HB 1641

Department of Legislative Services

Maryland General Assembly
2018 Session

FISCAL AND POLICY NOTE
First Reader

House Bill 1641 (Delegate Carr)

Environment and Transportation

Maryland Transportation Public-Private Partnership Oversight Act

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This bill establishes the Office of Transportation Oversight as an independent unit of the Executive Branch to oversee the drafting, legislative review, implementation, extension, and termination of transportation-related public-private partnerships (P3s) and partnership agreements. The Governor must appropriate at least $20.0 million annually in the budget bill for the office. The bill also expands the legal recourse available to persons who wish to pursue legal action against a party to a transportation-related P3 agreement.

Fiscal Summary

State Effect: Transportation Trust Fund (TTF) expenditures increase by $15.0 million in FY 2019, which reflects the bill's October 1, 2018 effective date, and by $20.0 million annually thereafter to establish and maintain the office. Other potential effects are discussed below. **This bill establishes a mandated appropriation beginning in FY 2020.**

($ in millions)	FY 2019	FY 2020	FY 2021	FY 2022	FY 2023
Revenues	$0	$0	$0	$0	$0
SF Expenditure	15.0	20.0	20.0	20.0	20.0
Net Effect	($15.0)	($20.0)	($20.0)	($20.0)	($20.0)

Note:() = decrease; GF = general funds; FF = federal funds; SF = special funds; - = indeterminate increase; (-) = indeterminate decrease

Local Effect: The bill is not anticipated to materially affect local governmental operations or finances.

Small Business Effect: Potential meaningful.

Analysis

Bill Summary:

Office of Transportation Oversight

The Governor appoints the director of the office with the advice and consent of the Senate; the director serves a five-year term beginning on July 1, and serves until a successor is appointed and qualifies.

The director may exercise specified powers and authority if the director determines that an action is in the best interest of the State and its citizens. The office has the power or authority to:

- require modifications to contracts, work orders, or designs related to partnership agreements to carry out its duties or to protect or more fully and fairly serve State residents or conserve or restore its natural resources;
- regulate transit fares and services related to, carried out, applied, or used under a partnership agreement;
- apply legal and equitable remedies to enforce any relevant law, contract, or mitigation commitment;
- inspect, investigate, or monitor any issues regarding the operation or implementation of a partnership agreement;
- consult with and make recommendations to the appropriate federal and State agencies regarding improvements or issues in a partnership agreement;
- bring, on its own initiative, an action against a party to a partnership agreement or other specified parties, for relief as a result of a violation of the partnership agreement or other related commitments;
- represent or advise an agency, local government, or State resident in an action against a party to a partnership agreement; and
- require that a defendant or respondent in an administrative proceeding pay the reasonable attorney's and expert witness fees and related costs at specified phases of the proceeding.

The office must adopt regulations to implement the bill.

Funding for the Office

As noted above, the Governor is required to appropriate at least $20 million in the annual budget bill for the operation of the office. It is the intent of the General Assembly that TTF be used to assist the office in carrying out its duties. The Governor must ensure that

Executive Branch staff are available in a timely manner to establish the office, with the cost of their services reimbursed from TTF.

Legal Actions

Specified provisions of the Environmental Standing Act, including provisions that bar actions for monetary damages, do not apply to actions brought by a resident, county, or municipality against a party to a transportation-related P3 agreement.

In an action brought by a State agency, local government, or State resident against a party to a transportation-related partnership agreement or other parties, evidence that the party caused a breach of a partnership agreement or a related commitment creates a rebuttable presumption of a violation that may be overcome by a preponderance of the evidence that the party is in compliance with the terms of the agreement and that the party has taken every reasonable step to avoid a breach.

The Maryland Rules must ensure that legal matters brought in accordance with the bill must, as circumstances require, be scheduled in an expeditious manner.

Current Law:

Public-Private Partnerships

Chapter 5 of 2013 established a new framework for the approval and oversight of P3s in the State. It defined a "public-private partnership" 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 decisionmaking 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.

Only specified "reporting agencies" may establish a P3. Reporting agencies include the Department of General Services, which oversees building purchases and leases for most of State government, the Maryland Department of Transportation (MDOT), the Maryland

Transportation Authority (MDTA), and State higher education institutions. However, in addition to existing exclusions, P3s subject to the bill do not include agreements entered into by St. Mary's College of Maryland, Morgan State University, and Baltimore City Community College in which State funds are not used to fund or finance any portion of the project. Specified revenue-producing transportation facilities are also not considered P3s.

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, subject to specified processes; however, BPW may not approve a P3 partnership that results in the State exceeding its capital debt affordability guidelines. Affected State employees retain all protections in effect at the time the P3 agreement is approved by BPW.

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.

A number of contract provisions must be included in all P3 agreements, including establishing a method for future increases in tolls, fees, and other charges related to the asset; minimum quality standards; oversight and remedies for default; and allowing for State inspection of facilities and audits.

Standing for Environment-related Legal Action

Under the Maryland Environmental Standing Act, a person, as defined in the Act, may pursue legal action in an appropriate circuit court for mandamus or equitable relief against the State or a political subdivision for its failure to perform a nondiscretionary duty under an environmental law or regulation or for its failure to enforce an applicable environmental quality standard for the protection of the air, water, or other natural resources of the State.

Environmental Impact Studies

For major transportation projects, the National Environmental Policy Act (NEPA) requires a range of alternatives to be considered and the environmental impacts of each alternative to be analyzed. This type of study is required prior to the commitment of federal funds to any major project or prior to any action taken by a federal agency that might cause a significant impact on the environment. Some of the basic steps in this process include a public scoping process, data collection, analysis of policy alternatives, and preparation of draft and final documents. The process involves numerous federal, state, and local partners; can take several years; and costs millions of dollars.

Background: The Purple Line is a P3 project that consists of a 16.2-mile light rail line that will extend from Bethesda, in Montgomery County, to New Carrollton, in Prince George's County. The Purple Line will operate largely at street level in a combination of dedicated and semi-exclusive rights-of-way and also includes segments on elevated structures and in tunnels. The alignment for the Purple Line will provide direct connections to the Washington Metropolitan Area Transit Authority at Bethesda, Silver Spring, College Park, and New Carrollton. The project will also connect to all three Maryland Area Regional Commuter rail lines, Amtrak, and local bus routes. The project includes 21 stations, two storage and maintenance facilities, and 25 light rail vehicles. The Purple Line Project is currently in the construction phase, with revenue operations scheduled for December 31, 2022. The estimated project cost is $2.4 billion.

In September 2017, the Governor announced plans to add four new lanes to I-270 in Montgomery County, the Capital Beltway (I-495), and the Baltimore-Washington Parkway (MD 295), with the first two projects expected to be completed using P3s. The combined cost of all three projects is estimated to be $9 billion, with the I-270 and I-495 projects seeking private developers to design, build, finance, operate, and maintain the new (toll) lanes on both roads. The MD 295 project is not expected to involve a P3 but instead would be carried out by MDTA following the transfer of ownership of the parkway from the U.S. Department of the Interior to the State.

State Fiscal Effect: Although the mandated appropriation does not take effect until fiscal 2020, the bill requires the Governor to ensure that Executive Branch staff be available "in a timely manner" to establish the office. Therefore, this analysis assumes that funding for the office begins in fiscal 2019. Accordingly, TTF expenditures increase by $15.0 million in fiscal 2019, which reflects the bill's October 1, 2018 effective date, and by $20.0 million annually thereafter. A reliable estimate of staffing needs for the office is not available, but it is assumed that the annual $20.0 million mandated appropriation is sufficient to cover any staffing requirements.

MDOT and MDTA are responsible for any transportation-related P3s in the State. They advise that the bill's provisions related to the power of the office to alter provisions of partnership agreements and transit fees has a detrimental effect on current and future P3 projects in the State, including the Purple Line and the Governor's proposed toll lanes. Those provisions could dissuade potential State partners from entering into P3 agreements. Any economic or financial consequences of foregone or disrupted partnership agreements cannot be reliably quantified but could be significant. Similarly, any environmental benefits from limiting the formation of new P3 agreements or securing monetary damages from P3 partners cannot be reliably quantified.

MDOT and MDTA advise that transportation-related P3 projects are subject to multiple layers of oversight by the federal and State governments, including but not limited to NEPA, BPW, and the Transportation Public-Private Partnership Steering Committee established by State regulation.

The Department of Legislative Services notes that MDTA's toll revenues are pledged to bond holders; any diminution in toll collections ordered by the office could expose the State to costly legal action by bond holders.

Small Business Effect: Small businesses that wish to enter into, or enter into, transportation-related P3 agreements with the State are exposed to greater risk associated with the power and authority of the Office of Transportation Oversight.

Additional Information

Prior Introductions: None.

Cross File: None.

Information Source(s): Baltimore, Charles, Frederick, and Montgomery counties; City of Frederick; City of Havre de Grace; Judiciary (Administrative Office of the Courts); Department of Budget and Management; Department of General Services; Department of Natural Resources; Maryland Department of Transportation; Department of Legislative Services

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Analysis by: Michael C. Rubenstein

Direct Inquiries to:
(410) 946-5510
(301) 970-5510