WEST VIRGINIA CODE CHAPTER 17 ARTICLE 28

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§17-28-1. Short title.

This article may be known and referred to as the "West Virginia Community Empowerment Transportation Act."

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§17-28-2. Legislative findings.

The Legislature finds as follows:

(1) That a broad and unified system should be continued and persistently upgraded by state law for financing, planning, designing, constructing, expanding, improving, maintaining and operating the public road system and transportation facilities that together comprise the transportation infrastructure of this state;

(2) That, in addition to traditional means and methods of putting transportation infrastructure into place, a significant contribution to a system as described in subdivision one of this section can be made by public-private partnerships that will assist federal, state and local governments in their efforts to meet the evolving needs of governmental entities, industry, labor, commerce, and, most importantly, the citizens of this state;

(3) That available public funding necessary to provide for an adequate or more than adequate transportation infrastructure have not kept pace with the needs of the governmental entities that are charged with financing, developing and maintaining an optimal transportation infrastructure in this state;

(4) That investment in transportation infrastructure by private entities should be facilitated, and innovative financing mechanisms should be encouraged and developed, so as to utilize private capital and other funding sources to supplement governmental actions taken in support of transportation projects, to the end that the financial and technical expertise and other experience of private entities regarding the development of transportation facilities may be garnered and put into service on behalf of the state;

(5) That public and private entities should have a clear and well-designed statutory framework to work within that allows for flexibility in partnering with each other and developing transportation infrastructure projects; and

(6) This article should not be limited by any rule of strict construction, but should be liberally construed to effect the legislative purpose of conceiving and creating a modern transportation infrastructure under the leadership and guidance of governmental entities, with corresponding and cooperative assistance, under appropriate circumstances, by public-private partnerships, inuring to the benefit and prosperity of the state and the welfare of its citizens.

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§17-28-3. Definitions.

Unless the context clearly indicates otherwise, as used in this article:

(1) "Affected local jurisdiction" means any county or incorporated municipality of this state in which all or any part of a transportation facility is or will be located, or any other local public entity, including, but not limited to, a public service district or highway authority or highway association that is directly affected by a transportation project.

(2) "Commissioner" means the Commissioner of Highways who is the chief executive officer of the Division of Highways.

(3) "Department" means the West Virginia Department of Transportation.

(4) "Division" refers to the Division of Highways, a division within the West Virginia Department of Transportation.

(5) "Governmental entity" means any county, municipality, or other governmental unit or political subdivision of the State.

(6) "Highway authority" or "highway association" means any entity created by the Legislature for the advancement and improvement of the state road and highway system, including, but not limited to, the New River Parkway Authority, Midland Trail Scenic Highway Association, Shawnee Parkway Authority, Corridor G Regional Development Authority, Coalfields Expressway Authority, Robert C. Byrd Corridor H Highway Authority, West Virginia 2 and I-68 Authority, Little Kanawha River Parkway Authority, King Coal Highway Authority, Coal Heritage Highway Authority, Blue and Gray Intermodal Highway Authority and the West Virginia Eastern Panhandle Transportation Authority or, if an authority is abolished, any entity succeeding to the principal functions of the highway authority or to whom the powers given to the highway authority are given by law.

(7) "Private entity" means any natural person, corporation, general partnership, limited liability company, limited partnership, joint venture, business trust, public benefit corporation, nonprofit entity or other business entity.

(8) "Project costs" means capital costs, costs of financing, planning, designing, constructing, expanding, improving, maintaining or controlling a transportation facility, the cost of land, equipment, machinery, installation of utilities and other similar expenditures and all other charges or expenses necessary, appurtenant or incidental to the foregoing.

(9) "Sponsor" or "project sponsor" means a governmental entity proposing a transportation project.

(10) "Public-private partnership" means a consortium that includes the Division of Highways, a governmental entity, a highway authority or any combination thereof, together with a private entity or entities, which proposes to finance, acquire, plan, design, construct,

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expand, improve, maintain or control a transportation facility.

(11) "Public service district" means a public corporation or political subdivision of this state created pursuant to section two, article thirteen-a, chapter sixteen of this code.

(12) "Revenue" means all revenue, income, earnings, user fees, lease payments or other service payments arising out of or in connection with supporting the development or operation of a transportation facility, including, without limitation, money received as grants or otherwise from the United States of America, from any public entity or from any agency or instrumentality of the foregoing in aid of such transportation project, moneys generated by way of contract, pledge, donation, bequest or bonds and moneys generated by taxes which are authorized to be assessed and levied by the Legislature or another governmental entity.

(13) "Secretary" means the Cabinet Secretary of the West Virginia Department of Transportation.

(14) "Transportation facility" means a public highway, road, bridge, tunnel, overpass, building, structure, airport, vehicle parking facility, riverport facility, rail facility, or intermodal facility used for the transportation of persons or goods.

(15) "Transportation project" means any project to acquire, design, construct, expand, renovate, extend, enlarge, increase, equip, improve, maintain or operate a transportation facility in this state for which a governmental entity is permitted by law to expend public funds but does not include any project that would otherwise be under the authority of the Public Port Authority, the Aeronautics Commission or the Parkways, Economic Development and Tourism Authority.

(16) "User fee" means a rate, toll, or fee imposed by an operator for use of all or a part of a transportation facility authorized in section five of this article.

(17) "Utility" means a privately, publicly or cooperatively owned line, facility or system for producing, transmitting or distributing communications, cable television, power, electricity, light, heat, gas, oil, crude products, water, steam, waste, storm water not connected with highway drainage, or any other similar commodity, including fire or police signal system or street lighting system, which directly or indirectly serves the public.

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§17-28-4. Governmental entities to submit transportation project requests to commissioner of highways generally; commissioner's powers and duties to implement the act; transportation project plan requirements; Division of Highways plan review; proprietary information.

(a) In addition to any other powers which a governmental entity may now have, a governmental entity seeking state funds for a transportation project may submit a transportation project plan to the commissioner as a project sponsor. The commissioner shall review the transportation project plan and the available financing for the project and shall encourage project sponsors to pursue alternative funding sources. Alternative funding sources may include, without limitation, utilization of tax increment financing, issuance of general obligations bonds, special revenue bonds or anticipation notes, cooperation with other governmental units, dedicated user fees and public-private partnerships.

(b) To implement and carry out the intent of this article, the commissioner shall propose legislative rules in accordance with article three, chapter twenty-nine-a of this code. The commissioner shall establish comprehensive, uniform guidelines in order to evaluate any transportation project plan. The guidelines shall address the following:

(1) The use of alternative sources of funding which could finance all or a portion of the transportation project;

(2) The transportation needs of the region;

(3) Project costs;

(4) Whether dedicated revenues from a project sponsor are offered for project costs;

(5) Available federal and state funds;

(6) The degree to which the transportation project impacts other infrastructure projects and implements cost-effective and efficient development of transportation projects with other infrastructure improvements;

(7) The cost effectiveness of the transportation project as compared with alternatives which achieve substantially the same economic development benefits;

(8) The project sponsor's ability to operate and maintain the transportation project or finance the continued operation and maintenance of the transportation project if approved;

(9) The degree to which the transportation project achieves other state or regional planning goals;

(10) The estimated date upon which the transportation project could commence if funding were available and the estimated completion date of the transportation project; and

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(11) Other factors the commissioner considers necessary or appropriate to accomplish the purpose and intent of this article.

(c) The commissioner shall create a transportation project plan application form that is to be used by project sponsors requesting funding assistance from the state for transportation projects. The application must require a preliminary proposal that includes:

(1) The location of the transportation project and affected local jurisdictions;

(2) The estimated total project cost of the transportation project;

(3) The amount of funding assistance desired from the Division of Highways and the specific uses of the funding;

(4) Other sources of funding available for the transportation project;

(5) Information demonstrating the need for the transportation project and documentation that the proposed funding of the project is the most economically feasible alternative to completing the transportation project;

(6) A timeline for activities to be performed by the project sponsors;

(7) A statement setting forth the financing of the project costs, including the sources of the funds and identification of any dedicated revenues, proposed debt, tax increment financing plans, issuance of bonds or notes, in-kind services or equity investment of project sponsors;

(8) A list of utilities that can be constructed in coordination with the transportation project and a statement of the plans to accommodate those utilities;

(9) Project sponsor contact information;

(10) A statement of the projected availability and use of dedicated revenues from user fees, lease payments, taxes, and other service payments over time; and

(11) Other information as the commissioner considers necessary to enable the review of the transportation project.

(12) The commissioner may also require the submission of geographic information system mapping of the transportation project and electronic filing of the preliminary proposal.

(d) If a preliminary proposal is approved by the commissioner for detailed review, the division will advise the project sponsors of the estimated cost of a detailed review. The project sponsor must deposit a bond with the commissioner, irrevocable letter of credit or other acceptable instrument guaranteeing payment by the project sponsors of the actual costs incurred by the division to perform a detailed transportation project plan review, to the maximum of the estimated costs, before a detailed review may begin.

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(e) In evaluating any transportation project, the commissioner may rely upon internal staff reports or the advice of outside advisors or consultants.

(f) The commissioner is to encourage collaboration among project sponsors, affected local jurisdictions and private entities through intergovernmental agreements and public-private partnerships including, without limitation, recommending the amounts and sources of funding which affected local jurisdictions or project sponsors may pursue, which state transportation or infrastructure agency or agencies may be consulted for appropriate investment of public funds and alternatives to carry out the intent of this article.

(g) After a detailed review, the commissioner may recommend to the Governor those transportation projects which are a prudent and resourceful expenditure of public funds. No proposal may be recommended or approved which is inconsistent with the division's twenty-year long range plans or other transportation plans.

(h) The commissioner must prepare and publish an annual report of activities and accomplishments and submit it to the Governor and to the Joint Committee on Government and Finance on or before December 15 of each year. The commissioner must also prepare and submit an annual report to the Governor and the Legislature outlining alternative road funding models and incentive packages. The report may also recommend legislation relating to third-party donation of funds, materials or services, federal credit instruments, secured loans, federal Transportation Infrastructure Finance and Innovation Act funds, state infrastructure banks (SIBS), private activity bonds or other matters respecting transportation considered by the commissioner to be in the public interest. The commissioner may consider alternatives to the current system of taxing highway use through motor vehicle fuel taxes including, without limitation, pilot programs for testing technology and methods for the collection of mileage fees.

(i) All documents maintained pursuant to this article shall be subject to the requirements of chapter twenty-nine-b of this code.

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§17-28-5. Powers conferred on counties; special charges for transportation facilities and projects; election on ordinance for user fees; form of ballots; procedure.

(a) In addition to any other powers which a county may now have, each county, by and through its county commission, shall have the following powers:

(1) To finance one or more transportation projects, or additions thereto, which shall be located within the county;

(2) To impose by ordinance reasonable user fees upon users of transportation facilities within a county to be collected in the manner specified in the ordinance, including, but not limited to, paying the costs of one or more transportation projects, the payment of debt service on any revenue bonds issued under section six of this article. The ordinance shall provide for the administration, collection and enforcement of the fee; and

(3) To establish a special transportation fund as a separate fund into which all user fees and other revenues designated by the county commission shall be deposited, and from which all transportation project costs shall be paid, which may be assigned to and held by a trustee for the benefit of bondholders if special transportation revenue bonds are issued by the county commission under section six of this article.

(b) No ordinance imposing a user fee authorized by this section is effective until it is ratified by a majority of the legal votes cast by the qualified voters of the county at a primary or general election. The ballot question must set forth the amount of the fee, the manner in which it will be imposed, the general use to which the proceeds of the fee will be put, a description of the transportation project to be financed with the fee, whether revenue bonds will be issued, and if bonds are to be issued, the estimated term and amount of the revenue bonds. The county commission may include additional information in the notice. Notice of the election shall be provided and the ballots shall be printed as set forth in subsection (c) of this section.

(c) On the election ballots shall be printed the following:

Shall the County Commission of (name of county) be authorized to adopt an ordinance to establish a fee for the use of the (transportation facility description) in accordance with section five, article twenty-eight, chapter seventeen of the code of West Virginia?

Yes

No

(d) If a majority of the legal votes cast upon the question be for the ordinance, the provisions of the ordinance become effective upon the date the results of the election are declared. If a majority of the legal votes cast upon the question be against the ordinance, the ordinance shall not take effect.

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(e) Subject to the provisions of subsection (d) of this section, an election permitted by this section may be conducted at any regular primary or general election as the county commission in its order submitting the same to a vote may designate.

(f) Notice of an election pursuant to this section shall be given by publication of the order calling for a vote on the question as a Class II-0 legal advertisement in compliance with the provisions of article three, chapter fifty-nine of this code and the publication area for the publication shall be the county in which the election is to be conducted.

(g) Any election permitted by this section shall be held at the voting precincts established for holding primary or general elections. All of the provisions of the general election laws of this state applicable to primary or general elections not inconsistent with the provisions of this section shall apply to voting and elections authorized by this section.

(h) Before an election is held, the county commission shall obtain written confirmation from the commissioner approving the user fee and a transportation project plan within the county that was reviewed by commissioner under section four of this article.

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§17-28-6. Issuance of transportation project revenue bonds by county.

(a) The county commission, in its discretion, may use the moneys in such special transportation fund established under section five of this article to finance the costs of transportation projects on a cash basis. Every county commission is empowered and authorized to issue, in the manner prescribed by this section, special revenue bonds secured by user fees authorized by section five of this article to finance or refinance all or part of a transportation project and pledge all or any part of the user fees for the payment of the principal of and interest on such bonds and the reserves therefor. Bonds issued for any of the purposes stated in this section shall contain in the title or subtitle thereto the word "transportation", in order to identify the same.

(b) The transportation revenue bonds may be authorized and issued by the county commission to finance or refinance, in whole or in part, public transportation projects in an aggregate principal amount not exceeding the amount which the county commission determines can be paid as to both principal and interest and reasonable margins for a reserve therefor from user fee revenues. A county commission issuing transportation revenue bonds shall establish a fund to deposit user fee revenues. The county commission shall thereafter deposit all revenues pledged to the payment of principal and interest of transportation revenue bonds into the fund.

(c) The issuance of transportation revenue bonds may be authorized by an order of the county commission. The transportation revenue bonds shall: (1) Bear a date or dates; (2) mature at a time or times not exceeding forty years from their respective dates; (3) be in a denomination not more than a maximum denomination fixed by the county commission; (4) be in a registered form with exchangeability and interchangeability privileges; (5) be payable in a medium of payment and at a place or places within or without the state; (6) be subject to such terms and prices for redemption, if any, as approved by the county commission; (7) bear a rate of interest that is not more than a maximum rate fixed by the county commission; and (8) may have such other terms and provisions as determined by the county commission. The transportation revenue bonds shall be signed by the president of the county commission under the seal of the county commission, attested by the clerk of the county commission. Transportation revenue bonds may be sold in a manner as the county commission determines is for the best interests of the county.

(d) The county commission may enter into: (1) Trust agreements with banks or trust companies within or without the state and in trust agreements or orders authorizing the issuance of bonds; (2) valid and legally binding covenants with the holders of the transportation revenue bonds as to the custody, safeguarding and disposition of the proceeds of the transportation revenue bonds, the moneys in the user fee revenue fund, sinking funds, reserve funds or any other moneys or funds; as to the rank and priority, if any, or different issues of transportation revenue bonds by the county commission under the provisions of this section; (3) agreements as to such provisions as payment, term, security, default and remedy provisions as the county commission shall consider necessary or desirable; and (4) agreements as to any other matters or provisions which are considered

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necessary and advisable by the county commission in the best interests of the county and to enhance the marketability of such transportation revenue bonds.

(e) The transportation revenue bonds are negotiable instruments under the Uniform Commercial Code of this state and are not obligations or debts of the state or of the county issuing the bonds and the credit or taxing power of the state or county may not be pledged therefor, but the transportation revenue bonds may be payable only from the revenue pledged therefor as provided in this article.

(f) A holder of transportation revenue bonds has a lien against the user fee revenues and the user fee revenue fund for payment of the transportation revenue bond and the interest thereon and may bring suit to enforce the lien.

(g) A county commission may issue and secure additional bonds payable out of the user fee revenues and the user fee revenue fund which bonds may rank on a parity with, or be subordinate or superior to, other bonds issued by the county commission and payable from the user revenue fee fund.

(h) For the purposes of this section, a county commission is authorized to sue and be sued; make contracts and guarantees; incur liabilities; borrow or lend money for any time period considered advisable by the county commission; sell, mortgage, lease, exchange, transfer or otherwise dispose of its property; or pledge its property as collateral or security for any time period considered advisable by the commission. All sales, leases or other disposition of real property acquired with state road funds or federal funds, or of real property dedicated to the state road system, must be done in accordance with applicable federal and state law and may be done only with the approval of the commissioner. A county commission is also authorized to create trusts as will expedite the efficient management of transportation projects and other assets owned or controlled by the county commission. The trustee, whether individual or corporate, in any trust has a fiduciary relationship with the county commission and may be removed by the county commission for good cause shown or for a breach of the fiduciary relationship with the county commission. Nothing in this article effects a waiver of the sovereign, constitutional or governmental immunity of the state or its agencies.

(i) The powers conferred by this article are in addition and supplemental to any other powers conferred upon county commissions by the Legislature relating to streets, road maintenance or to construct and maintain transportation facilities.

(j) After the issuance of any transportation revenue bonds, the user fee pledged to the payment thereof may not be reduced as long as any of the bonds are outstanding and unpaid except under such terms, provisions and conditions as shall be contained in the order, trust, agreement or other proceedings under which the transportation revenue bonds were issued.

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§17-28-7. Comprehensive agreement.

(a) Prior to acquiring, constructing or improving a transportation facility, the project sponsors 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 transportation facility, in the forms and amounts satisfactory to the division;

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

(3) Inspection of the construction of or improvements to the 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 transportation facility. However, 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 must be filed with the division accompanied by proofs of coverage;

(5) Monitoring of the maintenance and operating practices of the sponsoring governmental entity by the division and the taking of any actions the division finds appropriate to ensure that the 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) The date of termination of the sponsoring governmental entity's duties under this article and dedication to the division; and

(9) That a transportation facility must accommodate all public utilities on a reasonable, nondiscriminatory and completely neutral basis and in compliance with section seventeen-b, article four, chapter seventeen of this code.

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

(c) The comprehensive agreement is to incorporate the duties of the sponsoring governmental entity 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

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comprehensive agreement may contain provisions under which the division agrees to provide notice of default and cure rights for the benefit of the sponsoring governmental entity 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 sponsoring governmental entity and the division mutually agree.

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

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§17-28-8. Commissioner's authority over transportation projects accepted into the state road system; use of state road funds.

(a) Notwithstanding anything in this article to the contrary, the commissioner has final approval of any transportation project. However, no state road funds may be used, singly or together with funds from any other source, for any purpose or in any manner contrary to or prohibited by the constitution and laws of this state or the federal government or where such use, in the sole discretion of the commissioner, would jeopardize receipt of federal funds.

(b) All transportation projects that are accepted as part of the state road system, and all real property interests and appurtenances, are under the exclusive jurisdiction and control of the commissioner, who may exercise the same rights and authority as he or she has over other transportation facilities in the state road system. As a condition of acceptance of a transportation project into the state road system, the commissioner may require that the project sponsor provide a dedicated revenue source for the continued operation and maintenance of the transportation project.

(c) No state road funds may be used to finance a transportation project without the written approval of the commissioner.

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§17-28-9. Qualifying a transportation project as a public improvement.

All transportation projects authorized under this article are public improvements and are subject to article five-a, chapter twenty-one of this code. Article twenty-two, chapter five of this code applies to all transportation projects authorized under this article. All construction, reconstruction, repair or improvement of transportation projects under this article will be awarded by competitive bidding. Competitive bids are to be solicited by the governmental entity sponsoring a transportation project for each construction contract in excess of $25,000 in total cost. Competitive bids must be solicited by the sponsoring governmental entity through publication of a Class II legal advertisement, as required by article three, chapter fifty-nine of this code, and the publication area is the county or municipality where the transportation facility is to be located. The advertisement must also be published as a Class II advertisement in a newspaper of general circulation published in the city of Charleston. The advertisement is to include the solicitations of sealed proposals for the construction of the transportation project, stating the time and place for the opening of bids. All bids will be publicly opened and read aloud. Construction contracts must be awarded to the lowest qualified responsible bidder, who furnishes a sufficient performance or payment bond. The sponsoring governmental entity has the right to reject all bids and solicit new bids for the construction contract. Article one-c, chapter twenty-one of this code applies to the construction of all transportation projects approved under this article.

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§17-28-10. Coordination and development of transportation projects with other infrastructure; information sharing; agreements among municipal utilities and public service districts to participate in transportation projects; rates to include costs borne by municipal utilities and public service districts in coordination with transportation projects; exemption from Public Service Commission approval.

(a) The commissioner is to encourage the joint and concurrent development and construction of transportation projects with other infrastructure including, without limitation, water and sewer infrastructure.

(b) To coordinate and integrate the planning of transportation projects among local jurisdictions, all governing bodies, units of government, municipal utilities and public service districts within the affected local jurisdiction are to cooperate, participate, share information and give input when a project sponsor prepares a transportation project plan.

(c) Municipal utilities and public service districts may enter into agreements with any project sponsor for the purpose of constructing new infrastructure facilities or substantially improving or expanding infrastructure facilities in conjunction with a transportation project and dedicating revenue or contributing moneys to transportation project costs. Each agreement must contain, at a minimum, engineering and construction standards, terms regarding the revenue sources, allocation of project costs and confirmation that the agreement does not violate any existing bond covenants. Each agreement shall also comply and be consistent with the comprehensive agreement applicable to the transportation project. No infrastructure facilities may be located or relocated within a right-of-way in, or to be included within, the state road system except in accordance with transportation project plans approved by the commissioner.

(d) The rates charged by a municipal utility or public service district to customers in an affected local jurisdiction may include the additional cost borne by the municipal utility or public service district as a result of entering into an agreement with a project sponsor to contribute moneys or dedicate revenue to transportation project costs.

(e) This article may not be construed to affect the authority of the Department of Environmental Protection nor the authority of the Department of Health pursuant to this code.

(f) This article may not be construed to give the Public Service Commission authority to regulate or intervene in the approval and construction of any transportation project or any agreement between a project sponsor and a municipal utility or public service district under this article.

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§17-28-11. Excess funds; termination of user fee.

(a) When revenue bonds have been issued as provided in this article and the amount of user fees imposed pursuant to section five of this article and collected, less costs of administration, collection and enforcement, exceeds the amount needed to pay project costs and annual debt service, including the finding of required debt service and maintenance reserves, the additional amount shall be set aside in a separate fund and used to either fund transportation projects on a cash basis or retire some or all of the outstanding revenue bonds before their maturity date. The county commission may establish a call date for which bonds must be refunded with excess funds after a date determined by the county commission.

(b) Once the revenue bonds issued as provided in this article are no longer outstanding or a certified public accountant certifies that sufficient reserves have been or will be accumulated as of a specified date to pay all future debt service on the outstanding bonds, the user fee that is applicable to those specific bonds shall be discontinued. Termination of the user fee as provided in this section shall not bar or otherwise prevent the county commission from collecting user fees that accrued before the termination date.

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§17-28-12. Severability.

If any section, clause, provision or portion of this article shall be held to be invalid or unconstitutional by any court of competent jurisdiction, such holding shall not affect any other section, clause or provision of this article which is not in and of itself unconstitutional.

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