

RECORD OF PROCEEDINGS

MINUTES OF THE REGULAR BOARD OF DIRECTORS OF THE
HIGH PERFORMANCE TRANSPORTATION ENTERPRISE (HPTE) (Room 225 and HQ Auditorium)

Held: Wednesday, December 17, 2014; 12:00

4201 E. Arkansas Ave, Denver, CO 80222

A meeting of the Board of Directors of the HPTE was convened in accordance with applicable statutes of the State of Colorado, with the following Directors present:

Attendance: Tim Gagen, Chair Don Marostica Brenda Smith
Kathy Gilliland, Vice Chair Gary Reiff
Doug Aden Trey Rogers

Chair Gagen called the regular meeting to order @12:00pm in Room 225

Roll call was taken to establish a quorum, all were present.

General Discussion The HPTE Board engaged in discussion of matters relating to subsequent agenda items, upcoming projects, and administrative and budget matters.

Director Cheroutes reported on the following:

Director Cheroutes reported on the I-25 Corridor North activity. The North I-25 Corridor was discussed with the RAMP Governance Committee and Region 4 two weeks ago. Director Cheroutes also stated that the RAMP Governance Committee was recommending that \$35 million of the RAMP allocation to HPTE be moved to the Northern I-25 managed lanes as a result of more corridor activity. Resolution #150 on today's agenda recommends this allocation. Director Cheroutes stated it shows support to the corridor.

Vice Chair Gilliland added that the Northern Colorado officials and business leaders are pursuing every avenue in lobbying for the widening of Interstate 25 between Fort Collins and Longmont.

Megan Castle spoke about the HPTE communications and public relations activities over the last month. She discussed the re-branding efforts of HPTE. Upon concerns expressed by Executive Director Don Hunt regarding the re-branding, the Board agreed to table this item until January.

Meeting Break (12:40) Regular Board meeting moved from Room 225 to the Auditorium.

Chair Gagen reconvened the regular meeting @1:00pm in the Auditorium.

Board reconvened and roll was called to re-establish a quorum after a short break, all were present. Chair Gagen stated for the record, a change in Agenda item 8, HPTE Rebranding efforts, will be moved to the following month for a formal presentation.

Approval of minutes Resolution #149: Director Marostica moved approval of the November 19, 2014, meeting minutes. Upon a second by Vice Chair Gilliland, the minutes were approved by all present.

Chair Gagen wanted to note for the record a correspondence received dated December 17th, from Karen Hammer of Hammer Law. He went on to add the correspondence will be made part of the record, with no further discussion, Chair Gagen welcomed public comment.

Public Comment @ David May, President and CEO of the Fort Collins Chambers of Commerce, reminded the HPTE

1:10pm:

Board that he presented to the Board in September and was glad to be present in front of the HPTE Board again. Mr. May said he is here representing the Northern Colorado Legislative Alliance, along with Chairman Steve Toole of NCLA.

The business community in the two-county region has created the Fix North I-25 Business Alliance, a strategic initiative of the Northern Colorado Legislative Alliance. Collectively they represent thousands of companies that employ over 100,000 people. They are involved in many initiatives in Northern Colorado that impact the employment community and the economy. Mr. May said that none are more important than the traffic mobility on I-25. The two counties in Northern Colorado Region 4 currently has 584,670 residents, and according to our state demographers the population will double between now and the year 2040. The I-25 corridor currently functions at a level service D and will decline to a level service of F by the year 2035. Unless something is done, it will routinely take three hours to get from Fort Collins to Denver and Denver International Airport. Mr. May introduced Steve Toole, Chairman of Fort Collins Chamber of Commerce, who represented House District 53 from 1995 through 2000, and became the chair of JVC and then served as Sr. Director of the DMV, later becoming the Executive Director of Healthcare Policy and Financing, leaving state government in 2006.

Steve Toole, Chairman of Fort Collins Chamber of Commerce, thanked David May and said that he is here today to ask HPTE Board support on Agenda item 9, Resolution #150, which will allow the use of RAMP funds for the crossroads interchange expansion project over I-25, by adding a third lane to I-25 each way between Highway 14 in Fort Collins and Highway 66 in Longmont. He also stated North I-25 is rapidly changing from Northern Colorado's "Main Street". Mr. Toole said additionally that the news media has reported fatalities between Highway 14 and Highway 66 have increased this year or previous years. Mr. Toole said while this system is the responsibility of Federal and State government to improve and maintain, he wanted to let the Board know they have local business partners to support the Board's efforts on behalf of I-25 North. The business community in the two-county region has created the Fix North I-25 Business Alliance, a strategic initiative of the Northern Colorado Legislative Alliance to bring attention to this corridor and advocate for it. They are mobilized to help. Mr. Toole thanked the HPTE Board with special thanks to Vice Chair Kathy Gilliland, Director Don Marostica and Johnny Olson and Myron Hora of Region 4 for their support.

Attorney Karen Hammer of Hammer Law stated that under the provisions of the Taxpayers Bill of Rights (TABOR) HPTE is no longer an enterprise. She said the June, 2014 transfer of \$1 million to HPTE by the Transportation Commission is more than 10% of HPTE revenues, and therefore is really a grant. She said TABOR is a constitutional provision that trumps the FASTER legislation, and that now HPTE needs voter approval to enter into multi-year fiscal obligations because there are no reserves on hand to repay the debt. Ms. Hammer submitted the attached comments.

Before moving on to the next agenda item, Director's Report, Director Reiff asked if the Chair would reorder the agenda to address items 9 and 10, as he has to leave the meeting early. Chair Gagen agreed.

Considering Recommendations regarding an allocation from RAMP Resolution #150:

Staff requested that the Board approve Resolution #150 supporting the selection of the Crossroads Interchange expansion project over I-25 for \$35 million for RAMP funding. Director Gilliland made a motion to approve, citing a need to change wording in the Resolution to delete the Highway 34 reference and just to specify the Crossroads Interchange expansion over I-25. Upon a second by Director Marostica, Resolution #150 was approved by all present. Director Gilliland expressed thanks to the Northern Colorado business coalition for their support on the I-25 North project.

Authorizing the Execution and Delivery of a Loan Agreement and Intra-Agency

Director Cheroutes said this loan will finance the remaining construction for the I-70 PPSL project. HPTE will repay the \$25 million Note from toll revenues over a 7-year term for the PPSL. CDOT will enter into an Intra-Agency Agreement to provide an annual request for credit support to HPTE if needed. Mike Johnson, of Kutak Rock which provides bond counsel to HPTE, said he is comfortable that HPTE will retain its enterprise status. AG's representative Kathy Young agreed, saying her office had done

Agreement with
CDOT for the I-70
PPSL Project
Resolution #151:

additional due diligence on this matter, and is confident that the loan received by HPTE from CDOT will not jeopardize HPTE's enterprise status. Director Cheroutes said that an interest rate of 2.79% can be locked in for two business days until close, and that he expects that to happen on Friday. Staff is requesting that the Board approve the Loan Agreement between HPTE and Banc of America Preferred Funding Corporation, and the IAA between CDOT and HPTE. Upon a motion by Director Reiff to approve the Resolution subject to a 3% initial interest rate cap and a second by Director Rogers, Resolution #151 was approved by all present.

Director Reiff was excused from the rest of the Board meeting.

Director's Report:

Director Cheroutes reported that a pro-forma business plan will be presented to the Board in January. It will demonstrate HPTE's self-sufficiency for the next 10 years. He also said HPTE is in the last stages of a legislative audit, and findings will be forthcoming in January. Director Cheroutes said HPTE is in talks with Plenary regarding details of the US 36 Phase 1 opening, which is anticipated in July. He noted that the Annual Report to the state legislature will be posted by January 15. Director Cheroutes said that the C-470 and I-25 North corridors continue to be corridors of financing challenge, and that the loan approved today for the PPSL will become an important template for financing in the future. He also said HPTE continues to work with the Transportation Commission on alternative for the I-70 Viaduct project, and that a Commission workshop on that topic will be held later this afternoon.

OMPD Report

Peter Kozinski reported that OMPD is assisting HPTE with the commercial bank loan for the PPSL, and that is expected to close on December 19. He also reported that there is \$35 million in RAMP funding for I-25 North, as approved by Resolution #150 earlier. Mr. Kozinski said that the C-470 investment grade traffic and revenue analysis by the Louis Berger Group is progressing as expected, and that there will be a meeting with TIFIA in early January to familiarize them with that project. He said an official Letter of Interest will be submitted to TIFIA at the end of January.

Adjournment:

There being no further business to come before the Board, the meeting was adjourned.

HAMMER

LAW

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December 17, 2014

High Performance Transportation Enterprise
Transportation Commission

Please circulate these comments by Hammer-Law on behalf of our client Cliff Smedley for use at the December 17 and December 18, 2014 meetings.

The HPTE Board and the Transportation Commission will consider at their respective December meetings resolutions to approve transactions related to the financing of the I-70 Peak Period Shoulder Lanes. The public has not been provided with full and timely notice pursuant to Colorado's Open Meeting Laws (Sunshine Laws) that is appropriate for a matter of this complexity. Nor has the agenda information that is otherwise publicly available informed either the HPTE Board or the Transportation Commission of serious Taxpayer's Bill of Rights (TABOR) problems that are relevant to determining whether such resolutions should receive approval of these public bodies. Hammer-Law has previously raised TABOR concerns to HPTE and the Commission. The failure to mention and address these concerns in materials provided to the public prior to the December meetings prevents the disclosures from providing full and timely notice.

Full and timely notice is judged by looking at what the average person would understand when reviewing such notice. The HPTE Agenda for December 17, 2014, was intentionally not provided to the public in accordance with the custom of HPTE on the Friday before the meeting. Instead, the agenda was withheld. Materials in the agenda packet make clear that HPTE staff elected to withhold the agenda so that no disclosures were made to the public until within the 48 hour window within which the commercial lender would guarantee a specific interest rate. The result is that the public has had less than 48 hours to review over eighty pages of material relating solely to this

agenda item, as well as to review the remainder of the agenda packet. This is not adequate time for the average member of the public to read and digest the information in order to make fully informed public comment.

TABOR

The Transportation Commission has repeatedly transferred funds to HPTE to cover HPTE's basic operating expenses. The Commission and HPTE appear to rely on the language in the FASTER legislation that purports to define any transfer from the Commission to HPTE as a loan for purposes of TABOR. However, the FASTER statute cannot alter the TABOR classification of transfers such as these.

The General Assembly had previously interpreted grants as being any "direct cash subsidy or other direct contribution of money from the state or any local government in Colorado which is not required to be repaid." Colo. Rev. Stat. § 24-77-102(7). That definition is consistent with TABOR itself. FASTER's definition is not consistent with TABOR. If grants to an enterprise by state and local governments equal or exceed 10%, then the entity receiving such transfer loses its enterprise status under TABOR.

The key to determining whether a transfer triggers TABOR's cap lies in the words "not required to be repaid." In June 2014, both the HPTE Board and the Commission approved a \$1 million transfer to HPTE that did not involve an absolute requirement that such funds be repaid by HPTE to the Commission. Instead, HPTE is only required to repay funds to the Commission *if and when* HPTE had revenues available to do so. Even if HPTE has the funds available, if the HPTE Board declines to authorize such repayment, the so-called "loan" documentation mandates that HPTE will not be in default. Therefore, under these terms HPTE has no absolute obligation to repay.

HPTE took specific steps – we believe improperly – to ensure that revenues that it otherwise previously received were instead paid directly to Plenary Roads Denver LLC. HPTE, therefore, cannot claim these revenues as its own. The only revenue generated by HPTE is significantly less than HPTE's operating expenses. And that is the reason the Commission has had to transfer funds to HPTE. HPTE is not currently self-sufficient. HPTE made decisions to take revenues otherwise available to it and to have these revenues flow to Plenary rather than to HPTE. Even FASTER's erroneous reclassification of funds by the Commission to HPTE as loans rather than grants only permits this classification for the time period before which HPTE received revenues and issued bonds. Once HPTE started to receive revenues and issue bonds, the

Commission could no longer attempt to reclassify grants as loans, even under FASTER.

The materials presented by former Office of Major Project Development Director Ben Stein to the June 2014 meetings of the HPTE Board and the Commission establish that the Commission's transfer of \$1 million to HPTE was well in excess of 10% of HPTE's revenues. Therefore, HPTE was no longer an enterprise as of the date of such transfer (and likely was not an enterprise prior to that time because of other transfers of funds from the Commission that exceeded the TABOR cap).

Now that HPTE is no longer an enterprise for purposes of TABOR, HPTE cannot enter into any multiple fiscal year financial obligation without either voter approval or adequate reserves to repay this obligation. The commercial loan and the documentation supporting this loan that are on the agendas for today's HPTE Board meeting and for today and tomorrow's Commission meetings are multiple fiscal year financial obligations for which HPTE does not have existing adequate reserves to guarantee repayment. Therefore, voter approval is required before HPTE can engage in this transaction.

Please know that both Hammer-Law and our client Cliff Smedley are very strong supporters of appropriate transportation projects. However, the only way to ensure a strong future for Colorado transportation is by following existing laws. Smedley is not a supporter of TABOR, but TABOR is the law. The transparency and accountability laws limit the powers of both HPTE and the Commission. As Board members and Commissioners, you have sworn to uphold these laws.

If the future of highway transportation is undermined by TABOR, simply defying TABOR undermines the critically important rule of law that is vital to the health of the State of Colorado. TABOR exists until it is altered or repealed. Your obligation to uphold the law requires you to ensure compliance with TABOR while it remains in force, no matter how inconvenient or even destructive TABOR might be.

Please let me know if you have any questions.

Regards,

/s/

Karen A. Hammer
Principal