METROPOLITAN COUNCIL RESPONSES TO OCTOBER 26, 2020 TESTIMONY ON BEHALF OF METRO GOVERNANCE TRANSPARENCY INITIATIVE BEFORE THE GOVERNOR'S BLUE RIBBON COMMITTEE

Submitted by the Office of General Counsel

2015 FTA/FHWA Letter. In an August 3, 2015 letter (**Attachment 1**) the FTA and FHWA determined the Council complies with the requirements of federal law in its role as the Metropolitan Planning Organization (MPO). During her testimony, Ms. Goering indicated the 2015 letter was issued by "local" offices of the federal agencies and suggested the letter had not been reviewed by DOT legal staff.

In a January 13, 2011 letter (**Attachment 2**) responding to a Scott County inquiry about the Council's status as the MPO, the FHWA's Minnesota Division Administrator stated: "The law, as stated in 23 U.S.C. § 134(d)(3) is very clear that so long as there was a State Law in effect on December 18, 1991 that provided for a public agency with multimodal transportation responsibilities, the federal government should accommodate the State's wishes regarding the public agency's structure." The Division Administrator said his office "**consulted with our Chief Counsel and our Headquarters Planning staff to ensure that we thoroughly vetted the issue before reaching a determination**."

2016 DOT Letter. In a February 1, 2016 letter (**Attachment 3**) the U.S. DOT confirmed the FTA and FHWA August 2015 determination that the Council is the "properly constituted MPO for the region" because no substantial changes occurred that would require redesignation of the MPO. **The 2016 letter was issued by the FTA and FHWA Regional Administrators of the U.S. DOT's Washington D.C. headquarters**; not the agencies' Minnesota Division or Chicago Regional offices.

Grandfathering 2016. The DOT's 2016 letter (**Attachment 3**) noted that congressional amendments to the federal FAST Act which did not amend the grandfathering provision were "**a strong indication that Congress concurs with the agencies' interpretation of that provision**." The DOT's letter cited a United States Supreme Court decision for the proposition that "Congress' reenactment of [a statute], using the same language, indicates its apparent satisfaction with the agencies' interpretation of that provision." **The fact that the DOT letter cited United States Supreme Court decisions** (using standard legal citation format) **clearly indicates the DOT letter was reviewed, if not drafted, by DOT legal counsel.**

Grandfathering 2018. **Congress had the opportunity to change the grandfather provision in 2018 but declined to do so.** A House amendment to the FAA Reauthorization Act of 2018 that would have eliminated the MPO grandfather provision as it applies to the Council (**Attachment 4**) did not survive the legislative process. The amendment was *not* included in the FAA Reauthorization Act of 2018 that was passed by the 115th Congress and signed into law in October 2018.

Local and Elected Official Representation. In a November 19, 2018 letter from attorney Ann Goering addressed to FHWA and FTA administrators in St. Paul, Chicago, and Washington D.C. (**Attachment 5**), Ms. Goering asserted: "The Obama Administration's erroneous conclusion [about the Council's status as the MPO and its compliance with federal MPO law] leaves local communities, including the suburban counties . . . without any meaningful say in the metropolitan planning process." **Local communities and suburban counties are well-represented on the TAB and in the metropolitan planning process.** The TAB comprises 34 members (**Attachment 6**), 30 of whom (88%) represent counties, cities, and transit/transportation interests. More than half of the TAB members are elected officials who represent local interests in the MPO decision-making process.

ATTACHMENT 1

U.S. Department of Transportation
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August 3, 2015

Ann R. Goering
Ratwik, Roszak & Maloney Attorney
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Minneapolis, MN 55402

Dear Ms. Goering:

This letter is in response to your letter dated May 8, 2015, which claims there were significant inaccuracies in the 2012 Transportation Management Area (TMA) certification review report pertaining to the Metropolitan Planning Organization (MPO) designation of the Metropolitan Council (Council) for the Minneapolis-St. Paul Metropolitan Area. You assert that the 2012 Report erroneously concluded that the Council's Advisory Board is part of the Twin Cities MPO. Additionally, you assert that Council is not in compliance with 23 U.S.C. §134, requiring that the MPO be redesignated.

The wording used in the last TMA certification review, describing the MPO as the Council and the Transportation Advisory Board (TAB), was inaccurate. The TMA certification review report section covering the MPO designation will be changed to more accurately describe the designation and responsibilities in the next certification review.

The Council is the designated MPO for the Twin Cities Region, and the Council officials are responsible for carrying out the metropolitan transportation planning process [MN Statute 473.146 subd. 4(a)]. The TAB is an advisory body to the Council [MN Statute 473.146 subd. 4(b)]. The TAB is not designated as the MPO, and its membership is not consistent with 23 U.S.C. 134(d)(2).

That said, the Council is the properly designated MPO, in compliance with 23 U.S.C. §134. The limitation on statutory construction, known as the grandfathering exemption, continues to apply to the Council. Specifically, 23 U.S.C. §134 states in relevant part:

> (3) Limitation on statutory construction.-Nothing in this subsection shall be construed to interfere with the authority, under any State law in effect on December 18, 1991, of a public agency with multimodal transportation responsibilities-
>
> (A) to develop the plans and TIPs for adoption by a metropolitan planning organization; and
>
> (B) to develop long-range capital plans, coordinate transit services and projects, and carry out other activities pursuant to State law.

> (4) Continuing designation.-A designation of a metropolitan planning organization under this subsection or any other provision of law shall remain in effect until the metropolitan planning organization is redesignated under paragraph (5).

See 23 U.S.C. 134(d)(3) & (4).

The Minnesota State Law, that provided the Council with multimodal transportation responsibilities, was in effect on December 18, 1991. The exemption from the MPO structural requirements contained in 23 U.S.C. 134(d)(2) has been continued in law under 23 U.S.C. 134(d)(4) until such time as the MPO is redesignated.

While the Council has been altered by State Statute a few times over the years, the changes were not 'substantial' so as to require a redesignation. 23 C.F.R. 450,310(k) sets forth those instances when redesignation of a MPO would be required. It states:

> Redesignation of an MPO (in accordance with the provisions of this section) is required whenever the existing MPO proposes to make:
>
> (1) A substantial change in the proportion of voting members on the existing MPO representing the largest incorporated city, other units of general purpose local government served by the MPO, and the State(s); or
>
> (2) A substantial change in the decision making authority or responsibility of the MPO, or in decision making procedures established under MPO by-laws.

23 C.F.R. 450.310(l) sets forth those instances when redesignation of a MPO would **not** be required. It states:

> The following changes to an MPO do not require a redesignation (as long as they do not trigger a substantial change as described in paragraph (k) of the section):
>
> (1) The identification of a new urbanized area (as determined by the Bureau of the Census) within an existing metropolitan planning area;
>
> (2) Adding members to the MPO that represent new units of general purpose local government resulting from expansion of the metropolitan planning area;
>
> (3) Adding members to satisfy the specific membership requirements for an MPO that serves a TMA; or
>
> (4) Periodic rotation of members representing units of general-purpose local government, as established under MPO by-laws.

While you claim the Council has changed over the years, requiring redesignation, a review of those changes does not support your position. Specifically:

- The Council became a public corporation and political subdivision of the state. This change does not result in a substantial change to the proportion of voting members or decision-making authority [23 C.F.R. 450.310(k)].

- The appointment terms of the Council members was changed, but the proportion of voting members was sustained [23 C.F.R. 450.310(k)(1)]. Changes related to the periodic rotation of the members does not require redesignation [23 C.F.R. 450.310(l)(4)].

- The Council became able to manage the grant funding without depositing the money into the State Treasury. This change does not result in a substantial change to the proportion of voting members or decision-making authority [23 C.F.R. 450.310(k)].

- The Council membership districts were altered to represent the population changes from the census. This change does not result in a substantial change to the proportion of voting members [23 C.F.R. 450.310(k)(1)], and changes to the urbanized area within the metropolitan planning area do not require redesignation [23 C.F.R. 450.310(l)(1)].

- The Twin Cities urbanized area now extends into Wisconsin (St. Croix County) and two 2 MN counties (Wright and Sherburne) outside of the designated seven (7) counties. The Council can rebalance its representation because of the expansion of the urbanized area, and the rebalancing does not require redesignation [23 C.F.R. 450.310(l)(2)].

The Council may restructure, at any time, to meet the requirements of 23 U.S.C. 134(d)(2) for the policy board to be comprised of local elected officials; officials of public agencies that administer or operate major modes of transportation in the metropolitan area, including representation by providers of public transportation; and appropriate State officials without redesignation [23 U.S.C. 134(d)(5)(B)]. While we would encourage the Council to move toward the structure described in 23 U.S.C. 134(d)(2) in order to make the MPO more directly accountable to its public, it remains their decision, because restructuring is not required until a substantial change necessitates redesignation.

FHWA and FTA have concluded the 1973 designation of the Council as the MPO for the Twin Cities by then Governor Anderson was in conformance with both the Federal law and regulations and that the existing structure remains compliant. If you have any questions or would like to discuss the matter further, please feel free to contact our offices.

Sincerely,

Arlene K. Kocher, P.E.
Division Administrator
Federal Highway Administration

Marisol R. Simón
Regional Administrator
Federal Transit Administration

Cc: Adam Duininck, Metropolitan Council
Charlie Zelle, MnDOT

ATTACHMENT 2

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January 13, 2011

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Shakopee, MN 55379-1220

Dear Mr. Ciliberto:

This letter is in response to the question posed by you at our meeting on November 30, 2010 about the structure of the Met Council as the designated Metropolitan Planning Organization for the Twin Cities. Specifically you cited the Code of Federal Regulations (C.F.R.) §450.310 and the inclusion of non-elected officials on the Transportation Advisory Board (TAB) as your primary concern.

This office has reviewed all relevant Federal and State Statutes and Regulations. We have consulted with our Office of Chief Counsel and our Headquarters Planning staff to ensure that we thoroughly vetted the issue before reaching a determination. FHWA has concluded that the 1973 designation of the Met Council as the MPO for the Twin Cities by then Governor Anderson was in conformance with both the law and regulations and that the existing structure remains in compliance.

The law, as stated in 23 U.S.C. §134(d)(3) is very clear that so long as there was a State Law in effect on December 18, 1991 that provided for a public agency with multimodal transportation responsibilities, the federal government should accommodate the State's wishes regarding the public agency's structure. Since the statute designating the Met Council as the MPO for the region was enacted in 1975 it clearly falls under this provision in the U.S. Code.

I hope that we have addressed your concerns. If you have any questions or would like to discuss the matter further, please feel free to contact me. We will be transmitting to you the 2001 and 2008 Met Council Certification Reviews under separate cover shortly. It appears the 2004 review was never completed because of issues surrounding the team assigned to conduct the review.

Sincerely,

Derrell E. Turner

Derrell Turner
Division Administrator

Cc: Susan Haigh, Chair, metropolitan Council
Tom Sorel, Commissioner, Mn/DOT
Arlene McCarthy, Director, Metropolitan Transportation Services, Met Council
Ron Moses, Regional Counsel, FHWA
Susan Moe, Planning Team Leader, FHWA-MN

ATTACHMENT 3

U.S. Department of Transportation
Federal Transit Administration
Federal Highway Administration

Headquarters

1200 New Jersey Avenue, SE
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FEB 0 1 2016

Ms. Ann R. Goering
Ratwik, Roszak & Maloney, P.A.
730 Second Avenue South, Suite 300
Minneapolis, MN 55402

Re: **Metropolitan Council Certification Review**

Dear Ms. Goering:

On behalf of Secretary Foxx, this letter responds to your correspondence dated October 1, 2015, on behalf of a coalition of suburban counties of the Twin Cities metropolitan area ("Suburban Counties"), as well as your January 11, 2016, letter inquiring as to the status of our response. In your October 1 letter, you requested that the Federal Highway Administration ("FHWA") and Federal Transit Administration ("FTA") review an earlier determination, reached jointly by the FHWA Minnesota Division office and FTA Region V, that the Minnesota Metropolitan Council ("Metropolitan Council") complies with the structure requirements of 23 U.S.C. § 134(d)(2)[1] in its role as a metropolitan planning organization ("MPO"). For the reasons set forth below, FHWA and FTA confirm their earlier determination.

I. Background

A. Federal Requirements

Since the 1991 passage of the Intermodal Surface Transportation Efficiency Act ("ISTEA"), Pub. L. 102-240, Federal law has required MPOs serving transportation management areas (TMAs) to include certain structuring of their boards. The current version of the law requires:

> Not later than 2 years after the date of enactment of [the Moving Ahead for Progress in the 21st Century Act, Pub. L. 112-141, ("MAP-21")], each metropolitan planning organization that serves an area designated as a transportation management area shall consist of—

[1] Substantively similar provisions are codified in 23 U.S.C. § 134 and in 49 U.S.C. § 5303. For clarity, this letter refers only to Title 23.

> (A) local elected officials;
>
> (B) officials of public agencies that administer or operate major modes of transportation in the metropolitan area, including representation by providers of public transportation; and
>
> (C) appropriate State officials.

23 U.S.C. § 134(d)(2). The law also includes a "grandfathering" provision, which excludes planning entities established prior to ISTEA from the structuring requirements:

> Nothing in this subsection shall be construed to interfere with the authority, under any State law in effect on December 18, 1991, of a public agency with multimodal transportation responsibilities-
>
> (A) to develop the plans and TIPs for adoption by a metropolitan planning organization; and
>
> (B) to develop long-range capital plans, coordinate transit services and projects, and carry out other activities pursuant to State law.

23 U.S.C. § 134(d)(4).[2] This grandfathering clause applies to an MPO when: (1) the MPO operates pursuant to a State law that was in effect on or before December 18, 1991; (2) such State law has not been amended after December 18, 1991, with regard to the structure or organization of the MPO; and (3) the MPO has not been designated or redesignated after December 18, 1991. Policy Guidance on Metropolitan Planning Organization (MPO) Representation, 79 Fed. Reg. 31,214, 31,216 (June 2, 2014).

B. The Suburban Counties' May 8, 2015, letter to FHWA and FTA

The Metropolitan Council is the designated MPO for the Twin Cities metropolitan area, which is a transportation management area. Minn. Stat. § 473.146, subd. 4(a). It is composed of 17 members, all of whom are appointed by the Governor. *Id.* § 473.123, subds. 3 and 4. For purposes of transportation planning, the Metropolitan Council includes a transportation advisory board ("TAB") of, *inter alia*, local elected officials, representatives of State agencies, and representatives of public transit, freight transportation, non-motorized transportation, and the Metropolitan Airports Commission. *Id.* § 473.146, subd. 4(b).

Between June 25 and 28, 2012, FHWA and FTA conducted a review of the Metropolitan Council's compliance with the planning requirements of 23 C.F.R. Part 450. Transporta-

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[2] In previous correspondence on this matter, this section was designated as 23 U.S.C. § 134(d)(3). With the enactment of the Fixing America's Surface Transportation Act ("FAST Act"), Pub. L. 114-94, § 1201(3), on December 4, 2015, this section became 23 U.S.C. § 134(d)(4).

tion Planning Certification Review Report for the Minneapolis-St. Paul Metropolitan Area ("2012 Report"). The 2012 Report concluded that the Metropolitan Council was the properly constituted MPO for the region and made no recommendations for corrective actions. *Id.* at 9, 10. In reaching this conclusion, the 2012 Report emphasized the role of the TAB in the Metropolitan Council's planning process. For example, the 2012 Report stated that the "Metropolitan Council in conjunction with the [TAB] is the designated MPO" and that "[t]ogether, the Council and the TAB are responsible for the governance and transportation policy making for the Twin Cities region." *Id.*

In a May 8, 2015, letter addressed to FHWA's and FTA's regional offices, the Suburban Counties asked FHWA and FTA to partially reject the 2012 Report's findings and hold that the Metropolitan Council does not comply with the membership requirements for MPOs serving TMAs. The Suburban Counties argued that, because Federal law defines an MPO as "the policy board of an organization", 23 U.S.C. § 134(b)(2), the TAB, which by Minnesota law is merely advisory, should not be considered part of the MPO, and therefore the Metropolitan Council does not have the membership required by 23 U.S.C. § 134(d)(2). The Suburban Counties further argued that the Metropolitan Council is not grandfathered because post-ISTEA amendments to Minnesota law, adopted in 1994, have affected the structure or organization of the Metropolitan Council.

FHWA's Division and FTA's Regional office replied on August 3, 2015. The regional offices agreed with the Suburban Counties that the TAB is not part of the MPO, and therefore the Metropolitan Council's membership does not comply with 23 U.S.C. § 134(d)(2). However, the regional offices disagreed with respect to the application of the grandfathering clause. Considering the changes in Minnesota law identified by the Suburban Counties, the regional offices concluded that "the changes were not 'substantial' so as to require a redesignation" under 23 C.F.R. § 450.310(k). The regional offices' reply went on to discuss situations when an MPO would or would not be required to redesignate.

II. The Suburban Counties' October 1, 2015, letter to FHWA and FTA

The Suburban Counties sent another letter on October 1, 2015, this time addressed to Secretary Foxx and the Administrators of FHWA and FTA, requesting reconsideration of the conclusions set forth in the August 3, 2015, response. The Suburban Counties urged that we "find the Metropolitan Council is not a properly constituted MPO, and take all other necessary actions consistent with that finding." This October letter reiterated many of the same arguments put before FHWA and FTA previously, including the suggestion that the grandfathering clause of 23 U.S.C. § 134(d)(4) does not apply to MPOs generally, does not apply to the Metropolitan Council specifically, and does not apply to the membership requirements imposed on MPOs by the same subsection.

With respect to the first argument, as explained in our joint policy guidance, FHWA and FTA have determined that the grandfathering provision does still apply to any MPO that (1) operates pursuant to a State law that was in effect on or before December 18, 1991; (2) such State law has not been amended after December 18, 1991, with regard to the structure or organization of the MPO; and (3) the MPO has not been designated or re-designated after December 18, 1991. 79 Fed. Reg. 31,216. The agencies reiterated that interpretation in a joint Notice of Proposed Rulemaking to implement MAP-21 revisions to Federal metropolitan transportation planning requirements. 79 Fed. Reg. 31,784 (June 2, 2014). Subsequently, Congress enacted the FAST Act, P.L. 114-94, which included amendments to 23 U.S.C. § 134 (FAST Act § 1201) and 49 U.S.C. § 5303 (FAST Act § 3003). The FAST Act clarified requirements relating to an MPO's designation or selection of officials or representatives to an MPO in light of the FHWA/FTA Policy Guidance and NPRM and public comments that the agencies received on these two documents, but *did not* amend the grandfathering provision. Congress' enactment of these statutory changes while leaving the grandfathering provision intact is a strong indication that Congress concurs with the agencies' interpretation of that provision. *See, e.g., Davis v. United States*, 495 U.S. 472, 482 (1990) ("Congress' reenactment of [a statute], using the same language, indicates its apparent satisfaction with the prevailing interpretation of the statute."); *Pierce v. Underwood*, 487 U.S. 552, 566-68 (1988).

Second, the Suburban Counties disagreed with the FHWA and FTA regional offices' conclusion that the State law changes were not substantial enough to "require a redesignation" and so did not require the Metropolitan Council to come into compliance with 23 U.S.C. § 134(d)(2). As addressed in the FHWA/FTA Policy Guidance, an MPO is no longer grandfathered from current Federal board structuring requirements if *either* the MPO redesignates *or* changes in State law affect the structure or organization of the MPO. Bearing in mind this distinction between the standards for the grandfathering provision and redesignation, we conclude that neither of these standards is implicated here.

We reviewed the amendments to the laws governing the Metropolitan Council cited in your October 1, 2015, letter. In summary, the amendments: (1) changed the MPO from a State administrative agency to a public corporation and political subdivision of the State[3]; (2) changed the term length of MPO members[4]; (3) allowed the Metropolitan Council to "hold, use, and dispose of" grant funds without depositing the money into the State Treasury[5]; and (4) changed provisions regarding the Metropolitan Council districts which have changed to represent the population changes from the Federal decennial census, although the number of districts remains the same.[6]

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[3] Minn. Stat. §473.123, subd. 1 (1994); Minn. Laws 1994 c. 628-S.F. No. 2015, Sec. 4.
[4] Minn. Stat. § 473.123, subd. 2a. (1994).
[5] Minn. Stat. § 473.129, subd. 4 (1994); Minn. Laws 1994 c. 628-S.F. No. 2015, Sec. 39.
[6] Minn. Stat. § 473.129, subd. 3 (1994).

In our opinion, these amendments would not require the Metropolitan Council to redesignate. Our regulations require redesignation of an MPO whenever the existing MPO proposes to make (1) a substantial change in the representative proportion of voting members, or (2) a substantial change in the decisionmaking authority or responsibility of the MPO, or in decisionmaking procedures established under MPO by-laws. 23 C.F.R. 450.310(k). FHWA and FTA's regulations also identify the changes to an MPO that do not require a redesignation as long as they do not trigger a substantial change as described in 450.310(k). 23 C.F.R. 450.310(l). We find that the regional offices correctly analyzed the amendments under these regulations in determining that the amendments do not substantially change the Metropolitan Council's representation proportions or decisionmaking procedures such that redesignation is necessary.

Even if a change in State law would not require redesignation, the MPO no longer would be grandfathered if that change affected the structure or organization of the MPO. We conclude that none of the amendments you cite affect the structure or organization of the Metropolitan Council such that it would no longer be grandfathered from the structure requirements of 23 U.S.C. 134(d)(2). None of these changes, including, (1) changing the terms of the Council's members, (2) characterizing the Council as a public corporation instead of an administrative agency, (3) allowing the Council to "hold, use, and dispose of" grant funds without depositing the money into the State Treasury, and (4) other miscellaneous and minor statutory changes, directly affect in any material way the structure or organization of the Council itself, and they clearly cannot be deemed substantial changes. The core of the Metropolitan Council's structure and organization remains the same as it was in 1991, notwithstanding these minor legislative amendments.

In sum, we concur with the findings in the August 3, 2015, regional offices' response and decline to reverse their decision. If you have further questions, please do not hesitate to contact us.

Sincerely,

Gregory G. Nadeau, Administrator
Federal Highway Administration

Therese McMillan, Acting Administrator
Federal Transit Administration

ATTACHMENT 4

In a November 19, 2018 letter from attorney Ann Goering addressed to FHWA and FTA administrators in St. Paul, Chicago, and Washington D.C., Ms. Goering asserted that the FTA and FHWA erroneously concluded the Council was "grandfathered" in under federal law governing transportation planning for urbanized areas and incorrectly concluded the Council qualifies as the MPO under federal law. Ms. Goering stated: "The Obama Administration ignored the expressed will of Congress, choosing to rely on its own administrative prerogative instead."

Congress has at least twice expressed its "will" on this issue: first when it passed legislation in 1991[1] that "grandfathered" in MPOs as they existed at the time of the legislation; and a second time in 2018 when Congress had the opportunity to change the grandfather provision but declined to do so.

In April 2018 former Representative Jason Lewis (Minn.) offered an amendment to the FAA Reauthorization Act of 2018 that would have eliminated the "grandfather" provision of title 23 U.S.C. section 134(d)(4) as it applies to the Council's status as the MPO.[2] Representative Lewis' amendment did not survive the legislative process and was not included in the FAA Reauthorization Act of 2018 that was passed by the 115th Congress and enacted into law.[3]

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[1] Intermodal Surface Transportation Efficiency Act of 1991, Pub. L. No. 102-240 (Dec. 18, 1991).

[2] Among other things section 134 governs MPO designation, structure, and representation. Representative Lewis' amendment was incorporated as Section 599B under Title V of the House version of the bill (H.R. 4). The Lewis amendment would have made the following change to section 134(d)(4) of title 23, United States Code:

> **(4) Limitation on statutory construction. —** ~~Nothing~~ Except with respect to a metropolitan planning organization whose structure consists of no local elected officials, nothing in this subsection shall be construed to interfere with the authority, under any State law in effect on December 18, 1991, of a public agency with multimodal transportation responsibilities —

The Council has been the designated MPO for the Minneapolis-Saint Paul metropolitan area under state law since 1975. *See* 1975 Minn. Laws ch. 13, § 9 ("The metropolitan council shall be the designated planning agency for any long-range comprehensive transportation planning required under section 134 of the Federal Highway Act of 1962, Section 4 of the Urban Mass Transportation Act of 1964 and Section 112 of Federal Aid Highway Act of 1973 and such other federal transportation laws as may hereinafter be enacted.") (codified at Minn. Stat. § 473.146, subd. 4 (1976)).

[3] The Senate version of the bill (H.R. 302), which did not include the Lewis amendment, was signed by the President on October 5, 2018.

ATTACHMENT 5

Ann R. Goering
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R|R|M
Ratwik, Roszak & Maloney, P.A.

November 19, 2018

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RE: Metropolitan Council Certification Review
Our File No. 5070-0031

Dear Ms. Williams, Ms. Brookins, Ms. Hendrickson, and Ms. Kocher:

We have been working with the Minnesota counties of Anoka, Carver, Dakota, and Scott for the past several years. We are writing to follow-up on Ms. Williams' August 23, 2018, letter to Congressman Jason Lewis regarding the Metropolitan Council. At the outset, we thank you for agreeing to undertake further review of the Metropolitan Council's compliance with federal requirements regarding the composition of a Metropolitan Planning Organization ("MPO"). As part of your review, we ask that you reverse the Obama Administration's 2016 erroneous determination that the Metropolitan Council is "grandfathered" from the unequivocal statutory requirements of 23 U.S.C. § 134(d)(2). That decision did not accurately consider the changes made to the Metropolitan Council since 1991 and is inconsistent with the express language of Section 134(d).

The Obama Administration's erroneous conclusion leaves local communities, including the suburban counties that originally approached the Obama Administration with this issue, without any meaningful say in the metropolitan planning process. Instead, as stated in Congressman Lewis's letter, all significant decision-making is controlled at the state level, by

gubernatorial appointees. In effect, the Obama Administration's erroneous decision protected the authority of a governor and his unelected appointees at the expense of the rights of the citizens of the Twin Cities Metropolitan Region to have elected representation in the MPO decision-making process.

I. The Obama Administration Erroneously Determined that the Metropolitan Council is Exempt from the Federal Requirements Regarding MPO Structure.

In 2016, the Obama Administration admitted that the Transportation Advisory Board ("TAB") "is not part of the MPO, and therefore the Metropolitan Council's Membership *does not comply with* 23 U.S.C. § 134(d)(2)." Nevertheless, then-FHWA Administrator Gregory G. Nadeau and then-FTA Acting Administrator Therese McMillian concluded that the Metropolitan Council was "grandfathered" from compliance with Section 134(d)(2). With all due respect to the Obama Administration, this application of Section 134(d)(4) was erroneous and an over-reach of administrative authority.

The crux of the Obama Administration's decision is that the Metropolitan Council is "grandfathered" from compliance with the requirements of Section 134(d)(2) under Section 134(d)(4). As discussed in our 2015 correspondence with the Obama Administration ("2015 Letters"), as well as the separate correspondence from local suburban counties received by the Obama Administration in 2015, Section 134(d)(4) does not apply to the *membership* requirements of Section 134(d)(2). Nor does Section 134(d)(4) bestow the powers of an MPO on an entity that is not a properly constituted MPO. The Obama Administration ignored the expressed will of Congress, choosing to rely on its own administrative prerogative instead.

Nevertheless, even assuming that the Section 134(d)(4) applies to the MPO membership requirements of Section 134(d)(2) in general, they do not protect the Metropolitan Council from compliance with those requirements. As stated in Congressman Lewis's letter and our 2015 correspondence with the Obama Administration, there have been numerous changes to the statutes governing the Metropolitan Council. These changes have had a substantial effect on the organization and structure of the Metropolitan Council. Therefore, even if the grandfathering analysis of Section 134(d)(4) were applicable to the membership requirements of Section 134(d)(2), they would not apply to the Metropolitan Council.

Even according to the Obama Administration's June 2, 2014, *Policy Guidance*, "an exemption from the MPO structure requirements is *only appropriate* for an MPO where (1) the MPO operates pursuant to a State law that was in effect on or before December 18, 1991; (2) such State law has not been amended after December 18, 1991, as regards to the structure or organization of the MPO; and (3) the MPO has not been designated or re-designated after December 18, 1991." 79 Fed. Reg. at 31216 (emphasis added). The Metropolitan Council does not meet this standard.

As discussed by Congressman Lewis's letter and described in the 2015 Letter, there have been several significant changes to the Minnesota statutes governing the Metropolitan Council's structure and organization since 1991. Perhaps most significantly, when the Metropolitan Council was first created, it was an administrative agency of the State of Minnesota. Minn. Stat. § 473.122 (1990); *see also* Minn. Stat. § 473.123 (1990). In 1994, the Minnesota legislature amended Section 473.123 to provide that the "metropolitan council... *is established as a public corporation and a political subdivision of the state*..." Minn. Stat. § 473.123, subd. 1 (1994) (emphasis added).

The Obama Administration considered the creation of a separate, independent entity to be a "minor" change to the Metropolitan Council's structure and organization. Nevertheless, the fact remains that the body known as the Metropolitan Council simply did not exist as an independent entity prior to 1994. Creating a separate, independent "political subdivision," akin to a county, is a fundamental change in the structure of the Metropolitan Council. This change alone should remove any doubt as to the application of Section 134(d)(4) to the Metropolitan Council. The then-newly created entity should have been designated or re-designated as the MPO is 1994 and the fundamental shift in the nature of the Metropolitan Council, from an "administrative agency" of the State to a separate entity, is certainly a significant amendment regarding its structure.

Another noteworthy statutory change, in 1994, the Minnesota legislature amended the statutory provisions governing the terms of Metropolitan Council members to provide that Metropolitan Council members' terms "end with the term of the governor" or the effective date of the net appointment. Minn. Stat. § 473.123, subd. 2a (1994). Also, for the first time in 1994, the Minnesota legislature decreed that each Metropolitan Council member "serves at the pleasure of the governor." Minn. Stat. § 123, subd. 2a (1994).

This statutory change deeply affected the Metropolitan Council's organization. In 1991, Metropolitan Council members were appointed to a fixed term that potentially spanned multiple gubernatorial administrations. Minn. Stat. § 473.123, subd. 2a (1990). After 1994, Metropolitan Council members only serve as long as the governor who appointed them. In 1991, there was no express statutory provision for removing Met Council members. After 1994, the statute clearly provides that members can be removed by the governor. Before 1994, there was some stability in the Metropolitan Council's membership. Now, as Congressman Lewis indicated in his letter, the governing law "creates a dynamic where the regional planning board for seven counties is completely controlled at the state level" dependent on the four-year election cycle and the whim of the current governor. This is another fundamental shift in the organization of the Metropolitan Council that takes it firmly out of the ambit of Section 134(d)(4).[1]

[1] Our 2015 Letter and Congressman Lewis's letter describe multiple additional statutory changes that have had a significant impact on the Metropolitan Council's organization and structure since 1994.

The Obama Administration disregarded the significant statutory changes that have altered the Metropolitan Council's structure and organization since 1991. The Obama Administration determined that these statutory changes did not "directly affect in any material way the structure or organization of the Council itself." Categorizing these statutory amendments, including an amendment that *actually created* the independent political subdivision known as the Metropolitan Council, as "minor," the Obama Administration concluded that the "core of the Metropolitan Council's structure and organization remains the same as it was in 1991." The Obama Administration's apparently cursory review of the changes to the structure of the Metropolitan Council misses the mark entirely. All of these sweeping changes affected the organization and structure of the Metropolitan Council and occurred after December 18, 1991. Accordingly, even applying the test outlined in the June 2, 2014, *Policy Guidance*, the Metropolitan Council is not exempt from the membership requirements expressly set forth in Section 134(d).

II. The Metropolitan Council Still Represents that the TAB is Part of the MPO.

In her August 23, 2018, Ms. Williams stated that the FHWA and FTA previously "required the Met Council to remove reference to the [TAB] as the MPO." The Metropolitan Council has completely ignored that directive. As of the writing of this letter, the Metropolitan Council's website still reads:

> The Transportation Advisory Board (TAB) is a key participant in the region's transportation planning process. TAB was created by the state legislature in 1974 to perform transportation planning and programming for the Twin Cities metropolitan area, as designated by state and federal law
>
> ***
>
> As the region's federally designated Metropolitan Planning Organization (MPO) the Council *and the TAB* are responsible for the continuing, cooperative, and comprehensive transportation planning in the Twin Cities Metropolitan Area. This qualifies the region for federal transportation planning, operating, and construction funds[2]

The Metropolitan Council's "Transportation Advisory Board FAQ" goes even further, admitting that the TAB was created to comply with federal law regarding MPO membership. Specifically, the FAQ states that the Metropolitan "Council, *in conjunction with TAB*, serves as the designated FMPO and receives federal transportation funds."[3]

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[2] https://metrocouncil.org/Transportation/Planning-2/Transportation-Planning-Process/Transportation-Advisory-Board.aspx (emphasis added).

[3] https://metrocouncil.org/Transportation/Publications-And-Resources/Transportation-Planning/MISCELLANEOUS-DOCUMENTS/Transportation-Advisory-Board-(TAB)-Frequently-Ask.aspx (emphasis added).

The Metropolitan Council continues to make these assertions despite the previous determination by the FTA and FHWA that the "TAB is not part of the MPO, and therefore the Metropolitan Council's membership does not comply with 23 U.S.C. § 134(d)(2)." The gubernatorially-appointed members of the Metropolitan Council continue to mislead the public despite the previous direction to remove references to the TAB as part of the MPO. The Metropolitan Council continues to rely on the TAB to provide the appearance of local accountability, where, as indicated by Congressman Lewis, the metropolitan planning process for the Minneapolis-St. Paul region, is "completely controlled at the state level and certain counties often receive preference."

As evidenced by the Metropolitan Council's continuing misrepresentations, directing the Metropolitan Council to remove references to the TAB as part of the MPO and hoping for voluntary compliance with Section 134(d)(2) is not sufficient to address these concerns. The only way to ensure that the Metropolitan Council consists of the required statutory members, and thereby give local communities a meaningful voice in the regional planning process, is to force the Metropolitan Council to actually comply with Section 134(d)(2).

III. Conclusion

As the Obama Administration correctly recognized, the TAB is not, and has never been, the designated MPO for the Twin Cities region. Nevertheless, and despite direction from the FTA and FHWA, the Metropolitan Council continues to represent that the TAB is part of the designated MPO. These assertions mislead local communities into thinking that their local elected officials have an actual voice in making long-term planning decisions that affect their daily lives. The reality is that the Governor's office still controls those decisions, despite the express language in Section 134(d)(2).

The Obama Administration overlooked these concerns and concluded that the Metropolitan Council was excluded from the requirements of Section 134(d)(2). That determination ignores express congressional intent and cemented the authority of the Governor at the expense of Twin Cities taxpayers' representative voices.

In light of the foregoing and Congressman Lewis's letter, we request that you find that the Metropolitan Council is not a properly constituted MPO. We request that you take action consistent with that finding, including refusal to approve any TIP adopted by the Metropolitan Council, and any other submissions that require MPO action until such time as its membership conforms to the express congressional mandate in Section 134(d)(2).

Please feel free to contact the undersigned with any questions. We look forward to your response.

Sincerely,

Ann R. Goering
Christian R. Shafer

cc: Congressman Jason Lewis
Secretary of Transportation Elaine L. Chao
Anoka County Administrator Jerry Soma
Carver County Administrator Dave Hemze
Dakota County Administrator Matt Smith
Scott County Administrator Gary Shelton

Enclosures: 2015 Letters to FTA and FHA

RRM: 309276

ATTACHMENT 6

The Transportation Advisory Board ("TAB") and the composition of its membership is mandated by state statute.[1] The TAB was established "in fulfillment of the planning responsibilities of the council" which "is the designated planning agency for any long-range comprehensive transportation planning required by . . . federal transportation laws."[2] As required by state law, 30 (88%) of the 34 TAB members represent, sub-regional areas, counties, cities, and transit/transportation interests:

7	county board members representing each of the seven metropolitan-area counties
8	citizens appointed by the Council representing the 16 Council districts
10	elected officials of metropolitan-area cities
1	elected official from a city representing an opt-out city
2	individuals representing public transit
1	individual representing nonmotorized transportation
1	individual representing the freight rail transportation industry

Eighteen (53%) of the TAB members are elected county and municipal officials. Ten of the eleven city "elected" official are appointed by Metro Cities; one elected city official is appointed by the Suburban Transit Association.[3] The seven "elected" county members are appointed by their respective county boards.[4]

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[1] *See* Minn. Stat. § 473.146, subd. 4(b) ("the council shall establish an advisory body" which is known as the Transportation Advisory Board).

[2] Minn. Stat. § 473.146, subd. 4 (a) and (b).

[3] Minn. Stat. § 473.146, subd. 4(b)(7) and (10).

[4] Minn. Stat. § 473.146, subd. 4(b)(8).