# SH 121 Comprehensive Development Agreement Position Paper

March 11, 2007

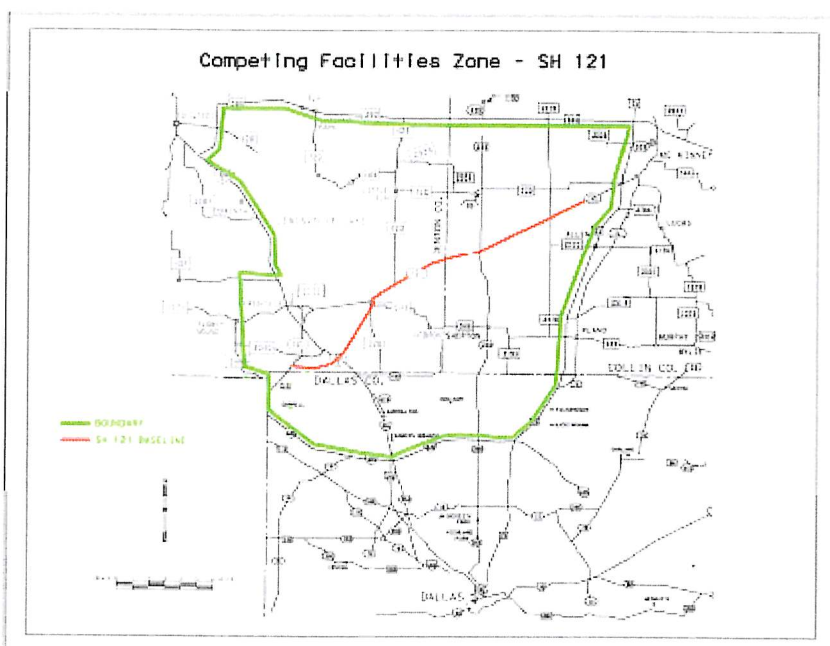
In an effort to clarify much of the public discourse related to the SH 121 Comprehensive Development Agreement, Innovative Transportation Solutions, Inc, at the Request of Denton County, has compiled the following information from various governmental agencies.

## CDA Contract Issues

The SH 121 CDA contract has been available to the public via the Texas Department of Transportation's website of http://www.txdot.gov/services/texas_turnpike_authority/sh121_rfp.htm since December 22, since December 22, 2006.

### Non-Compete Clause

Concern has been raised that the SH 121 CDA Agreement contains a Non-Compete Clause that will "prevent the state from building roads that would compete with the toll roads." Article 11.3 [Attachment 1] of the SH 121 CDA Contract addresses the issue of a Non-Compete Clause within an area represented by Reference Item 1. Article 3.1 begins by outlining TxDOT rights under this agreement. It states in part that "TxDOT will have the unfettered right in its sole discretion, at any time and without liability, regardless of impacts on Toll Revenues, to finance, develop, approve, expand, improve, modify, upgrade, add capacity to, reconstruct, rehabilitate, restore, renew and replace any existing and new transportation or other facilities (including, without limitation, free roads, connecting roads, service roads, frontage roads, turnpikes, managed lanes, HOT/HOV lanes, light rail, freight rail, bus lanes, etc.). Such right extends to facilities both within the Airspace and outside the Project Right of Way, whether identified or not identified in transportation plans, and whether adjacent to, nearby or otherwise located at to affect the Project, its operation and maintenance (including the costs and expenses thereof), its vehicular traffic and/ its revenues." Article 3.2 outlines the Developers right associated with a Competing Facility within the area represented by Reference Item 1. Article 11.3.2.4 is provided as Reference Item 2 and it outlines the definition of what does NOT constitute a Competing Facility




**Reference Item 1**

> 11.3.2.4 If for any reason Developer fails to deliver such written notice of Claim and related information within the foregoing time period (as it may be extended), Developer shall be deemed to have irrevocably and forever waived and released any Claim or right to compensation for any adverse effect on Toll Revenues attributable to the construction, operation and use of the subject potential Competing Facility or any Competing Facility that is not substantially different from the potential Competing Facility. For this purpose, a Competing Facility ultimately constructed and operated shall be considered substantially different from the subject potential Competing Facility if (a) the route is substantially different, (b) the number of lanes is different, (c) the number of HOV, HOT, truck or other special purpose or restricted use lanes is different or their length is substantially different, (d) the total length is substantially
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> TEXAS DEPARTMENT OF TRANSPORTATION - 94 - RFP Addendum #5
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> different, (e) TxDOT stated in its written notice that the potential Competing Facility would be tolled and the actual Competing Facility is not tolled or is tolled at materially lower toll rates for the predominant classifications of vehicles than the rates described in TxDOT's notice, (f) the means for collecting tolls is substantially different (e.g. barrier only vs. barrier-free or open lane tolling), (g) the number of access points to the Competing Facility is different or the design capacity of access points to the Competing Facility is substantially different or (h) there are other differences similar in scale or effect to the foregoing differences.

**Reference Item 2**

As the definition points out if the potential Competing Facility is substantially different from the Developers Roadway, there is no claim for compensation.

Additionally, Exhibit 18 of the SH 121 CDA agreement further defines Competing Facilities by excluding "all highway projects included in any of the following long range transportation plans and programs:

1. 2006-2008 Statewide Transportation Improvement Program (STIP)
2. Unified Transportation Program (UTP) 2006
    a. 2006 State Preservation Program (SPP)
    b. 2006 Statewide Mobility Program (SMP)
3. Mobility 2025 Plan, amended April 2005 by the Regional Transportation Council, the MPO for the Dallas, Fort Worth Metropolitan region
4. Mobility 2030 Plan, adopted by the RTC on January 11, 2007

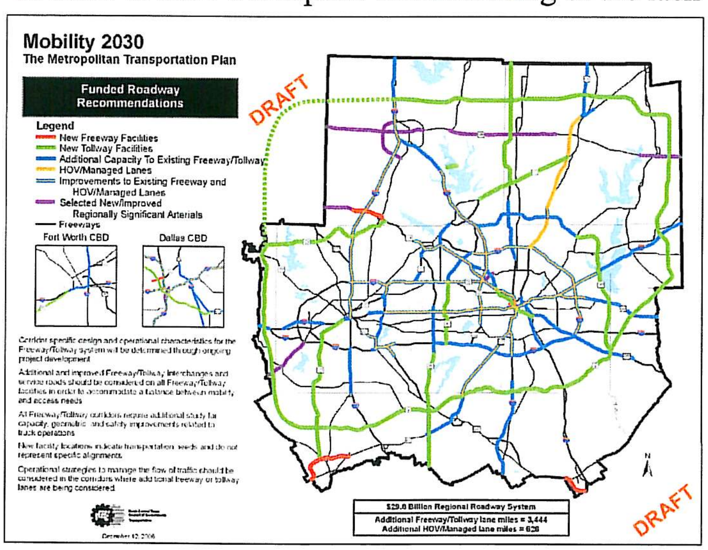
Exhibit 18 also calls out specific exclusions to the Non-Compete area by stating:

"Specific Exclusions

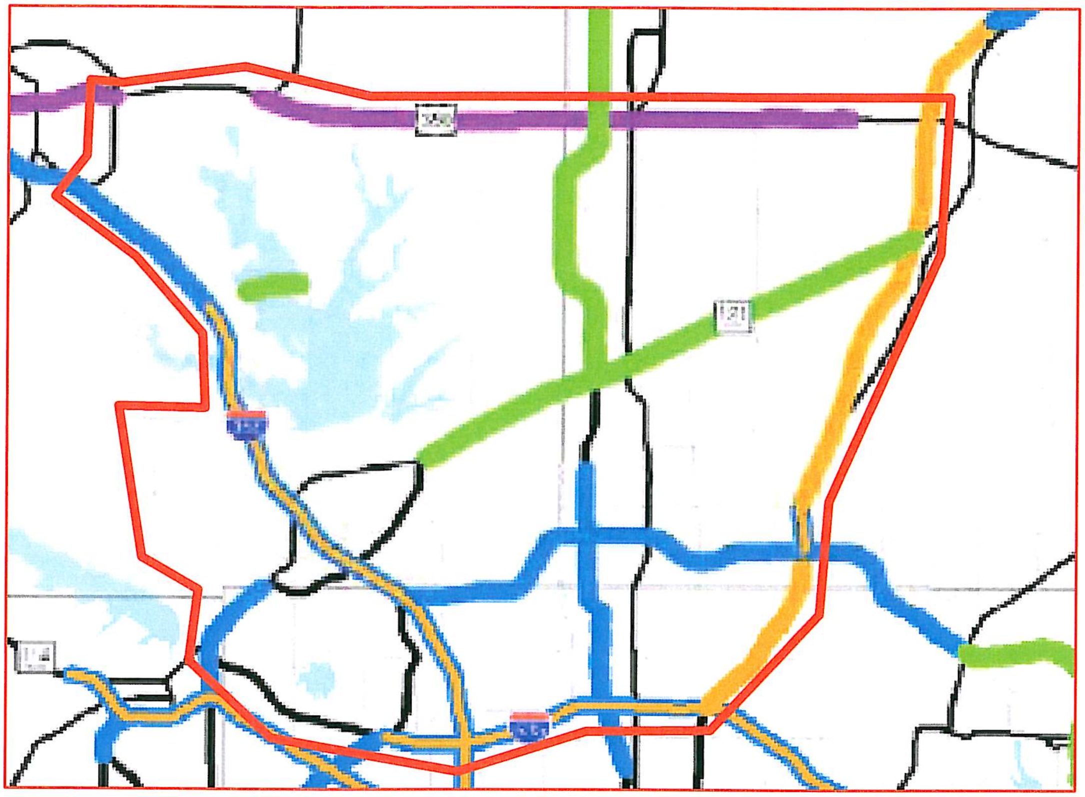
All portions of US 75, US 380, I-35E, I-635 and President George Bush Turnpike and any and all current and future modifications, expansions, extensions, additions, upgrades, renewals, reconstructions, repairs, rehabilitations, replacements and improvements thereof."

**Planned Improvements within the Non-Compete Area**

In order to have a complete understanding of the lack of impact to the regional transportation plan related to the Non-Compete Clause as drafted in the SH 121 CDA Agreement, we must look at what is planned to be constructed by the 4 transportation programs listed above. Reference Item 3 represents the Funded Roadway Recommendations approved by the Regional Transportation Council on January 11, 2007. This section of the Mobility Plan outlines those projects that can be funded and implemented by 2030. They include new freeway facilities, additional capacity to existing freeways and tollways, HOV/managed lane, and selected new/improved regionally significant arterials.



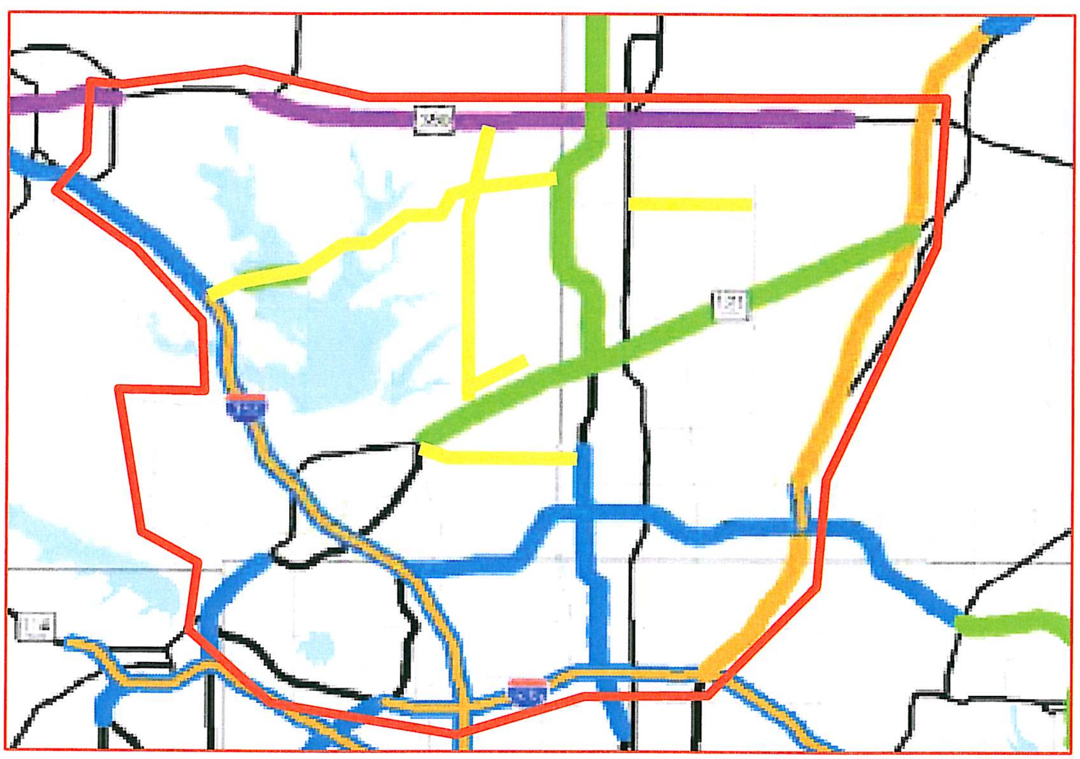

**Reference Item 3**



**Reference Item 4**

Reference Item 4 is a subset of the Mobility 2030 Funded Roadway Recommendation with the Non-Compete Area identified. As you can see, the Non-Compete area does not prohibit the implementation of new capacity on The Dallas North Tollway, I-635, US 75, or I-35E.

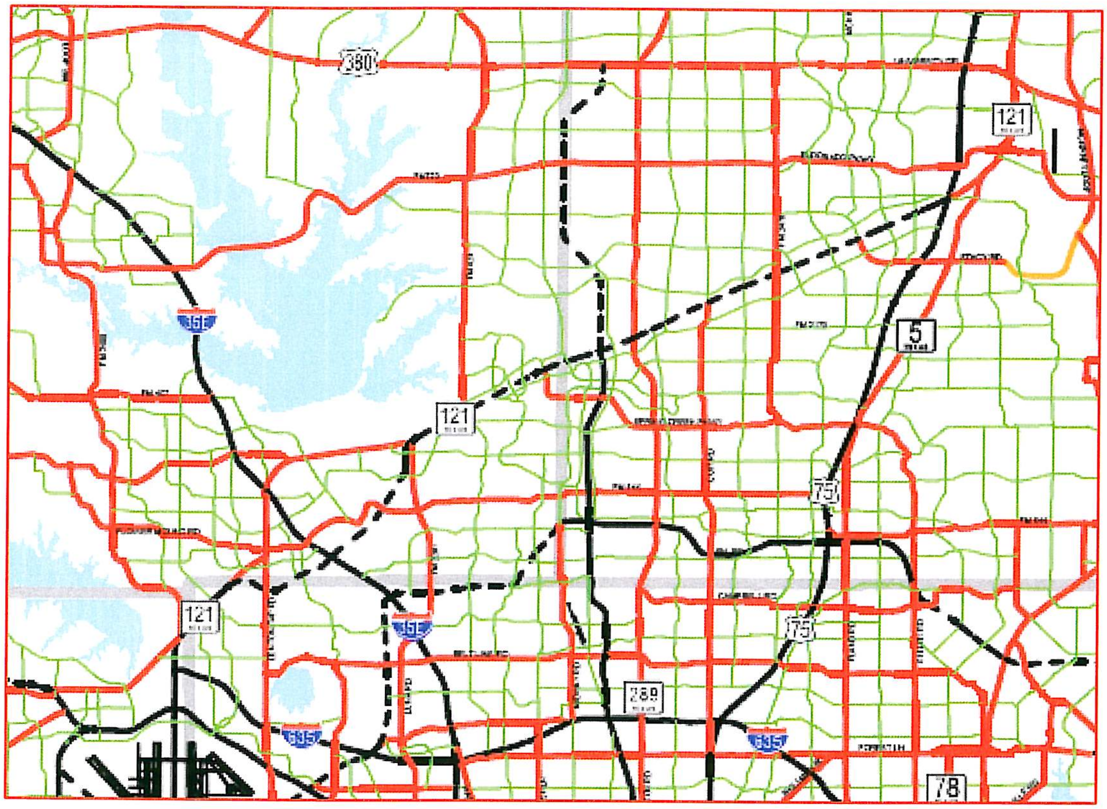
Once you incorporate the transportation limitations Lake Lewisville imposes on this Non-Compete Area, it further demonstrates the difficulty the region would have in developing a Competing Facility within the Non Compete Area.



**Reference Item 5**

Additional capacity planned for this area of the region covered by the Non-Compete Area. Reference Item 5 shows those projects that are either called for in the SH 121 Memorandum of Agreement [Attachment 2]. They include the Lake Lewisville Toll Bridge, FM 720, FM 423, FM 3537, FM 544, and Memorial Drive.

It must also be kept in mind that the municipalities within the Non-Compete area will be able to continue to build out their thoroughfare plans. These roadways are typically 4 to 6 lane roadways.




Reference Item 6

Reference Item 6 is a subset of the Regional Transportation Council's Regional Thoroughfare Plan covering the area within the Non-Compete Area. As you can see, a significant arterial roadway system is planned for the Non-Compete Area. All of these roadways are excluded from the definition of a Competing Facility.

<u>In the final analysis, it is empirically evident that the Non-Compete Clause of the SH 121 CDA Agreement does not materially prohibit the region from meeting the mobility needs of the traveling public</u>.

## MOBILITY 2030
## RTC PRESENTATION HIGHLIGHTS

**$29.8 Billion of roadway recommendations, including $16.8 billion of Innovative Funding Strategies**

**Unfunded roadway needs identified**

**$9.6 Billion of rail recommendations, including $3 billion of Regional Transit Initiative (RTI) rail lines**

**Incorporation of Regional Outer Loop**

Reference Item 7

It should be noted that the Regional Transportation Council's, Mobility 2030 Plan adopted January 11, 2007 anticipated the revenue generated from the Innovative Financing tools provided to the region by the Legislature over the past 4 years. The RTC has identified $16.8 billion of Innovative Funding Strategies for the construction of critical new capacity to the region.

<u>Given that the Mobility Plan is financially constrained, if the Legislature was to implement the 2 year moratorium, the RTC would have to eliminate most of the new capacity anticipated in the Mobility 2030 Plan.</u>

**Toll Polices**

Concerns have also been voiced related to the Developer's "ability to levy unlimited toll increases" on the drivers that use SH 121. In March of 2006, the Texas Department of Transportation requested that the The Regional Transportation Council establish the business terms by which any successful bidder on a concession on a TxDOT facility within the Region would have to operate. The RTC initially adopted Business Terms for TxDOT-Sponsored Toll Road on State Highways [Attachment 3] on April 13, 2006 and modified it on July 13, 2006 and again on September 14, 2006. Reference Item 8 shows that the policy adopted by the RTC established the Maximum Base Toll Rate for 2010 at 14.5 cents/mile traveled. This is consistent with the North Texas Tollway Authority's policies and plans for their toll rates. Attachment 3 also shows that the RTC's Business terms sets the rate of increase possible in the out years.

> 14. The peak and off-peak toll rates will be set at 14.5 cents/mile for an initial interim period. The North Central Texas Council of Governments (NCTCOG) will conduct a pilot "before" and "after" study in a corridor within the region with the approved "time of day" pricing schedule. Results will be presented to the RTC before regionwide implementation of time-of-day pricing. The pilot study and subsequent action will be completed by 2012.

**Reference Item 8**

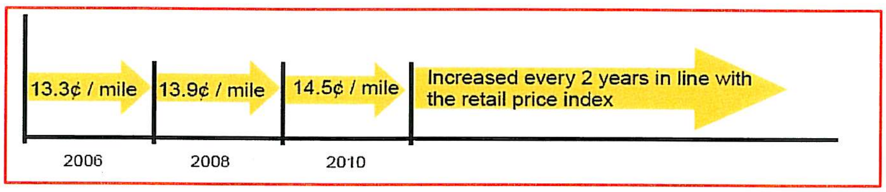
Reference Item 9 outlines that policy. This policy calls for an adjustment every two year starting after 2010.

Exhibit 4 of the SH 121 CDA Contract covers Toll Regulation [Attachment 4]. This 17 page document establishes the manner in which tolls can be charged or changed.

> 5. Toll rates will be adjusted sooner and later in time using the "all items" Consumer Price Index and "average household income." For Consumer Price Index values of 3 percent and under, the Index will be used and calculated applying annual compounded rates. For values over 3 percent, the "average household income" growth rate will be used. Toll rates will be adjusted every two years. If the Consumer Price Index or the "average household income" growth rates are negative for a two-year period, the growth rate will be set at zero and no adjustments to toll rates will be permitted.

**Reference Item 9**

Cintra's presentation to its shareholders described the Toll Regulations with the following chart. Should Cintra desire to change rates different than that described in the Toll Regulations, TxDOT would have to seek RTC approval.




**Reference Item 10**

It should be clear from the above referenced material, that the Regional Transportation Council's and the Texas Department of Transportation's work to establish the toll policies over the past two years is neither a policy developed by "acting in haste" nor does it allow the Developer to "levy unlimited toll increases."

**Foreign Owned vs. TxDOT Lease**

Some State elected officials have expressed concern over the state selling "away the rights to the road...." They say that "Texas should seek a share of future toll revenue that will help it pay for projects decades into the future" Others have said that "we are seeing the rush to sell the crown jewels of the state." The SH 121 CDA Contract is a 50 year lease. TxDOT still owns the asset. Once the lease has expired the state can either re-lease the asset or operate the toll facility itself. <u>Nothing is being sold.</u> Additionally, the SH 121 CDA Contract includes an out year revenue stream established by the Regional Transportation Councils' Business Terms for TxDOT Sponsored Toll Roads on State Highways as shown in Reference Item 11.

> 7. Excess revenue will be paid 75 percent up front and 25 percent over time.

**Reference Item 11**

That 25% paid over time is accomplished through the payment of $25,200,000.00 increased by 3 percent per year over the remaining 49 years. That represents an additional $700,000,000.00 net present value.

**SH 121 CDA Contract Profit of 12.5% vs. NTTA 15% "System Risk"/Profit**

The SH 121 CDA Contract estimates that the Internal Rate of Return will be approximately 12.5% over the life of the project. Many State elected officials have expressed concerns over paying high profits to construct and operate SH 121 as a toll facility. It would prove beneficial to see what would happen if NTTA was the toll provider.

NTTA establishes within its financing formula a coverage ratio of 1.35. Of that ratio, .15 of the .35 is called "System Risk." The average person calls that profit. The argument can be made that the NTTA profit is some how different than the Developers profit. However, if you need a road constructed such as I-635 or I-35E, you will never be part of the "System" so you will never profit from the "System Risk." NTTA is good at building certain roads, but there are roads such as those mentioned above where it will never be feasible for NTTA to construct the project.

## Gas Tax vs. Toll Revenue

**Mandatory vs. Optional**

Many of North Texas State elected officials have expressed concern that TxDOT is relying too much on toll roads. Senator Corona has that "the move to toll roads here 'is the direct result of the Legislature not having the will to raise fuel taxes appropriately'." He may be right about the legislature not doing its job over the past 16 years, however, the impacts of raising the gas tax needs to be compared to the implementation of tolls.

In the case of SH 121, there are 4 toll lanes planned in the current proposal. In addition to the toll lanes, TxDOT proposes to construct 6 general purpose/non-tolled frontage roads directly adjacent to the toll lanes. Additionally, Denton County has committed over $10,000,000.00 towards the construction of Memorial Drive which runs directly parallel to SH 121 from The Colony to Lewisville. These two road provide the traveling public with a total of 12 additional general purpose/non-toll lanes to travel on without ever having to pay a toll on SH 121. The traveling public will be able to choose whether or not to pay the toll.

The gas tax increase, regardless of how little or how much will directly impact every resident of the State of Texas. You will not be able to "choose" whether or not you wish to pay the tax each time you fill up the tank on your car. It won't matter if you drive an electric car. Everything you buy will have a transportation cost included in the price that reflects the higher gas tax rate.

**Local vs. Statewide**

Another aspect that should be considered when choosing which form of payment is less regressive and less responsive to the traveling public in a certain region is to look at what happens once the payment is made.

Gas taxes are collected at the pump and the state portion is sent to Austin. According to information gathered from the Texas Department of Transportation and Federal Highway Administration and published in the *Dallas Morning New* Sunday edition, Texas generated $3.034 Billion in 2006 from the 20 cents per gallon it collects.

Of that money, $738 million or 24 percent was diverted into public education. When Senator Carona stated that the Legislature had failed to do its job over the years, it included their inability or lack of desire to stop diverting transportation dollars into non-transportation areas. That leaves $2.19 Billion, statewide to meet the growing transportation needs of the State of Texas.

**Texas rate:** 20 cents per gallon

**Year last raised in Texas:** 1991 (5-cent increase)

**Amount generated in fiscal 2006:** $3.034 billion

**Amount dedicated to highways:** $2.19 billion (72 percent)

**Amount for public education:** $738 million (24 percent)

* 2005 figures, the most recent available

SOURCES: Texas Department of Transportation, Federal Highway Administration

*Dallas Morning News March 11, 2007*

**Reference Item 12**

Texas law currently requires the funds generated from a toll facility stay within the TxDOT District from which the tolls were generated. That aspect alone eliminates the 25 percent reduction in buying power that the state levies on every dollar sent to Austin. As part of the devolution of power that TxDOT began 4 years ago, capacity funds are selected at the regional level in a partnership between TxDOT and the Regional Transportation Council. That means that the funds generated from a toll road within the region stays in the region and the projects funded with those toll revenues are selected by the local officials of the Regional Transportation Council. There is no more need to lobby your State Representative or Senator for project funding. The decision making occurs right here locally by local officials that can be directly be held accountable for the decisions they make.

**SH 121 CDA Contract Up Front Payment vs. Gas Tax Payments**

Much has been made about the fact that the legislature is finally getting serious about raising the gasoline tax. In recent testimony before the House Transportation Committee, TxDOT testified that "out of a 5 cent per gallon tax increase, the metropolitan areas would receive $367 million a year. Dallas-Fort Worth receives 36.32% of all the category 2 mobility funding for the metropolitan areas and 69% of that goes to Dallas per the wishes of the RTC. The other 31% goes to Ft. Worth. This means that out of the 5 cent gasoline tax increase, Dallas would receive $92 million per year." SH 121 in Collin County is estimated to cost $550 million. That means if the region was willing to commit all of the additional revenue to this one project. It would take 5.9 years before the funds would be sufficient to construct SH 121. That, however, does not include any additional cost and therefore time due to inflationary tendencies during that same time period.

The SH 121 CDA Contract calls for an upfront payment of $2,100,000,000 in addition to constructing the Collin County portion of SH 121 at an additional cost of $550,000,000. Two very important points need to be made about these two figures. First the $2,100,000,000 up front payment will remain within the Dallas/Fort Worth Region. It happens to equal to what the State of Texas had available for highways in the entire state for 2006. Secondly, if the Collin County section of SH 121 ends up costing more than $550,000,000, Cintra will be required to pay the additional costs, thereby shifting the risk of construction cost increase from the State to Cintra.

Additionally, the SH 121 CDA Contract up front payment will help finance the following projects as reported by the *Dallas Morning News.* Note that all four Metropolitan Counties will benefit from the CDA process. Note also that the list of projects not only includes most of the critical roadways within the region but also provides funding for alternate forms of transportation including transit and light rail. Attachment 2 which contains the SH 121 MOA also contains a list of roadway projects that will be funded by the SH 121 CDA Contract up front payment.

The $2.1 billion Cintra payment is expected to help fund numerous area transportation projects, though none would be paid for solely with the Cintra funds. Detailed plans will be worked out in the next several months, but at the Feb. 27 announcement of the contract, regional leaders listed numerous projects that could receive money. Among them:

COLLIN COUNTY

- Central Expressway bottlenecks
- Bush Turnpike bottlenecks
- Possible contribution for Carrollton-to-Frisco rail service

DALLAS COUNTY

- LBJ Freeway reconstruction
- Interstate 35E south of downtown Dallas
- Light-rail extensions
- Trolley line extensions into downtown Dallas

DENTON COUNTY

- Interstate 35E from LBJ Freeway to the city of Denton
- FM423 around The Colony
- FM720 in Little Elm
- Passenger-rail construction between Denton and north Carrollton

TARRANT COUNTY

- State Highway 121/Highway 114 north of D/FW Airport (Grapevine Funnel)
- Interstate 35W north of downtown Fort Worth
- State Highway 183/Highway 121/Loop 820 in north Fort Worth

**Reference Item 13**

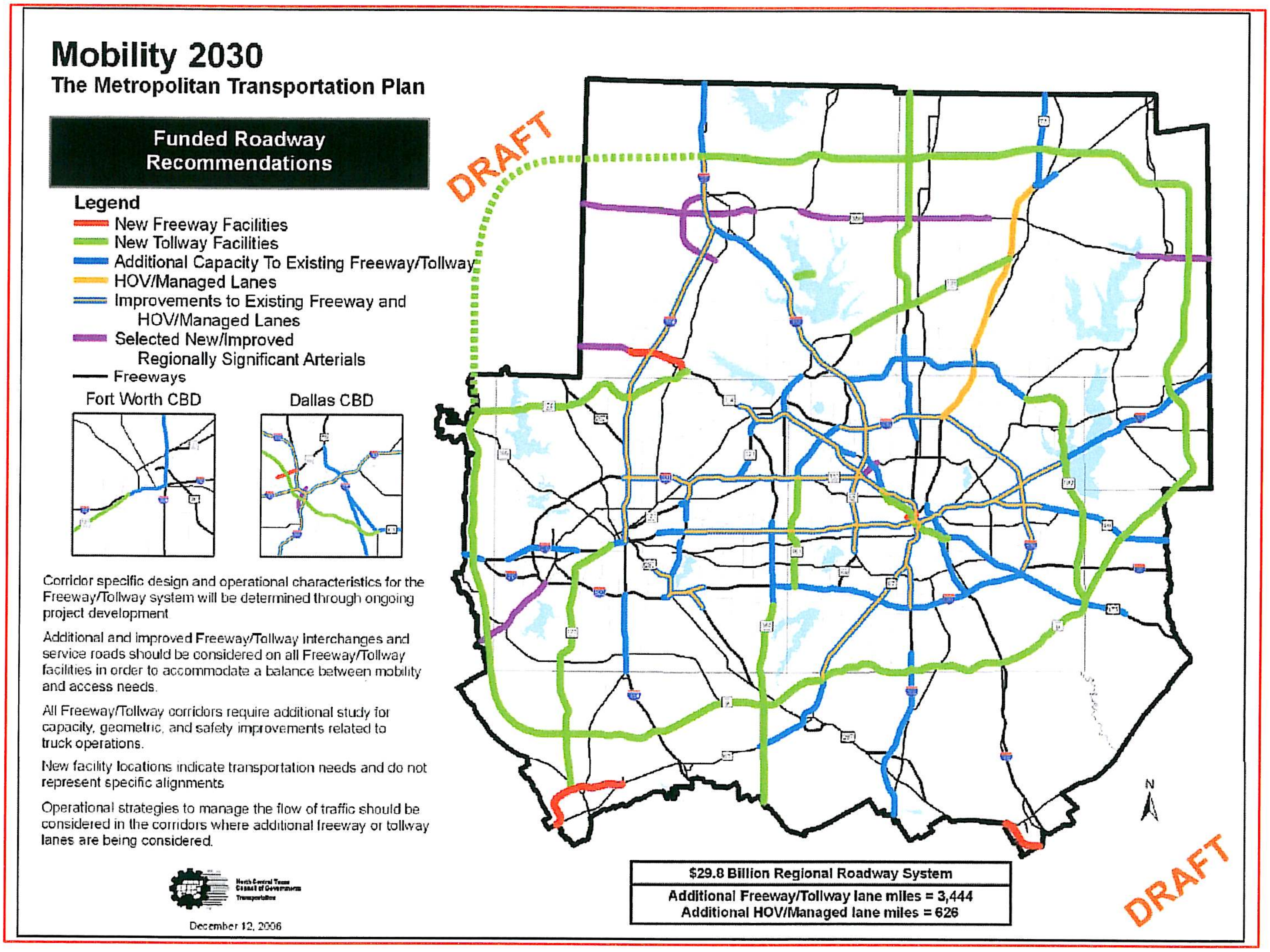
**Unfunded Needs vs. Mobility 2030 Plan that includes SH 121 CDA**

According to the Texas Department of Transportation's Dallas District and the Regional Transportation Council, the region has $9 Billion in unfunded projects as represented by Reference Item 14, as they began work on the Mobility 2030 Plan. As you can see, these unfunded projects are the most critical and most congested corridors in our region. In order to reduce this backlog of projects, the regional transportation leaders spent the past two years developing and implementing new innovative tools to bring these projects to construction years and sometimes decades ahead of schedule.

**Unfunded Projects: $9 Billion**


**Reference Item 14**

The "Funded Roadway Recommendations" portion of the Mobility 2030 Plan demonstrates how many of these major roadways were able to be brought forward and funded using the innovative financing tools provided by the legislature over the past 4 years (Reference Item 15).




**Reference Item 15**

## Local Decision Making

The decisions discussed in this paper are difficult decisions to make and to understand. Since the Legislature began to provide local governments with the necessary tools to craft transportation plans that meet the needs of the local drives, the local governments have been meeting monthly at the Regional Transportation Council, the North Texas Tollway Authority Board Meetings, the Tarrant Regional Mobility Coalition, the Dallas Regional Mobility Meetings discussing what was needed to address the congestion problems of our region. Many hours and countless meetings have been held to craft the 2030 Mobility Plan, the Business Terms for TxDOT Sponsored Toll Roads, and the Protocol between TxDOT and the NTTA.

These meetings and plans developed over the past 4 years, have been attended and crafted by local officials that possess the clearest understanding of the transportation problems that plague our region and are most directly held accountable for the deteriorating quality of life generated by increasing congestion. Many of the specific details of the plans have had to be approved by local governmental bodies prior to adoption by the region.

<u>For any State elected official to state that the current plan has been made in "haste" only demonstrates how far removed they are from the transportation process and the accountability for is success or failure.</u>

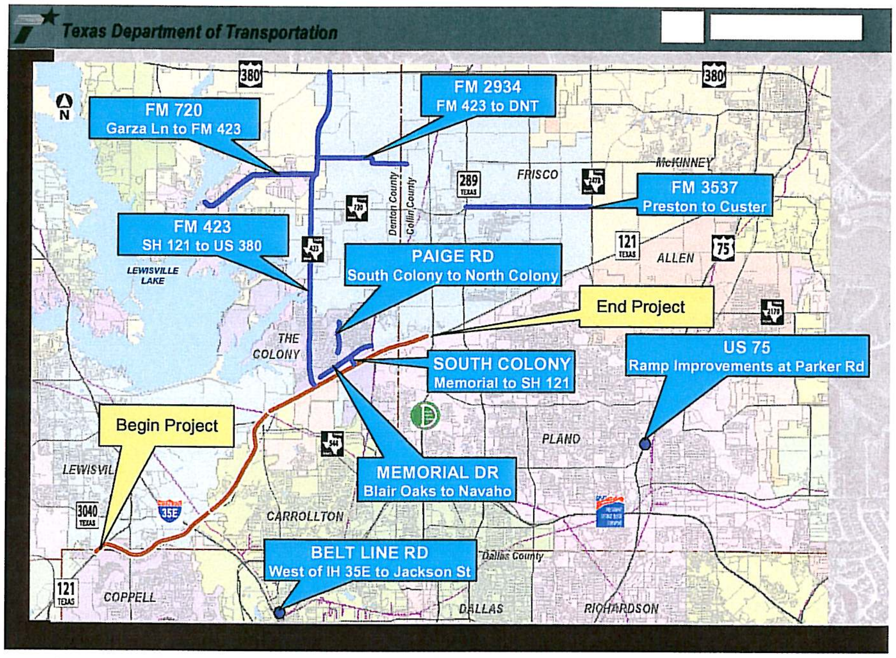
**Moratorium Impacts**

Rep. Lois Kolkhorst said that she doesn't "think it's too much to ask to take two years to look at contracts that will cover our grandkids 50 years from now."

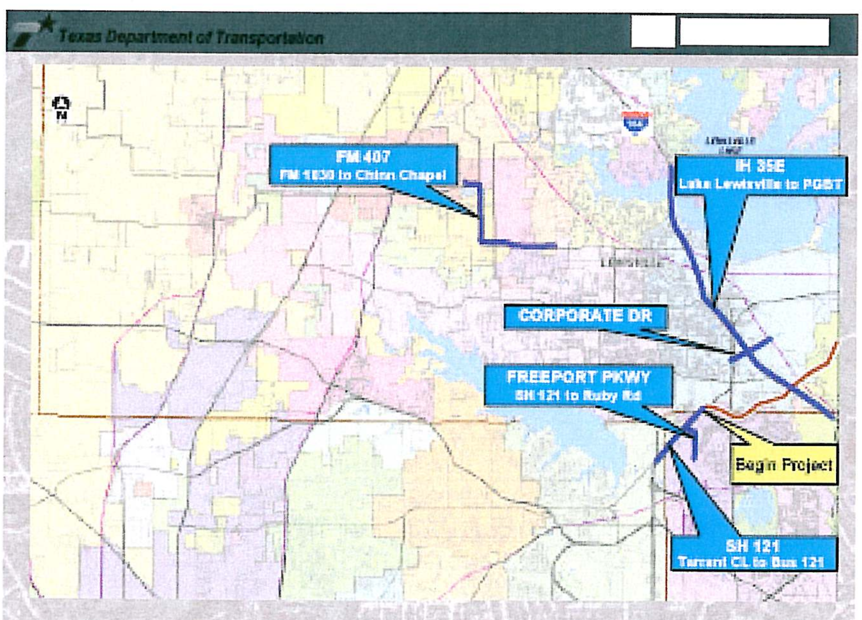
A 2 year moratorium on CDA's will stop the construction of IH 35E from the George Bush to US 380 in Denton- a non-tolled facility; FM 423 in Frisco and The Colony- a non-tolled facility; FM 720 in Little Elm- a non-tolled facility; FM 407 in Highland Village, Flower Mound, Double Oak and Bartonville a non-tolled facility; SH 114 from IH 35 to the Wise County Line- a non-tolled facility and about $20 million in local streets like Memorial Drive (which is a 6 lane divided roadway the County is trying to build to give folks along SH 121 an alternative to the toll lanes) which is in addition to the 6 free frontage road lanes on SH 121; Lakeside Parkway in Flower Mound; Corporate/Windhaven in Lewisville which is a 6 lane road south of SH 121 to give those drivers an alternative to SH 121. All of which are non-tolled facilities. **<u>That list, which is shown in Reference Items 16 and 17, is currently estimated to cost $1.3 Billion dollars. Those projects are scheduled to begin in 2009 and be completed in 2013. If the Moratorium is imposed, these projects will either never get built or will cost significantly more than currently estimated.</u>**

If the Moratorium is passed, this legislature will be know by its tombstone that reads "transportation delayed equals transportation denied."

That is a scenario that should not be permitted to happen. Because if we do, we will be passing down a poorer quality of life, more pollution, longer commutes and a staggering infrastructure bill to not only our "grandkids" but to their grandkids as well.




**Reference Item 16**




**Reference Item 17**