

WEST VIRGINIA LEGISLATURE

2022 REGULAR SESSION

ENROLLED

Committee Substitute

for

Committee Substitute

for

Senate Bill 530

BY SENATORS BLAIR (MR. PRESIDENT) AND BALDWIN

(BY REQUEST OF THE EXECUTIVE)

[Passed March 12, 2022; in effect 90 days from passage]

1 AN ACT to amend the Code of West Virginia, 1931, as amended, by adding thereto a new section,
2 designated §11-13A-6b; and to amend and reenact §17-27-3, §17-27-4, §17-27-5, §17-
3 27-7, §17-27-8, §17-27-9, §17-27-11, §17-27-13, §17-27-14, §17-27-15, and §17-27-16
4 of said code, all relating to encouraging public-private partnerships related to
5 transportation facilities; providing coal severance tax escrow fund for the state portion of
6 coal severance taxes paid on a public-private transportation facility; authorizing the
7 Division of Highways to repay collected tax in escrow to private entities; cleaning up
8 antiquated language; clarifying the roles of the division, public entities, and developers;
9 simplifying the public-private partnership review process; providing that project proposal
10 may not include use of more than \$100 million from state road fund; clarifying that
11 Commissioner of the Division of Highways may approve or modify the division's rankings,
12 authorize negotiations and entry into comprehensive agreement with the highest-ranked
13 developer, or reject all proposals; providing that division is not obligated to accept,
14 consider, or review unsolicited conceptual proposals, but may choose to do so; providing
15 that no obligation or liability attaches to either party if they are unable to reach an
16 agreement; providing that the division may negotiate a comprehensive agreement with the
17 next highest-ranked developer if agreement cannot be reached with highest-ranked
18 developer; clarifying the extent to which the division may utilize condemnation if it is found
19 the project serves a public purpose or the developer is in material default; and exempting
20 public-private partnership agreements from statutory government construction contract
21 requirements.

Be it enacted by the Legislature of West Virginia:

CHAPTER 11. TAXATION.

ARTICLE 13A. SEVERANCE AND BUSINESS PRIVILEGE TAX ACT.

**§11-13A-6b. Severance tax on coal extracted incident to highway construction performed
under §17-27-1 et seq. of this code.**

1 (a) Notwithstanding any other provision of this code, severance tax paid on coal extracted
2 incident to the construction of any highway financed, in whole or in part, by this state or any
3 agency of the government of the United States, and subject to the provisions of 30 CFR §912.707
4 or §22-3-26 of this code shall be deposited on a quarterly basis by the Tax Commissioner in a
5 special fund in the State Treasury to be managed by the Commissioner of the Division of
6 Highways and held in escrow until such time as the conditions specified in this section are
7 complied with.

8 (b) *Coal severance tax subject to escrow.* —

9 The severance tax subject to escrow under this section includes:

10 (A) The 4.65 percent state portion of severance tax on coal imposed under §11-13A-3 of
11 this code; and

12 (B) The 1.65 percent state portion of the coal severance tax on coal extracted from seams
13 having a thickness of 37 to 45 inches; and

14 (C) The 0.65 percent state portion of the coal severance tax on coal extracted from seams
15 having a thickness of less than 37 inches; and

16 (D) The 2.65 percent state portion of the coal severance tax on thermal coal imposed
17 under §11-13A-3(b) of this code; and

18 (E) If the minimum severance tax set forth in §11-12B-1 *et seq.* of this code is paid or due
19 owing and payable, the minimum severance tax.

20 (c) *Coal severance tax not subject to escrow.* — The severance tax on coal imposed under
21 §11-13A-3 and §11-13A-6 of this code for the benefit of counties and municipalities may not be
22 subject to escrow under this section, but shall be distributed for the benefit of counties and
23 municipalities as mandated by law.

24 (d) The moneys accumulated in escrow pursuant to the provisions of this section shall be
25 paid to each participant in a public-private partnership related to transportation facilities under
26 §17-27-1 *et seq.* of this code.

27 (e) The amount paid to each such private entity shall be equal to the severance tax paid
28 by each entity that was deposited into the escrow fund, with interest at the statutory rate of interest
29 on tax overpayments established under the West Virginia Tax Procedure and Administration Act,
30 §11-10-1 *et seq.* of this code.

31 (f) Moneys to be paid out of the escrow fund to each such private entity shall only be paid
32 when the Commissioner of the Division of Highways has certified that:

33 (1) All contracted work of the private entity for construction of the highway that yielded
34 the coal extracted incident to the construction has been satisfactorily completed, and that the work
35 meets all applicable highway construction standards;

36 (2) All taxes due and owing to this state by the private entity have been paid;

37 (3) All rights-of-way relating to the highway have been satisfactorily settled;

38 (4) All subcontractors, laborers, and obligees of the private entity have been properly paid;

39 (5) All legal and contractual obligations undertaken by the private entity under §17-27-1 *et*
40 *seq.* of this code have been satisfactorily fulfilled; and

41 (6) The private entity is in compliance with all state and federal laws applicable to the
42 construction project.

43 (g) Upon a determination by the Commissioner of the Division of Highways that moneys
44 in the escrow fund may not be paid, or that the moneys have remained unpaid for a period of not
45 less than one year, the moneys shall be removed from the escrow fund and paid into the General
46 Fund.

CHAPTER 17. ROADS AND HIGHWAYS

ARTICLE 27. PUBLIC-PRIVATE TRANSPORTATION FACILITIES ACT.

§17-27-3. Prerequisites for development.

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

20 (4) A statement setting forth the method by which the private entity proposes to secure all
21 property interests required for the transportation facility or facilities: *Provided*, That with the
22 approval of the division, the private entity may request that the comprehensive agreement assign
23 the division with responsibility for securing all property interests, including public utility facilities,
24 with all costs, including costs of acquiring the property, to be reimbursed to the division by the

25 private entity. The statement shall include the following information regarding the property
26 interests or rights, including, but not limited to, rights to extract mineable minerals:

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

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

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

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

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

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

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

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

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

49 (10) Information about the private entity and, to the extent they differ, any developer,
50 including, but not limited to, an organizational chart, capitalization, experience in the operation of

51 transportation facilities, and references and certificates of good standing from the Tax
52 Commissioner, Insurance Commissioner, and the Division of Unemployment Compensation
53 evidencing good standing with state tax, workers' compensation, and unemployment
54 compensation laws, respectively; and

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

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

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

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

65 (3) The estimated cost of the transportation facility or facilities is reasonable in relation to
66 similar facilities: *Provided*, That moneys used by the state road fund shall not exceed \$100 million.

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

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

74 (d) If proposals for a transportation facility are solicited by the division, the division shall
75 review all solicited conceptual proposals, assign them a priority ranking, and present them with
76 the priority ranking to the Commissioner of the Division of Highways for review. Upon presentation

77 of the priority-ranked proposals, the commissioner shall approve or modify the division's rankings,
78 and may authorize the division to negotiate and enter into a comprehensive agreement with the
79 highest-ranked developer or reject all proposals. The division has no duty to accept, consider, or
80 review a conceptual proposal that was not solicited by the division, but may do so in its sole
81 discretion.

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

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

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

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

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

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

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

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

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

18 (e) The developer shall:

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

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

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

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

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

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

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

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

§17-27-9. Comprehensive agreement.

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

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

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

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

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

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

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

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

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

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

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

28 (b) The comprehensive agreement may require user fees established by agreement of the
29 parties. Any user fees shall be set at a level that, taking into account any service payments, allows
30 the developer the rate of return on its investment specified in the comprehensive agreement:
31 *Provided*, That the schedule and amount of the initial user fees to be imposed and any increase
32 of the user fees shall be approved by the Commissioner of the Division of Highways. A copy of
33 any service contract shall be filed with the division. A schedule of the current user fees shall be
34 made available by the developer to any member of the public upon request. In negotiating user
35 fees under this section, the parties shall establish fees that are the same for persons using the
36 facility under like conditions and that will not unreasonably discourage use of the qualifying
37 transportation facility. The execution of the comprehensive agreement or any amendment to the
38 comprehensive agreement constitutes conclusive evidence that the user fees provided in the
39 comprehensive agreement comply with this article. User fees established in the comprehensive
40 agreement as a source of revenues may be in addition to, or in lieu of, service payments.

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

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

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

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

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

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

67 (i) Before entering into any comprehensive agreement related to or resulting from an
68 unsolicited proposal, the commissioner shall make a written finding that entry into the
69 comprehensive agreement serves the public purpose of this article and is in the best interest of
70 the state.

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

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

5 (1) To elect to take over the transportation facility or facilities and in that case, it shall
6 succeed to all of the rights, title and interest in the transportation facility or facilities, subject to any

7 liens on revenues previously granted by the developer to any person providing financing for the
8 facility or facilities and the provisions of this section;

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

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

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

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

§17-27-13. Condemnation.

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

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

§17-27-14. Utility crossings.

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

§17-27-15. Dedication of assets.

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

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

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

The Joint Committee on Enrolled Bills hereby certifies that the foregoing bill is correctly enrolled.

.....
Chairman, Senate Committee

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Chairman, House Committee

Originated in the Senate.

In effect 90 days from passage.

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Clerk of the Senate

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Clerk of the House of Delegates

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President of the Senate

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Speaker of the House of Delegates

The within this the.....
Day of, 2022.

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Governor