

Cheryl Nenn

From: McComb, Dwight [Dwight.McComb@fhwa.dot.gov]
Sent: Monday, May 12, 2008 1:48 PM
To: Cheryl Nenn
Cc: Radliff, Allen; Szudera, Roger; rod.clark@dot.state.wi.us; john.duffe@dot.state.wi.us; sheri.schmit@dot.state.wi.us; Ahles, Scott; john.fandrich@dot.state.wi.us; david.kitzman@dot.state.wi.us; McMullen, Peter T - DNR
Subject: RE: CMAQ questions for KK River Bike Trail
Attachments: 071292 City Atty Opinion.pdf; UpdatedNarrative empowerment village.pdf

Ms Nenn-

Thank you for bringing this issue to our attention. The FHWA response to your inquiry follows. The Wisconsin Department of Transportation Southeast Region is responsible for administering the project and should be contacted regarding the issue and applicable WisDOT policies and procedures.

CMAQ program eligibility is restricted to transportation projects that will contribute to attainment or maintenance of the national ambient air quality standards for ozone, carbon monoxide and particulate matter. The Kinnickinnic River Bike Trail project was submitted by the City of Milwaukee in 1999 for funding during the state fiscal years 2000-2001 CMAQ Program cycle. In support of CMAQ eligibility, the project proposal stated that "the Kinnickinnic River Bike Trail can be expected to induce a significant mode switch from motor vehicles to bicycles for work trips during the summer when emission reductions are critical. Preliminary travel demand is anticipated to be 200-300 one-way work trips per day in addition to numerous recreational trips." The proposal made no mention of engaging in a public-private partnership to implement the project or of purchasing real estate in excess of that needed to construct the transportation project.

Based on the proposal, a Federal-aid project to purchase right of way for the bike trail project using CMAQ program funding was approved and authorized by FHWA on March 1, 2001. The Federal-aid funding agreement is between the FHWA and WisDOT. WisDOT in turn, has an agreement with the City of Milwaukee as the basis for the project. Under this relationship, WisDOT and the City of Milwaukee are subject to Federal-aid program requirements. The WisDOT Southeast Region Office is responsible for administering the project and should be contacted regarding the issues at hand and WisDOT requirements and procedures, which may be more restrictive than those of the Federal government.

Acquisition, use and disposal of real property using Federal-aid Highway Program funding are subject to provisions of the United States Code of Federal Regulations, Title 49, Section 18.31 as follows:

§ 18.31 Real property.

- (a) *Title. Subject to the obligations and conditions set forth in this section, title to real property acquired under a grant or subgrant will vest upon acquisition in the grantee or subgrantee respectively.*
- (b) *Use. Except as otherwise provided by Federal statutes, real property will be used for the originally authorized purposes as long as needed for that purposes, and the grantee or subgrantee shall not dispose of or encumber its title or other interests.*
- (c) *Disposition. When real property is no longer needed for the originally authorized purpose, the grantee or subgrantee will request disposition instructions from the awarding agency. The instructions will provide for one of the following alternatives:*
- (1) *Retention of title. Retain title after compensating the awarding agency. The amount paid to the awarding agency will be computed by applying the awarding agency's percentage of participation in the cost of the original purchase to the fair market value of the property. However, in those situations where a grantee or subgrantee is disposing of real property acquired with grant funds and acquiring replacement real property under the same program, the net proceeds from the disposition may be used as an offset to the cost of the replacement property.*
 - (2) *Sale of property. Sell the property and compensate the awarding agency. The amount due to the awarding agency will be calculated by applying the awarding agency's percentage of participation in the cost of the original purchase to the proceeds of the sale after deduction of any actual and reasonable selling and fixing-up expenses. If the grant is still active, the net proceeds from sale may be offset against the original cost of the property. When*

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a grantee or subgrantee is directed to sell property, sales procedures shall be followed that provide for competition to the extent practicable and result in the highest possible return.

(3) Transfer of title. Transfer title to the awarding agency or to a third-party designated/approved by the awarding agency. The grantee or subgrantee shall be paid an amount calculated by applying the grantee or subgrantee's percentage of participation in the purchase of the real property to the current fair market value of the property.

At the time of FHWA funding approval, the City of Milwaukee represented that the property to be acquired under the CMAQ grant was required for a transportation purpose of constructing, operating and maintaining a section of the Kinnickinnic River Bike Trail between the Oak Leaf Trail at W. Rosedale Avenue and East Washington Street. As provided in 49CFR18.31(b), title for the real property acquired by the City of Milwaukee under the Federal-aid CMAQ project must remain with the City of Milwaukee for purposes of the transportation project. Further, the City of Milwaukee is under obligation to complete the project or return the CMAQ program funding. Use of the property for other than the transportation project purpose authorized is not allowable.

Disposal of property not needed for purposes of the Federal-aid transportation project is subject to the general provisions stated, specific provisions under the Federal-aid highway program, and FHWA approval. Title 23, Section 156 of the United States Code governs proceeds from the sale or lease of real property acquired under the Federal-aid Highway Program as follows:

Sec. 156. Proceeds from the sale or lease of real property

(a) Minimum Charge.--Subject to section 142(f), a State shall charge, at a minimum, fair market value for the sale, use, lease, or lease renewal (other than for utility use and occupancy or for a transportation project eligible for assistance under this title) of real property acquired with Federal assistance made available from the Highway Trust Fund (other than the Mass Transit Account).

(b) Exceptions.--The Secretary may grant an exception to the requirement of subsection (a) for a social, environmental, or economic purpose.

(c) Use of Federal Share of Income.--The Federal share of net income from the revenues obtained by a State under subsection (a) shall be used by the State for projects eligible under this title.

Subject to WisDOT procedures and FHWA approval, the City of Milwaukee may dispose of real property acquired under the CMAQ grant that is not needed to construct, operate, and maintain the Kinnickinnic River Bike Trail. The Federal-aid Highway Program provisions require that the prorata share of Federal-aid funding (80% in this case) based on the current fair market value of the excess property must be returned to the WisDOT for use on other Title 23 eligible projects. The property must be appraised to estimate the current fair market value.

Subject to WisDOT procedures, the Federal-aid provisions allow exception to the minimum charge provision for social, environmental, or economic purposes. If WisDOT procedures permit, perhaps the proposed use described in the attachments could be framed in support of such a request.

Regarding the public-private partnership provisions under the CMAQ program, in accordance with the CMAQ program guidance, partnerships must have a legal, written agreement in place between the public agency and the private or non-profit entity before a CMAQ-funded project may be implemented. The project was implemented as of the date of the FHWA funding agreement, March 1, 2001. The proposed partnership was not in place at the time.

I reiterate that the WisDOT Southeast Region Office is directly responsible for administering the Federal-aid CMAQ project should be contacted regarding the issues and WisDOT policies and procedures governing real property.

Best Regards,

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From: Cheryl Nenn [mailto:cheryl_nenn@mkeriverkeeper.org]
Sent: Friday, April 11, 2008 5:22 PM
To: McComb, Dwight; John.Duffe@wisconsin.gov
Cc: 'McMullen, Peter T - DNR'; 'Tony Zielinski'; 'Peter McKeever'
Subject: FW: CMAQ questions for KK River Bike Trail

Mr. McComb and Mr. Duffe--

I received your contact info from Peter McMullen at Wisconsin DNR regarding some questions that I have on the use of CMAQ funds. It's my understanding that the City of Milwaukee used CMAQ funds in 2000 or thereabouts to purchase 16.2 acres of land along the river outright for the Kinnickinnic (KK) River Bike Trail for approximately \$2.6 Million dollars, 80% of which came from federal CMAQ funding. A local developer, Cardinal Development (who is a for-profit developer) has approached the City about creating a housing complex for the mentally ill on one of the properties purchased with CMAQ funds on behalf of several non-profit organizations (Our Space and Red Cross). This development is entitled "Empowerment Village", consists of 2.37 acres, and the land sale/rezoning has passed the Milwaukee City Plan Commission already, and will probably come before the Zoning Committee in May. Several non-profits locally, including my organization, have been partnering with the City on designing the trail and even fundraising for trail amenities, so we were surprised when we heard that the City was considering selling this property off. Many local citizens have also been very involved in comprehensive planning for this part of the City, and this area was always delineated as discussed as trail and open space. It is the City's contention that as long as the developer pays to put in the trail, that the city's obligations under CMAQ are met (see attached City Attorney Opinion). I frankly disagree. The city did not buy a "right of way" along these properties for the trail, but bought the land outright at fair market value to enable creation of the trail and trail amenities necessary for a 10-foot wide trail. In fact the property in question has been designed as a key "trailhead" for the KK River Trail. We fear that if this development is allowed, than the entire trail corridor will become built upon—wedging the bike trail between the KK River and a "bluff" of buildings. We also don't feel that this is a good use of CMAQ funds, which were mean to "provide funding for transportation projects that improve air quality and reduce traffic congestion" according to the Wisconsin CMAQ Program Guidance (attached). Quite the opposite, this project will encroach upon the trail, and also involve creation of a parking lot for over 32 cars and increase local traffic congestion. The City is also planning on selling the property acquired with CMAQ to the developer for only \$10,000, which isn't fair market value and doesn't approximate what they spent buying it (with 80% federal money). If one approximates a price per acre for the land sale (approx. \$160,494 per acre), than the 2.37 acre property would represent approximately \$380,370 of the total funds expended. This of course approximates that all the land acquired had equal value, which in this case, is a good assumption since the City purchased a former rail corridor for a lump sum.

It's also my understanding from reading the CMAQ interim program guidance from 2006 that projects are ineligible for CMAQ funding that add NEW capacity for SOVs unless construction is limited to high-occupancy vehicle lanes or similar projects (Page 11 of state guidance). Again, as this project would be providing parking for 32 cars and increasing congestion along this corridor, it hardly seems to fit the intent of this funding. Also, the City Attorney intimates in his opinion that this type of development would be allowable as bolstered by language in the public-private partnerships section of the CMAQ guidance (Page 12). However, my reading of that section is that these partnerships were meant to be devoted to partnerships that would "benefit the general public by clearly reducing emissions, not for financing marginal projects". In my opinion, Empowerment Village, although laudable in its aim to house the mentally ill, is "financing a marginal project" on a property meant for a bike trail. Also, Page 30 of the guidance has the actual code language (23 USC S 149) that the City Attorney cites in his opinion. This language contains some more of the same congressional intent language to ameliorate air quality, and under (b)7(B) it states again that "no funds may be provided....which will result in construction of new capacity available to single occupant vehicles..."

It is also my understanding after reading 49 CFR Part 18 regarding use and sale of "real property" (pasted below) that the City could sell the property but would have to pay back the awarding agency in a percentage commensurate with that used for the acquisition, and that said property would have to be sold to result in "the highest possible return". We feel that if the City goes forward with this land sale, than they should have to return at least a portion of the CMAQ funds used for the acquisition of these 2.37 acres, and sell this property closer to

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fair market value, so that these funds could benefit another project more fully meeting the intent of the CMAQ program. Although the City is proposing to sell only a small portion of the property acquired with these funds (2.37 acres of 16.2 total acres), we are concerned that this land sale would set a bad precedent that could affect development along the entire 2.2 mile KK River Trail corridor.

We would appreciate your thoughts on this matter and your interpretation of the City Attorney's opinion on the Empowerment Village proposal. Please feel free to call me with any questions at (414) 287-0207 ext. 29 or further information needs.

Respectfully,

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