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## BILL ANALYSIS



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Senate Bills 627 and 628 (as introduced 12-1-15)  
Sponsor: Senator Mike Kowall  
Committee: Commerce

Date Completed: 12-8-15

**CONTENT**

**Senate Bill 627** would create the "Michigan Alternative Project Delivery Act" to do the following:

- Authorize a public authority to enter into public-private agreements to develop eligible projects, enter into ancillary agreements to public-private agreements, and exercise eminent domain to acquire property necessary for an eligible project.
- Require a public authority to consider and compare various methods for developing a project and identify the proposed delivery method.
- Allow any lawful source of public and private funding to be used for the development of an eligible project under the proposed Act.
- Allow a public authority to impose or increase and collect fees, including user fees, and taxes to support the development of an eligible project.
- Authorize a public authority to include any provision that it determined necessary or appropriate in a public-private agreement.
- Specify that authority granted under the Act would supplement any existing authority, and would supersede all conflicting laws.
- Require a public authority to submit a proposed project summary to the Senate and House Appropriations Committees for review if the State, or an agency of the State, as a public authority, intended to be a party to a public-private agreement for an eligible project subject to the Management and Budget Act.
- Prescribe a penalty for a person who failed to pay a user fee owed for use of an eligible project.
- Provide that property developed or held by a private party under a public-private agreement would be exempt from all applicable State and local ad valorem and property taxes.

**Senate Bill 628** would amend the Michigan Vehicle Code to do the following:

- Require the Secretary of State to suspend a person's license upon receiving evidence that the person was subject to a final decision or order for the nonpayment of a user fee and associated costs.
- Provide that failure to pay a user fee would be a civil violation punishable by a fine of three times the amount of the user fee, in addition to payment of the fee.
- Require an action for a civil violation to be treated in a similar manner as a civil infraction action.
- Prescribe the requirements for notices of payment due and nonpayment.
- Prescribe the requirements for an administrative hearing for a person who failed to pay a user fee.

**-- Allow a public authority or private entity to whom a user fee was owed to use a variety of methods to collect the amount due.**

Senate Bill 628 is tie-barred to Senate Bill 627.

### **Senate Bill 627**

#### Definitions

"Public-private agreement" would mean an agreement between a public authority and one or more private parties for the development of an eligible project under the proposed Act, including a predevelopment agreement.

"Develop" or "development" would mean the study, planning, design, acquisition, construction, reconstruction, rehabilitation, improvement, repair, financing, management, operation, or maintenance of an eligible project and any other services related to an eligible project. The term would include the imposition, charging, assessment, collection, and enforcement of user fees related to an eligible project.

"Eligible project" would mean any existing, enhanced, expanded, rehabilitated, refurbished, upgraded, or new asset or portion of an asset or services or provision of services under the jurisdiction and control of the State or any of its agencies, political subdivisions, special districts, public corporations established under State law, regional or local governmental entities, joint power authorities, or any intergovernmental agency or corporation. The term would include any facility, asset, or service and associated services that serve a public purpose, any capital or financial asset, real estate or facility used directly or indirectly in the transportation of people, and the transportation or storage of goods, substances, vehicles, information, or matter of any kind, or in the generation and transportation of energy, or the transport and treatment of water, wastewater, and waste, and any building, structure, and appurtenance, or other real property or information or management system necessary or desirable for the delivery of government functions, or health care, education, justice, security, or entertainment services.

"Private party" would mean a person, entity, or organization that is not the State or the Federal government, a political subdivision of the State, a local unit of government, or any other public authority.

"Public authority" would mean the State, a political subdivision of the State, a county, city, township, village, school district, intermediate school district, community college, or public university that receives appropriations from the State, any agency, board, commission, authority, or instrumentality of such an entity, or any two or more of those entities working together to develop an eligible project.

"User fees" would mean user fees, tolls, consumption charges, rents, license fees, or similar or ancillary charges from users of eligible projects. User fees also would include fees and charges for maintaining and administering an account, including credit card, bank, and similar fees and charges.

#### Powers of a Public Authority

A public authority would be authorized to do one or more of the following:

- Consider, compare, and implement various methods for procuring and developing eligible projects, including alternatives to traditional methods used by the public authority.
- Enter into public-private agreements to develop eligible projects.
- Bundle two or more eligible projects under one public-private agreement.

- Procure services, award contracts, administer revenue, appropriate funds, and take any other action that could be required in connection with the development of eligible projects.
- Subject to applicable law, exercise powers of eminent domain to acquire property or rights in property necessary to develop an eligible project under the proposed Act, regardless of whether the property would be owned in fee simple by the public authority or leased, licensed to, or operated by the private party in connection with the development of the eligible project.

A public authority also could enter into any agreements ancillary to public-private agreements, including one or more of the following: a) agreements with financial, legal, or other consultants with specialized knowledge to assist in the study, planning, design, structuring, drafting, procurement, evaluation, and negotiation of public private agreements; or assist in the administration of public-private agreements and the operation or maintenance of eligible projects, or b) agreements between the public authority and a private party, a private party's lender, or Federal, State, and local governments.

Before developing an eligible project, a public authority would have to consider and compare various methods for the development of an eligible project and identify the proposed delivery method. Notwithstanding any other provision of State law, the public authority would be authorized to use any procurement method and process that the public authority determined, in its discretion, was appropriate to solicit private parties and award public-private agreements under the proposed Act, including any of the following:

- Calls for project proposals, whereby the public authority described the eligible project that private parties would be invited through a competitive process to submit proposals to develop the project.
- Competitive solicitations using one or more requests for qualifications, prequalification or short-listing of qualified proposers, requests for proposals, preproposal meetings with individual short-listed proposers, revised proposals, and final and best offers.
- Unsolicited proposals, provided that if the public authority determined that there was sufficient merit to pursue any unsolicited proposal, reasonable opportunity for other entities to submit competing proposals for consideration would be provided.
- Negotiations with one or more bidders prior to award.

For any procurement in which the public authority issued a request for qualification, request for proposals, or similar solicitation document, the request would have to set forth, generally, the factors that the public authority would evaluate when reviewing the submittals. The public authority, in its discretion, could determine which factors it would consider and the relative weight of those factors in the evaluation process to obtain the best value. Evaluation methodologies for selection could include best value, low bid or proposal, lowest responsible or adjusted bid or proposal, qualifications-based selection, lowest public contribution, most expansive project, or any combination of those factors or other evaluation methodology that the public authority determined appropriate for the project.

The public authority would be authorized to pay stipends or payments for work product on terms and conditions and in the amounts as determined in its discretion in the following circumstances, or in other circumstances that it determined to be appropriate, including the following:

- To short-listed or prequalified bidders if the public authority canceled the procurement before the due date for proposals in the request for proposals.
- To unsuccessful bidders, provided that the public authority determined that the proposal was responsive to the request for proposal or similar solicitation and met other requirements established by the public authority for the project.
- To the selected bidder if the public authority canceled the eligible project after selection of the bidder.

("Work product" would mean any technical or financial concepts, including one or more of the following: a) included in a bidder's response to a request for qualifications or any portion of the bidder's response or in a bidder's proposal or any portion of the proposal; b) submitted by the bidder for review by the public authority in accordance with its request for qualifications or request for proposals; c) raised by the bidder at one-on-one meetings or alternative technical or financial concept meetings with the public authority before the due date for proposals, and in each case includes any alternative technical or financial concepts, ideas, innovation, technology, techniques, methods, processes, unique uses of commercial items, design concepts, solutions, construction means and methods, project execution approach, drawings, reports, plans and specifications, information, and submittals that constitute intellectual property of the bidder; or d) raised in any negotiations between the public authority and a bidder before award and execution of a public-private agreement.)

In exchange for a stipend or payment for work product, the public authority could require the bidder to grant to the public authority the right to use some or all of the work product contained in the proposer's proposal. The public authority could identify in a request for qualification or similar solicitation document a process whereby bidders could request and receive authorization to deviate from technical and financial specifications, subject to demonstrating to the authority that the deviations would provide the same or greater quality, utility, function, and value.

Notwithstanding any other provision of law, the public authority could do one or more of the following:

- Provide exclusive protest remedies in its solicitation documents.
- Limit the rights of private parties responding to solicitation documents to protest matters that arose in connection with the procurement.
- Require that private parties responding to solicitation documents expressly waive all other rights and remedies that could be available under applicable law.

#### Applicability of Freedom of Information Act; Confidential Information & Trade Secrets

Except as expressly provided otherwise, a writing prepared, owned, used, in the possession of, or retained by the public authority in the performance of an official function would be a public record and would be subject to Freedom of Information Act (FOIA). Documents and other analysis used in the decision-making process and preparation of the procurement documents and proposals would not be subject to release or disclosure until final award and execution of the public-private agreement and the conclusion of any protest or challenge to the award, absent an administrative or judicial order requiring a release or disclosure.

A record or portion of a record, material, or other data received, prepared, used, or retained by the public authority that was a trade secret or other confidential information and acknowledged by the authority as confidential would not be subject to the disclosure requirements of FOIA. In order for confidential and proprietary information and trade secrets to be exempt from disclosure, the bidder would have to do all of the following: a) invoke the exclusion upon submitting of the information or other materials for which protection was sought, b) identify the data or other materials for which protection was sought with conspicuous labeling, c) state the reason why protection was sought, and d) fully comply with any applicable provision of law with respect to information the bidder contended should be exempt from disclosure. The characterization of documents as being exempt from disclosure would not be binding upon the public authority if the documents were not afforded that protection under the proposed Act or existing law.

## Funding, Financing, & User Fees

Any lawful source of public and private funding and financing, or combination of these, could be used for the development of an eligible project under the proposed Act. A public-private agreement could require the private party to arrange for all or a portion of the financing required for the project. Public authorities could elect in their discretion to contribute funds or financing instead of or in combination with that arranged by the private party, or could participate with the private party in any gains realized through revenue sharing, cost-saving sharing agreement, or refinancing of the project, or offer revenue protection guarantees.

The public authority could accept from the United States, any state, any Federal or state agencies, or any regional or local government entity, funds or credit assistance available to it for carrying out the purposes of the Act, regardless of the financing arrangement. The public authority could enter into these agreements with any of the entities described above as necessary, proper, and convenient for carrying out the purposes of the Act. The public authority could seek allocation for, issue, and provide for the issuance of private activity bonds under applicable Federal, state, or local programs.

The public authority could accept from any source any grant, donation, gift, or other form of conveyance of real or personal property or other valuable thing made to the public authority for carrying out the purposes of the Act.

Public authorities could impose and collect user fees, increase the user fees, and use lawful measures to enforce it or authorize, pursuant to a public-private agreement or otherwise, a private party or another public entity to impose, collect, increase, and enforce the user fees to the same extent as available to the public authority. Subject to the agreement, the use, application, and sharing of collected user fees would have to be determined by the public authority or the private party, as determined by the public authority. User fees could be imposed, charged, and collected by electronic means. The public-private agreement also could include a schedule, formula, or mechanism for adjustment of user fees during the term of the agreement.

The imposition of a user fee for the use of an eligible project would not be subject to regulation by any other governmental agency, and would have to be administered, collected, and enforced as provided by law.

Bonds, notes and other obligations could be issued under applicable law to provide funding for an eligible project. Revenue, including user fees, received under an agreement could be directed to a segregated account and pledged for the repayment of obligations without appropriation. Obligations supported exclusively by revenue received from a public-private agreement would not be considered a debt of the State. Any financing could be structured on a senior, parity, or subordinate basis with any other financing or funding. Public authorities could impose or increase and collect fees and, subject to applicable law, taxes to support the development of the eligible project.

## Public-Private Agreement Provisions

Notwithstanding any other provision of law, a public authority would be authorized to include in a public-private agreement any provision that it determined necessary and appropriate, including provisions that addressed the following:

- The allocation and management of project risks including design, construction, geotechnical, delay, permitting, governmental approvals, change of law, utility adjustments, change in utility costs, operations and maintenance, force majeure, insurance availability and costs, inflation, and financing risks.
- Payments on terms determined by the public authority.

- A requirement that the private party or one or more of its prime contractors provide proposal, performance, or payment security.
- A requirement that the private party lease or lease back or otherwise be granted licenses, rights of entry, or right to operate the land and the eligible project through the terms of the public-private agreement.
- The provision of utilities required during construction and operation of the eligible project, including the right and authority to adjust, relocate, or protect-in-place existing utilities.
- The use of arbitration or other alternative dispute resolution procedures between the public authority and private party.
- Criteria for determining substantial completion, final acceptance, occupancy, or service readiness of the eligible project and any applicable commissioning of the eligible project.
- The public authority's requirements for programming, operations, use, and change in the use of the eligible project and flexibility to expand, rehabilitate, or reconstruct the project.
- The operations, maintenance, and facilities management services, including maintenance and renewal, to be provided by the private party, the public authority, or third parties.
- Responsibility for maintenance and rehabilitation for an eligible project to meet the standards determined by the public authority at the end of public-private agreement.
- Compensation of the private party upon early termination of the public-private agreement.
- Events of default and remedies available to the private party and the public authority.
- Technical standards and specifications with which the private party would have to comply.
- Requirements for insurance with the coverages and deductibles as determined by the public authority to be appropriate in its discretion.
- The maintenance and auditing of the private party's books and records.

A public-private agreement could not be entered into for an initial period exceeding 50 years from final acceptance or occupancy or service readiness of the eligible project, as applicable. However, the term of the agreement could be extended as a result of force majeure or as a means to compensate a private party for an event or occurrence set out in the agreement that would entitle the party to additional compensation or funds from the public authority. (The term "force majeure" generally refers to an event or circumstance beyond the control of the parties, such as an act of nature or a war.)

#### Conflicts with Other Law

The authority granted under the proposed Act would supplement and would be independent of any existing authority, and would not limit, replace, or detract from existing authority. The Act also would supersede all conflicting laws. Public contracting and procurement laws that would restrict or limit, or would prescribe terms for, procurement or contracting under the Act would not apply if they affected application of environmental, health, safety, labor, and land use laws.

#### Proposed Project Summary

If the State, or an agency of the State, as a public authority, intended to be a party to a public-private agreement under the proposed Act for the real property lease or construction of an eligible project that otherwise would be subject to the Management and Budget Act, the public authority would have to submit a proposed project summary for the project to the Senate and House Appropriations Committees for review. If both Appropriations Committees failed to reject by resolution the proposed project summary within 30 calendar days of the date it was submitted, the procurement could continue and any awarded public-private agreement could be submitted to the State Administrative Board for approval. A proposed project summary could be resubmitted to the Appropriations Committees if rejected.

## Failure to Pay User Fee

In addition to any other rights and remedies available to a public authority or private entity under a public-private agreement, a person who failed to pay a user fee imposed for use of an eligible project authorized by an agreement would have to pay three times the amount of the user fee.

If the required sum remained unpaid for 180 days after the person's use of the project, the government agency, or a private entity authorized to do so by the government agency, could bring a civil suit against the person to collect the unpaid user fees in a court having jurisdiction. If the civil action resulted in a judgment for unpaid charges, the defendant also would have to reimburse the plaintiff for all costs of enforcement and collection, including filing and legal fees. During the period that a person owed and had failed to pay user fees for a transportation facility, the person and a motor vehicle used by the person could be barred from using the facility.

Except as provided in Section 675b of the Michigan Vehicle Code involving leased vehicles, proof that a particular vehicle used a transportation facility without payment of the applicable user fee, together with proof from the Department of State of the name of the vehicle's registered owner, would create a presumption that the vehicle's registered owner was the person who used the transportation facility, who failed to pay the user fee, and who was prima facie responsible for the unpaid user fees. If the conditions of Section 675b were satisfied, the lessee or renter of a motor vehicle and not the leased vehicle owner would be the person liable, for which purposes the entity that gives notice of unpaid user fees to the vehicle's registered owner would have to be given the notice that otherwise would be given to the court clerk or parking violations bureau under Section 675b.

(Section 675b specifies that the renter or lessee of a motor vehicle and not the leased vehicle owner is liable for a violation of a State law or local ordinance pertaining to a parked vehicle if the leased vehicle owner provides proof that the vehicle described in the violation was in the possession or custody of the lessee or renter of the vehicle at the time of the violation.)

## **Senate Bill 628**

### Suspension of License

Section 319 of Michigan Vehicle Code requires the Secretary of State (SOS) to suspend a person's license under a variety of circumstances. Under the bill, the SOS would have to suspend a person's license as provided upon receiving evidence that the person was subject to a final decision or order for the nonpayment of a user fee and associated costs under Section 753(12) (which the bill would add) until the SOS was notified by each public authority or private party to whom payment was owed under the final decision or order that the full amount ordered had been paid, or upon the applicant's presentation of evidence to the SOS that the full amount ordered had been paid, or for 30 days, whichever was shorter.

### Civil Violations

Under the Code, a civil infraction action is a civil action in which the defendant is alleged to be responsible for a civil infraction. A civil infraction action is commenced upon issuance and service of a citation. The plaintiff in a civil infraction action must be the State if the alleged infraction is a violation of State law, or a political subdivision if the alleged infraction is a violation of a local ordinance that substantially corresponds to a provision of the Code. Where the Code refers to a civil infraction in these provisions, the bill also would refer to a civil violation, which would have to be commenced upon the issuance and service of a citation described below. Courts having jurisdiction over a civil infraction action also would have jurisdiction over civil violations. "Civil violation" would mean a violation of a traffic law that is

or may be prosecuted under the subdivision "User Fees" (which the bill would add) and that is not a civil infraction.

### User Fees

Failure to Pay. Under the bill, failure to pay a user fee would be a civil violation punishable by a fine of three times the amount of the user fee, in addition to payment of the user fee and other rights or remedies available to a public authority or a private party at law or under a public-private agreement.

("Private party", "public authority", "public-private agreement", and "user fee" would mean those terms as defined by the proposed Michigan Alternative Project Delivery Act.)

If an owner failed to pay the fine or other amounts within 180 days after incurring a user fee, a public authority or a private entity authorized by a public authority could request the Secretary of State to conduct an administrative hearing. If the administrative hearing resulted in a determination that the owner owed unpaid user fees, the owner also would have reimburse the public authority or private entity for costs of enforcement or collection, including filing fees and attorney fees. Except as otherwise provided, the SOS would have to conduct an administrative hearing in the same manner as a contested case under the Administrative Procedures Act.

("Owner" would mean a person in whose name a motor vehicle is registered in this State, another state, or another country, or with the Federal government, except as follows: a) a motor vehicle rental or leasing company when a motor vehicle registered by the company is being operated by another person under a rental or lease agreement with the company, in which event "owner" would mean the person to whom the vehicle is rented or leased; b) a motor vehicle displaying a dealer license plate, in which event "owner" would mean the person to whom the vehicle is assigned for use; c) a motor vehicle that was reported stolen to a law enforcement agency before the time of the civil violation, in which event "owner" would mean the person who was found guilty of stealing the motor vehicle.)

During the period that an owner owed user fees for use of a transportation facility and failed to pay those fees, a public authority or a private party authorized by a public authority could prohibit that owner or a motor vehicle used by that owner from using the transportation facility.

A public or private party authorized by a public authority could offer video, electronic, or other image capture technology toll transactions as a means of paying user fees.

Notice of Payment Due. If an owner were found by electronic transaction and payment technology or image capture technology or by visual observation to have failed to pay a user fee, a public authority or private party to which the user fee was owed would have to deliver a notice of payment due to the owner or any other person who could be responsible for paying the user fee. Except as otherwise provided, a notice of payment due would have to be delivered within 180 calendar days after the user fee was incurred. If the identity or address of the owner were not ascertainable within that time frame, the public authority or private party would have to deliver the notice of payment due within 270 days after the user fee was incurred.

The notice would have to include the following: a) the date, approximate time, and approximate location of the transaction or use of the transportation facility that resulted in the nonpayment of the user fee, b) the motor vehicle's registration plate number, c) the make of the vehicle, if known, d) a photograph or image of the registration plate of the vehicle that incurred the user fee, if available, e) the amount of the user fee and any administrative charges or penalties, f) the deadline by which payment would have to be made to avoid



incurring additional charges or other consequences, which could not be less than 14 calendar days after the date notice of payment due was delivered, g) the address of the person to whom payment would have to be sent, and h) a statement describing the acceptable methods of payment.

Notice of Nonpayment. If a user fee were not paid by the due date in the notice of payment, the public authority or private party owed the user fee could deliver to the owner a notice of nonpayment, which would have to include similar information to the notice of payment due. The notice of nonpayment also would have to include the following: a) a statement that the notice of payment due was sent, and that the owner failed to remit payment as required, and b) a statement that if the amount owing as described in the notice of nonpayment were not paid by the deadline, the nonpayment would be a civil violation, and the recipient of the notice could be subject to additional action under the Vehicle Code and any other applicable law.

Administrative Hearing. A public authority or private party to which payment of a user fee was owed that sought to enforce collection of the user fee, administrative charges, and penalties, or an owner who received a notice of nonpayment who wished to contest the nonpayment, could request the SOS to conduct an administrative hearing within one year after the deadline prescribed in the notice. Except as otherwise provided, the SOS would have to conduct such an administrative hearing in the same manner as a contested case under the Administrative Procedures Act.

If a public authority or private party to which payment of a user fee was owed requested an administrative hearing, the owner could contest the alleged nonpayment and associated administrative charges and penalties at the hearing. The scope of the hearing would be limited to the user fees, administrative charges, and penalties identified in the notice of nonpayment. If the evidence presented by a public authority or private party included all of the following, it would be considered prima facie evidence of the nonpayment of the amounts described in the notice of nonpayment: a) the notice of amount due; b) the notice of nonpayment; c) information received from the SOS or another State or local government agency that identified the owner; d) a certificate sworn to or affirmed by a person employed, engaged, or authorized by a public authority or private party to which a user fee was owed that stated, to the knowledge of that person, that the notices were authentic, the amount due was accurate, and the notices of payment due and nonpayment were delivered as required; e) if the owner were a lessee of the motor vehicle, a copy of the rental agreement, lease, contract document, or an affidavit that identified the lessee at the time of the alleged nonpayment; and f) if the owner were a transferee of title to the vehicle, a copy of the assignment of title or interest in the motor vehicle and a warranty to the transferee that evidenced a transfer of title to the person identified in the notice of nonpayment before the date of the alleged nonpayment.

A person authorized to issue a notice of payment due or notice of payment would not have to participate in a hearing and would not be subject to a subpoena.

If a public authority or private party to which payment of a user fee was owed requested a hearing and the owner failed to appear at the time of the hearing to contest the nonpayment, the hearing officer would have to make a record of the evidence and enter a written decision or order based on the evidence presented by the public authority or private entity to whom the user was owned.

Decision or Order; Post-Hearing Payment or Collection. Upon entry of a decision or order after a hearing, if the hearing officer found that the owner was responsible for an unpaid user fee, the hearing officer would have to direct the owner to remit the unpaid user fee, administrative charges, and other penalties to the appropriate public authority or private entity to which the fee was owed within 14 calendar days after entry of the decision or order. Unless appealed within the applicable time limit, a decision or order would be final and could be enforced by execution and levy.

After a decision or order became final, each person determined in the final decision or order to be liable for the nonpayment of a user fee would be considered to be indebted to the public authority or private entity to whom payment of the user fee was owed for the user fee, administrative charges, and penalties, as well as assessed filing fees and post-award collection and execution costs, until those amounts were fully paid or compromised in a mutually agreed-upon settlement.

Once a decision became final, a public authority or private entity to which a user fee was owed could do any of the following to collect the amount due: a) levy the person's assets, b) place a lien against the person's property, c) garnish the person's wages, or d) take any other actions authorized by State law, including impounding the owner's motor vehicle until the amount due was paid.

MCL 257.319 et al. (S.B. 628)

Legislative Analyst: Jeff Mann

### **FISCAL IMPACT**

#### **Senate Bill 627**

The bill likely would have no fiscal impact at the State or local level. While local governments could see an increase in operating and administrative costs if they chose to exercise provisions under the bill, the bill also would grant authority to levy fees for the associated services.

#### **Senate Bill 628**

The bill could result in an indeterminate increase in administrative costs at the State level, as well as an indeterminate increase in revenue at the local level. The extent of either of these increases would depend on the number of civil violations under the bill that resulted in administrative hearings and associated fines. The Department of State has indicated that it already conducts an average of 12 administrative hearings per year and the additional hearings that could result from the bill's implementation would require additional resources for the Department. The amount of additional funding is indeterminate and dependent on the increase in the number of administrative hearings that would result from implementation of the bill.

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This analysis was prepared by nonpartisan Senate staff for use by the Senate in its deliberations and does not constitute an official statement of legislative intent.