



POSITION STATEMENT

Bill: HB 1249 - I-495 and I-270 Public-Private Partnership - Partnership Agreement - Requirements (Maryland State Department of Transportation Promises Act of 2020)

Position: SUPPORT WITH AMENDMENTS **Date:** March 5, 2020

Contact: Adrian R. Gardner, General Counsel

What The Bill Does: Among other things, the bill would synchronize the process for procuring a public-private partnership for the State’s project to construct toll lanes on I-495/95 and I-270 (the “Project”), and also engage the Montgomery County Government and Prince George’s County Government to ensure that the local public interest in environmental, local transportation and community benefits can be reasonably addressed.

Why We Support: The Maryland-National Capital Park and Planning Commission (Commission) is responsible for inspiring the local transportation plans and stewarding over 60,000 acres of public parkland on behalf of nearly 2 million Marylanders who live in Montgomery and Prince George’s counties. The parklands entrusted to our protection include some of the most environmentally sensitive areas of Rock Creek, Sligo Creek, and the Anacostia and Patuxent rivers. They also include vulnerable parkland acquired on behalf of the State under the aegis of the federal Capper-Cramton Act of 1930.

Under current law, the process for awarding a public-private partnership (“P3”) contract does nothing to assure the due diligence required to address important impacts and risks that affect our local parkland and transportation plans. Indeed, the State is currently proposing to procure a P3 agreement for the Project before the environmental and local transportation impacts have been reasonably assessed. Moreover, the scope and phasing of the Project alternatives now being considered do not square with the scope and phasing of the proposed P3 agreement. This approach departs from the customary, common-sense sequence of milestone events, as well as from best practices that require completing an environmental assessment that aligns closely with project scope.

Project impacts to local transportation systems and environmental assets can best be avoided or mitigated if they are known in time to avoid or mitigate them. Under current law, the procurement process does nothing to assure that due diligence is exercised for these aspects of any project. Those impacts may affect our local parkland and transportation plans in ways the Commission cannot assess because the assessments have not been completed or undertaken properly.

If the State procures a P3 deal before completing a fair evaluation of local environmental and transportation impacts – besides making the job of our Commission almost impossible – the

Office of the General Counsel
221 Prince George Street, First Floor, Annapolis, Maryland 21401
410.263.1930 tel. • 410.263.3745 fax

6411 Kenilworth Avenue, Suite 200, Riverdale, Maryland 20737
301.454.1670 tel. • 301.454.1674 fax

consequence is to foist the entire financial risk of avoiding or mitigating those impacts onto the public. On the one hand, if necessary avoidance or mitigation measures are not specified at the time of solicitation, a later change of scope may entitle the selected vendor to additional compensation. On the other hand, if the wholesale risk of unknown work required to avoid or mitigate these impacts is assigned blindly to the successful vendor under the terms of a contract, potential vendors likely will hedge the financial terms of their offers to avoid the open-ended exposure to the unknown additional costs. In either case, the taxpayers are most likely to cover the cost of this avoidable uncertainty.

Considered in light of the application of the National Environmental Policy Act (NEPA) and its implementing regulations, the bill codifies what has long stood as best practice. Completion of the EIS is customarily completed before procuring a P3 partner for the reasons described above.

The bill would also require the State to disclose certain transportation planning and other data that is essential for the Commission and other local stakeholders to comprehend – at an appropriate time in the process – the Project’s immediate impacts on the communities we serve.

In short, this bill will help our Commission to do its job – protecting the public legacy in sensitive parkland and advancing the mission of local transportation planning. We will be working with the sponsors to consider a number of “friendly” amendments intended to clarify and/or strengthen several aspects. For example, in addition to a handful of more procedural or technical amendments, we believe the sponsors should consider including substantive amendments such as the following:

- The Maryland Department of Transportation (MDOT) must demonstrate the agency has made best efforts to avoid impact to parkland before addressing mitigation to parkland.
- The American Legion Bridge (ALB) must be designed and built to structurally accommodate rail.
- In addition to requiring the State to engage with Virginia to conduct a study of the ALB corridor, the State must also engage with Virginia to conduct a study of the Woodrow Wilson Bridge (WWB) corridor to determine how to tie-in rail from Montgomery County to the ALB, and from Prince George’s County to the WWB.

The Commission accordingly urges your favorable report and passage with amendments.

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