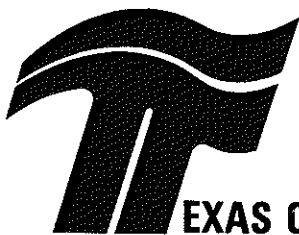


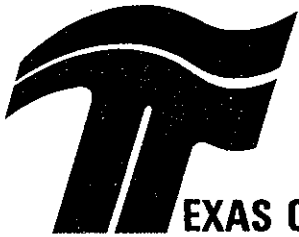


CONSTITUTIONAL REVISION ISSUES
Part II Energy and Transportation



TEXAS COASTAL AND MARINE COUNCIL

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To: Council Members and Friends

The attached report was prepared for the Texas Coastal and Marine Council in order to pinpoint the major energy and transportation issues which may arise during the constitutional revision session of the Legislature in 1974.

This report is the second in a series of summaries of important constitutional revision issues which will be published by the Texas Coastal and Marine Council. These reports will be distributed in an effort to contribute to the knowledge of the Legislature and the people of Texas concerning constitutional revision and will be directed at providing information rather than reaching conclusions.

Senator A. R. Schwartz
Chairman

CONSTITUTIONAL REVISION: ENERGY AND TRANSPORTATION ISSUES

I. INTRODUCTION

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Nowhere is the archaic nature of the Constitution of 1876 more evident than in the related areas of energy and transportation. The present Texas constitution was written during the years when the railroads were coming to Texas, and many provisions indicate the framers' concern that pressure from the railroads could result in special privileges being granted by the Legislature.

A century later we are faced with a new crisis in transportation and its sister field, energy, but this crisis is of an altogether different nature. The railroad colossus of the 1870's has long since ceased to be an issue; the problem now is scarcity of energy resources and what impact this will have on transportation.

Obviously there are limitations on how a state constitution can effectively deal with the energy crisis. *A constitution is a document which grants and limits powers; it is not an ideal vehicle for establishing the mechanics of governmental programs. That task should be left to the Legislature.*

This approach has been the course followed by the Constitutional Revision Commission. Their concept of the constitution has been one which establishes a specific framework for the legislative, executive, and judicial branches of the state government and its political subdivisions to follow. Dilatory statements of policy and redundant grants of power were eliminated wherever possible to reduce the staggering length of the 1876 Constitution.

Nevertheless, despite the very different circumstances which exist today compared to 1876, and the work of the Constitutional Revision Commission to streamline the State's basic law, several important energy and transportation issues will have to be settled during the convention.

II. DELETED PROVISIONS

The Constitutional Revision Commission deleted a large number of provisions, most of which involved the power to build roads and the power to control railroads.

ART. III, Sec. 52. COUNTIES, CITIES OR OTHER POLITICAL CORPORATIONS OR SUBDIVISIONS:
LENDING CREDIT: GRANTS.

- (a) ...
- (b) ...
- (c) Notwithstanding the provisions of Subsection (b) of this Section, bonds may be issued in any county in an amount not to exceed one-fourth of the assessed valuation of the real property in the county, for the construction, maintenance, and operation of macadamized, graveled, or paved roads and turnpikes....

Comment: The Constitutional Revision Commission gave counties considerable freedom in issuing bonds, requiring only that general obligation bonds be approved by the voters and that provision must be made for paying the interest and principal when due.

ART. III. Sec. 52-b. LOAN OF STATE'S CREDIT OR GRANT OF PUBLIC MONEY FOR TOLL ROAD PURPOSES.

The Legislature shall have no power or authority to in any manner lend the credit of the State or grant any public money to, or assume any indebtedness, present or future, bonded or otherwise, of any individual, person, firm, partnership, association, corporation, public corporation, public agency, or political subdivision of the State, or anyone else, which is now or hereafter authorized to construct, maintain, or operate toll roads and turnpikes within this State.

Comment: Under the proposed constitution, public money and public credit shall be used for public purposes only. This is the only restriction on pledging the credit of the State; however, the State may incur debts only after approval by two-thirds of each house of the Legislature and a majority of the electorate. Bond issues therefore would be subject to the same procedures as under the present constitution, but on approval by the voters would not become part of the constitution itself.

ART. III, Sec. 52e*. DALLAS COUNTY BOND ISSUES
FOR ROADS AND TURNPIKES.

Bonds to be issued by Dallas County under Section 52, Article III of this Constitution for the construction maintenance and operation of macadamized, graveled, or paved roads and turnpikes, or in aid thereof, may, without the necessity of further or amendatory legislation, be issued upon a vote of a majority of the resident property taxpayers voting thereon who are qualified electors of said county, and bonds heretofore or hereafter issued under Subsections (a) and (b) said Section 52 shall not be included in determining the debt limit prescribed in said Section.

* Misnumbered by error; there are two Sections 52e.

Comment: This section is an example of the inflexibility of the old constitution, requiring a constitutional amendment in order to vary from the procedures in Art. III, Sec. 52.

ART. III, Sec. 54. LIENS ON RAILROADS: RELEASE,
ALIENATION OR CHANGE.

The Legislature shall have no power to release or alienate any lien held by the State upon any railroad, or in any wise change the tenor or meaning, or pass any act explanatory thereof; but the same shall be enforced in accordance with the original terms upon which it was acquired.

Comment: This section is obsolete and reflects the transportation problems of another era.

ART. VIII, Sec. 1-a. NO STATE AD VALOREM TAX LEVY:
COUNTY LEVY FOR ROADS AND FLOOD CONTROL: TAX
DONATIONS.

From and after January 1, 1951, no State ad valorem tax shall be levied upon any property within this State for general revenue purposes. From and after January 1, 1951, the several counties of the State are authorized to levy ad valorem taxes upon all property within their respective boundaries for county purposes...in addition to all other ad valorem taxes authorized by the Constitution of this State, provided the revenue derived therefrom shall be used for construction and maintenance of Farm to Market Roads or for Flood Control....

Comment: The new constitution would free counties from this type of restraint. The powers of counties would be those granted by the Legislature; however, the CRC document also contains a provision enabling counties with a population greater than 25,000 to attain home rule status.

ART. IX, Sec. 12. AIRPORT AUTHORITIES.

The Legislature may by general law provide for the creation, establishment, maintenance and operation of Airport Authorities composed of one or more counties....

Comment: A single provision in the new constitution applies to all special districts other than school and community college districts. The Legislature is directed to provide by general law for establishing, financing, consolidating, and abolishing special district authorities, and with defining their powers. The constitution does, of course, retain bonding authority and continue the validity of bonds applicable to existing districts.

ART. X, Sec. 2. PUBLIC HIGHWAYS: COMMON CARRIERS: REGULATION OF TARIFFS, CORRECTION OF ABUSES AND PREVENTION OF DISCRIMINATION AND EXTORTION: MEANS AND AGENCIES.

Railroads heretofore constructed or which may hereafter be constructed in this State are hereby declared public highways, and railroad companies, common carriers. The Legislature shall pass laws to regulate railroad, freight and passenger tariffs on the different railroads in this State, and enforce the same by adequate penalties; and to the further accomplishment of these objects and purposes, may provide and establish all requisite means and agencies invested with such powers as may be deemed adequate and advisable.

Comment: This section was the constitutional authority for the creation of the Texas Railroad Commission, although the Legislature undoubtedly could have established the agency without specific authority. The Constitutional Revision Commission left the status of the Railroad Commission unchanged: it is not a constitutional agency, and the election of its members is not addressed in the constitution.

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ART. XVI, Sec. 24. ROADS AND BRIDGES.

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The Legislature shall make provision for laying out and working public roads, for the building of bridges, and utilizing fines, forfeitures, and convict labor to all these purposes.

Comment: This type of direction to the Legislature, indicating a desire on the part of the delegates rather than a grant of or limitation upon power, has largely been eliminated from the constitution drawn up by the Constitutional Revision Commission.

III. DEDICATED MOTOR FUELS TAX REVENUE

One of the most controversial subjects considered by the Constitutional Revision Commission was the dedication of tax revenues from motor fuels and lubricants to the State Highway Fund and the Available School Fund. The division is three-fourths to highways, one-fourth to schools. The significance of a dedicated tax is that the revenue raised is required by the constitution to be placed in a particular fund for particular purposes, and may not be reached by the Legislature for General Revenue appropriations.

Advocates of mass transportation programs have urged that a portion of gasoline tax receipts should be available to be used at the discretion of the Legislature to develop mass transportation systems, a proposal which has met strong opposition from highway user groups. The debate is not over the merits of highway travel versus mass transportation systems, but whether it is wise to set aside hundreds of millions of dollars annually for highway construction and maintenance.

The provision in the Constitution of 1876 reads:

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Subject to legislative appropriation, allocation, and direction, all net revenues remaining after payment of all refunds allowed by law and expenses of collection derived from motor vehicle registration fees, and all taxes, except gross production and ad valorem taxes, on motor fuels and lubricants used to propel motor vehicles over public roadways, shall be used for the sole purpose of acquiring rights-of-way, constructing, maintaining, and policing such public roadways, and for the administration of such laws as may be prescribed by the Legislature pertaining to the supervision of traffic and safety on such roads;...provided, how-

ever, that one-fourth (1/4) of such net revenue from the motor fuel tax shall be allocated to the Available School Fund...

The recommendation of the CRC essentially restates the present provision with a few minor changes:

Subject to legislative appropriation, allocation, and direction, all net revenues from motor vehicle registration fees and three-fourths of net revenues from all taxes on fuels and lubricants used to propel motor vehicles over public roadways, except gross production and ad valorem taxes, shall be deposited in the State Highway Fund. Such revenues shall be used solely for acquiring rights-of-way, constructing, and maintaining a State highway system; for policing public roadways; and for administering laws pertaining to the supervision of traffic and safety on public roadways. One-fourth of net revenues from these taxes shall be allocated to the available school fund....

There is no change which might be considered substantive, although some adherents of mass transportation contend that the CRC provision is more restrictive. The present constitution speaks of acquiring rights-of-way for public roadways; a few urban transportation advocates have maintained that this language is broad enough to include rail roadbed rights-of-way. However unlikely this contention is, the new language thoroughly squelches such possibilities by explicitly limiting use of the revenue to the State highway system.

Since the time when the CRC decided not to change the highway user tax dedication, the energy crisis has become a reality. Urban delegates may be expected to make significant attempts to utilize the highway fund for mass transportation purposes during the constitutional convention in the spring of 1974, in anticipation of possible gasoline rationing.

IV. STATE SPONSORSHIP OF THE INTRACOASTAL CANAL

One important new transportation issue confronting the State is the possible sponsorship of the Intracoastal Canal. This involves providing spoil easements along the intracoastal to allow the Corps of Engineers to continue improvement as well as maintenance dredging of this vital water transportation artery without damaging private property.

This is not an issue which will be considered directly in the constitutional convention. However, there are constitutional provisions which do have a bearing on the State's ability to undertake this all-important function. The Constitution of 1876 states that the "Legislature shall have no power to make any grant or authorize the making of any grant of public moneys to any individual, association or individuals, municipal or other corporations whatsoever..." (Article III, Sec. 51). Nor may the Legislature give or lend or authorize the giving or lending of the credit of the State of any person, association, or corporation (Article III, Sec. 50). These provisions have been combined in the CRC document in a short clause stating that "Public money and public credit shall be used for public purposes only."

There should be little doubt that State sponsorship of the Intracoastal Canal would be an expenditure of public money (or credit, if it is financed through bonds) for public purposes. In State v. City of Austin, the validity of a statute was under attack which provided that relocation of utility facilities necessitated by improvement of highways as part of the interstate highway program shall be made by the utility at the expense of the State. The Supreme Court held that the statute was a reasonable exercise by the State of its power to assume the financial burden of public improvements. 331 S.W. 2d 737 (1960). The proposed sponsorship of the Intracoastal Canal is analagous since the State would be paying the cost of moving a spoil easement inland to allow the completion of a federal project. The benefit to adjacent landowners and industries requiring water transportation would be incidental to the public purpose achieved.

V. THE PERMANENT SCHOOL FUND

The Permanent School Fund, another example of a dedicated fund which cannot be reached by the Legislature for General Revenue purposes, has become an issue as a result of the energy crisis. The proposed language reads:

The Permanent School Fund consists of all property set apart for support of the free public schools. The Permanent School Fund shall not be expended but shall be preserved and invested at the direction of the State Board of Education in the manner prescribed by law.

The energy crisis has proved to be a windfall for the Permanent School Fund. Much of the fund consists of rich oil

and gas land; the shortage of petroleum has brought about an increase in the price of oil with a resulting increase in the value of the fund. The same is true, of course, for the Available School Fund, which consists of income from the Permanent School Fund plus taxes dedicated to the fund. The Constitutional Revision Commission continued to protect the Permanent School Fund, but there has been considerable discussion, in light of the energy crisis, of asking the constitutional convention to allow the Legislature to utilize some of the unexpected revenue.

VI. SUMMARY

The Constitution of 1876 contains few provisions which are relevant to the energy and transportation problems faced by the State of Texas in 1973. Of these, the only one which has been retained by the Constitutional Revision Commission is the dedicated motor fuels fund. The only other provision in the CRC document closely related to the current crisis in energy and transportation is the environmental section, already analyzed thoroughly in a previous paper in this series. The CRC proposal reads:

The State and each person shall maintain and improve a clean and healthful environment in Texas for present and future generations. The Legislature shall provide for the administration and enforcement of this duty. The Legislature shall provide adequate remedies for the protection of the environmental life support system from degradation and provide adequate remedies to prevent unreasonable depletion and degradation of natural resources.

The provision is atypical of the proposed constitution, because the version submitted to the Legislature, unlike the Constitution of 1876, contains few sections that could be considered merely advisory, or evidence of desires, rather than actual substantive provisions. It is possible that a court may interpret the provision as being substantive--for example, by giving individual citizens standing to bring environmental lawsuits. But its main thrust appears directory rather than mandatory; in any event, it does not substantially hinder the freedom of the Legislature to act regarding the energy crisis.

It is also possible that the constitutional convention may consider other energy and transportation measures: in-kind royalty, compulsory unitization, freedom of the School Land Board to allocate (rather than take bids on) its in-kind royalty share. More likely, however, these are questions which are statutory in nature and will be considered by the Legislature in Special or Regular Session, rather than at a constitutional convention.