



**NEW YORK STATE THRUWAY AUTHORITY
NEW YORK STATE CANAL CORPORATION**



MINUTES

GOVERNANCE COMMITTEE MEETING NO. 6

November 19, 2008

Minutes of a meeting of the New York State Thruway Authority/Canal Corporation Governance Committee, held in the Board Room at Administrative Headquarters, 200 Southern Boulevard, Albany, New York 12209.

The meeting began at 9:30 a.m.

The following members of the Governance Committee were present, constituting a quorum:

Present:

Chairman John L. Buono, Governance Committee Member (ex officio)
Kevin Plunkett, Chair, Governance Committee
Erin Crotty, Governance Committee Member
Brandon R. Sall, Governance Committee Member

In addition, the following staff were present:

Michael R. Fleischer, Executive Director
Daniel Gilbert, Chief of Staff
Kevin Allen, Acting Director, Audit and Management Services
Wendy Allen, Deputy Chief of Staff
John Barr, Director, Administrative Services
John Bryan, Chief Financial Officer
Kim Chupa, Public Information Specialist
Tom Fitzgerald, Director, Office of Human Resource Management
Kenneth Flood, Director, Real Property Management
Diane Galuski, Director, Bureau of Management Analysis and Projects

Richard Garrabrant, Syracuse Division Director
Harry Lennon, Senior Investigator
Katherine McCartney, Deputy Counsel
Sharon O'Connor, General Counsel
Elizabeth Yanus, Special Assistant

Also in Attendance:

John Armstong, Assistant Television Engineer, New York Network
Bill Estes, Assistant Counsel to the Governor
Scott Fein, Partner, Whiteman Osterman & Hanna LLP

PUBLIC SESSION

Mr. Plunkett, Committee Chair, called the meeting of the Governance Committee to order.

Ms. Yanus recorded the minutes as contained herein.

Item 1

Approval of Minutes of Governance Committee Meeting No. 5

Mr. Plunkett noted that the Committee raised an issue at the previous meeting concerning the proposed Code of Ethics for Board Members which required further discussion. Ms. O'Connor advised that Scott Fein has researched the matter and would be available to address it when he makes his presentation later in the meeting.

After full discussion, on the motion of Ms. Crotty, seconded by Mr. Sall, without any objections, the Governance Committee approved the minutes of Governance Committee Meeting No. 5, held July 16, 2008.

Item 2

Review and Approve the Following for Board Action: Revised Freedom of Information Law (FOIL) Regulations for the Thruway; FOIL Regulations for the Canal; and Confirmation of the Transfer of FOIL Responsibility from Secretary to the Board to a Records Access Officer Designated by the Executive Director

Ms. Allen reported that this item covers changes to the rules and regulations of the Authority and Corporation related to the provision of information required under New York State's FOIL. Although FOIL is not specifically covered by the Governance Committee Charter, FOIL pertains to the public's right to government records which is consistent with this Committee's responsibilities to review policies that address accountability and transparency. Ms. Allen said that the two documents before the Committee for approval are the Authority's revised FOIL regulations and the newly-created Canal Corporation FOIL regulations. Authority staff recommends that the Governance Committee review and approve for Authority and Corporation Board action the Authority and Corporation FOIL regulations and the transfer of responsibility for coordinating and responding to FOIL requests from the Secretary to the Board to a Records Access Officer designated by the Executive Director.

Mr. Plunkett asked the Committee Members if they had any questions, and whether or not it was appropriate to act on this item or if further review was required. Mr. Sall requested an overview of the significant changes. Ms. Allen said that the Authority's FOIL regulations were primarily revised to reflect statutory changes. These regulations were first created in 1983 and last revised in 1994. The Canal Corporation had always followed the Authority's regulations and it was deemed appropriate for Canals to have its own regulations. The proposed Canal regulations mirror the Authority's. Ms. O'Connor added that the new regulations also accommodate the fact that many more requests are submitted electronically and the Authority often provides responses in an electronic format. Also, the original regulations contained a list of available records. This list predated E-ZPass and the acquisition of the Canal Corporation and all changes to the list required Board action. The FOIL statute does not require that a detailed list of records be maintained in the regulations. Rather, it just requires that a list of types of records be made available. Authority staff believes it is better not to have the list in the

regulations so that the list can be modified as appropriate without obtaining Board approval. Mr. Sall asked if the Records Access Officer is an existing position or one that needs to be added. Mr. Plunkett responded that the responsibility is currently assigned to the Secretary of the Board. Ms. O'Connor added that the responsibility has been given to another person who holds an existing position. This transfer was made to align with both: a) the recommendation in the State Comptroller's audit of the Authority's FOIL processes that the responsibility for FOIL coordination be a primary function of the Records Access Officer in order that requests could be handled as promptly as possible; and b) changes in the law which mandate a more aggressive schedule in responding to FOIL requests requiring that records be provided within 20 days. Mr. Plunkett asked if the Canal Corporation was adopting separate FOIL regulations for the first time. Ms. O'Connor responded affirmatively, noting that the Canal Corporation regulations mirror the Authority's.

After full discussion, on the motion of Ms. Crotty, seconded by Mr. Sall, without any objections, the Governance Committee approved and authorized submission of the following to the Authority/Corporation Board for consideration: revised FOIL regulations for the Authority, FOIL regulations for the Canal Corporation, and confirmation of the transfer of FOIL responsibility from Secretary to the Board to a Records Access Officer designated by the Executive Director.

Item 3

Review and Approve for Board Action: Thruway Real Property Management Policy, Thruway Real Property Standard Operating Procedures (SOPs), and Thruway Personal Property Disposal Policy

Mr. Plunkett asked Mr. Bryan if it would be appropriate to combine items three and four for discussion purposes. Mr. Bryan responded affirmatively, stating that these items seek the approval of the Governance Committee of the Thruway and Canal Real Property Management Policies, Real Property SOPs, and Personal Property Disposal Policies. The Public Authorities Accountability Act of 2005 (PAAA) requires that these items be reviewed by the Board annually, and with the Committee's concurrence it is expected that they will be advanced to the

Board in January. The Personal Property Disposal Policies and SOPs for both entities have not changed since being reviewed and approved by the Board in March 2008. However, several changes to the Thruway and Canal Real Property Management Policies are being proposed. The changes are essentially technical in nature, clarifying certain existing disposal and permitting policies to ensure that they conform more appropriately to the statute.

Mr. Plunkett commented that the changes appear to be a matter of wordsmithing. Mr. Bryan concurred, adding that the revised language provides clarity to staff as they undertake the process and contemplate making revisions to the SOPs, which are expected in early 2009. Mr. Plunkett reiterated that changes were only made to the Real Property Management Policies; the SOPs and Personal Property Disposal Policies remain unchanged since being reviewed in March; and these Policies were approved by the Authority's counsel. Mr. Bryan confirmed that these statements were accurate.

After full discussion, on the motion of Mr. Plunkett, seconded by Mr. Sall, without any objections, the Governance Committee approved and authorized submission of the following to the Authority Board for consideration: the Thruway Real Property Management Policy, Thruway Real Property SOPs, and Thruway Personal Property Disposal Policy.

Item 4

Review and Approve for Board Action: Canal Real Property Management Policy; Canal Real Property SOPs; and Canal Personal Property Disposal Policy

After full discussion, on the motion of Mr. Plunkett, seconded by Ms. Crotty, without any objections, the Governance Committee approved and authorized submission of the following to the Corporation Board for consideration: the Canal Real Property Management Policy, Canal Real Property SOPs, and Canal Personal Property Disposal Policy.

Item 5

Review and Approve a Revised Affirmative Action/Equal Employment Opportunity Policy for Board Action

Mr. Barr requested the Governance Committee's review and approval of the revised Affirmative Action/Equal Employment Policies (25-2-24 and 25-2-24C) that were established pursuant to Executive Order 6. The Policies were revised to improve readability. In addition, an opening purpose statement was added, as was language affirmatively stating that the Thruway Authority's and Canal Corporation's policies should be in accordance with Federal and State law.

Mr. Plunkett asked if any issues had arisen under the prior Affirmative Action/Equal Employment Policies requiring corrective action or if the Policies were merely updated in accordance with the law and from a good governance perspective. Mr. Barr was not aware of any issues. Mr. Fitzgerald advised that there were no reports that the Policies were inadequate or otherwise inappropriate.

After full discussion, on the motion of Ms. Crotty, seconded by Mr. Plunkett, without any objections, the Governance Committee approved and authorized submission of the revised Affirmative Action/Equal Employment Opportunity Policy to the Authority/Corporation Board for consideration.

Item 6

Review and Discuss as Necessary the Following Items: Ethics Violations, if Applicable; and Ethics-Related Publications, if Applicable

Ethics Violations

Mr. Fleischer reported that no ethics violations were referred to the New York State Commission on Public Integrity in 2008. One case remains open.

Ethics-Related Publications

Mr. Fleischer reported that one new publication, “Outside Activities and Honoraria,” was issued in August. This Executive Instruction is issued annually.

After full discussion, on the motion of Mr. Plunkett, seconded by Ms. Crotty, without any objections, the Governance Committee accepted Mr. Fleischer’s reports on ethics violations and ethics-related publications.

Item 7

Presentation on Governance Best Practices and Trends

Mr. Plunkett welcomed Mr. Fein. Following an introduction to the Committee Members, Mr. Fein commenced a presentation on governance best practices and trends. The PAAA was enacted in 2005 for the purpose of introducing transparency into the operations of public authorities. This was done in two manners: the first was to develop policies to help guide decision-making at public authorities; the second was to mandate that public authorities submit annual reports that describe budget, debt service, programmatic goals and property disposition. The PAAA requires Board Members to be trained in the areas of ethics and governance and mandates periodic updates on governance trends. As counsel to the Governance Committee, Mr. Fein will periodically provide updates on trends. The New York State Authority Budget Office (ABO), a subsidiary of the Division of the Budget, is responsible for implementing the PAAA. It periodically reviews the policies and practices of public authorities and provides a grade (similar to a report card) as a measure of compliance with the PAAA. Mr. Fein compared the compliance reviews conducted by the ABO on other public authorities to the policies and practices of the Authority and Corporation, and reported that the Authority’s and Corporation’s policies and practices are in conformance with the PAAA. This is not merely an expectation, as not all public authorities have met this standard, but a tribute to a significant effort put forth by Authority/Corporation staff. He also reviewed, on a random basis, minutes of both the Governance Committee and Board meetings, and in his view, these minutes comport with the requirements of the PAAA as well. Based on these two standards, Mr. Fein expressed the

opinion that the Authority/Corporation is doing well and, if audited, would receive a high grade. In addition to reviewing the activities, minutes and policies of other authorities, the ABO commented on Board interaction and dynamics. Mr. Fein presented these findings to the Governance Committee so that the Committee could determine their applicability to the Authority and Corporation Boards. He directed the first comment to Mr. Sall. As a new Board Member, Mr. Sall should feel comfortable with the fact that he has been oriented to the organization and received information and history as well as training. Mr. Sall stated that he had not yet received training, but was scheduled to attend in February.

With respect to a quorum, if a Board Member leaves the room, and there is no longer a quorum business needs to cease. Mr. Plunkett inquired as to whether a quorum can be convened by a telephonic conference call. Mr. Fein did not have a definitive answer, but offered to find out. Mr. Fein continued with a second point that relates to Board Members' attendance. All Members are expected to attend, with the exception of hardship and illness situations. Absence is frowned upon, since there are relatively few Members and every action is a consensus of the whole. Mr. Plunkett asked if a specific number was provided, to which Mr. Fein responded negatively; it is soft bit of guidance.

Board Member participation is another aspect of guidance provided by the ABO. Board Members are expected to actively participate in meetings. As part of its review of meeting minutes, the ABO assesses such interaction by the inclusion of Board Members' comments, including requests for additional information in cases of complex propositions. Members are expected to slow down the process, when appropriate, and take adequate time to gather and review information prior to making decisions. If you are uncertain, so few cases are time sensitive that you cannot wait and, as such, Members are expected to request clarification of any issues when necessary. Mr. Plunkett asked if it would be appropriate to schedule additional meetings of the Governance Committee to resolve issues concerning items that have a time line for Board consideration associated with them (for example, in cases when an item is expected to be presented to the full Board at a specific meeting). Mr. Fein advised that such meetings are subject to the requirements of the Open Meetings Law, but are permissible pursuant to the

PAAA and encouraged. In follow-up, Mr. Plunkett asked if this practice pertained to both Committees and the Board. Mr. Fein responded affirmatively.

At Mr. Sall's request, Mr. Fein provided a synopsis of the Open Meetings Law. The Law requires public meetings to be webcast and minutes recorded. Meeting minutes must be made available to the public within certain time frames. Mr. Plunkett asked if this is applicable if the minutes are still in draft form. Mr. Fein responded affirmatively; Ms. O'Connor added that the document would indicate that it was in draft form prior to distribution. Mr. Fein continued, stating that Executive Session is an exception to the Open Meetings Law. It may not be invoked simply to convene privately and/or to discuss confidential issues; the subject matter must pertain to one or more of the following criterion: imperiling public safety, disclosing a law enforcement agent, proposed litigation, collective bargaining, health-related issues or human resource issues. The reason for entering into Executive Session should be identified and a vote taken to enter it. Only the disclosed topic(s) may be discussed. If a decision is made during Executive Session, minutes are required. They are not required otherwise. Mr. Plunkett asked if attorney-client issues are exempt from the Open Meetings Law, citing a hypothetical need to obtain advice from the Authority's General Counsel as an example. Mr. Fein advised that Executive Session would be permissible if it related to pending or proposed litigation; however, privileged conversation would not be. Ms. O'Connor stated that it was her understanding, based on discussions with Bob Freeman of the Committee on Open Government, that if there is a separate privilege, then it is beyond the scope of the Open Meetings Law completely. Attorney-client discussions are privileged and not considered to constitute a meeting and therefore are not subject to the Open Meetings Law. Mr. Sall asked if there were any pitfalls to the Board Members meeting outside of a public meeting. Mr. Fein advised that social interaction among Board Members is encouraged. However, sub-quorum meetings to make preliminary decisions would probably not be appropriate. Mr. Plunkett revisited the appropriateness of Board Members meeting to privately discuss attorney-client issues, asking if this Governance Committee meeting could theoretically be held privately. Ms. O'Connor and Mr. Fein offered to research and discuss this matter further before providing a definitive answer. In a subsequent question, Mr. Plunkett asked if Executive Session would be appropriate if someone threatens litigation. Mr. Fein noted

that the pending or proposed litigation criterion is litigation in its broadest and most generic sense. He offered to research this matter as well.

Conflict was the next topic of Mr. Fein's presentation. He praised the Authority/Corporation Board for its methods of handling conflicts. He encouraged Board Members to maintain a conservative approach and err on the side of caution.

Mr. Fein continued his presentation with a discussion of gifts. The \$75 limit was changed to "nominal" one-and-one-half years ago. A State officer or employee may not accept a gift of more than nominal value if it may reasonably be inferred that the gift was intended to influence the officer or employee. The sanction can be a \$40,000 fine or referral to a prosecutor for prosecution for a misdemeanor. Reiterating the standard, if it may reasonably be inferred that the gift was intended to influence the officer or employee in the performance of his duties, an external party witnessing a gift being given to a state officer or employee could report the matter to the Commission on Public Integrity. The Commission will commence an investigation based on a report of perceived impropriety alleged by a third party or the gift recipient. Mr. Fein recommended that Board Members adopt the following rule: interpret "nominal" to mean "nothing" as opposed to something trifling or having insignificant value, and consider going beyond the regulatory requirement and do not accept items from anyone that may have an interest in Authority/Corporation business. Ms. Crotty expressed strong support for this suggestion. Mr. Fein admitted the rule was challenging; however, the penalties are so significant it is worth contemplating. Chairman Buono suggested that in cases of gatherings, the Board Member pay the bill. Mr. Plunkett agreed with Mr. Fein's rule, but asked if it was a realistic expectation for an employee attending an out-of-town meeting at which a continental breakfast is served to place a few dollars on the table as payment for a bun and cup of coffee. Mr. Fein suggested that in this type of situation the employee reimburse the host an appropriate amount for any food and beverage items consumed. In doing so the employee is reminding oneself and sending the message to others that this is the employee's government. This rule is not a statutory requirement; it is a suggested practice.

Mr. Plunkett commented that there had been a thorough discussion of Section 74 of the Public Officers Law regarding the Code of Ethics for Board Members at the last Governance Committee meeting. In the interest of time, he suggested deferring further discussion to a later meeting.

Mr. Fein concurred, and concluded his presentation with a discussion of trends. He pointed out that public authorities are independent entities and corporations intended to operate outside of the political cycle and calendar, while still remaining accountable to statewide elected officials. The State is in the midst of a fiscal crisis; all fiscal decision-making is consequently accelerated. If the Authority/Corporation is asked to participate, the Board is encouraged to slow down the process and consider its obligations and fiduciary duties prior to making any decisions.

The Committee thanked Mr. Fein for his informative presentation. Mr. Plunkett asked that his request to resume discussion of the Code of Ethics for Board Members be recorded in the minutes.

Adjournment

There being no further business to come before the Governance Committee, on the motion of Mr. Sall, seconded by Ms. Crotty, without any objections, the meeting was adjourned at 10:15 a.m.