

HOUSE No. 2746

The Commonwealth of Massachusetts

PRESENTED BY:

Harold P. Naughton, Jr.

To the Honorable Senate and House of Representatives of the Commonwealth of Massachusetts in General Court assembled:

The undersigned legislators and/or citizens respectfully petition for the adoption of the accompanying bill:

An Act providing for public-private transportation facilities.

PETITION OF:

NAME:

DISTRICT/ADDRESS:

Harold P. Naughton, Jr.

12th Worcester

Jose F. Tosado

9th Hampden

HOUSE No. 2746

By Mr. Naughton of Clinton, a petition (accompanied by bill, House, No. 2746) of Harold P. Naughton, Jr. and Jose F. Tosado relative to the construction of public-private transportation facilities in the Commonwealth. Transportation.

The Commonwealth of Massachusetts

**In the One Hundred and Ninetieth General Court
(2017-2018)**

An Act providing for public-private transportation facilities.

Be it enacted by the Senate and House of Representatives in General Court assembled, and by the authority of the same, as follows:

1 Chapter 6C of the General Laws is hereby amended by adding the following section at
2 the end thereof:-

3 Section XX. The Legislature finds and declares that there is a public need for the rapid
4 construction of safe and efficient transportation facilities for the purpose of traveling within the
5 state, and that it is in the public’s interest to provide for the construction of additional safe,
6 convenient, and economical transportation facilities.

7 (1) The department may receive or solicit proposals and, with legislative approval as
8 evidenced by approval of the project in the department’s work program, enter into agreements
9 with private entities, or consortia thereof, for the building, operation, ownership, or financing of
10 transportation facilities. The department may advance projects programmed in the adopted 5-
11 year work program or projects increasing transportation capacity and greater than \$500 million
12 in the 10-year Transportation Improvement Plan using funds provided by public-private

13 partnerships or private entities to be reimbursed from department funds for the project as
14 programmed in the adopted work program. The department shall by rule establish an application
15 fee for the submission of unsolicited proposals under this section. The fee must be sufficient to
16 pay the costs of evaluating the proposals. The department may engage the services of private
17 consultants to assist in the evaluation. Before approval, the department must determine that the
18 proposed project:

19 (a) Is in the public's best interest;

20 (b) Would not require state funds to be used unless the project is on the State Highway
21 System or the existing MBTA rail and transit system;

22 (c) Would have adequate safeguards in place to ensure that no additional costs or
23 service disruptions would be realized by the traveling public and residents of the state in the
24 event of default or cancellation of the agreement by the department;

25 (d) Would have adequate safeguards in place to ensure that the department or the
26 private entity has the opportunity to add capacity to the proposed project and other transportation
27 facilities serving similar origins and destinations; and

28 (e) Would be owned by the department upon completion or termination of the
29 agreement.

30 The department shall ensure that all reasonable costs to the state, related to transportation
31 facilities that are not part of the State Highway System, or the existing MBTA rail and transit
32 system are borne by the private entity. The department shall also ensure that all reasonable costs
33 to the state and substantially affected local governments and utilities, related to the private

34 transportation facility, are borne by the private entity for transportation facilities that are owned
35 by private entities. For projects on the State Highway System or the existing MBTA rail and
36 transit system, the department may use state resources to participate in funding and financing the
37 project as provided for under the department's enabling legislation. Because the Legislature
38 recognizes that private entities or consortia thereof would perform a governmental or public
39 purpose or function when they enter into agreements with the department to design, build,
40 operate, own, or finance transportation facilities, the transportation facilities, including leasehold
41 interests thereof, are exempt from Massachusetts Sales taxes. Any private entities or consortia
42 thereof must pay any applicable corporate taxes as provided for in law. The private entities or
43 consortia thereof must also register and collect the tax on all their direct sales and leases that are
44 subject to tax under Massachusetts laws. The agreement between the private entity or consortia
45 thereof and the department establishing a transportation facility under this chapter constitutes
46 documentation sufficient to claim any exemption under this section.

47 (2) Agreements entered into pursuant to this section may authorize the private entity to
48 impose tolls or fares for the use of the facility. The following provisions shall apply to such
49 agreements:

50 (a) The department may lease existing toll facilities through public-private partnerships.
51 The public-private partnership agreement must ensure that the transportation facility is properly
52 operated, maintained, and renewed in accordance with department standards.

53 (b) The department may develop new toll facilities or increase capacity on existing toll
54 facilities through public-private partnerships. The public-private partnership agreement must

55 ensure that the toll facility is properly operated, maintained, and renewed in accordance with
56 department standards.

57 (c) Any toll revenues shall be regulated by the department. The regulations governing
58 the future increase of toll or fare revenues shall be included in the public-private partnership
59 agreement.

60 (d) The department shall include provisions in the public-private partnership agreement
61 that ensure a negotiated portion of revenues from tolled or fare generating projects are returned
62 to the department over the life of the public-private partnership agreement. In the case of a lease
63 of an existing toll facility, the department shall receive a portion of funds upon closing on the
64 agreements and shall also include provisions in the agreement to receive payment of a portion of
65 excess revenues over the life of the public-private partnership.

66 (e) The private entity shall provide an investment grade traffic or ridership and revenue
67 study prepared by an internationally recognized traffic or ridership and revenue expert that is
68 accepted by the national bond rating agencies. The private entity shall also provide a finance plan
69 that identifies the project cost, revenues by source, financing, major assumptions, internal rate of
70 return on private investments, and whether any government funds are assumed to deliver a cost-
71 feasible project, and a total cash flow analysis beginning with implementation of the project and
72 extending for the term of the agreement.

73 (3) Each private transportation facility constructed pursuant to this section shall comply
74 with all requirements of federal, state, and local laws; state, regional, and local comprehensive
75 plans; department rules, policies, procedures, and standards for transportation facilities; and any
76 other conditions which the department determines to be in the public's best interest.

77 (4) The department may exercise any power possessed by it, including eminent domain,
78 with respect to the development and construction of state transportation projects to facilitate the
79 development and construction of transportation projects pursuant to this section. The department
80 may provide services to the private entity. Agreements for maintenance, law enforcement, and
81 other services entered into pursuant to this section shall provide for full reimbursement for
82 services rendered for projects not on the State Highway System or the existing MBTA rail and
83 transit system.

84 (5) Except as herein provided, the provisions of this section are not intended to amend
85 existing laws by granting additional powers to, or further restricting, local governmental entities
86 from regulating and entering into cooperative arrangements with the private sector for the
87 planning, construction, and operation of transportation facilities.

88 (6) The department shall ensure that generally accepted business practices for
89 exemptions provided by this subsection are part of the procurement process or are included in the
90 public-private partnership agreement.

91 (a) The department may request proposals from private entities for public-private
92 transportation projects or, if the department receives an unsolicited proposal, the department
93 shall publish a notice in the Massachusetts CommBuys system and a newspaper of general
94 circulation at least once a week for 2 weeks stating that the department has received the proposal
95 and will accept, for 120 days after the initial date of publication, other proposals for the same
96 project purpose. A copy of the notice must be mailed to each local government in the affected
97 area.

98 (b) Public-private partnerships shall be qualified by the department as part of the
99 procurement process as outlined in the procurement documents, provided such process ensures
100 that the private firm meets at least the minimum department standards for qualification in
101 department rule for professional engineering services and road, bridge and tunnel contracting
102 prior to submitting a proposal under the procurement.

103 (c) The department shall ensure that procurement documents include provisions for
104 performance of the private entity and payment of subcontractors, including, but not limited to,
105 surety bonds, letters of credit, parent company guarantees, and lender and equity partner
106 guarantees. The department shall balance the structure of the security package for the public-
107 private partnership that ensures performance and payment of subcontractors with the cost of the
108 security to ensure the most efficient pricing.

109 (d) After the public notification period has expired, the department shall rank the
110 proposals in order of preference. In ranking the proposals, the department may consider factors
111 that include, but are not limited to, professional qualifications, general business terms, innovative
112 engineering or cost-reduction terms, finance plans, and the need for state funds to deliver the
113 project. If the department is not satisfied with the results of the negotiations, the department may,
114 at its sole discretion, terminate negotiations with the proposer. If these negotiations are
115 unsuccessful, the department may go to the second-ranked and lower-ranked firms, in order,
116 using this same procedure. If only one proposal is received, the department may negotiate in
117 good faith and, if the department is not satisfied with the results of the negotiations, the
118 department may, at its sole discretion, terminate negotiations with the proposer. Notwithstanding
119 this subsection, the department may, at its discretion, reject all proposals at any point in the
120 process up to completion of a contract with the proposer.

121 (e) The department shall provide an independent analysis of the proposed public-private
122 partnership that demonstrates the cost-effectiveness and overall public benefit at the following
123 times:

- 124 1. Prior to moving forward with the procurement; and
- 125 2. If the procurement moves forward, prior to awarding the contract.

126 (7) The department may use innovative finance techniques associated with a public-
127 private partnership under this section, including, but not limited to, federal loans as provided in
128 Titles 23 and 49 of the Code of Federal Regulations, commercial bank loans, and hedges against
129 inflation from commercial banks or other private sources.

130 (8) The department may enter into public-private partnership agreements that include
131 extended terms providing annual payments for performance based on the availability of service
132 or the facility being open to traffic or based on the level of traffic using the facility. In addition to
133 other provisions in this section, the following provisions shall apply:

134 (a) The annual payments under such agreement shall be included in the department's
135 tentative work program and the long-range transportation plan for the applicable metropolitan
136 planning organization. The department shall ensure that annual payments on multiyear public-
137 private partnership agreements are prioritized ahead of new capacity projects in the development
138 and updating of the tentative work program.

139 (b) The annual payments are subject to annual appropriation by the Legislature..

140 (9) The department shall provide a summary of new public-private partnership projects
141 each year..

142 (10) Prior to entering such agreement where funds are committed from the
143 Massachusetts Transportation Trust Fund, the project must be prioritized as follows:

144 (a) The department, in coordination with the local metropolitan planning organization,
145 shall prioritize projects

146 (b) The department, in coordination with the local metropolitan planning organization
147 or local government where there is no metropolitan planning organization, shall prioritize
148 projects.

149 (11) Public-private partnership agreements under this section shall be limited to a term
150 not exceeding 50 years. Upon making written findings that an agreement under this section
151 requires a term in excess of 50 years, unless approved by the governor. Agreements under this
152 section shall not have a term in excess of 75 years unless specifically approved by the
153 Legislature. The department shall identify each new project under this section with a term
154 exceeding 75 years in the transmittal letter that accompanies the submittal of the tentative work
155 program to the Governor and the Legislature.

156 (12) The department shall ensure that no more than 15 percent of total federal and state
157 funding in any given year for the Massachusetts Transportation Trust Fund shall be obligated
158 collectively for all projects under this section.

159 (13) In connection with a proposal to finance or refinance a transportation facility
160 pursuant to this section, the department shall consult with the Executive Office of Administration
161 and Finance. The department shall provide the Office with the information necessary to provide
162 timely consultation and recommendations. The Office may make an independent
163 recommendation to the governor.