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HIGHWAYS, BRIDGES, AND FERRIES Department of Transportation: Amend Title 32 Relating to Highways, Bridges, and Ferries, so as to Provide for a Division and a Director of Planning; Provide for the Development of Transportation Plans for the State; Specify Certain Duties for the Commissioner of Transportation; Specify Certain Duties for the State Transportation Board; Provide for an Organizational Structure Within the Department; Provide a Timetable for Completion and Reporting of Transportation Plans; Provide for Investment Policies to Guide Transportation Planning; Provide for the Appointment of the

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Kris Alderman

Erin Elwood

Crystal D. Filberto

Nicholas Lacis

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Kris Alderman Erin Elwood

Crystal D. Filiberto Nicholas Lacis

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CODE SECTIONS:	O.C.G.A. §§ 32-2-1 (amended), 32-2-20 (amended), 32-2-21 (amended), 32-2-22 (new), 32-2-27 (new), 32-2-41 (amended), 32-2-41.1 (amended), 32-2-41.2 (amended), 32-2-42 (amended), 32-2-43 (new), 32-2-78 (amended), 32-2-79 (amended), 32-2-80 (amended); 50-32-11 (amended)
BILL NUMBERS:	SB 200
ACT NUMBER:	340
GEORGIA LAWS:	2009 Ga. Laws 340
SUMMARY:	The Department of Transportation will consist of the State Transportation Board, which includes a new position, the Director of Planning. The Director of Planning will supervise the new Planning Division, which will have

	responsibility for developing statewide improvement programs and making strategic planning decisions. The Governor will appoint the Director, subject to approval. The Director will be required to prepare and submit a report for comments and suggestions by the House and Senate Transportation Committees and the Governor. The Director will deliver a final version of the report to the Governor, Lt. Governor, Speaker of the House, and House and Senate Transportation Committees. The Director will make periodic reports and updates. The Planning Division and Director will develop and implement a funding allocation formula subject to the Appropriations Act.
EFFECTIVE DATE:	May 11, 2009

History

In the past, legislators have continually failed to address one of Atlanta's largest problems: traffic. But in 2009 they have finally turned their attention not only to the state's traffic problems, but to transportation issues as a whole. They recognize the system "is in crisis and that the situation in metro Atlanta is particularly dire."[1] Not only did the legislature recognize the traffic problems, but Georgia residents recognized the problem as well. A recent poll showed residents agreed traffic was bad and required the legislature's attention.[2] Jeff Mullis, Senator from the 53rd District, and Chair of

1. Jay Bookman, *Issue In-Depth: Transportation: Ga. Laws, Politics Create Bottleneck*, ATLANTA J.-CONST., Jan. 11, 2009, *available at* http://www.ajc.com/opinion/content/printedition/2009/01/11/transported.html.

2. Ariel Hart, *Poll: Voters Want a Say on Transportation Funds*, ATLANTA J.-CONST., Jan. 9, 2009, *available at* http://www.ajc.com/metro/content/printedition/2009/01/09/transport.html.

the Senate Transportation Committee, commented on the traffic situation: "I'm surprised the people of Metro Atlanta haven't stormed the state capitol with torches, pitchforks and sickles. They can't get there because they are stuck in traffic."[3] Aging infrastructure, diminishing funding and a "fail[ure] to modernize our transportation thinking"[4] have contributed to the state's current transportation problems.[5]

According to transportation officials, Georgia is far behind other states when it comes to building new roads and mass transit systems.[6] "Georgia ranks second-to-last among states, spending $380 per person annually on transportation . . . . That's not nearly enough."[7] To make the improvements necessary to fix the transportation crisis, the Department of Transportation (DOT) will need between $150 billion and $257 billion during the next thirty years.[8] It is not the easiest time to fix Georgia's transportation problems because according to Governor Sonny Perdue, "the only diagnosis has been a lack of money, and the only prescription has been to spend more of it,"[9] but in these tough economic times the General Assembly will face the challenge of funneling more money into transportation while cutting about $2 billion from its budget.[10] Despite the failing economy, voters want an opportunity to vote on optional taxes to raise funds for transportation improvements.[11]

Though money was undeniably one source of the transportation crisis, it is not the only source.[12] The DOT has been described as

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3. Jerry Grillo, *Keeping Georgia Moving*, GEORGIA TREND, Feb. 2009, *available at* http://www.georgiatrend.com/features-economic-development/02_09_traffic.shtml.

4. Bookman, *supra* note 1.

5. Grillo, *supra* note 3.

6. Blake Aued, *Legislators Urged to Handle Worsening Road Congestion*, ONLINE ATHENS, ATHENS BANNER-HERALD, *available at* http://www.onlineathens.com/stories/121008/new_365673913.shtml.

7. *Id.*

8. *Id.*

9. Jim Galloway, *Perdue on Secret Mission to Remake Dysfunctional Georgia DOT*, ATLANTA J.-CONST., Feb. 16, 2009, *available at* http://www.ajc.com/metro/content/printedition/2009/02/16/polinsider0216.html%253Fcxntlid%253Dinform_artr.

10. Bookman, *supra* note 1.

11. Hart, *supra* note 2.

12. Bookman, *supra* note 1.

"archaic"[13] and "dysfunctional."[14] The DOT board is currently made up of thirteen members, one from each congressional district.[15] This method of representation prevents the board from acting cohesively because each member wants to put as much money as possible into his or her own district, which takes the focus away from a statewide transportation plan.[16] This individualistic focus is not the only shortcoming in the DOT. According to Governor Perdue, the DOT "'hasn't shown a reasonable return on the record investments the state has made in transportation during [his] six years in office.'"[17] Governor Perdue wants "a process where we can commit to citizens that we can deliver value for their transportation dollars."[18] On top of these problems, the DOT has also faced accounting and cost problems.[19] On average, it takes approximately fifteen years to start a project under the current DOT board.[20] These delays not only place a heavy toll on our economy, as the prices of steel, concrete, and asphalt rise every year, but it also deters new companies and corporations from locating to Georgia, taking even more money out of the state.[21] Lieutenant Governor Casey Cagle said, "Atlanta has the second worse traffic congestion in the country," and as a result, "companies that have shown interest in locating in Georgia have indicated that one major reason for not doing so is our terrible traffic congestion."[22] These companies are locating to areas such as

13. *Id.*
14. Galloway, *supra* note 9.
15. Bookman, *supra* note 1.
16. *Id.*
17. Dave Williams, *Georgia DOT Board Ousts Evans*, ATLANTA BUS. CHRON., Feb. 26, 2009, *available at* http://atlanta.bizjournals.com/atlanta/stories/2009/02/23/daily95.html?surround=etf. (quoting Gov. Sonny Perdue).
18. Bob Keefe, *Perdue Defends Move to Overhaul DOT*, ATLANTA J.-CONST., Feb. 22, 2009, *available at* http://www.ajc.com/services/content/metro/stories/2009/02/22/sonny_DOT.html%253Fcxtype%253Drss%2526cxsvc%253D7%2526cxcat%253D13.
19. Tommie Williams & Brandon Beach, *Should the Legislature Revamp DOT Oversight?*, ATLANTA J.-CONST., Mar. 16, 2009, *available at* http://www.ajc.com/opinion/content/opinion/stories/2009/03/16/proconed0316.html.
20. *Id.*
21. *Id.*; Grillo, *supra* note 3.
22. Williams & Beach, *supra* note 19.

Charlotte and Orlando that show their willingness to make the improvements Georgia has yet to make.[23]

Overall, the Governor, Lieutenant Governor, Speaker of the House, legislators, and citizens of Georgia all agree that the current system is failing to address the transportation problems, but the chambers of the General Assembly cannot agree on a solution.[24] Last year, in 2008, a proposal for regional referendums on one percent sales tax failed by three Senate votes in the last few minutes of the Legislative Session.[25] As a result, Governor Perdue and Lieutenant Governor Cagle both advocated for big transportation changes in 2009.[26]

While Governor Perdue set his sights on transportation governance, aiming to overhaul the DOT,[27] business leaders and transportation coalitions have remained focused on transportation funding issues.[28] In fact, at least one recent poll suggests that the general public is interested in the transportation funding issue.[29]

During the 2008 legislative session, the House and Senate battled over how to structure a one percent sales and use tax for transportation to be presented to the voters at the 2008 statewide election.[30] Ultimately, neither the Senate nor the House plan prevailed and voters were left without an option to increase transportation funding at the 2008 election.[31] Transportation issues in

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23. *See Lawmakers 2009* (GPTV broadcast, Feb. 3, 2009) (remarks by Sen. Kasim Reed) (on file with the Georgia State University Law Review).

24. Williams, *supra* note 17; s*ee Lawmakers 2009* (GPTV broadcast, Feb. 3, 2009) (remarks by host David Zelski) (on file with the Georgia State University Law Review).

25. Hart, *supra* note 2.

26. Bookman, *supra* note 1.

27. Press Conference: Feb 19, 2009, Sonny Perdue, http://gov.georgia.gov/02/gov/home/0,2218,78006749,00.html (last visited Apr. 12, 2009); Williams, *supra* note 17.

28. *E.g.*, Get Georgia Moving Coalition, *Get Georgia Moving Urges Lawmakers to 'Cross the Finish Line' with Transportation Funding Bill in the Final Week of 2009 Legislative Session*, Mar. 30, 2009, http://www.getgeorgiamoving.com/files/3.30.09%20GGM%20Press%20Release.pdf.

29. INSIDER ADVANTAGE / MAJORITY OPINION RESEARCH, GEORGIA TRANSPORTATION POLL—3.23.09, *available at* http://www.getgeorgiamoving.com/files/polling_pdf.pdf.

30. Ariel Hart et al., *2009 Legislative Preview: Big Issues, Deficit Beg Attention*, ATLANTA J.-CONST., Jan. 11, 2009, *available at* http://www.ajc.com/metro/content/printedition/2009/01/11/legissues.html.

31. *Id.*

Georgia have always involved overt political pressures and this session was no exception.[32]

Political stakes are high this year as Georgia's leaders make plans for the 2010 Governor's race.[33] Lt. Governor Casey Cagle, who during the 2009 legislative session was perhaps the most visible gubernatorial candidate for 2010, put tremendous emphasis on the transportation funding issue, making any progress or lack of progress an issue for his 2010 bid.[34] Shortly after the end of the legislative session, Cagle announced that he would not run for Governor in 2010, citing health concerns. Although the main source of dissention has been a Senate/House divide, Democrats see an opening in the Republican leadership's failure to address the state's transportation problems.[35] Historically, political jockeying has been between rural legislators (who thought their tax money was all going to Atlanta) and metro Atlanta legislators (who thought that their tax money was going to subsidize rural Georgia).[36] A recent poll suggests that the public, if not the legislators, have outgrown these old perceptions.[37]

In fact, the poll suggests that Georgians are ready to put aside political differences to fix a system of transportation that seventy-three percent of Georgians characterize as negative.[38] More than sixty-five percent of Georgians said that it was important for the General Assembly to pass legislation that will provide a means for increasing funding for transportation.[39] Almost eighty percent of metro Atlantans felt that passing such legislation in 2009 was important.[40]

The transportation funding deficiency has long been recognized as an area of concern. In 2007, Senate Resolution 365 created the Joint

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32. Jim Galloway, *Transportation Funding Still an Explosive Issue*, ATLANTA J.-CONST., April 6, 2009, *available at* http://www.ajc.com/services/content/printedition/2009/04/06/polinsider0406.html.

33. *Id.*

34. *Id.*

35. *Id.*

36. Editorial, *Road to Nowhere*, MARIETTA DAILY J., Apr. 9, 2009, *available at* http://www.mdjonline.com/content/index/showcontentitem/area/1/section/22/item/131086.html.

37. *Id.*; Insider Advantage, *supra* note 29.

38. Editorial, *supra* note 36.

39. *Id.*

40. *Id.*

Study Committee on Transportation Funding in Georgia.[41] The Committee was co-chaired by Senator Jeff Mullis (R-53rd) and Representative Vance Smith (R-52nd). Other members included Senator Chip Pearson (R-51st), Senator Doug Stoner (D-6th), Senator Tommie Williams (R-19th), Representative James Mills (R-25th); Representative Jay Shaw (D-176th), Representative Donna Sheldon (R-105th), Senator Valencia Seay (D-34th), and Representative Mark Hamilton (R-23rd).[42]

The Committee agreed that "[n]ew sources and methods of funding are necessary to meet the growing needs for transportation in Georgia."[43] The Committee was designed to study transportation funding needs and to recommend any necessary action or legislation. Perhaps foreshadowing the difficulties to come in the 2008 legislative session, the Preface to the Final Report warned, "[a]lthough Committee members did not agree on all aspects of the findings and recommendations, a general consensus was reached to move forward with a final report from the Committee as a whole."[44] The Committee's final report reads more like a collection of op-eds than a coherent, compatible plan of action.[45] The only section that ostensibly represents any sort of consensus—the "Recommendations" section—is again prefaced with the warning that the Committee decided to prepare a final report although there was not complete agreement among all members as to all the recommendations.[46] Further illustrating the failure to reach a consensus, among the recommendations are both a plan to implement a statewide transportation sales tax and a plan to allow for regional transportation sales taxes—plans ultimately deemed incompatible by the General Assembly.[47] Accordingly, the take-away points from the Committee's work are probably limited to the recognition of a

41. JOINT STUDY COMMITTEE ON TRANSPORTATION FUNDING, FINAL REPORT: ADDRESSING GEORGIA'S TRANSPORTATION FUNDING ALTERNATIVES at 3 (2007) [hereinafter FUNDING REPORT].
42. *Id.*
43. *Id.*
44. *Id.*
45. *See generally* FUNDING REPORT, supra note 41.
46. *Id.* at 123.
47. *Id.* at 124.

funding deficiency and an inability to achieve bi-partisan, bicameral consensus.

In fact, in 2008 it was the clash between the statewide one percent sales and use tax for transportation, a regional Transportation Special Local Option Sales Tax (TSPLOST) and an inability to compromise that resulted in neither plan being submitted to the voters in the November 2008 election.[48] In 2008, the Senate favored a regional approach, while the House favored a statewide tax.[49] A compromise bill, which presented the voters with the question of whether to implement a mandatory statewide tax and also allowed counties or regions to hold referendums on an additional sales tax for local use, passed in the House but failed in the Senate by three votes.[50] The battle lines did not change between the end of the 2008 session and the beginning of the 2009 session.[51]

Bill Tracking of SB 200

SB 200 originated ceremoniously with the Governor, flanked by the Lieutenant Governor and the Speaker of the House, announcing his intention to solve transportation problems in Georgia by overhauling the DOT and creating a new agency, the State Transportation Authority, which would be the chief transportation agency in the state.[52] Perdue stressed his frustration with having responsibility for transportation problems, but not having any power to do anything about it.[53] He called transportation a quality of life issue for every Georgian as well as an economic development concern for the state.[54] Perdue hoped to address transportation

48. Dave Williams, *Lawmakers Adjourn Without Transportation Funding Solution*, ATLANTA BUS. CHRON., Apr. 6, 2009, *available at* http://atlanta.bizjournals.com/atlanta/stories/2009/03/30/daily121.html.

49. *Id.*

50. *Id.*

51. *Id.*

52. Video Recording of Transportation Reform Press Conference, Feb. 19, 2009 (remarks by Gov. Sonny Perdue), http://tmp12.georgia.gov/02/gov/video/0,2218,78006749,00.html [hereinafter Press Conference].

53. *Id.*

54. *Id.*

problems not by spending more money, but by overhauling transportation departments to make the system more efficient.[55]

Consideration of SB 200 in the Senate

Senator Tommie Williams (R-19th) sponsored the bill in the Senate. The Senate version created a new agency, the State Transportation Authority.[56] The DOT would continue to exist but its responsibility would be limited to maintenance.[57] The Senate believed the DOT administration was not well-suited for dealing with transportation problems other than maintenance and safety.[58] The General Assembly would still have the power to elect members of the DOT Board, as they had before the bill; however, the chief transportation agency would be comprised of eleven individuals: five appointed by the Governor, three by the Speaker, and three by the Lieutenant Governor. All appointments were subject to ratification by a majority vote of the General Assembly.[59]

The opposition to SB 200 immediately voiced displeasure with the appointment process for the new State Transportation Authority.[60] Opponents of the bill expressed concerns that the appointment process vested too much power in the hands of the Governor.[61] Further, opponents argued that the role of the General Assembly was merely to rubber stamp the Governor's picks.[62] Senators also expressed concern that the bill was being pushed through the process too fast without allowing adequate time for the level of deliberation and consideration warranted by such a drastic transformation of state government.[63] However, even those opposed to the bill conceded

55. *Id.*
56. SB 200 (SCS), 2009 Ga. Gen. Assem.
57. *Id.*
58. *See* Video Recording of Senate Proceedings, Mar. 5, 2009 at 2 hr., 21 min., 32 sec. (remarks of Sen. Tommie Williams (R-19th)) [hereinafter Mar. 5 Senate Video].
59. SB 200, as introduced, 2009 Ga. Gen. Assem.
60. Mar. 5 Senate Video, *supra* note 58, at 2 hr., 35 min., 49 sec. (remarks by Sen. Vincent Fort (D-39th)).
61. *Id.*
62. *Id.*
63. Mar. 5 Senate Video, *supra* note 58, at 2 hr., 50 min. (remarks by Sen. Doug Stoner (D-6th)).

there were problems in the DOT.[64] The bill was debated for less than two days in the Senate.[65]

Once it reached the Senate floor, the Senate only amended the bill to provide that "except as expressly authorized by . . . rule or regulation relating to alternative procedures for letting contracts for public-private initiatives[,] . . . all contracts shall be let to the reliable bidder submitting the lowest sealed bid."[66] The amendment was offered to limit alternatives to the lowest sealed bid procedure, customary in public contracting, to public-private initiatives.[67] Before the amendment, there was concern that although the bill would have allowed alternative procedures for public private initiatives, the Authority would have been permitted to use alternative methods in virtually any situation.[68] The amendment was adopted without objection.[69] The Committee substitute as amended was then passed by a vote of 30 to 25.[70]

Consideration of SB 200 in the House

SB 200, as passed in the Senate, stood almost no chance of passage in the House.[71] Vance Smith, Chairman of the House Transportation Committee, estimates that House committees and subcommittees spent approximately fourteen hours debating the bill.[72] Ultimately, the House transformed the 104 page bill passed by the Senate to the fifteen page bill eventually signed into law by the Governor.[73] Most of the difference in volume can be accounted for by the decision made in the House Transportation Committee not to create a new

64. *Id.* at 3 hr., 12 min., 40 sec. (remarks by Sen. Jeff Mullis (R-53rd)).
65. Interview with Rep. David Ralston (R-7th) (May 16, 2009) [hereinafter Ralston Interview].
66. SB 200 (SCSFA), 2009 Ga. Gen. Assem.
67. Mar. 5 Senate Video, *supra* note 58, at 3 hr., 25 min., 19 sec. (remarks by Sen. David Shafer (R-48th)).
68. *See* Mar. 5 Senate Video, *supra* note 58, at 3 hr., 25 min., 19 sec. (remarks by Sen. David Shafer (R-48th)).
69. Mar. 5 Senate Video, *supra* note 58, at 3 hr., 35 min.
70. Georgia Senate Voting Record, SB 200 (Mar. 5, 2009).
71. Ralston Interview, *supra* note 65; interview with Rep. Vance Smith (R-129th) (May 15, 2009) [hereinafter Smith Interview].
72. Smith Interview, *supra* note 71.
73. Ralston Interview, *supra* note 65.

state agency.[74] The bulk of the Senate version was devoted to revising the laws to account for a new principal transportation agency, an idea which was rejected by the House.[75]

The House Transportation Committee assigned the bill to a special subcommittee that attempted to amend SB 200 while maintaining the new State Transportation Authority.[76] The Special Subcommittee was chaired by Representative Carl Rogers (R-26th). The Subcommittee significantly amended the composition and appointment of the State Transportation Authority Board. Initially, the bill was amended to alter the appointment process. The bill provided that the Governor would appoint five members, the Lieutenant Governor would appoint three, and the Speaker would appoint three.[77] The Governor would also have the power to appoint the Secretary of Transportation, who would head the new agency.[78] The Subcommittee amended the appointment process so that the House would elect seven members, the Senate would elect four, and the Governor would retain the power to appoint the Secretary.[79] The Subcommittee was careful not to allow the appointment of a majority of members from the Atlanta Regional Commission area, preserving the long-held value of rural/urban diversity in transportation governance.[80] The Subcommittee clarified that the Secretary was not a voting member.[81] Finally, the approval of the Governor's appointment for Secretary was made subject to a two-thirds vote by the House and Senate Transportation Committees, rather than a majority vote of the Transportation Authority Board.[82]

The Subcommittee also focused in on SB 200's provisions relating to the General Assembly's power to appropriate transportation funds. First, it provided that funds appropriated to a specific project by the General Assembly could not subsequently be taken out of the budget.

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74. *Id.*
75. *Id.*
76. Smith Interview, *supra* note 71.
77. SB 200, as passed Senate, 2009 Ga. Gen. Assem.
78. *Id.*
79. Video Recording of House Transportation Subcommittee Meeting, Mar. 18, 2009 at 56 min., 48 sec. (remarks by Rep. Donna Sheldon (R-135th)) [hereinafter Mar. 18 House Subcommittee Video].
80. *Id.*
81. *Id.* at 1 hr., 4 min., 20 sec. (remarks by Rep. Donna Sheldon (R-135th)).
82. *Id.* at 1 hr., 51 min., 30 sec. (remarks by Barry Loudermilk (R-14th)).

Further, the Subcommittee added a step in the appropriations process—requiring the Governor to submit his recommendations of specific projects to the House and Senate Transportation Committees to allow them to amend those recommendations before the project list is sent to the General Assembly, which decides whether to appropriate funds for those projects.[83]

Two days later, the Subcommittee considered a substitute to SB 200.[84] Chairman Rogers announced at the beginning of the Subcommittee meeting that the substitute would be moved to the full committee without a recommendation from the Subcommittee.[85] The biggest change in the substitute dealt with the State Transportation Authority's power to make rules regarding public-private initiatives and design build contracts.[86] The Senate version of SB 200 would have given the Authority substantial discretion in these areas, but the substitute basically returned to the procedures codified by existing law.[87] The substitute incorporated all Subcommittee amendments made to the Senate version of SB 200.[88] It also restored some of the power to the State Transportation Board, including returning the power to elect the commissioner of DOT and to entering into contracts without the State Transportation Authority's approval.[89] The DOT's responsibilities were enlarged to include more than merely maintenance.[90] The restoration of powers to the DOT Board was perhaps evidence of dissention swelling in the halls of the capitol that had not been expressly manifested in the subcommittee meetings. When the substitute was moved to the full Committee, the question of whether a new agency should be created at all came to the forefront of the debate.

In the following House of Representative Transportation Committee meeting, Representative Lucas (D-139th) observed that,

83. *Id.* at 1 hr., 0 min., 10 sec.

84. Video Recording of House Transportation Subcommittee Meeting, Mar. 20, 2009 at 0 min., 20 sec. (remarks by Rep. Carl Rogers (R-26th)).

85. *Id.*

86. *Id.* at 0 min., 35 sec. (remarks by legal counsel).

87. *Id.*

88. *Id.*

89. *Id.*

90. *Id.*

as amended in the subcommittee, SB 200 basically created districts for the State Transportation Authority Board members that were not altogether different in concept from the DOT Board districts.[91] Accordingly, Representative Lucas questioned why a new board had to be created.[92] He surmised that the creation of the State Transportation Authority was an end run around the DOT, a constitutional entity that could not be destroyed without a constitutional amendment.[93] Representative Lucas made a motion to make the DOT Board the State Transportation Authority.[94] After discussion of the motion, during which time Representative Lucas made clear that his intention in offering the amendment was to avoid the rural/urban conflict that the state had decided to avoid long ago by electing DOT Board members by congressional district, Representative Levitas (D-139th) asked if it was necessary to create a new authority at all.[95] He suggested if the committee decided to make the DOT Board the new State Transportation Authority, then they should consider not creating a new agency, but rather just amending the existing laws to make the substantive changes that SB 200 seeks to make while leaving out the formalistic creation of a new authority.[96] Representative Ralston (R-7th) spoke against the motion, arguing that the bill, as written, was designed to avoid the compartmentalized views that result from electing DOT Board members by congressional district.[97] The intention of the bill is to get a state-wide view of transportation, at least for the planning function, which is not compatible with the current system of electing the DOT Board.[98] Nevertheless, the motion to amend SB 200 to provide that the DOT Board is the State Transportation Authority was adopted.[99]

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91. Video Recording of House Transportation Committee Meeting, Mar. 24, 2009 at 22 min., 21 sec. (remarks by Rep. David Lucas (D-139th)).
92. *Id.*
93. *Id.*
94. *Id.* at 39 min., 30 sec. (remarks by Rep. David Lucas (D-139th)).
95. *Id.* at 1 hr., 1 min., 47 sec. (remarks by Rep. Kevin Levitas (D-82nd)).
96. *Id.*
97. *Id.* at 1 hr., 7 min., 47 sec. (remarks by Rep. David Ralston (R-7th)).
98. *Id.*
99. *Id.* at 1 hr., 26 min., 12 sec.

A motion for reconsideration was also approved, however, and the motion was subsequently withdrawn.[100]

Not surprisingly, despite the withdrawal of the motion, the dissatisfaction with SB 200 made its way to the leadership. At the next House Transportation Committee Meeting, Speaker of the House Glenn Richardson (R-19th) addressed the committee:

> We pared down, we heard what you said. We understand that you don't wish to create a new agency, and you don't wish to change the way we elect the DOT Board. But, we think there are some good things that need to come out of this, so we pared down the provisions dramatically of SB 200. . . . [I]t talks about planning, and it talks about appropriating money—the important things that allow us to have a role in the planning process and allows us and the governor to have a role in the appropriations process. We'll change around a little bit how the officers are selected, but it does not change the DOT Board.[101]

When the resulting version of SB 200 finally made it to the House floor, it was in its final form, having eliminated the creation of a new authority, but retaining the office of a director of planning who had substantial power and accountability to the Governor but who exercised that power within the framework of the current DOT. Despite a protracted debate on the House floor, the bill passed the House without further amendment,[102] and the Senate agreed to the House changes to SB 200.[103] Even after the drastic changes to SB 200, eliminating the new agency, restoring some power to the State Transportation Board, and creating a new planning position within the DOT, supporters of SB 200 continued to believe the bill would bring greater transparency and accountability to DOT.[104] On the other

100. *Id.* at 1 hr., 35 min., 10 sec.

101. Video Recording of House Transportation Committee Meeting, Mar. 26, 2009 at 39 min., 30 sec. (remarks by Speaker Glenn Richardson (R-19th)).

102. *See* Video Recording of House Proceedings, Apr. 1, 2009 [hereinafter Apr. 1 House Video].

103. Video Recording of Senate Proceedings, Apr. 3, 2009 at 3 hr., 39 min., 32 sec. [hereinafter Apr. 3 Senate Video].

104. *E.g.*, Apr. 1 House Video, *supra* note 102, at 1 min., 58 sec. (remarks by Rep. David Ralston (R-7th)).

hand, opponents of the bill continued to complain the bill concentrated too much power at the top, labeling the new Director of Planning as the "Planning Czar."[105] Some criticized the bill, because although it returned some power to DOT and the State Transportation Board, the role of the Commissioner and the Board were substantially less than under current law.[106] Finally, some members of the House were still frustrated with the process in which the bill hurried through the legislative process and cited concerns that Representative Vance Smith (R-129th), Chairman of the House Transportation Committee, had not endorsed the bill.[107]

Although the bill was not amended on the House floor, two questions asked on the floor clarified provisions within the bill. First, in response to a parliamentary inquiry by Representative Powell (D-23rd), the Speaker clarified that if the DOT Board voted against the plan presented by the director of planning, the director would have to create a new plan, revealing a check on the director's power in the DOT.[108] Second, in response to a parliamentary inquiry by Representative Hatfield (R-127th), the Speaker stated that the funds allocated under the Local Maintenance and Improvement Grant Program, which includes those funds formerly available under the local assistance road program (LARP), were not under the director's control.[109]

When the vote was called, SB 200 passed by a vote of 90 to 84.[110] However, the vote was left open for over four minutes,[111] an unusually long period according to House custom, as supporters found last-minute support for the bill.[112] A motion for reconsideration failed, despite complaints about the length of the voting period.[113]

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105. *See, e.g.*, *id.* at 27 min., 50 sec. (remarks by Rep. Alan Powell (D-29th)); *id.* at 24 min., 10 sec. (remarks by Rep. Jay Shaw (D-176th)).

106. *Id.* at 32 min., 55 sec. (remarks by Rep. Mark Hatfield (R-28th)).

107. *Id.* at 1 hr., 23 min., 53 sec. (remarks by Rep. Al Williams (D-165th)).

108. *Id.* at 1 hr., 24 min., 47 sec. (remarks by Rep. Alan Powell (D-29th)).

109. *Id.* at 1 hr., 27 min., 32 sec. (remarks by Rep. Mark Hatfield (R-28th)). *But see* O.C.G.A. § 32-5-27(d) (Supp. 2009) (providing that the director and planning division shall devise the allocation formula for funds allocated under the local maintenance and improvement grant program).

110. Georgia House of Representatives Voting Record, SB 200, Apr. 1, 2009.

111. Apr. 1 House Video, *supra* note 102, at 1 hr., 28 min., 28 sec.

112. Smith Interview, *supra* note 71.

113. Georgia House of Representatives Voting Record, SB 200 Reconsideration, Apr. 1, 2009.

Senate Consideration of House Committee Substitute to SB 200

Like their counterparts in the House, Senate supporters of SB 200 continued to cite the bill's ability to bring transparency and accountability to transportation policy in Georgia.[114] Opposition in the Senate continued to argue that the bill would concentrate too much power in hands of the Governor and lead to corrupt decision-making.[115] Senators were also concerned about a provision of the bill that gave the House Transportation Committee sole authority to approve the Governor's appointment of the director of planning.[116] A motion to amend SB 200 to grant approval power to the Senate failed, however, likely because of Senator Williams' (R-19th) admonition that if SB 200 went back to the House, it would fail to pass.[117] The Senate agreed to the House substitute to SB 200,[118] sending the bill to the Governor, who signed it into law on May 11, 2009

The Act

The Act amends Title 32 of the Official Code of Georgia Annotated to create a Director of Planning and a Planning Division within the Georgia Department of Transportation.[119] The Commissioner of the DOT remains the chief executive officer of the department, but his principal responsibility is now defined as "the faithful implementation of transportation plans produced by the director of planning and approved by the Governor and the State Transportation Board, subject to the terms of such appropriations Acts as may be adopted from time to time."[120] The new Planning

114. Apr. 3 Senate Video, *supra* note 103, at 3 hr., 2 min., 42 sec. (remarks by Sen. Tommie Williams (R-19th)).

115. *See id.* at 3 hr., 10 min., 38 sec. (remarks by Sen. Steve Thompson (D-33rd)).

116. *Id.* at 3 hr., 6 min., 10 sec. (remarks by Sen. David Shafer (R-48th)); *id.* at 3 hr., 7 min., 37 sec. (remarks by Sen. Doug Stoner (D-6th)); Failed Senate Floor Amendment to SB 200, introduced by Sen. David Adelman (D-42nd).

117. *See* Apr. 3 Senate Video, *supra* note 103, at 3 hr., 9 min., 45 sec. (remarks by Sen. Tommie Williams (R-19th)).

118. Georgia Senate Voting Record, SB 200 (Apr. 3, 2009).

119. O.C.G.A. § 32-2-1 (Supp. 2009); *id.* § 32-2-41(b)(4).

120. *Id.* § 32-2-41(a).

Division is responsible for developing state-wide transportations plans.[121] The Director is the head of the Planning Division. For the first time, capital construction projects will be subject to the appropriations process and will not be completed at the sole discretion of the Department of Transportation.[122] The Act has been described by its supporters as an effort to bring greater accountability to the Department of Transportation.[123]

Section 1 of the Act amends Code section 32-2-1 to include the Director of Planning within the Department of Transportation and gives the director powers coextensive with the commissioner to create subordinate positions with the department.[124]

Section 2 amends Code section 32-2-20 to provide that members of the Transportation Board will not receive per diem pay for board meetings conducted by conference call.[125]

Section 3 amends Code section 32-2-21, taking away the Transportation Board's authority to confirm or reject appointments of department officers, including the deputy commissioner, the chief engineer, the treasurer, and the assistant treasurer.[126]

Section 4 adds a new Code section, 32-2-22, which describes the responsibilities of the Planning division and director of planning,[127] provides that the state transportation improvement program and the state-wide strategic transportation plan must be approved by both the Governor and the Transportation Board,[128] and defines the terminology used in the new Code section.[129] Among the most important definitions included in this section are the definitions of the State-Wide Strategic Transportation Plan (SSTP) and the State Transportation Improvement Plan (STIP). SSTP is defined as "the official, intermodal, comprehensive, fiscally constrained transportation plan which includes projects, programs, and other

121. *Id.* § 32-2-41(b)(4).
122. *See id.* § 32-5-27(c)(2).
123. *E.g.*, Video Recording of House Proceedings, Apr. 1, 2009 at 1 min., 58 sec. (remarks by Rep. Ralston (R-7th)).
124. O.C.G.A. § 32-2-1 (Supp. 2009).
125. *Id.* § 32-2-20.
126. *See id.* § 32-2-21.
127. *Id.* § 32-2-22(b).
128. *Id.* § 32-2-22(c).
129. *Id.* § 32-2-22(a).

activities to support implementation of the state's strategic transportation goals and policies."[130] The Act defines STIP as "a statewide prioritized listing of transportation projects covering a period of four years that is consistent with the state-wide strategic transportation plan, metropolitan transportation plans, and transportation improvement programs and required for multi-modal projects to the eligible for funding under [federal law]."[131]

New Code section 32-2-22 requires that the director and division of planning review and make recommendations to the Governor concerning regional transportation plans and negotiate with the regional planners concerning the recommendation of the department or Governor;[132] review any transportation projects proposed by the department for possible inclusion in department plans;[133] develop the SSTP and STIP;[134] "support the various transportation improvement programs" propounded by metropolitan planning organizations;[135] "develop an annual capital construction project list to be reviewed by the Governor and submitted to the General Assembly for consideration in the budget;"[136] and promulgate rules and regulations subject to approval by the House and Senate Transportation Committees.[137] Further, the director and division are given responsibility to "[d]o all things necessary or convenient to carry out the powers expressly given in this Code section."[138]

Section 5 of the Act revises Code section 32-2-41 to further limit the commissioner's duties, powers, and authority to those not reserved to the director of planning under the new law.[139] Moreover, new language is added to that Code section stating that "[t]he commissioner's principal responsibility shall be the faithful

130. O.C.G.A. § 32-2-22(a)(6) (Supp. 2009).
131. *Id.* § 32-2-22(a)(7). This Code section also defines terms including Metropolitan planning organization, Metropolitan transportation plan, Nonmetropolitan area, and Transportation improvement program. *Id.* § 32-2-22(a).
132. *Id.* § 32-2-22(b)(1).
133. *Id.* § 32-2-22(b)(2).
134. *Id.* § 32-2-22(b)(3).
135. O.C.G.A. § 32-2-22(b)(3) (Supp. 2009).
136. *Id.* § 32-2-22(b)(4).
137. *Id.* § 32-2-22(b)(5).
138. *Id.* § 32-2-22(b)(6).
139. *Id.* § 32-2-41(a).

implementation of transportation plans produced by the director of planning and approved by the Governor and the State Transportation Board, subject to the terms of such appropriations Acts as may be adopted from time to time."[140] Consistent with section 3 of the Act, section 5 removes the commissioner's authority to confirm certain departmental appointments when the Transportation Board is not in session.[141] Consistent with section 1, which grants the director of planning power coextensive with that of the commissioner to create subordinate positions, section 5 takes away the power of the commissioner "to create, staff, abolish, and regulate . . . organizational elements" of the department.[142]

Section 5 also creates the Planning Division, to be "directed and staffed by the director of planning."[143] The Planning Division is described as the principal unit for developing the STIP and SSTP, as well as "coordinating transportation policies, planning, and programs related to design, construction, maintenance, operations, and financing.[144] The Department of Transportation is further restructured by creating Engineering, Finance, Administration, and Local Grants Divisions, all of which are ultimately subject to the commissioner's control.[145] The commissioner is also given discretion to create and control Construction, Operations and Maintenance, Permitting, and Public-Private Initiative Divisions.[146]

Section 6 amends Code section 32-2-41.1 by placing the reporting and planning duties on the director rather than the commissioner and revising dates and procedures in the reporting process. First, by October 15, 2009, the director must submit to the Governor, Lt. Governor, Speaker, and Chairs of both Transportation Committees a report detailing progress on the SSTP.[147] By December 31, 2009, the director must submit to the General Assembly and Governor a draft

140. *Id.*
141. O.C.G.A. § 32-2-41(a) (Supp. 2009).
142. *Id.* § 32-2-41(b)(1).
143. *Id.* § 32-2-41(b)(4).
144. *Id.* § 32-2-41(b)(4).
145. *Id.* § 32-2-41(b)(5).
146. *Id.* § 32-2-41(b)(6).
147. O.C.G.A. § 32-2-41.1(a) (Supp. 2009).

of the SSTP.[148] The Transportation Committees of both houses, the General Assembly, and the Governor are required to submit comments and suggestions to the director by February 15, 2010.[149] The final version of the SSTP must be delivered to the Governor, Lt. Governor, Speaker, and the Chairs of both Transportation Committees by April 10, 2010.[150] Thereafter, the director must deliver semi-annual reports concerning the progress of projects and programs in the SSTP.[151] The Act further provides that the report should be revised and delivered at least biennially.[152] Section 6 also outlines requirements for the SSTP. The SSTP must include a realistic list of projects for the next four years as well as the cost and source of funds for those projects.[153]

> The Plan shall be developed with consideration of investment policies addressing: (1) Growth in private-sector employment, development of work force, and improved access to jobs; (2) Reduction in traffic congestion; (3) Improved efficiency and reliability of commutes in major metropolitan areas; (4) Efficiency of freight, cargo, and goods movement; (5) Coordination of transportation investment with development patterns in major metropolitan areas; (6) Market driven travel demand management; (7) Optimized capital asset management; (8) Reduction in accidents resulting in injury and loss of life; (9) Border-to-border and interregional connectivity; and (10) Support for local connectivity to the state-wide transportation network.[154]

These same policies shall guide the development of allocation formulas that the division is charged with developing.[155]

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148. *Id.*
149. *Id.*
150. *Id.*
151. *Id.*
152. *Id.*
153. *Id.*
154. *Id.*
155. *Id.*

Section 7 amends Code section 32-2-41.2 to make the director rather than the commissioner responsible for delivering reports required under that Code section.[156]

Section 8 revises Code section 32-2-42, relating to the appointment of deputy commissioner, chief engineer, treasurer, and assistant treasurer. The Code section is amended so that the commissioner still makes the appointments, but the appointments are no longer subject to approval by the Transportation Board.[157] Also, rather than requiring a $100,000 bond, the Act requires a bond of $500,000 for the deputy commissioner and treasurer.[158] The treasurer, like the deputy commissioner and chief engineer, now serves at the pleasure of the commissioner instead of the Board.[159]

Section 9 adds a new Code section, 32-2-43, which describes the appointment process of the new director of planning. The director is appointed by the Governor subject to approval by a majority vote of the House Transportation Committee.[160] The director serves during the term of the appointing Governor and at the pleasure of the Governor.[161] The director's principal responsibility is to develop transportation plans.[162]

Section 10 replaces Code sections 32-2-78, 32-2-79, and 32-2-80, relating to public-private initiatives, with entirely new Code sections governing public-private initiatives. The Act provides that the department shall identify projects on the STIP or otherwise that afford the greatest gains in congestion mitigation or economic development.[163] Any project so identified that will not be initiated within two years or does not have in place complete funding may be completed through a public-private initiative.[164] For such projects, the department shall determine the appropriate levels of state, local, and private funding.[165] Where the project will be financed in whole or

156. *Id.* § 32-2-41.2.
157. *Id.* § 32-2-42(a)–(d).
158. O.C.G.A. § 32-2-42(a) and (c) (Supp. 2009).
159. *Id.* § 32-2-42(c).
160. *Id.* § 32-2-43(a).
161. *Id.*
162. *Id.* § 32-2-43(b).
163. *Id.* § 32-2-79(a).
164. O.C.G.A. § 32-2-79(b) (Supp. 2009).
165. *Id.* § 32-2-80(a)(1).

part by a private source, the department may issue requests for proposals.[166]

After receiving proposals, that department must accept written public comment and hold at least one public hearing on the proposals.[167] Thereafter, the department will engage in discussions with at least two respondents to the request for proposals.[168] Any local governing authority that has agreed to participate in the project may participate in these discussions.[169] At the conclusion of the discussions, the department will rank at least two respondents.[170] Rankings are based on the evaluation factors listed in the request for proposals, information developed during the discussions, and the input of any local governing authority.[171] Negotiations will then be conducted with at least two respondents.[172] The Act states:

> Upon approval by the department, the commissioner shall select the respondent for project implementation based upon contract terms that are most satisfactory and advantageous to the state and to the department based upon a thorough assessment of value and the ability of the final project's characteristics to meet state strategic goals provided for by paragraphs (1) through (10) of subsection (a) of Code Section 32-2-41.1."[173]

Subject to approval of the transportation committees, the department may promulgate rules to implement the public-private initiative process.[174]

The Act gives the department broad discretion to draft contracts, including the authority "to include tolls, fares, or other use fees and tax increments."[175] The State Transportation Board retains final

166. *Id.* § 32-2-80(a)(2).
167. *Id.* § 32-2-80(a)(3).
168. *Id.* § 32-2-80(a)(4).
169. *Id.*
170. O.C.G.A. § 32-2-80(a)(4) (Supp. 2009).
171. *Id.*
172. *Id.*
173. *Id.*
174. *Id.* § 32-2-80(a)(6).
175. *Id.* § 32-2-80(b).

approval authority over all contracts.[176] The department has discretion to determine the appropriate penalty for breach or amount of security required for a particular project based on the amount "required to adequately protect the department, state, and contracting and subcontracting parties."[177]

Section 11 amends Code section 32-5-21 to provide that the priority of expenditures from the State Transportation Fund may be directed by appropriations Acts.[178]

Section 12 creates a new Code section, 32-5-27, that describes the responsibility of the Division of Planning for determining the allocation formulas to control expenditures from the State Public Transportation Fund. The Planning Division must develop allocation formulas for the State-Wide Transportation Asset Management Program (STAMP), the State-Wide Transportation Asset Improvement Program (STAIP), and the Local Maintenance and Improvement Grant Program (LMIGP).[179] STAMP funds are used for administration, maintenance, operations, and rehabilitation of infrastructure.[180] STAIP funds are used for capital construction projects.[181] A portion of the STAIP funds must be allocated to "a specific itemized and prioritized list."[182] Between ten and twenty percent of the total allocation from the State Public Transportation Fund must be allocated to projects on the list.[183] The Planning Division develops the list, but it may accept recommendations from the Transportation Committees, the Governor, metropolitan planning organizations, and nonmetropolitan areas.[184] The Planning Division will prioritize the projects in accordance with the SSTP.[185] The

176. O.C.G.A. § 32-2-80(c) (Supp. 2009).
177. *Id.* § 32-2-80(e).
178. *Id.* § 32-5-21.
179. *Id.* § 32-5-27(a).
180. *Id.* § 32-5-27(b).
181. *Id.* § 32-5-27(c).
182. O.C.G.A. § 32-5-27(c)(2) (Supp. 2009). Funds may be allocated to STAIP that are not subject to the appropriations process. *See id.* § 32-5-27(c)(3). The only requirement is that, within the STAIP allocation, ten to twenty percent of the total expenditures from the State Public Transportation Fund must be allocated to a specific, prioritized list.
183. O.C.G.A. § 32-5-27(c)(2) (Supp. 2009).
184. *Id.*
185. *Id.*

prioritized list must be submitted to the Governor, who "shall submit all or a portion of such capital construction project requests as a part of the Governor's budget recommendations to the General Assembly."[186]

The General Assembly decides whether to appropriate funds to the particular projects on the list.[187] Funds allocated to the local maintenance and improvement grant program replace the funds previously known as the local assistance road program (LARP) and state-aid program.[188] Funds allocated under the new program are allocated by the Local Grants Division in accordance with the allocation formula developed by the Planning Division.[189] That formula must take into consideration "paved and unpaved lane miles and vehicle miles traveled and may include population, employment, and local funding matches available, as well as other factors."[190] Funds allocated under the local maintenance and improvement grant program must be between ten and twenty percent of the revenue from the motor fuel tax from the prior year.[191]

Funds that are allocated or appropriated under this new Code Section are not subject to redirection or reservation unless the appropriations Act passed by the General Assembly would create a budget deficit in violation of the state constitution.[192]

Finally, section 12 provides that "[i]nformation pertaining to all funds received and expended by, through, or from the department" must be published on the department's website.[193]

Section 13 amends Code section 50-32-11, relating to the jurisdiction of the Georgia Regional Transportation Authority, by removing GRTA's authority to review and make recommendations to

186. *Id.*
187. *Id.*
188. *Id.*
189. O.C.G.A. § 32-5-27(d) (Supp. 2009).
190. *Id.*
191. *Id.*
192. O.C.G.A. § 32-5-27(e) (Supp. 2009); *see* GA. CONST. art. III, § 9, para. 6(b).
193. O.C.G.A. § 32-5-27(f) (Supp. 2009).

the Governor concerning proposed regional transportation plans.[194] The Act vests such authority solely in the Planning Division.[195]

Analysis

This Act was intended to be a solution for the transportation crisis in Georgia. A similar attempt failed in the last few minutes of the 2008 Legislative Session[196] and legislators were determined not to let this happen again. In fact, at times the tactic was simply to pass a bill that would elicit support from the other side, rather than create a bill that was one-sided, in efforts to pass some sort of transportation legislation this term.[197] Supporters and opponents of the bill alike recognize concerns about the future implications of this piece of legislation. They approach these concerns differently, however. Supporters see this as just a "first step" in the answer to the transportation crisis and changes and alterations are expected and welcomed,[198] and opponents see this as a rushed attempt at a poor solution that should not have been passed.[199]

One of the main concerns is the absence of a companion funding bill. The funding issue was strongly advocated in this year's legislative session, and the House and Senate kept the same positions as they did during the 2008 session—the House favored a statewide tax plan, and the Senate favored a regional tax plan.[200] Like in 2008, however, the General Assembly could not agree on a tax plan.[201] Representative Vance Smith (R-129th), who was opposed to the Act, said the failure to agree on the funding issue has resulted in two

194. *Id.* § 50-32-11.
195. *See id.* § 32-2-22(b)(1).
196. Hart et al., *supra* note 30.
197. *See, e.g.*, Video Recording of Senate Proceedings, Feb. 3, 2009 at 1 hr., 13 min., 46 sec. (remarks by Sen. Jeff Mullis (R-53rd)), http://www.georgia.gov/00/article/0,2086,4802_6107103_129987583,00.html [hereinafter Feb. 3, Senate Video]; Apr. 3 Senate Video, *supra* note 103, at 3 hr., 7 min., 38 sec. (remarks by Sen. Tommie Williams (R-19th)).
198. Mar. 5 Senate Video, *supra* note 58, at 3 hr., 12 min., 40 sec. (remarks by Sen. Jeff Mullis).
199. *Id.* at 2 hr., 52 min., 28 sec. (remarks by Sen. Steve Thompson (D-33rd)).
200. Williams, *supra* note 48.
201. *Id.*

problems.[202] First, failure of the General Assembly to adopt a plan leaves the issue up to voters, which will require some public relations initiatives to make voters aware of the ballot question and why it should pass.[203]

Second, it will be more difficult to pass a funding bill next year because it is an election year and legislators may want to avoid tax increases for political reasons.[204] Representative Smith does not plan on backing down from the funding issue, and he still believes a statewide tax plan could pass, despite the fact that no other state has such legislation.[205] According to Representative Smith, the reason it will pass is that the project list will prove to voters that their money is going to transportation problems in their areas, which should bypass the concerns of urban voters who think their money is going to rural Georgia and rural voters who think their money is going to the metropolitan area.[206] Funding is expected to be a prominent transportation issue next year.

A major concern among legislators stems from the creation of a new board position, the Director of Planning. Before the creation of this position, the Commissioner was the "chief executive officer of the department" and had "direct and full control of the department."[207] The same language is in the amended Code section, but it also includes language that prevents the Commissioner from exercising any powers delegated to the Director of Planning.[208] Opponents of the Act are worried about conflicting and/or overlapping roles of the Director of Planning and the Commissioner.[209] For example, the Commissioner's role after the Act is "faithful implementation of transportation plans produced by the director of planning."[210] The Commissioner's power and role has

202. *See* Smith Interview, *supra* note 71.
203. *See id.*
204. *See id.*
205. *See id.*
206. *See id.*
207. O.C.G.A. § 32-2-41(a) (2008).
208. O.C.G.A. § 32-2-41(a) (Supp. 2009).
209. Apr. 1 House Video, *supra* note 102, at 32 min., 55 sec. (remarks by Rep. Mark Hatfield (R-177th)).
210. O.C.G.A. § 32-2-41(a) (Supp. 2009).

been greatly diminished and reduced to "one who stands by and watches as the work is being done . . . by the planning division."[211] Neither the Commissioner nor the Board has any say in the planning; the Director of Planning and the Governor make the planning decisions and the Commissioner will merely implement them.[212] This will also lead to the concern about a concentration of power in the Governor because he appoints the director of planning, subject to approval of the House Transportation Committee, and a more detailed discussion on this point will follow below.

There is also fear that this muddled transition of power from the Commissioner to the Director of Planning may result in finger pointing when things are not done or are not done correctly, and the citizens of Georgia will be the ones to suffer.[213] In addition, when there are two people in charge, it is unclear who is responsible if the job does not get done.[214]

The creation of the Director of Planning and the newly assigned duties of that Director is only one example of the DOT Board's diminished importance. Several sections in the Act demonstrate a trend of taking power away from the Board. For example, section 2 of the Act revises subsection (f) of Code section 32-2-20 by prohibiting per diem compensation for conference call meetings.[215] In addition, the Board no longer has the power to confirm or reject recommendations for appointment of the deputy commissioner, the chief engineer, the treasurer or the assistant treasurer.[216] And lastly, the treasurer no longer serves at the pleasure of the Board, but instead serves at the pleasure of the Commissioner.[217]

There has been no direct indication of what this pattern of changes will mean for the future of the DOT Board. There was great opposition to the idea of adding a new agency to take power away

211. Apr. 1 House Video, *supra* note 102, at 32 min., 55 sec. (remarks by Rep. Mark Hatfield).
212. *Id.* at 27 min., 50 sec. (remarks by Rep. Alan Powell (D-29th)).
213. *Id.* at 43 min., 38 sec. (remarks by Rep. Chuck Martin (R-47th)).
214. *Id.*
215. O.C.G.A. § 32-2-20(f) (Supp. 2009).
216. *Id.* § 32-2-21.
217. *Id.* § 32-2-42(c).

from the Board,[218] indicating this may just be an effort to cure the corruption and to make the process more transparent and the actors more accountable, or it may be an indirect approach to phasing out the Board.

The General Assembly is demanding that the Director of Planning be more accountable by implementing reporting requirements.[219] The Director of Planning must submit a final version of the State-wide Strategic Transportation Plan by April 10, 2010 and must provide semiannual reports regarding the progress of projects in the plan.[220] In addition, the State-wide Strategic Transportation Plan must be revised and delivered at least biannually.[221] These requirements will force the Director of Planning to create updated and revised versions of the plan in hopes that it will increase efficiency and productivity.

The creation of the Director of Planning is not only a mechanism for taking power away from the DOT Commissioner and Board, but many legislators are worried it is a mechanism to give more power to the already powerful Governor.[222] Senator Thompson (D-33rd) repeatedly warned the Senate about corruption and the consequences of giving the Governor too much power.[223] He was concerned things would go back to how they were before Governor Carl Sanders, when transportation resources went to paving the driveway of mayors or influential businessmen.[224] This concern may be warranted because the Governor appoints the Director of Planning, and the Director of Planning decides what projects will be put on the list. The only person the Director is accountable to is the Governor.[225] For those who believe the problems with the DOT Board are a result of the

218. *See, e.g.*, Ralston Interview, *supra* note 65 (stating that it became apparent that the House Transportation Committee would not support the creation of a new agency).

219. O.C.G.A. § 32-2-41.1 (Supp. 2009).

220. *Id.*

221. *Id.*

222. Apr. 3 Senate Video, *supra* note 103, at 3 hr., 10 min., 38 sec. (remarks by Sen. Steve Thompson (D-33rd)).

223. Mar. 5 Senate Video, *supra* note 58, at 2 hr., 52 min., 28 sec. (remarks by Sen. Steve Thompson (D-33rd)); Apr. 3 Senate Video, *supra* note 103, at 3 hr., 10 min., 38 sec. (remarks by Sen. Steve Thompson (D-33rd)).

224. Mar. 5 Senate Video, *supra* note 58, at 2 hr., 52 min., 28 sec. (remarks by Sen. Steve Thompson (D-33rd)).

225. Apr. 3 Senate Video, *supra* note 103, at 3 hr., 10 min., 38 sec. (remarks by Sen. Steve Thompson (D-33rd)).

"second floor meddling in their business," this Act will inflame the problems that currently exist.[226] However, not everyone shares this fear of corruption if the Governor gets too much power. Representative Ralston (R-7th), for example, said he does not have a problem with holding the Director accountable to the Governor because elections have consequences, and if the Governor wins the race, he should have a lot of power.[227]

The battle over the appointment of the Director of Planning was not the only battle fought this year over power. There was resistance about the amount of power the House and the Senate were giving up by passing this Act which gave absolute power over the project list to the Director of Planning.[228] According to the new Code section, the director "*may* accept project recommendations from the Transportation Committees of the Senate and the House of Representatives, the Governor . . . ."[229] The only power that the General Assembly has over projects is the power to appropriate ten to twenty percent of the total expenditures from the Transportation Fund.[230] To some, the power over the money is more power than the General Assembly has ever had in transportation,[231] but to at least one Representative, it is not as powerful as it appears because the process has not changed, and the General Assembly has no power to do things like name a road.[232]

Not only is the Senate powerless regarding the selection of the projects for the project list, but it is also powerless in selecting the Director of Planning.[233] The Director of Planning is appointed by the Governor "subject to approval by a majority vote of the House Transportation Committee."[234] This provision faced opposition in the

226. Apr. 1 House Video, *supra* note 102, at 24 min., 10 sec. (remarks by Rep. Jay Shaw (D-176)).
227. *See* Ralston Interview, *supra* note 65.
228. Apr. 1 House Video, *supra* note 102, at 32 min., 55 sec. (remarks by Rep. Mark Hatfield (R-177)); *id.* at 43 min., 38 sec. (remarks by Rep. Chuck Martin (R-47th)).
229. O.C.G.A. § 32-5-27(c)(2) (Supp. 2009) (emphasis added).
230. *Id.*; Ralston Interview, *supra* note 65.
231. Apr. 1 House Video, *supra* note 102, at 47 min., 52 sec. (remarks by Rep. Earl Erhart (R-36th)); Apr. 3 Senate Video, *supra* note 103, at 3 hr., 6 min., 33 sec. (remarks by Sen. Tommie Williams (R-19th)).
232. Smith Interview, *supra* note 71.
233. O.C.G.A. § 32-2-43(a) (Supp. 2009).
234. *Id.*

Senate because the Senate had been in a position of less power compared to the House in the past, and some Senators wanted to use this as an opportunity to "even the score."[235] Despite the disparity in power, Senator Tommie Williams (R-19th) encouraged the Senate to vote on SB 200 because if the bill did not pass, there would be no solution to transportation this year.[236] This provision may be debated or changed in the future when they have more leverage to "even the score" but it is clear that this year the focus in the Senate was on taking the first step in transportation.

There is another area of the Act that may raise some concern among legislators. Section 10 of the Act strikes several Code sections and replaces them completely.[237] The part of this section that may create problems is the amended Code section 32-2-80, which changes the process for soliciting and accepting proposals, participating in negotiations, and entering into contracts.[238] It is unclear at this time what implications this new section will have on the competitive bidding process because it was rarely debated or discussed. Senator Thompson argued from the well that the bill will allow the director of planning to circumvent the bid process.[239] This was the only discussion about the bidding process that applies to the Act. This section is intended to bring transparency to the process and set legal parameters for the bidding process.[240] This section is substantially different than the section that existed previously, but it did not attract much attention or debate because the legislators were so focused in on the director of planning issues.[241] Currently, there is no way to tell if this section will stir up more debate and controversy once the members have a chance to work through the bill and sift through the section over the next year.

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235. Apr. 3 Senate Video, *supra* note 103, at 3 hr., 9 min., 30 sec. (remarks by Sen. Doug Stoner (D-6th)).
236. *Id.* at 3 hr., 9 min., 45 sec. (remarks by Sen. Tommie Williams (R-19th)).
237. O.C.G.A. §§ 32-2-78–80 (Supp. 2009).
238. *Id.* § 32-2-80.
239. Apr. 3 Senate Video, *supra* note 103, at 3 hr., 10 min., 38 sec. (remarks by Sen. Steve Thompson (D-33rd)).
240. Ralston Interview, *supra* note 65.
241. *Id.*

Little litigation is anticipated as a result of this Act, but there are two areas that could present constitutional questions. First, there is concern about the constitutionality of the provision giving the House Transportation Committee the authority to affirm the Governor's appointment for the Director of Planning.[242] The argument has been made that Georgia's Constitution states the Senate shall confirm the Governor's appointments, and thus the Act is unconstitutional if it gives that confirmation power to the House Transportation Committee and not to the Senate.[243] However, Representative Ralston believes this argument is weak because there is no such provision in Georgia's Constitution; instead, it is at most a custom that the Senate confirms the appointments.[244]

The second argument is that the creation of the Director of Planning violates the Constitution because in its definition, the DOT Board does not include the position "Director of Planning."[245] Although it is true there is no mention of this new position in the Constitution, there is also no language prohibiting the creation of new positions to the board; this argument, therefore, like the one above, is weak and not likely to pose any significant Constitutional problems.[246]

Another section that could create future litigation is section 4. This section lists ten things to consider in development of the State-Wide Strategic Transportation Plan.[247] Although, on its face, it appears to create mandatory criteria that the Director of Planning must follow, it was expressed that the list was not intended to set legal parameters in anticipation of litigation.[248] Instead, factors were set to define a minimum level of consideration in developing the plan.[249] Representative Ralston recognizes litigation may ensue as a result of

242. Apr. 3 Senate Video, *supra* note 103, at 3 hr., 10 min., 38 sec. (remarks by Sen. Steve Thompson (D-33rd)).
243. *Id.*
244. Ralston Interview, *supra* note 65.
245. Apr. 1 House Video, *supra* note 102, at 50 min., 55 sec. (remarks Rep. David Lucas (D-139th)).
246. Ralston Interview, *supra* note 65.
247. O.C.G.A. § 32-2-41.1(a) (Supp. 2009).
248. Ralston Interview, *supra* note 65.
249. *Id.*

the factors, but he thinks litigation is not necessarily a bad thing, especially if it will encourage adherence to the factors.[250]

This Act is seen by many as a first step in the right direction for transportation reform in Georgia.[251] It is anticipated that changes in transportation will occur in the upcoming years until the transportation crisis is under control. Now that the governance issue has been addressed, the General Assembly will likely focus on the funding issue next. Political aspirations, however, could interfere with an immediate solution to funding.[252]

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250. *Id.*
251. *See* discussion *supra* Analysis.
252. *See* discussion *supra* Analysis.