

RECORD OF PROCEEDINGS

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

Held: Wednesday, January 21, 2015; 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 (excused) | Brenda Smith (telephone) |
| | Kathy Gilliland, Vice Chair | Gary Reiff | |
| | Doug Aden | Trey Rogers | |

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

Roll call was taken to establish a quorum, and it was noted that Director Marostica was excused.

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 that an Executive Session of the Board was scheduled to take place in the Auditorium, after an abbreviated lunch discussion, with the subsequent agenda items to occur after the executive session. The planned executive session was to discuss the detail of the draft I-70 East Corridor Project Value for Money (VFM) report prepared by Macquarie Capital and to have representatives of Macquarie answer questions. Macquarie Capital conducted an extensive Value for Money (VFM) analysis on the I-70 East Corridor Project. The analysis looked at the total cost of delivering various alignments and scopes as well as three different procurement methods. The purpose was to identify the scope and delivery method that fit within CDOT's funding which represents the best public policy.

There was a vigorous discussion between Board members and staff about whether the HPTE Board should go into Executive Session to discuss the I-70 VFM report. Director Cheroutes stated that the VFM study contained, in his opinion, information, that if released to the public, could be used to the financial disadvantage of CDOT in this I-70 procurement process and that was the reason to go into the Executive Session.

CDOT Executive Director Don Hunt went on to add that he agreed with Director Cheroutes that there are details in this report that should be kept confidential so not to limit competition in the eventual I-70 procurement.

Director Reiff stated that he was willing to go into a limited Executive Session to address solely those issues contained in the VFM report that should be kept confidential. He went to state that he believed there are challenges with the Macquarie report that needed to be discussed in a public session.

Director Aden also stated that he too had some reservations about the Executive Session and that transparency on this project is an important issue.

Director Smith stated that we need to be sensitive to and learn from past experiences and added that if there was any way that the Board could avoid an Executive Session, it would be beneficial.

Director Rogers suggested that the Board may want to have a public discussion of the public portions of the VFM report and then decide if an Executive Session was necessary unless this approach would not work with the timeline for the I-70 project.

Vice Chair Gilliland went on to state that while she wanted to make sure that the HPTE Board is as transparent as possible through this process, she also would like the opportunity to go into Executive Session to have the ability to discuss the confidential portions of the VFM report. Executive Director Don Hunt went on to add he thinks the dilemma we have, is that you start to have questions for Macquarie and you start to drill in on specific aspects on the report, that's problematic to the public. They don't have the report, so I think what you do in public session has to be structured much more generally about the report and if you're going to drill in on specific pages, to me that is what the Executive Session is for. The public does not have this report and is considered confidential proprietary to maintain competition.

Chair Gagen summarized that he was hearing that from the Board that the desire was to discuss the VFM report in public as much as possible. After further discussion, it was decided that the Board would move to go into a limited executive session during today's Board meeting held in the auditorium.

Director Cheroutes concluded his report by stating that he has been spending his time on the VFM and Executive Session. During the meeting in the auditorium, there will be a report on the scope and funding of the C-470 project. There will also be a report from CDOT CFO Scott Richrath talking about some operating funding for the Board. Director Cheroutes also reported that US 36 Concessionaire Plenary Roads Denver is working on a request for an adjustment on tolling schedule when the road opens. The Board will revisit Plenary's new schedule next month and item 12 on the agenda was removed.

Meeting Break
(12:35-12:40)

Regular Board meeting moved from Room 225 to the Auditorium.

Chair Gagen reconvened the regular meeting @12:40pm in the Auditorium. convened the regular meeting

Board reconvened and roll was called to re-establish a quorum after a short break. All directors present with the exception of Director Marostica.

Approval of minutes
Resolution #152:

Vice Chair Gilliland moved approval of the December 17, 2015 meeting minutes, and attaching to them an email from Karen Hammer to Mike Cheroutes, without accepting or acknowledging the contents of that email. Upon a second by Director Rogers, the minutes were approved by all present.

Public Comment @
1:10pm:

No Public Comment, but the Board had received a letter from attorney Karen Hammer and the letter is attached to these minutes.

Director's Report:

Director Cheroutes went to say he would make his comments short to save time for the end of the meeting. He also wanted to note the special meeting scheduled for February 4th, was no longer a date on the calendar and just wanted to inform the public.

OMPD Report:

Acting Director Peter Kozinski thanked the HPTE Board and spoke about the on-going efforts of the I-70 East Project, the C-470 Project and the I-70 Mountain Corridor eastbound peak period shoulder lanes and the closing of the PPSL Loan

Chair Gagen asked Acting Director Kozinski was the revenue analysis based on that design and Acting Director Kozinski said that was correct.

Director Reiff commented on maybe this is better question for Tony DeVito, he went on to add the traffic impact of that without the ability of going Eastbound to transition how has that been looked at?

Acting Director Peter Kozinski went on to note that we have looked to merging over to add lanes.

Director Cheroutes went on to comment design work of RTD using new lanes and having conversation with RTD and having these available for transit.

Acting Director Peter Kozinski went to state they have been in conversation with RTD have recognized limited access to the light rail in that area on C-470 as well as limited RTD activity. He went on to add last Tuesday he met with TIFIA and they were excited. One of the question they had for us gross or net pledge on the toll revenue on the TIFIA loan.

Chair Gagen wanted to know how the public process is going.

Acting Director Peter Kozinski went to add the public process is going amazing, C-470 not appropriate for a P's Public Privet Partnership. Louis Berger has finalized the investment grade study, we plan to submit a letter of interest in to TIFIA later this month.

Director Cheroutes wanted to know when will be seeing some number regarding this.

Acting Director Peter Kozinski we anticipate having a preliminary look of the analysis, for the final report by June July frame. That covers the update that I have.

Chair Gagen asked for Megan Castle to come up and give an update on the public outreach.

Megan castle went on to comment about the HPTE outreach. On January the 5th, we had the smart hearing, we presented to the legislature required hearing, accompanied us was Dale Bonner from Plenary, had a discussion with Senator Nancy Todd, she had questions about P's and HPTE. We also went to the Boulder Daily Camera along with US 36 Solutions talking about express lane education. Wanted an update about the express lane outreach. We are also working with the Denver Metro Chamber to set-up a P'3 alliance. February 6th, we have another P's alliance with the Beuchner Institute where Michael Cheroutes will be a key speaker.

Chair Gagen wanted an update about the HPTE Logo re-branding efforts.

Megan Castle stated that with our branding effort we had to take a step back, it's on the back burner to see how that is best to be rolled out. We plan to get advice from the board but, but it's an ongoing effort.

Director Cheroutes want the Board to note that Amy and Megan Castle have been working on the express lanes video.

Megan Castle went on to say we are working on how to use express lanes videos. Launch a 5 minute video on the website and showing people how to use the switchable transponder.

HPTE Revenue Source (Scott Richrath):

CDOT CFO Scott Richrath presented to the Board a HPTE 10-year preform plan. Mr. Richrath explained that HPTE provides necessary benefits to CDOT based on comparable tolling agencies and their related publicly available documents. Mr. Richrath outlined a plan for CDOT and HPTE to enter into an agreement in which CDOT will reimburse HPTE for defined areas of work. He said that the plan was to have this agreement in place by 2016 if not sooner.

Vice Chair Gilliland was glad to see the detail and waits to see the outcome of this analysis. See what value is put on some of those efforts.

Annual Report to the Legislature (Kari Grant): Kari Grant presented to the Board the HPTE 2014 Annual Report. The report an overview of HPTE's work, activities, and programs as well as finances and the status of current projects. She went on to add US 36 is Express Lanes projects is well underway, HPTE's Public Private Partnerships with Plenary Roads. She also noted that active corridors are C-470, I-70 East and West as well as I-25 North Corridor, stating HPTE is exploring potential delivery approaches in these corridors, with improvements.

Director Cheroutes went on to add this report is by statue to be made public and will be formally filled with legislature by February 15.

Approving Master Calendar for 2015 Resolution 153: Director Aden moved approval for Resolution 153, upon seconded by Director Rogers, Resolution 153 Master calendar for 2015 was approved.

Approving Supplemental Budget Resolution 154: Staff requested the Board to approve Resolution 154, approving the First Budget Supplemental for FY 2015. Piper Frode informed the Board about the budget amendment is a result to staff efforts to identify and liquidate expired or completed Purchase Orders (PO's). Identifying addition FY2015 for both fund 536 and 537. She went on to add to date staff has identified 17 Po's that have been liquidated. Liquidating these expired Po's will allow HPTE to utilize the funds in other areas. Over \$575 thousand identified. Director Smith moved for approval for Resolution 154. Upon second Vice Chair Gilliland., Resolution 154 approved Supplemental Budget.

Chair Gagen went on to add agenda item 12 to our next meeting. Which leaves us to our Executive Session. Colorado Statutes Section 24-6-402(3)(a)(II). HPTE January Board meeting is reconvened.

Executive Session 1:13pm: Chairman Gagen asked for a motion to move into Executive Session (script attached to these minutes). the Board voted affirmatively by all present to go into Executive Session for the purpose of discussing matters to kept confidential commercial and financial delivery matter located in Colorado pursuant to Colorado Revised Statutes Section 24-6-402(3)(a)(II). The members of the public were excused.

The topic of the Executive Session was to discuss matters related to confidential commercial and financial information surrounding the development and procurement of the I-70 East Project.

Executive Session Ends @2:13pm: Upon a motion by Director Rogers and second by Director Gilliland, the Board voted affirmatively by all present to move out of Executive Session.

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

HAMMER LAW

Karen A. Hammer, J.D., LL.M.
Principal

Barbara K. Brown, Ph.D.
Sr. Strategy Advisor (not a lawyer)

**3773 Cherry Creek Drive, North
Suite 575
Denver, CO 80209
303.204.4447
hammer@hammer-law.com**

January 21, 2015

VIA EMAIL

High Performance Transportation Enterprise
c/o Secretary Sharon Williams

Dear HPTE Board and Mr. Michael Cheroutes:

Please ensure that this letter and all attachments are distributed for the January 21, 2015 High Performance Transportation Enterprise Board (HPTE) meeting and included in the minutes for such meeting.

Agenda Item 8: HPTE Revenue Source

CDOT CFO Scott Richrath is scheduled to present this agenda item, for which the public was provided a copy of the "HPTE Revenue Source" report. However, the report does not disclose sufficient data that apparently formed the basis of such report. The public does not have sufficient information to effectively review the report prior to the public meeting and to make meaningful public comment thereon either in writing prior to or orally during the public comment period.

By way merely of example and without limitation, Hammer-Law raises on behalf of our client Cliff Smedley, the following objections to such report:

- a. Page 4 of the report states that unspecified data gathered from "other tolling entities" was reviewed and, on the basis thereof, some unnamed entity or person "[d]etermined that \$2.7M is a reasonable amount for HPTE to invoice CDOT annually" for vaguely identified services. The data upon which this determination was made have not been revealed to the public and, therefore, the public cannot review, verify, or analyze this

information in order to establish and/or comment on whether this determination is reasonable.

- b. The report includes a letter from Stifel, Nicolaus & Co. that refers to appendices. However, the version distributed to the public fails to identify any portion thereof as constituting such appendices.
- c. The Stifel letter specifically states that no person other than CDOT may rely on the advice given in the letter. Therefore, the HPTE Board members may not rely on such letter to satisfy their legal duties.
- d. Page 5 of the report states that the North Texas Tollway Authority (NTTA) provided \$285,051 in "Project Development" services to some unnamed entity. On the basis of this figure, HPTE now asserts that it should be able to invoice CDOT for project development services in approximately the same amount. It seems an odd and unsupported coincidence that NTTA and HPTE provided within \$51 of the same value of services for project development over an unspecified time period. The public is not provided with any data that form the basis for the conclusion that HPTE performed or intends to perform this level of services. The fact that NTTA arguably did so is irrelevant for purposes of identifying and valuing services performed by HPTE. Nor does the report disclose why the services provided by NTTA are reasonably related to any specific service performed by HPTE for CDOT in terms of scope, size of the project, number of work hours, or any other factor that would influence the value of project development services, if any, HPTE performs for CDOT. HPTE currently relies on CDOT staff to perform many of its functions. HPTE provides no explanation about who performs the services for which HPTE plans to invoice CDOT – the public can reasonably conclude that CDOT's own staff is performing the bulk of these services. HPTE cannot credibly charge CDOT for having CDOT's own staff perform services. Rather, one would reasonably assume that CDOT should be able to invoice HPTE rather than vice versa. The HPTE Revenue Source report reflects on page 5 a similarly faulty analysis for each of four other categories of services which HPTE claims to perform for CDOT.
- e. The report on page 5 asserts that "CDOT's payment [to HPTE] will be Federal funds whenever possible." No information is provided about the types of federal funds CDOT may appropriately use to fund HPTE activities. The only conceivable reason for using federal funds is the previously stated belief by HPTE that transfers of federal funds to HPTE by CDOT will be excluded from revenue calculations under TABOR for

purposes of determining HPTE's ongoing eligibility for enterprise status. However, the key determining factor in how to characterize revenues received by HPTE for purposes of calculating its enterprise status is not the initial federal source of such funds, but whether the federal funds were specifically allocated by the federal government to benefit HPTE. See, *The TABOR Foundation v. Colorado Bridge Enterprise*, 12 CV 3113 (Denver District Court, July 19, 2013) *slip op.* at 10 ("Funds from the Federal Highway Administration allocated to the CBE were never credited to CDOT's state treasury account and there was no transfer from CDOT to the CBE under this process"). Clearly, the structure anticipated by the HPTE Revenue Source report relies on grants by CDOT to HPTE – the fact that CDOT will scour its own revenue sources to find some spare funding that happens to have a federal source is irrelevant. The true source of the funds would remain the state, which is electing to use some of its available funding to pay HPTE for the sole purpose of circumventing TABOR. Hammer-Law notes that the hunt for new ways to classify state funds transferred to HPTE was triggered by our assertion on behalf of our client Cliff Smedley that past and current transfers have stripped HPTE of its former enterprise status for purposes of TABOR exemption.

- f. The Stifel letter that is part of the HPTE Revenue Source report concludes that, based solely upon the assumptions provided by CDOT to Stifel, CDOT can provide funds to HPTE as alleged payment for services from HPTE to CDOT. Apparently, the information provided by CDOT to Stifel purports to achieve the self-serving purpose of justifying CDOT's proposed plan to flout TABOR when making payments to HPTE. Therefore, the Stifel letter is not any more reliable than the information provided by CDOT to Stifel. The HPTE Board and the Transportation Commission cannot pretend to be relying on Stifel to justify any reasonable decision on this issue because CDOT is relying on its own analysis and data.

Agenda Item 12 Surcharge for License Plate Tolls

No information has been provided to the public on agenda item 12. Therefore, no action can properly be taken on this agenda item because of this obvious Sunshine Law violation.

Please let me know if you have any questions.

Regards,

/s/

Karen A. Hammer
Principal