

BACKGROUND

The Governor's line-item veto power applies to any bill that "contains several items of appropriation." TEX. CONST. art. IV, § 14. When a bill contains several items of appropriation, the Governor "may object to one or more of such items, and approve the other portion of the bill." *Ibid.* Thus, the Governor may line-item veto one or more "items of appropriation" without vetoing the entire appropriations bill.

The Texas Supreme Court examined the Governor's line-item veto authority in *Jessen Assocs., Inc. v. Bullock*, 531 S.W.2d 593 (Tex. 1975). In *Jessen*, the Court held that "[a]n item of appropriation is an indivisible sum of money dedicated to a stated purpose." *Id.* at 599. The Court elaborated: "[T]he term 'item of appropriation' contemplates the setting aside or dedicating of funds for a specified purpose. This is to be distinguished from language which qualifies or directs the use of appropriated funds or which is merely incidental to an appropriation. Language of the latter sort is clearly not subject to veto." *Ibid.*; accord *Fulmore v. Lane*, 140 S.W. 405, 412 (Tex. 1911).

The Court held that the Governor's veto in *Jessen* was invalid because he struck a rider that did not set aside or dedicate specified funds for any purpose. Rather, the Governor attempted to veto a rider that merely "authorized" the Board of Regents of the University of Texas to spend unspecified sums of "bond proceeds," and "to accept gifts" and "grants" in unspecified sums, for building alterations and additions at the Law School. 531 S.W.2d at 597. That language constituted "legislative approval" of construction projects at the Law School; but because the rider did not set aside a particular sum of money for that purpose, it did not constitute a vetoable "item of appropriation." *Id.* at 600.

THE GOVERNOR'S VETOES OF CERTAIN ITEMS IN HB 1 (84TH R.S.)

The items of appropriation that Governor Abbott line-item vetoed easily satisfy Article IV, § 14 of the Constitution, are distinguishable from the rider in *Jessen*, and comport with the Texas Supreme Court's description of the line-item veto power. Governor Abbott vetoed particular items that set aside particular sums of money for particular purposes—including sums for constructing particular buildings, a sum for paying dues to a specified entity, and a sum for a particular museum. In adopting those items, the Legislature "set[] aside" and "dedicat[ed] funds for a specified purpose," and in doing so, it exposed those items to the Governor's line-item veto power.

It does not matter that a particular item is prefaced with "Out of funds appropriated above," or other language to that effect. The *Jessen* Court specifically held that a binding set-aside of funds "is an item of appropriation *even though it may be included in a larger, more general item.*" 531 S.W.3d at 599 (emphasis added). Indeed, if the contrary were true, the Legislature could adopt a single "item" appropriating \$200 billion to the State of Texas, and then include the entire balance of the budget in 1,000 pages of veto-proof riders, each of which is prefaced with "Out of funds appropriated above." It would be absurd to say that the Governor cannot veto those items simply because of their prefatory language.

What really matters is whether the vetoed set-aside satisfies the definition of “item of appropriation” adopted by the Supreme Court in *Jessen*. One way of approaching the question is to consider whether the vetoed item can be lifted cleanly from the rest of the bill’s appropriations without interfering with the bill’s other, non-vetoed items. As the Virginia Supreme Court explained in an opinion cited favorably in *Jessen*:

[An ‘item’] refers to something which may be taken out of a bill without affecting its other purposes or provisions. It is something which can be lifted bodily from it rather than cut out. No damage can be done to the surrounding legislative tissue, nor should any scar tissue result therefrom.

Commonwealth v. Dodson, 11 S.E.2d 120, 124 (Va. 1940); *see also Jessen*, 531 S.W.2d at 599 (relying on *Dodson*). And here, each of Governor Abbott’s line-item vetoes has no effect on the other, non-vetoed items. For example, the veto of the Elias Ramirez State Office Building’s parking garage has no effect on the non-vetoed Capitol Complex parking garage. Both of those items are separate, “‘indivisible sums of money’” that can be vetoed (or not) without affecting the other. *Jessen*, 531 S.W.2d at 599 (quoting *Dodson*, 11 S.E.2d at 127).

THE LEGISLATURE CANNOT USE MAGIC WORDS TO MAKE AN ITEM VETO-PROOF

It does not matter whether the Legislature used magic words to label an item of appropriation a “rider,” a “goal,” a “strategy,” or anything else. Under *Jessen*, what matters is the *substance* of the Legislature’s act. *See Jessen*, 531 S.W.2d at 599. If the Legislature set aside a particular sum of money and bound the state agency or institution to use that money for a particular purpose, then it adopted an “item of appropriation.” *Id.* at 599-600. The Legislature cannot simultaneously claim that it required agencies to use specific sums for specific purposes, but that magic words like “rider” or “capital budget” nonetheless insulate the item of appropriation from a veto.

Some have misread *Jessen* to countenance a different result. In *Jessen*, the Education Code required the Coordinating Board or the Legislature to approve any new construction at the University of Texas Law School. *See* 531 S.W.3d at 596-97 (quoting TEX. EDUC. CODE § 61.058). In the budget for the 1976-1977 biennium, the Legislature provided that approval when it “authorized” the Board of Regents to use unspecified sums of grants, gifts, and bond proceeds for unspecified alterations and additions to the Law School. The Supreme Court held that the rider was not vetoable because it merely provided the legislative approval—not an appropriation—for construction projects at the law School. *See id.* at 600.

That does not mean, however, that the Legislature can use the budget to make its own approval process and then declare that all of the items of appropriation are veto-proof. Under Article IX, § 14.03(a)(1) and (h)(2) of the budget, an agency cannot use funds to build things like parking garages unless (A) the budget itself uses the magic words “capital budget” to make an appropriation for the parking garage, or (B) the agency requests and receives approval from the Governor and the Legislative Budget Board to build the parking garage. Thus, it might be argued, when the Legislature uses the magic words “capital budget” to appropriate a specific sum for a specific parking garage, it is merely providing the legislative approval that otherwise

would be required for the garage under Article IX, § 14.03. To illustrate, here is the way the Legislature directed the Facilities Commission to build the Elias Ramirez State Office Building’s parking garage:

3. **Capital Budget.** None of the funds appropriated above may be expended for capital budget items except as listed below. The amounts shown below shall be expended only for the purposes shown and are not available for expenditure for other purposes. Amounts appropriated above and identified in this provision as appropriations either for "Lease Payments to the Master Lease Purchase Program" or for items with an "(MLPP)" notation shall be expended only for the purpose of making lease-purchase payments to the Texas Public Finance Authority pursuant to the provisions of Government Code §1232.103.

		<u>2016</u>	<u>2017</u>
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(6) Elias Ramirez State Office Building - New Parking Garage		26,000,000	UB

The Ramirez garage item is easily distinguishable from the *Jessen* rider for two reasons. First, unlike the rider in *Jessen*, the capital budget item for the Ramirez garage contains a sum certain—\$26,000,000 of general revenue—that can be used for one and only one thing. The *Jessen* rider, by contrast, set aside *zero* dollars and required the Board of Regents to do *nothing*. The Legislature cannot set aside a specific sum of money, direct the Facilities Commission to use it for only one purpose, and then claim that it merely authorized or approved a construction project in the same way the Legislature in *Jessen* did.

Second, it does not matter that the budget itself creates an approval process for construction projects that do not bear the “capital budget” magic words. Were it otherwise, the Legislature could insulate the entire budget from line-item vetoes simply by designating special approval processes for items that are unadorned by an arbitrary list of magic words. That would be a dramatic expansion of the Legislature’s powers, and it would run directly contrary to *Jessen* and the constitutional provision for the Governor’s line-item veto authority.