

**WEST VIRGINIA
SECRETARY OF STATE
NATALIE E. TENNANT
ADMINISTRATIVE LAW DIVISION**

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OFFICE OF WEST VIRGINIA
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Form #6

**NOTICE OF FINAL FILING AND ADOPTION OF A LEGISLATIVE RULE AUTHORIZED
BY THE WEST VIRGINIA LEGISLATURE**

AGENCY: WV Department of Transportation, Division of Highways TITLE NUMBER: 157

AMENDMENT TO AN EXISTING RULE: YES NO

IF YES, SERIES NUMBER OF RULE BEING AMENDED: _____

TITLE OF RULE BEING AMENDED: _____

IF NO, SERIES NUMBER OF RULE BEING PROPOSED: Ten

TITLE OF RULE BEING PROPOSED: Community Empowerment Transportation Act Program

THE ABOVE RULE HAS BEEN AUTHORIZED BY THE WEST VIRGINIA LEGISLATURE.

AUTHORIZATION IS CITED IN (house or senate bill number) House Bill 2586

SECTION 64-8-1, PASSED ON March 8, 2011

THIS RULE IS FILED WITH THE SECRETARY OF STATE. THIS RULE BECOMES EFFECTIVE ON THE
FOLLOWING DATE: April 6, 2011

Paul A. Matton, Jr.
Authorized Signature

FILED

TITLE 157
LEGISLATIVE RULE
DEPARTMENT OF TRANSPORTATION
DIVISION OF HIGHWAYS

2011 APR -6 AM 11:06

OFFICE OF THE
SECRETARY OF STATE

SERIES TEN
COMMUNITY EMPOWERMENT TRANSPORTATION ACT PROGRAM

§157-10-1. General.

1.1. Scope. -- This legislative rule applies general rules to govern special highway financing programs.

1.2. Authority. -- W. Va. Code §17-28-4.

1.3. Filing Date. --

1.4. Effective Date. --

§157-10-2. Definitions.

2.1. Terms. The terms used in this rule are defined as follows:

2.1.1. "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.

2.1.2. "Commissioner" means the Commissioner of Highways who is the chief executive officer of the Division of Highways.

2.1.3. "Department" means the West Virginia Department of Transportation.

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

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

2.1.6. "Highway authority" or "highway association" means any entity created by the Legislature for the advancement and improvement of the state road and highway system, 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.

2.1.7. "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.

2.1.8. "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 a transportation facility.

2.1.9. "Sponsor" or "project sponsor" means a governmental entity proposing a transportation project.

2.1.10. "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, expand, improve, maintain or control a transportation facility.

2.1.11. "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.

2.1.12. "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.

2.1.13. "Secretary" means the Cabinet Secretary of the West Virginia Department of Transportation.

2.1.14. "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.

2.1.15. "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 Authority.

2.1.16. "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.

2.1.17. "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.

§157-10-3. Coordination and Development of Transportation Projects with Other Infrastructure; Exemption from Public Service Commission Approval.

3.1. The Commissioner will encourage the joint and concurrent development and construction of transportation projects with other infrastructure including, without limitation, water and sewer infrastructure.

3.2. 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 must cooperate, participate, share

information and give input when a project sponsor prepares a transportation project plan.

3.3. 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.

3.4. 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.

3.5. This rule does not affect the authority of the Department of Environmental Protection nor the authority of the Department of Health and Human Resources as provided by law.

3.6. The Public Service Commission does not have 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 rule.

§157-10-4. Submission and Consideration of Project Proposals; Bonds.

4.1. A sponsor seeking state funds for a transportation project must submit to the Division for review a transportation plan project proposal for the project. The project proposal must include:

4.1.1. A completed application in a form approved by the Division;

4.1.2. A map in a scale approved by the Division depicting the location of the transportation project and the affected local jurisdictions;

4.1.3. The estimated total project cost;

4.1.4. An estimate of any state or federal funds requested from the Division;

4.1.5. Other sources of funding available for the transportation project;

4.1.6. 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;

4.1.7. A timeline for activities to be performed by the project sponsors;

4.1.8. 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;

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

4.1.10. Project sponsor contact information;

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

4.1.12. Such other information as the Commissioner considers necessary to enable the review of the transportation project.

4.1.13. If requested by the Commissioner, geographic information system mapping of the transportation project and electronic filing of the preliminary proposal.

4.2. 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 with the commissioner a bond, 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.

4.3. The Commissioner and the sponsor shall encourage other affected public and private entities to collaborate on the project and to provide funding.

4.4. 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.

§157-10-5. Comprehensive Agreement

5.1. Prior to acquiring, constructing or improving a transportation facility, the project sponsors must enter into a comprehensive agreement with the Division. The comprehensive agreement must provide for:

5.1.1. 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;

5.1.2. Review and approval of the final plans and specifications for the transportation facility by the Division;

5.1.3. Inspection of the construction of or improvements to the transportation facility to ensure that they conform to the engineering standards acceptable to the Division;

5.1.4. 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;

5.1.5. 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;

5.1.6. Itemization and reimbursement to be paid to the Division for the review and any services provided by the Division;

5.1.7. Filing of semi-annual financial statements in a level of detail approved by the Division;

5.1.8. The date of termination of the sponsoring governmental entity's duties and dedication to the Division; and,

5.1.9. That a transportation facility must accommodate all public utilities on a reasonable, nondiscriminatory and completely neutral basis and in compliance with W.Va. Code §17-4-17b, as amended.

5.2. 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.

5.3. The comprehensive agreement must incorporate the duties of the sponsoring governmental entity and may contain any other terms and conditions that the Division determines serve the public purpose of the West Virginia Community Empowerment Transportation Act. 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 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.

5.4. Changes in the terms of the comprehensive agreement must be mutually agreed to in writing.

§157-10-6. Funding of Project.

6.1. The sponsor and the Division may use alternative funding sources to conduct the project, including Transportation Infrastructure Finance and Innovation Act, general obligation bonds, special revenue bonds, anticipatory bonds, multi-entity bonds, and dedicated user fees.

6.2. Upon completion of the project, any monies excess to the monies defined in the funding section of the project agreement shall be deposited in to a separate account for either the earlier retirement of the debt or to fund the operation or maintenance of the project.

6.3. No fees may be terminated until the bonding for the project is retired.

§157-10-7. Commissioner's Authority over Transportation Projects Accepted into the State Road System; Use of State Road Funds.

7.1. The Commissioner has final approval of any transportation project. 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.

7.2. All transportation projects that are accepted as part of the state road system, and

all real property interests and appurtenances, will be 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.

7.3. No state road funds may be used to finance a transportation project without the written approval of the Commissioner.

§157-10-8. Transportation Project is a Public Improvement. All transportation projects governed by this rule are public improvements and are subject to the provisions of W. Va. Code §21-5A-1, et. seq. and §5-22-1, et. seq. All construction, reconstruction, repair or improvement of transportation projects must be awarded by competitive bidding. Competitive bids must be solicited by the governmental entity sponsoring a transportation project for each construction contract in excess of \$25,000 in total cost through publication of a Class II legal advertisement, as required by W.Va. Code §59-3-1, et.seq. 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 must 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 must be publicly opened and read aloud. Construction contracts must be awarded to the lowest qualified responsible

bidder who furnishes a sufficient performance and payment bond. The sponsoring governmental entity may reject all bids and solicit new bids for the construction contract. W. Va. Code §21-1C-1, et.seq. applies to the construction of all transportation projects approved under this Rule.

§157-10-9. Reporting. The Division shall prepare and publish an annual report detailing the activities and accomplishments regarding the community empowerment transportation act and also outlining alternative road funding modes and incentive packages. The report shall be provided to the Governor and Joint Committee on Government and Finance no later than December 15 of each year.

LINKS TO FEDERAL CODE AND STATE RULES FOR SERIES 7

<http://www.epa.gov/lawsregs/search/40cfr.html>

<http://www.access.gpo.gov/cgi-bin/cfrassemble.cgi?title=200349>

<http://www.wvsos.com/csr/verify.asp?TitleSeries=33-20>