

1 **ENROLLED**

2 **Senate Bill No. 190**

3 (BY SENATORS KESSLER (MR. PRESIDENT) AND M. HALL,

4 BY REQUEST OF THE EXECUTIVE)

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6 [Passed April 13, 2013; to take effect July 1, 2013.]
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9
10 AN ACT to amend and reenact §17-27-5 and §17-27-9 of the Code of
11 West Virginia, 1931, as amended, all relating to the funding
12 of transportation public-private partnership projects and
13 their corresponding comprehensive agreements; eliminating
14 requirement that money from the State Road Fund only be used
15 for public-private partnership projects where the money serves
16 as a required match for federal funds specifically earmarked
17 in a federal authorization or appropriation bill and does not
18 exceed four percent of the immediate preceding three fiscal
19 years' average of the Division of Highways' construction
20 contracts awarded under the competitive bid process; allowing
21 public-private partnership projects to use money from the
22 State Road Fund when the projects are in excess of

1 \$20 million, constructed by the Division of Highways and
2 contained in its six-year plan; providing that any earnings in
3 excess of maximum rate of return that is negotiated in
4 comprehensive agreements be deposited in the State Road Fund;
5 providing a sunset provision prohibiting comprehensive
6 agreements for public-private partnership projects after June
7 30, 2017; eliminating the requirement that a comprehensive
8 agreement for public-private partnership projects be approved
9 by concurrent resolution of the Legislature and be submitted
10 to the Governor for his or her approval or disapproval before
11 the Division of Highways enters into the comprehensive
12 agreement; and mandating that the Division of Highways provide
13 a copy of any comprehensive agreement to the Legislature's
14 Joint Committee on Government and Finance at least thirty days
15 prior to said agreement being executed by the Division of
16 Highways for a public-private partnership project.

17 *Be it enacted by the Legislature of West Virginia:*

18 That §17-27-5 and §17-27-9 of the Code of West Virginia, 1931,
19 as amended, be amended and reenacted, all to read as follows:

20 **ARTICLE 27. PUBLIC-PRIVATE TRANSPORTATION FACILITIES ACT.**

21 **§17-27-5. Submission and review of conceptual proposals; approval**
22 **by the Commissioner of Highways.**

1 (a) A private entity may submit in writing a solicited
2 conceptual proposal for a transportation facility to the division
3 for consideration. The conceptual proposal shall include the
4 following:

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

7 (2) A description of the proposed transportation facility;

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

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

14 (b) Following review by the division, the division shall
15 submit to the Commissioner of Highways the conceptual proposals and
16 priority ranking for review for final selection.

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

22 (1) A topographic map (1:2,000 or other appropriate scale)

1 indicating the location of the transportation facility or
2 facilities;

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

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

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

22 (A) The names and addresses, if known, of the current owners

1 of the property needed for the transportation facility or
2 facilities;

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

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

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

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

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

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

1 accommodate the crossings or relocations;

2 (8) A statement setting forth the developer's general plans
3 for financing and operating the transportation facility or
4 facilities;

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

7 (10) Information about the developer, including, but not
8 limited to, an organizational chart of the developer,
9 capitalization of the developer, experience in the operation of
10 transportation facilities and references and certificates of good
11 standing from the Tax Commissioner, Insurance Commissioner and the
12 Division of Unemployment Compensation evidencing that the developer
13 is in good standing with state tax, workers' compensation and
14 unemployment compensation laws, respectively; and

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

17 (d) The division, with approval of the Commissioner of
18 Highways, may solicit proposals from private entities for the
19 acquisition, construction or improvement of transportation
20 facilities in a form and with the content determined by the
21 division.

22 (e) The division may solicit any proposal for the acquisition,

1 construction or improvement of the transportation facility or
2 facilities as a qualifying transportation facility if it is
3 determined that it serves the public purpose of this article. The
4 division may determine that the acquisition, construction or
5 improvement of the transportation facility or facilities as a
6 qualifying transportation facility serves a public purpose if:

7 (1) There is a public need for the transportation facility of
8 the type the private entity proposes to operate as a qualifying
9 transportation facility;

10 (2) The transportation facility and the proposed
11 interconnections with existing transportation facilities and the
12 developer's plans for development of the qualifying transportation
13 facility are reasonable and compatible with the state
14 transportation plan and with the local comprehensive plan or plans;

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

17 (4) The acquisition, construction, improvement or the
18 financing of the transportation facility or facilities does not
19 involve any moneys from the State Road Fund: *Provided*, That moneys
20 from the State Road Fund may be used if the project is constructed
21 by the division, is in excess of \$20 million and is contained in
22 the division's six-year plan: *Provided, however*, That the moneys

1 from the General Revenue Fund may also be used if so designated and
2 approved by the Legislature.

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

7 (6) The private entity's plans will result in the timely
8 acquisition or construction of or improvements to the
9 transportation facility for their more efficient operation and that
10 the private entity's plans will result in a more timely and
11 economical delivery of the transportation facility than otherwise
12 available under existing delivery systems.

13 (f) Notwithstanding any provision of this article to the
14 contrary, the recommendation of the division to the Commissioner of
15 Highways is subject to:

16 (1) The private entity's entering into a comprehensive
17 agreement with the division; and

18 (2) With respect to transportation facilities, the requirement
19 that public information dissemination with regard to any proposal
20 under consideration comply with the division's policy on the public
21 involvement process, as revised.

22 (g) In connection with its approval of the development of the

1 transportation facility as a qualifying transportation facility,
2 the division shall establish a date for the acquisition of or the
3 beginning of construction of or improvements to the qualifying
4 transportation facility. The division may extend that date.

5 (h) Selection by the Commissioner of Highways:

6 (1) Upon presentations of proposals received by the division,
7 the commissioner shall make his or her decision for the project.

8 (2) The commissioner shall notify the division and the public
9 of the final selection for the project.

10 **§17-27-9. Comprehensive agreement.**

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

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

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

21 (3) Inspection of the construction of or improvements to the
22 qualifying transportation facility to ensure that they conform to

1 the engineering standards acceptable to the division;

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

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

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

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

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

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

1 (10) That a transportation facility shall accommodate all
2 public utilities on a reasonable, nondiscriminatory and completely
3 neutral basis and in compliance with the provisions of section
4 seventeen-b, article four, chapter seventeen of this code.

5 (b) The comprehensive agreement may require user fees
6 established by agreement of the parties. Any user fees shall be
7 set at a level that, taking into account any service payments,
8 allows the developer the rate of return on its investment specified
9 in the comprehensive agreement: *Provided*, That the schedule and
10 amount of the initial user fees to be imposed and any increase of
11 the user fees must be approved by the Commissioner of the Division
12 of Highways. A copy of any service contract shall be filed with
13 the division. A schedule of the current user fees shall be made
14 available by the developer to any member of the public upon
15 request. In negotiating user fees under this section, the parties
16 shall establish fees that are the same for persons using the
17 facility under like conditions and that will not unreasonably
18 discourage use of the qualifying transportation facility. The
19 execution of the comprehensive agreement or any amendment to the
20 comprehensive agreement constitutes conclusive evidence that the
21 user fees provided in the comprehensive agreement comply with this
22 article. User fees established in the comprehensive agreement as

1 a source of revenues may be in addition to, or in lieu of, service
2 payments.

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

7 (d) The comprehensive agreement shall incorporate the duties
8 of the developer under this article and may contain any other terms
9 and conditions that the division determines serve the public
10 purpose of this chapter. Without limitation, the comprehensive
11 agreement may contain provisions under which the division agrees to
12 provide notice of default and cure rights for the benefit of the
13 developer and the persons specified in the comprehensive agreement
14 as providing financing for the qualifying transportation facility.
15 The comprehensive agreement may contain any other lawful terms and
16 conditions to which the developer and the division mutually agree,
17 including, without limitation, provisions regarding unavoidable
18 delays or provisions providing for a loan of public funds to the
19 developer to acquire, construct or improve one or more qualifying
20 transportation facilities.

21 (e) The comprehensive agreement shall require the deposit of
22 any earnings in excess of the maximum rate of return as negotiated

1 in the comprehensive agreement in the State Road Fund established
2 pursuant to section one, article three, chapter seventeen of this
3 code.

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

7 (g) Notwithstanding any provision of this article to the
8 contrary, the division may not enter into any comprehensive
9 agreements with a developer after June 30, 2017. (h)
10 Notwithstanding any provision of this article to the contrary,
11 at least thirty days prior to execution, the commissioner
12 shall provide a copy of a comprehensive agreement to the Joint
13 Committee on Government and Finance.