

Charges and Recommendations

Charge #1

Evaluate the potential benefits offered through the “design-build” form of bidding, which allows engineers, architects, and builders to form teams and bid on state projects in contrast to the current method which mandates that each entity bid separately. The Committee shall compare the State of Texas practices to other states and to the private sector and evaluate the “design-build” option as it relates to buildings, roads, and other publicly funded projects.

Background

As defined, design-build is a “team based system organized to provide efficient design and construction processes, where the owner contracts with a single entity to provide the whole service².” The structure of a design-build contract allows for a single contract for design and construction as contrasted with the traditional method, which uses separate contracts for design and construction. This allows one firm or a joint venture of two or more of the firms to contract with the owner or agency and provide single source accountability to design and construct a facility and warrant its performance. According to owners who have used the design-build method this single source accountability is a factor in choosing to use design-build. Use of design-build has grown from 5% of U.S. construction in 1985 to approximately 1/3 of all U.S. construction in 1999 and is projected to surpass low-bid construction in 2005³.

Currently, the only public entities in Texas that have design-build as an option are school districts and institutes of higher education. SB 583 by Senator Ratliff was passed in the 75th Legislature to establish specific procedures for school districts and institutes of higher education to follow in utilizing design-build contracts, as well as other alternative delivery methods. In the 76th Legislative Session, SB 669 also by Senator Ratliff set forth new procedural guidelines to clarify the alternative construction methods used by school districts and universities.

Since implementation of SB 583 and 669, many school districts and universities have reaped the benefits of design build. The University of Texas System recently completed an 860 room dormitory on the Austin campus that was completed on schedule and under budget. Because of their success with the project, the System is currently proposing to complete several future projects using design-build.

² Hovet, Timothy D. “Allowing the Design/Build Project Delivery Method in the Procurement of Public Construction Contracts.” 1994 Oregon Better Government Competition, Cascade Policy Institute.

³ James A. Broaddus, PhD., P.E., presentation to the Senate Committee on Intergovernmental Relations, 28 October 1999.

Work Group

In order to address the issue of design-build, a work group was formed so individuals representing all aspects of the construction industry could debate the pros and cons of the procurement method and provide input to the committee. Per the parameters set by Lieutenant Governor Perry, design-build is being considered for only two separate state agencies, the Texas Department of Transportation (TXDOT) and the Texas Department of Criminal Justice (TDCJ). Representatives of these two agencies were also included in the group.

In the first two meetings, the group discussed issues that had surfaced in the first three Intergovernmental Relations Committee hearings. These issues included, but were not limited to, legislative approval of design-build projects, monetary and size limitations for design-build projects, the payment of stipends, and conforming any new design-build language to language already in statute. In the third and final meeting, draft language was distributed for the use of design-build by TXDOT. The group reviewed the draft and made comments regarding the language. Many of those comments were incorporated into the next TXDOT draft. Design-build language for TDCJ was also drafted, separate from the TXDOT language. On July 14, 2000 the work group submitted their recommendations to the full Committee. Details of the group's work is laid out in their recommendations (See Appendix A-1).

Committee Findings

The majority of the testimony received at the three Committee hearings provided Committee members with information supporting the use of design-build for both vertical and horizontal projects. Testifying were professionals who had engaged in design-build projects in the past, and project owners who had monitored the work of design-build teams. Additionally, the Committee received testimony from city and county officials, as well as representatives from port authorities, who were interested in being given authority to use design-build, however, the Committee's focus was on the use of design-build for state projects, specifically TXDOT and TDCJ.

While the bulk of the testimony was supportive of the use of design-build in the public sector, testimony was also received from those that were opposed to the use of design-build by state agencies. At the hearing in Houston on February 8, 2000, the argument was made that because design-build was qualifications based, biases could be introduced into the selection process and in the end prevent many teams from being chosen. Claims were also made that design-build pushed smaller contractors out of the process and prohibited them from entering into any design-build contracts.

Based on testimony and correspondence received by the Committee, it was found that design-build is a procurement method that would benefit the state for both horizontal and vertical project types. There are many instances of success with design-build both in the public and private sector. Projects such as Interstate 15 in Utah and State Route 68 in Arizona, both using design-build, have merited success and are proving this method of construction should be incorporated into the options available for state agencies (See Appendix A-2).

However, because of the reservations of several members of the work group and Committee members, it was decided a pilot program for TXDOT should be established at this time, rather than authorizing full authority. Because there was some opposition to the use of design-build for roadway construction projects, the Committee chose to use caution in allowing TXDOT and TTA to be fully authorized to use design-build. The Committee heard testimony from contractors expressing their concern regarding qualifications based selection. These contractors felt that without a low bid process, the State could control to whom projects were being awarded and in the end eliminate many firms' involvement in the process. In addition, several of the work group members did not support the use of design-build by TXDOT and TTA. Specifically, the Associated General Contractors of Texas expressed serious concern about allowing TXDOT and TTA to enter into design-build contracts. In a memo to the Committee, the AGC of Texas stated, "the design-build delivery system is a subjective process that promotes the opportunity for scandal associated with influence, peddling and favoritism. Any system that has this weakness is unfit for use by

the public sector regardless of the type of construction⁴” (See Appendix A-1). Contrary to this opinion, the Committee received correspondence from other highway contractors who expressed their support for design-build (See Appendix A-3).

Based on discussions, the Committee decided to authorize TXDOT and TTA to use the design-build method of procurement under a pilot program. Projects completed under this program must have a cost estimate of at least 50 million dollars. The pilot program should allow TXDOT to complete 16 design-build projects and TTA 24 design-build projects over the next 8 years. It should be required of TXDOT and TTA to submit reports biennially to the Legislature regarding the use of design-build. The reports should include information regarding the current status of each project, problems associated with each project, schedule issues, budget issues and the impact of the process on small and historically underutilized businesses. In addition to the biennial reports, a final report should be presented to the 79th Legislature and include detailed information regarding each completed project under this pilot program. Finally, the Committee recommends that the study of the use of design-build be included in the Sunset Advisory Commission’s review of the Department in 2009. Draft language is included in Appendix A-1.

Recommendations

Recommendation 1.1 - Authorize the Texas Department of Transportation (TXDOT) and the Texas Turnpike Authority (TTA) to enter into design-build contracts under a pilot program.

Currently, TXDOT and TTA are not permitted to use the design-build method of construction for highway projects. Although there are no problems associated with TXDOT’s current method of construction, the Department needs more options when building highways. Design-build could possibly allow TXDOT and TTA to “fast-track” certain projects and thus meet the current roadway needs of this state. With issues such as the lack of highway infrastructure, the growth of the state, and NAFTA, improving the roadways

⁴ Robert C. Lanham, letter to the Senate Committee on Intergovernmental Relations, 19 May 2000

of Texas is crucial and the Department needs all tools available to meet the demands. The Committee recommends that in order to continue to study the use of design-build by TXDOT and TTA, a pilot program be established with the parameters as detailed above.

Recommendation 1.2 - Authorize the Texas Department of Criminal Justice (TDCJ) to enter into design-build contracts.

The Committee recommends that TDCJ be authorized to use the design-build method of procurement for construction purposes. The design-build language for TDCJ was drafted very similarly to §44.036, Education Code, which gives design-build authority to public schools and universities in Texas. Unlike the TXDOT language, TDCJ projects do not have a price threshold nor do they require stipends be paid to unsuccessful proposers.

Charge #2

Study the funding and expenditures of Councils of Government (COGs) and examine the changing relationship between COGs and the state and federal governments since 1982. The Committee shall monitor the compliance by COGS regarding publication of financial statements, as referenced in the General Appropriations Bill, HB 1, 76th Legislature, Regular Session.

Background

With the enactment of Section 701 of the Housing Act of 1954, the federal government offered financial assistance to cities that had developed planning agencies. Funding for these agencies was provided by the U.S. Department of Housing and Urban Development (HUD). Eleven years later the Texas Legislature passed the Regional Planning Act of 1965 (Chapter 391, Local Government Code) authorizing the creation of regional councils. With the availability of federal funds, regional councils grew. By 1969, 21 COGs had been established in Texas. Eventually, three additional COGs were formed out of the original 21. In 1971, the Legislature made some changes to the statute governing the COGs which included setting a financial formula for state assistance. The Omnibus Budget Reconciliation Act of 1981 (OBRA), eliminated HUD funding for these planning agencies thereby eliminating a majority of federal support. However, Regional councils continue to provide a variety of services to their communities through an array of other funds.

"Councils of Governments (COGs)", also known as regional planning commissions, are voluntary associations of local governments and other affiliated organizations, which perform comprehensive regional planning, mapping, and coordination of community development and social programs in areas such as aging, criminal justice, employment and training, economic development, environmental resources, transportation, and workforce development. Created under Chapter 391 of the Local Government Code, COG's are defined by law as political subdivisions of the state (See Appendix B-1: Chapter 391, Local Government Code). However, they have no regulatory power or other authority possessed by cities, counties or other local governments. They are subject to state laws governing open meetings, access to public records and conduct of public officials. Each COG operates under its own bylaws. The governing body must consist of at least two-thirds local elected officials of cities and counties. The policy making bodies in most COGs include the general assembly and the board of directors.

COGs are divided into twenty-four state planning regions which are designated and biennially reviewed by the governor (See Appendix B-2: Regional Map). There are a total of 2,030 cities, counties, local school

districts, soil and water conservation districts, along with other special districts which are current members of regional councils. Counties and cities make up the majority of COG membership. (12.6% counties and 49.8% cities).

Depending on the needs of a particular region, COGs engage in several different programs and services. (See Appendix B-3: Services) A number of these programs and services are provided through contracts or agreements with state or federal agencies, other regional organizations, and local governments.

In response to concerns about the fiscal accountability of COGs, Senate Bills 174, 175, 176, and 177 by Senator Bill Ratliff and Representative Rob Junell were passed in the 76th Legislative Session. These bills were enacted with the intent of holding the COGs fiscally accountable in addressing concerns of salary schedules, restrictions on travel costs, certain reporting and accounting requirements, restrictions on commission costs, and restrictions on employment. In addition, the bills codify certain provisions that were previously prescribed by the General Appropriations Act to ensure their constitutional validity.

Funding and Expenditures

Although the federal government was an important source of funds in the past, direct federal grants now provide a smaller percentage of total budgets. Regional councils have taken on a number of state and local initiatives, thereby further increasing their funding from state and local sources. According to the Texas Association of Regional Councils, COGS received a total of almost \$360.4 million in fiscal year 1998 from all sources. Of these funds, 60% were passed through to local governments and programs. The remaining 40% was used by the COGs for direct service delivery and program administration. (See Appendix B-4: Financials)

Local Funds

Local funding comes from dues paid by member governments, contributions, and miscellaneous revenues for services rendered. In fiscal year 1998, the regional councils received a total of \$1,838,365 in local dues. Other local funds added to the dues total \$125,321,558 in local funds.

State Funds

State funding provided to regional councils is allocated in several ways, from many different state agencies. The major programs funded from state funds are solid waste management grants, aging programs, criminal justice planning, law enforcement training, and 911 emergency communications.

The state assistance planning grant administered by the Governor's Office is used for a wide range of activities, including capacity building, matching other funding sources and program administration. The grant formula is calculated by population and number of member counties, with a \$10,000 base amount, plus \$1,000 per member county, plus 10¢ per capita for all member cities and member counties in the region. To qualify for the grant, the regional council must receive funds from local sources equal to at least half of the proposed state assistance planning grant.

The Criminal Justice Division of the Governor's Office also funds programs through the regional councils with pure state dollars. The state assistance planning grant allocations totaled approximately \$2.4 million in fiscal year 1998, including supplemental funds to the formula allocations to bring all regional councils to a minimum grant of \$50,000. Supplemental funds were used to match federal funds provided through the Texas Department of Housing and Community Affairs for regional operation of the Texas Community Development Program and for other regional council activities, including the Texas Review and Comment System. In 1998, pure state funding comprised 8.87% of all grants-in-aid received by the regional councils. The largest percent of state apportioned funds, approximately 35.18%, were allocated to the Texas Natural Resource Conservation Commission in fiscal year 1998.

Federal Funds

Federal funding provided to COGs by the federal government is awarded directly to regional councils or indirectly as pass-through funds administered by state agencies. Of the total grants-in-aid received by the regional councils in 1998, direct federal funds comprised 8.15% and indirect pass-through funds comprised 44.26%. Direct federal funding for regional councils peaked at \$70.5 million in 1980 but stood at \$29 million in 1998. This change reflects the decline of a number of federal grant programs along with an increased pattern of block grants to the state from which funds are then passed through to regional councils and local governments.

In 1998 the U.S. Department of Housing and Urban Development (HUD) provided the largest portion of direct federal funds received by Texas regional councils. At \$25.1 million, HUD provided 85.46% of the direct federal funding to regional councils. The Economic Development Administration was a distant second, with 4.92%. The Federal Transit Authority provided the third largest portion at 4.58%. The Economic Development Administration provided the largest number of grants, with 18 regional council recipients. Federal funds administered by state agencies and granted or contracted to regional councils are usually referred to as "pass-through" funds, providing by far the largest funding source for the regional councils. In 1998, federal funds in the amount of \$97.5 million administered by the Texas Workforce Commission made up the majority of federal pass-through funds to regional councils at 61.10%. Approximately 25% of total federal pass-through funds to regional councils were administered by the Texas Department on Aging.

Oversight

COGs are monitored and audited by many entities including the federal government, state agencies, independent auditors and in some cases the state auditor and legislative committees. COGs have ten Single State Coordinating Agency assignments including the: Texas Department on Aging; Criminal Justice Division of the Governor's Office; Texas Department of Health; Texas Department of Housing and

Community Affairs; Texas Department of Human Services; Texas Juvenile Probation Commission; Texas Department of Mental Health-Mental Retardation; Texas Parks and Wildlife Department; Texas Department of Transportation; and Texas Workforce Commission. These coordinating agencies are responsible for oversight and monitoring of the COGs which receive funding through the agency programs. The oversight, in most cases consist of on-site monitoring visits, desk reviews of audits and other records, technical assistance, required documentation of activities, and for certain programs, monthly reviews of funding and financial reports. Federal law requires subgrantees and contractors (which include the COGs) to have an independent Single Audit made if they expend more than \$300,000 in total federal funds.

Committee Findings

The Committee was charged to monitor the COG's compliance regarding publication of financial statements as referenced in the General Appropriations Bill, HB 1, 76th Legislature, Regular Session. The Committee requested from each COG a list of document distribution dates for their financial reporting items as required by §391.009 and 391.0095, Local Government Code and the Governor's Rules (See Appendix B-5: Reporting Items Schedule). All reports for fiscal year 1999 were due September 1, 2000. It has come to the Committee's attention that some of the COGs were not able to meet the filing deadline of September 1, 2000 for the financial reports. Senate Bills 174-177 did not pass until the middle of fiscal year 1999. The bills, which amended §391.009 and 391.0095, Local Government Code and the Governor's Rules, called for data from the entire 1999 fiscal year. Developing reports for the entire 1999 fiscal year has proven difficult for these COGs due to the fact that some of the relevant data was not kept prior to the passage of the bills. However, the Committee believes there should not be a problem with COGs submitting the reports for fiscal year 2000.

Over all, the Committee received public testimony in support of COGs as well as several letters from state officials, consulting firms, small businesses and special districts endorsing their local COGs. The Committee found that Senate Bills 174-177 address most of the fiscal accountability issues as they relate to the interim charge and the majority of COGs submitted their financial statements in a timely manner.

Based on these findings, the Committee formulated its recommendations to further enhance and improve accountability, service provision, and reimbursement procedures performed by the COGs.

Recommendations

Recommendation 2.1 - Require the State Auditor's Office to fully review COGs' financial audits.

Currently, no single entity is designated to review COGs' entire financial audits. The Committee recommends this review be completed by the State Auditor's Office.

Recommendation 2.2 - Request both the State Auditor's Office and the Governor's office to work towards developing a more simplified reporting process for COGs, to include what specific items need to be reported and to what entities.

This would help to reduce the duplication of efforts by COGs in their requirement to supply numerous financial reports to various entities, the Committee recommends a more simplified reporting process be developed along with assistance.

Recommendation 2.3 - Amend Chapter 391 of the Local Government Code to strengthen state and regional coordination of planning and program development.

The Committee recommends the Local Government Code, Chapter 391 be amended by adding the following language.

" In carrying out planning and program development responsibilities, state agencies shall, to the maximum extent feasible, coordinate planning with regional councils to ensure effective and orderly implementation of state programs at the regional and local levels."

Recommendation 2.4 - Amend §391.006(b), Local Government Code, to encourage and facilitate participation by members of the public.

Currently, at least two-thirds of the members of a governing body of a commission must be elected officials of participating counties or municipalities. The Committee recommends the Local Government Code, Chapter 391.006 (b) be amended as follows:

"No more than two-thirds and at least one-half of the members of a governing body of a commission must be elected officials of participating counties or municipalities."

Recommendation 2.5 - Require the State Comptroller's Office to evaluate and report back to the Committee any concerns regarding the current invoice and payment procedures between COGs, state agencies, and service providers.

To determine and correct instances of delayed reimbursements to service providers, the Committee recommends the State Comptroller's Office review the current invoice and payment procedures between COGs, state agencies, and service providers, and make these findings available to the Committee.

Charge #3

Review the statutory authority granted to local governments to regulate the development of residential subdivisions. The Committee shall identify conflicting provisions and make recommendations to clarify existing statutes.

Background

Municipal and county authority over subdivisions is established primarily by Chapters 212, 232, and 242 of the Local Government Code. Chapter 212 governs the subdivision authority of cities. Chapter 232 governs the subdivision authority of counties. Chapter 242 defines how city and county authorities interact in geographical areas where both the city and county exercise jurisdiction. Currently, counties do not have ordinance-making or any other authority to control growth and progress within the unincorporated part of the county in the areas of land-use planning, water quality, and building and construction standards.

During previous Legislative history, there has been significant opposition to granting counties more governing authority over those that reside inside the county lines. There has always been the notion that people leave cities and set up a residence or business in the unincorporated areas of counties because they want little control by government in their daily lives.

As we begin the 21st century, counties, specifically those adjoining metropolitan areas, have realized that their citizens desire certain protections for their homes and businesses. Counties would like the ability to ensure that adjacent land uses are compatible, that activities on the land are not harmful to the water supply, and physical structures are built to acceptable standards .

A series of statutes that give counties, on a local option basis and with the consent of the voters in the unincorporated areas, would be beneficial to the people of Texas in a 21st century environment.

Committee Findings

Upon receipt of the interim charge, the Committee staff requested the Texas Legislative Council to prepare a comparison of municipal and county authority relating to the Regulation of Subdivisions of Land. Following receipt of a memorandum from the Texas Legislative Council on December 10, 1999, the Committee staff discussed the charge and the memorandum with interested parties, which included

representatives from various cities and counties, the Texas Association of Builders, the Texas Association of Urban Counties, the Texas Municipal League, and members of the public to develop a better understanding of the issue and the problems that needed to be addresses by the Committee. On October 28, 1999 and June 12, 2000, the Committee held public hearings in Austin to take formal public testimony on the charge.

Based upon the information included in the memorandum prepared by the Texas Legislative Council and the testimony provided to the Committee at the hearings, the Committee prepared its recommendations.

Recommendations

Recommendation 3.1 - Legislation should be drafted for consideration by the 77th Legislature to accomplish the following:

1. Provide counties, on a local option basis and after a referendum of their citizens, the authority for (A) land-use planning, (B) limited construction and/or building codes (basic protection from hazards of fire, windstorm and substandard construction), and (C) water quality protection.
2. Implement comprehensible guidelines in the extra territorial jurisdiction (ETJ) where city and county authorities may conflict.

Recommendation 3.2 - Maintain the language of all Government Code sections dealing with municipalities authority to protect their citizens.

Charge #4

Monitor the implementation of SB 89, 76th Legislature, Regular Session relating to municipal annexation.

Background

Senate Bill 89 is a culmination of over two years of effort of the Senate Interim Committee on Annexation, the House Committee on Land and Resource Management, and scores of local elected officials and interested parties from across the state. The goal was to pass legislation that enabled residents of outlying areas to retain a certain degree of local autonomy, while allowing municipalities to plan and direct their growth.

From combined efforts of both Senate and House members, the 76th Legislature passed workable solutions that benefit all Texans. In assuring our annexation policies are fair and effective, Senate Bill 89 balances cities need for expansion with the need to preserve the rights of those that are annexed.

Senate Bill 89

SB 89 is a comprehensive rewrite of the state's annexation statute. The bill creates two procedures for annexation: annexation under Subchapter C or C-1. The procedure that applies depends upon the area that is proposed for annexation.

Subchapter C : Applies to all areas proposed for annexation unless the area: (1) contains fewer than 100 separate tracts of land on which one or more residential dwellings are located on each tract; (2) will be annexed by petition of the property owners or voters in the area; (3) is the subject of an industrial district or strategic partnership agreement; (4) is located in a Colonia; (5) is annexed under very specific statutes pertaining to general law cities; (6) is located completely within the boundaries of a closed military installation; or (7) must be annexed to provide protection from imminent destruction of property or injury to persons, or there is a public or private nuisance as determined by the city.

- Areas that are annexed under Subchapter C must be included in a three-year annexation plan.

- The city must give written notice to property owners and entities that provide services in the area. Notice must also be posted on the city's Internet website, if it has one.
- The city must compile a comprehensive inventory of services that are provided in the area.
- After holding the required public hearings, the city shall negotiate with the property owners of the area for the provision of services. The county commissioners court shall select five people to negotiate on behalf of the area to be annexed. If the area to be annexed is a district, the governing body of the district shall negotiate with the city.
- Negotiations are an effort to reach either an agreement for provision of services or an agreement in lieu of annexation.
- Either party may request arbitration to resolve the dispute if an agreement cannot be reached. The arbitrator's authority is limited to service plan issues in dispute.
- If a city does not agree with the terms of the arbitrator's decision, the city may not annex the area for five years.

Subchapter C-1 : Applies to the annexations of areas that are not required to be on the annexation plan under Subchapter C.

- The annexation of the area must be completed within 90 days.
- If the area is an area that contains fewer than 100 separate tracts as described in Subchapter C, then written notice must be given to all property owners and entities providing services in the area, prior to annexation.

Procedures Applicable to Annexations under both Subchapter C and Subchapter C-1:

- The annexation service plan must provide for municipal services within 2½ years. If services cannot reasonably be provided within that time, they must be provided within 4½ years.
- Police and fire protection; emergency medical services; solid waste collection; and operation and maintenance of water and wastewater facilities, roads and streets, and other publicly owned facilities must be provided on the effective date of annexation.

- Construction of capital improvements in the service plan shall be completed within the period provided in the service plan.
- If the area has a lower level of services and infrastructure than inside the city, then services shall be comparable to the level within the city. If the level of services is equal, that level shall be maintained. If level of services in the area is superior to services within the city, then the services shall be comparable to the level within the city, except that operation and maintenance of the infrastructure must be maintained at existing levels.
- Disputes concerning the level of services and service plans may be enforced by arbitration in areas annexed by the City of Houston and by writ of mandamus for all other cities.
- The court may order various remedies for failure to comply with the service plan, including refund of taxes and civil penalties.
- Notice of public hearings on all annexations must be posted on the city's Internet website, if the city has one.

Additional Provisions:

- Modifies the strategic partnership agreement provisions to provide for arbitration if a city and a district cannot reach an agreement.
- Provides limitations on annexation of areas that are in the ETJ due to prior "spoke" annexations.
- Provides that a city may not prohibit a person from continuing to use land in the manner it was being used on the date annexation proceedings were instituted, with some exceptions including sexually oriented businesses, Colonia, fireworks, and more.
- Removes the extension of ETJ from non-contiguous city owned property.
- Provides that the city shall apply for preclearance from the Justice Department at least 90 days before the effective date of the annexation or the earliest date permitted under federal law.
- Provides for a particular notice to be provided to school districts located in an area to be annexed.

- Provides that an area may not be annexed again within ten years if it is disannexed.
- Deletes the requirement that a city with a population of 225,000 must be authorized by its charter to annex for limited purposes.

Recommendations

Recommendation 4.1 - Continue to monitor the implementation of SB 89, 76th Legislature, Regular Session relating to municipal annexation.

Home rule municipalities are just beginning to apply in practice all of the various changes to the state's annexation policies. Many cities did not feel that there has been sufficient time to adequately evaluate these changes and requested that the Committee continue to monitor the implementation of SB 89.

Recommendation 4.2 - Provide a clear definition of "tract of land" and provide direction on how to account for tracts that are either vacant or are occupied by one or more residential dwellings.

§43.052(h)(1), Local Government Code, provides an exclusion of an area from the municipality's annexation plan if "...the area contains fewer than 100 separate tracts of land on which one or more residential dwellings are located on each tract." Questions centered on two primary concerns: (1) how to account for vacant tracts; and (2) what is the legal definition of "tract".

Charge #5

Examine the powers, functions and programs administered by the Texas Department of Housing and Community Affairs (TDHCA) and the Texas State Affordable Housing Corporation (TSAHC). The committee's report will assess the methodology used in allocating the various housing funds and resources, including the Low-Income Housing Tax Credit program and the Housing Trust Fund, and the compliance by the agency with that methodology, and address whether the programs administered by TDHCA and the TSAHC meet the affordable housing demands of targeted population groups throughout the State of Texas.

Background

In 1991, the Texas Department of Housing and Community Affairs (TDHCA or the Department) was created after the merger of the Texas Housing Agency, the Community Development Block Grant Program from the Texas Department of Commerce, and the Texas Department of Community Affairs. Since then, several programs have been transferred to the Department from the Texas Department of Human Services and the Texas Department of Licensing and Regulation.

According to §2306.002(b), Texas Government Code, “The Department’s highest priority is to provide assistance to individuals and families of low and very low income who are not assisted by private enterprise or other governmental programs so that they may obtain affordable housing or other services and programs offered by the department.” In order to provide this assistance, the Department obtains the majority of its funding from the U.S. Department of Housing and Urban Development (HUD). Monies are also received from the U.S. Treasury Department, the U.S. Department of Health and Human Services, and the Department of Energy. In addition to federal funding, the state directs funds to the Department via its general revenue. Currently, the state contributes 2.8% to the annual budget of the Department. TDHCA is meeting less than 1% of the affordable housing needs of the state.

Past audits of the Department have revealed troubling information criticizing the overall management of the Department, the conduct of several board and staff members, and the administration of program funds. These audits, completed by HUD and the State Auditor’s Office, urged the Department to rectify the problems at the state level before the federal government considers the withdrawal of vital funds. In the past, the Department has not been responsive to the problems identified and therefore, is jeopardizing the assistance Texas will be able to give to its citizens. This lack of responsiveness and the seriousness of the allegations and findings illustrates the urgency needed to address the problems associated with the Department.

TDHCA Housing Programs

In order to assist low income individuals and families in obtaining affordable housing, the Department offers six main housing programs that account for 24% of the Department's overall programming. These programs are the Housing Trust Fund (HTF), the Home Investment Partnership Program (HOME), the Statewide Housing Assistance Payments Program (Section 8), the Multifamily Mortgage Revenue Bond Program, the Single Family Mortgage Revenue Bond Program, and the Low Income Housing Tax Credit Program (LIHTC).

The HTF is a statewide program that seeks to allocate funds to achieve a broad geographical distribution of affordable housing. It is the only state funded affordable housing program. Funds are available to non-profit organizations, for-profits, units of local government, public housing authorities, community housing development organizations (CHDOs), and income eligible individuals and families. Eligible activities include acquisition, rehabilitation, and new construction of housing. Funding sources consist of general revenue, appropriations or transfers made to the program, unencumbered fund balances and public and private gifts or grants. The criteria for evaluating applications includes the degree to which the project meets area housing needs, financial feasibility, degree of targeting income categories and long term affordability.

The Department receives an annual allocation from the U.S. Department of Housing and Urban Development to fund the HOME program. CHDOs, non-profit housing organizations, local governments, public housing agencies and for-profit developers are authorized to apply for HOME funds. Eligible activities include development of rental housing, homebuyer assistance, rental assistance, and home rehabilitation. The HOME program provides the state flexibility, based on public comment, to decide what kind of housing assistance is most appropriate. Funds are distributed through regional or statewide competitions and by direct award. Allocations are based on a five-year plan for distribution. The Department must review applications and award contracts to applicants within two years from the date of the HUD allocation. By the end of the five-year term,

all money from an allocation must be expended for HOME eligible activities. Un-used funds are returned to the Department.

Section 8 provides rent subsidy vouchers to families, the elderly and persons with disabilities earning less than 50% of the area median family income (AMFI). The vouchers are distributed through community action agencies or other local organizations in areas of the state without a public housing authority. Those in areas with a public housing authority may receive assistance directly from the authority.

In order for non-profit and for-profit developers to finance the construction, acquisition, or rehabilitation of multifamily properties, the Department issues taxable and tax-exempt mortgage revenue bonds to fund loans under the Multifamily Mortgage Revenue Bond Program. Owners must restrict a portion of the units for families earning moderate, low and very low incomes, and services must be offered on the property to benefit the residents. These types of services can include job training, child care or others that meet the needs of the tenants and encourage self-sufficiency.

The Single Family Mortgage Revenue Bond Program provides home buyer assistance through the Texas First-Time Home Buyer Program. In order to receive funds under the program, applicants must not exceed 115% of the AMFI and must meet traditional lending criteria for standard mortgage loans. Qualified applicants receive loans with below-market interest rates from participating lending institutions.

By directing private equity to affordable rental housing projects, the Low-Income Housing Tax Credit Program provides developers with tax credits that may be used to offset their federal tax liability. Developers who receive the credits sell them to investors in order to raise the necessary capital for the project. To qualify, 20% or more of the project's units must be rent-restricted and occupied by families whose income is 50% or less of the AMFI. Projects may also qualify if 40% or more of the units are rent-restricted and occupied by individuals whose income is 60% or less of the AMFI.

Other Departmental Programs

In addition to the housing programs, the Department administers 19 other programs. The majority of these programs fall under the Texas Community Development Division (TCDD). The main objective of this division is to assist small communities with their housing, infrastructure and economic development needs. Funds are to be allocated to non-entitlement communities with populations less than 50,000 and counties with populations less than 200,000. Entitlement communities, cities with populations greater than 50,000 and counties greater than 200,000, receive an allocation of funds directly from HUD. There are eight programs administered by this division.

The Office of Colonia Initiatives (OCI) was created to coordinate department programs for Colonias. Colonias are defined as subdivisions in unincorporated areas within 150 miles of the Texas-Mexico border. This definition has been expanded, however, as Colonias are developing in East Texas. In addition to five Colonia Self-Help Centers, the OCI administers the “Bootstrap” Homebuilder Loan Program and the Contract-for-Deed Conversion Initiative. The “Bootstrap” program, created by the 76th Legislature, provides low-interest home mortgage loans of up to \$25,000 to low-income Texans who agree to assist in the construction of their home. Two-thirds of the available funds are used for residents of Colonias. The Contract-for-Deed Conversion Initiative helps Colonia residents become property owners by converting their contracts for deeds into traditional mortgages.

In order to address emergency relief to the homeless and to individuals and households experiencing crisis poverty, the Community Affairs Division of the Department administers six programs. Included is the Community Services Block Grant Program (CSBG) which provides much needed administrative support to local Community Action Agencies (CAAs). Also included is the Emergency Shelter Grant Program (ESGP), which addresses homelessness through services and prevention, the Weatherization Assistance Program (WAP), which strives to reduce the energy cost burden of low-income households through energy efficiency, and the Comprehensive Energy Assistance Program (CEAP), which assists low-income in meeting energy needs.

The only regulatory function of the Department is the regulation of the manufactured housing industry by the Manufactured Housing Division. The Department provides licensing, titling, inspections and enforcement of standards for manufactured housing. Fees from these activities help fund the division.

Texas State Affordable Housing Corporation

The Texas State Affordable Housing Corporation (TSAHC or the Corporation), operating under the name Texas Star Mortgage (TSM), is a non-profit corporation created to provide single and multi-family loans to low-income individuals. TSM originates first lien, single family, and purchase money mortgage loans to individuals and families of low, very low and extremely low income. To qualify, the individual's or family's income must not be greater than 60% of the median family income for the State of Texas, as defined by HUD, or 60% of the AMFI adjusted for family size as defined by TDHCA. In addition, TSM also administers other financing programs funded by grants from TDHCA or HUD.

In June of 2000, the TSAHC Board of Directors approved its new business plan. This new business plan redirects the activities of the Corporation from mortgage banking and grant administration to increasing and preserving affordable multifamily housing in Texas. In order to do this, the Corporation will issue taxable single-family mortgage revenue bonds, setting aside more than half of the proceeds for low income households. Also, the Corporation will issue 501(c)(3) multi-family tax exempt mortgage revenue bonds. The Corporation does not intend to compete with private lenders, but plans on lending to poorer home buyers or renting to lower income residents who are not served by private lenders.

Committee Findings

In order to address this charge, the Committee held two public hearings at which its main focus was TDHCA and TSAHC. Committee members and staff held various meetings in order to obtain additional

information regarding the programs administered by the two entities. In addition, correspondence to the Committee office relayed details regarding personal dealings with the Department and its staff.

On April 25, 2000 the Committee convened to address the housing programs administered by TDHCA, in addition to the functions of TSAHC. Daisy Stiner, Executive Director of the Department, presented to the Committee an overview of the six main housing programs as listed above. In her presentation, Ms. Stiner focused on the funding sources for each program, eligible activities and applicants associated with each program, the allocation process, and the targeted population. The Committee's inquiries to Ms. Stiner focused heavily on the allocation of funds to the 11 Departmental regions, the assessment of needs in rural areas, and the LIHTC program. In addition, Senator Ellis asked Ms. Stiner to present to the Committee the Department's vision and plan for meeting the affordable housing needs of Texans. Ms. Stiner presented the vision to the Committee at the June 12th hearing (See Appendix E-1).

The hearing on June 12, 2000 provided a forum for the Department to present to the Committee other programs that the Department offers, including the Community Development Block Grant Program (CDBG) and the Office of Colonia Initiatives (OCI). Ms. Stiner once again made the presentation that focused on the 19 other programs offered by the Department. Concern was expressed regarding the allocation of funds to the Colonia areas of the state.

Based on testimony and correspondence made to the Committee and meetings held by the Committee and its staff, problems associated with the Department and the management of its various programs and services were identified. Specifically, the Committee found four major areas where the Department is failing considerably in addressing the affordable housing needs of this state: the distribution of program information, the equitable distribution of awards, the lack of innovation in providing assistance, and the inability to maximize the efficiency of program funds.

Because of the complexities associated with each program the Department offers, understanding the details of the programs can sometimes be difficult for smaller communities or eligible participants. Furthermore, entities are often not informed of the available programs. This lack of knowledge in the programs available and the difficulties understanding the particulars of the programs creates many problems for smaller communities and less prominent entities. Non-entitlement communities, as defined above, do not have the outside resources made available to entitlement communities, and they often lack staff to research available assistance. The Committee found that many smaller communities around the state were unaware of the assistance available through the Department and were not knowledgeable on how to obtain that information. This lack of access to information is inhibiting many small communities and rural areas from receiving assistance needed.

To make an effort to distribute awards statewide, the Department has established set-asides and prioritized awards going to rural areas of the state. Although this is amiable, the Committee found it is often overlooked, and consequently, these areas are not receiving the help they need to provide affordable housing. For instance, the HOME program's rules state that priority is to be given to applications received from communities that do not receive direct funding from HUD. However, the Department has tied HOME funds in with its own bond issuance programs in urban areas, or with tax credit projects, ostensibly to make these more viable. Subsequently, the non-participating jurisdictions are losing out on funds earmarked for rural areas.

Although HUD places restrictions on how dollars obtained by the Department can be used, there is some leeway on how certain funds can be allocated, particularly HOME funds. The Committee found that the Department's leveraging of these funds often precludes awards being made to non-participating jurisdictions. In addition, the Department is not innovative in its efforts to create alternate programs. Programs similar to the "Bootstrap Program" could be creative and could assist families in need, and in turn, reach a new segment of those in need of assistance. The Committee found the Department is not thinking creatively and inaugurating programs that can target a new sector and, in the end, stretch the Department's funds and broaden the spectrum of those receiving assistance.

Many of the dollars awarded by the Department are very similar to those made available by USDA Rural Development, CDCs, participating jurisdictions, Housing Finance Corporations, Texas State Affordable Housing Corporation and other providers of housing related programs. Although, there is often overlap of funding, the Committee found that the Department does not work closely with these and other entities by sharing information in the effort to maximize the efficiency of limited funds. The result of this is a concentration of awards to certain areas of the state. This concentration is often not in areas whose needs surpass other parts of the state. By working together, providers of housing related assistance could better address the needs of all of the state rather than a few centralized areas.

The primary focus of the Committee's recommendations is to address the four main problem areas identified. Due to the parallel work of this Committee and that of the Sunset Commission's review of the Department, this report reflects recommendations by that body. At the time of the drafting of this report, the Sunset Commission had not voted on all recommendations made by the Sunset staff. This report, therefore, will not reference those recommendations not voted on as of September 1, 2000.

Recommendations

Recommendation 5.1 - Require the Department to immediately classify preservation as a top priority and begin undertaking, through any and all possible means, accelerated attempts to preserve housing stock

Current affordable housing stock will continue to expire and the developments will convert to full-market rates if no actions are taken to preserve the existing affordable housing stock. Therefore, the Committee recommends the Department pursue aggressive preservation strategies to preserve the current affordable housing stock. In order to fund the preservation activities, the Department needs to establish a dedicated funding resource and leverage funds so that preservation can be actively

pursued by the Department. In addition, the Department should establish a threshold of units it is responsible for maintaining.

Recommendation 5.2 - Require the Department to collect from participating jurisdictions, entitlement communities, and other local organizations any housing plans submitted to HUD and information on funding received from HUD for activities which the Department also offers.

In order for the Department to focus on areas not being served directly by the U.S. Department of Housing and Urban Development, the Committee recommends that participating jurisdictions, entitlement communities, and other local housing organizations report to the Department any housing plans submitted to HUD and any funds received related to the plan submitted. This exchange of information will allow the Department to analyze the areas of the state being served and be informed of the recipients of other housing dollars. The information obtained by the Department can help the Department assess the needs of the state and allow them to strive to reach those citizens that are under served by other sources.

The Committee recommends the reports be submitted to the Department's Office of Strategic Planning. The Office of Strategic Planning shall use the information to assist them in assessing the affordable housing needs of the state and in preparing their statewide plan.

Recommendation 5.3 - Require the Department to adopt a policy to work in conjunction with USDA Rural Development, CDCs, participating jurisdictions, Housing Finance Corporations, Texas State Affordable Housing Corporation and other providers of housing related programs to reduce overlap of expenditures and to maximize housing resources.

The Committee recommends the Department seek out information regarding other monies that are being allocated for affordable housing projects so that the Department may minimize the duplication of funds allocated, and in turn, maximize their dollars spent. The Committee found that in many instances, projects could have been funded if multiple sources had been utilized. By tapping into

an array of sources, not one entity is funding the project in its entirety, thus leaving money available for other projects. In the end, the Committee found the Department, working with other providers of housing programs, could maximize the dollars spent on housing projects in this state.

Recommendation 5.4 - Require the Department to work with the 24 Councils of Governments in the state to distribute program information to local communities.

The Committee found that because the Department offers a variety of assistance to citizens of the state, the Department should ensure that all communities are aware of the assistance available to them. Because COGs are local units of governments with a multitude of local and regional planning responsibilities, they are the perfect candidate to aid the Department in informing local communities of services available. The Department should not place all responsibility on the COGs, but should use them as a facilitator to disperse the information.

Recommendation 5.5 - Require the Department to give priority to applications for HOME funds from non-participating jurisdictions as required by the Department's governing rules.

The Committee recommends the Department allocate HOME funds as intended by the governing rules. According to §53.56, Texas Administrative Code, applications from entities in non-participating jurisdictions are to be given first priority. However, a large portion of the HOME funds are still being directed towards participating jurisdictions and many applications received by the Department from non-participating jurisdictions remain unfunded.

Recommendation 5.6 - Require the Department to adopt policies regarding the use of de-obligated funds and program income, specifically the process by which they are allocated and reporting requirements regarding their use.

Currently, there is no standardized policy regarding the use of de-obligated funds and program income, thus an increasing amount of funds at the Department are not being tracked. The Committee

recommends the Department prioritize its use of de-obligated funds and maintain a database of how the de-obligated funds are reassigned. The de-obligated funds should be reassigned to the program from which they originated in order to fulfill their intended use. More importantly, the funds should be reassigned to the region in which they were originally awarded. A process shall be instated by the Department that details how funds are reassigned. Furthermore, the reassignment of funds shall be completed in a timely manner. The database shall provide detailed information regarding the funds and their reassignment, and the information contained within database shall be readily accessible to those who submit inquiries.

Recommendation 5.7 - Require the Department to create a single application for the Housing Trust Fund, CDBG funds, HOME funds and the Mortgage Revenue Bond Program.

Currently, each funding program administered by the Department has its own separate application. In most instances, the information requested is the same for each application. The Committee recommends the Department create a more “user-friendly” application for several of its funds to eliminate repetitiveness and unnecessary additional paperwork for the applicant.

Recommendation 5.8 - Require the Department to monitor and strictly enforce all fair housing laws.

The Committee recommends the Department require developers and landlords to comply with all current laws that housing and related services be made accessible for people with disabilities. The Committee found these laws are often violated by developers and landlords simply because they are uneducated about the laws. Furthermore, there is little effort to enforce them.

Recommendation 5.9 - Concur with the recommendations voted on by the Sunset Advisory Commission as of September 1, 2000.

To prevent duplication between this report and the Sunset report, the Committee concurs with the

recommendations voted on by the Sunset Advisory Commission as of September 1, 2000 (See Appendix E-2).