

MEMORANDUM

TO: Oklahoma Council of Bond Oversight

FROM: Robert E. Norman, Esq.

RE: Oklahoma Turnpike Authority Application for \$200,000,000 Line of Credit for Access Oklahoma Turnpike Projects

This memorandum focuses on an objection to the Oklahoma Turnpike Authority's legal authority to fund and build the new Access Oklahoma East-West Connector and Tri-City Connector turnpikes. Elaine Dowling, Esq. is submitting an objection which focuses on the OTA's lack of legal authority to build the Access Oklahoma South Extension Turnpike.

I. THE RESTRICTIONS ON THE OTA'S AUTHORITY SET FORTH IN 69 O.S. §1705(F) MANDATE THAT THE OTA IS NO LONGER AUTHORIZED TO BUILD THE EAST-WEST CONNECTOR OR THE TRI-CITY CONNECTOR TURNPIKES.

A. Section 1705(F) Mandates That the OTA Had to Fund and Build Four Enumerated Turnpikes Together, and Not Split Them Into Separate, Subsequent Bond Issues and Projects Such as The East-West and The Tri-City Connectors.

The starting point for any issue of statutory interpretation is the language of the statute itself.¹ Courts must presume that a legislature says in a statute what it means and means in a statute what it says.² If the language of a statute or regulation has a plain and ordinary meaning, courts need look no further, and should apply the law as it is written.³

Title 69, Section 1705(f) of the Oklahoma Statutes describes, but also limits, the OTA's bonding and turnpike building authority. The statute states that the OTA has the authority:

f) To issue turnpike revenue bonds of the Authority, payable solely from revenues, including the revenues accruing to the trust fund created by Sections 1701 through 1734 of this title, for the purpose of paying all or any part of the cost of any one or more turnpike

¹ *United States v. Bly*, 510 F.3d 453, 460 (4th Cir.2007).

² *Conn. Nat'l Bank v. Germain*, 503 U.S. 249, 253-54, (1992) (quoting *Rubin v. United States*, 449 U.S. 424, 430 (1981)).

³ *Id.*; *Applications of Oklahoma Turnpike Authority*, 1954 OK 341, 277 P.2d 176, 182; *Loeffler v. Federal Supply Company*, 187 Okl. 373, 102 P.2d 862.

projects. Provided that any bonds issued for the construction of the proposed turnpike referred to in **subparagraphs (10), (20), (21) and (22) of paragraph (e) of this section shall be issued as one issue for all four of the proposed turnpikes and shall be financed, constructed and operated under one bond indenture.**⁴

As the statute clearly states, the second sentence of section (f) limits the OTA's turnpike bonding and building authority for the turnpikes described in Section e (10), (20), (21), and (22) turnpikes. These four turnpikes, along with the "one issue," "one bond indenture" mandate of Section (f), were part of a turnpike package the legislature authorized in 1987.⁵ The OTA confirms in its Access Oklahoma podcasts and other material that the East-West Connector Turnpike, and the Tri-City Connector Turnpike, are part of the package legislatively authorized back in 1987. Specifically, the OTA confirms the two turnpikes are both part of the "Oklahoma City Outer Loop" which appears in Section 20 of the statute.⁶

The plain language of the second sentence of the statute clearly required, and still requires, the OTA to have funded and built all four of the enumerated turnpikes - to the extent the OTA chose to build them - with **both** one single bond issue **and** one single bond indenture. There is no other reasonable way to construe the mandate of "**shall** be issued as one issue for **all four** of the proposed turnpikes and **shall** be financed, constructed and operated under one bond indenture."⁷

Thus, the plain language of the statute clearly prohibits the OTA from splitting the four specifically enumerated projects, or any part of them, into separate projects financed under separate, subsequent, or multiple bond **issues**. For example, the statute mandates that the OTA could not and cannot execute one bond issue for part of the Section (20) and (21) turnpikes, a

⁴ 69 O.S. §1705(f) (emphasis added).

⁵ See *In re Application of Oklahoma Turnpike Authority*, 1989 OK 21, ¶ 22, 770 P.2d 16.

⁶ 69 O.S. §1705(e)(20); <https://www.accessoklahoma.com/tri-city-connector>; <https://www.accessoklahoma.com/east-west-connector>.

⁷ 69 O.S. §1705(f) (emphasis added).

second bond issue for all or part of the Section 10 turnpike, a third bond issue for yet another part of the Section 20 turnpike, and then a fourth bond issue for all or part of the Section 11 turnpike.

The first part of this example is based on what actually happened in 1989. In that year, the OTA executed one bond issue for a significant portion of the four enumerated turnpikes. Among other things, in this one bond issue, the OTA funded and built a significant segment of the Oklahoma City Outer Loop - the Kilpatrick Turnpike. In the same bond issue, the OTA funded and built a significant portion of the Creek Turnpike up by Tulsa, enumerated as Section 21 in the statute.

Now, over thirty years later, the OTA has decided it wants to build two new segments of the Section 20 Oklahoma City Outer Loop - the East-West Connector and the Tri-City Connector. However, as the OTA has acknowledged in its own application for a line of credit, and in its own explanation of the Access Oklahoma program, the OTA is having to execute new, separate, and subsequent bond issues to do this.⁸ To really understand why this is an unlawful splitting of the four turnpike projects into multiple and subsequent bond issues, one has to know what legally constitutes “one” bond issue or “a” bond issue.

B. One Bond Issue, Or A Bond Issue, Is A Group Of Bonds Issued At The Same Time.

The courts and authoritative dictionary publications have all agreed that a “bond issue” is a class or series of bonds that are all offered, emitted, or delivered at one and the same time.⁹ The

⁸ See OTA Application, page entitled “List Anticipated Prospective Financings Anticipated After the Issue, Including Refunding;” Bond Buyer Article entitled Oklahoma Turnpike Draws Up Plan for \$5 Billion Project, March 3, 2022, included and attached as Exhibit 1; also available at: <https://www.bondbuyer.com/news/oklahoma-turnpike-prepares-bond-plan-for-5-billion-project#:~:text=The%20Oklahoma%20Turnpike%20Authority%20is,according%20to%20a%20turnpike%20official>

⁹ *Chem. Bank New York Tr. Co. v. S. S. Westhampton*, 358 F.2d 574, 578 (4th Cir. 1965) (citing Encyclopedic Dictionary of Business Finance, p. 23 (Prentice-Hall 1960)); *Bell City. v. Lightfoot*, 104 Tex. 346, 349, 138 S.W. 381, 383 (1911) (citing Black’s Law Dictionary and Webster’s Unabridged Dictionary); see also *McMasters v. Town of Byars*, 1950 OK 260, 223 P.2d 545, 546 (explaining that a “bond issue” denotes delivery of the bonds and the issuing authority’s receipt of the sale proceeds).

latest edition of Black’s Law Dictionary defines “bond issue” and “stock issue” as “[a] class or series of securities that are **simultaneously** offered for sale.”¹⁰

Likewise, United States Treasury Regulations (Internal Revenue Service) on tax exemption requirements for state and local bonds emphasize the same simultaneous transaction requirements. In defining a bond issue, as opposed to separate bond issues, the regulations provide for three requirements, all of which must be met. One of the requirements is the following:

(i) Sold at substantially the same time. The bonds are sold at substantially the same time. Bonds are treated as sold at substantially the same time if they are sold less than 15 days apart.¹¹

All of this law reveals with great clarity what one bond issue is, and what it is not. Specifically, no matter what label one may wish to place on a chronologically separate sequence or series of bond issues, a group of bonds issued in year one (say, 1989), and another group of bonds issued 27 years after year one, and then another group of bonds issued 34 years after year one, cannot be legally called “one issue.” They are three separate bond issues. No semantic games can change this. We don’t even really need court cases and treasury regulations to tell us this; common sense and ordinary English language usage tells us all we need to know.

C. The OTA Can No Longer Bond And Build The Outer Loop Turnpike Segments That The OTA Calls The East-West Connector And The Tri-City Connector.

The plain language of the statute, together with the legal definition of one bond issue, reveals that the OTA’s attempt to build the East-West Connector and Tri-City Connector turnpikes is an unlawful splitting of the 1987 turnpike package into distinctly separate bond issues and distinctly separate projects. The Legislature clearly did not authorize the OTA to do this. If the OTA was ever going to build what it is now calling the East-West Connector and Tri-City

¹⁰ Black’s Law Dictionary (11th Ed. 2019).

¹¹ 26 CFR § 1.150-1(c)(1)(i) (emphasis in original).

Connector, the OTA had to do so in compliance with the one bond issue requirement of Section 1705(f), or in other words, as part of the one bond issue the OTA offered, sold, and delivered in 1989. The OTA did not do so, however. No matter what reason the OTA may have had for the choice it made in 1989, the OTA is now legislatively bound by that choice.

Moreover, the people of Oklahoma, particularly those in and around the path of these turnpikes, are entitled to rely on the choice the OTA made thirty-five years ago. The areas in and around these two new turnpikes have changed tremendously since 1987. In the wake of the OTA's choice not to build these turnpikes with the one bond issue allowed to them under Section 1705 (f), people in these areas have built homes and businesses, raised families, and lived productive lives for a generation. Now, a generation later, thousands of homes, businesses, and properties are being destroyed, and thousands of people are being displaced. People's lives are being changed and adversely impacted forever because the OTA has now decided it wants to build new turnpikes in violation of a clear legislative mandate.

All of this disruption, displacement, and destruction is a compelling demonstration of why the legislature places constraints on the OTA in the first place. Executive Branch agencies do not simply get to ignore and flout the clear constraints the Legislative Branch has placed upon them. This is so no matter how much the Agency believes a project may be needed or desirable, and no matter how inconvenient those constraints may seem to be to the Agency.

This Council is required to determine whether or not the OTA's proposed debt is being incurred for "Authorized Public Functions or Purposes," which include functions authorized by law. OAC 90:1-1-3(c) and 90:10-7-3. If the OTA wishes to fund, bond, and build the East-West Connector and Tri-City Connector at this late date - over thirty years after issuing its one legislatively authorized bond issue in 1989 - the OTA needs to convince the legislature to repeal

or amend the second sentence of Section 1705 (f). For any oversight authority to conclude otherwise would be to ignore the plain language of the statute, and to decide that the duly enacted legislation of the people’s elected representatives means nothing. The Council of Bond Oversight therefore cannot approve a line of credit, or any other kind of funding, for the OTA to perform any work of any kind for the East-West Connector or the Tri-City Connector.

D. The Oklahoma Supreme Court’s Approval of a New and Separate Bond Issue in 2016 Is Not Precedential Legal Authority For the OTA to Bond and Build the East-West Connector and Tri-City Connector.

In 2016, the OTA issued new bonds for the OTA to build the Kickapoo turnpike and a new segment of the Kilpatrick turnpike. The OTA would describe these two turnpikes as segments of the Oklahoma City Outer Loop. As such, these projects would have been subject to the mandate in Section 1705(f) for one, and only one, bond issue for the four enumerated turnpikes. The 2016 bond issue was, however, a new and separate bond issue, subsequent to the bond issue of 1989. This new issue was for part of only one of the four turnpikes enumerated in Section 1705(f). The OTA thus funded and built the 2016 projects in clear violation of the plain language of Section 1705(f).

The fact that the Oklahoma Supreme Court granted the OTA’s application to approve these 2016 bonds¹² does not, moreover, stand as legal precedent for any claim that the OTA can lawfully issue new bonds for the East-West and Tri-City Connectors. This is so because the correct Section 1705(f) issue was neither raised by the parties nor addressed by the Court in the 2016 case.

When parties do not raise or consider an issue, and the court does not address it, “the case is not binding precedent on that point.”¹³ It is universally recognized that “questions which merely

¹² *In re Oklahoma Turnpike Authority*, 2016 OK 124, 389 P.3d 318.

¹³ *United States v. Turrieta*, 875 F.3d 1340, 1346 (10th Cir. 2017) (citing *U.S. v. L.A. Tucker Truck Lines*, 344 U.S. 33 (1952)); *Oklahoma Educ. Ass'n v. State ex rel. Oklahoma Legislature*, 2007 OK 30, 158 P.3d 1058, 1064.

lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents.”¹⁴

In the 2016 Oklahoma Supreme Court case, Protestor Jerry Fent failed to raise the correct legal issues. Mr. Fent simply made incorrect and unmeritorious legal arguments. He claimed that Oklahoma turnpike bonds violate the rule against perpetuities.¹⁵ He claimed, without any real evidence, that the OTA’s actions with 2016 bond issue and turnpike project were intrinsically fraudulent. It is not surprising that the Oklahoma Supreme Court dispensed with his challenge without any analysis of the real meaning and consequences of Section 1705(f).

Fent did point out that Section 1705(f) in essence called for the four enumerated turnpikes to be bundled together into one bond issue and one overall building project. However, Fent then incorrectly argued that it was an unconstitutional violation of the single subject rule for the legislature to have done so. Not surprisingly, the Supreme Court focused exclusively upon the single subject argument, and then easily dispatched it.¹⁶ The Court did not address the meaning or consequences of Section 1705(f) any further.

The parties simply did not raise the correct legal issue about Section 1705(f), and the Court did simply not address it, in the 2016 case. Section 1705(f) is of course constitutional. However, Section 1705(f) required, not just authorized, the OTA to build and fund the four enumerated turnpikes together in one bond issue. If the Supreme Court had been presented with and considered the true and proper issue, the case would have turned out differently. The plain language of the statute would have compelled the Supreme Court to hold that the OTA was

¹⁴ *Com. of Pa. v. Brown*, 373 F.2d 771, 784 (3d Cir. 1967) (citing *L.A. Tucker*, *supra*, 344 U.S. at 37-38; *Webster v. Fall*, 266 U.S. 507, 511 (1925)).

¹⁵ *Oklahoma Turnpike Authority*, 389 P.3d at 321.

¹⁶ *Oklahoma Turnpike Authority*, 389 P.3d at 320.

impermissibly piecemealing and splitting segments of the four enumerated turnpikes into bond issues occurring many years apart.

The same is true of the East-West and Tri-City Connector Turnpikes. The OTA long ago executed the one bond issue the legislature authorized for the Oklahoma City Outer Loop and the three other turnpikes enumerated in Section 1705(f). The OTA cannot now execute another, new bond issue for some other part of the Oklahoma City Outer Loop not constructed under that one legislatively authorized issue. Until OTA can produce a final order from a court of competent jurisdiction that the Access Oklahoma Turnpikes it intends to use these funds to build, plan and develop are authorized by statute; this Council should deny any requests to incur debt – either this line of credit, or any future bond issue.

Please feel free to contact us with any questions or requests for further information.