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Can Public-Private Partnerships Pave the Way for West Virginia Road Construction?

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In these days of ever-increasing demands on public monies and ever-growing public resistance to yet another bond issue being floated or tax being levied, cities and states are facing a fiscal crisis of unprecedented proportion. These financial pressures seem to weigh heaviest on transportation infrastructure projects – the repair and building of streets, roads and highways, and the maintenance of bridge and overpasses. Funds seem to migrate to higher profile, popular projects, yet our infrastructure is at a critical juncture. Much of the nation's Interstate system, begun in the mid-1950s, is reaching the end of its projected life span. Many bridges, aging and stressed by heavier vehicles, as well as higher-than-designed-for traffic volumes, are exhibiting signs of fatigue and deterioration. Secondary roads are increasingly difficult to maintain.

Recognizing this funding dilemma, West Virginia Governor Earl Ray Tomblin issued an executive order on August 14, 2012, forming the Blue Ribbon Commission on Highways, a 24-member panel tasked with studying the highway system's condition and needs, and identifying funding options. Funding for highways projects has been stagnant for more than a decade, while costs have steadily increased. The situation shows no sign of changing – if anything, it looks to worsen. The Commission will explore all funding options, including ones used by other states to maintain and improve their highway systems.

Other states and cities have turned to private investors as a means of solving this financial dilemma. The idea is simple. In return for an infusion of capital, the public get its infrastructure renewed and investors get a guaranteed return on their investment. A number of such public-private partnership (PPP) projects have been successfully completed across the country, spurring calls for more such projects. PPPs are particularly appropriate for road construction and maintenance projects.

West Virginia enacted legislation, called the "Public-Private Transportation Facilities Act" (The Act), in 2008. It is specifically focused on PPPs related to road and transportation projects. Such legislation is necessary to modify the myriad of existing public procurements laws and regulations that would otherwise preclude PPPs from undertaking highway projects. The Act recognizes that "authorizing private entities to acquire, construct or improve one or more transportation facilities may result in the availability of transportation facilities in a more timely or less costly manner," and that the existing manner of constructing and improvising transportation facilities is unsatisfactory.

The Act is intended to provide significant flexibility in the way in which PPPs are formed, the projects they may undertake and the way in which the private entities receive a return on

their investment. Nonetheless, there are a number of steps with which a private entity must comply before it can take on a PPP transportation project. A developer must first submit a conceptual proposal for the project to the Division of Highways (DOH). Interestingly, the DOH can solicit proposals, but developers may initiate a proposal on their own. The proposal must provide the developer's qualifications and experience, a description of the project and detail the financing for the project. It must be accompanied by several attachments, including a topographical map, a statement of public support for the project and a statement of how the developer is going to acquire the property interests necessary for the project. Upon DOH recommendation, the DOH Commissioner decides whether to select the proposal for further development.

Once a proposal is selected, the developer must enter into a "Comprehensive Agreement" with the DOH that governs all aspects of the project. Among other things, the comprehensive agreement must provide for DOH review and approval of the plans and specifications for the project, to ensure that they conform to engineering standards acceptable to the DOH, and for DOH inspection of the project. It also must set the maximum rate of return on investment for the developer, provide for the developer's filing of appropriate financial statements on a periodic basis and set the date for the termination of the developer's duties and the dedication of the project to the public. The comprehensive agreement may set user fees, which must be calculated to allow the developer to achieve the rate of return specified in the agreement, but not discourage use of the road or facility. The agreement may also include any other terms that the DOH determines serve the public purpose of the Act, or to which the developer and the DOH mutually agree.

The developer and the DOH cannot enter into the comprehensive agreement, however, until it has been approved by a roll call vote of the West Virginia Legislature and approved by the Governor. It then becomes the operative document for the project, and the project may proceed.

Because PPP transportation projects are considered public improvements, they are subject to West Virginia's laws governing public construction. The developer must advertise the project and solicit proposals, and is required to award the contract for the project to the lowest responsible bidder. Our prevailing wage law applies, as does the West Virginia Jobs Act, requiring employers to hire 75 percent of their employees from within West Virginia or surrounding counties, on projects greater than $500,000.

Upon completion of the project, the developer receives reimbursement from operation of the transportation facility at the rate of return set by the comprehensive agreement and, in turn, must perform all operational and maintenance duties required by the agreement. The developer's interests and obligations in the project terminate on the date previously agreed upon, and the road or facility is dedicated for public use.

Given West Virginia's pressing need for alternative funding methods for roadway and infrastructure improvements, PPPs can – and should – be a part of the funding solution. Admittedly, PPPs can never be the entire solution to the funding woes plaguing infrastructure projects in West Virginia: The types of projects suitable for such financing are limited in nature. Moreover, PPPs cannot provide the steady funding stream needed to pay for all, or even a majority of, transportation projects. But every project funded by private investment through a PPP frees up public dollars for other transportation infrastructure projects. A push for more PPPs should be part of West Virginia's efforts to finance future transportation projects. V