



July 16, 2009

Memorandum #2009-118

TO: TPO Committee

BY: Chairman Joe S. Frank

RE: TPO Committee Meeting, July 23, 2009

Attached are the agenda and related materials for the TPO Committee meeting scheduled for **Thursday, July 23, 2009, 12:00 Noon – 3:00 p.m.**, in the **Regional Board Room**. **Lunch will be served to Committee members.**

JSF/kg

TPO Committee

Joe S. Frank, Chairman, NN
Stan D. Clark, IW
Jeffrey Florin, VPA
Clifton E. Hayes, Jr., CH
Dennis W. Heuer, VDOT
James O. McReynolds, YK

Mark D. Rickards, WATA
Ivan P. Rucker, FHWA
Douglas L. Smith, PO
James K. Spore, VB
Michael S. Townes, TDCHR
Molly J. Ward, HA

cc: TPO Voting Members
TPO Voting Alternates
TPO Nonvoting Members
Dwight Farmer
Camelia Ravanbakht
Mike Kimbrel
Carlos Gonzalez
Jessica Banks
Joe Turner
Peter Huber
John Gergely

Chuck Cayton
Ray Taylor
Elizabeth Kersey
Jim Oliver
Jeffrey Raliski
Vincent Thomas
Bruce Williams

AGENDA
TPO COMMITTEE
JULY 23, 2009

CALL TO ORDER 12:00 Noon

The Regional Building, 723 Woodlake Drive, Chesapeake, Virginia

CALL TO ORDER

PUBLIC COMMENT PERIOD (Limit: 3 minutes per individual)

APPROVAL OF AGENDA

AGENDA

1. SUMMARY MINUTES

Minutes of the June 18, 2009 meeting are attached.

Attachment 1

RECOMMENDED ACTION:

Approve the minutes.

2. QUADRENNIAL CERTIFICATION REVIEW: STATUS REPORT

The final report for the most recent federal certification review included eleven corrective actions (CAs) and 16 programmatic recommendations (PRs). To-date, the HRTPO has addressed eight CAs and fifteen PRs. The remaining CAs and PR are associated with updating the HRTPO Public Participation Plan, with special emphasis on Environmental Justice, Limited English Proficiency, and outreach to low-income and minority communities.

Mr. Carlos Gonzalez, Public Involvement and Community Outreach Administrator, will brief the Committee on the plans and timelines for addressing the remaining CAs and PR.

RECOMMENDED ACTION:

None required.

3. LEGISLATIVE LIAISON

During the June meeting of the TPO Committee, it was requested that the job description for the proposed Legislative Liaison staff position be distributed to the HRTPO Board for review and comment. The updated job description and comments received to-date are attached.

Attachment 3

RECOMMENDED ACTION:

Per discussion.

4. LEGISLATIVE AD-HOC COMMITTEE

During the June meeting of the TPO Committee, the Committee Chair suggested that there may be a need for an HRTPO legislative committee whose purpose would be to provide guidance to the legislative liaison(s). HRTPO staff was asked to draft a description of such a committee, including information on the mission of the committee and recommendations on its membership. The research materials will be emailed to the Committee by close of business on Tuesday, 7/21/09.

RECOMMENDED ACTION:

Per discussion.

5. LEGAL STATUS OF MPOS IN VIRGINIA

During the discussion on this topic at the June meeting of the TPO Committee, it was requested that the Executive Director follow up on the issue of the legal status of metropolitan planning organizations (MPOs) in Virginia. Mr. Dwight Farmer has arranged a meeting with the executive directors of the fourteen MPOs in Virginia to discuss this issue. The meeting will take place on July 31, 2009, during the Summer Conference of the Virginia Association of Planning District Commissions (VAPDC) in Virginia Beach.

During the June meeting of the TPO Committee, it was also requested that Mr. Peter Huber, HRPDC Legal Counsel, outline an issue paper on forming the HRTPO into a non-stock, not-for-profit corporation. It was requested that the issue paper (attached), to be considered by the Committee at its July meeting, include information on establishing a new legal status for the TPO as well as the costs involved.

Mr. Farmer will be available to address questions related to his discussions with other MPO executive directors. Mr. Huber will be available to address questions related to the issue paper.

Attachment 5

RECOMMENDED ACTION:

Provide guidance for next steps.

6. MEMORANDUM OF UNDERSTANDING: HRTPO FINANCIAL ISSUES

During the June meeting of the TPO Committee, it was requested that Mr. Peter Huber, HRPDC Legal Counsel, draft a memorandum of understanding (MOU) regarding financial issues related to the HRTPO. A draft MOU is attached.

Mr. Huber will be present to answer questions on the draft MOU.

Attachment 6

RECOMMENDED ACTION:

Approve the Memorandum of Understanding.

7. HRTPO BOARD TRAINING

The FY 2010 Unified Planning Work Program includes items under Task 1.1, TPO Administration, regarding orientation and training for HRTPO Board members. In addition, during its April meeting, the HRTPO Board approved a resolution to endorse a comprehensive training program for members of the Board and its advisory committees. The resolution specifies that the Executive Director and HRTPO staff will coordinate with the Federal Highway Administration (FHWA) and the Federal Transit Administration (FTA) to provide training and updates to such training as deemed necessary.

Mr. Ivan Rucker, FHWA, will be present to advise the TPO Committee on the training options that are available.

RECOMMENDED ACTION:

Select a preferred training option.

8. OLD/NEW BUSINESS

ADJOURNMENT

Summary Minutes
Transportation Planning Organization Committee
Meeting of June 18, 2009

Chairman Frank called the Transportation Planning Organization (TPO) Committee meeting to order at 12:40 p.m. in the HRPDC Board Room with the following in attendance:

MEMBERS:

Joe S. Frank, Chairman (NN)
Unwanna Dabney (FHWA)
Mark D. Rickards (WATA)

Douglas L. Smith (PO)
James K. Spore (VB)
Michael S. Townes (HRT)

TPO STAFF:

Dwight Farmer
Carlos Gonzalez
Kathlene Grauberger

Mike Kimbrel
Camelia Ravanbakht

OTHER PARTICIPANTS:

Thomas Ballou (DEQ)
Peter Huber (Willcox & Savage)

Ross Kearney (HA)
Eric Stringfield (VDOT)
Chris Voigt (VDOT)

OTHERS:

Keith Cannady (HA)
Elizabeth Kersey (HA)

Bryan Pennington (NO)
Jeff Raliski (NO)
Ray Taylor (FHR)

Public Comment Period

There was no public comment.

Summary Minutes of April 10, 2009

Chairman Frank stated the minutes from the April 10, 2009 meeting had been distributed to all committee members. He asked for amendments, if any. Hearing none, Chairman Frank asked for a motion to accept the minutes. Mr. Townes Moved to approve the April 10, 2009 minutes as written. Mr. Smith seconded the motion. The Motion Carried.

Metropolitan Planning Agreement

Chairman Frank explained the Metropolitan Planning Agreement (MPA) was the document between the Commonwealth of Virginia and the Hampton Roads Transportation Planning Organization (HRTPO) that defines their already established relationship. The agreement, authored by the Virginia Department of Transportation (VDOT), is comprised mostly of boiler plate language, but there are some issues that are more specific to the HRTPO that need to be discussed.

Mr. Smith asked what would be accomplished by having an MPA. Mr. Farmer replied the MPA is a State document and VDOT's Central office created a template to be used by all the MPOs. He believed it was VDOT's attempt to have all the MPOs on an equal level. He asked Mr. Stringfield to comment regarding how far the HRTPO could sway from the original template language.

Mr. Stringfield stated that every MPO has this agreement in hand but each MPO does have the liberty to individualize it to meet the needs of its specific MPO.

Chairman Frank noted that Staff researched MPA public comments, received input and responses from VDOT, and also HRTPO Legal Council Peter Huber in order to help the Committee understand the document.

Chairman Frank explained that Federal Law requires a Lead Planning Organization (LPO) because of any air quality issues in the State. This is timely to the Hampton Roads region because of its non-attainment status due to the NOx calculations. The LPO of Hampton Roads is the Hampton Roads Air Quality Committee (HRAQC) which is referenced in the MPA. VDOT Staff reports the LPO is a required organization and that certifications of the LPOs in Virginia were delegated to the Virginia Department of Environmental Quality (DEQ). HRAQC is the LPO of the Hampton Roads region and was documented in letters to individual members confirming their committee membership in 2004. Mr. Voigt gave Chairman Frank a copy of this 2004 letter.

Mr. Ballou of DEQ stated the original LPO was established in 1996 to construct the attainment and maintenance plan for the area. In 1997, a new standard was established by the Environmental Protection Agency (EPA) and again the area came into compliance and a maintenance plan was put into action.

Chairman Frank noted the HRAQC has not been utilized in a long time and asked if it should be a separate standing committee or a function of the HRTPO. Ms. Dabney commented that this was discussed during the preparation of the HRTPO bylaws.

Mr. Voigt of VDOT stated the MPOs handle transportation and the LPOs handle air quality. The LPO receives its authority from the Clean Air Act. The air quality in the area has not been bad enough so the HRAQC has not had to meet very often in the past.

Mr. Ballou explained the Clean Air Act defines the LPO as a separate organization that will interact with the HRTPO. The HRAQC is being reactivated now due to the potential non-attainment status of the region.

Chairman Frank asked staff to review the use of MPO and TPO within the MPA. Mr. Farmer stated "MPO" as referenced in the MPA is a generic term, whereas "TPO" as referenced in the MPA refers to the HRTPO specifically.

Chairman Frank asked Mr. Ballou who would be the Chair of the HRAQC. Mr. Ballou replied that once the committee convened, it would vote on a chair.

Chairman Frank suggested eliminating the fourth "Whereas paragraph" and adding language to the fifth "Whereas paragraph" in the MPA. Ms. Dabney stated the fourth

paragraph was pulled directly from the Federal Planning Regulations. After discussion, the Committee did make the change in the MPA to eliminate the fourth "Whereas paragraph". Ms. Dabney stated that it appeared to be fine but she would have the air quality specialist at the Federal Highway Administration (FHWA) review the language.

Chairman Frank said it was suggested through public comment to add the Annual Obligation Report to Article 2 where it explains responsibilities of the HRTPO Board and related HRTPO Committees. Mr. Stringfield stated the Annual Obligation Report is a document provided to the HRTPO by VDOT. Ms. Ravanbakht also stated the HRTPO does not prepare this document and therefore, it is not under Article 2 of the MPA. The Committee agreed not to add this language to Article 2.

After some discussion, the Committee decided to change the language in Article 5, Section F. Mr. Farmer asked Mr. Stringfield to have VDOT Legal review this section and respond to ensure the document is in good standing before going to the HRTPO Board.

Chairman Frank asked Mr. Farmer to share the guidelines of the Long Range Transportation Plan for Article 8 at a future date for further clarification.

Mr. Townes Moved that the Metropolitan Planning Agreement (MPA) for the Hampton Roads area, as amended at the June 18th TPO Committee Meeting, be recommended for adoption by the HRTPO Board at the July 2009 Meeting. Mr. Kearney seconded the Motion.

Discussion of Motion: Mr. Townes asked when VDOT would approve the MPA and what the administrative process entailed. Chairman Frank replied that VDOT must approve the draft document before the July HRTPO Board Meeting. The Motion Carried.

Memorandum of Understanding

Chairman Frank stated he saw no issues with the Memorandum of Understanding (MOU) and asked if there was a motion for approval.

Mr. Kearney Moved to approve the MOU between the Hampton Roads Transportation Planning Organization (HRTPO) and the Hampton Roads Planning District Commission (HRPDC) and it be recommended for adoption by the HRTPO Board at the July 2009 Meeting. Mr. Spore seconded the Motion.

Discussion of Motion: Mr. Townes stated there were public comments at the table regarding the MOU and asked if the Committee should address them before approving it. He also asked if it was the HRTPO or the HRPDC that received the Planning (PL) Funds. Mr. Farmer replied that the HRPDC received all funds.

After some discussion, Chairman Frank stated the MOU clarifies the relationship between the HRPDC and the HRTPO with regards to staffing. It further defines the distinctness between the staffs and it is a negotiated agreement between the two entities.

Mr. Townes stressed his concern regarding the PL funds that were specifically allocated for the HRTPO and wanted to know how that would be addressed between the HRTPO and the HRPDC. Mr. Farmer stated the Unified Planning Work Program (UPWP) details the precise amounts for each project, task by task.

Mr. Townes asked if it was more than a separation of staff that needed to be reflected in the MOU. He also asked if there should be recognition of the appropriation of funds in addition to the UPWP. Chairman Frank stated there was a federal audit that ensured this process. Mr. Farmer stated that for the first time, the HRTPO approved a separate budget. Ms. Ravanbakht commented that in the HRTPO bylaws there was a separate paragraph regarding financial transactions. Mr. Farmer noted the federal audit report was produced by the Chief Financial Officer of the HRPDC and that VDOT also does a performance audit of both the PL and 5303 funds.

Chairman Frank asked if the financial information should be in the MOU document. Mr. Huber replied that the MOU only addressed staffing relationships between the HRPDC and the HRTPO. He suggested drafting a second MOU to address the financial aspects.

Mr. Farmer suggested asking both the State (VDOT) and the Federal Highway Administration (FHWA) if such a document was necessary. Chairman Frank replied that his suggestion was to have Mr. Huber draft a short document and circulate it to VDOT and the FHWA for their approval.

The Committee agreed with Mr. Spore's suggestion to change the MOU title to "First MOU" because there could be more MOUs in the future.

It was noted there was still a motion on the floor as follows: Mr. Kearney Moved to approve the First MOU between the Hampton Roads Transportation Planning Organization (HRTPO) and the Hampton Roads Planning District Commission (HRPDC) and it be recommended for adoption by the HRTPO Board at the July 2009 Meeting. Mr. Spore seconded the Motion. The Motion Carried.

Legal Status of MPOS in Virginia

Mr. Farmer stated he had conferred with both Mr. Huber and Chairman Frank, and given that reform was facing the HRTPO, he reorganized staff and there is now a separate HRTPO staff performing a separate function, yet all remain HRPDC staff as well. He firmly believes the State Code and the Federal Regulations are not anywhere close in matching in tone and words. His view is that the State Code needs to be changed.

Chairman Frank stated the HRTPO needs to address the formal structure of the HRTPO with the Commonwealth. He believed it would be a long term process. He also believed that Mr. Farmer's idea was a good one and that the State Code should be changed but it should not be tackled by the TPO Committee.

Chairman Frank asked the TPO Committee to recommend to the HRTPO Board that the Executive Director, on behalf of the HRTPO, be instructed to engage with the relevant State, Federal, and regional agencies to develop a plan to be presented to the General Assembly for formalizing the relationship and structure of the MPOs in the Commonwealth. Mr. Townes Moved to adopt this recommendation. Mr. Spore seconded the Motion. The Motion Carried.

Chairman Frank suggested that in the interim, the HRTPO create a not-for-profit, non-stock corporation, so that the HRTPO would have the right to contract, receive, and disburse

funds. He commented that this would be a monumental undertaking. He further commented that discussion was needed on what steps the HRTPO should take in the meantime. He suggested Mr. Huber outline an issue paper discussing the issues needed to be both considered and resolved in the context of creating a non-stock corporation.

Mr. Huber asked what the objective was regarding the issue paper. Chairman Frank replied that when the FHWA did their quadrennial evaluation of the MPO, there was criticism that there was not a clear distinction between the MPO and the PDC functions. The HRTPO has spent over a year trying to define that distinction. There was also an issue that the only language in the Code of Virginia that addresses MPOs was roughly two sentences with no guidance. The HRTPO had a consulting team research best practices around the nation and that report had information on how other MPOs were structured which could be a form of guidance for the issue paper. The HRTPO would need to know the legal approach to forming a non-stock corporation and how it could benefit from it.

Mr. Farmer stated Staff would answer Mr. Huber's questions to better inform him for the issue paper.

Mr. Townes Moved to have Mr. Huber prepare an issue paper detailing those issues that need to be considered and resolved in the context of creating a non-stock corporation and what benefits there would be, if any to doing so. Mr. Rickards seconded the motion. The Motion Carried.

Mr. Farmer asked if the motion was a recommendation to the HRTPO Board to have Mr. Huber prepare a paper. Chairman Frank replied that it was not; the motion was to have Mr. Huber prepare a paper for exploratory reasons only. Mr. Farmer stated technically he had to go to the Board, but if the Committee wanted to go forward, then he would call Chairman Sessoms and inform him.

Mr. Spore asked if the HRTPO was going to draft legislation for the General Assembly's approval regarding the previous motion on formalizing the relationship and structure of the MPOs in the Commonwealth. He stated he would prefer that route for the HRTPO instead of creating a non-stock corporation. Mr. Townes stated the previous motion enabled Mr. Farmer to confer with the State, FHWA, and regional agencies to develop such a plan. Chairman Frank also believed it should be the HRTPO that creates the legislation and take it to the General Assembly.

Legislative Liaison

Chairman Frank explained there was a letter in the TPO Committee Agenda Packet from the legislative liaisons from Chesapeake, Hampton, Virginia Beach, Portsmouth, Norfolk, and Newport News. The letter outlined the position of the local liaisons in the area. Given the fact that the HRTPO now has members of the General Assembly on the Board, the liaisons believed they were more than capable of communicating the Board's position on any issues to the General Assembly.

Mr. Townes stated that by merely having four General Assembly Members on the board did not cover the HRTPO legislatively. The legislative outlook was more than statewide, it also included federal legislation. He noted because there were so many legislative

representatives in the region it created a chorus, but what the HRTPO needed was one voice. There might be jurisdictions that do not agree with a vote and have the right to go to the General Assembly, but there was a regional consensus that had been arrived at, and that needed to be articulated. Mr. Townes believed an experienced person was needed and a mistake would be made if the HRTPO hired someone right out of college.

Chairman Frank agreed with the remarks by Mr. Townes and suggested the creation of a Legislative Committee of the HRTPO. The committee would need to monitor what was going on and create a recommended legislative package with at least two components. First, a series of policy statements would be needed, and second, if there were specific issues the HRTPO wanted addressed, the Board would need to enumerate those items to the Liaison. With the guidance from a Legislative Committee, supported by Staff, and adopted by the HRTPO Board, the Liaison, subject to the supervision of the Executive Director, would then be able to do his/her job.

Mr. Spore raised the question regarding the issue that federal funds could not be used to pay for a lobbyist. Mr. Farmer noted the position would be funded through PL funds. Mr. Townes stated there was a significant difference between a legislative representative of an organization and a lobbyist who was hired as a big gun.

Mr. Farmer indicated the position was initially going to be funded by the reserve funds; however, it was changed after the May HRTPO Board Meeting. The Board was not willing to use local funds for the position because their budgets were already completed. Mr. Farmer stated the only other source for funding was from the PL funds. He noted the position of Legislative Liaison would not be as a lobbyist. Ms. Dabney stated the PL funds

could only be used for the position if the Liaison's job was to research and report back to the HRTPO in order for the Executive Director to make informed decisions.

Mr. Kearney stated a dedicated Legislative Liaison was not necessary and felt the local liaisons were on target in their concerns and thought it would be unwise to spend the funding on the position.

Mr. Spore suggested the HRTPO have a process where a legislative packet be constructed and adopted to have implemented in Richmond and/or Washington D.C. He also expressed his concern regarding funding for the position.

Mr. Farmer indicated that if there was not a dedicated liaison to go to the General Assembly, it would have to be him or Ms. Ravanbakht and that was just not feasible.

Mr. Kearney suggested the HRTPO spend its funds on marketing itself instead of hiring a specific liaison.

Mr. Spore suggested including the Commonwealth Transportation Board in the Legislative Liaison job description and also inserting the task of managing the annual legislative agenda. He also suggested reviewing the recommendations of the local liaisons such as working within certain parameters with regards to the other local liaisons. The Committee agreed with his suggestions.

Chairman Frank stated there needed to be more discussion with a larger number of TPO

Committee members present and recommended deferring it to the next TPO Committee meeting. He suggested distributing the comments from the legislative liaisons, the comments from Mr. Townes, and to also invite members of the HRTPO to share their observations regarding the subject. Mr. Kearney also suggested sending a letter to the members of the General Assembly to ask their opinion regarding the position. The Committee agreed to send a letter to the Hampton Roads General Assembly delegation.

Chairman Frank stated there were only a few other items that needed closure such as the Title VI plan with VDOT and the Public Participation Plan. The next major piece would be to finish the Legislative Liaison issue and the Public Participation Plan. He believed there should be a proposed draft for an ad-hoc committee for legislative issues. Mr. Farmer stated that past TPO Committee meeting minutes read that the proposed ad-hoc committee for legislative issues would be deferred until a dedicated liaison was hired. Chairman Frank commented that since it was now undecided on whether the HRTPO would hire a dedicated liaison, he would like to see a draft on who might be on a legislative advisory ad-hoc committee from the HRTPO Board and what its role might be.

Chairman Frank asked if there were any other issues beyond those that would need to be addressed by the TPO Committee. Mr. Farmer stated there were a number of items that Staff would like addressed by the TPO Committee. He planned to draft a list, including time frames for each item, for the Committee. Mr. Kearney suggested that Mr. Farmer also explain the importance of the items on the list. Mr. Kearney believed the HRTPO should have a marketing department that could accomplish many items being addressed. Chairman Frank noted the HRTPO just hired Mr. Gonzalez as the Public Involvement and Community Outreach Administrator and that was part of the marketing concept.

Old/New Business

There was no old/new business. There being no further business, the meeting adjourned at 3:30 p.m.

LEGISLATIVE LIAISON

GENERAL DEFINITION OF WORK

The Legislative Liaison monitors current and proposed federal, state, and local legislation and keeps the Executive Director and the Hampton Roads Transportation Planning Organization (HRTPO) Board apprised on potential impacts of such legislation on HRTPO activities and issues. The Legislative Liaison maintains on-going communications with members of the U.S. Congress, the Virginia General Assembly (GA), the Commonwealth Transportation Board (CTB), and appropriate rulemaking federal and state agencies on behalf of the HRTPO. The foregoing is performed subject to the direction, supervision, and guidance of the Executive Director.

TYPICAL TASKS

- Monitor and evaluate all relevant legislation and/or regulations with respect to transportation, transportation related matters, and the HRTPO.
- Alert the HRTPO Board and staff to potential impacts of proposed legislation and/or regulations.
- Provide recommendations regarding legislation and/or regulations to the Executive Director and, if appropriate, to the HRTPO Board.
- Prepare weekly (during the GA session) and monthly (year-round) legislative reports, and a final summary of legislative action, for timely distribution to the HRTPO Board.
- Manage the development of the annual legislative agenda.
- Other duties as may be assigned from time to time.
- Coordinate with the appropriate legislative liaison staffs of HRTPO member jurisdictions.

KNOWLEDGE, SKILLS, AND ABILITIES

- Ability to represent the HRTPO in a professional manner.
- Ability to communicate the intent of federal and state bills/laws/regulations in a clear, concise manner – orally and in writing.
- Understanding of federal and state budget funding mechanisms and their effects on the HRTPO.
- Understanding of operations of Virginia state and local governments.
- Ability to work effectively with limited supervision.

EDUCATION AND EXPERIENCE

Graduation from an accredited college or university with a concentration in public administration, political science or communications plus five (5) years of relevant experience, or any equivalent combination of experience and training which provides the required knowledge, skills and abilities.

SALARY RANGE

\$75,000 – \$90,000

SOURCE OF FUNDING

PL Funds

FROM: DelGOder@house.virginia.gov
TO: Dwight Farmer
SUBJECT: HRTPO Legislative Liaison Position
DATE: 7/1/2009

Dwight,

Thank you for including me in the communications concerning this position. Speaking from my experience, I believe the TPO needs a legislative liaison to coordinate information to the legislators in Hampton Roads. In the past, legislators have primarily received information from our individual localities and not from the representative body of the region. In some instances I am aware of legislators that have little or no knowledge of the activities of the TPO. I believe this position could be an important position that helps open lines of communications to local legislators. If we structure the position correctly, I believe this position could grow with the TPO as we develop into the organization that we must become.

In consideration of the comments attached to the original email, I believe that the position does not need the level of professional experience that was described in the job explanation. I agree with the comments that a seasoned veteran may have a hard time limiting themselves to the strict limits outlined in the job description. Therefore, I suggest that the TPO continue to explore the opportunity for a legislative liaison but seek someone with less experience that can grow with the organization and the position as we continue to reform and grow the TPO.

Delegate Glenn Oder

FROM: sbwanner@james-city.va.us
TO: Dwight Farmer
SUBJECT: HRTPO Legislative Liaison Position
DATE: 7/2/2009

I'm ok with the proposals as drafted and experience requirements.

Sandy



Memorandum

TO: The TPO Committee
FROM: Peter M. Huber
DATE: July 13, 2009
SUBJECT: Potential Organization of the HRTPO as a Virginia Nonstock Corporation

By memorandum dated May 15, 2009, I reviewed the legal status of the Hampton Roads Transportation Planning Organization (“HRTPO”) under Virginia law. That memorandum concluded:

1. The HRTPO is a creation of federal law but does not have any independent enabling law in Virginia;
2. Absent the adoption of specific enabling legislation or establishment as a recognized entity under existing Virginia law, the HRTPO has virtually no defined rights and powers under Virginia law; and
3. There are two options to pursue clarification of the legal status of the HRTPO. The first is to seek new, enabling legislation by the General Assembly that would set forth the legal character and structure and the rights and obligation of the HRTPO under Virginia law. The second alternative would be to utilize an existing legal structure recognized under Virginia law. Incorporation as a non-stock corporation under the Virginia Nonstock Corporation Act would seem the most appropriate fit.

In its prior meeting, the TPO Committee expressed reservations about seeking detailed enabling legislation from the General Assembly, and this memorandum was requested to further discuss the specific steps that would be required, and the specific issues that require further examination, in connection with the possible incorporation of the TPO as a Virginia nonstock corporation. However, as noted in the final section of this memorandum, while utilizing a nonstock corporation would define a legal status for the TPO and would give it specific and detailed powers, it would not address in any way the unique Federal origins of the TPO, the resolution of existing lack of coordination between Federal regulations and certain state policies, or provide any uniformity in the treatment of Metropolitan Planning Organizations throughout Virginia.

Discussion

The Virginia Nonstock Corporation Act (the “Act”) is set forth in Virginia Code Title 13, Chapter 9, Section 13.1-801-13.1-980. The Act is employed most commonly for the organization

of and conduct of business by entities that are not organized for profit, as a counterpart to traditional corporations that issue stock as indicia of their ownership.

In substitution for stockholders, the Act employs the concept of “members.” While members do not have ownership interests in nonstock corporations, they have rights of control and management as defined by the articles of incorporation and bylaws of the individual nonstock corporation. However, a nonstock corporation may be created without members if so provided in its articles of incorporation.

A nonstock corporation has a board of directors and officers, equivalent to those of a stock corporation. A nonstock corporation must adopt and be governed by bylaws.

Among the rights that may be defined for members of a nonstock corporation are whether the members have the right to elect or appoint one or more members of the board of directors of the corporation. There may be both voting and non-voting members. If the decision is made to pursue creation of the corporation, the TPO will need to decide whether or not to identify corporate members. Those localities and other stakeholders defined by the current bylaws as having the right to appoint members of the TPO board of directors could be named as members and would have the right to appoint their respective voting or non-voting representatives on the Board. By law, members of a nonstock corporation may be granted additional powers, but that would not seem necessary or desirable if the governance of the entity is rest with the TPO board of directors. In the alternative, the corporation could be established without members, in which case the articles of incorporation and bylaws would need to identify the entities that are to have representation on the board of directors.

A corporation established under the Act is declared to have the purpose of engaging in any lawful purpose or purposes, unless its purposes are expressly limited by the Articles of Incorporation or by other state law. Again unless expressly limited by the Articles of Incorporation, a Virginia nonstock corporation has a right of perpetual existence, and all of the powers of an individual necessary or convenient to carry out its business. Those include, but are not limited to, specifically listed powers in Virginia Code Section 13.1-826. Those listed powers include the commonly thought of powers of a corporation to purchase, hold and sell personal and real property; the power to contract; the power to hire employees and establish pension and employee benefit plans; and the power to sue and be sued.

The process involved in establishing a nonstock corporation under the Act is straightforward:

1. Articles of Incorporation must be prepared and filed with the State Corporation Commission. The filings fees for the Articles of Incorporation and certificate of authority to do business are modest, approximately \$100. Under the Act, very few items must be stated in the Articles of Incorporation and most matters may be defined by the corporation’s bylaws. Those items that must be included in the Articles of Incorporation are:

- a. The corporate name;

- b. If the corporation has no members, a statement to that effect;
- c. If the corporation has members of different classes, either the rights and definition of those different member classes must be stated or the Articles of Incorporation must state that those provisions are provided in the bylaws;
- d. If the directors are not appointed by members, the manner in which directors are to be appointed, and a designation of any ex officio directors, must be stated; and
- e. The address of the initial registered office and name of the initial registered agent.

2. The Board of Directors must be formed. The initial directors may but are not required to be listed in the Articles of Incorporation. If the initial directors are not listed in the Articles of Incorporation, they must be appointed by the authorized members of the corporation or by whatever other procedure is provided for the appointment of directors. The board of directors must hold an initial meeting for the purpose of adopting bylaws, electing officers, and taking other necessary organizational action. Although the TPO currently has officers and adopted bylaws, those are not the officers and bylaws of a designated nonstock corporation so those actions would need to be replicated by the corporation's board following its creation. It appears that the only changes that might be required to be made to the form of the existing bylaws would be ministerial in nature, required to recognize and reference the existence of the corporate entity.

3. Additional actions that might be required to be taken by the Board would depend upon decisions made as to the conduct of its business, such as the selection of depositories for its funds and adoption of any necessary banking resolutions; adoption of any desired employee benefit plan documents; etc.

4. Once created, the nonstock corporation must file an annual report with the State Corporation Commission.

5. As the status of the TPO as the area's recognized metropolitan planning organization under Federal law flows from gubernatorial designation, a newly created nonstock corporation created for the purposes of carrying out the duties of the TPO should require redesignation by the Governor.

Recommended Further Steps

Before making a determination to establish a nonstock corporation under the Act to succeed to the duties and organization of the TPO, the following further steps are recommended or would be necessary:

1. To the extent possible, it should be determined whether this approach has been utilized by a metropolitan planning organization in any other state. (It is believed that no other metropolitan planning organization in Virginia has been established in nonstock corporate form.) The experience of a counterpart in another state could be instructive as to the process followed and any particular operational or legal issues that may have arisen.

2. Although the TPO is conducting itself as a “governmental body” and “public body” for purposes of Virginia statutes governing the activities and operations of public entities, and has declared itself such in Article IX of its existing bylaws, there is little if any precedent for the incorporation of a public or governmental body in Virginia. Further analysis should be undertaken to be certain that organization in a corporate form would not conflict with the characterization of the TPO as a governmental body, or limit in any undesired way any right or power that otherwise be available to a governmental body under Virginia law.

3. The TPO would need to decide whether its constituent entities would be designated as members of the corporation, or whether there would be no members and the entities would be identified and given the right to appoint the intended representatives on the board of directors. There may be substantive concerns or even legal barriers on the part of the Federal and state entities, such as the FHWA, in being named as legal members of a corporation.

4. By establishing a corporate form for the TPO, it would acquire a broad range of traditional but new and clearly defined operational powers. For example, the corporation would acquire the power to hire its own employees; hold, manage and disburse its own funds; etc. Careful consideration should be given as to the extent to which the TPO would plan to utilize those powers, many of which would entail additional operating complexity and expense and result in loss of the efficiencies and costs savings now realized through the sharing of services, staff and facilities with the HRPDC. Some new expenses associated with the creation of the separate corporate entity would be required, such as the expense of separate insurance coverage and, probably, the expense of a separate independent annual audit.

Alternatives To Use of a Nonstock Corporation For Consideration

In my memorandum of May 15, I discussed the adoption of enabling legislation by the Virginia General Assembly as the alternative to creation of a nonstock corporation that would define and clarify the status of the HRTPO. Concerns with the use of new enabling legislation were expressed due to the number of complex matters that would have to be addressed by that legislation and the risk of lack of direct control and participation in the resulting law.

As noted at the outset of this memo, utilizing a nonstock corporation would define a legal status for the TPO and would give it specific and detailed powers, but would not address in any way the unique Federal origins of the TPO, the resolution of existing lack of coordination between Federal regulations and certain state policies (such as the lack of correlation between the Six Year Improvement Program and the TIP), or provide any uniformity in the treatment of Metropolitan Planning Organizations throughout Virginia. For those reasons, specifically tailored enabling legislation would provide a more complete and detailed resolution of these

issues and framework for the operation of the TPO and other Metropolitan Planning Organizations in the state.

Consideration might be given to a third possible option, would which be to seek very narrow legislation from the General Assembly. If the objectives of the committee are to only (1) define the status of the HRTPO as a recognized public body under Virginia law and (2) define powers of the HRTPO, those objectives might be accomplished by a narrowly drawn bill that would state that Virginia's MPOs are public, governmental bodies and have all of the rights and powers of a Virginia nonstock corporation. Essentially, the powers that would be obtained by a formal incorporation could be bestowed by specific statute and incorporated by reference. Such a provision could be added to the one existing reference to MPOs in the Virginia Code and would require one, or perhaps two, sentences. This approach might address the objectives of the Committee and minimize the complications and risks associated with more detailed enabling legislation that have been identified. It would provide a clearer foundation for the TPO than taking the unusual step of creating a public body under traditional corporation law. However, it would not resolve the specific Federal/state coordination issues or address the detailed role of Federal law and regulation in the TPO with the clarity that could be provided in detailed enabling legislation.

**Second
Memorandum of Understanding
Between
The Hampton Roads Transportation Planning Organization
And
The Hampton Roads Planning District Commission**

This Second Memorandum of Understanding is executed as of _____, 2009, by and between the Hampton Roads Transportation Planning Organization, hereinafter referred to as HRTPO, and the Hampton Roads Planning District Commission, hereinafter referred to as HRPDC.

WHEREAS, by Memorandum of Understanding dated as of _____, the HRTPO and the HRPDC set forth certain terms by which the HRPDC would provide planning and administrative staff support to the HRTPO; and

WHEREAS, the parties have agreed that the HRPDC shall serve as fiscal agent for the HRTPO and now desire to set forth certain terms and conditions that will govern the provision of those fiscal services by the HRPDC, and the related rights and responsibilities of the respective parties with respect to those services.

NOW, THEREFORE, the parties hereby agree as follows:

1. The HRPDC shall receive, hold and disburse grant and other funds payable or belonging to the HRTPO. All funds and other assets of the HRTPO shall be separately identified in the books and records of the HRPDC.
2. Assets of the HRTPO shall be held and invested only in such accounts or in such form as are authorized for the investment of public funds under the laws of the Commonwealth of Virginia and any other applicable law, regulation or grant requirement.
3. Monthly, the HRPDC staff shall prepare and submit to the HRTPO Board a financial report reflecting all receipts and disbursements through the period covered by the report, and cash and cash equivalents on hand as of the date of the report. The books and records of the HRPDC relating to HRTPO funds and assets shall be open to review and inspection at all times by the officers and Board of the HRTPO, or their designee, upon reasonable notice.
4. To the extent required by any third party, the HRPDC shall serve as the applicant for and recipient of state, Federal and other grants for and on behalf of the HRTPO. The HRPDC shall submit grant applications on behalf of the HRTPO upon approval by the Boards of both parties.

5. In the provision of staff services to the HRTPO, HRPDC staff shall prepare and submit to the Board of the HRTPO for its approval a proposed annual budget. Allocable costs of HRPDC staff performing services for and on behalf of the HRTPO, costs of supplies and equipment to carry out the work of the HRTPO, and allocable costs of overhead and third party services shall be reflected in the proposed budget. Upon approval of the annual budget by the HRTPO, payments and disbursements of HRTPO funds shall be made only in accordance with the approved budget and any amendments thereto approved from time to time by the HRTPO.
6. The provision of all fiscal services by the HRPDC shall in all events conform to and comply with the requirements of all applicable regulations as determined by the Federal Highway Administration, the Virginia Department of Transportation, the provisions of state, Federal or other grants, and all other applicable law.

In Witness Whereof, the parties have caused this Second Memorandum of Understanding to be executed by their duly authorized officers as of the date first set forth above.

William D. Sessoms, Jr.
Chairman
Hampton Roads Transportation Planning Organization

Bruce C. Goodson
Chairman
Hampton Roads Planning District Commission