



ENABLING PUBLIC-PRIVATE PARTNERSHIPS FOR TRANSPORTATION IN CALIFORNIA

By George Passantino



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Part I

Introduction

California does not currently have the policy tools necessary to finance and develop large-scale improvements to its highway system, on which we will continue to rely for more than 90 percent of passenger transportation and the large majority of all goods movement over the next 30 years. A growing number of other fast-growing states (as well as urban areas in Australia, Britain, Canada, France, and others) have developed effective means of tapping the private capital markets and drawing on the project-delivery skills of the private sector to make major improvements to their transportation systems. California needs to do likewise.

Most recent legislative efforts to authorize public-private partnerships in California (including AB 1467) focus on modifying California Streets & Highways Code Section 143, the statute established by Assembly Bill 680 in 1989. While it is reasonable to create statutory authorization in this code section, as written, the statute fails to draw upon the best practices developed over the past 17 years in other states. If California is to authorize a true 21st Century authorizing statute in this code section, a complete rewrite will be required. Yet, while the authority created in AB 1467 may be severely limited, it seems reasonable to at least offer the opportunity for this statute to be used before it is completely overwritten.

Fortunately, another statute was approved in 1996 through Assembly Bill 2660, Government Code 5956, which may provide an easier avenue to improve access to public-private partnerships without overwriting AB 1467 and without requiring a complete rewrite of law.

AB 2660 authorized the broad use of public-private partnerships in varying local infrastructure, with two notable limitations. First, it did not allow state entities such as CalTrans to utilize this approach to infrastructure. Second, it excluded toll-based transportation projects within the State highway system from consideration. If a road is not within the state highway system, it is unlikely to have sufficient traffic levels to be financially feasible as a public-private partnership. In other words, while AB 2660 opened the door to public-private partnerships in other areas of infrastructure such as the development of water and waste-water facilities, it has provided no benefit in tackling the transportation crisis.

Despite its limitations, the law is generally well constructed and could become a potentially valuable tool in addressing California's transportation infrastructure crisis if two minor changes are made to the law:

- Government Code 5956 should be amended to remove the exclusion for toll-funded projects within the state highway system.
- The authority to enter into public-private partnerships through this statute should be extended to state entities as well (most notably CalTrans).

Part 2

Legislative Change

The amendments to Government Code 5956, which was authorized by Assembly Bill 2660, to achieve these two needed changes are provided in standard legislative format: Underlined text is added, ~~Strikethrough text~~ is deleted.

Amend Govt. Code Section 5956 to read:

5956. State and ~~Local~~ governmental agencies have experienced a significant decrease in available tax revenues to fund necessary infrastructure improvements. If ~~local~~ governmental agencies are going to maintain the quality of life that this infrastructure provides, they must find new funding sources. One source of new money is private sector investment capital utilized to design, construct, maintain, rebuild, repair, and operate infrastructure facilities. Unless private sector investment capital becomes available to study, plan, design, construct, develop, finance, maintain, rebuild, improve, repair, or operate, or any combination thereof, fee-producing infrastructure facilities, some ~~local~~ governmental agencies will be unable to replace deteriorating infrastructure. Further, some ~~local~~ governmental agencies will be unable to expand and build new infrastructure facilities to serve the increasing population.

5956.1. It is the intent of the Legislature that ~~local~~ governmental agencies have the necessary authority and flexibility to utilize private investment capital to study, plan, design, construct, develop, finance, maintain, rebuild, improve, repair, or operate, or any combination thereof, fee-producing infrastructure facilities. Without the ability to utilize private sector investment capital to study, plan, design, construct, develop, finance, maintain, rebuild, improve, repair, or operate, or any combination thereof, fee-producing infrastructure facilities, the Legislature finds that some ~~local~~ governmental agencies will not be able to adequately, competently, or satisfactorily retrofit, reconstruct, repair, or replace existing infrastructure and will not be able to adequately, competently, or satisfactorily design and construct new infrastructure.

5956.2. It is the intent of the Legislature that this chapter be construed as creating a new and independent authority for state and local governmental agencies to utilize private sector investment capital to study, plan, design, construct, develop, finance, maintain, rebuild, improve, repair, or operate, or any combination thereof, fee-producing infrastructure facilities. To that end, this authority is intended to supplement and be independent of any existing authority and does not limit, replace, or detract from existing authority. This chapter may be used by state and local governmental entities when they deem it appropriate in the exercise of their discretion. It is the intent of the Legislature that this act create no new governmental entities.

5956.3. (a) For purposes of this chapter, "governmental agency" includes a state agency, state department, or state commission, city, county, city and county, including a chartered city or county, school district, community college district, public district, county board of education, joint powers authority, transportation commission or authority, or any other public or municipal corporation.

(b) For purposes of this chapter, "private entity" includes a person, business entity, combination of persons and business entities, or a combination of business entities.

(c) For purposes of this chapter, "fee-producing infrastructure project" or "fee-producing infrastructure facility" means the operation of the infrastructure project or facility will be paid for by the persons or entities benefited by or utilizing the project or facility.

5956.9. In order to use the authority conferred by this chapter to the maximum extent, a governmental agency may use private infrastructure financing pursuant to this chapter as the exclusive revenue source or as a supplemental revenue source with federal, state, or local funds. The governmental agency involved may be a state, local governmental agency or a combination of governmental agencies. The governmental agency may work cooperatively with the California Infrastructure and Economic Development Board with regard to the design, construction, operation, and financing of privately financed facilities, but the projects will not be subject to the review or approval of that board.

5956.10. Notwithstanding any provision of this chapter, ~~neither the state or any state agency may directly or indirectly use the authority in this chapter,~~ no governmental agency as defined in Section 5956.3, may use the authority in this chapter, to design, construct, finance, or operate a project which ~~a state project.~~ For

~~purposes of this section, a state project includes any of the following:~~

- ~~(a) MIXED USE Toll roads on state highways.~~
- ~~(b) (a) State water projects.~~
- ~~(c) (b) State park and recreation projects.~~
- ~~(d) (c) State financed projects.~~

~~These limitations shall not prohibit the state, any state agency, or any governmental agency as defined in Section 5956.3, from utilizing the authority contained in this chapter to design, construct, finance, or operate a tolled transportation facility that may be outside of, adjacent to or within existing state-highway rights of way. Furthermore, these limitations shall not prohibit the state, any state agency, or any governmental agency as defined in Section 5956.3, from utilizing authorizations contained in other provisions of law.~~

Part 3

A Cautionary Note

While there may be other areas of the statute that lawmakers may wish to expand upon or clarify, making these two minor changes, as outlined above, will dramatically enhance California's ability to bring privately funded transportation projects to fruition.

Nonetheless, it is important that the final statute, as approved, be as permissive and flexible as possible. Lawmakers must resist the urge to offer such a level of detail in the statute that project innovation is stifled.

For instance, when AB 680 was crafted, the statute required that qualifying projects were entirely privately financed and that the public sector could not be a financial partner in the projects. While this may have been a well-intended effort to conserve taxpayer resources, it helped create the adversarial relationship that resulted in the 91 Express Lanes controversy. When the public and private sector both hold financial interests in a joint venture, a spirit of collaboration and goal-oriented thinking is far more likely to be achieved.

Part 4

Conclusion

In summary, California has a tremendous need to tap into private capital to help improve its transportation infrastructure but lacks the necessary tools to do it, even with the recent passage of AB 1467.

The simplest approach to authorizing public-private partnerships would be to amend Government Code 5956 as described above. A second, more ambitious effort would require the creation of a model 21st Century authorizing statute that overwrites AB 1467 and draws heavily upon the experience of other states. Given the political realities of California and the likely difficulty in extending such broad authority, the most appropriate step would be to simply expand upon what the state already has at its disposal.

Regardless of the option pursued, however, lawmakers must be mindful to not stifle innovation by passing an overly restrictive measure.

California remains in a pitched battle for economic competitiveness with a number of fast-growing states like Texas, Florida and Virginia. To truly succeed in this competition, California lawmakers must be willing to allow the market and existing safeguards to protect the public good and not attempt to do so with well-intended but misguided statutory restrictions.

About the Author

George Passantino is a senior fellow at Reason Foundation. In 2004, Passantino served as a full-time director on Gov. Arnold Schwarzenegger's California Performance Review. Passantino helped lead a thorough, top-to-bottom review of state government that the nonpartisan Legislative Analyst's Office concluded could save California \$15 billion over five years.

Passantino has authored frequent studies, white papers, and commentaries on California's need for fundamental economic, legislative, and regulatory reform. His views have appeared in numerous publications, including the *Los Angeles Times*, *Los Angeles Daily News*, *Orange County Register*, *San Diego Union-Tribune*, *San Jose Mercury News*, *San Francisco Chronicle*, and *Investor's Business Daily*. Passantino graduated cum laude with a B.A. in Applied Economics from California State University, Bakersfield.



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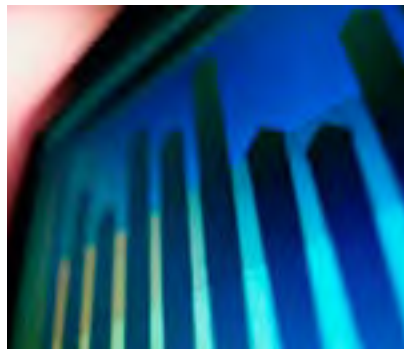
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