

Northern Virginia Transportation Authority

MEMORANDUM

TO: Martin E. Nohe, Chairman
Northern Virginia Transportation Authority

Members
Northern Virginia Transportation Authority

FROM: David Snyder
Legal Working Group, Chairman
Northern Virginia Transportation Authority

SUBJECT: Legal Working Group Second Interim Report

DATE: June 20, 2013

Background and Recommendations:

On Wednesday, June 19, 2013, the NVTA Legal Working Group held its second meeting in the City of Falls Church.

I presided at that meeting. Also in attendance were Steve MacIsaac, Angela Horan, Ellen Posner, Jim Banks, Rob Dickerson, Erin Ward, Corinne Lockett, Tom Biesiadny, Todd Wigglesworth, Jack Roberts, Mark Pohl, Jennifer Fioretti, Arthur Andersen, and Chris Sadowski.

The meeting was called to order at 10:00am at which time participant introductions were made.

I then asked if there were any items for discussion by the Legal Working Group beyond those set forth on the posted agenda. Ellen Posner advised that there were two items referred to the Legal Working Group by NVTA's Organizational Working Group and one additional item that had been referred by NVTA's Financial Working Group. The Organizational Working Group referred a question relating to a possible personnel matter for closed session consideration by NVTA and an issue related to payroll tax withholding by or on behalf of NVTA with respect to any Interim Executive Director that NVTA might hire. On behalf of Loudoun County, the NVTA Financial Working Group separately referred to the Legal Working Group the question whether HB2313 required region- wide uniformity with regard to the methodology used to calculate the towns' shares of project revenues authorized under the law. Without objection, those matters were added to the Legal Working Group's June 19, 2013, discussion agenda.

The Legal Working Group next briefly discussed the issue of membership on NVTA's Council of Counsels. At its May 23, 2013, meeting, NVTA unanimously voted to retain its existing Council of Counsels concept. The attorneys who currently comprise NVTA's Council of Counsels are Steve MacIsaac from Arlington County, Angela Horan from Prince William County and Ellen Posner from Fairfax County. The follow-up question that was posed at NVTA's May 23, 2013, meeting and referred to the Legal Working Group was whether counsel

from NVTA's other constituent local governments could be added to the NVTA Council of Counsels. The Legal Working Group conducted a brief discussion on this issue and agreed that other counsel could be added so long as the locality passed a resolution authorizing its local counsel to participate on a voluntary, uncompensated basis and NVTA passed a resolution in concurrence.

The Legal Working Group next discussed the issue as to the legal parameters governing NVTA's development of its fiscal year 2014 project list and beyond. That discussion included an analysis of all relevant statutory requirements and a comprehensive presentation by Jennifer Fioretti, the Staff Coordinator to NVTA's Project Implementation Group. Ms. Fioretti described in detail the methodology utilized, criteria considered, and process deployed by NVTA's JACC and by NVTA's Project Implementation Group in developing the current proposed project list which will be the subject of upcoming public comment and future consideration by NVTA. Several members of the Legal Working Group posed questions to Ms. Fioretti in order to ascertain whether, how, and to what extent all pertinent statutory factors had been considered and analyzed in the development of the tentative project list. After considering the presentation and after engaging in further discussion, a motion was made, seconded, and unanimously adopted that NVTA's Legal Working Group had no objection to the project list or to the methodology used to develop that list of projects, as a matter of law.

The Legal Working Group next discussed the question whether NVTA's administrative expenses could be paid by the revenues generated by HB2313. After brief discussion, the Legal Working Group agreed that NVTA's general administrative expenses could be paid from the "30%" as authorized by Va. Code Ann. Section 15.2-4838.1(B)(1). The Legal Working Group also agreed that "project based" administrative costs could be paid from the "70%" as authorized Va. Code Ann. Section 15.2-4838.1(C)(1). Because the enabling legislation is, however, not clear as to whether NVTA's general administrative costs can also be paid from the "70%", the Legal Working Group recommended that NVTA's Council of Counsels present that issue to the NVTA for possible judicial determination within the context of a bond validation suit should NVTA choose to pursue one. A motion embodying all the conclusions regarding payment of NVTA's administrative expenses was made, seconded, and passed without objection.

The Legal Working Group also briefly considered the issue whether NVTA could convene a closed session to discuss possible candidates for NVTA's Interim Executive Director, even if the individual who was ultimately selected was hired on a short term contractual basis. The Legal Working Group and NVTA's Council of Counsels, upon motion made and unanimously agreed, concluded that discussion of individual candidates was a proper subject for closed session by NVTA under the Virginia Freedom of Information Act.

With respect to the payroll tax withholding question that was referred by NVTA's Organizational Working Group, the Legal Working Group recommends that NVTA's Financial Working Group review that issue and make recommendations to the NVTA since the question was more in the nature of a financial matter than a legal matter.

The Legal Working Group next discussed the possible legal consequences for NVTA and/or its constituent localities should they undertake pay-as-you-go projects, whether or not NVTA decides to pursue a bond issuance or a bond validation proceeding. Tom Biesiadny advised the Legal Working Group that there were ongoing discussions in other NVTA working groups on this matter and no recommendation has yet been forthcoming. Since this concept involves an

array of possible financial and legal risks by NVTA and/or its component localities, a motion was made, seconded, and unanimously adopted, recommending that further risk analysis be performed by NVTA's Financial Working Group, by NVTA's Council of Counsels, and by NVTA's Financial Advisor should NVTA retain one.

Steve MacIsaac and Ellen Posner next briefed the Legal Working Group with regard to a discussion that they had had with counsel from the Virginia Attorney General's Office. Several matters were discussed with attorneys from that office. Counsel discussed developing a possible future omnibus Memorandum of Understanding as between VDOT and NVTA for projects involving those entities. Counsel also discussed whether the revenues generated by HB2313 could be used by NVTA and/or its component localities for revenue sharing purposes. VDOT's counsel agreed with NVTA's counsel that the HB2313 funds could be used for revenue sharing and grant match purposes. VDRPT's counsel indicated that she would need to confer with the VDRPT Director before she could give a definitive answer to that question. NVTA's counsel also briefly broached with counsel from the Attorney General's Office whether the Commonwealth might be amenable to participating in any bond validation proceeding should NVTA pursue the filing of one. Although counsel from the Attorney General's Office could not commit to such a request, their initial reaction was not unfavorable. NVTA's counsel indicated that we would keep the Attorney General's Office updated as to any formal action taken by NVTA that might trigger an official request to the Virginia Attorney General's Office for litigation related assistance.

The Legal Working Group next discussed the issue that had been referred by the Financial Working Group regarding calculation of the towns' project revenue shares under HB2313. Specifically, the question was asked whether the method of calculating the towns' project revenue shares needs to be uniform across the region. There was no immediate consensus on this point among members of the Legal Working Group other than that the enabling statute does not expressly dictate uniformity in the methodology used to calculate town revenues. Mr. Biesiadny advised that discussions on this issue and others relative to the towns are ongoing as between the towns and their respective NVTA member counties. Therefore, the Legal Working Group deferred final consideration of this question until its next meeting so as to allow those discussions to continue.

The Legal Working Group next acknowledged the oral request made by Ms. Fioretti, on behalf of NVTA's Project Implementation Group, that the Legal Working Group and/or NVTA's Council of Counsels provide legal guidance on project size and type should NVTA decide to pursue a bond issuance and bond validation proceeding. The Legal Working Group responded to that request by indicating that any such assistance would naturally be dependent on the issues to be posed in any bond validation proceeding and that assistance would be provided if so directed by NVTA.

The Legal Working Group again discussed the need for a letter by NVTA to the Commonwealth Treasury Board in which NVTA would request that the Treasury Board exempt NVTA from Treasury Board regulations and control should NVTA choose to issue bonds. Because NVTA has not yet taken a formal action on a bond issuance or the filing of a bond validation proceeding, the Legal Working Group deferred action on this matter until its next meeting.

The Legal Working Group also held a brief discussion on NVTA's retaining of a Financial Advisor. Mr. Biesiadny advised that an Item will be presented to NVTA for action at its June 20,

2013, meeting which would propose a scope of work for a financial advisor and which would formally authorize the retention of a Financial Advisor for NVTa by riding Prince William County's existing financial advisor contract.

The issue of NVTa's possible retention of bond counsel was also broached. The Legal Working Group agreed that this matter would be a matter to be discussed by NVTa with its Council of Counsels in a closed session.

There was also a brief discussion on the requested updating of the 2007 Memoranda of Understanding that NVTa had entered into with NVTC and the Arlington County Treasurer. That legal review is ongoing. Based upon input from various counsel and from Mr. Biesiadny, the conclusion was also reached that any updated Memorandum of Understanding that NVTa would enter into with the Arlington County Treasurer would likely be of a short duration, perhaps six months at the outset.

Mr. Biesidany also updated the Legal Working Group on the outreach efforts that had been made to Hampton Roads. At this point, there have been a few calls exchanged as between Fairfax County staff and Dwight Farmer, but no actual discussions have been held.

The Legal Working Group's next meeting is scheduled for Wednesday, July 16, 2013, at 9:30am in the City of Falls Church.