

Department of Legislative Services
Maryland General Assembly
2021 Session

FISCAL AND POLICY NOTE
First Reader

Senate Bill 960 (Senator Lee)
Education, Health, and Environmental Affairs
and Budget and Taxation

Highways - Public-Private Partnerships - Cultural Preservation

This bill prohibits the Maryland Department of Transportation (MDOT) from acquiring a right-of-way or exercising eminent domain, and prohibits a person from acquiring a right-of-way, for a highway project subject to a public-private partnership (P3) agreement that encroaches or has an adverse effect on specified historical properties and properties that have benefited from a State grant. However, MDOT or a person may develop a highway project that is subject to a P3 agreement that encroaches or has an adverse effect on such a property if the General Assembly approves the development by a majority vote in each of the two houses of the General Assembly. **The bill takes effect July 1, 2021.**

Fiscal Summary

State Effect: State operations and finances related to P3s may be significantly affected, as discussed below; the State's proposed traffic relief plan for the Capital Beltway and Interstate 270 is directly affected by the bill.

Local Effect: The bill does not directly affect local government operations or finances.

Small Business Effect: Potential meaningful.

Analysis

Bill Summary: The bill's prohibitions apply to a P3 agreement that encroaches on or has an adverse effect on:

- a historic African American cemetery, burial ground, or cultural heritage site;

- a property listed in or eligible for listing in the National Register of Historic Places of the U.S. Department of the Interior;
- a property listed in the Maryland Inventory of Historic Properties; or
- a property that benefited from a grant from the State within 20 years before the adoption of the P3 agreement.

Current Law:

Public-Private Partnerships

Chapter 5 of 2013 established a new framework for the approval and oversight of P3s. Chapter 5 defined a P3 as a method for delivering public infrastructure assets using a long-term, performance-based agreement between specified State “reporting” agencies and a private entity where appropriate risks and benefits can be allocated in a cost-effective manner between the contract partners, in which:

- a private entity performs functions normally undertaken by the government, but the reporting agency remains ultimately accountable for the public infrastructure asset and its public function; and
- the State may retain ownership of the public infrastructure asset and the private entity may be given additional decision making rights in determining how the asset is financed, developed, constructed, operated, and maintained over its life cycle.

A “public infrastructure asset” is a capital facility or structure, including systems and equipment related to the facility or structure intended for public use.

Chapter 5 establishes the public policy of the State to utilize P3s, if appropriate, for (1) developing and strengthening the State’s public infrastructure assets; (2) apportioning between the public sector and the private sector the risks involved in the development and strengthening of public infrastructure assets; (3) fostering the creation of new jobs; and (4) promoting the State’s socioeconomic development and competitiveness. The public policy also asserts that private entities that enter into P3s must comply with the provisions of the Labor and Employment Article and the federal Fair Labor Standards Act.

The Board of Public Works (BPW) must approve all P3 agreements, but a reporting agency may not issue a public notice of solicitation or request that BPW designate a project as a P3 until the Comptroller, Treasurer, budget committees, and the Department of Legislative Services (DLS) have had at least 45 days to review and comment on a presolicitation report that contains specified information (for transportation facilities projects, the presolicitation report is submitted only to the budget committees and DLS).

Once a P3 agreement is formed, BPW may not approve the agreement until (1) a copy of the agreement is submitted simultaneously to the Comptroller, Treasurer, budget committees, and DLS; (2) the Treasurer, with the Comptroller, analyzes the agreement's effect on the State's capital debt affordability limits and submits the analysis to the budget committees and DLS; and (3) the budget committees have reviewed and commented on the agreement within 30 days.

Reporting agencies may establish P3s in connection with any public infrastructure asset for which they are responsible, and they may establish specific functions within their agencies dedicated to P3s. P3 agreements may include provisions that are necessary to develop and strengthen a public infrastructure asset.

P3 agreements involving road, highway, or bridge assets may not include a noncompete clause that inhibits the planning, construction, or implementation of State-funded transit projects.

Maryland Historical Trust

The Maryland Historical Trust (MHT) within the Maryland Department of Planning (MDP) administers, for the State, the National Register of Historic Places, which is a program of the U.S. Department of the Interior, and the Maryland Inventory of Historic Properties. Broadly, the programs recognize districts, buildings, structures, objects, and sites for their significance in American history, archeology, architecture, engineering, or culture, and identifies them as worthy of preservation.

A unit of State government must consult MHT, to the extent feasible, when it submits a request or is otherwise responsible for a capital project to determine whether the project will adversely affect any property listed in or eligible for listing in the register. If an adverse effect is determined to exist, the unit must follow specified procedures that include accepting or rejecting MHT's findings and exploring alternatives to the project. Additionally, if a historic property is to be altered substantially or destroyed by State action or with financial assistance from a State unit, the State unit must cause timely steps to be taken to make appropriate investigations and records, salvage appropriate objects and materials, and provide the results, objects, and materials to MHT.

State Fiscal Effect: MDOT and the Maryland Transportation Authority (MDTA) are currently in the planning stages of the traffic relief plan and, as such, the details of the proposed P3 to construct toll lanes on I-270 and I-495 have not yet been finalized; the *Consolidated Transportation Program for Fiscal 2021 through 2026* includes \$40.1 million to continue planning for the new lanes on I-270 and I-495. Additionally, while the State has not yet selected a private partner for any aspect of the P3, a short list of qualified developers was announced in July 2020. MDOT and MDTA are currently

reviewing proposals from three qualified firms for Phase 1 of the project. MDOT and MDTA plan to select a preferred developer and recommend a Phase 1 P3 agreement to BPW for review and approval in spring 2021.

As such, the bill's requirements likely affect State operations and finances in the short term (as MDOT makes its selection of a partner for the P3) and in future years (depending on if, when, and how the project and any future P3 projects are ultimately implemented). MDOT advises that when it is required to acquire historical property for highway projects, it generally uses "sliver takes," (meaning small amounts of highway or tree line far removed from major historical features of a property) that would be prohibited under the bill. Moreover, MDOT advises that the broad prohibitions established by the bill may, barring approval by the General Assembly, prohibit the State from executing any highway P3 projects. Depending on whether the State uses alternative projects to replace proposed P3s, State transportation planning and operations could be significantly affected.

Additionally, MDP advises that MDOT is likely to have difficulty implementing the bill. Specifically, MDP can provide information to MDOT about properties in the National Register of Historic Places and Maryland Inventory of Historic Properties but notes (1) the bill does not establish a definition for what qualifies as a historic African American cemetery, burial ground, or cultural heritage site and (2) it is likely to be difficult or impossible for MDOT and MDP to identify properties that benefited from a grant from the State within 20 years before the adoption of the P3.

Small Business Effect: To the extent that the bill significantly changes, delays, or results in the cancellation of any P3 project, small and minority-owned business contractors involved or potentially involved with those projects, are likely negatively affected.

Additional Information

Prior Introductions: None.

Designated Cross File: HB 1373 (Delegate Love) - Rules and Executive Nominations.

Information Source(s): Maryland Department of Planning; Board of Public Works; Maryland Department of Transportation; Maryland State Treasurer's Office; Department of Budget and Management; Maryland State Archives; Department of Legislative Services

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