

Managed Lanes Network Development Strategy – Phase I

Managed Lanes Legal and Regulatory Issues

MARICOPA ASSOCIATION OF GOVERNMENTS

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1.0 BACKGROUND

The Maricopa Association of Governments (MAG) is working in cooperation with the Arizona Department of Transportation (ADOT) and other regional partner agencies to explore the regional managed lanes system, including determining future needs for High-Occupancy Vehicle (HOV) system expansion and the potential for introducing enhanced lane management techniques such as value pricing in the form of High-Occupancy Toll (HOT) lanes, and active traffic management. The outcome of this effort will be a MAG Managed Lanes Network Development Strategy – Phase I Report that will guide future planning and investment in HOV and Managed Lanes facilities in the region.

The purpose of the MAG Managed Lanes Network Development Strategy – Phase I study is to examine the existing or planned freeways in the region to identify where managed lanes strategies, policies or actions could improve overall system efficiency. For those corridors where such strategies or policies are considered most promising, the study will then provide an action plan that establishes the framework for subsequent phases to further define the network concept including establishing a preliminary concept of operations and design concept, develop corridor specific concepts including preliminary design and environmental clearance, and complete implementation including business rules, market grade traffic and revenue forecasts, construction and operations.

To support the evaluation of the managed lanes network in the MAG region, a series of technical “white papers” will be developed to examine the relevant issues by drawing upon the substantial and growing research and experience on managed lanes around the nation. These white papers will assess the pros and cons associated with each relevant issue to better enable the regional partners to reach conclusions on the feasibility and specific technical aspects of managed lanes for the Phoenix area.

1.1. Purpose

The purpose of this paper is to address the legal and regulatory issues associated with the implementation of managed lane facilities across the state. Numerous federal and state laws govern the financing and operation of roadway facilities in Arizona. This paper focuses specifically on the policy and legislative issues associated with the operational strategies of tolling or pricing.

The first section of this paper provides a broad discussion of regulatory and legal implications associated with tolling facilities. This is followed by a discussion of state statutes and regulations that have the potential to affect the future implementation of managed lanes in the MAG region. A summary of Federal programs that support the use of tolling was also prepared and appended to this paper.

2.0 DISCUSSION OF LEGAL AND REGULATORY ISSUES

2.1. Legislative Authority to Toll

A fundamental component of any potential managed lanes project is the ability for the state or local jurisdiction to legally operate a roadway using a specific managed lane operational strategy, such as tolling or pricing.

Currently, Arizona law only permits the collection of tolls¹ as part of a public private partnership project (PPP).² Pursuant to the original legislation³, only the private partner was authorized to collect tolls under any PPP agreement. However, earlier this year, SB 1270, which became effective on July 20, 2011, expanded ADOT's participation in PPPs to include its authority to collect fees and receive all or a share of the revenues pursuant to an executed PPP agreement.⁴ It further allows for a PPP agreement to authorize ADOT to continue the collection of tolls after the agreement expires.⁵

However, because Arizona law limits the collection of tolls to PPP projects, implementing high occupancy toll (HOT) lanes as a public project on an interstate or other state highway would require legislative action, and it should be noted that a supermajority in each house of the legislature is required to approve any act that would provide for an increase in state revenues.⁶

2.2. User Fees versus Taxes

The distinction between fees (e.g., tolls) and taxes is important because typically the imposition of a new tax or a tax increase requires legislative approval, while an agency can set a fee administratively, with the appropriate statutory authority.⁷ In order to be considered a fee rather than a tax, a nexus relationship needs to exist between the collection of revenue and the use of that revenue. For example, the collection of tolls should be related to paying for the capital expenses of the tolled facility or the broader system of tolled facilities and related transportation facilities.

In Arizona, whether an assessment is categorized as a fee or a tax is generally determined by three factors, including the relationship between the revenue collected and the use of that revenue: (1) the entity that imposes the assessment; (2) the parties upon whom the assessment is imposed; and (3) whether the assessment is expended for

¹ The term "toll" is used throughout to include collection of user fees, tolls, fares, rents, advertising and sponsorship fees, service fees or similar charges. A.R.S. § 28-7705(A)(1).

² A.R.S. § 28-7701 et seq.

³ HB 2396 <<http://www.azleg.gov/legtext/49leg/1r/bills/hb2396s.pdf>>

⁴ A.R.S. § 28-7705(A)(1).

⁵ A.R.S. § 28-7705(A)(1)(d).

⁶ "An act that provides for a net increase in state revenues ... is effective on the affirmative vote of two-thirds of the members of each house of the legislature." Arizona Const. art. 9, § 22.

⁷ Arizona Const. art. 9, § 22. In distinguishing between a fee and a tax, the Arizona Supreme Court has noted that a fee is a voluntary charge paid in return for a public service that bestows a particular benefit on the recipient, ' while a tax is a forced contribution of wealth to meet the public needs of the government.' *Stewart v. Verde River Irrigation & Power District*, 68 P.2d 329, 334-35 (Ariz. 1937).

general public purposes, or used for the regulation or benefit of the parties upon whom the assessment is imposed.⁸

- An assessment imposed by an administrative agency is less likely to be a tax than one imposed directly by the legislature.⁹
- An assessment imposed upon a narrow class is less likely to be a tax than one that is imposed upon a broad class of parties.¹⁰
- Finally, an assessment that is placed in a special fund and used only for special purposes is less likely to be a tax.¹¹

This is a fairly straight forward analysis would likely apply to rate setting for tolls as a part of any managed lanes strategy.

Currently, state law does not specifically address the disposition of revenue from facilities tolled as part of a PPP agreement. Article IX, § 14 of the Arizona Constitution does require that all revenues derived from fees, excises or taxes relating to motor vehicles or fuels be expended for highway or street purposes.¹² However, it is not clear whether this constitutional requirement contemplates the collection of tolls as part of a managed lanes strategy.

In the event that toll revenue is subject to the constitutional restriction, existing case law indicates that “highway or street purposes” is broadly interpreted to include any activity that promotes “highway or street purposes” even if the activity does not fall within the enumerated categories.¹³ The key to analyzing specific expenditures is whether they, in fact, relate directly to “highway and street purposes.”¹⁴ For example, the Attorney General has issued an opinion stating that costs associated with public outreach and public hearings regarding road construction projects are permissible expenditures under Article IX, § 14.¹⁵ Regional and environmental planning that directly relates to highways and streets is also an appropriate expenditure.¹⁶

⁸ *May v. McNally*, 55 P.3d 768, 773-74 (Ariz. App. 2002) (citing *Bidart Bros. v. Cal. Apple Comm'n*, 73 F.3d 925, 931 (9th Cir. 1996)).

⁹ *Jachimek v. State*, 74 P.3d 944, 948 (Ariz. App. 2003).

¹⁰ *Bidart Bros.*, 73 F.3d at 931.

¹¹ *Id.* (citing *Trailer Marine Transp. Corp. v. Riviera Vazquez*, 977 F.2d 1, 6 (1st Cir. 1992)).

¹² “No moneys derived from fees, excises, or license taxes relating to registration, operation, or use of vehicles on the public highways or streets or to fuels or any other energy source used for propulsion of vehicles on the public highways or streets, shall be expended for other than highway and street purposes including the cost of administering the state highway system and the laws creating such fees, excises, or license taxes, statutory refunds bonds and obligations, expenses of state enforcement of traffic laws and state administration of traffic safety programs, payment of costs of publication and distribution of Arizona highways magazine, state costs of construction, reconstruction, maintenance or repair of public highways, streets or bridges, costs of rights of way acquisitions and expenses related there to, roadside development[.]” Arizona Const. art. 4, § 14.

¹³ *Id.*

¹⁴ Op. Atty. Gen. I05-003 (May 23, 2005).

¹⁵ *Id.*

¹⁶ *Id.*

Assuming tolls collected as part of a PPP project are subject to Article IX, §14, the broad interpretation of “highway and street purposes,” appears to provide the State with some latitude in determining how the revenue is expended. For example, costs associated with mitigating the impacts of a tolled facility would arguably be a permissible expenditure of toll revenues. However, to avoid the appearance that a narrow class of users is funding transportation improvements for the general public, toll revenues generated from the use of managed lanes should be expended for the construction, operation, and maintenance of the tolled facilities.

Because the tolling of roadway facilities would be a new practice for Arizona, a court may find that Article IX, § 14 does not apply to the use of toll revenues. In order to maximize the flexibility the agency has for using toll revenues, it would be prudent to continue to explore other state imposed user fees. There may be analogous precedent related to user fees, which could provide additional insight as to the permissible uses of toll revenues.

2.3. Tolls on Federally Funded Facilities

Federal law generally prohibits the imposition of tolls by states on Federally funded facilities.¹⁷ With the enactment of the Safe, Accountable, Flexible, and Efficient Transportation Equity Act: A Legacy for Users (SAFETEA-LU), Congress enabled three new exceptions, and modified one existing exception to this general prohibition. The legislation permits states and other qualifying agencies to impose tolls on certain Interstate highways, tunnels, and bridges. All tolling and pricing programs are coordinated by the Federal Highway Administration (FHWA).

The application process for all tolling and pricing programs is a two-step process. The first step involves submission of an Expression of Interest to FHWA “Tolling and Pricing Team.” The Tolling and Pricing Team assists the applicant in identifying the range of available options and directs the application to the most appropriate program office to accomplish the goals stated in the Expression of Interest. The applicant is required to respond to comments made by the Team on the Expression of Interest. The second step is for the applicant to formally apply to the appropriate program office for review, in compliance with any specific procedural requirements of the selected program office.

The number of opportunities for these Federal programs is limited, and in some cases only one slot remains. If the State of Arizona desires to impose tolls on a Federally funded facility, the State should move as quickly as practicable to identify those facilities and to apply to FHWA for clearance to impose tolls.

2.4. Interstate Commerce Issues

Implicit in the Commerce Clause¹⁸ is a prohibition from passing state legislation that improperly burdens or discriminates against Interstate commerce.

¹⁷ 23 U.S.C. § 301.

¹⁸ U.S. Const. art. I § 8, cl. 3.

- **Three-Factor Test:** Federal courts have upheld tolls on highways linking different states based on a three-factor test.¹⁹ A toll does not improperly burden Interstate commerce if it (1) is based on some fair approximation of use of the facility; (2) is not excessive in relation to the benefits conferred; and (3) does not discriminate against Interstate travelers.²⁰
- **Market-Participant Doctrine:** The limitations provided by the Commerce Clause do not apply where the public entity is acting as a market participant rather than a market regulator.²¹ The market-participant doctrine permits a state to influence a discrete, identifiable class of economic activity in which it is a major participant.²²

In Illinois, the Seventh Circuit upheld the City of Chicago’s use of tolls collected on the Chicago Skyway under the market-participant doctrine.²³ In doing so, the Court found that the following facts suggested that the City was acting as a property owner, using its property to raise money, not as a regulator:

- City sold revenue bonds to pay for construction of the Skyway and funded Skyway maintenance and operation by charging drivers a toll.
- As owner and operator of the facility, the City offered drivers access to the Skyway in exchange for a fee.
- When the Skyway was not raising sufficient revenue, the City would fund debt service and maintenance costs.²⁴

Arizona’s existing PPP enabling legislation currently allows drivers who pay tolls to apply for refunds or credits from the state for motor vehicle fuel license taxes, use fuel taxes, or motor carrier fees.²⁵ Because these are taxes typically paid by the fuel and commercial trucking industry, this provides some level of protection against a Commerce Clause challenge.

Where a PPP agreement authorizes the public partner to collect tolls, the standards outlined in the Supreme Court’s three-part test would need to be considered when setting toll rates on any facility in Arizona, unless it can establish that the public partner is acting as a “market participant” rather than as a governmental unit engaged in the regulation of Interstate commerce.

¹⁹ The Supreme Court has held that a state may impose a flat fee for the privilege of using its roads, without regard to the actual use by particular vehicles, so long as the fee is not excessive. *Aero Mayflower Transit Co. v. Georgia Public Service Comm’n*, 295 U.S. 285 (1935); *Morf v. Bingaman*, 298 U.S. 407 (1936); *Aero Mayflower Transit Co. v. Board of Railroad Comm’rs*, 332 U.S. 495 (1947).

²⁰ *Evansville-Vandeburgh Airport Auth. Dist. v. Delta Airlines*, 405 U.S. 707 (1972) (Supreme Court held that a tax designed merely to impose upon an Interstate traveler’s fair share of the government’s costs in maintaining the public facility used is not an unconstitutional burden on the constitutionally guaranteed right to travel).

²¹ *New Energy Co. of Ind. v. Limbach*, 486 U.S. 269, 277 (1988).

²² *South-Central Timber Dev. v. Wunnicke*, 467 U.S. 82, 97 (1984).

²³ *Roy L. Endsley III v. City of Chicago*, 230 F.3d 276 (7th Cir. 2000).

²⁴ *Id.*

²⁵ A.R.S. § 28-7705(E).

2.5. Toll Discount Programs

Discount programs are often used in response to opposition to tolling by local residents and commuters. The constitutionality of these discount programs implicates the Commerce Clause as well as the Equal Protection Clause and the Privileges and Immunities Clause of the Fourteenth Amendment. The three primary types of discounts are – discounts related to residency, discounts based on transponder, and discounts for frequent users.²⁶

- **Discounts Related to Residency:** There are two cases currently pending in Federal district court regarding the constitutional validity of discount programs based on residency requirements. In *Selevan v. New York Thruway*, plaintiffs challenged the constitutionality of toll discounts for local residents of Grand Island under the Commerce Clause, Equal Protection Clause and the Privileges and Immunities Clause.²⁷

Pending before the U.S. District Court in the District of Massachusetts, *Surprenant v. Massachusetts Turnpike Authority* challenges the constitutionality of the discount tolls that the Massachusetts Turnpike Authority (MTA) and Massachusetts Port Authority offer to residents living near the Tobin Bridge or the Ted Williams or Sumner Tunnels.²⁸ The court dismissed plaintiff's Privileges and Immunities Clause claim and ordered further discovery and briefing regarding the Commerce Clause claim.²⁹

Federal legislation has also been introduced in both the House and the Senate that would provide express authorization for public authorities to provide toll discounts based on residency.³⁰

Pending case law and legislation will likely shape the future of toll discounts related to residency.

- **Discounts Based on Transponder:** In *Yerger v. Massachusetts Turnpike Authority*, the Third Circuit upheld a discount program where eligibility was based on use of the particular transponder.³¹ MTA provides discounts to those drivers using MTA's Fast Lane transponders, but not to users of E-ZPass even though the two systems operate interchangeably permitting drivers using either transponder to use the same facilities without using the toll booths.³² Because the discount program is open to everyone and offers discounted toll rates to individuals, from any state, who choose to enroll in Fast Lane, the court held that the program did not

²⁶ Kessler, Frederic W., *Recent Developments on the Constitutionality of Toll Discount Programs* <<http://www.nossaman.com/7511>> (October 25, 2010).

²⁷ 584 F.3d 82 (2009). Case is currently pending in the U.S. District Court in the Northern District of New York.

²⁸ See *supra* FN26.

²⁹ *Surprenant v. Massachusetts Turnpike Authority*, (D. Mass., March 4, 2010, 09-CV-10428-RGS).

³⁰ S.B. 346 (<http://www.govtrack.us/congress/billtext.xpd?bill=s112-346>); H.R. 897

(<http://www.govtrack.us/congress/billtext.xpd?bill=h112-897>); H.R. 792

(<http://www.govtrack.us/congress/billtext.xpd?bill=h112-792>)

³¹ (3rd Cir. 2010).

³² *Id.*

discriminate against Interstate commerce and further found no violation of the Equal Protection Clause or the Privileges and Immunities Clause.

- **Discounts Based on Frequent Users:** Transportation agencies, such as Delaware River Bay Authority, New York State Bridge Authority, and the Maryland Transportation Authority, provide discounted frequent user plans open to anyone regardless of residency.³³ Because frequent users are likely to be residents and commuters, this type of program may provide a solution to local opposition without raising questions of constitutional validity.³⁴

2.6. Rate Setting

Under the current statute, user fees collected by a private party to cover its cost and provide for a reasonable rate of return are negotiated as part of a concession agreement.³⁵ A formula for adjusting fees or provisions regulating the private partner's return on investment may be included in the agreement.³⁶

The statute is silent regarding the rate setting authority of ADOT, as part of a PPP agreement. However, establishment of fees is typically considered an administrative function³⁷ controlled by the Arizona Administrative Procedure Act.³⁸ The Administrative Procedure Act coupled with the Administrative Review Act³⁹ provides for public notice of rulemaking and an opportunity to challenge administrative decisions in court based on lack of statutory authority, lack of supporting evidence, or on the basis of arbitrary and capricious conduct.⁴⁰

The Arizona Administrative Procedure Act does not apply to any "rule that relates to the use of public works, including streets and highways, under the jurisdiction of an agency if the effect of the order is indicated to the public by means of signs or signals."⁴¹ In the case of tolled facilities, the price of the toll would typically be displayed somewhere on the roadway. However, there is no case law regarding this exemption to provide insight as to its applicability in a managed lanes scenario.

³³ See *supra*. FN26.

³⁴ *Id.*

³⁵ A.R.S. § 28-7705(A)(15).

³⁶ A.R.S. § 28-7705(A)(15)(b) and (c).

³⁷ *Arizona Dept. of Aeronautics v. Fred Harvey Transportation Co.*, 561 P.2d 322 (Ariz. App. 1977) (court held that fee proposed to be charged to a commercial user of the Grand Canyon Airport by the Arizona Department of Aeronautics is a 'rule' as defined by the Administrative Procedure Act.)

³⁸ A.R.S. § 41-1001 et seq.

³⁹ A.R.S. § 12-9901 et seq.

⁴⁰ A.R.S. § 12-910(E).

⁴¹ A.R.S. § 41-1005(A)(a).

2.7. Toll Enforcement

A system that imposes steep penalties faces the threat of being invalidated either on constitutional grounds or as arbitrary and capricious.⁴² The Eighth Amendment prohibits the imposition of excessive fines,⁴³ and the Arizona Constitution provides that “excessive fines” shall not be imposed.⁴⁴ The standard used in a constitutional analysis of a penalty is the principle of proportionality – whether the amount of the fine bears some relationship to the gravity of the offense it is designed to punish.⁴⁵ However, where a penalty is reviewed under administrative law principles, the court will typically use the “arbitrary and capricious” standard requiring the citizen challenging the agency rule to meet a heightened burden in the face of a presumption that the agency’s rules are reasonable.⁴⁶ As a system for toll enforcement begins to evolve, these standards should be considered when determining penalties associated with failure to pay tolls.

2.8. Data Privacy Concerns

Privacy is a significant public concern and citizens are often uneasy with providing personal information that may allow a government agency to track them or may subject them to unwanted solicitations.

The Fourth Amendment and Article 2, § 8 of the Arizona Constitution only protect citizens from governmental intrusion.⁴⁷ However, Arizona does recognize invasion of privacy as a cause of action designed to prevent unwanted publication of personal information by private parties.⁴⁸

The Federal Driver Privacy Protection Act 1994 as adopted in Arizona regulates the release of personal information obtained by states through motor vehicle records.⁴⁹ The statute requires a “permissible use” for requesting and receiving a motor vehicle record which contains personal identifying information.⁵⁰ The release of personal information “for use in connection to the operation of private toll transportation facilities” is a permissible use enumerated in the statute.⁵¹

- **Toll Enforcement:** Arizona law allows a PPP agreement to include provisions for the use of cameras by both the public and private partner to enforce the payment of tolls and would allow a private partner access to driver information

⁴² Skove, Thomas M., *Electronic Toll Collection and Violation Enforcement*, (July 2007). In an attempt to collect or deter unpaid toll fees, a PPP agreement may include provisions that govern the enforcement of tolls. A.R.S. § 28-7705(A)(1)(c).

⁴³ U.S. Const. amend. VIII.

⁴⁴ Arizona Const. art. 2, § 15.

⁴⁵ *U.S. v. Bajakajian*, 524 U.S. 321, 327-328, 334, 336 (1998) (citing *Austin v. U.S.*, 509 U.S. 602, 609-610 (1993)).

⁴⁶ *See supra*. FN40.

⁴⁷ Arizona Const. art. 2, § 8. “This constitutional provision was not intended to give rise to a private cause of action between private individuals, but was intended as a prohibition on the State[.]” *Cluff v. Farmers Ins. Exch.*, 460 P.2d 666, 669 (Ariz. App. 1969)

⁴⁸ *Reed v. Real Detective Publishing Co.*, 162 P.2d 133 (1945).

⁴⁹ 18 U.S.C. §§ 2721-2725; A.R.S. § 28-455.

⁵⁰ A.R.S. § 28-455.

⁵¹ A.R.S. § 28-455(C)(10).

databases for enforcement purposes.⁵² To provide some protection from the commercial use of information, the statute provides that “[m]isuse of data contained in the databases, including negligence in securing the data properly, shall result in a civil penalty of ten thousand dollars for each violation.”⁵³

- **Toll Collection:** The type of technology to be used on a facility may be specified in the PPP agreement.⁵⁴ There is no statutory language that would prohibit the use of electronic or automatic toll technology, such as transponders, and some of the available Federal programs require the use of automatic tolling. Often times with electronic tolling programs, a motorist is required to set up an account using a credit card and provide other personal identifying information.

While there is some level of protection provided by existing law, as PPP projects develop lawmakers should continue to evaluate whether the privacy interests of citizens remain adequately protected.

⁵² A.R.S. § 28-7705(A)(1)(c).

⁵³ *Id.*

⁵⁴ A.R.S. § 28-7705(A)(1)(a).

3.0 ANALYSIS OF EXISTING STATE LEGISLATION

3.1. Public Private Partnerships

As discussed previously, at this time tolling of highway facilities is only allowed as part of a project developed under a public private partnership. The purpose of this section is to discuss key provisions of the existing PPP statute.

In 2009, Governor Jan Brewer signed into law HB 2396⁵⁵, allowing public entities to explore the use of PPPs as a tool for addressing Arizona's future transportation demand. With the authority to use PPPs for transportation projects comes the opportunity for implementing managed lanes. This section identifies the key elements of Arizona's PPP enabling legislation and current ADOT guidelines and evaluates them in the context of a managed lanes scenario.

Arizona's Public-Private Partnerships in Transportation statute grants the ADOT broad authority to partner with the private sector to build or improve the state's transportation facilities.⁵⁶ Pursuant to A.R.S. § 28-7702, ADOT has developed guidelines to document a clear, consistent, efficient and transparent process for interaction with the private sector related to the management of PPPs.

3.1.1. "Eligible Facility"

A PPP may be used for the development or operation of any "eligible facility."⁵⁷ HB 2396 required that any PPP agreement must be used for a "new, upgraded or enhanced facility" allowing PPPs to be used for new facilities or for expansions to existing facilities.

Recently, SB 1270 expanded the definition of "eligible facility" to include the word "existing." The statutory definition now reads, in part, as follows:

- "'Eligible facility' means any facility ... developed or operated after September 30, 2009 ... including any existing, enhanced, upgraded or new facility that is ... used or useful for the safe transport of people or goods via one or more modes of transport[.]"

Because there is no express statutory limitation prohibiting the conversion of existing roads into toll facilities or limiting those conversions to projects that add capacity, the definition of "eligible facility" determines the types of facilities that may be tolled pursuant to a PPP agreement. The recent addition of the word "existing" arguably allows the use of concession agreements for existing roads. Of course tolling on any existing Federally funded facility would be subject to qualification under one of the Federal programs.

⁵⁵ See HB 2396 <<http://www.azleg.gov/legtext/49leg/1r/bills/hb2396s.pdf>>

⁵⁶ A.R.S. § 28-7701 et seq.

⁵⁷ A.R.S. § 28-7703.

By not limiting PPP projects to new or upgraded facilities, SB 1270 provides more opportunities for managed lanes concepts to be implemented in the MAG region, but may be controversial with the public.

3.1.2. Project Delivery Methods

One of the generally understood values of using PPPs is flexibility. Arizona law permits a wide range of innovative project delivery methods ranging from design-build to full concession PPPs, and specifically provides for the use of predevelopment agreements.⁵⁸ While the statute enumerates several specific types of innovative project delivery methods, it includes language permitting any project delivery method that is determined to serve the public interest.⁵⁹

By allowing for a wide range of delivery methods, the statute enables the public entity to better manage its risks by selecting the method that is most appropriate for a particular project.

3.1.3. Procurement

A.R.S. § 28-7704 defines procurement processes that may be used in selecting contractors and concessionaires to deliver transportation projects using PPPs and other innovative project delivery methods as permitted by the statute. Key provisions of this section include:

- The law allows solicited and unsolicited proposals for PPP projects.⁶⁰ A.R.S. § 28-7704(A)(2) authorizes procurements arising from unsolicited proposals if ADOT determines that the proposal has sufficient merit and that a reasonable opportunity is afforded other entities to submit competing proposals for consideration. ADOT P3 Guidelines document submission requirements and evaluation processes for both solicited and unsolicited proposals.
- A.R.S. § 28-7704(F) explicitly exempts ADOT's procurement authority from any requirements of the state's general procurement law. This legitimizes the procurement processes used in PPP projects impeding any subsequent legal challenges to the contrary.
- A.R.S. § 28-7704(D) permits ADOT to pay a stipend to a proposer based on the value of the work product submitted.
- A.R.S. § 28-7704(E) permits ADOT to charge an administrative fee for review of unsolicited proposals.

The current statute balances private sector and public sector interests creating a cooperative framework to foster public-private cooperation and partnership. Allowing both solicited and unsolicited proposals results in projects that have been identified as

⁵⁸ A.R.S. § 28-7703.

⁵⁹ A.R.S. § 28-7703(8).

⁶⁰ A.R.S. §§ 28-7704(A)(1); -7704(A)(2).

transportation priorities, as well as projects that may not have been otherwise considered by the public entity.⁶¹ The ability to pay stipends encourages private sector participation to prepare quality proposals, while the implementation of administrative fees will help to defray some of the costs incurred in reviewing unsolicited proposals.⁶² Documentation of submission procedures and evaluation and review processes in ADOT's PPP Guidelines instills confidence in the private sector by clearly outlining expectations. Since ADOT's PPP Guidelines create an incentive for public-private cooperation, it could be expected that private sector entities will be attracted to developing projects in Arizona resulting in more opportunities for managed lanes.

3.1.4. Public-Private Partnership Agreements

A.R.S. § 28-7705(A) gives ADOT broad discretion to address a wide range of issues in a PPP agreement. Matters that may be addressed through specific provisions in the PPP agreement include:

- **Toll Authority:** A.R.S. § 28-7705(A)(1) permits provisions authorizing the department or the private partner to collect tolls or similar charges. The PPP agreement may include terms that specify the technology to be employed on the facility, establish circumstances under which the public entity may receive all or a share of revenues generated, govern the enforcement of tolls, and authorize the department to continue collection of tolls after the end of the term of the agreement.
- **Rate Setting in Concession Agreements:** Toll and user fees are negotiated as part of the PPP agreement. A.R.S. § 28-7705(A)(15) allows provisions authorizing the private partner in any concession agreement to collect tolls or similar charges to cover a reasonable rate of return on the private party's investment, such as a formula for adjustment of fees or provisions regulating the private party's return on investment. A variety of traffic management strategies are allowed, including general purpose toll lanes, high-occupancy toll (HOT) lanes, dynamic tolling, and static tolling.⁶³

Other key provisions included in A.R.S. § 28-7705 include the following:

- A.R.S. § 28-7705(B) allows for a maximum 50 year term for concession or other agreements with the ability to extend for additional terms. The statute is silent as to the duration of any additional terms.
- A.R.S. § 28-7705(C) permitting other regional or local entities to develop eligible facilities using PPPs upon approval by ADOT.
- A.R.S. § 28-7705(D) provides that PPP agreements are exempt from state or local ad valorem or property taxes.

⁶¹ *Overview of Key Elements and Sample Provisions State PPP Enabling Legislation for Highway Projects*, <http://www.fhwa.dot.gov/ipd/pdfs/legis_key_elements.pdf> (October 2005).

⁶² *Id.*

⁶³ A.R.S. § 28-7705(A)(15)(d).

- A.R.S. § 28-7705(E) allows for a refund or credit from the state for motor vehicle fuel license taxes, use fuel taxes or motor carrier fees paid while operating a vehicle on a PPP roadway project. These types of taxes and fees are directed toward the commercial industry and interstate commercial carriers.
- A.R.S. § 28-7705(F) acts to prohibit the use of non-compete clauses in PPP agreements. The private entity must expressly agree to not impede the department from developing or constructing a facility that might impact the revenue that the private partner might derive from the facility developed under the PPP agreement. Any competing facility that is developed or constructed must have been planned as of the time the PPP agreement was executed. However, the PPP agreement may address compensation of the private partner for the loss of user fee revenues resulting from the development and construction of a competing facility that was unplanned.
- Pursuant to A.R.S. § 28-7705(I) all PPPs are subject to the 5-Year Transportation Facilities Construction Program.

Much of the language in this section is permissive, giving ADOT the flexibility, characteristic of PPPs, to address key issues through the PPP agreement. The challenge will be to find the right balance that will encourage private sector participation while meeting the public goals of safe and efficient roadways. The opportunity to implement managed lanes concepts will depend on successful cooperation between the public and private sector and the ability to balance both public and private interests and expectations.

3.1.5. Financing and Funding

A.R.S. § 28-7706 relates to funding and financing of PPP projects. The law permits a full range of funding options. A.R.S. § 28-7706(G) specifically allows for the combination of public funds with private sector funds for any project purposes. Other key provisions include:

- A.R.S. § 28-7706(A) permits the use of TIFIA loans, PABs, and GARVEE bonds for PPP projects.⁶⁴
- A.R.S. § 28-7706(C) permits the issuance of toll revenue bonds for PPP projects.

Most transportation projects are so large that access to a number of different funding mechanisms is critical in order to finance them.⁶⁵ Allowing available monies from Federal programs to be combined with private sector funds will facilitate development of PPP projects.

⁶⁴ See Appendix A.

⁶⁵ See *supra*. FN26.

3.1.6. Confidentiality and Public Disclosure

The current statute provides for limited confidentiality of PPP proposals. A.R.S. § 28-7707(A) enumerates several requirements the private entity must meet in order for confidential or proprietary information included in the proposal to be exempt from disclosure. Any solicited proposal is required to include an executive summary covering major elements of the proposal, which can be subject to public disclosure at any time.⁶⁶ The executive summary is not required to contain any information the private entity wishes to remain exempt from disclosure.⁶⁷ It is anticipated that ADOT will institute formal safeguards for procurement of each project concerning proposal security.⁶⁸

Business secrets and proprietary information are of great concern to private entities. While some level of disclosure is necessary to ensure transparency of the process, it should be balanced with sufficient protection of proprietary information in order to encourage private sector participation.

3.2. High Occupancy Vehicle Lanes

The conversion of high occupancy vehicle (HOV) lanes to HOT lanes is one way to implement a managed lanes concept. However, state regulations related to the operation of HOV lanes have the potential to affect whether this type of conversion is feasible. This section will discuss the key elements of existing state programs related to high occupancy vehicles.

3.2.1. Energy Efficient Plate Program⁶⁹

Arizona's Energy Efficient Plate Program is a federally approved pilot program that allows for owners of eligible hybrid vehicles⁷⁰ to apply for a special license plate that would permit them to utilize the HOV lane during restricted hours regardless of occupancy. Eligible hybrid vehicles currently include all models of Honda Civic, Honda Insight, and Toyota Prius. The maximum 10,000 plates have been issued under this program and at this time there are no plates available. While there is no official sunset date for this program, because it is currently authorized by SAFETEA-LU, it may be discontinued by changes in Federal regulations or by potential degradation of the HOV lanes.⁷¹

3.2.2. Alternative Fuel Vehicles

Similar to the Energy Efficient Plate Program, A.R.S. § 28-2416 authorizes single occupant alternative fuel vehicles to qualify for a special license plate which would allow them to use HOV lanes during restricted times regardless of occupancy. In order to be eligible,

⁶⁶ A.R.S. § 28-7707(B).

⁶⁷ *Id.*

⁶⁸ Arizona Department of Transportation, *P3 Guidelines* (September 7, 2010).

⁶⁹ A.R.S. § 28-2416.01.

⁷⁰ Hybrid vehicles with at least 45 percent fuel efficiency in combined city-highway fuel economy, based on information provided by the United States Department of Energy and United States Environmental Protection Agency are eligible for this program.

⁷¹ See A.R.S. § 28-337.

the vehicle must be exclusively powered by one of the alternative fuels identified in A.R.S. § 1-215.4 and be incapable of operating on any other type of fuel.⁷²

3.2.3. Degradation of HOV Lanes

In accordance with SAFETEA-LU, ADOT is required to monitor the impact of single occupancy vehicles (SOVs) on the operation of HOV lanes to ensure that the performance of HOV lanes is not degraded.⁷³ An HOV lane is considered degraded if it fails to operate at a speed of more than 45 mph 90 percent of the time over a consecutive 180 day period during morning and evening peak hour periods.⁷⁴ ⁷⁵ If this occurs, the use of SOVs would be restricted until such time as the HOV lane is no longer degraded.⁷⁶

⁷² The statutory definition of alternative fuel vehicle includes vehicles that are powered 100 percent on alternative fuel sources, such as electricity, hydrogen, natural gas or propane. It also includes those vehicles that use a maximum of 70 percent alternative fuel and a maximum of 30 percent petroleum based fuel, and qualify as a federal low emission vehicle.

⁷³ A.R.S. § 28-337(A).

⁷⁴ 23 U.S.C. 166

⁷⁵ A.R.S. § 28-337(D).

⁷⁶ A.R.S. § 28-337 (C). If the HOV lane becomes degraded due to the authorization of SOVs, use of the lane is restricted to the following vehicles in the following priority: (1) 2+ passenger vehicles; (2) public transit buses; (3) 2+ buses; (4) motorcycles; (5) alternative fuel vehicles; and (6) low emission and energy efficient vehicles. A.R.S § 28-337(B).

4.0 CONCLUSION

With the authority to enter into PPP agreements, there is an opportunity for implementation of managed lanes operational strategies in the MAG region using a private partner. However, converting existing HOV lanes to HOT lanes pursuant to one of the various Federal programs without the participation of a private partner would require a legislative action granting ADOT or some other public entity the authority to toll the existing freeway system. It would also require further consideration of existing state laws and regulations that govern the use of HOV lanes.

With respect to PPP projects, the key is to be able to attract private participation while balancing the public's identified transportation goals. Arizona's enabling statute is fairly comprehensive and appears to allow for the flexibility to balance both public and private objectives.

Whether managed lanes operational strategies are implemented as part of a PPP agreement or as part of a HOV to HOT lane conversion, the legal and regulatory issues identified in Section 2.0 should continue to be considered.

5.0 APPENDIX

Below is a brief discussion of the various Federal programs and exceptions, which support the use of PPPs and managed lane concepts.

▪ Tolls on Federally Funded Facilities

SAFETEA-LU created a variety of programs authorizing the implementation of tolling on Interstate highways. These programs facilitate the use of PPPs to implement managed lane strategies on Federally funded facilities. More information about these programs, including contact information, is available at the following website:

http://ops.fhwa.dot.gov/tolling_pricing/announcement%5Ctolling_announcement.htm

Value Pricing Pilot Program

Enacted in ISTEA and amended in TEA-21 and SAFETEA-LU, this program authorizes FHWA to enter into cooperative agreements with up to 15 states, local governments, or other public authorities to establish, maintain, and monitor value pricing pilot programs. This is the only program that provides funding to support studies and implementation aspects of a tolling or pricing project. The program is limited to 15 slots of which only one vacancy remains. Each state can have an unlimited number of projects.

“Value pricing” describes a number of strategies to reduce traffic congestion on highways including tolling of highway facilities. Charges may vary by time of day, location, severity of congestion, vehicle occupancy, or type of facility.

Interstate System Construction Toll Pilot Program

Created by SAFETEA-LU, this program authorizes tolling on up to three Interstate highway facilities to finance construction of new Interstate highways. States or interstate compacts of States are eligible for this program. There is no special funding authorized for this program. States who wish to apply for this program must demonstrate that tolling is the most efficient and economical way to finance construction of the facility. Other program requirements include:

- A facility management plan must be submitted.
- Automatic toll collection is required.
- Non-compete agreements between the state and a private entity, under which the state is prevented from improving or expanding the capacity of public roads in the vicinity of the toll facility, are prohibited.
- Interstate Maintenance funds may not be used on the facility while it is tolled.
- Revenues may be used only for debt service, reasonable return on investment of private entity, and operation and maintenance costs. Regular audits will be conducted.

Express Lanes Demonstration Program

Created by SAFETEA-LU, this program authorizes up to 15 demonstration projects in which States, public authorities, or designated public or private entities may collect tolls on an eligible facility.

An “eligible toll facility” includes those accomplishing any of the following:

- Manage high levels of congestion typically by varying the toll price by time of day or level of traffic;
- Reduce emissions in a non-attainment area or maintenance area;
- Finance the expansion of a highway, for the purpose of reducing traffic congestion, by constructing one or more additional lanes (including bridges, tunnels, supports or other necessary structures) on the Interstate system.

Qualified Demonstration Projects may consist of the following:

- Variable pricing by time of day or level of traffic, as appropriate to manage congestion or improve air quality (required if an HOV facility is tolled, optional for non-HOV facility);
- Motor vehicles with fewer than two occupants may be permitted to use HOV lanes as part of a variable toll pricing program;
- Automatic toll collection is required in express lanes; and
- Toll revenue may only be used for debt service, reasonable rate of return on private financing, operation and maintenance costs, or any eligible Title 23 or Title 49 project if the facility is being adequately maintained.

Section 129 Toll Agreements

Pursuant to 23 U.S.C. 129, tolling is allowed for five types of highway construction activities including reconstruction of Interstate bridges and tunnels. These activities include:

- Initial construction of non-Interstate toll facilities and approaches to these facilities;
- Reconstruction of existing toll facilities;
- Reconstruction of free bridges or tunnels and conversion to toll facilities;
- Reconstruction of a free non-Interstate highway and conversion to a toll facility; and
- Preliminary feasibility studies for any of the above.

If Federal-aid funds are used for construction of or improvements to a toll facility or the approach to a toll facility or if a State plans to reconstruct and convert a free highway, bridge or tunnel previously constructed using Federal-aid funds to a toll facility, a toll

agreement must be executed with FHWA. There is no limit to the number of agreements a state may execute.

Toll revenue must be used for debt service, a reasonable return on private investment, and the costs of operation and maintenance. Excess revenues may be used for highway and transit purposes authorized under Title 23 if the State certifies annually that the toll facility is being adequately maintained.

Interstate Reconstruction and Rehabilitation Pilot Program

SAFETEA-LU continued this TEA-21 program by permitting up to three existing Interstate facilities (highway, bridge, or tunnel) to be tolled, for funding reconstruction or rehabilitation on Interstate highway corridors that could not otherwise be maintained or functionally improved without the collection of tolls. Each of these three facilities must be in a different state. There is no special funding authorized for this program. Interstate maintenance funds may not be used on a facility for which tolls are being collected under this program. Two of the three available slots have been reserved under this pilot program.

HOV Facilities Program

23 U.S.C. § 166 authorizes States to create High Occupancy Toll (HOT) lanes. Specifically, this section allows States to charge tolls to vehicles that do not meet the established requirements to use an HOV lane if the State establishes a program that addresses the selection of certified vehicles and procedures for enforcing the restrictions. Toll under this section may be charged on both Interstate and non-Interstate facilities. There is no limit on the number of projects or the number of states that can participate.

- **Federal Funding Mechanisms**

The Federal government has developed a number of financing initiatives to increase the role of the private sector in highway and transit projects and encourage PPPs.

Private Activity Bonds

SAFETEA-LU amended Section 142 of the Internal Revenue Code to permit the issuance of private activity bonds (PABs) to finance privately developed and operated highway and freight transfer facilities. PABs allow highway and freight transfer facilities to be developed, designed, financed, constructed, operated and maintained by the private sector as PPPs, while maintaining the tax-exempt status of the bonds. PABs are issued by a public entity which acts as a conduit issuer for the private developer. The private developer is deemed the borrower and is responsible for repayment. These PABs are not subject to the state volume caps that typically apply to other types of private activity bonds.

Transportation Infrastructure Finance and Innovation Act of 1998 (TIFIA)

This program established a Federal credit program for eligible transportation projects authorizing USDOT to provide three forms of credit assistance – secured (direct) loans, loan guarantees, and standby lines of credit. The program’s fundamental goal is to

leverage Federal funds by attracting substantial private and other non-Federal investment. TIFIA credit assistance can be used for as much as 33 percent of a project's total costs. Eligible projects must be supported in whole or in part from user chargers or other non-Federal dedicated funding sources. Flexible repayment and subordination terms of TIFIA credit assistance make it easier and less costly for the private sector to obtain senior debt and invest in transportation infrastructure.

Grant Anticipation Revenue Vehicles (GARVEEs)

GARVEE is used as a term for a debt instrument that has a pledge of future Title 23 Federal-aid funding. It is authorized for Federal reimbursement of debt service and related financing costs. States can receive Federal-aid reimbursements for debt-related costs incurred in connection with an eligible financing investment, such as a bond, note, certificate, mortgage or lease – the proceeds of which are used to fund a project eligible for assistance under Title 23. Bonds are the most frequently debt instrument used. Costs eligible for Federal-aid reimbursement include interest payments, retirement of principal, and any other cost incidental to the sale of an eligible debt issue.