WEST VIRGINIA CODE CHAPTER 17 ARTICLE 27

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§17-27-1. Legislative findings and purposes.

The Legislature finds and declares:

(1) That there is a public need for timely acquisition or construction of and improvements to transportation facilities within the state that are compatible with state and local transportation plans;

(2) That public need may not be wholly satisfied by existing ways in which transportation facilities are acquired, constructed or improved;

(3) That authorizing private entities to acquire, construct or improve one or more transportation facilities may result in the availability of transportation facilities to the public in a more timely or less costly manner, thereby serving the public health, safety, convenience and welfare and the enhancement of the residential, agricultural, recreational, economic, commercial and industrial opportunities;

(4) That providing a mechanism for the solicitation, receipt and consideration of proposals submitted by private entities for the purposes described in this section serves the public purpose of this article to the extent that the action facilitates the timely acquisition or construction of or improvement to a qualifying transportation facility or the continued operation of a qualifying transportation facility; and

(5) That providing for the expansion and acceleration of transportation financing using innovative financing mechanisms, including, but not limited to, design-build contracting and financing arrangements, will add to the convenience of the public and allow public and private entities to have the greatest possible flexibility in contracting with each other for the provision of the public services which are the subject of this article.

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§17-27-2. Definitions.

As used in this article, the following words and terms have the following meanings:

(1) "Comprehensive agreement" means the comprehensive agreement by and between a developer and the division required by section nine of this article.

(2) "Department" means the Department of Transportation.

(3) "Developer" means the private entity that is responsible for the acquisition, construction or improvement of a qualifying transportation facility.

(4) "Division" means the Division of Highways.

(5) "Material default" means any default by the developer in the performance of its duties under subsection (f), section eight of this article that jeopardizes adequate service to the public from a qualifying transportation facility and remains unremedied after the division has provided notice to the developer and a reasonable cure period has elapsed.

(6) "Private entity" means any natural person, corporation, limited liability company, partnership, joint venture or other private business entity.

(7) "Public entity" means the State of West Virginia or any political subdivision thereof.

(8) "Qualifying transportation facility" means one or more transportation facilities acquired, constructed or improved by a private entity pursuant to this article.

(9) "Revenues" mean the user fees or service payments generated by a qualifying transportation facility.

(10) "Service contract" means a contract entered into between a public entity and a developer pursuant to section six of this article.

(11) "Service payments" mean payments to the developer of a qualifying transportation facility pursuant to a service contract.

(12) "State" means the State of West Virginia.

(13) "Transportation facility" means any public inland waterway port facility, road, bridge, tunnel, overpass or existing airport used for the transportation of persons or goods, and the structures, equipment, facilities or improvements necessary or incident thereto.

(14) "User fees" mean the rates, tolls, fees or other charges imposed by the developer of a qualifying transportation facility for use of all or a portion of the qualifying transportation facility pursuant to the comprehensive agreement.

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§17-27-3. Prerequisites for development.

Any private entity seeking authorization under this article to acquire, construct, or improve a transportation facility shall first submit a conceptual proposal as set forth in §17-27-5 of this code.

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§17-27-4. Powers and duties of the division and other agencies that are part of the department.

In addition to the powers and duties set forth elsewhere in this code, the division and any other agency that is part of the department may:

(1) Review proposals submitted by private entities in accordance with this article. The review shall consist of the review by the division of the conceptual proposal: Provided, That expenses of the division incurred for review of an unsolicited proposal or proposals shall be paid by the private entity submitting the proposal. The division shall take into account at all times the needs and funding capabilities of the state as a whole in terms of transportation;

(2) Enter into agreements, contracts, or other transactions with any agency that is part of the department, as well as any federal, state, county, municipal agency, or private entity;

(3) Act on behalf of the state and represent the state in the planning, financing, development, and construction of any transportation facility for which proposals have been received in accordance with the provisions of this article. Other public entities in this state shall cooperate to the fullest extent with what the division considers appropriate to effectuate the duties of the division;

(4) Exempt from disclosure any sensitive business, commercial, or financial information that is not customarily provided to business competitors that is submitted to the division for final review and approval;

(5) Exempt from disclosure any documents, communications, or information described in this section including, but not limited to, the project's design, management, financing, and other details in accordance with §29B-1-1 *et seq*. of this code; and

(6) Do any and all things necessary to carry out and accomplish the purposes of this article.

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§17-27-5. Submission and review of conceptual proposals; approval by the Commissioner of the Division of Highways.

(a) The division may solicit, or a private entity may submit in writing, a conceptual proposal for a transportation facility to the division for consideration. The conceptual proposal shall include the following:

(1) A statement of the private entity's qualifications and experience;

(2) A description of the proposed transportation facility;

(3) A description of the financing for the transportation facility; and

(4) A statement setting forth the degree of public support for the proposed transportation facility, including a statement of the benefits of the proposed transportation facility to the public and its compatibility with existing transportation facilities.

(b) The conceptual proposal shall be accompanied by the following material and information unless waived by the division with respect to the transportation facility or facilities that the private entity proposes to develop as a qualifying transportation facility:

(1) A topographic map (1:2,000 or other appropriate scale) indicating the location of the transportation facility or facilities;

(2) A description of the transportation facility or facilities, including the conceptual design of the facility or facilities and all proposed interconnections with other transportation facilities;

(3) The projected total life-cycle cost of the transportation facility or facilities and the proposed date for acquisition of or the beginning of construction of, or improvements to, the transportation facility or facilities;

(4) A statement setting forth the method by which the private entity proposes to secure all property interests required for the transportation facility or facilities: *Provided*, That with the approval of the division, the private entity may request that the comprehensive agreement assign the division with responsibility for securing all property interests, including public utility facilities, with all costs, including costs of acquiring the property, to be reimbursed to the division by the private entity. The statement shall include the following information regarding the property interests or rights, including, but not limited to, rights to extract mineable minerals:

(A) The names and addresses, if known, of the current owners of the property needed for the transportation facility or facilities;

(B) The nature of the property interests to be acquired;

(C) Any property that the division may expect to condemn; and

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(D) The extent to which the property has been or will be subjected to the extraction of mineable minerals.

(5) Information relating to the current transportation plans, if any, of each affected local jurisdiction;

(6) A list of all permits and approvals required for acquisition or construction of or improvements to the transportation facility or facilities from local, state, or federal agencies and a projected schedule for obtaining the permits and approvals: *Provided*, That the acquisition, construction, improvement, or operation of a qualifying transportation facility that includes the extraction of mineable minerals is required to obtain all necessary permits or approvals from all applicable authorities in the same manner as if it were not a qualifying transportation facility under this article;

(7) A list of public utility facilities, if any, that will be crossed or affected by or as the result of the construction or improvement of the public port transportation facility or facilities and a statement of the plans of the developer to accommodate the crossings or relocations;

(8) A statement setting forth the private entity's general plans for financing and operating the transportation facility or facilities;

(9) The names and addresses of the persons who may be contacted for further information concerning the request;

(10) Information about the private entity and, to the extent they differ, any developer, including, but not limited to, an organizational chart, capitalization, experience in the operation of transportation facilities, and references and certificates of good standing from the Tax Commissioner, Insurance Commissioner, and the Division of Unemployment Compensation evidencing good standing with state tax, workers' compensation, and unemployment compensation laws, respectively; and

(11) Any additional material and information requested by the Commissioner of the Division of Highways.

(c) The division may solicit proposals for the acquisition, construction, or improvement of any transportation facility or facilities if it finds that it serves the public purpose of this article. The division may find that the acquisition, construction, or improvement of the transportation facility or facilities serves a public purpose if:

(1) There is a public need for the transportation facility;

(2) The transportation facility and the proposed interconnections with existing transportation facilities are reasonable and compatible with the state transportation plan and any applicable local plans;

(3) The estimated cost of the transportation facility or facilities is reasonable in relation to

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similar facilities: Provided, That moneys used by the state road fund shall not exceed $100 million.

(4) The use of federal funds in connection with the financing of a qualifying transportation facility has been determined by the division to be compatible with the state transportation plan and any applicable local plans; and

(5) The solicitation will result in the timely acquisition, construction, or improvements of transportation facilities, or the more efficient operation thereof, and will result in a more timely and economical delivery of transportation facilities than otherwise available under existing delivery systems.

(d) If proposals for a transportation facility are solicited by the division, the division shall review all solicited conceptual proposals, assign them a priority ranking, and present them with the priority ranking to the Commissioner of the Division of Highways for review. Upon presentation of the priority-ranked proposals, the commissioner shall approve or modify the division's rankings, and may authorize the division to negotiate and enter into a comprehensive agreement with the highest-ranked developer or reject all proposals. The division has no duty to accept, consider, or review a conceptual proposal that was not solicited by the division, but may do so in its sole discretion.

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§17-27-6. Service contracts.

In addition to any authority otherwise conferred by law, any public entity may contract for services to be provided for a qualifying transportation facility in exchange for service payments and other consideration as the division determines appropriate.

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§17-27-7. Dedication of public property.

Any public entity may dedicate any property interest that it has for public use as a qualified transportation facility if it finds it will serve the public purpose of this article. In connection with the dedication, a public entity may convey any property interest that it has to a developer or the division for any consideration determined by the public entity. This consideration may include, without limitation, the agreement of the developer to develop the qualifying transportation facility. No real property may be dedicated by a public entity pursuant to this article unless all other public notice and comment requirements are met.

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§17-27-8. Powers and duties of the developer.

(a) The developer has all power allowed by law generally to a private entity having the same form of organization as the developer and may acquire, construct or improve a qualifying transportation facility and impose user fees in connection with the use of the facility.

(b) The developer may own, lease, or acquire any other right to facilitate the development of a qualifying transportation facility.

(c) Any financing of a qualifying transportation facility may be in the amounts and upon terms and conditions negotiated by the developer. The developer may issue debt, equity or other securities or obligations, enter into sale and leaseback transactions and secure any financing with a pledge of, security interest in, or lien on, any or all of its property, including all of its property interests in the qualifying transportation facility.

(d) In developing the qualifying transportation facility, the developer may:

(1) Make classifications according to reasonable categories for assessment of user fees; and

(2) With the consent of the division, make and enforce reasonable rules to the same extent that the division may make and enforce rules with respect to a similar transportation facility. The developer may, by agreement with appropriate law-enforcement agencies, arrange for video enforcement in connection with its toll collection activities.

(e) The developer shall:

(1) Acquire, construct, or improve the qualifying transportation facility in a manner that meets the engineering standards of:

(A) The authority for facilities operated and maintained by the division, in accordance with the provisions of the comprehensive agreement; and

(B) The division, in accordance with the provisions of the comprehensive agreement;

(2) Keep the qualifying transportation facility open for use by the members of the public at all times after its initial opening upon payment of the applicable user fees or service payments: *Provided*, That the qualifying transportation facility may be temporarily closed because of emergencies or, with the consent of the division, to protect the safety of the public or for reasonable construction or maintenance procedures;

(3) Contract for the performance of all maintenance and operation of the transportation facility through the division, using its maintenance and operations practices, until the date of termination of the developer’s duties as defined in the comprehensive agreement;

(4) Cooperate with the division in establishing any interconnection with the qualifying transportation facility requested by the division;

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(5) Remain in compliance with state tax, workers' compensation, and unemployment compensation laws; and

(6) Comply with the provisions of the comprehensive agreement and any service contract.

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§17-27-9. Comprehensive agreement.

(a) Prior to acquiring, constructing, or improving the qualifying transportation facility, the developer shall enter into a comprehensive agreement with the division. The comprehensive agreement shall provide for:

(1) Delivery of performance or payment bonds in connection with the construction of or improvements to the qualifying transportation facility, in the forms and amounts satisfactory to the division;

(2) Review and approval of the final plans and specifications for the qualifying transportation facility by the division;

(3) Inspection of the construction of or improvements to the qualifying transportation facility to ensure that they conform to the engineering standards acceptable to the division;

(4) Maintenance of a policy or policies of public liability insurance or self insurance, in a form and amount satisfactory to the division and reasonably sufficient to insure coverage of tort liability to the public and employees and to enable the continued operation of the qualifying transportation facility: Provided, That in no event may the insurance impose any pecuniary liability on the state, its agencies, or any political subdivision of the state. Copies of the policies shall be filed with the division accompanied by proofs of coverage;

(5) Monitoring of the maintenance and operating practices of the developer by the division and the taking of any actions the division finds appropriate to ensure that the qualifying transportation facility is properly maintained and operated;

(6) Itemization and reimbursement to be paid to the division for the review and any services provided by the division;

(7) Filing of appropriate financial statements on a periodic basis;

(8) A reasonable maximum rate of return on investment for the developer;

(9) The date of termination of the developer’s duties under this article and dedication to the division; and

(10) That a transportation facility shall accommodate all public utilities on a reasonable, nondiscriminatory, and completely neutral basis and in compliance with §17-4-17b of this code.

(b) The comprehensive agreement may require user fees established by agreement of the parties. Any user fees shall be set at a level that, taking into account any service payments, allows the developer the rate of return on its investment specified in the comprehensive agreement: *Provided*, That the schedule and amount of the initial user fees to be imposed and any increase of the user fees shall be approved by the Commissioner of the Division of

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Highways. A copy of any service contract shall be filed with the division. A schedule of the current user fees shall be made available by the developer to any member of the public upon request. In negotiating user fees under this section, the parties shall establish fees that are the same for persons using the facility under like conditions and that will not unreasonably discourage use of the qualifying transportation facility. The execution of the comprehensive agreement or any amendment to the comprehensive agreement constitutes conclusive evidence that the user fees provided in the comprehensive agreement comply with this article. User fees established in the comprehensive agreement as a source of revenues may be in addition to, or in lieu of, service payments.

(c) In the comprehensive agreement, the division may agree to accept grants or loans from the developer, from time to time, from amounts received from the state or federal government or any agency or instrumentality of the state or federal government.

(d) The comprehensive agreement shall incorporate the duties of the developer under this article and may contain any other terms and conditions that the division determines serve the public purpose of this chapter. Without limitation, the comprehensive agreement may contain provisions under which the division agrees to provide notice of default and cure rights for the benefit of the developer and the persons specified in the comprehensive agreement as providing financing for the qualifying transportation facility. The comprehensive agreement may contain any other lawful terms and conditions to which the developer and the division mutually agree, including, without limitation, provisions regarding unavoidable delays.

(e) The comprehensive agreement shall require the deposit of any earnings in excess of the maximum rate of return as negotiated in the comprehensive agreement in the State Road Fund established pursuant to §17-3-1 of this code.

(f) Any changes in the terms of the comprehensive agreement, agreed upon by the parties, shall be added to the comprehensive agreement by written amendment.

(g) Notwithstanding any provision of this article to the contrary, at least 60 days prior to execution, the commissioner shall provide a copy of a comprehensive agreement, with any findings required by this article, to the Joint Committee on Government and Finance and the Joint Legislative Oversight Commission on Department of Transportation Accountability and the commissioner shall provide notice to the public.

(h) If a developer and the division cannot agree to the terms of a comprehensive agreement, neither party shall have any further obligation or liability to the other. In the event a developer and the division fail to enter into a comprehensive agreement, the commissioner may authorize the division to negotiate and enter into a comprehensive agreement with any next-highest-ranked developer identified pursuant to §17-27-5 of this code.

(i) Before entering into any comprehensive agreement related to or resulting from an unsolicited proposal, the commissioner shall make a written finding that entry into the

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comprehensive agreement serves the public purpose of this article and is in the best interest of the state.

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§17-27-10. Federal, state and local assistance.

The division may take any action to obtain federal, state or local assistance for a qualifying transportation facility that serves the public purpose of this article and may enter into any contracts required to receive federal assistance. The division may determine that it serves the public purpose of this article for all or any portion of the costs of a qualifying transportation facility to be paid, directly or indirectly, from the proceeds of a grant or loan made by the local, state or federal government or any agency or instrumentality thereof.

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§17-27-11. Material default; remedies.

(a) Except upon written agreement of the developer and any other parties identified in the comprehensive agreement, the division may exercise any or all of the following remedies provided in this section or elsewhere in this article to remedy any material default that has occurred or may continue to occur.

(1) To elect to take over the transportation facility or facilities and in that case, it shall succeed to all of the rights, title and interest in the transportation facility or facilities, subject to any liens on revenues previously granted by the developer to any person providing financing for the facility or facilities and the provisions of this section;

(2) To exercise the power of condemnation to acquire the qualifying transportation facility or facilities;

(3) To terminate the comprehensive agreement and exercise any other rights and remedies that may be available to it at law or in equity, subject only to the express limitations of the terms of the comprehensive agreement; and

(4) To make or cause to be made any appropriate claims under the performance or payment bonds required by this article.

(b) If the division elects to take over a qualifying transportation facility pursuant to subdivision (1), subsection (a) of this section, the division may acquire, construct, or improve the transportation facility, impose user fees for the use of the transportation facility and comply with any service contracts as if it were the developer. Any revenues that are subject to a lien shall be collected for the benefit of, and paid to, secured parties, as their interests may appear, to the extent necessary to satisfy the developer's obligations to secured parties, including the maintenance of reserves and the liens shall be correspondingly reduced and, when paid off, released. The full faith and credit of the division may not be pledged to secure any financing of the developer by the election to take over the qualifying transportation facility. Assumption of development of the qualifying transportation facility does not obligate the division to pay any obligation of the developer from sources other than revenues.

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§17-27-12. Governmental entities prohibited from pledging full faith and credit.

The full faith and credit of the state, or any county, municipality or political subdivision of the state may not be pledged to secure any financing of the developer in connection with the acquisition, construction or equipping of a qualifying transportation facility.

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§17-27-13. Condemnation.

(a) At the request of the developer, the division may exercise the power of condemnation that it has under law for the purpose of acquiring any lands or estates or interests in any lands or estates to the extent that the division finds that the action serves the public purpose of this article. Any amounts to be paid in any condemnation proceeding shall be paid by the developer.

(b) Until the division has provided written certification as to the existence of a material default under §17-27-11(a) of this code, the power of condemnation may not be exercised against a qualifying transportation facility.

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§17-27-14. Utility crossings.

The developer and each county, municipality, public service district, utility, railroad, and cable television provider whose facilities are to be crossed or affected shall cooperate fully with the other in planning and arranging the manner of the crossing or relocation of the facilities. Any entity possessing the power of condemnation is expressly granted the powers in connection with the moving or relocation of facilities to be crossed by the qualifying transportation facility or that must be relocated to the extent that the moving or relocation is made necessary or desirable by construction of or improvements to the qualifying transportation facility, which includes construction of or improvements to temporary facilities for the purpose of providing service during the period of construction or improvement. Any amount to be paid for the crossing, construction, moving or relocating of facilities shall be paid by the developer.

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§17-27-15. Dedication of assets.

The division shall terminate the developer's authority and duties under this article on the date set forth in the comprehensive agreement. Upon termination, the duties of the developer and division under this article cease and the qualifying transportation facility shall be dedicated to the division for public use.

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§17-27-16. Qualifying a transportation facility as a public improvement.

Comprehensive agreements entered into pursuant to this article are exempt from the provisions of §5-22-1 *et seq*. of this code. The provisions §21-1C-1 *et seq*. of this code apply to the construction of all qualifying transportation facilities approved under this article.

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§17-27-17. Exemptions from taxation.

(a) The exercise of the powers granted in this article will be in all respects for the benefit of the people of this state, for the improvement of their health, safety, convenience and welfare and for the enhancement of their residential, agricultural, recreational, economic, commercial and industrial opportunities and is a public purpose. As the construction, acquisition, improvement, operation and maintenance of qualifying transportation facilities will constitute the performance of essential governmental functions, a developer is not required to pay any taxes or assessments upon any qualifying transportation facility or any property acquired or used by the developer under the provisions of this article or upon the income therefrom, other than taxes collected from the consumer pursuant to article fifteen, chapter eleven of this code.

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§17-27-18. Construction.

The provisions of this article are remedial and shall be liberally construed and applied so as to promote the purposes set out in section one of this article.

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