

**CITY OF MADISON
OFFICE OF THE CITY ATTORNEY
Room 401, CCB
266-4511**

Date: August 20, 2012

MEMORANDUM

TO: Mayor Paul Soglin
Common Council
Plan Commission

FROM: Michael P. May, City Attorney
Carolyn S. Hogg, Assistant City Attorney

RE: **State Street Grant Restrictions; Legistar No. 26603**

On July 19, 2012, we prepared a short memo to the Downtown Coordinating Committee reflecting what we knew at that time regarding federal transit funding for the State Street Mall. A copy of that memo is attached.

This memo supplements the memo dated July 19, 2012 regarding the above, including providing information from historic documents that had not been located at the time of the original memo. It also addresses the process for obtaining Federal Transit Administration (FTA) approval/concurrence on changes to State Street Transit Mall's current use.

History of Use as Transit Mall/Fixed Guideway

Background

Historic records reflect that the City of Madison began an extensive examination and determination process regarding the potential use of State Street Mall/Capitol Concourse as a pedestrian or transit mall in the late 1960s. This process continued into the 1970s when a final project was fixed upon. City of Madison staff and hired consultants produced reports relating to possible designs and use options.¹ Records show that the process also included review of research on transit malls throughout the U.S., some of which was funded by the federal Urban Mass Transportation Administration (UMTA).² It is interesting to note the definition of "transit mall", as used in the literature of the time; the term is, to some extent, a misnomer. The 1977-1978 UMTA funded report provides this definition:

¹ *State Street: The next few years*, prepared by City Planning Department, January 1969; *State Street Capitol Concourse*, Task VI final report for the Urban Design Plan section of the State Street Mall and Capitol Concourse Project, by Paul Friedberg & Associates, submitted 1974.

² *Streets for Pedestrians and Transit: An Evaluation of Three Transit malls in the United States*, Final Report, UMTA/TSC Project Evaluation Series, Report No. UMTA-MA-06-0049-79-1, Crain and Associates (R. Edminster, D. Koffman), February, 1979.

A transit mall is a street which has been improved for pedestrian use, but retains a roadway reserved for transit vehicles integrated with the city-wide or regional transit system. Access for automobiles is denied or strictly limited, except for cross-street traffic. Transit malls represent a combining of two trends: Traditional pedestrian malls and preferential treatments for buses on city streets. Although the two functions may conflict, there are also ways in which they may reinforce each other. (Supra, Executive Summary, p. 1).

One of the several suggestions floated during public meetings included eliminating all vehicles from the street except some kind of shuttle service like minibuses or trolleys. That plan was strongly opposed by Madison Metro.³

1975 UMTA Grant

Ultimately, a project plan for the State Street Mall/Capitol Concourse was selected. The City of Madison's grant application for the 1975 UMTA grant to finance the construction of the "State Street Transit Mall" provided the following project description:

- (a) A full pedestrian mall in the 700 and 800 blocks of State Street.*
- (b) An automobile-free transit mall in the 100 to 600 blocks of State Street.*
- (c) A segregated transit-way around the Capitol Concourse.*
- (d) Widened sidewalks (or pedestrian-ways) to accommodate the pedestrian traffic.*
- (e) Methods to minimize automobile, bus, pedestrian and bicycle congestion and conflicts.*
- (f) Improvements to the mass transit service through and to the Central Business District.*

Exhibit C of the application addressed the project justification. The City's statement in support of mass transportation funds noted the following project impacts:

The next logical step is to improve transit travel times in the CBD[Central Business District]. The State Street Mall-Capitol Concourse (SSM-CC) will accomplish this goal. With the removing of approximately 50% of all automobile traffic from the Capitol Concourse, removal of all automobile traffic on State Street, and the establishment of an exclusive transit-way on the Capitol Concourse, it is estimated that the average travel time for buses on State Street can be reduced from 6 minutes to 5 minutes. Madison Metro also found that 21% of all accidents involving Madison metro buses during 1971-73 occurred on State Street or the Capitol

³ *Charette's Solution for State St – Build Mall*, Capital Times, October 11, 1973.

Concourse. The reduction of automobile traffic will lessen the potential for bus-automobile conflict situations.

Through the establishment of an exclusive transit-way along State Street and around the Capitol Concourse, Madison metro will be able to improve the operating speed of the system and thus improve the travel time for all Madison Metro users. With the elimination of two minutes of travel time on each main line route, Madison metro will be able to extend service ¼ to ½ mile on either end depending on the route and area in question. This increase in available time will allow Madison to expand the transit service to people in the suburban areas without increasing the operating expenses.

Also the additional time gained by improving travel time along State Street will help improve the reliability of the buses and minimize delay along the route. (Fourth Application for a Mass Trans. Capital Improvement Grant Project, Ex. C.)

Interestingly, UMTA's review of the project application includes a request that the City's statement in Exhibit C "...be expanded to more fully and adequately justify UMTA's participation in the Mall-Concourse project. Discussions should center around increased operating speed and time savings and accident prevention."⁴ The grant was approved in May, 1975. The grant contract funding the "project" incorporated the grant application's project description (Exhibit A set forth above).

Given the categorical language regarding automobile traffic in the project description, staff was asked to search the historic records regarding the introduction of taxis onto the State Street Transit Mall. As mentioned in the July 19, 2012 memo, limited taxi access to State Street was codified in 1978 Sec. 12.805(11) and 1979 Sec. 12.905(14) of the Madison General Ordinances. No written documentation has been found regarding interaction with or approval by UMTA on this point. However, Warren Somerfeld, who was Director of Transportation for the City of Madison at the time of the grant application, explained his recollection of the process in a recent email to Traffic Engineer David Dryer, as follows:

The contract that we signed in the early 1970s made no mention of the use of taxis on State St. for any reason, however we received a great deal of pressure from the cab companies to be able to drop passengers off and pick up requested, phoned in, fares on the street. Since the contract did specify that we could not allow auto use of the street I contacted our UMTA rep in DC-D.J. Mitchell-and we agreed that

⁴ Letter from Department of Transportation, UMTA, D. Jacobs, Director – Division of Project Development re: Project No. WI-03-0017, received by City of Madison Department of Transportation February 5, 1975. (Letter included in original grant application). It may be helpful to keep these factors in mind should the City seek FTA concurrence on changes to the incidental use of State Street (assuming the street's continued use as a transit mall or fixed guideway).

permitting taxis (a form of mass transportation ⁵) to enter State St. at the nearest intersection to the destination of the pick up or drop of the passenger and exit at the next intersection would not violate our agreement. This decision was made because we didn't believe that this temporary use would significantly impair transit, bike or pedestrian traffic or safety. (Excerpt from Somerfeld email to Dryer dated June 24, 2012.)

In order to follow up on the written comments submitted to Traffic Engineer Dryer concerning his (Somerfeld's) recollection of the development of State Street Mall and the original UMTA (FTA) grant process, City staff had a telephone conference call with Somerfeld. Somerfeld recalled that the entire City process on the proposed redevelopment of State Street was lengthy, comprehensive and inclusive; it covered a full range of issues from use (pedestrian; transit; bicyclists; specified other vehicles); design; construction elements; and funding. Stakeholders who weighed in during public hearings and meetings of public bodies included merchants; bicyclists; pedestrians; transit; taxis; etc.

Somerfeld confirmed his recollection that the original grant documentation indicated a goal of creating a transit mall which would include portions of pedestrian mall/ widened sidewalks and allow access to bicycles – but no automobiles other than emergency vehicles. He recalled that at some point taxi operators raised the issue of whether and to what extent taxis would be allowed. Somerfeld had direct contact with UMTA in Washington D.C. regarding the proposal. After discussion, FTA concluded that the grant would not need to be amended; that as long as the original intent (project scope) of the grant was not violated and the City continued to control the use of the transit mall consistent with that project description, the proposed use would be, in Somerfeld's words, "the City's call". As to the particular access to the street by taxis ultimately embodied in the 1978 & 1979 ordinances, Somerfeld recalls that the FTA did not express any concern.

Post- 1975 Grants

Subsequent to the original grant, Metro Transit obtained three separate fixed guideway modernization grants (49 USC § 5309) to repair/renovate State Street as follows:

| <u>Project No.</u> | <u>Certification Date</u> | <u>Project Activity on State Street</u> |
|--------------------|---------------------------|---|
| WI-03-0065 | May 4, 1998 | Renovate Transit Mall |
| WI-03-0070-00 | February 2, 2000 | Rehab/Renovate Transit Mall |
| WI-03-0071-00 | February 23, 2000 | Rehab/Renovate Transit Mall |

⁵ Legally, at least, taxis are not mass transportation as defined in 49 USC Sec. 5302.

As mentioned in the original memo, State Street's continued use as a "fixed guideway" has been reflected in the formula fund grants (49 USC 5307) received by Metro/the City annually. Taxi access to the transit mall has continued in substantially the same fashion since the 1978-79 ordinance enactments. Amendments in 1995, enacted in an attempt to reduce the congestion on State Street, repealed and recreated the provisions under a new Sec. 12.915 MGO, clarifying and expanding the traffic regulations for vehicles, including large and small motor trucks, public passenger vehicles, and food delivery vehicles. Amendments in 2000 further restricted access to State Street for motor trucks during certain hours. City staff does not know if these other changes were cleared with the FTA, or whether the changes were significant enough that such clearance was required.⁶

Grant Management Requirements

The FTA's general grant management requirements are set forth in Circular FTA C 5010.ID. Other Circulars may also apply to specific types of projects. These requirements are also embodied in the FTA Master Agreement which is now incorporated by reference into each grant agreement. Among the responsibilities that a grantee takes on as a condition of receiving an FTA Grant are to administer and manage the grant in compliance with all federal regulations, circulars and the applicable grant agreement; to demonstrate and retain satisfactory continuing control over the use of project property; and to ensure that resources are used solely for authorized purposes. FTA grant management guidance recognizes that it may be necessary and appropriate to amend a grant at times and/or to allow incidental use of project property under certain conditions. Circular C. 5010.ID. specifies three ways to modify a grant after it has been awarded: budget revision; administrative amendment; grant amendment. Grantees are instructed to work with FTA regional or metropolitan offices relating to these requests, including which type of grant modification is appropriate for the proposed action. In discussions with FTA Region V General Counsel, it was concluded that potential expanded taxi use of State Street (as contemplated by the Alternate Ordinance, Legistar File No. 26603) would not implicate a grant amendment process; rather the matter involves a project management process to allow incidental use of project property (assuming that it remains the City's intent to maintain the Street as a transit mall/fixed guideway).

Pursuant to FTA C. 5010.1D, incidental use of project property requires prior FTA approval (with one exception not at issue here). Grantees are advised to consult their FTA regional or metropolitan office prior to incorporating incidental use activities. The

⁶ The background section of this memo is based on City staff's extensive record search – in City agency files; City off-site storage; State Historical Society; UW Libraries; internet searches, etc. The City Attorney's office has accumulated a wealth of material and cites to reference material which may be useful in the future. The OCA will pass it on to City Engineering for retention so that such a search need not be repeated.

Project Management section of the Circular, Chapter IV, Project Management, Page IV-16, specifies that incidental use will be permitted if:

- (a) The incidental use does not interfere with the grantee's project or public transportation operations;
- (b) The grantee fully recaptures all costs related to the incidental use from the non-transit public entity or private entity, including all applicable excise taxes on fuel for fueling facilities and wear and tear to capital improvements;
- (c) The grantee uses revenues received from the incidental use for capital and/or operating expenses that were or will be incurred to provide the public transportation; and
- (d) Private entities pay all applicable excise taxes on fuel.

The Office of the City Attorney has now had an opportunity to discuss the above incidental use approval procedure with FTA Region 5 Legal Counsel. Per the conversation the OCA understands the administrative process to be as follows: Before instituting the proposed incidental use, the City/Transit Agency must submit a letter indicating that it would like to allow/expand a certain incidental use of State Street Transit Mall/fixed guideway, describing the specifics of the proposed incidental use - in this instance logically including a proposed ordinance codifying the use, and requesting FTA's concurrence. The letter should explain why the proposal qualifies under the Circular, including that the proposed use will not interfere with the City's current use of State Street as a transit mall/fixed guideway. The FTA would view the incidental use request as evidence of the City's intent to continue the street as a limited access/controlled use fixed guideway and would permit the use if the letter demonstrated that the Circular standards were met. The burden is by no means an onerous one. It should be understood, however, that the process is not designed to have FTA mediate or decide between disputing views; rather it is to obtain concurrence of the FTA on an incidental use of the street which the City wishes to permit and has concluded will not interfere with the use of the street as a transit mall/fixed guideway.

The Future of State Street

It may be useful to add a further note on FTA and State Street. The fact that there may be a federal interest in the City of Madison's current use of State Street as a transit mall/fixed guideway does not mean that the federal government (FTA) can prohibit the City from rethinking the nature of the street – including its use as a fixed guideway/transit mall. There is no federal law that would permanently foreclose the City from returning State Street to an ordinary street on which all traffic – autos, trucks, buses – can circulate or from making other changes that alter its current use. That does not mean that such a decision is necessarily without consequence.

As is required for federal UMTA/FTA grants generally, the City as a condition of the 1975 grant and the above-mentioned subsequent grants agreed to use the facilities funded by the grant for the provision of mass transportation service substantially as

described in the project description for the useful life of the project. In the case of the 1975 grant, WI-03-0017, this was “. . . for a period from the date of construction or installation of twenty years.” The subsequent grants for the renovation/rehab of the transit mall simply continued the general requirement that project property/equipment/facilities, etc. be used for appropriate project purpose for the duration of the useful life of the property as required by FTA. A similar requirement appears in the annual formula fund grant awards.

Thus, were the City to make a change, e.g., return State Street to an ordinary street, there would need to be a calculation of whether there is a residual federal liability under all existing grants for federal financial contributions related to the construction, renovation/rehab and use of the Street as a transit mall/fixed guideway, and if so what is the extent of the liability. This requires a determination of the useful life of the grant project(s) and the value, *if any*, of the remaining federal interest.

General grant requirements specify that if property/facilities/equipment is disposed of before the end of its useful life, the grantee is responsible to reimburse the FTA for its proportionate share of the proceeds. FTA C 5010.1D. In the context of State Street, the original grant set the useful life of the 1975 construction project at 20 years from the completion of construction. Consequently, there is no residual federal interest in the facilities constructed under that grant. The renovation/rehab grants as well as the formula grants each would involve a separate “useful life” determination in consultation with FTA and using standard accounting principles referenced in the FTA grant management circular, FTA C. 5010.1D, as no explicit time period was established in those grant award documents. In this case, the facilities constructed/renovated with grant funds are the street improvements themselves – which would naturally not follow a standard calculation of useful life, disposition of the property and distribution of proceeds scenario. Such calculations would necessarily take into account proposed uses where the property/facilities were not actually sold or otherwise disposed of but continued to be used for public transit purposes. For example, under some scenarios State Street might no longer be a fixed guideway, but the street and its bus shelters might nonetheless continue to function as part of Metro’s non-fixed guideway bus route system for delivery of its transit service. This memo does not determine what residual federal liability, if any, there might be under the post 1975 grants.

Changes to State Street, short of a complete return of the street to ordinary street use for all vehicles generally, could also implicate the amount of and/or eligibility for certain types of FTA grant funding in the future. For example, if the City decided to emphasize the pedestrian element of the transit mall during a portion of the year – say the summer months – by eliminating all traffic including buses during those months, any request for FTA funding to rehab/renovate the street as a whole would involve a determination by FTA as to what portion of funds requested were dedicated to enhancing mass transportation services and otherwise met the requirements of the grant funding source. (There are fixed guideway facilities (some ferries, for example) that do not function all year round, however.) Without having specific plans at issue, the OCA can only make the general observation that decisions which envisage substantial changes to State Street may implicate what elements of any project FTA could fund and might also weigh

against the street being considered a fixed guideway in the future.⁷

Conclusion

Prior to expanding/modifying the current incidental use of the State Street Transit Mall/fixed guideway, the City must seek FTA concurrence by using the administrative process set forth in the federal grant management circular. The circular specifies that the incidental use will be permitted if the listed standards, including that the use does not interfere with the grantee's project or public transportation operations, are met. It should be understood generally that plans for future use of State Street may implicate residual federal liability that the City may have under prior FTA grants, and eligibility for future FTA funding for specific projects.

Attachment

cc: Chuck Kamp
Steve Cover
Brad Murphy
Anne Monks

⁷ It should be noted that recent federal legislation entitled *Moving Ahead for Progress in the 21st Century* (MAP-21) amended the definition of fixed guideway and made other significant changes in FTA grant programs. FTA officials and City staff are still assessing what effect these changes will have.