

Concept paper and preliminary issue discussion
for
COLORADO TRANSPORTATION FINANCE AUTHORITY
draft of June 4, 2007
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I. OVERVIEW

A. Goals: Create state authority (the “Authority”) that can do the following **without voter approval**:

1. Collect user fees that are not taxes (could include tolls, vehicle registration fees, license fees, weight/distance fees for trucks, vehicle miles traveled fees, impact fees, emission fees).
2. Issue revenue bonds, payable from user fees, to finance Authority transportation projects.
3. Issue “conduit” revenue bonds to finance transportation projects for local governments (and authorities formed by local governments such as regional transportation authorities) (i.e., act as a conduit issuer for local government transportation projects similar to the function performed by the Water Resources and Power Development Authority for local government water project). The conduit bonds would be payable from amounts paid to the Authority by the local governments. The Authority could also use a portion of the Authority’s revenues or assets to pay or to provide credit enhancement for the bonds. Could also be credit enhanced by the moral obligation referenced in “Bonding” below. Local government projects could be financed separately or pooled.
4. Authority revenues are not state fiscal year spending subject to TABOR spending and revenue limits.

B. Constitutional issues

1. To comply with TABOR, either:
 - a. Authority must qualify as an enterprise (see part II of this paper for a discussion of enterprise issues); or
 - b. State-wide voter approval to exempt Authority revenues from TABOR spending and revenue limits and state-wide voter approval of Authority bonds. Exemption from spending/revenue limits can be voted without limitation; voter approval of bonds will require voting limits on principal amount and total repayment cost.
2. In order to avoid the limitations on state debt under Article XI, Section 3 of the Constitution (which effectively prohibits state debt without a Constitutional amendment), the Authority’s revenue bonds will have to be payable from a “special fund” into which user fees and/or specially designated tax revenues are deposited. (Use of tax revenues would, however, make it difficult and perhaps impossible to qualify as an enterprise as discussed in part II of this paper.)
3. Pursuant to Article X, Section 18 of the Constitution, revenues derived from “any license, registration fee, or other charge for the use and operation upon any public highway in this state” may only be used “for the construction, maintenance and supervision of the public highways of this state.” (Same applies to “the proceeds from the

imposition of any excise tax on gasoline or other liquid motor fuel except aviation fuel used for aviation purposes.”)

C. Governing board

1. Composition choices
 - a. Appointed directly by Governor
 - b. Transportation Commission servings in a different capacity
 - c. Specified state officials, e.g., Treasurer, Executive Director of CDOT or their designees
 - d. Legislators or others appointed by legislative leadership
 - e. Combination of a. – d. above
2. Other choices for board members who are not specified governmental officials
 - a. Geography (e.g., one from each Congressional or CDOT district)
 - b. Expertise (e.g., in transportation or finance)
 - c. Political party affiliation.
3. Terms of board members

D. Projects to be paid for/financed

1. Types of projects
 - a. Highway, transit, rail and other. (Subject to Constitutional provision limiting use of higher user fees and fuel excise taxes on highways.)
 - b. New transportation projects
 - c. Expansion or improvement of existing transportation projects
 - d. Maintenance of new or existing transportation projects
 - e. Operating costs of new or existing transportation projects
2. Selection of projects
 - a. Transportation Commission selects
 - b. Authority board selects projects based on Transportation Commission guidelines or Transportation Commission approval
3. Special projects
 - a. Vehicle miles traveled pilot program
 - b. Conduit bond issuer for transportation projects owned and paid for by local governments (and authorities formed by local governments such as regional transportation authorities)

E. Revenue sources

1. Tolls on new lanes, existing lanes or both (but tolling of existing lanes financed with federal funds will require approval of federal government)
2. Vehicle registration fees (which could be varied in amount based on age of vehicle, registration address, etc. and could be subject to a sunset)
3. License fees
4. Weight/distance fees for trucks
5. Vehicle miles traveled fees
6. Impact fees
7. Emission fees

8. Other fees?
9. CDOT or other state subsidy. If enterprise status is desired, must be limited to 10% of total revenues. See part II of this paper for a discussion of enterprise issues. To avoid limitations on state debt, CDOT or other state subsidy derived from taxes could not be pledged to pay Authority bonds.
10. CDOT or other state loans required (and expected) to be repaid from Authority's other revenues

F. Bonding

1. Bonding powers similar to other authorities
2. Authority bonds payable from Authority user fee revenues
3. Conduit bonds for local governments (and authorities formed by local governments such as regional transportation authorities) payable from amounts paid to the Authority by the local governments. Could also be payable from or credit enhanced by Authority revenues or assets (and moral obligation referenced below).
4. Consider moral obligation (for both Authority bonds and conduit bonds) – state agreement to consider an appropriation to the Authority to replenish reserve fund pledged to pay bonds if reserve drops below a specified level.
5. Transportation Commission approval required to issue bonds?

G. Miscellaneous

1. Specific authorization and direction to plan and implement a vehicle miles traveled fee pilot program. Funded from Authority user fees or legislative appropriation.
2. Contracting and other powers similar to other authorities
3. Condemnation exercisable by Authority or by CDOT on behalf of Authority
4. Specific authorization to enter into lease purchase agreements, concessions with private parties, public private partnerships (including design-build contracts, sponsoring "63-20" corporations, long term management contracts)
5. Specific authorization to make loans to Colorado local governments (and authorities formed by local governments such as regional transportation authorities) to finance local government transportation projects and pledge repayments on such loans to pay Authority bonds
6. Language similar to that contained in other authority statutes regarding open records, open meetings, conflict of interest, no personal liability of board members, agreement of state not to impair bond security, bonds are exempt from state income tax, bonds are legal investments, investment powers
7. Annual reports to CDOT, legislature, others
8. The new Authority could replace current Colorado Statewide Tolling Enterprise or exist along side it

II. ENTERPRISE ISSUES

TABOR enterprise definition: (1) government-owned, (2) business, (3) authorized to issue its own revenue bonds and (4) receiving under 10% of annual revenue in grants from all Colorado state and local governments combined. (5) Supreme Court case that power to tax, even if never exercised, is inconsistent with enterprise status.

Conclusion regarding enterprise status:

- (1) The Authority will be government-owned because it will be controlled by, and upon liquidation its assets will be distributed to, the state.
- (2) In order to qualify its activities as a business, the Authority may need to own the projects it finances and limit user fees to people who are benefited by Authority-owned projects. See more detailed discussion below.
- (3) The third part of the enterprise definition (authorized to issue its own revenue bonds) will be satisfied by the statute that creates the Authority.
- (4) The fourth part of the definition (under 10% of revenues from grants) will impose limits on the way the Authority operates but will not prevent it from qualifying as an enterprise. See more detailed discussion below.
- (5) The Authority cannot have the power to tax.

Business issues – Case law interpreting TABOR requires that the activity be conducted in the pursuit of benefit, gain or livelihood. Attorney General’s opinions add requirement that the business be “self-supporting.”

- a. Tolls: toll road activities will qualify as a business based on E-470 case law.
- b. Other user fees (including vehicle registration fees, license fees, weight/distance fees for trucks, vehicle mile traveled fees, impact fees, emission fees).
 - i. E-470 case law supports the business status of an authority that (A) collects vehicle registration fees from owners of vehicles who are benefited by a project owned by the authority and (B) spends the proceeds of such vehicle registration fees on a project owned by the authority.
 - ii. E-470 case law analysis should extend to other user fees and support the business status of authorities that (A) collect user fees from people who are benefited by projects owned by the authority and (B) spend the proceeds of such fees on projects owned by the authority.
 - iii. There is no guidance in case law or elsewhere as to whether an authority qualifies as a business if it (A) collects user fees from people who are not benefited from projects owned by the authority and/or (B) spends the proceeds of user fees on projects that are not owned by the authority.
 - iv. In order to qualify the Authority as a business, it may, therefore, be necessary that (A) the Authority is the owner of the projects on which the user fees collected by it are spent and (B) the people who pay the Authority’s user fees are benefited by projects owned by the Authority.
- c. Conduit bond issuance – conduit activities of Authority should qualify as business activities based on precedents for other state-wide conduit issuers.
- d. Vehicle miles traveled pilot program - should qualify as business activities based on contract for services provided by the Authority to CDOT.

Under 10% in grants issues – will limit activities of the Authority

- a. Annual subsidy from CDOT or other state sources will have to be limited to 10% of the Authority’s total annual revenues.
- b. CDOT or other state loans not grants if required (and expected) to be repaid from other Authority revenues.

- c. If Authority bonds are credit enhanced with a state moral obligation, any amounts appropriated by the state and paid to the Authority pursuant to the moral obligation may constitute grants.
 - i. Consider limitations on moral obligation payments to under 10% of Authority – annual revenues. (How would this affect the market value of the moral obligation?)
 - ii. Consider structuring moral obligation payments as loans to Authority that are required (and expected) to be repaid from other Authority revenues in order to avoid grant treatment.
- d. Transfer of existing transportation projects to Authority
 - i. Grant?
 - ii. If so, how valued?
 - iii. May be possible to structure transfer of a project to the Authority as a long-term lease to Authority with “rent” from the Authority “paid” through Authority’s agreement to improve, maintain and operate the project from Authority revenues.
 - iv. May be able to treat the value of the property transferred as a loan to the Authority that is required (and expected) to be repaid from other Authority revenues.
 - v. See statute referenced in g. below which defines grant as a cash subsidy (which a transfer of an existing project in kind would not be).
- e. Maintenance, operation of Authority projects by CDOT or other governmental entities
 - i. Grant?
 - ii. If so, how valued?
 - iii. Consider maintenance, operation contracts pursuant to which CDOT or another governmental entity maintains and operates the project for the Authority in exchange for payments from Authority revenues.
 - iv. May be able to treat the value of the services provided as a loan to the Authority that is required (and expected) to be repaid from other Authority revenues.
 - v. See statute referenced in g. below which defines grant to as a cash subsidy (which services in kind would not be).
- f. Payments by conduit borrowers not grants because Authority is acting as pass-through to bondholders and fees and charges to Authority are for services rendered.
- h. CRS 24-77-102 (7) provides that “grant” (a) means any direct cash subsidy or other direct contribution of money from the state or any local government in Colorado which is not required to be repaid; and (b) does not include: (I) any indirect benefit conferred upon an enterprise from the state or any local government in Colorado; (II) any revenues resulting from rates, fees, assessments, or other charges imposed by an enterprise for the provision of goods or services by such enterprise; or (III) any federal funds, regardless of whether such federal funds pass through the state or any local government in Colorado prior to receipt by an enterprise.