



STATE ETHICS COMMISSION

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FORMAL ADVISORY OPINION—EDITED FOR PUBLICATION

December 17, 2012

Re: Applicability of the State Government Ethics Act to the Technical Coordinating Committee of the Metropolitan Planning Organization
23 U.S.C. §134(b); N.C.G.S. §136-200(4); Session Law 2012-142
AO-E-12-002

Dear Requester:

This is in response to your request for a formal advisory opinion as to the applicability of the State Government Ethics Act (“Ethics Act”) to individuals that constitute the Technical Coordinating Committee (“TCC”) the Metropolitan Planning Organization (“MPO”). At issue is whether Session Law 2012-142, which made MPO’s and Rural Transportation Planning Organizations (“RPOs”) covered “boards” under the Ethics Act, includes coverage for TCCs.

This request was presented to the Commission at its November 9, 2012, meeting, and the following opinion was authorized for issuance as soon as possible thereafter.¹

I. Brief Conclusion.

Based upon our analysis of the applicable statutes, recognition of the legislative authority to cover advisory bodies, and the clearly stated legislative intent regarding applicability of Session Law 2012-142, we have determined that the Technical Coordinating Committee is covered by the Ethics Act.

II. Facts.

You currently serve as Chairman of the Technical Coordinating Committee (“TCC”) for a the Metropolitan Planning Organization (“MPO.”) MPOs are responsible for maintaining a continuing transportation planning process as required by federal planning regulations. 23 U.S.C. §134. MPO’s work with the North Carolina Department of Transportation (“DOT”) and make joint decisions regarding transportation planning priorities and the expenditure of certain

¹ Please see the enclosure entitled “Formal Advisory Opinions Issued by the State Ethics Commission” for further information regarding the protections offered to individuals receiving those opinions.

federal and state highway funds allocated for the MPO's region. As discussed below, the work of a TCC is critical to that process.

An MPO is formed by a Memorandum of Understanding (MOU) as required by state and federal law. 23 U.S.C §134(d)(1)(A) and (B); N.C.G.S. §136-200(4). There are currently 17 MPOs operating in regions throughout North Carolina, pursuant to 17 separately agreed upon MOUs. The parties to these MOUs are the Secretary of DOT, on behalf of the Governor, and the local government leaders of the cities, townships and counties located within the region covered by the MOU. 23 U.S.C §134(d)(1)(A). In each case, the MOU defines the structure, roles and responsibilities of the parties to the MOU. The ultimate charge of an MPO is to develop long-range, comprehensive transportation plans and transportation improvement programs for urbanized areas of the State. 23 USC §134(c)(1).

To carry out this charge, every MOU establishing an MPO creates both a Transportation Advisory Committee ("TAC") and a Technical Coordinating Committee ("TCC").² The membership and responsibilities of both the TAC and the TCC are specifically delineated in each MOU.³ A TAC is comprised of a member of the NC Board of Transportation, as well as the chief elected officials of the local governments and/or an elected official from each of the boards of local government which are represented in the MOU. There are usually voting and non-voting members of a TAC. The TCC commonly includes one "technical" representative from all of the local and state government agencies directly involved in the planning process for the given planning area (e.g. the director of a county/city planning department, NC Department of Transportation division engineers for the relevant area, etc.). You identify these individuals on the TCC as "advisory staff."

Largely, the 17 MOUs define the responsibilities of the TAC to include: 1) serving as a forum for cooperative transportation planning decision making, 2) keeping the local government policy boards informed of the status and requirements of the transportation planning process, 3) ensuring meaningful citizen participation in the transportation planning process, and 4) reviewing, approving and endorsing various transportation improvement plans and work programs for their area.

You state that, "For [your] MPO, the policy board [pursuant to your MOU] is the TAC. In fact, based upon Title 23 a TAC and MPO are one in the same." However, the MOU establishing your MPO states under the "duties and responsibilities of the TAC," that the "TAC shall not set policy for the planning area but shall establish goals and objectives. . . ." (*emphasis added*). Thus, the MOU does not identify the TAC as a policy board, nor does it identify it as "the MPO." In fact, the MOU does not define the MPO at all. It simply establishes a TAC and a TCC.

You state that the TCC should not be covered because it is purely "advisory" in nature and the Ethics Act was not created to cover advisory entities. As noted above, each of the 17

² We reviewed the 17 MOUs currently in effect in North Carolina. One MOU states that the MPO "shall function as a TAC." As with the other 16 MOUs, it also establishes a TCC.

³ Thirteen of the 17 MOUs have virtually identical language. The other four vary slightly as will be discussed below.

MOUs establishes a TCC and outlines its membership and responsibilities similarly. The TCCs basically develop, review, revise and recommend for approval (to their respective local and state agencies and the TAC), the various transportation plans and programs required under state and federal law. We think it is fair to say that the TCCs may be “advisory” in that they make “recommendations.” However, they appear to be very important to the transportation planning process in North Carolina. Because of the “advisory” nature of the TCC, you contend it is exempted from coverage under the Ethics Act and is not “the MPO” intended for coverage.

The North Carolina legislature amended the state statutes which authorize MPOs and RPOs to make them covered “boards” under the Ethics Act. As noted above, you state 1) that your TAC is a policy board synonymous with “the MPO,” and that the TAC alone was intended for coverage; and 2) that TCCs are purely advisory, and as such, do not meet the definition of a covered board under the Ethics Act.

III. Applicable Statutory and Contractual Provisions.

A. Session Law 2012-142.

During the 2012 legislative session, the North Carolina legislature amended N.C.G.S. §§ 136-202 and -211 to make MPOs and RPOs covered “boards” under the Ethics Act, effective January 1, 2013:

(e) A Metropolitan Planning Organization [and Rural Transportation Planning Organization] shall be treated as a board for the purposes of Chapter 138A of the General Statutes.

Members of the Metropolitan Planning Organizations and Rural Transportation Planning Organizations shall file an initial Statement of Economic Interest with the State Ethics Commission no later than April 15, 2013. . . .

Session Law 2012-142, §§ 24.16(a), (b) and (c)).

B. G.S. §136-200(4).

North Carolina law defines an MPO as “an agency that is designated or redesignated by a memorandum of understanding as a Metropolitan Planning Organization in accordance with 23 U.S.C. §134.” N.C.G.S. §136-200(4).

C. G.S. §136-210.

A “Rural Transportation Planning Organization” (“RPO”) is defined as a “voluntary organization of local elected officials or their designees and representatives of local transportation systems formed by an [MOU] with [DOT] to work cooperatively with the [DOT] to plan rural transportation systems and to advise [DOT] on rural transportation policy.” N.C.G.S. §136-210. RPOs are also formed by an MOU and are comprised of a TAC and a TCC.

D. 23 U.S.C. §134(b).

Federal law defines the term “metropolitan planning organization” as the “policy board of an organization established as a result of the designation process under subsection (d).” 23 U.S.C. §134(b)(2). Subsection d states that an MPO “shall be designated for each urbanized area with a population of more than 50,000 individuals,” by agreement between the Governor and the units of local government that represent at least 75% of the population in that region or in accord with other applicable state and local laws. N.C.G.S. §§134(d)(1)(A) and (B). The structure of the MPO is also outlined to include: (A) local elected officials; (B) local transportation officials and (C) appropriate State officials. N.C.G.S. §134(d)(2)(A), (B), and (C).

E. The MOU.

As noted, the MOU does not include a definition for the “Metropolitan Planning Organization” at issue. It does define the “Metropolitan Planning Area.” It also establishes the TAC and the TCC as separate committees. As noted previously, neither the TAC nor the TCC is defined as “the MPO” or as the “policy board.” In fact, according to the MOU, the TAC specifically “shall not set policy for the planning area but shall establish goals and objectives. . . .” Otherwise, the duties, responsibilities and composition of the TAC and TCC in the MPO area are as outlined above in Section II for all MPOs.

IV. Application of the Statutory Provisions and MOUs to Your Questions.

A response to your specific question follows:

Is the TCC covered by the Ethics Act pursuant to the recent legislative amendments?

Yes.

Both the federal and state statutes defining “Metropolitan Planning Organization” state that an MPO is an organization established by an MOU. While the federal statute refers to the “policy board” of an organization created by MOU, the state statute simply refers to the “agency” created by MOU.⁴ There is no specific statutory designation of either the TAC or the TCC singularly as “the MPO” or as “the policy board.” The amendments in question state simply that “MPOs” and “RPOs” shall be boards under the Ethics Act. Our state statutes look to the MOU to define what constitutes an MPO and an RPO.

As noted, the MOU does not define the “Metropolitan Planning Organization.” Consequently, we looked to other MOUs for additional guidance. Our review of the 16 remaining MOUs forming our state’s MPOs, as well as information provided by DOT, confirms

⁴ Pursuant to State statute, RPOs are also formed by an MOU.

that all MPOs establish both a TAC and a TCC.⁵ Fifteen of those 16 MOUs *do* define their relevant “MPO.” Of those, 13 define the MPO to include, the relevant local governments, the NC DOT, the TAC *and* the TCC. Thus, in the majority of North Carolina regions, “the MPO” is specifically defined to include the TAC *and* the TCC.

This information, combined with the fact that the MOU: 1) does not define MPO, 2) does not refer to the TAC as the policy board nor as the MPO, but rather states that the TAC “shall not set policy,” and 3) establishes both a TCC and a TAC, does not support your assertion that the TAC is the policy board and is solely the intended MPO for coverage.

However, while the policy versus advisory nature of the TAC and TCC could be debated, our response to this inquiry does not hinge on whether the TCC is purely advisory and the TAC is policymaking in form or in substance. Our legislature has the authority to specifically designate a board -- whether advisory or policymaking -- to be covered by the State Ethics Act. The North Carolina General Assembly has statutorily designated boards that may not meet the strict definition of a “covered board” as specifically “covered” under the Ethics Act.⁶ It has exercised that authority on prior occasions when the work of a particular board has the potential for significant impacts on fiscal or other determinations.

Finally, where coverage questions arise that may not be clearly answered solely from the statutory language, the Commission is guided by legislative intent. In this case, before, during and after passage of the amendment, it was made clear that the language was intended to cover both the TCCs and the TACs.

V. Closing.

Thank you for contacting the State Ethics Commission. Please do not hesitate to call the Commission’s staff if you have any questions about the foregoing formal advisory opinion.

State Ethics Commission

By: _____
Robert L. Farmer
Chairman

⁵ See footnote 2.

⁶ Examples include the Governor’s Crime Commission and the Centennial Authority.

Formal Advisory Opinions Issued by the State Ethics Commission
Pursuant to the Ethics Act

Upon the written request of a public servant or legislative employee, G.S. 138A-13(a) of the State Government Ethics Act (“the Ethics Act”) authorizes the State Ethics Commission (“Commission”) to issue formal advisory opinions on the “meaning and application” of the Ethics Act “and the public servant’s or legislative employee’s compliance therewith.” All opinions have prospective application only, are limited to the particular facts presented, and confer limited civil immunity upon a requester who follows the advice given. G.S. 138A-13(a) and (a2).

Reliance upon a formal advisory opinion immunizes the public servant or legislative employee making the request from (1) investigation by the Commission, except the alleged violation of criminal law while performing his or her official duties, (2) adverse action by his or her employing entity, or (3) investigation by the Secretary of State. G.S. 138A-13(a2).

Once issued by the Commission, formal advisory opinions are published in a redacted format on the Commission’s website within 30 days of issuance. G.S. 138A-13(d). Otherwise, requests for advisory opinions, the opinions themselves, and all materials related to the opinions are confidential and are not public records. G.S. 138A-13(e).