

# TASK 8: POLICY, ORDINANCE, STATUTE AND GUIDANCE REVIEW

## INTRODUCTION

The purpose of this task is to review the federal, state, and local policies, ordinances, statutes, obligations and guidance that affect the ABC Ramps transportation, multimodal and carpooling program options.

To begin with, much of the guidance for the management and operation of the ABC Ramps is laid out in the Maintenance and Operations Plan<sup>1</sup>, prepared for and adopted by MnDOT and FHWA in 1989, and put into effect with the adoption of the Management Agreement<sup>2</sup> between MnDOT and the City of Minneapolis on July 29, 1989. The latter agreement was put into effect for 20 years, ending in 2009, and the City has the option to extend the agreement three times for 10 years each (the ramps currently operate under the first of these three possible extensions), for a total possible term of 50 years.

These agreements are formed under the legal authority of several federal laws and regulations, state statutes and additional specific agreements (beyond the Operations and Management plans) between the relevant parties.

This Report discusses these regulations and several related questions, as follows:

1. What documents govern the ABC Ramps?
2. What purposes must the ramps serve?
3. Is it legal to expand HOV incentives beyond I-394?
4. What programs can the ramps offer to serve these purposes?
5. How should these programs be prioritized?
6. What are allowable uses of the transit areas?
7. What are allowable uses of other under-utilized areas?

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<sup>1</sup> Minnesota Department of Transportation Maintenance and Operation Plan for the I-394 Third Avenue Distributor Garage A, Garage B, Garage C, Prepared for Minnesota Department of Transportation and Federal Highway Administration by Strgar-Roscoe-Fausch, Inc., June 1989 Hereinafter “Maintenance and Operations Plan”

<sup>2</sup> Management Agreement for the I-394 Parking Facilities By and Between the Commission of Transportation for the State of Minnesota and the City of Minneapolis, July 29, 1989 Hereinafter “Management Agreement”

8. How long should the ramps be expected to serve their purpose? How must they be maintained during this time?
9. What are the responsibilities for decommissioning / disposing of the ramps when they reach the end of their useful life, including additional duties or restrictions articulated in initial environmental documents?
10. Can the ramps be leased, or and/or produce revenue? If so, how can the revenue be used?
11. What are the limits on discretionary spending? What is a "Title 23 eligible" expenditure?
12. What duties that can be shared under MN Joint Powers statute (MN stat 471)?
13. What social issues, such as safety, security and equity must be addressed? How?

## GOVERNING DOCUMENTS

### A. Federal

**23 CFR 650, Subpart C, National Bridge Inspection Standards** 23 CFR 650, Subpart C, defines a bridge as a "structure, including supports erected over a depression or an obstruction, such as water, [or] highway . . . ." <sup>3</sup> Section V(A)(2) of the Maintenance and Operations Plan notes that the ramps are "Considered bridges under 23 CFR 650, Subpart C, National Bridge Inspection Standards," which means that inspection and maintenance standards for the ramps are those required for maintaining bridges, rather than other parking structures.

**23 CFR 710.401 – 710.409 Right of Way (ROW) and Real Estate** These regulations, which are part of Subchapter H of Title 23 of the Code of Federal Regulations, relate to management of right of way and real estate. Their purpose is to "ensure the prudent use of Federal funds under title 23, United States Code, in the acquisition, management, and disposal of real property."<sup>4</sup> Specifically, Subpart D, (701.401 et. seq.) applies to use of real property, which is defined as

. . . any interest in land and any improvements thereto, including fee and less-than-fee interests such as: . . . air or access rights, access control, . . . and other contractual rights to acquire an interest in land,

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<sup>3</sup> 23 CFR 650, Subpart C, section Sec. 650.301 "Application of Standards." The full text can be found at <https://www.fhwa.dot.gov/legregs/directives/fapg/cfr0650c.htm> (last accessed May 24, 2017), and in Appendix B-4 of the Maintenance and Operations Plan.

<sup>4</sup> 23 CFR 710.101, available at <https://www.law.cornell.edu/cfr/text/23/710.101> Last accessed March 21, 2019

rights to control use or development, leases, and licenses, and any other similar action to acquire or preserve ROW for a transportation facility.<sup>5</sup>

As MnDOT manages ownership of the land (fee), air rights and access control to the ramps, as bridges over the I-394 Right of Way, these regulations appear to apply.

**(ROW) Manual as defined in 23 CFR 710** This subchapter also calls for a “ROW Manual,” which is defined as “an operations manual that establishes a grantee's acquisition, valuation, relocation, and property management and disposal requirements and procedures.”<sup>6</sup>

28 CFR 710.201(c)(1) states that all title 23 funded projects must have “an FHWA-approved and up-to-date ROW manual,”<sup>7</sup> which MnDOT must submit for FHWA approval by August 2018, and certify that it continues to conform “to existing practices and contains necessary procedures to ensure compliance with Federal and State real estate law and regulation,” every 5 years thereafter. These certifications must include periodic updates of operational changes, and approval of those changes by FHWA.<sup>8</sup>

The Maintenance and Operations Plan discussed below appears to fit this description, other than it does not note any disposal requirements, nor cite these regulations as the source for its authority.

**23 USC 137 Fringe and Corridor Parking Facilities (general traffic)** This statute provides the authority for construction of publicly-owned parking facilities adjacent to or above or below the right of way of a federal-aid highway. Section (f)(1)(B) provides for federal funding of facilities that “have as their primary purpose the reduction of vehicular traffic on the interstate highway.” Further, section (a) notes that “In the event fees are charged for the use of any such facility, the rate thereof shall not be in excess of that required for maintenance and operation (including compensation to any person for operating such facility).”<sup>9</sup>

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<sup>5</sup> 23 CFR 710.105, available at <https://www.law.cornell.edu/cfr/text/23/710.105> Last accessed March 21, 2019

<sup>6</sup> *Id.*

<sup>7</sup> 23 CFR 710.201(c)(1), available at, <https://www.law.cornell.edu/cfr/text/23/710.201>, last accessed March 24, 2019

<sup>8</sup> 23 CFR 701.201(c)(2), available at, <https://www.law.cornell.edu/cfr/text/23/710.201>, last accessed March 24, 2019

<sup>9</sup>23 USC 137 The full text can be found at <https://www.law.cornell.edu/uscode/text/23/137> (last accessed October 25, 2017) and in Appendix B-1of the Maintenance and Operations Plan

**23 CFR 810 Fringe and Corridor Parking Facilities (HOV)** Sections 102 and 106 of this regulation provide further detail regarding authority for the Federal government to fund parking facilities that promote high-occupancy vehicles and mass transit.<sup>10</sup> Section 106<sup>11</sup> then provides the criteria for designating parking facilities as part of the federal-aid system:

- improve traffic capacity of the movement of persons<sup>12</sup>;
- provide a benefit in the form of high-occupancy facilities that replace the need for additional highway capacity<sup>13</sup>;
- must be within the right-of-way of the Federal aid highway, and may use the airspace above the highway<sup>14</sup>;
- must be publicly-owned as long as the facility is needed, and any change in ownership requires FHWA approval<sup>15</sup>; and
- in particular for the ABC Ramps, the facility must have been included in the 1981 Interstate plans (see Task 2 report)<sup>16</sup>.

**23 USC 142** This statute largely relates to construction of mass transit facilities on federal-aid highways, but section (a)(1) notes “If fees are charged for the use of any parking facility constructed under this section, the rate thereof shall not be in excess of that required for maintenance and operation of the

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<sup>10</sup> <https://www.law.cornell.edu/cfr/text/23/810.102> (new facilities),  
<https://www.law.cornell.edu/cfr/text/23/810.108> (designation of existing facilities)

<sup>11</sup> 23 CFR 810.106 The sections noted in this list can be found in <https://www.law.cornell.edu/cfr/text/23/810.106> and [Appendix B-3](#) of the Maintenance and Operations Plan

<sup>12</sup> 810.106 (a)(1)

<sup>13</sup> 810.106(c)

<sup>14</sup> 810.106(a)(3)

<sup>15</sup> 810.106(a)(6)

<sup>16</sup> 810.106(c)

facility and the cost of providing shuttle service to and from the facility.”<sup>17</sup> To the extent this applies to the ABC ramps, it reinforces the non-profit requirement of the ramps.

**23 USC 116 Maintenance** Part (b) of this statute states that it is MnDOT’s duty to maintain the ABC Ramps until they “no longer constitute(s) a part of the Federal-aid system.”<sup>18</sup>

**23 USC 156 Proceeds from the sale or lease of real property** Unlike 23 USC 142 (above), this Statute states that MnDOT must charge a fair market value for the “sale, use, lease or lease renewal” of the ABC Ramps.<sup>19</sup> In addition, 23 USC 116 (discussed immediately above), among other items, create significant barriers to the sale of the ramps, as well as restrictions on uses if they were leased.

**49 CFR 18.25** This federal regulation applies to use of income generated by federal grantees. Section (a) notes that “Grantees are encouraged to earn income to defray program costs,” and section (h) further notes that “There are no Federal requirements governing the disposition of program income earned after the end of the award period”<sup>20</sup>

## B. State

**Minnesota Statute 161.1231** This statute provides MnDOT the specific authority to build, own and operate the ABC Ramps, specifically described as “parking facilities primarily to serve vehicles traveling .

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<sup>17</sup> 23 USC 142 (a)(1) The full text can be found at <https://www.law.cornell.edu/uscode/text/23/142> (last accessed May 31, 2017)

<sup>18</sup> 23 USC 116 (b) (This section was designated as (a) until definitions were added as a new section (a) in 2012) “It shall be the duty of the State transportation department or other direct recipient to maintain, or cause to be maintained, any project constructed under the provisions of this chapter or constructed under the provisions of prior Acts” The full text and amendment history can be found at <https://www.law.cornell.edu/uscode/text/23/116> (last accessed May 24, 2017) and in Appendix B-5 of the Maintenance and Operations Plan.

<sup>19</sup> 23 USC 156 “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” The full text can be found at <https://www.law.cornell.edu/uscode/text/23/156> (last accessed May 25, 2017)

<sup>20</sup> 49 CFR 18.25, available at <https://www.gpo.gov/fdsys/pkg/CFR-2011-title49-vol1/pdf/CFR-2011-title49-vol1-sec18-25.pdf> (Last accessed November 18, 2017)

. . . I-394.”<sup>21</sup> The statute also notes that “other vehicles may use the parking facilities when space is available.”<sup>22</sup> The statute also requires that the Ramps include incentives for HOV use on I-394 and charge a market rate to single-occupant vehicles.<sup>23</sup> Finally, the statute provides the authority for contracting or leasing the ramps to the City of Minneapolis or a private party.<sup>24</sup> While this subdivision specifically allows for this lease or contract to be for operation of the ramps, it does not restrict the lease or contract to be for those uses. However, the lease must “be approved by the federal agency that grants money for the construction of the facilities,<sup>25</sup>” which means the terms must follow the restrictions stated in 23 CFR 810 (noted above) and others items that restrict the use of federal funds, unless FHWA would find otherwise (see “useful life” discussion below).

**Minnesota Statute 471.59** This statute authorizes the ability of “Two or more governmental units, by agreement entered into through action of their governing bodies, . . .[to] . . . cooperatively exercise any power common to the contracting parties or any similar powers.”<sup>26</sup>

### C. Additional Agreements

**Maintenance and Operations Plan and associated letters** Possibly the most comprehensive and influential document of these agreements is the *Minnesota Department of Transportation Maintenance and Operation Plan for the I-394 Third Avenue Distributor Garage, A, Garage B and Garage C*, (hereinafter “Maintenance and Operations Plan”) prepared for and adopted by MnDOT and FHWA in 1989 as noted above<sup>27</sup>. It provides a detailed discussion of MnDOT’s responsibilities based upon the

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<sup>21</sup> Minn. Stat. 161.1231 subd. 1 The full text of the law, as amended, is available at <https://www.revisor.mn.gov/statutes/?id=161.1231> (last accessed May 26, 2017). The full text as passed in 1989 is available in Appendix B-6 of the Maintenance and Operations Plan. The amendments have been technical, removing sections deemed to no longer be relevant and/or updating citations to other laws as they were updated. The amendments do not appear to have substantively changed the meaning of the law as discussed above.

<sup>22</sup> *Id.*

<sup>23</sup> Minn. Stat. 161.1231 subd. 2(1) and subd. 2(2)

<sup>24</sup> Minn. Stat. 161.1231 subd. 4(a)

<sup>25</sup> Minn. Stat. 161.1231 subd. 4(b)

<sup>26</sup> Minn. Stat. 471.59, available at <https://www.revisor.mn.gov/statutes/cite/471.59> Last accessed March 21, 2019

<sup>27</sup> Maintenance and Operations Plan, cited in Note 1, above

statutes and regulations discussed above, and provides the basis for the Management Agreement MnDOT set with the City of Minneapolis.

Should changes be necessary to this plan, Section XI states, “Mn/DOT has the authority and responsibility to make changes in the Maintenance and Operation Plan for the TAD Garages as needed to assure safe and efficient operation. Such changes *will not require the prior concurrence of FHWA* unless such changes would negatively impact priority access for I-394 vehicles, priority access and preferential rates for HOVs, transit access, the intermodal transit facilities, implementation of the I-394 TSM Plan or the profitability of the garages.”<sup>28</sup>

The requirement for involvement of FHWA is further discussed in a 1989 letter approving the Plan from FHWA, which states that while FHWA *concurrence* may not be needed, “MnDOT must *notify* FHWA of all changes to this plan.” The letter further reinforces the need for concurrence for all changes beyond those required to assure safe and efficient operation, noting the need to “obtain FHWA approval, *as appropriate*, before implementing the proposed changes.”<sup>29</sup>

**Management Agreement** One power MnDOT has under MN Stat. 161.1231 is to delegate operation of the Ramps to a third party, in particular, the City of Minneapolis. This agreement between MnDOT and the City of Minneapolis (*Management Agreement for the I-394 Parking Facilities By and Between the Commissioner of Transportation for the State of Minnesota and the City of Minneapolis*, noted above) sets out the responsibilities for each party in establishing this relationship. As pointed out above, this is the only governing document with specific start and end dates, initially set for 20 years (1989 -2009), with the City having the option to extend the agreement three times for 10 years each, for a total possible term of 50 years. If the City should choose to not extend the agreement, it must provide a 180 day written notice prior to the expiration date.<sup>30</sup>

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<sup>28</sup> Maintenance and Operations Plan, Section XI, page 44 (emphasis added)

<sup>29</sup> August 25, 1989 letter from FHWA Division Administrator Charles Foslien, signed by FHWA District Engineer Alan Friesen, to MnDOT Commissioner Leonard Levine, re: Maintenance and Operation Plan for the I-394 Third Ave. Distributor Garage A, Garage B, Garage C. Hereinafter “1989 Foslien letter” (emphasis added)

<sup>30</sup> Management Agreement, section 1.2

The Management Agreement does not include any additional language regarding changes or amendments, other than the State having the ability to terminate the agreement should the City fail to carry out the work identified in the agreement.<sup>31</sup>

**Highway airspace and associated letters** In the early 2000's, questions arose regarding the potential for other uses of the top level of the "A" ramp for non-transportation purposes. Through discussions between representatives of FHWA and the State of Minnesota interpreting the statutes, regulations and agreements above, MnDOT Policy 6.5 "Agreements Relating to the Use of and Access to Highway Airspace," was issued in 2006. Of particular note, the policy states that non-highway uses of airspace above a transportation facility are permissible only when the use meets the following conditions:

- it is interim (not to exceed 99 years);
- it does not interfere with the *current safety*, construction, operation or maintenance of the facility or "*anticipated future transportation needs*"(emphasis added);<sup>32</sup>
- it does not interfere with the original purpose of any associated structures;
- it will be paid for (leased) at a fair market value as determined by MnDOT; and
- it receives approval from the FHWA.

This statement re-affirms the primary use of the ramps to serve their transportation purpose, so long as they can do so.

**MTC Contract No. 91-020-019** This contract, entitled "Interagency Agreement Between the Metropolitan Transit Commission and the City of Minneapolis for Garage A (Seventh Street Garage) and Garage B (Fifth Street Garage) Transit/Rideshare Operations A Part of the I-394 Third Avenue Distributor"<sup>33</sup> outlines the roles and responsibilities for the City of Minneapolis and MetroTransit (successor to the Metropolitan Transit Commission) in operating the transit facilities in Ramps A and B.

**Internal MnDOT e-mail March 4, 2013** This message was in response to a question regarding the appropriate use of revenues generated by the ABC Ramps, due to a proposed change suggested in a Minnesota Senate bill that year (SF 779, which was passed and codified in Minn. Stat. 161.1231 subd.

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<sup>31</sup> Management Agreement, section 8 Section 8.2 does provide that the State may give the City the opportunity remedy the breach before terminating the Agreement.

<sup>32</sup> MnDOT Policy Position Statement 6.5 "Agreements Relating to the Use OF and Access to Highway Airspace,"October 10, 2006

<sup>33</sup> MTC Contract No. 91-020-019 "Interagency Agreement Between the Metropolitan Transit Commission and the City of Minneapolis for Garage A (Seventh Street Garage) and Garage B (Fifth Street Garage) Transit/Rideshare Operations A Part of the I-394 Third Avenue Distributor" August 1990 Hereinafter MTC Contract No. 91-020-019

8<sup>34</sup>). For clarification, then MnDOT Chief Counsel Betsy Parker stated that “The law and regulations governing the construction, operation, maintenance and *fees* for using the ABC ramps are found in United State Code, title 23, section 137 and Code of Federal Regulations, title 23, part 810, subparts A and B.”<sup>35</sup> The language in these statutes is covered in the original report.

**E-mail communication between FHWA and MnDOT March 19, 2018** In these e-mail messages, Bonnie McCabe of FHWA introduces 23 CFR 710, discussed above. A review of the Federal Register indicates that this regulation was substantially written and became effective on September 22, 2016,<sup>36</sup> which would explain why it was not referenced prior to these messages.

## PURPOSE OF RAMPS

The legal basis for the Ramps’ primary purpose of transportation and reduction of Single Occupant Vehicle (SOV) travel is stated in several different places. First among these is Federal Statute 23 USC 137, which provides authority for using federal funds to construct publicly-owned parking facilities adjacent to or above or below the right of way of a federal-aid highway, including section (f)(1)(B), which provides for federal funding of facilities that “have as their primary purpose the reduction of vehicular traffic on the interstate highway.”<sup>37</sup> Federal Regulation 23 CFR 810 adds further detail, providing authority for using federal funds to construct or designate existing facilities for the use of high occupancy vehicles (HOV) and mass transit. Section 106 of this regulation then states that parking

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<sup>34</sup> Minn. Stat. 161.1231 Subd. 8 “Fees collected by the commissioner under this section must be deposited in the state treasury and credited to a special account. Money in the account is appropriated to the commissioner to construct, operate, repair, and maintain: (1) the parking facilities, (2) managed lanes, and (3) related multimodal and technology improvements that serve users of the parking facilities.” <https://www.revisor.mn.gov/statutes/cite/161.1231> (Last Accessed March 21, 2019)

<sup>35</sup> March 4 2013 e-mail from Betsy Parker to Lisa Austin, and others subject: SF 779 I-394 parking facilities special account modification” (emphasis added)

<sup>36</sup> 81 FR 57715 Aug 23, 2016, available at <https://www.federalregister.gov/documents/2016/08/23/2016-19475/right-of-way-and-real-estate> last accessed March 25, 2019

<sup>37</sup> 23 USC 137 cited in Note 4, above

facilities for this purpose must meet several criteria, including “providing a benefit in the form of high-occupancy facilities that *replace the need for additional highway capacity.*”<sup>38</sup>

This purpose is complemented and reinforced in Minnesota State Statute 161.1231, which requires that the ramps include incentives “to encourage drivers of vehicles . . . that are occupied by two or more persons to use the facilities,” while also providing a surcharge to SOV’s during peak period travel that creates rates up to “the same level as parking fees charged in the private parking ramps located in Minneapolis.”<sup>39</sup> The statute does note that the ramps should “primarily . . . serve vehicles travelling the route . . . known as I-394,” and that the incentives discussed above should “encourage drivers . . . that travel I-394,”<sup>40</sup> but the language appears to only prioritize travels of I-394, rather than limiting the incentives and services to them exclusively.

The scope of activities that serve this purpose is further articulated in documents developed during the development of MnDOT’s Airspace Policy.<sup>41</sup> Specifically, this Policy notes that non-highway uses are permissible only when they do not interfere with current or future transportation needs (as discussed above). While FHWA has the ultimate authority to approve or deny these potential uses, the applicable definition of “transportation purpose” likely stems from that stated in 23 USC 137 (reduction of vehicular traffic on the interstate highway).

Contrary to these more general definitions, however, the Maintenance and Operation Plan uses more specific language, noting that “the I-394 Transportation System is being designed to accomplish a major shift in transportation moved from single occupant vehicles to *carpools, vanpools and buses,*” with subsequent discussion continuing to refer to carpools and vanpools.<sup>42</sup> Given that there are a number of programs beyond carpools, vanpools and buses that could achieve the purposes discussed by the other laws and regulations above (including, for example, adjacent rail services provided by NorthStar, Green and Blue lines, bike facilities and bike share, as well as more innovative programs identified in Task 9), it may be worth broadening this language so it matches that in the regulations. As noted in the earlier discussion of the Maintenance and Operations Plan, MnDOT may be able to amend the language in the

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<sup>38</sup> 23 CFR 810 (a)(3), cited in Note 8, above (emphasis added)

<sup>39</sup> MN Stat 161.1231 Subd2(1) and (2), cited in Note 18, above.

<sup>40</sup> MN Stat 161.1231, Subd 1 and 2, cited in Note 16, above.

<sup>41</sup> MnDOT Policy Position Statement 6.5 “Agreements Relating to the Use OF and Access to Highway Airspace,” October 10, 2006, cited in note 26, above

<sup>42</sup> Maintenance and Operation Plan, section I.B. pp 1-2.

Plan on its own, provided the change can be shown to improve the safe and efficient operation of the Ramps. Otherwise, consent of FHWA would be necessary.

## LEGALITY OF EXPANDING HOV INCENTIVES BEYOND I-394

One specific question that has arisen over time is whether the geographic limitation of providing HOV incentives can be removed. Currently, the best known HOV incentive is the availability of a \$20 per month carpool parking contract, but this benefit is restricted to carpools coming from the I-394 corridor. However, should other HOV incentives, such as a discounted daily rate, be introduced, the questions of whether those incentives are restricted just to the I-394 corridor, and how to verify that information, will also need to be considered.

The recommendation to remove the geographic restriction followed analysis of the “transportation purpose” of reducing vehicular traffic, which the ramps must serve as a requirement of receiving the federal funding. The federal requirements state that the traffic reduction must be seen on interstate highways, but only Minnesota state statute 161.1231 specifically states Interstate 394. However, the statute only states that the benefit must be seen on I-394, but it does not restrict the benefits to just that highway. Finally, other documents pertaining to the history of the corridor show an interest in controlling traffic congestion in downtown Minneapolis which receives trip from throughout the metro area. Consequently, since reducing traffic on other highways leading to downtown Minneapolis may reduce some travel on I-394, and will definitely reduce traffic in downtown itself, expanding incentives for HOV use would be within the purpose of the ramps.

## PROGRAMS

The programs offered by the ramps need to serve the transportation purposes noted in the preceding section. However, other than the potentially obsolete language in the Maintenance and Operation Plan, noted in the “Purpose” section, the language setting the parameters for these programs is quite broad. While the statutory and regulatory language clearly includes carpool and vanpool language from the Maintenance and Operation Plan, the Federal statute permits any and all programs that “reduce vehicular traffic,” the accompanying regulations simply refer to “high occupancy facilities,” and the State statute identifies programs that provide incentives to vehicles “occupied by two or more persons.” Consequently, while FHWA has the power to approve or deny the program, and provided the language in the Maintenance and Operation Plan can be amended, it appears that programs do not need to be limited to carpools, vanpools and buses, but could permit any program that serves the purpose of reducing SOV travel and/or increasing HOV use (see, for example, the programs discussed in Task 9).

## PRIORITIES

The documents appear to be fairly clear regarding operational priorities:

1. **Safely serve a transportation purpose**, specifically reduce vehicular traffic.<sup>43</sup> The State Statute notes that the purpose is primarily directed towards “drivers of vehicles that travel I-394 and that are occupied by two or more persons<sup>44</sup>” although it does not appear to limit its applicability to those vehicles. The Maintenance and Operation Plan specifically notes that the purpose of the ramps is to shift modes to carpools, vanpools and buses, but, as noted above, it may be useful to update this language to the broader terms used in federal and state laws and regulations.<sup>45</sup>
2. **Provide a benefit in the form of facilities that serve high occupancy vehicles.**<sup>46</sup> While this clearly includes carpools, vanpools and buses, as noted in the Maintenance and Operations Plan, the federal language (“high occupancy vehicles that replace the need for additional highway capacity”) appears broad enough that it could include programs beyond these 3 modes.
3. **Serve other transportation purposes.** These purposes can be defined under 23 CFR 810.106(a)(1), which defines a transportation purpose as “improving traffic capacity for the movement of persons,”<sup>47</sup> which would include allowing single occupant vehicles to use spaces in the ramps not used by higher occupancy vehicles, so long as the parking fee charged to the single occupant vehicles is “the same level as parking fees charged in the private parking ramps located in Minneapolis.”<sup>48</sup> Beyond this, guidance for prioritizing transportation use could appropriately follow those defined in MnDOT’s performance measures, which also call for increased transit and bicycle use, while decreasing congestion on Twin Cities Freeways.<sup>49</sup> One

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<sup>43</sup> 23 USC 137 cited in Note 4, above.

<sup>44</sup> MN Stat 161.1231, Subd 1 and 2, cited in Note 16, above.

<sup>45</sup> Maintenance and Operation Plan section I(A) also states a purpose of assuring that the ramps “are maintained and operated safely, efficiently and in support of the I-394 HOV incentive programs and I-394 Transportation System Management Plan . . . and in accordance with 23 USC 137.”

<sup>46</sup> 23 CFR 810.106 (a)(3), cited in Note 8, above

<sup>47</sup> 23 CFR 810.106 (a)(1), cited in Note 7, above

<sup>48</sup> MN Stat 161.1231, Subd 2, cited in Note 16, above.

<sup>49</sup> Annual Minnesota Transportation Performance Report, 2015, pp 17, 24 and 26. Available at <http://www.dot.state.mn.us/measures/pdf/12-2%20publicationsmall.pdf> Last accessed November 18, 2017.

should presume that safety in serving these purposes, while not explicitly mentioned, is included.

4. **Cover operating costs** Section X(B)(4) of the Maintenance and Operation Plan states one of the primary objectives of the Ramps is to operate without a profit “while insuring funding of mandatory operating and maintenance expenses.”<sup>50</sup> 49 CFR 18.25 provides authority for this by noting that “Grantees are encouraged to earn income to defray program costs,” thus allowing the ramps to generate revenue.<sup>51</sup> However, 23 USC 137 and 23 USC 142 state that rates charged should not exceed maintenance and operations costs.<sup>52</sup> The Management Agreement with Minneapolis explicitly incorporates these goals by noting that “The City shall pay all maintenance and operating expenses from available parking revenues. . . .”<sup>53</sup> While guidance regarding the reconciliation of revenues and costs to conform to these requirements is considerably more complicated (see “Revenue” discussion below), it is clear that coverage of maintenance and operating costs is an acceptable purpose for the programs provided by the ABC Ramps.
5. **Receive fair market value for any approved non-transportation use** 23 USC 156 states that MnDOT must charge a fair market value for the “sale, use, lease or lease renewal” of the ABC Ramps,<sup>54</sup> and affirmed in MnDOT Policy 6.5 relating to airspace use.<sup>55</sup> While chapter 156’s inclusion of “use” appears to be at odds with the prohibitions on collecting revenue in excess of costs noted in chapters 137 and 142 (an attempt to reconcile these differences is discussed in the “Revenue” discussion below), it is clear that sale or lease of the ramps for a non-transportation purpose, when such uses are allowed (see “Useful Life” section below) can only be conducted when fair market value is obtained.

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<sup>50</sup> Maintenance and Operations Plan section X(B)(4)

<sup>51</sup> 49 CFR 18.25(a), cited in Note 15, above

<sup>52</sup> 23 USC 137, cited in Note 4, above, and 23 USC 142, cited in Note 12, above.

<sup>53</sup> Management Agreement section 3.1

<sup>54</sup> 23 USC 156 cited above in Note 19

<sup>55</sup> MnDOT Policy Position Statement 6.5 “Agreements Relating to the Use OF and Access to Highway Airspace,” October 10, 2006, cited in note 26, above

## ALLOWABLE USES OF THE TRANSIT AREAS

A related question to this “Purpose” discussion is how certain areas may be used. The ramps were constructed with several areas that could be used as intermodal facilities, which would allow for linking express bus services on I-394 to local transit service as well as carpool and vanpool passengers. The City of Minneapolis and Metro Transit have an interagency agreement<sup>56</sup> regarding provision and operation of the facilities and services for transit operations in Ramps A and B. These agreements cover transit operations, facility maintenance and also carpool and vanpool verification and permitting.

A recent issue is that not all of the spaces built in the ramps for these purposes are currently being used as such, creating questions regarding whether they may be used differently. The other uses could be those serve the Ramps’ mission of reducing vehicular traffic, such as taxis, transportation network companies (Uber/Lyft) or other transportation services. However, the interagency agreement does not specify all of the spaces that may or may not be used. Rather, the agreement refers to Ramps A and B as “intermodal facilities . . . serving the downtown Minneapolis area,” and notes that the City “will ensure that bus entrances and exits . . . will be maintained so as to restrict unauthorized access,” suggesting that use of transit spaces within the Ramps would need to be authorized by the City and, since the City also agrees to ensure “proper transit operation,” such authorization would require agreement by Metro Transit.

The agreement is otherwise silent regarding authorized uses, so, provided that these other services can be shown to support the Ramps’ transportation purpose and their operation does not hinder those of Metro Transit, it does appear possible that other uses could be accommodated.

## ALLOWABLE USES OF OTHER UNDER-UTILIZED AREAS

Beyond the areas reserved for transit use, discussed immediately above, there are a number of other areas within the structures that are also not dedicated to parking vehicles. These include skyways, offices, elevator lobbies and other indoor areas that could be used for a number of purposes, including possibly leasing to private developers, which could improve the pedestrian experience and increase the safety or at least the perception of safety, or development of physical mobility hubs, which would not only similarly increase safety, but also likely enhance the ability of the ramps to serve their transportation purpose.

A number of regulations and policies appear to govern this question. First, 23 USC 156 notes that any “sale, use, lease or lease renewal” of space not used for transportation purposes must receive fair market value, and 23 USC 142 and 49 CFR 18.25 appear to reinforce the idea that use of this revenue

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<sup>56</sup> “MTC Contract 91-020-019”

would best be spent in support of the ramps' transportation purpose. These statutes and regulations have been applied to a similar situation already, which is the policy allowing non-highway use of air rights if the use meets the following conditions:

- it is interim (not to exceed 99 years);
- it does not interfere with the *current* safety, construction, operation or maintenance of the facility or "*anticipated future transportation needs*" (emphasis added);<sup>57</sup>
- it does not interfere with the original purpose of any associated structures;
- it will be paid for (leased) at a fair market value as determined by MnDOT; and
- it receives approval from the FHWA.

For this purpose (non-transportation uses), the use of air rights above the ramps and non-transportation areas within the ramps appear to be analogous situations, as both apply to use of building space that is not directly usable for transportation. Further, since it can be argued that some of the alternative proposed uses could increase safety (by increasing foot traffic, visibility, etc.), and/or enhance transportation capacity, the question of not interfering with those needs appears to be easily addressed. Consequently, the guidelines issued in the air rights policy are likely sufficient to use as criteria for acceptable uses of otherwise under-utilized areas, although the fact that some uses may further serve needs and purposes of the ramps could argue for an additional policy that is more lenient, or even encouraging.

### **"USEFUL LIFE"**

These regulatory documents also provide guidance regarding the length of time that MnDOT must continue to own and operate the ramps as transportation facilities. 23 USC 116 states that MnDOT is responsible for maintaining the ramps until they "no longer constitute a part of the Federal-aid system."<sup>58</sup> However, while it is likely that the ramps would cease to be part of the Federal aid system when they no longer serve a transportation purpose, and the Management Agreement has a potential duration of 50 years,<sup>59</sup> other documents provide are silent regarding when this moment may occur. The "useful life" can be defined in terms of a length of time, operational usefulness, or ability to maintain

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<sup>57</sup> MnDOT Policy Position Statement 6.5 "Agreements Relating to the Use of and Access to Highway Airspace," October 10, 2006

<sup>58</sup> 23 USC 116, cited above in Note 13

<sup>59</sup> Management Agreement Sections 1.1 and 1.2

them in a state of good repair. The scenarios under which each of these could operate are discussed below.

**Interpretation 1: Temporal** The most intuitive definition of “useful life” would be one that defines the term in terms of a time span. For example, the *AASHTO Transportation Glossary* defines useful life as “the total productive time span of a piece of equipment . . .,” although it does not provide more specific information about how this definition might apply to parking structures or bridges.<sup>60</sup> Other documents do, however. Appendix C of the *State of Minnesota Guide to Local Government Capital Assets*, notes that the broad range for infrastructure is 20 to 60 years of useful life, but “bridges will be around 50 years or greater,”<sup>61</sup> and FHWA’s *Bridge Preservation Guide* says the “theoretical design life of a bridge has been 50 years.”<sup>62</sup> MnDOT’s Benefit Cost Analysis webpage lists 60 years as the useful life of major structures (e.g., bridges) in its table on “Useful Life.”<sup>63</sup>

Conversely, guidance for projects funded by the Congestion Mitigation and Air Quality (CMAQ) program that was created as the ABC Ramps were being completed (1991), and supports projects with similar travel demand reduction goals as the ramps, calls for parking structures only to have program lives of 30 years.<sup>64</sup> Despite these similarities, however, this guidance may not be as influential as some of the others above, as CMAQ did not exist when ABC Ramps were planned, and this guidance is for parking structures, rather than bridges as the ramps are classified (see “Maintenance” definition below).

**Interpretation 2: Operational** Discussions regarding potential re-use, and end of the “useful life,” of the ramps appear to state that MnDOT must maintain ownership, and ensure proper operation, of the ramps so long as they serve, and are needed for, a “transportation purpose.” This is the term used in many of the statutes, regulations and agreements discussed above, and specifically refers to purposes of

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<sup>60</sup> American Association of State Highway and Transportation Officials (2009), *AASHTO Transportation Glossary*, 4<sup>th</sup> Ed.

<sup>61</sup> State of Minnesota Guide to Local Government Capital Assets (2002), Appendix C, p. C-2

<sup>62</sup> FHWA, Bridge Preservation Guide, p. 2, available at <https://www.fhwa.dot.gov/bridge/preservation/guide/guide.pdf> (last accessed November 19, 2017)

<sup>63</sup> Table 5, MnDOT, Benefit Cost Analysis webpage, <http://www.dot.state.mn.us/planning/program/benefitcost.html> (last accessed November 19, 2017)

<sup>64</sup> See, for example, the tables in the “2015 NOACA CMAQ Program Application and Guidance” (<http://www.noaca.org/modules/showdocument.aspx?documentid=9178> – last accessed May 31, 2017) and “AMATS 2015 CMAQ Program Guidance” (<http://amatsplanning.org/wp-content/uploads/AMATS-2015-CMAQ-Program-Guidance.pdf> - last accessed May 31, 2017).

maintaining smooth operations in the I-394 corridor and in downtown Minneapolis. Unfortunately, there appears to be little documentation of when a facility has ceased to serve a transportation purpose (or conversely, when it continues to be essential for doing so). It appears possible that an explicit agreement noting specific performance indicators, such as average vehicle occupancy, congestion in the corridor or downtown, overall ramp use, maintenance costs and/or a combination of these and other factors in a cost-benefit analysis could be arrived at to help determine when the ramps are or are no longer serving their transportation purpose. Should these be established, procedures for ending existing agreements and exploring alternative uses for the structures and/or surrounding land could also follow.

**Interpretation 3: Maintenance** The book, *Parking Structures* by Sam Bhuyan, published in 1996 (shortly after the ramps opened), notes that “Parking facilities experience harsh exposure conditions which can contribute to accelerated concrete deterioration and adversely affect the life expectancy of the structure. Quite often, owners and operators have to repair deteriorated structures with only 15-20 years of service.”<sup>65</sup> However, Section V(A)(2) of the Maintenance and Operations Plan notes that the ramps are “Considered bridges under 23 CFR 650, Subpart C, National Bridge Inspection Standards,” which means that inspection and maintenance standards for the ramps are those required for maintaining bridges, rather than other parking structures. Since the ramps meet the AASHTO definition of bridge, as laid out in 23 CFR 650, Subpart C, as they are a “structure, including supports erected over a depression or an obstruction, such as water, [or] highway . . .”<sup>66</sup> they were constructed and are maintained to those standards, rather than what are often lower standards for regular parking structures. The information included in the “temporal” discussion above then indicates that the ramps should last much longer with proper maintenance. Since the ramps are not typical bridges, however, it is unclear whether those expectations are accurate. Again, a data-driven discussion of costs and benefits may provide insight and agreement regarding when maintenance costs of the ramps exceed the value of their use.

## MAINTENANCE

23 USC 116 states that MnDOT is responsible for the maintenance of the ramps until they “no longer constitute a part of the Federal-aid system.”<sup>67</sup> While none of the other statutes or regulations provide

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<sup>65</sup> Chapter 19, Chrest, A., Smith, M., Bhuyan, S., Iqbal, M., and Monahan, D. (2001). *Parking structures: Planning, design, construction, maintenance, and repair*, Kluwer Academic Publishers, Boston. P. 651

<sup>66</sup> 23 CFR 650, Subpart C, section Sec. 650.301 “Application of Standards.” The full text can be found at <https://www.fhwa.dot.gov/legregs/directives/fapg/cfr0650c.htm> (last accessed May 24, 2017), and in Appendix B-4 of the Maintenance and Operations Plan.

<sup>67</sup> 23 USC 116, cited above in Note 13

additional information, MnDOT accepts this responsibility and articulates how maintenance will be conducted in section V of the Maintenance and Operations Plan, which notes that the ramps are to be maintained as bridges, covered by 23 CFR 650, and providing additional information not covered in the federal regulation.<sup>68</sup> The responsibility for doing the work is then delegated, under the authority of delegating operation of the ramps in Minn. Stat. 161.1231 Subd. 4 to the City of Minneapolis in section 4 of the Management Agreement.<sup>69</sup>

**RESPONSIBILITIES FOR DECOMMISSIONING / DISPOSING OF THE RAMPS WHEN THEY REACH THE END OF THEIR USEFUL LIFE, INCLUDING ADDITIONAL DUTIES OR RESTRICTIONS ARTICULATED IN INITIAL ENVIRONMENTAL DOCUMENTS**

This discussion of “useful life” then begs the question of what to do once the ramps reach the end of that time period. In contrast to the question of useful life, however, procedures on this question are relatively clear. Once the ramps reach the end of their useful life, 23 CFR 710.403<sup>70</sup> and 710.409<sup>71</sup> provide guidance for procedures to be followed. These include agreement with FHWA that

1. the ramps have become “excess real property;”<sup>72</sup>
2. the property is first offered to other government agencies, or considered for use “to restore, preserve, or improve the scenic beauty and environmental quality adjacent to the transportation facility”<sup>73</sup>

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<sup>68</sup> Maintenance and Operations Plan, Section V.

<sup>69</sup> Management Agreement, Section 4

<sup>70</sup> 23 CFR 710.403(a) available at <https://www.law.cornell.edu/cfr/text/23/710.403#a>, last accessed March 24, 2019

<sup>71</sup> 23 CFR 710.409, available at <https://www.law.cornell.edu/cfr/text/23/710.409>, last accessed March 24, 2019

<sup>72</sup> 23 CFR 710.403(c) available at <https://www.law.cornell.edu/cfr/text/23/710.403>, last accessed March 24, 2019

<sup>73</sup> 23 CFR 710.409, available at <https://www.law.cornell.edu/cfr/text/23/710.409>, last accessed March 24, 2019

3. that fair market value be obtained, unless the new use is also a “transportation project;”<sup>74</sup> and
4. that environmental procedures be followed.

Points 1, 3 and 4 are discussed in further detail below.

#### A. Determination of “Excess real property”

The question of when the ramps may be determined to be “excess real property,” returns to the question of defining “useful life,” and the need for agreement that the ramps have reached the end of that time (i.e. determination that the ramps are “excess real property”). 23 CFR 710.403(c) notes that “Grantees shall specify procedures in their approved ROW manual<sup>75</sup> for determining when a real property interest is excess real property and may be disposed of in accordance with this part.<sup>76</sup> While no such procedures appear to currently be defined in the Maintenance and Operations Plan, coming to agreement regarding the processes as outlined in the original task report, and placing them in the Maintenance and Operations Plan and the Management Agreement, would appear to fulfill this need.

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<sup>74</sup> “Transportation project means any highway project, public transportation capital project, multimodal project, or other project that requires the approval of the Secretary. As used in this part, the term transportation project does not include an Early Acquisition Project as defined in this section.”

[https://www.law.cornell.edu/definitions/index.php?width=840&height=800&iframe=true&def\\_id=5e4eb3e28a0ea6ff1e1586dd5c3f1058&term\\_occur=2&term\\_src=Title:23:Chapter:I:Subchapter:H:Part:710:Subpart:D:710.403](https://www.law.cornell.edu/definitions/index.php?width=840&height=800&iframe=true&def_id=5e4eb3e28a0ea6ff1e1586dd5c3f1058&term_occur=2&term_src=Title:23:Chapter:I:Subchapter:H:Part:710:Subpart:D:710.403)

<sup>75</sup> “ROW manual means an operations manual that establishes a grantee's acquisition, valuation, relocation, and property management and disposal requirements and procedures, and has been approved in accordance with 710.201.”

[https://www.law.cornell.edu/definitions/index.php?width=840&height=800&iframe=true&def\\_id=0907b9824306f4f00535148a073456f3&term\\_occur=1&term\\_src=Title:23:Chapter:I:Subchapter:H:Part:710:Subpart:D:710.403](https://www.law.cornell.edu/definitions/index.php?width=840&height=800&iframe=true&def_id=0907b9824306f4f00535148a073456f3&term_occur=1&term_src=Title:23:Chapter:I:Subchapter:H:Part:710:Subpart:D:710.403)

<sup>76</sup> 23 CFR 710.403, available at <https://www.law.cornell.edu/cfr/text/23/710.403> last accessed March 24, 2019

## B. Obtaining “Fair Market Value”

As noted in other regulations regarding non-transportation uses of the ramps and related right of way, MnDOT must receive fair market value for the property when disposing of the ramps, except when FHWA approves disposal in the following ways (including relevant regulatory guidance in each case):<sup>77</sup>

- The new use “is in the overall public interest based on social, environmental, or economic benefits, or is for a nonproprietary governmental use;”
- The new use is for use by public utilities according to 23 CFR 645;
- The new use is for use by railroads according to 23 CFR 646;
- The new use is for use for bikeways and pedestrian walkways according to 23 CFR 652;
- The new use is for use by public transit according to 23 USC 142(f)
- The new use is for other transportation projects that are not concessions as defined in 23 CFR 710.703

## C. Relevant Environmental Procedures

23 CFR 710.403(d) states that “disposal actions . . . are subject to 23 CFR 771,”<sup>78</sup> which covers Environmental Impact and Related Procedures.<sup>79</sup> Specifically, 23 CFR 771.129 states that “The Administration must determine, prior to granting any new approval related to an action or amending any previously approved aspect of an action, . . . *whether an approved environmental document remains valid. . .*”<sup>80</sup> Such determination appears to be required if more than 3 years have passed since the

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<sup>77</sup> 23 CFR 710.403 (e)(1)-(6), available at <https://www.law.cornell.edu/cfr/text/23/710.403> last accessed March 24, 2019

<sup>78</sup> 23 CFR 710.403(d), available at <https://www.law.cornell.edu/cfr/text/23/710.403>, last accessed March 24, 2019

<sup>79</sup> 23 CFR 771, available at <https://www.law.cornell.edu/cfr/text/23/part-771>, last accessed March 24, 2019

<sup>80</sup> 23 CFR 771.129, available at <https://www.law.cornell.edu/cfr/text/23/771.129>, last accessed March 24, 2019. In this regulation, “Administration” is defined as “The FHWA, FRA, or FTA, whichever is the designated Federal lead agency for the proposed action.” 23 CFR 771.107, available at <https://www.law.cornell.edu/cfr/text/23/771.107>, last accessed March 24, 2019.

previous major step to advance an action.<sup>81</sup> An “Action” is defined as “A highway, transit, or railroad project proposed for U.S. DOT funding. It also can include activities such as joint and multiple use permits, changes in access control, or rulemakings, which may or may not involve a commitment of Federal funds.”<sup>82</sup> While it is not clear that this definition includes disposal, the specific mention of 23 CFR 771 in 23 CFR 710.403(d) suggests this guidance would apply.

A supplemental EIS, as defined in 23 CFR 771.130, may be required instead, as disposal may also be defined as a change to the proposed action that “would result in significant environmental impacts that were not evaluated in the EIS.”<sup>83</sup>

## LEASING AUTHORITY

Minnesota statute 161.1231, Subd. 4 provides authority for contracting or leasing the ramps to the City of Minneapolis or a private party.<sup>84</sup> While this subdivision specifically allows for this lease or contract to be for operation of the ramps, it does not restrict the lease or contract to be for those uses. However, the lease must “be approved by the federal agency that grants money for the construction of the facilities,<sup>85</sup>” which indicates that unless the ramps have reached the end of their “useful life,” as discussed above, approval of the lease will likely hinge on the use remaining for the identified transportation purposes. (See “Purpose” section, above). In addition, 23 USC 156 states that MnDOT must charge a fair market value for the “. . . lease or lease renewal” of the ramps<sup>86</sup>

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<sup>81</sup> 23 CFR 771.129(b), available at <https://www.law.cornell.edu/cfr/text/23/771.129>, last accessed March 24, 2019.

<sup>82</sup> 23 CFR 771.107, available at <https://www.law.cornell.edu/cfr/text/23/771.107>, last accessed March 24, 2019.

<sup>83</sup> 23 CFR 771.130(a)(1), available at <https://www.law.cornell.edu/cfr/text/23/771.130>, last accessed March 24, 2019. “Action” continues to be defined as in note 29 (23 CFR 771.107)

<sup>84</sup> Minn. Stat. 161.1231 subd. 4(a), cited in Note 19, above. Note that this subdivision also states that this contract or lease can be made without requiring competitive bids, although the terms must be approved by “the federal agency that grants money for construction of the facilities”

<sup>85</sup> Minn. Stat. 161.1231 subd. 4(b), cited in Note 20, above

<sup>86</sup> 23 USC 156 cited above in Note 19

## RATES

There is a considerable discussion of how MnDOT may set the parking rates for the ABC Ramps. 23 USC 137 notes that “In the event fees are charged for the use of any such facility, *the rate thereof shall not be in excess of that required for maintenance and operation* (including compensation to any person for operating such facility),”<sup>87</sup> and 23 USC 142 reinforces this point of view, stating, “If fees are charged for the use of any parking facility constructed under this section, *the rate thereof shall not be in excess of that required for maintenance and operation of the facility* and the cost of providing shuttle service to and from the facility.”<sup>88</sup>

Minnesota Statute 161.1231, Subd 5. is consistent with these laws in that it states “The commissioner shall establish and collect fees for use for the parking facilities. *The fees must be established and adjusted in compliance with*” 23 USC 137.<sup>89</sup> However, this law also provides that “during peak travel hours, single-occupant vehicles *be charged a surcharge to bring the parking fee for those vehicles to approximately the same level as parking fees charged in the private parking ramps located in Minneapolis.*”<sup>90</sup>

The Maintenance and Operation Plan<sup>91</sup> addresses these requirements in Section III, beginning with an explicit reference to the profit prohibition in 23 USC 137, and listing fee setting priorities as follows:

1. The fees will provide incentives for HOV’s using I-394
2. The fees will not generate a profit
3. The fees will be set such that revenues will cover operating and maintenance costs
4. The fees charged to SOV’s will not have a negative impact on private parking facilities; and
5. Incentive rates will be extended to other HOV’s provided all other operational and financial incentives are met.

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<sup>87</sup> 23 USC 137, section (a), cited above in Note 4 (emphasis added)

<sup>88</sup> 23 USC 142, section (a)(1), cited above in Note 12 (emphasis added)

<sup>89</sup> Minn. Stat. 161.1231 subd. 5, cited in Note 16, above

<sup>90</sup> Minn. Stat. 161.1231, subd. 2(2), cited in Note 18, above

<sup>91</sup> Maintenance and Operation Plan, Section III

Finally, non-parking fees, to the extent a use is allowed where these are charged (see “Purpose,” “Leasing Authority,” and “Useful Life” section above), must also be at the market rate. 23 USC 156, states that MnDOT must charge a fair market value for the “sale, use, lease or lease renewal” of the ABC Ramps,<sup>92</sup> and this rate is affirmed in MnDOT Policy 6.5 relating to airspace use.<sup>93</sup>

## REVENUE AND LIMITS ON DISCRETIONARY SPENDING

Minnesota law states that revenues from the ramps must be kept separate from other funds, and used for purposes that support the maintenance and operation of the ramps and related programs.<sup>94</sup> 23 USC 137 and 23 USC 142 both state that rates cannot exceed the costs “required for maintenance and operation of the facility,” a position that is confirmed in Minnesota Statute 161.1231, Subd. 5 and Section III of the Maintenance and Operation Plan.

However, 23 USC 156 states fair market value must be charged for “sale, use, lease or lease renewal of real property acquired with Federal assistance made available from the Highway Trust Fund,”<sup>95</sup> and Minn Statute 161.1231, Subd. 2 also calls for SOV’s to be charged a market rate during peak periods.<sup>96</sup>

Consequently, as discussed in the “Rate” section above, these regulations suggest a rate structure that balances revenue generated from market rates paid by SOV users (presuming that the market sets a rate that creates revenue exceeding maintenance and operation costs, given that private ramps charge fees designed to provide a profit) with maintenance and operation costs and any costs incurred in creating incentives for HOV users. However, there are many moving parts to such a structure, creating a real possibility that the revenues could exceed costs.

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<sup>92</sup> 23 USC 156 cited above in Note 19

<sup>93</sup> MnDOT Policy Position Statement 6.5 “Agreements Relating to the Use OF and Access to Highway Airspace,” October 10, 2006, cited in note 25, above

<sup>94</sup> Minn. Stat. 161.1231, Subd. 8 “Fees collected by the commissioner under this section must be deposited in the state treasury and credited to a special account. Money in the account is appropriated to the commissioner to construct, operate, repair, and maintain: (1) the parking facilities, (2) managed lanes, and (3) related multimodal and technology improvements that serve users of the parking facilities.”

<sup>95</sup> 23 USC 156, cited above in Note 19 (emphasis added)

<sup>96</sup> See note 58 and related discussion, above.

## A. Discretionary Spending

The Maintenance and Operation Plan attempts to address this situation by creating “discretionary operating costs” that are eligible to receive excess revenues. In Section III (C)(4), it states that “If revenues exceed expenses, Mn/DOT may elect to: decrease I-394 HOV fees, decrease other HOV fees, or fund discretionary programs.”<sup>97</sup> Section IV (C) then lists 10 programs that would be eligible for these “discretionary operating expenses.” These include creating HOV incentives for routes other than 394, marketing transit and rideshare services, funding transit and rideshare services themselves, funding enforcement of the I-394 HOV lanes, evaluating the I-394 HOV lanes and the ABC ramps, and/or defraying administrative costs incurred by other public agencies and that are directly related to operation of the I-394 HOV lanes.<sup>98</sup> Further, “priority [should be] given to those programs which have no traditional or established source of revenue”<sup>99</sup> The 1989 Foslien letter appears to provide conditional approval of these measures by first noting that all measures set out in the plan “assure that the garages do not produce any revenues above the cost for maintenance and operation,”<sup>100</sup> but then stating that “FHWA review and approval, as appropriate, is required before garage revenues are used to fund any discretionary operational activities.”<sup>101</sup> The question of “appropriateness,” may be quite significant, as section XI of the plan notes that prior FHWA concurrence is not required for changes needed to “assure safe and efficient operation,” unless such changes “would *negatively* affect priority access for I-394 vehicles, priority access and preferential rates for HOV’s, transit access, the intermodal transit facilities, implementation of the I-394 TSM Plan or the *profitability of the garages.*”<sup>102</sup>

## B. “Title 23” purposes

Another interpretation of “appropriateness” comes from the March 4 2013 e-mail from Betsy Parker which refers to 23 USC 137 and title 23 CFR 810 subparts A and B. As such, Title 23 “purposes” as applied to the ABC ramps are for facilities that “have as their primary purpose the reduction of vehicular

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<sup>97</sup> Maintenance and Operation Plan Section III(C)(4)

<sup>98</sup> Maintenance and Operation Plan section IV(C).

<sup>99</sup> *id*

<sup>100</sup> 1989 Foslien letter. The letter states that this is “in accordance with 23 USC 317.” However, since 23 USC 317 refers to designating federal land for highway purposes, and not rate setting, this statement appears to be a typographical error, with the writer likely intending to refer to 23 USC 137.

<sup>101</sup> *id*

<sup>102</sup> Maintenance and Operation Plan, Section XI. (emphasis added)

traffic on the interstate highway,”<sup>103</sup> and that they must “promote high-occupancy vehicles and mass transit.”<sup>104</sup>

The introduction of 23 USC 710.403(b) confirms these as the purposes as it states “all real property interests within the approved ROW limits or other project limits of a facility that has been funded under *title 23 are devoted exclusively to the purposes of that facility* and the facility is preserved free of all other public or private alternative uses, unless such non-highway alternative uses are permitted by Federal law (including regulations) or the FHWA.”<sup>105</sup>

In other words, to meet the criteria of being serving “Title 23 eligible” purposes, revenues generated by the ramps must be dedicated to furthering the ramps’ primary purpose of transportation, and reduction of Single Occupant Vehicle (SOV) travel, as noted at the beginning of section III of the original document.

### C. Need for continued authorization from FHWA

Finally, a question remains regarding whether FHWA must approve use of revenues before they can formally be considered as “Title 23 eligible.” A 2011 e-mail from FHWA to MnDOT notes that “use of revenue from the ABC Ramps falls under regulation 49 CFR 18.25(h) ‘Income after the award period.’ There are no additional federal requirements governing the disposition of funds except under the terms of the agreement.” Whether this statement is a clarification or an evolution of the 1989 position that use of revenue to fund discretionary programs consistent with the Management and Operation Plan required approval is not perfectly clear, however.

The addition of 23 CFR 710 in 2016 provides some clarification. It first raises the question of whether federal involvement was limited to funding the ramps' construction (thus meaning that revenues are “income after the award period” as defined in 49 CFR 18.25(h)), or if revenues must be treated as part of on-going Right of Way management (which is what 23 CFR 710 covers). If the former, then there may be no restrictions on MnDOT’s use of Ramp revenue, beyond what it agreed to restrict itself to in the Maintenance and Operations Agreement, but if the latter, then FHWA approval continues to be required. However, 23 CFR 710.403(f) may reconcile the two as it notes “Where project income derived from the use . . . of real property interests is used for subsequent title 23-eligible projects, *the funds are*

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<sup>103</sup> 23 USC 137 The full text can be found at <https://www.law.cornell.edu/uscode/text/23/137> (last accessed October 25, 2017) and in Appendix B-1 of the Maintenance and Operations Plan

<sup>104</sup> <https://www.law.cornell.edu/cfr/text/23/810.102> (new facilities),  
<https://www.law.cornell.edu/cfr/text/23/810.108> (designation of existing facilities)

<sup>105</sup> 23 CFR 710.403(b) <https://www.law.cornell.edu/cfr/text/23/710.403> Last accessed March 21, 2019 (emphasis added)

*not considered Federal financial assistance and use of the income does not cause title 23 requirements to apply.*<sup>106</sup> In other words, explicit FHWA approval is not required.

Nevertheless, given the parallels between the ROW manual requirements listed in 23 CFR 710.201 and many of the procedures outlined in the Maintenance and Operations Plan, given that many of those procedures also call for collaboration with and/or approval of FHWA of any changes, and given that it has been the practice for MnDOT to collaborate with FHWA on its management decisions as they relate to the ramps, it appears that the best practice would continue to be to inform and seek approval of FHWA regarding any changes to anything currently covered in the Maintenance and Operations Plan.

#### **DUTIES THAT CAN BE SHARED UNDER MN JOINT POWERS STATUTE (MN STAT 471)**

The question has also arisen about what is included within that authority, as well as what other powers the State may share with the City or other governmental entity. This question is governed by Minn. Stat. 471, which covers Municipal Rights, Powers and Duties. Specifically, as stated above, Minn. Stat. 471.59 authorizes the ability of “Two or more governmental units, by agreement entered into through action of their governing bodies, . . .[to] . . . cooperatively exercise any power common to the contracting parties or any similar powers.”<sup>107</sup> Since both MnDOT (as the State of Minnesota) and the City of Minneapolis are governmental units, and the powers of MnDOT related to the ramps are outlined in Minn. Stat. 161.1231, it appears the City of Minneapolis may exercise any of the duties of MnDOT, provided the two entities agree to it, as they have already done in the Management Agreement. Finally, it may be permissible to do further delegations under these statutes through additional or supplemental agreements, although further research into existing city powers to existing power to manage their municipally owned ramps in their ordinances or charter, is still needed.

#### **SAFETY AND SECURITY**

The statutes and regulations discussed here, which address the transportation goals of the ramps, do not address safety and security issues. However, several security measures are included in sections IX(C) and (D) of the Maintenance and Operations plan. The measures discussed include use of closed circuit cameras and other monitoring equipment, as well as hours of operation. This responsibility is then delegated to the City of Minneapolis in section 6 of the Management Agreement.

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<sup>106</sup> 23 CFR 710.403(f) available at <https://www.law.cornell.edu/cfr/text/23/710.403> last accessed March 24, 2019 (emphasis added)

<sup>107</sup> Minn. Stat. 471.59, available at <https://www.revisor.mn.gov/statutes/cite/471.59> Last accessed March 21, 2019

## EQUITY

Similar to safety and security issues, the relevant statutes and regulations are silent regarding specific measures to address transportation equity. Unlike those issues, however, equity issues also are not specifically discussed in the Maintenance and Operation Plan nor the Management Agreement. Since the Americans with Disabilities Act had not been passed at the time of these documents, such discussion was not required.

Nevertheless, a few equity points are worth noting:

1. Several points above note the priority given to buses, vanpools, carpools and other high occupancy modes. Inasmuch as these modes provide improved mobility and access to people unable to drive, the Ramps support this basic equity goal
2. However, the current restrictions that focus incentives on those traveling I-394 are inherently inequitable, as people in this section of the Twin Cities Metro area have a higher median income than the rest of the area (see Task 4 report).
3. Now that the ADA is in effect, the Ramps are required to be compliant with building (elevators, doors etc.), wayfinding and parking stall requirements.
4. New programs should also be evaluated for advancing questions of equity. This analysis is carried out in Task 9 for the programs noted there.

## CONCLUSIONS AND RECOMMENDATIONS

The statutes, regulations and other documents have held up well since the ramps opened between 1989 and 1992. However, a few areas for improved clarity exist, largely addressing the relationship between FHWA and MnDOT, which could be included in a revised Maintenance and Operation Plan.

1. First, the terminology of high occupancy modes should be updated. The terminology used in the relevant statutes and regulations (e.g. “vehicles occupied by 2 or more persons”<sup>108</sup>) appears to allow for a wide variety of programs and modes, but the Management and Operation Plan explicitly refers to “carpools, vanpools and buses.” Updating this language to the broader terms used in the statutes and regulations will create clarity in allowing the ramps to host and serve

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<sup>108</sup> Minn. Stat 161.1231 subd. 2(1), cited in Note 18, above

new programs that also promote “the reduction of vehicular traffic on the interstate highway.”<sup>109</sup>

2. Offer HOV incentives to other corridors serving downtown Minneapolis. As discussed in Section III, these regulations do not appear to require offering the HOV incentives exclusively to the I-394 corridor. Consequently, to address the equity issue identified in Section XII, and to potentially increase the ability of the ramps to discourage SOV travel and/or encourage HOV travel, MnDOT, FHWA, the City of Minneapolis and related partners should explore the opportunity of extending the HOV incentives to other corridors serving downtown. This analysis was unable to find any legal restrictions to expanding HOV incentives beyond the I-394 Corridor.
3. MnDOT and FHWA consider amending the Maintenance and Operations Plan, as the “ROW manual” for the ramps to include criteria for defining when the ramps may become “excess real property” as covered in 23 USC 710. In particular, this process should incorporate the following points:
  - a. A more specific set of benchmarks to indicate when the ramps have fulfilled their “useful life.” These will help guide if it will be appropriate to convert part or all of the ramps to non-transportation uses. Explicit agreement noting specific performance indicators, such as average vehicle occupancy, congestion in the corridor or downtown, overall ramp use, maintenance costs and/or a combination of these and other factors in a cost-benefit analysis could be arrived at to help determine when the ramps are or are no longer serving their transportation purpose.
  - b. Along these same lines, a document further discussing whether the bridge regulations that apply to the Ramps include expectation of service life, as well as other points of common application and points where the regulations would not apply, would be helpful.
  - c. A clearer definition of permitted discretionary operational expenses, and when they do or do not require FHWA approval would be useful, given the increased variety of potential programs that could continue to further the purpose of the ramps. It would be especially helpful to define that these funds should be used to specifically further the transportation purpose *of the ramps*, and not any other transportation purpose. The current Maintenance and Operations Agreement, State law and Federal regulations indicate, but do not explicitly state, that this is the case, leaving opportunity for confusion as currently written.

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<sup>109</sup> 23 USC 137, cited in Note 4, above

4. It appears to be possible to expand use of the transit facilities beyond transit services. However, the best option would be to obtain agreement from the City of Minneapolis and Metro Transit that
  - a. opening use of these facilities to other services would further the ramps transportation purpose,
  - b. doing so would not interfere with Metro Transit's operation; and that
  - c. both parties agree to modify their interagency agreement ("MTC Contract 91-020-019") to reflect this change.
  
5. Regarding the opening of other under-utilized areas to alternative uses, MnDOT could use Policy 6.5 "Agreements Relating to the Use of and Access to Highway Airspace" as the basis for any agreement for doing so. As time passes and specific opportunities develop, creating a similar, but possibly less restrictive policy may be useful.