2) of those who testified on the questions relating to organization, witnesses favoring the establishment or creation of a planning or coordination mechanism outnumbered proponents of either a State DOT, or advocates of assigning public and mass transportation programs to the Texas Highway Department - by more than three to one. On December 13, 1974 the ITC met and discussed the results of the hearings. Eighteen specific legislative recommendations were made to the Governor, but no recommendation was made relating to abolition or creation of state transportation agencies.

The House Transportation Committee has recently approved 23 recommendations developed from public hearings it conducted in Texas cities in 1974. The 3 items principally related to reorganization of the state's transportation agencies are:

1. "The Texas Highway Department and mass transit operations should be included in one governmental unit.
2. The Interagency Transportation Council should be left as an Executive Committee rather than making it statutory.
14. Study should be given to what type of agency

should administer dedicated funds for mass transit. The Committee recommends consideration of an expanded role for the Texas Highway Department of Transportation which might prove suitable to Texas."

The Senate Mass Transit Subcommittee which participated in, the same series of public hearings, developed their own recommendations, expressing a different view from their colleagues in the House.

The first Recommendation of the Senators is:

State Transportation Commission

At the State level we should move towards a unification of all transportation functions under one umbrella agency to insure maximum efficiency for our state transportation expenditure and to provide for orderly development of a unified transit system. The first step toward this goal should be for the 64th Legislature to reconstitute the Governor's Interagency Transportation Council as the Texas Transportation Commission. In addition to the Council's present duties, it should have the additional duty of urging cooperation in transportation matters among the various state agencies and preparing an annual report for the members of

the Legislature outlining the level of cooperation attained. The Texas Mass Transportation Commission's name should be changed to the Texas Public Transportation Commission, and it should be given the additional responsibility for channeling state and federal public and mass transportation funds to local areas.

The Texas Mass Transportation Commission after studying the issues and alternatives found that the reformation of the various state transportation agencies into one comprehensive DOT is not necessarily advantageous. Each of the transportation agencies, reflecting the expertise and specialization of different transportation modes, must focus on specialized tasks and problems. There are definite boundaries of responsibility in our transportation agencies. By dissolving these boundaries and creating a massive DOT, there is the risk of submerging the enthusiasm and expertise developed in the separate agencies.

The Commissioners believe the Highway Department should conduct highway programs; the Aeronautics Commission should conduct aviation programs; the Railroad Commission should continue their economic regulation of transportation. The Department of Public Safety should continue the enforcement of the laws; and so forth; including a continuation of the Mass Transportation Commission's responsibility for developing public and mass transportation in Texas.

What is needed most observers agree is a body that could resolve mutual problems among the state transportation agencies, undertake joint studies, encourage cooperative, comprehensive and continuous planning by each state agency; help coordinate state, regional and local transportation related plans and policy. This body could also help collect information to increase effectiveness of the allocation of State and federal resources.

There is no need to go shopping for such a body. The "job

description" above is the charge of the ITC which was created by Executive Order in March 1971. Representatives of the seven major transportation agencies comprise the Council and participate with voting power. The members in addition to TMTC are Texas Railroad Commission, Texas Highway Department, Texas Aeronautics Commission, Texas Offshore Terminal Commission, Texas Turnpike Authority and the Department of Public Safety. Each has a specific transportation mandate from the Legislature in addition to their participation in this planning and coordinating body.

By setting up a formal working relationship among the various transportation agencies, the Council fosters communication and coordination among them, and should prevent a state agency from acting "in the dark" or from duplicating another agency's efforts. Today when all modes of transportation are increasingly interdependent, a total transportation strategy is especially important.

The TMTC after examining the dimensions of a complete DOT and other combinations, decided that an interim step would be more appropriate than a giant step. Rather than create another layer of government, the Interagency Transportation Council, within the existing framework of government would appear to be the most suitable "planning and coordinating mechanism" for Texas at this time. The Council, however, has not reached it's full potential because of inadequate funds and fluctuating staffing patterns.

Accordingly, the Commission recommends that the ITC be established

statutorily (rather than by Executive Order, as it now exists), appropriately staffed and funded; and that it report annually to the Governor and the Legislature; and provide coordination between state transportation agencies, or between the various local, state or federal transportation agencies.

If there is in fact a need for an all inclusive state DOT, or for abolition of one or more state agencies, it should soon become apparent. Meanwhile, transportation planning and policy development will be better coordinated. The ITC will become responsible to both the Governor and the Legislature, and further recommendations can be advanced in the annual reports submitted by the Council, through it's Director, who is appointed by the Governor.

State Financial Support for Public and Mass Transportation

The Texas Mass Transportation Commission has previously adopted as one of its goals ". . .the establishment and continued provision of public transportation systems designed to provide at least a minimal level of mobility to urban citizens. . ." As one of the objectives related to this goal, the Commission has declared that the State should begin providing financial aid to its political subdivisions to assist public transportation by fiscal year '76, (Chapter 4, Texas Transit Development Plan) Since fiscal year '76 begins next September 1st, it is the 64th Legislature that will make the decisions that determine if that goal is met.

Budget Estimates for the next two fiscal years from the Commission include requests for \$250,000 for each year to fund the statutory authority of TMTC to ". . .render financial assistance in the planning of public and mass transportation systems. . ." This would allow the State to pay for up to one-half of the local share of transit related planning.

The Commission is also recommending capital grant assistance for public and mass transportation. In providing such assistance, Texas would be following the lead of other states. New York, California, Massachusetts, Pennsylvania, Illinois and Florida to name a few, all have made legislative provisions to assist local or regional transit systems

with capital improvement costs. Currently in Texas no governmental subdivisions of the State, or the State itself has any dedicated tax source for transit financing. All such funding comes from the very limited resource of local general revenue funds.

It was House Bill 1404 passed by the 61st Legislature which gave the authority to Texas cities to deal directly with the federal government in obtaining financial assistance for improvement of mass transit services in their incorporated areas and their suburbs and adjacent areas. This meant that federal funds could go directly to urban areas provided that the urban areas could provide the required local matching money.

The arrangement has proved less than successful because local funds have been insufficient to meet the needs. As a result, from 1964 through 1973, Texas has received only 2.1 percent of the national total of Urban Mass Transportation Assistance (UMTA) funds dispersed - a total of some \$55 million for both planning and capital assistance. During this same ten year period, California received over one and one quarter billion from UMTA - a sum 20 times Texas' grants. Illinois, Massachusetts, New York and Pennsylvania all received from 5 to 10 times the amounts Texas cities received - and each of those states provided funds to assist their cities in obtaining federal grants.

In the light of this disappointing record, there is growing support in Texas to shift some of the financial responsibility to the State. During the Constitutional Convention in the Spring of 1974, representatives

of both the Texas Good Roads Association and the Texas Municipal League supported the creation of a State fund dedicated to the assistance of public and mass transportation. The source of the funds was recommended to be a fraction of the existing sales and use tax on motor vehicles - a tax that presently goes into the State's General Fund.

A recent issue of Texas Transportation and Energy Report quotes the Texas AFL-CIO as including in their Texas legislative program, support for ". . .a mass transportation program which would include grants for development and capital improvements from either a refinery tax or by diverting part of the sales tax on motor vehicles."

The House Transportation Committee voted on December 3rd to recommend to the Legislature that "Texas should have a dedicated fund committed to mass transit", and approved another recommendation that ". . .Texas should have a dedicated fund for mass transit, similar to the one established for the highway system." Financing, the Committee says, could come from ". . .a portion of the sales tax on automobiles, a portion of the wellhead tax, or an increase of 1¢ per gallon in the gasoline tax."

The Senate Mass Transit Subcommittee's third recommendation is that "State financial assistance should be provided to public transportation systems for planning, development, capital expenditure and for transit operation".

The ITC, after extensive public hearings, has recommended that ". . .the State should provide financial assistance for planning and

promoting mass and public transportation systems and for capital improvements."

The passage of the National Mass Transportation Assistance Act of 1974, just signed into law, creates a new impetus for State involvement in transit funding. The Act authorizes an additional \$4.8 billion for transit capital grants, bringing the new total to nearly \$8 billion nationally over the next 6 years. In addition, nearly \$4 billion is available under a formula apportionment based on urbanized area population and population density, for either capital or operating expenses. (See Table 2 in Appendix IV which gives the cities approximate share of the discretionary funds from the National Mass Transportation Assistance Act of 1974.) The first fund is dispersed on application in the same way UMTA grants have historically been made. Texas' apportioned share of the second fund is some \$184 million over 6 years with about \$42 million of that amount coming to the state for re-distribution to urbanized areas with populations between 50,000 and 200,000.

There is only one major problem with acquiring this money. As with other federal funding, allocations are subject to local or state matching--20 percent in the case of capital funds, 50 percent in the case of operating expense. If past records are any indicator of what will happen in the future, the local governments will again have difficulty in matching the federal funds. As a result, without some State support, plans for development of mass and public transportation will be severely restricted.

The Texas Transit Development Plan gives a preview of the magnitude

of total operating and capital costs that will be incurred in implementing adequate transit plans through the year 1980, based on projections of transit ridership. (See Chapter 6 of the Plan for more detailed account.) According to the development strategy, if existing transportation plans in Texas' 27 urbanized areas are to be followed from now through 1980, the total capital cost in Texas will be \$1.178 billion (in 1975 dollars), an average of \$235 million per year. Prior to the passage of the National Mass Transportation Act of 1974, Texas historically received approximately 2.1 percent of federal UMTA capital grant funds. If Texas continues to receive the percentage of capital grant funds, in addition to the apportioned funds contained in the 1974 Act, Texas or its local governments will have to provide at least \$166 million per year plus operating costs. If Texas could increase its share of UMTA capital grant funds to 4.4 percent of the total amount, \$130 million would still be required from State and local funds.

With that range of financial requirement, it seems obvious that the State will have to provide assistance if we are to implement the mass and public transportation systems planned for local and regional service. The net difference between the amount of federal UMTA capital improvement funds coming to Texas and the total estimated capital cost must be provided from state and local government sources.

From figures furnished by the Comptroller's Office it is estimated that if in 1973, one-fourth of the sales and use tax on motor vehicles, (approximately \$200 million) had been set aside for planning and capital

grant assistance to public and mass transportation, it would have produced \$50 million in revenues. That \$50 million per year in state financial assistance (which is less than one half of the minimum non-federal cost) would be of significant help in accomplishing the plans of Texas urbanized areas. Such a dedicated source would provide continuity of funds which is essential when dealing with such long term projects. The fruits of a reliable, adequate and replenishable fund are beautifully manifest in the Texas highway system.

The State adopted an aggressive planning and assistance strategy toward the highway system, nurturing it with the Dedicated Highway Fund. The result is more than 70,000 miles of outstanding highways. In contrast, the State has not yet assumed any financial role of planning and capital assistance grants for mass transit.

The 64th Legislature can make the decisions that would allow the state's urban areas to claim and utilize federal funds that are available. For this reason, the Commission has recommended legislation creating a fund dedicated to provide planning and capital grant assistance for public and mass transportation from one-fourth of the revenue of the state's sales and use tax on motor vehicles.

This proposal, if adopted by the Legislature, will provide the financial assistance needed by the state's urban population, and without the levying of any new or increased tax.

Conclusion

Mass transit is like an aging Hollywood star who has seen better days and now is preserved in occasional reruns. Transit development reached a peak in 1926, declined steadily until 1933, then began an upturn. World War II saw a tremendous increase in transit ridership, due to interruption of new car production and nationwide gasoline rationing. Ridership then dropped sharply after 1947, and has continued a downward trend until very recently.

Unlike nostalgia which is reviving the popularity of old movie stars, the increase in transit ridership is caused by different circumstances. We are going through a mid-1970's version of what happened during World War II. This time the interruption of new car production is the result of the recession-inflation twister. And though not involved in a war, we live in the shadow of an impending war and oil embargo in the Middle East that could cause nationwide gasoline rationing. Economic dislocations alone may cause stringent fuel restrictions in the U.S.

As a result of these changing circumstances, public and mass transportation may find new supporters. Automobiles, though almost a necessity, are also becoming a luxury. They are expensive to purchase and expensive to operate. If you consider their initial cost and then tally up the price of oil, gasoline, tires, insurance, as well as the cost of streets, bridges and highways; and the cost of traffic law

enforcement; the private automobile seems less of a bargain. In comparison, transit is a real bargain.

In addition to economic costs, environmental costs should also be considered. Proposed federal air quality emission controls have been postponed, but sooner or later transit must be considered as an alternative that can help reduce air pollution. It has been estimated that it would take an additional 136,000 automobiles to provide the trips currently being made in transit vehicles in Texas. These additional automobiles would generate 8 times as much air pollution as the transit vehicles, most of it in the largest cities, which can least afford an increase. Consideration of traffic safety can also supply some pro-transit statistics. Transit transportation is safer than the private car.

For all of these reasons there may be strong motivation to improve and use public transportation. TMTC is trying to ". . . encourage, foster and assist in the development of public and mass transportation. . .in the State" in accord with their legislative mandate. Before we can entice people into transit usage, sufficient and convenient public and mass transportation must be available.

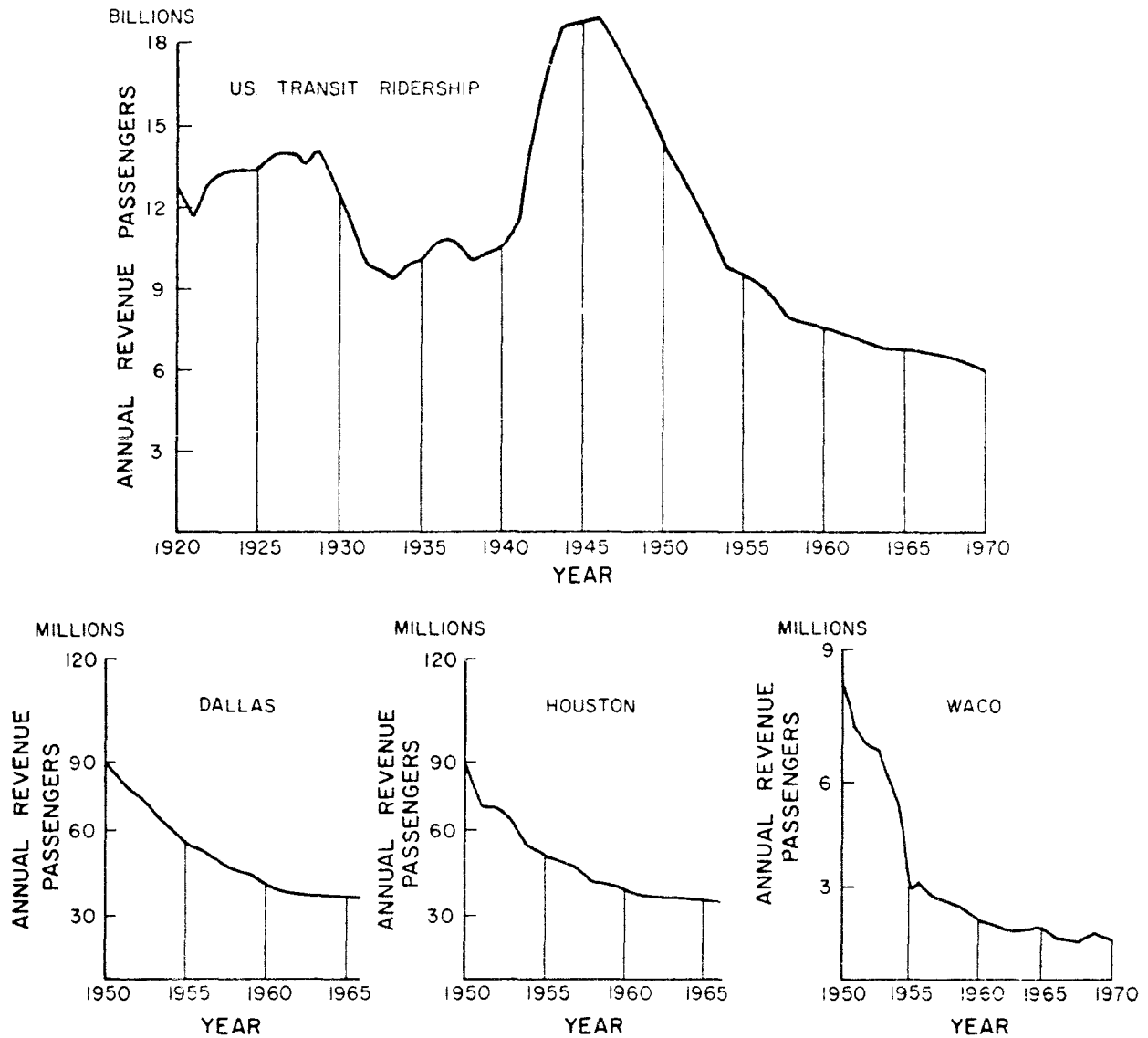
Marketing public and mass transportation in Texas is a difficult task, in some ways like introducing a second language. Texans have been fluent for so long in their "mother" tongue: "I drive; you drive; he, she, it drives; we drive; they drive." It is a most convenient

and flexible language that has, and in many cases, will continue to serve the state well. But suddenly, due to a variety of circumstances we are being encouraged to learn a second and unfamiliar language. . . ."I am waiting at the bus stop; he is going to 'Park and Ride'; Do you have the exact fare for the bus?"

TMTC's legislative recommendations are, as directed by the Legislature, ". . .to advance the interests of the state in public mass transportation. . .". Under the National Mass Transportation Assistance Act of 1974, Section 5, Texas placed in the "Top Ten" states receiving 9-digit figures for operating and capital improvements, based on urban population and population density. Texas came in seventh with an allocation of some \$184 million. New York, California, Illinois, Pennsylvania, Ohio and Michigan received more; with New Jersey, Florida and Massachusetts receiving less. As Texas evolves into this new urbanized society in changing circumstances, we must make the necessary adaptations in transportation. The Legislature by considering TMTC's recommendations will make the decisions to chart our course. In this way Texas will evolve gracefully and powerfully without losing mobility.

APPENDIX I

FIGURE 1: TRENDS IN TRANSIT RIDERSHIP



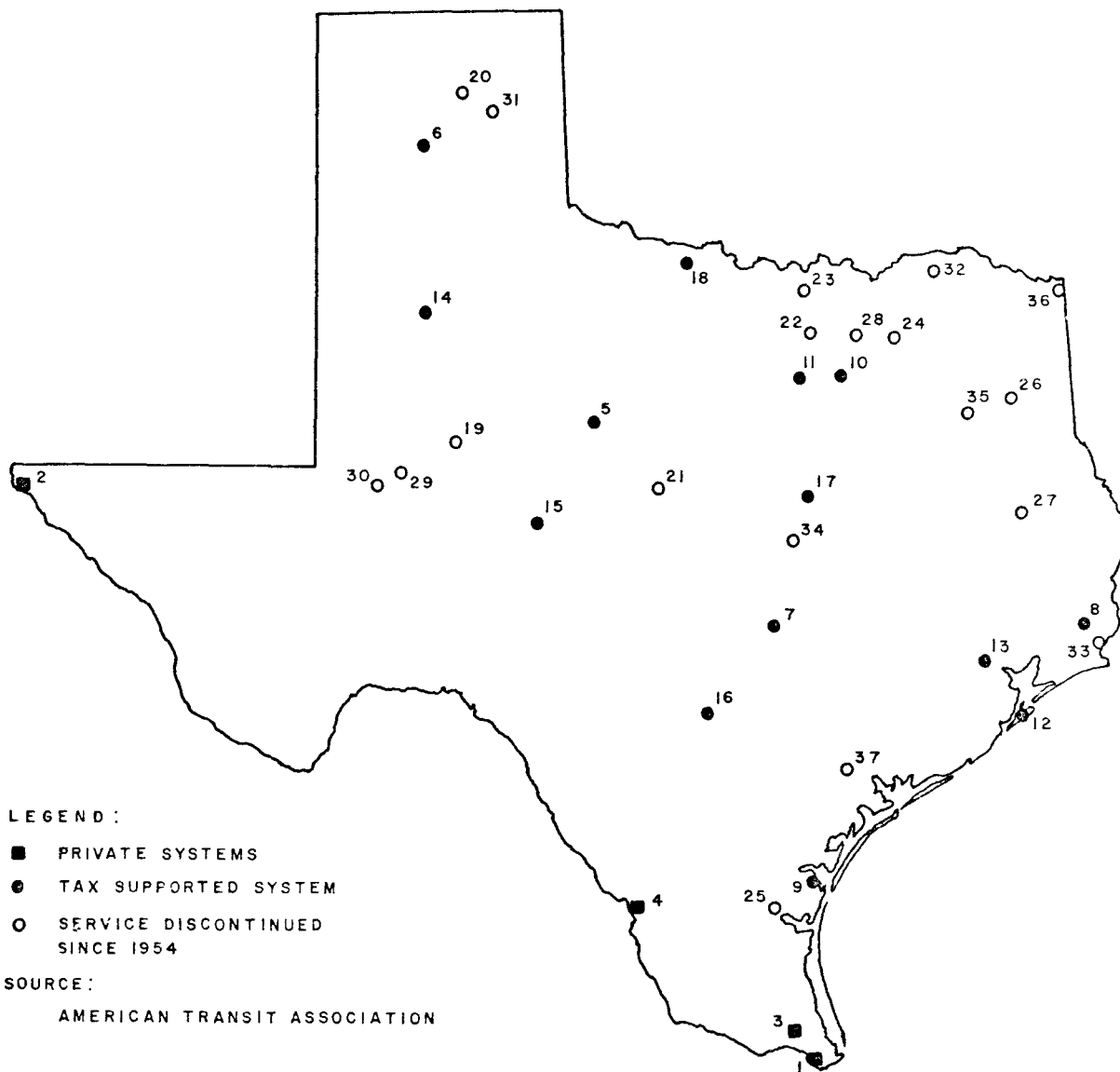
Despite rapid urban growth and increasing needs for mass transit, there has been a long-term downward trend in ridership. Reasons for this trend include: (1) decreasing population densities, (2) deteriorating transit service, (3) increasing personal incomes, and (4) increasing automobile ownership.

Taken from "The Role of The Texas Mass Transportation Commission"
(Texas Transportation Institute) p.3.

FIGURE 2

CITIES WITH CURRENT OR RECENT
TRANSIT SERVICE

Appendix 1-b



PRIVATE

- 1. Brownsville
- 2. El Paso
- 3. Harlingen
- 4. Laredo

TAX SUPPORTED

- 5. Abilene
- 6. Amarillo
- 7. Austin
- 8. Beaumont
- 9. Corpus Christi
- 10. Dallas
- 11. Ft. Worth

- 12. Galveston

- 13. Houston
- 14. Lubbock
- 15. San Angelo
- 16. San Antonio
- 17. Waco
- 18. Wichita Falls

SERVICE DISCONTINUED

- 19. Big Spring
- 20. Borger
- 21. Brownwood
- 22. Denton
- 23. Gainesville

- 24. Greenville
- 25. Kingsville
- 26. Longview
- 27. Lufkin
- 28. McKinney
- 29. Midland
- 30. Odessa
- 31. Pampa
- 32. Paris
- 33. Pt. Arthur
- 34. Temple
- 35. Tyler
- 36. Texarkana
- 37. Victoria

POPULATION PROJECTIONS FOR TEXAS URBANIZED AREAS

<u>URBANIZED AREAS</u>	<u>1970 POPULATION</u>	<u>POPULATION FORECASTS</u>	
		<u>1980</u>	<u>1990</u>
<u>Over 500,000</u>			
Houston	1,677,863	2,025,000	2,371,000
Dallas	1,338,684	1,640,000	1,926,000
San Antonio	772,513	963,000	1,154,000
Fort Worth	676,944	852,000	1,030,000
<u>200,000-500,000</u>			
El Paso	337,471	382,000	427,000
Austin	264,499	332,000	399,000
Beaumont-Orange- Port Arthur (1)	257,281	354,000	375,000
Corpus Christi	212,820	238,000	264,000
<u>100,000-200,000</u>			
Lubbock	150,135	176,000	203,000
Galveston-Texas City- LaMarque (1)	145,863	252,000	357,000
Amarillo	127,010	144,000	160,000
Waco	118,843	131,000	143,000
<u>Less Than 100,000</u>			
Wichita Falls	97,564	107,000	117,000
McAllen-Pharr	91,141	105,000	120,000
Abilene	90,571	99,000	109,000
Odessa	81,645	92,000	102,000
Laredo	70,197	74,000	78,000
San Angelo	63,884	71,000	79,000
Midland	60,371	67,000	73,000
Tyler	59,781	74,000	88,000
Sherman-Denison	55,343	67,000	80,000
Brownsville	52,627	61,000	70,000
Bryan-College Station	51,395	59,000	66,000
Harlingen-San Benito	50,469	62,000	73,000
Longview	45,547	51,000	56,000
Temple-Belton	42,127	50,000	52,000
Victoria	41,349	50,000	55,000
Texarkana (Texas Part)	36,888	44,000	51,000
Denton	39,874	51,000	62,000
Killeen-Harker Hts.(2)	39,723	52,000	65,000
	<u>7,150,422</u>	<u>8,725,000</u>	<u>10,205,000</u>

SOURCE: 1974 National Transportation Study, Manual II, Vol. 2, Appendix F, Revised April, 1973.

(1) Includes two urbanized areas.

(2) Not including Fort Hood population.

Studies of Mass Transit Problems

In Texas *

(None of which included draft Legislation)

- 1964 Legislative Council Report: "A Preliminary Report on Mass Transportation" - outlined problem areas and recommended continued study.
- 1967 Legislative Council Report: "Balanced Transportation for Texas Cities" - recommended coordinated planning for all transportation modes in metropolitan areas; and that transportation and land use planning be coordinated by a new state agency created for local government planning, including transportation. Also recommends new revenue sources for cities and assistance to private transit companies.
- 1970 Senate Interim Committee on Urban Affairs: "An Action Program for Urban Texas" - recommends requiring Mass Transportation Commission approval before granting assistance for transit projects, increased appropriations to TMTC, allow cities to use highway user taxes for transit purposes, and authorize local governments to establish authorities for management of area-wide systems.
- 1971 Texas Urban Development Commission: "Urban Texas - Policies for the Future" - recommends a State Department of Transportation to be responsible for operation and funding of all modes of transportation and operating through "semi-autonomous districts"; and, admitting the difficulty of incorporating such an organization into the existing state governmental framework", the Interim recommendation is statutory authority for metropolitan regions to form "public transportation administrations".
- 1971 Texas Mass Transportation Commission: "The Role of Texas Mass Transportation Commission" - prepared for TMTC by Texas Transportation Institute, the report defines the principal problems in public and mass transportation in Texas, with three alternative sets of legislative and funding constraints assumed and a suggested scope of operations outlined for each.

- 1974 Reports of The House Transportation Committee, and the Senate Mass Transit Subcommittee.
- 1974 Texas Mass Transportation Commission: "Texas Transit Development Plan, 1975 - 1990" - a history, inventory and consolidation of Texas transit plans, intercity and intracity, prepared in compliance with statutory directives.

* All available at Legislative Reference Library in the Capitol.

APPENDIX II

A BILL TO BE ENTITLED

AN ACT

1
2 relating to the duties of the Texas Mass Transportation Commission;
3 amending Subsection (h), Section 8, Texas Mass Transportation
4 Commission Act (Article 4413(34), Vernon's Texas Civil Statutes);
5 and declaring an emergency.

6 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF TEXAS:

7 Section 1. Subsection (h), Section 8, Texas Mass
8 Transportation Commission Act (Article 4413(34), Vernon's Texas
9 Civil Statutes), is amended to read as follows:

10 "(h) The commission may accept and receipt for federal and
11 other grants either public or private, for [~~the-state-or~~] any
12 political subdivision [~~thereof~~] of this state when authorized
13 by the [~~state-or~~] subdivision, for the acquisition, construction,
14 improvement, maintenance, study, or operation of public mass
15 transportation facilities. The commission may also accept and
16 receipt for federal and other grants either public or private on
17 behalf of the State of Texas, for the acquisition, construction,
18 improvement, maintenance, study, or operation of public mass
19 transportation facilities. Grants may be accepted under this
20 subsection whether the work is to be done by the state, a
21 municipality, or any other political subdivision of the state
22 aided by grants from the United States upon terms and conditions
23 now or later prescribed by the laws of the United States. The
24 state or the governing body of a municipality or other political

1 subdivision may designate the commission as its agent to receive
2 money under this section and the commission acting as agent may
3 contract with the federal government for the acquisition,
4 construction, improvement, maintenance, study, or operation of
5 public mass transportation facilities."

6 Sec. 2. The importance of this legislation and the crowded
7 condition of the calendars in both houses create an emergency and
8 an imperative public necessity that the constitutional rule
9 requiring bills to be read on three several days in each house
10 be suspended, and this rule is hereby suspended, and that this
11 Act take effect and be in force from and after its passage, and
12 it is so enacted.



THE ATTORNEY GENERAL
OF TEXAS

AUSTIN, TEXAS 78711

JOHN L. HILL
ATTORNEY GENERAL

October 4, 1973

The Honorable Russell Cummings
Executive Director, Texas Mass
Transportation Commission
1013 San Jacinto
Austin, Texas 78701

Opinion No. H- 120

Re: Construction of Mass
Transportation Commission
Act, Article 4413(34), V. T. C. S.

Dear Mr. Cummings:

You have requested the opinion of this office on two questions related to § 8 of Article 4413(34), Vernon's Texas Civil Statutes, the Texas Mass Transportation Commission Act adopted in 1969. Your two questions are:

1. "Does the enactment of this legislation (in 1969) constitute being 'authorized by the State, ' and are we therefore able to 'accept and receipt' for federal grants? If not, does the Governor have the authority to 'authorize' or does it require another act of the Legislature to 'authorize' what this subsection describes?"

2. "Can TMTC grant financial assistance to Texas political subdivisions for planning public mass transportation systems from appropriations made by the Legislature for that purpose?"

The Act calls for the creation of the Texas Mass Transportation Commission. Section 8(a) provides that its purposes shall be to encourage and assist in the development of public mass transportation and to encourage the establishment of rapid transit and other transportation media. Other subsections of § 8 define the authority of the Commission.

Subsection h, in part, provides:

"The Commission may accept and receipt for federal and other grants either public or private, for the state or any political subdivision thereof, when authorized by the

state or subdivision, for the acquisition, construction, improvement, maintenance or operation of public mass transportation facilities . . . The state or the governing body of a municipality or other political subdivision may designate the commission as its agent to receive money under this section and the commission acting as agent may contract with the federal government for the acquisition, construction, improvement, maintenance, or operation of public mass transportation facilities. " (Emphasis added)

The State is the people and all political power of the State is inherent in them. Article 1, § 2, Constitution of Texas; Dickson v. Strickland, 265 S. W. 1012 (Tex. 1924); Love v. Wilcox, 28 S. W. 2d 515 (Tex. 1930). The people, in turn, exercise their inherent power through the Legislature. Article 2, § 1, Constitution of Texas; Ferguson v. Wilcox, 28 S. W. 2d 526 (Tex. 1930). Neither the Governor nor any other State officer may act for the State unless authorized to do so either by the Constitution or by statute. State v. Ragland Clinic-Hospital, 159 S. W. 2d 105 (Tex. 1942); Calvert v. Adams, 388 S. W. 2d 742 (Tex. Civ. App., Austin, 1965), rev. on other grounds, Adams v. Calvert, 396 S. W. 2d 948 (Tex. 1965). See also Attorney General Opinions M-1141, M-1199 (1972) and Letter Advisory No. 2 (1973).

With these general principles in mind we would answer your first question that the enactment of the Texas Mass Transportation Commission Act, authorizing the Commission to accept and receipt for federal grants "when authorized" does not itself constitute the authorization. We believe that such "authorization" or "designation" would have to be expressed in another act of the Legislature as, for example, Article 5521b-22d, V. T. C. S., in which the Legislature exercised for the State the election authorized to be covered by the Texas Unemployment Compensation Act provided in Article 5221b-6(b)(2). Or, such authorization or designation may come from a political subdivision or an agency of the State which in turn has legislative authority to receive such grants.

To the second part of your first question we answer that, in our opinion, unless specifically authorized to do so by some statute, the Governor does not have the authority to extend authorization on behalf of the State. Article 4413(34)(h) specifically authorizes the governing body of a municipality or

other political subdivision to designate the Commission as its agent to receive such grants.

Your second question involves the authority of the Texas Mass Transportation Commission to render financial assistance to other political bodies for planning public mass transportation systems "from appropriations made by the Legislature for that purpose."

Section 8(d) of Article 4413(34), V. T. C. S., is:

"The commission may render financial assistance in the planning of public mass transportation systems out of appropriations made by the Legislature for that purpose."

Your letter cites, as one possible source of difficulty, § 51 of Article 3 of the Texas Constitution. This section provides:

"The Legislature shall have no power to make any grant or authorize the making of any grant of public moneys to any individual, association of individuals, municipal or other corporations whatsoever . . ."

Section 52(a) of Article 3 denies the Legislature the power to authorize any county, city, town or other political corporation or subdivision to lend its credit or make such a grant of public money.

Finally, § 6 of Article 16, in its subsection (a), prohibits the appropriation of funds for private or individual purposes unless authorized by the Constitution.

These constitutional provisions have been the subject of many questions and much writing. It is clear, however, that they are now interpreted to mean only that the Legislature must appropriate funds for public purposes. That an appropriation is also of assistance to a private individual or corporation does not render it unconstitutional if it meets the "public purpose" test. See for instance, State v. City of Austin, 331 S. W. 2d 737 (Tex. 1960).

With specific reference to the use of federal funds, we would call your attention to Attorney General Opinion M-782 (1971) where, after a thorough review of the authorities, it was held that federal grants deposited in the

State Treasury might be distributed not only to public or State supported institutions, but also to non-profit corporations and associations "so long as such payment and expenditure is made in accordance with the terms of the grant and for the purposes of the Federal grant. Such payment is for a public or governmental purpose and would not violation Section 51 of Article III of the Constitution of Texas."

From your question we assume the existence of an appropriation "made by the Legislature" for financial assistance to public subdivisions. In addition, the appropriation bills for the year ending August 31, 1973 (Senate Bill 1, 62nd Leg., 3rd Called Session) and for the biennium commencing September 1, 1973 (House Bill 139, 63rd Leg.) contain provisions (§ § 22 and 23 of Article 5 of the 1972 appropriations and § § 18 and 19 of Article 5 of the 1973 appropriation bill) that funds received either as private bequests and gifts or federal grants to State agencies "are hereby appropriated to such agencies for the purposes for which" the grant, bequest or gift was made or similar language.

It is our opinion therefore that appropriated funds or bequests, gifts or grants for the purpose of assisting political subdivisions of the State in planning public mass transportation systems, may be used for that purpose by the Commission. See Attorney General Opinion M-581 (1970); M-266 (1968).

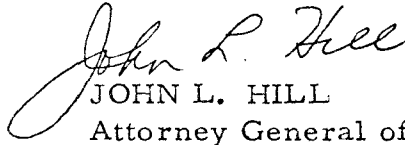
S U M M A R Y

The Texas Mass Transportation Commission may accept and receipt for federal grants when authorized to do so either by legislative enactment or by an agency to whom such grant is made. Article 4413(34), V. T. C. S., does not, by itself, constitute such authorization.

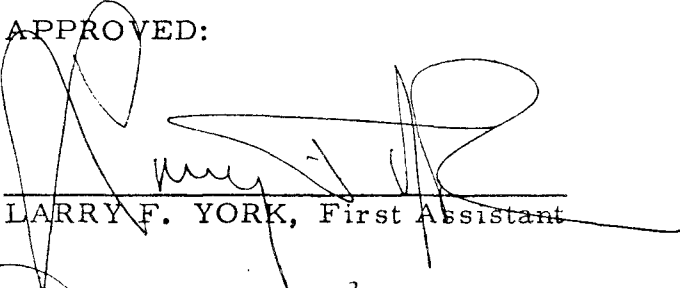
The Commission may also grant financial assistance to political subdivisions of the State of Texas for planning

public mass transportation either out of any funds which may be appropriated to it for that specific purpose by the Legislature or out of private bequests or gifts or federal grants made to it for that purpose.

Very truly yours,


JOHN L. HILL
Attorney General of Texas

APPROVED:


LARRY F. YORK, First Assistant


DAVID M. KENDALL, Chairman
Opinion Committee



THE ATTORNEY GENERAL
OF TEXAS

AUSTIN, TEXAS 78711

May 7, 1974

JOHN L. HILL
ATTORNEY GENERAL

The Honorable Russell Cummings
Executive Director,
Texas Mass Transportation Commission
510 South Congress, Suite 208
Austin, Texas 78704

Re: Attorney General Opinion
H-120

Dear Mr. Cummings:

We have your letter of May 3, 1974, citing our opinion H-120 and asking whether the Governor may designate Texas Mass Transportation Commission as the appropriate recipient of a grant from the Urban Mass Transportation Administration of the Federal Department of Transportation to be used for the purposes set out in Article 4413(34) V. T. C. S., creating your Commission.

In Opinion H-120 we stated that the Commission could accept federal grants when designated to do so by an "agency of the State" which had authority to accept such grants.

You have directed our attention to Article 4413(32a), V. T. C. S., as conferring such authority upon the Governor and ask whether he would qualify as a "state agency" as we used that term in H-120. We did not intend "state agency" as a term of art. Rather, we intended it to encompass all arms of the state government and this would include the Governor.

Where the Governor is designated Chief Planning Officer of the State, he is authorized to designate your Commission to receive federal funds to be used for planning purposes within the sphere of your activities.

Very truly yours,

A handwritten signature in cursive script, appearing to read "David M. Kendall".

David M. Kendall, Chairman
Opinion Committee

DMK:cg

APPENDIX III



**THE ATTORNEY GENERAL
OF TEXAS**

AUSTIN, TEXAS 78711

**JOHN L. HILL
ATTORNEY GENERAL**

October 3, 1973

The Honorable Joe Resweber
County Attorney
Harris County Courthouse
Houston, Texas 77002

Opinion No. H-119

Re: Validity of Senate Bill 642,
63rd Legislature (Article
1118x, V. T. C. S.)

Dear Mr. Resweber:

You have requested our opinion concerning the constitutionality of Senate Bill 642 of the 63rd Legislature (Acts 1973, 63rd Leg., ch. 141, p. 302; Article 1118x, V. T. C. S.) which generally provides for the creation of rapid transit authorities possessing the powers, among others, to construct and operate mass transit systems and to levy a "motor vehicle emission tax" based upon the number of cubic inches of cylinder displacement.

You have suggested, as possible grounds of unconstitutionality, (1) that the Act is a local bill rather than a general taxing statute and (2) that the Legislature lacks constitutional authority to create a district having such taxing powers.

Section 3 of the Act authorizes the "governing body of a principal city in a metropolitan area" to institute proceedings to create a rapid transit authority. A "metropolitan area" is defined in § 2(a) as "any area within The State of Texas having a population density of not less than 250 persons per square mile and containing not less than 51 per cent of the incorporated territory comprising a city having a population of not less than 1,200,000 inhabitants according to the last preceding or any future federal census, and in which there may be situated other incorporated cities, towns and villages and the suburban areas and environs thereof."

Section 15 would exclude from this definition any bicounty metropolitan area - an area comprised of two contiguous counties each having within its bounds a city of 350,000 or more inhabitants.

However, not every open-ended classification (e. g. , all areas having a population in excess of a certain number) is constitutional and not all "brackets" (e. g. , all areas with populations between two figures) are unconstitutional. The courts now require a showing that there "is a reasonable basis for the classification and that the law operates equally on all within the classification." Rodriguez v. Gonzales, 227 S. W.2d 791, 793 (Tex. 1950).

Justice Greenhill (now Chief Justice), writing for the Supreme Court in Smith v. Davis, 426 S. W. 2d 827 (Tex. 1968), stated the rule to be:

"The Legislature may restrict the application of a law to particular counties by the use of classifications, providing the classifications are not arbitrary. There must be a reasonable relationship between the classification and the objects sought to be accomplished by the statute. Smith v. Decker, 158 Tex. 416, 312 S. W. 2d 632 (1958); Miller v. El Paso County, 136 Tex. 370, 150 S. W. 2d 1000 (1941). As stated in Miller, the classification ' . . . must not be a mere arbitrary device resorted to for the purpose of giving what is, in fact, a local law, the appearance of a general law.' The ultimate test for whether a law is general or special is whether there is a reasonable basis for the classification and whether the law operates equally on all members within the class. County of Cameron v. Wilson, 160 Tex. 25, 326 S. W. 2d 162 (1959); Rodriguez v. Gonzales, 148 Tex. 537, 227 S. W. 2d 791 (1950). "

See also Bexar County v. Tynan, 97 S. W. 2d 467 (Tex. 1936); Anderson v. Wood, 152 S. W. 2d 1084 (Tex. 1941); Smith v. Decker, 312 S. W. 2d 632 (Tex. 1958).

Another exception to the general rule against special or local laws is that a law may be made applicable to only one area if it is of general import and interest to the people of the State.

Thus, in County of Cameron v. Wilson, *supra*, it was said:

" . . . In a number of decisions it has been said that a statute is not local or special within the meaning of the Constitution even though its enforcement or operation is confined to a restricted area, if persons or things throughout the State are affected thereby or if it operates upon a subject in which the people at large are interested . . . " (326 S. W.2d at 165) (Emphasis added)

Cameron County involved public park facilities on Padre Island. Stephensen v. Wood, 34 S. W.2d 246 (Tex. 1931), applied the rule to laws for the preservation of fish in streams and coastal waters. Smith v. Davis, supra, involved a hospital district and medical school.

In construing the application of these rules to a particular statute to determine its constitutionality we are admonished by the courts that a statute is to be construed as valid if reasonably possible. Duncan v. Gabler, 215 S. W.2d 155 (Tex. 1948). It is to be presumed that the Legislature did not act unreasonably or arbitrarily in adopting a statutory classification. The mere fact that reasonable minds might differ as to the efficacy of an enactment is not sufficient grounds to hold it either arbitrary or unreasonable. It is for the Legislature and not for us or the courts to decide the wisdom or expediency of a bill. Smith v. Davis, supra.

We are not at liberty to substitute our judgment for that of the Legislature if there exists any state of facts justifying a classification such as that of the "bicounty metropolitan area" of Senate Bill 642. Inman v. Railroad Commission, 478 S. W.2d 124 (Tex. Civ. App., Austin, 1972, err. ref'd., n. r. e.); Reed v. City of Waco, 223 S. W.2d 247 (Tex. Civ. App., Waco, 1949, err. ref'd.)

With these rules in mind, we turn to the provisions of Senate Bill 642. In our opinion, it is a general law within the meaning of the above-discussed legal rules and authorities and, on that ground, its constitutionality must be upheld. Although the Act, by its terms, applies only to the Harris County-Houston metropolitan area at this time, it is open-ended and may apply in the future to other areas which can meet the definition of "metropolitan area". It cannot be said that, as a matter of law, the classification of areas contained in that definition is either arbitrary or unreasonable.

Surely there is a basis for holding that the problems of air pollution, traffic congestion and mass transportation in such an area differ from those existing in less populous areas. We cannot say that the line drawn by the Legislature should have been drawn elsewhere.

Furthermore, we are of the opinion that the matter of controlling air pollution and traffic congestion in such a metropolitan area can fairly be said to be a matter of interest and import to people throughout the State. The Houston metropolitan area to which this Act presently is applicable is one of our most populous and popular areas. Each year large numbers of people from all parts of Texas and the United States visit the area for various and sundry reasons. The interdependence of industrial and commercial centers of the State, and the commerce between them could have fairly have been viewed by the Legislature as affecting the entire State. Since we believe it is our legal duty to presume that the Legislature understands and correctly appreciates the needs of the people of this State, that its laws are directed to problems made manifest by experience, that its classifications are based on adequate grounds, and that the stated purpose of the Rapid Transit Act (aimed at air pollution, traffic congestion and related problems of general concern) are genuine, we are of the opinion that the statute is not unconstitutional as a special or local law. As we have said above, this decision is not meant and should not be construed as a commentary on the general merits of the proposition, for that is and should be initially for the Legislature and ultimately for the voters to decide.

What we have said about the population classification of the Act so as to limit its application presently to the Houston area applies equally, we believe, to the classification of bicounty areas to exclude them. The Legislature reasonably might have found that in an area with two contiguous counties, each having a sizeable city that might be classified as a "principal" one, the problems of pollution and traffic congestion would be met better by a different approach than that contemplated by Senate Bill 642.

It is our opinion, therefore, that the statute is a general law and meets the requirements of Article 3, § 56 and Article 8, § 3 of the Constitution.

Turning to the question of the validity of the "emission tax", we are first confronted with the need to determine whether it is, in fact, a tax for revenue purposes or, to the contrary, is primarily a regulatory measure. The distinction is well stated in Hurt v. Cooper, 110 S. W.2d 896 (Tex. 1937):

" . . . The principle of distinction generally recognized is that when, from a consideration of the statute as a whole, the primary purpose of the fees provided therein is the raising of revenue, then such fees are in fact occupation taxes, and this regardless of the name by which they are designated. On the other hand, if its primary purpose appears to be that of regulation, then the fees levied are license fees and not taxes. [citing cases]" (110 S. W.2d at 899)

And see Harris County v. Shepperd, supra.

In § 1 of Senate Bill 642, the Legislature recited the findings which called for the enactment of the law. Summarized, they were (a) the State's population has achieved increased mobility freeing it of county lines; (b) resulting concentrations of population result, in turn, in concentrations of motor vehicles with concomitant air pollution endangering public health and creating hazards; (c) the concentrations of motor vehicles overtax existing streets causing congestion with its attendant ills; (d) the proliferation of the use of motor vehicles results, in part, from the absence of efficient mass transit facilities; and (e) that the "artificial" use of the air, resulting in pollution, is subject to regulation and control by the State. Section 20, the emergency clause, is framed in much the same tenor.

The Act provides for the levy of a tax which, of necessity, will result in raising revenue to be used to aid in the financing of mass transit facilities. However, in our opinion one of the prime purposes of the Act is to control and regulate the use of motor vehicles in the affected area with the ultimate goal of reducing pollution of the air and congestion of the streets. Thus, the "emission tax" serves a dual purpose - partially revenue-raising and partially regulatory - and with its overriding general thrust having substantial regulatory aspects.

It is our opinion, therefore, that the court authorities do not permit us to subject this Act to the most strict limitations imposed by the Constitution on revenue taxes. See Atkins v. State Highway Dept., 201 S. W. 226 (Tex. Civ. App., Austin, 1918, no writ); Payne v. Massey, 196 S. W. 2d 493 (Tex. 1946).

In Atkins v. State Highway Dept., supra, (quoted with apparent approval by the Supreme Court in County of Harris v. Shepperd, supra), the plaintiff challenged the constitutionality of motor vehicle registration fees based upon horse power, invoking various provisions of Article 8 of the Constitution.

In rejecting his contentions, the Court said:

" . . . Those sections of the Constitution relate to ordinary ad valorem taxes, and not to license taxes, or fees, such as we have found the fees here involved to be. Besides, authorities are numerous to the effect that license fees for the operation of automobiles may be fixed according to the horse power "
(201 S. W. at 232)

Section 17 of Article 8 of the Constitution gives to the Legislature broad powers to determine subjects and objects to be taxed, consistent with other constitutional provisions, so long as such classifications are not unreasonable or arbitrary. See Calvert v. Capital Southwest Corporation, 441 S. W. 2d 247 (Tex. Civ. App., Austin, 1969, err. ref'd., n. r. e.), appeal dis'm. 397 U. S. 321 (1970). The United States Supreme Court has recently held in dealing with State tax classifications under attack for violation of the Equal Protection Clause, that great leeway is permitted to states in making tax classifications. Lehnhausen v. Lakeshore Auto Parts Co., _____ U. S. _____, 35 L. Ed. 2d 351, 93 S. Ct. 1001 (1973). We are unable to say that the regulatory aspects of Senate Bill 642 applicable to a limited area of the State and in varying amounts dependent upon engine displacement are not consistent with the proper regulation of causes of pollution and aggravated traffic congestion.

Section 13 of the Act authorizes the board to adopt and enforce "reasonable rules and regulations" (a) to maintain safety; (b) governing use of its facilities by the public, including charges to be paid; (c) regulating "privileges" on any of its property; and (d) regulating the collection and payment of emission taxes. It provides, in part:

"The board may set reasonable penalties for the breach of any rule or regulation of the authority which shall not exceed fines of more than \$200, or imprisonment for more than 30 days or both. Such penalties shall be in addition to any other penalties provided by the laws of the state and may be enforced by complaint filed in the appropriate court of jurisdiction in the county in which the authority's principal office is located. "

The legislative power, and particularly that having to do with the definition of crimes, is confined by our Constitution to the Legislature. Article 1, § 28, Article 2, § 1, Article 3, § 1. The Penal Code, in Article 3, provides that " . . . no person shall be punished for any act or omission, unless the same is made a penal offense, and a penalty is affixed thereto by the written law of this State. " And see § 1. 03(a), Penal Code of 1973, (Acts 1973, 63rd Leg., ch. 399, p. 883).

The rule is well stated in 12 Tex. Jur. 2d, Constitutional Law, § 65, p. 410:

"The legislature cannot delegate to an administrative agency the power to make a law prescribing a penalty. But the legislature may authorize an administrative agency created for that purpose to prescribe duties or ascertain conditions on which an existing law may operate in imposing a penalty and in effectuating the purpose designed in enacting the law. "

In the present Act, no crime is defined and no penal offense is created by the Legislature. That power purports to be delegated to the transit authority along with the power to fix punishments for violations.

Since a transit authority does not have general police powers, as a city does, we are of the opinion that so much of § 13 as purports to delegate to transit authorities the power to make violation of its rules and regulations a crime, will be held unenforceable. Ex parte Lislle, 223 S. W. 227 (Tex. Crim. 1920); Dockery v. State, 247 S. W. 508 (Tex. Crim. 1923); Ex parte Wilmoth, 67 S. W. 2d 289 (Tex. Crim. 1933); Williams v. State, 176 S. W. 2d 177 (Tex. Crim. 1943); Attorney General Opinions O-872 (1939); O-2913 (1940); O-5047 (1943); Attorney General Letter Advisory No. 42 (1973).

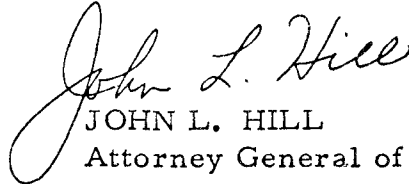
This provision is severable and does not affect the constitutionality of other portions of the Act.

S U M M A R Y

The creation of transit authorities under Senate Bill 642 of the 63rd Legislature and the authorization of an "emission tax" are not unconstitutional.

Insofar as the Act purports to delegate to the board of an authority the power to define crimes and fix punishments for their violation, that portion is unconstitutional. However, it is severable and does not invalidate the entire Act.

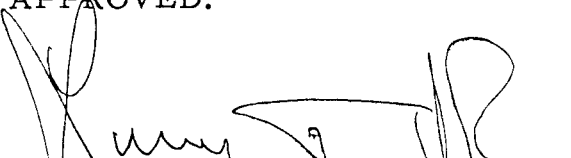
Very truly yours,



JOHN L. HILL

Attorney General of Texas

APPROVED:



LARRY F. YORK, First Assistant



DAVID M. KENDALL, Chairman
Opinion Committee

APPENDIX IV

Table 2

TEXAS APPROXIMATE SHARE OF THE DISCRETIONARY FUNDS FROM
THE NATIONAL MASS TRANSPORTATION ASSISTANCE ACT OF 1974*

Projected Apportionments for Urbanized Areas of 200,000
population and above.

Austin	\$ 7,648,458
Corpus Christi	4,893,648
Dallas	32,712,259
El Paso	9,404,328
Fort Worth	15,773,235
Houston	48,737,703
San Antonio	<u>23,547,070</u>
Sub-total	\$ 142,716,701

Combined Urbanized Areas under 200,000 population:

Abilene	McAllen - Pharr
Amarillo	Edinburg
Beaumont	Midland
Brownsville	Odessa
Bryan-College Station	Port Arthur
Galveston	San Angelo
Harlingen-San Benito	Sherman - Denison
Killeen	Texarkana Urbanized Area
Laredo	Texas City - LaMarque
Lubbock	Tyler
	Waco
	Wichita Falls
Texas State Totals	\$ <u>184,576,237</u>

*These sums must be matched with 20% local (or state) funds if used for capital improvements, and with 50% local (or state) funds if used for operating expenses.

In addition, Capital Funding Grants are available in the amount of about \$7.8 billion for the entire nation over the same six year period.