

PEOPLE FOR EFFICIENT	§	IN THE DISTRICT COURT
TRANSPORTATION, INC.,	§	
	§	
Plaintiff,	§	
	§	
v.	§	
	§	
GOVERNOR RICK PERRY, TEXAS	§	OF TRAVIS COUNTY, TEXAS
DEPARTMENT OF TRANSPORTATION,	§	
CAPITAL AREA METROPOLITAN	§	
PLANNING ORGANIZATION, and	§	
SAN ANTONIO-BEXAR COUNTY METRO-	§	
POLITAN PLANNING ORGANIZATION,	§	
	§	
Defendants.	§	353 <sup>rd</sup> JUDICIAL DISTRICT

**PLAINTIFF’S ORIGINAL PETITION FOR DECLARATORY JUDGMENT,  
REQUEST FOR DISCLOSURE, REQUESTS FOR PRODUCTION, AND JURY DEMAND**

Plaintiff People for Efficient Transportation, Inc., complaining of defendants Governor Rick Perry, Texas Department of Transportation, Capital Area Metropolitan Planning Organization, and San Antonio-Bexar County Metropolitan Planning Organization, respectfully shows:

DISCOVERY CONTROL PLAN

1. The plaintiff intends that discovery be conducted under level two, and affirmatively pleads that it seeks only declaratory relief.

DISCOVERY REQUESTS

2. Pursuant to Texas Rule of Civil Procedure 194, the plaintiff requests that the defendants, within fifty days of the service of this document, disclose the information and material described in Rule 194.2.

3. Pursuant to Texas Rule of Civil Procedure 196, the plaintiff requests that the defendants produce for inspection and copying:

(a) all documents that authorize Governor Perry or the Texas Department of Transportation to create or establish special districts such as the Capital Area Metropolitan Planning Organization and the San Antonio-Bexar County Metropolitan Planning Organization; and

(b) all documents discussing, concerning, or otherwise relating to the authority, or lack of authority, of Governor Perry or the Texas Department of Transportation to create or establish special districts such as the Capital Area Metropolitan Planning Organization and the San Antonio-Bexar County Metropolitan Planning Organization.

4. The plaintiff requests that the defendants produce the documents described in paragraph 3 at the following date, time, and place: December 1, 2005; 9:00 a.m.; business office of Governor Perry or other mutually agreeable location.

#### PARTIES

5. Plaintiff People for Efficient Transportation, Inc. is a Texas nonprofit corporation. In this lawsuit, the plaintiff represents the interests of its more than 5,000 members. The members, who are *inter alia* Texas citizens, registered voters, property taxpayers and future toll taxpayers, oppose Governor

Perry's plan to privatize and toll public highways for the first time in United States' history.

6. Defendant Governor Rick Perry is the current governor of Texas. Governor Perry may be served with process at his business office, which is located at the Texas State Capitol, 1100 Congress Avenue, Room 2S.1, Austin, Texas 78701.

7. Defendant Texas Department of Transportation ("TxDOT") is a Texas state agency. TxDOT may be served with process by serving its executive director, Michael Behrens, at 125 East 11th Street, Floor 2, Austin, Texas 78701.

8. Defendant Capital Area Metropolitan Planning Organization ("CAMPO") is the entity designated under federal law as the metropolitan planning organization for the Austin urbanized area. CAMPO may be served with process by serving its executive director, Michael Aulick, at 505 Barton Springs Road, Suite 700, Austin, Texas 78704.

9. Defendant San Antonio-Bexar County Metropolitan Planning Organization ("SAMPO") is the entity designated under federal law as the metropolitan planning organization for the San Antonio urbanized area. SAMPO may be served with process by serving its executive director, Joanne Walsh, at 1021 San Pedro, Suite 2200, San Antonio, Texas 78212.

RELEVANT FACTS & LAW

10. A true and correct copy of the "Joint Powers Agreement" dated February 3, 2003 that governs CAMPO is attached hereto. TxDOT is a party to the agreement.

11. By letter dated February 19, 2003, Governor Perry approved the boundary change proposed by CAMPO at its February 10, 2003 board meeting.

12. A true and correct copy of the "Agreement" dated June 18, 1996 that governs SAMPO is attached hereto. TxDOT is also a party to that agreement.

13. The plaintiff's position in this declaratory judgment action is that neither Governor Perry nor TxDOT have authority under Texas law to create or establish special districts such as CAMPO and SAMPO.

14. No Texas constitutional provision or Texas statute expressly authorizes the creation of special districts such as CAMPO and SAMPO.

15. It is well-settled that the Legislature has inherent authority to create various types of special districts. See, e.g., *Davis v. City of Lubbock*, 326 S.W.2d 699, 710 (Tex. 1959); *Blessing v. City of Galveston*, 42 Tex. 641, 659 (1875).

16. However, the Legislature has never exercised its constitutional grant of legislative power to create special districts such as CAMPO and SAMPO.

17. Moreover, the Legislature has not delegated to the governor or TxDOT the authority to create special districts such as CAMPO and SAMPO, and neither the governor nor TxDOT have any inherent authority to create such districts.

18. As a condition of receiving certain federal transportation funds, Texas is required to designate a metropolitan planning organization ("MPO") in each urbanized area of the state.

19. More specifically, Title 23 U.S.C. § 134(b)(1) provides:

To carry out the transportation planning process required by this section, a metropolitan planning organization shall be designated for each urbanized area with a population of more than 50,000 individuals—(A) by agreement between the Governor and units of general purpose local government that together represent at least 75 percent of the affected population (including the central city or cities as defined by the Bureau of the Census); or (B) in accordance with procedures established by applicable State or local law.

20. In addition, Title 23 C.F.R. § 450.306(c) provides:

To the extent possible, the MPO designated should be established under specific State legislation, State enabling legislation, or by interstate compact, and shall have authority to carry out metropolitan transportation planning.

21. A longstanding Texas administrative rule, codified at Title 1 T.A.C. § 5.57, provides:

The governor retains the right to designate or redesignate the MPO at any time if, in the governor's opinion, it is necessary to do so. The governor's decision to rescind an MPO's designation shall be administratively final.

22. In *Sierra Club v. Austin Transp. Study Policy Advisory Comm.*, 746 S.W.2d 298, 301 (Tex.App.—Austin 1988, writ denied), a

case involving the predecessor entity to CAMPO (Austin Transportation Study Policy Advisory Committee—"ATSPAC"), the Third Court of Appeals stated:

The record also shows that ATSPAC is an official body designated by the governor, and its action is necessary to accomplish a primarily local benefit or improvement. We find, therefore, that ATSPAC is a "special district" and thus a "governmental body" within the terms of the Open Meetings Act.

23. In the district court, ATSPAC had asserted:

[ATSPAC] is not organized pursuant to Texas law. . . . [ATSPAC] was created and exists pursuant to Federal law and regulations to assist the Secretary of Transportation with her responsibilities to make Federal-aid funds available for the realization of transportation projects throughout the United States.

(No. 404,930) (available from the Travis County District Clerk).

24. In a joint application for writ of error filed in the Texas Supreme Court on May 20, 1988, ATSPAC and the predecessor agency of TxDOT (State Department of Highways and Public Transportation—"SDHPT") set forth the following point of error:

The Court of Appeals erred in holding that [ATSPAC] is a governmental body as defined in Sections 1(c) and 3A(f) of the Texas Open Meetings Act, because the act only applies to bodies formed under Texas law, [ATSPAC] being formed solely and entirely under and pursuant to federal statute.

(No. C-7393) (available from the Texas Supreme Court Clerk).

25. In support of the aforementioned point of error, the application, which was prepared by the Texas Attorney General, argued:

Even the governor of the state, in designating an MPO for

an urbanized area, is merely playing the role set out for him by the Congress, in its exercise of power belonging only to it. . . . There is no trace of the power of the State of Texas at issue, here. The State Senator who chairs ATSPAC is not performing any duty assigned to his office by State law; nor are the State Representatives, County Commissioners or City Council members. **Not one word of any statute of Texas, any rule, any ordinance or appropriation creates the MPO, or delegates to it any State power, or makes any mention of it, whatever.** All the power that it has and all the duties it performs, come, like its very existence, from the Congress by delegation. . . . The determination to be made by this Honorable Court, as a matter of law, is whether the function performed by ATSPAC is a function of State or Federal government. If ATSPAC performs the functions of the State of Texas, then it may be governed by the laws of Texas, including the Open Meetings Act. If its functions are those of the Federal Government, application of the Open Meetings Act violates the immunity conferred by the Supremacy Clause of the United States Constitution.

(emphasis added).

26. The Texas Supreme Court subsequently denied the application for writ of error, leaving in place the Third Court of Appeals's holding that ATSPAC was a "special district" under Texas law and therefore subject to the Open Meetings Act.

27. In the case discussed above, neither the district court, the Third Court of Appeals, nor the Texas Supreme Court considered or addressed whether the governor or SDHPT were authorized under state law to create ATSPAC.

28. The plaintiff's position in this declaratory judgment action is that the service of state legislators on the governing boards of CAMPO and SAMPO violates Article II, Section 1, the separation-of-powers provision, of the Texas Constitution.

29. Two state senators and seven state representatives are on CAMPO's twenty-three member governing board.

30. Two state legislators are on SAMPO's nineteen member governing board.

31. Both CAMPO and SAMPO make final decisions regarding local transportation planning and the allocation of a large dollar amount of federal transportation funds in their respective urbanized areas. In performing those functions, they exercise only executive authority. They exercise no legislative or judicial authority.

32. "It is the function of the legislative branch of the government to make the laws; it is the function of the executive branch of the government to administer and execute those laws. . . . Under Article 2, Section 1, of the Constitution of the State of Texas, the Legislature is powerless to clothe itself, or a portion of its members, with executive authority." TEX. ATTY. GEN. OP. O-4609 (1942).

33. The plaintiff's position in this declaratory judgment action is that neither CAMPO nor SAMPO have authority under Texas law to appropriate Surface Transportation Program Metropolitan Mobility funds.

34. According to its February 2005 newsletter, CAMPO "is preparing to award more than \$38 million dollars in Surface Transportation Program Metropolitan Mobility (STP MM) funds." The newsletter further states that "[t]he entire process will take

approximately one year and begins with the development of the project selection criteria, and ends with the CAMPO Board selecting projects that best incorporate the criteria.”

35. According to its web site, SAMPO also annually appropriates tens of millions of dollars in Surface Transportation Program Metropolitan Mobility funds.

36. A special district possesses only those powers expressly granted to it, and powers necessarily and fairly implied from an express grant of authority.

37. The “Joint Powers Agreement” that governs CAMPO does not authorize the entity to appropriate Surface Transportation Program Metropolitan Mobility funds.

38. Similarly, the “Agreement” that governs SAMPO does not authorize the entity to appropriate Surface Transportation Program Metropolitan Mobility funds.

#### DECLARATORY RELIEF

39. The plaintiff seeks relief under the Texas Uniform Declaratory Judgments Act (Chapter 37, Texas Civil Practice & Remedies Code).

40. The plaintiff is entitled to a judicial declaration that neither Governor Perry nor TxDOT have authority under Texas law to create or establish special districts such as CAMPO and SAMPO.

41. The plaintiff is entitled to a judicial declaration that the service of state legislators on the governing boards of CAMPO

and SAMPO violates Article II, Section 1 of the Texas Constitution.

42. The plaintiff is entitled to a judicial declaration that neither CAMPO nor SAMPO have authority under Texas law to appropriate Surface Transportation Program Metropolitan Mobility funds.

ATTORNEY FEES

43. The plaintiff is entitled to recover reasonable and necessary attorney fees under Section 37.009 of the Texas Civil Practice & Remedies Code.

CONDITIONS PRECEDENT

44. All conditions precedent have been performed or have occurred.

JURY DEMAND

45. The plaintiff demands a jury trial and tenders the appropriate fee.

REQUEST FOR RELIEF

46. Based on the foregoing, the plaintiff requests that the defendants be cited to appear and answer, and that the Court grant the declaratory relief sought by the plaintiff and award it attorney fees, prejudgment and postjudgment interest, costs of suit, and all other relief, in law and in equity, to which it may be entitled.

Respectfully submitted,

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By: \_\_\_\_\_ /S/ \_\_\_\_\_

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