Bond Case Briefs

Municipal Finance Law Since 1971

Tennessee Enacts Public-Private Partnership Statute In Quest To Solve Growing Traffic Problems.

Thanks to newly enacted legislation signed into law late last month, Tennessee may be one step closer to solving a critical problem facing residents and officials in Middle Tennessee: How to solve Nashville's growing traffic congestion.

An estimated 80 to 100 people are moving to Nashville each day. That is good news to private developers who continue to pour money into the area to meet the demand created by the rapid growth. Many of those people moving to Nashville want to live close to where they work or attend school. In Nashville, that typically means living somewhere between Downtown, the West End, and Green Hills—ground zero for Nashville's traffic congestion.

Most public officials who have looked at the traffic problem in and around Nashville agree more roads and bridges are not necessarily the answer. Nashville's Metro Transit Authority has been studying the issue for years and recently released several options being considered. Those options range in price from an estimated $5.4 billion down to $800 million. And those options all look at solving the problem with mass transit. While most all public officials and their consultants agree mass transit is the best way to solve the growing traffic problem, they also agree funding that solution is likely to be the biggest challenge. That is where the "Public-Private Transportation Act of 2016" steps in.

The new law authorizes agencies to pursue public-private partnerships (referred to as "Public-Private Initiatives" under the act) for mass transit and other related projects. The law was first introduced in January 2016, was signed into law by Gov. Haslam in late April, and becomes effective October 1, 2016. Once implemented, the law will allow the private sector to participate in the development of mass transit projects and, hopefully, provide a creative solution which avoids asking the tax payers to foot the bill through tax revenues.

Under the new law, agencies can either solicit competitive bids or proposals for a project or even receive and consider unsolicited proposals for certain transportation related projects. In the event an unsolicited proposal is received, the public entity will be required to take several steps, including advertising for competitive proposals for the same project.

Under Tennessee's law, a Public-Private Initiative is an agreement between a state, county, or municipality (including agencies or authorities created by those entities) and a private entity whereby the private entity contributes equity, shares resources, or assists in the development of a transportation facility. The law, however, defines a "transportation facility" in such a way that it prevents highways, bridges, and tunnels from being funded by Public-Private Initiatives.

One question raised by several early Public-Private Partnership statutes was whether projects built under the enabling statute would be considered public or private under other laws like the states "little Miller Act" and mechanic's lien laws. That question was raised in several states where a private entity developing a similar project defaulted on payments to contractors hired to build the project. The problem is that when a developer defaults on a private project, the contractors can assert a mechanic's lien to recoup their costs incurred for building the project that the defaulting developer is unable to pay. Those liens, however, are generally not available on a public project or only extend to payments the public owner owes and has not yet made to its general contractor. Therefore, public entities generally require general contractors on public projects to post payment bonds which ensure contractors performing the work will be paid in the event the general contractor defaults. On this issue, Tennessee joins the majority of states who have recently enacted these laws by requiring private entities participating in a Public-Private Initiative to post both payment and performance bonds.

Ultimately, the new law gives public entities a way to fund mass transit and related projects (e.g., parking facilities, utilities, and related projects to support mass transit projects) without using tax dollars. At the same time, the new law creates opportunities for private investors and developers looking to invest in Nashville's growth. Following the lead of at least 33 other states, including, most recently, Kentucky, Tennessee lawmakers believe Public-Private Partnerships will offer a solution to the traffic problem without dipping too deep into the public coffers.

The content of this article is intended to provide a general guide to the subject matter. Specialist advice should be sought about your specific circumstances.

Article by Zachary D. Jones

Last Updated: May 12 2016

Stites & Harbison PLLC