

December 2019

Public-Private Partnerships and Smart Growth: A Legislative Tool Kit for Public- Infrastructure Projects

Emma Lagle

Elisabeth Haub School of Law at Pace University

Follow this and additional works at: <https://digitalcommons.pace.edu/pelr>



Part of the [Energy and Utilities Law Commons](#), [Environmental Law Commons](#), [Land Use Law Commons](#), [Legislation Commons](#), and the [Natural Resources Law Commons](#)

Recommended Citation

Emma Lagle, *Public-Private Partnerships and Smart Growth: A Legislative Tool Kit for Public-Infrastructure Projects*, 37 Pace Envtl. L. Rev. 211 (2019)

Available at: <https://digitalcommons.pace.edu/pelr/vol37/iss1/6>

This Article is brought to you for free and open access by the School of Law at DigitalCommons@Pace. It has been accepted for inclusion in Pace Environmental Law Review by an authorized administrator of DigitalCommons@Pace. For more information, please contact dheller2@law.pace.edu.

NOTE

**Public-Private Partnerships and Smart
Growth:
A Legislative Tool Kit for Public-
Infrastructure Projects**

EMMA LAGLE

TABLE OF CONTENTS

<i>I.</i>	<i>Introduction</i>	<i>212</i>
<i>II.</i>	<i>The Problem of American Infrastructure.....</i>	<i>215</i>
<i>III.</i>	<i>A History in Public-Private Partnerships.....</i>	<i>218</i>
	<i>A. Full-Privatization with Limited Government Oversight.....</i>	<i>218</i>
	<i>B. Government Controlled Design-Bid-Build Approach.</i>	<i>218</i>
	<i>C. Strengths and Weaknesses of the Modern Public- Private Partnership</i>	<i>220</i>
<i>IV.</i>	<i>Federal Infrastructure Policy.....</i>	<i>229</i>
	<i>A. The 2018 Infrastructure Plan and Federal Smart Growth Policy.....</i>	<i>229</i>
	<i>B. Recent Federal Support for Smart Growth Policy.....</i>	<i>231</i>
	<i>C. Why Smart Growth? How Smart Growth Addresses Disadvantages of P3 Use</i>	<i>235</i>
<i>V.</i>	<i>Existing State Legislation: A Maryland Case Study</i>	<i>239</i>
<i>VI.</i>	<i>Conclusion.....</i>	<i>245</i>

I. INTRODUCTION

Experts estimate that well-over half of the infrastructure¹ needed to accommodate population growth in the United States, by 2050, does not yet exist.² The demand for new, expanding infrastructure systems stems from existing funding shortages, necessary to maintain aging infrastructure, and worsening threats of infrastructure-failure.³ The risks posed by the United States' underfunded and rapidly aging infrastructure are well documented.⁴ In light of these risks, the Trump Administration issued Executive Order No. 13807 ("the Order") to facilitate drafting of federal legislation, which would improve the environmental review and permitting processes for infrastructure projects nationwide.⁵ The Order's goals included identification of

1. "Infrastructure," as discussed in this paper, refers to road and transit systems, along with such critical elements of the nation's surface transportation infrastructure, including highways, bridges, and commercial rail. However, arguments made within apply equally to utility infrastructure systems (e.g., drinking water, wastewater, and energy).

2. Lisa Grow Sun, *Smart Growth in Dumb Places: Sustainability, Disaster, and the Future of the American City*, 2011 BYU L. REV. 2157, 2158–59 n.10 (2011) (citing Arthur C. Nelson & Robert E. Lang, *The Next 100 Million: Reshaping of America's Built Environment*, PLAN., Jan. 2007, at 4 (estimating that the United States will reach a population of 400 million by 2037)).

3. See AM. SOC'Y OF CIVIL ENGINEERS, 2017 INFRASTRUCTURE REPORT CARD 4–5 (2017), <https://www.infrastructurereportcard.org/wp-content/uploads/2019/02/Full-2017-Report-Card-FINAL.pdf> [<https://perma.cc/5UBU-VZZL>] [hereinafter REPORT CARD]; see also Eric Jaffe, *America's Infrastructure Crisis is Really a Maintenance Crisis*, CITYLAB (Feb. 12, 2015), <https://www.citylab.com/solutions/2015/02/americas-infrastructure-crisis-is-really-a-maintenance-crisis/385452/> [<https://perma.cc/J2XW-XL4W>] (asserting recent deadly infrastructure failures - including an electrical malfunction on the D.C. Metrorail on January 12, 2015, and a series of incidents on New York City's Metro-North commuter railroad between 2013 and 2014 - resulted from poor maintenance).

4. See generally AM. SOC'Y OF CIVIL ENGINEERS, FAILURE TO ACT: CLOSING THE INFRASTRUCTURE INVESTMENT GAP FOR AMERICA'S ECONOMIC FUTURE (2016), <https://www.infrastructurereportcard.org/wp-content/uploads/2016/05/2016-FTA-Report-Close-the-Gap.pdf> [<https://perma.cc/QZ2J-T5DC>] (noting that water and wastewater systems are examples of aging infrastructure) [hereinafter FAILURE TO ACT]; see also Steve Kroft, *Falling Apart: America's Neglected Infrastructure*, CBS NEWS (Nov. 23, 2014), <https://www.cbsnews.com/news/falling-apart-america-neglected-infrastructure/> [<https://perma.cc/96XG-QUH5>].

5. Exec. Order. No. 13807, 82 Fed. Reg. 40,463, 40,466 (Aug. 24, 2017).

methods to increase public-private partnerships (“P3s”) needed to fund the maintenance and expansion of public infrastructure.⁶

The Trump Administration released the Legislative Outline for Rebuilding Infrastructure in America (“the Plan”) on February 12, 2018.⁷ The Plan, which “[estimated to] stimulate at least \$1.5 trillion. . . over the next 10 years,” advocates for limiting federal investments to under 20% of a project’s total cost, while also placing greater responsibility on states and municipalities to fund important infrastructure projects in partnerships with private-sector firms.⁸ In order to transfer the responsibility of planning, funding, maintaining, and operating major infrastructure projects to states, municipalities, and the private-sector, the Plan depends on P3 agreements meeting demands for funds, resources, and expertise.⁹ The Plan also emphasizes investments in rural, over urban-infrastructure, and roadways, over transit-systems—policies that are likely to promote sprawl.¹⁰ Any legislation developed from such policies will certainly (1) shift the responsibility of funding infrastructure projects from the federal government to private sources, (2) increase the need for P3s between both state- and-local governments and private-developers, and (3) move away from recent federal Smart Growth policies.¹¹

6. *Id.* at 40,463.

7. THE WHITE HOUSE, LEGISLATIVE OUTLINE FOR REBUILDING INFRASTRUCTURE IN AMERICA (Feb. 12, 2018), <https://www.transportation.gov/sites/dot.gov/files/docs/briefing-room/304441/legoutline.pdf> [<https://perma.cc/Q7ZF-FY8X>] [hereinafter THE PLAN].

8. *See id.* at i, 3, 5.

9. *See id.* at 3–4.

10. *See id.* at 5–7. Although the Plan does discuss elimination of federal law that constrains funds available for capital transit projects, this single addition does little to counteract the overall policy. *See id.* at 20–25; *see also* Patricia E. Salkin, *Smart Growth and Sustainable Development: Threads of a National Land Use Policy*, 36 VAL. U. L. REV. 381, 385–86 (2002).

11. *See* THE WHITE HOUSE, FACT SHEET 2018 BUDGET: INFRASTRUCTURE INITIATIVE (2018), https://www.whitehouse.gov/sites/whitehouse.gov/files/omb/budget/fy2018/fact_sheets/2018%20Budget%20Fact%20Sheet_Infrastructure%20Initiative.pdf [<https://perma.cc/EBZ5-FHWH>]; *see* Salkin, *supra* note 10, at 382; *see generally* *Smart Growth*, EPA, <https://www.epa.gov/smartgrowth> [<https://perma.cc/UC8L-QYB7>] (noting different programs and benefits surrounding Smart Growth initiatives) [hereinafter *Smart Growth*].

Although subsequent political and economic events decreased the likelihood of comprehensive infrastructure legislation,¹² executive and administrative actions have already reduced or eliminated federal funding for infrastructure projects.¹³ Regardless of whether the federal government takes legislative action, the nation's infrastructure continues to age and continues to threaten environmental, economic, and physical harm to the public.¹⁴ The responsibility to fund public infrastructure projects will likely continue to fall on cash-strapped states. Therefore, states and municipalities will need to enter into P3 agreements in order to fund infrastructure development, while also considering necessary protections to the public's environmental and economic interests from risks associated with such agreements.

Inspired by the Plan's infrastructure policy, this Note discusses the strengths and weaknesses of modern P3 agreements used for public infrastructure projects, and legislative options states have to support P3 use for the protection of the public's environmental and economic interests. Tools like P3 and Smart Growth legislation help states prepare for the management of

12. See David Shepardson, *Republicans, Democrats Fight Over Infrastructure Plans*, REUTERS (Feb. 8, 2018), <https://www.reuters.com/article/us-usa-infrastructure/republicans-democrats-fight-over-infrastructure-plans-idUSKBN1FS3CU> [<https://perma.cc/J9AE-F2YB>] (revealing how passage of infrastructure legislation quickly became subject to political disputes and partisan politics); see also Mike DeBonis, *Democrats to Unveil \$1 Trillion Infrastructure Plan*, WASH. POST (Mar. 7, 2018), https://www.washingtonpost.com/powerpost/democrats-to-unveil-1-trillion-infrastructure-plan-seek-reversal-of-gop-tax-cuts-to-finceit/2018/03/07/0de718f621c811e894daebf9d112159c_story.html?utm_term=.c794c98444a3 [<https://perma.cc/UNQ6-WQPD>]; see also Ryan Mallory Shelbourne, *Infrastructure Plan will Come in Five or Six Different Bills*, THE HILL (Mar. 8, 2018), <https://thehill.com/policy/transportation/infrastructure/377472-ryan-infrastructure-plan-will-come-in-5-or-6-different> [<https://perma.cc/XRS5-LBSF>]; see also Michael Sargent & Anthony Kim, *Steel & Aluminum Tariffs a Big Threat to Trump's Infrastructure Plan*, THE HILL (Mar. 9, 2018), <https://thehill.com/opinion/white-house/377553-steel-and-aluminum-tariffs-a-big-threat-to-trumps-infrastructure-plan> [<https://perma.cc/4ZZV-UGS6>].

13. See Karen Yi, *Feds Deal Major Blow to Gateway Tunnel Project*, NJ.COM (Dec. 30, 2017), http://www.nj.com/news/index.ssf/2017/12/federal_funding_deal_for_gateway_tunnel_project_no.html [<https://perma.cc/36E8-U9NV>]; see also Grace Guarnieri, *Trump Halts \$13 Billion Obama Amtrak Plan Despite Calls for Infrastructure Spending in 2018*, NEWSWEEK (Dec. 31, 2017), <http://www.newsweek.com/trump-amtrak-infrastructure-spending-766861> [<https://perma.cc/AY9R-TCST>].

14. See REPORT CARD, *supra* note 3, at 5.

these often-competing positions. A review of the Plan and existing federal Smart Growth policy reveals how the Plan failed to integrate Smart Growth principles to address common weaknesses of P3 use, such as, limited public input, inappropriate projects, and projects that promote sprawl.¹⁵

In order to facilitate infrastructure development that integrates both P3s and Smart Growth, states can incorporate Smart Growth policies into new or amended P3 legislation or adopt separate, but complementary, legislation. An analysis of a recent P3 agreement in Maryland provides further instruction on how P3 and Smart Growth laws and policies interact with states and municipalities. This interaction can protect the public's environmental and economic interests to the greatest extent possible when forming P3 agreements. Further, these tools may be implemented regardless of whether federal infrastructure development legislation is successful or current federal Smart Growth policy continues.

II. THE PROBLEM OF AMERICAN INFRASTRUCTURE

The United States' most visible infrastructure systems are arguably the nation's 4 million miles of streets, roads, and highways.¹⁶ Vehicle-miles traveled hit a record high in 2016, when people and goods moved over 3.2 trillion miles.¹⁷ Unsurprisingly, the most cited effect of inadequate maintenance and backlogged rehabilitation to the nation's roadways are congestion and traffic delays.¹⁸ Increased traffic congestion causes road conditions to disintegrate faster, and poor road conditions increase automobile

15. See THE PLAN, *supra* note 7, at 3–4 (promoting sprawl by highlighting new development and rural expansion while allocating zero funds to the maintenance and repair of urban-transit's existing physical infrastructure); see also Matti Siemiatycki & Naeem Farooqi, *Value for Money and Risk in Public-Private Partnerships*, 78 J. OF THE AM. PLAN. ASS'N 286, 288 (2012) (identifying common shortcomings of P3); see also Deborah Ballati & Richard Robinson, *Public-Private Partnerships: Lessons Learned and Predictions for the Future*, 34 CONSTR. L. 27, 32-33 (2014).

16. REPORT CARD, *supra* note 3, at 76.

17. *Id.*

18. See *id.*

accident rates.¹⁹ In 2017, 40% of all urban interstate highways were congested, and 20% of highway pavement was in poor condition.²⁰ The American Society of Civil Engineers (“ASCE”) reported that, “[a]fter years of decline, traffic fatalities increased by 7% from 2014 to 2015”²¹

Road infrastructure quality directly impacts the national economy. In 2014, poor road conditions caused traffic, which used 3.1 billion gallons of fuel, and delayed Americans by 6.9 billion hours, amounting to \$160 billion in wasted time.²² The ASCE directly correlates insufficient investment in infrastructure maintenance to broad, negative economic impacts.²³ The ASCE found that aging infrastructure causes every American household to lose \$3,400 annually.²⁴ By 2025, the ASCE predicts that infrastructure underperformance will cost the United States \$3.9 trillion in gross domestic product (“GDP”), \$7 trillion in business sales, and 2.5 million jobs.²⁵

Discussions about maintenance, repair, or replacement of existing roads and highways should concurrently consider the conditions and availability of transit systems.²⁶ The earliest domestic transit systems, constructed in the late-1800s, were privately owned.²⁷ As the automobile decreased transit’s profit

19. *See id.*; *see also* Rajeev Kumar et al., *Smart Management of Heavy Traffic Urban Roads*, 04 INT’L RES. J. OF ENGINEERING & TECH. 840, 841 (2017) (“[P]avement that can last for 10 years without overloading will last only for 6.5 years, if there is 10 percent overloading on an average. With 30 percent overloading, the same pavement will last only for 3.5 years. The situation has led to swift rate of deterioration. . .”).

20. REPORT CARD, *supra* note 3, at 76; *see also* U.S. DEPT OF TRANSP., FED. HIGHWAY ADMIN. & FED. TRANSIT ADMIN., REPORT TO CONGRESS: 2015 STATUS OF THE NATION’S HIGHWAYS, BRIDGES, AND TRANSIT: CONDITIONS AND PERFORMANCE, at 5–3 (2015), <https://www.fhwa.dot.gov/policy/2015cpr/pdfs/2015cpr.pdf> [<https://perma.cc/A4EQ-CGNX>] (defining “Congestion, which can be recurring or nonrecurring, occurs when traffic demand approaches or exceeds the available capacity of the system.”) [hereinafter HIGHWAYS, BRIDGES, AND TRANSIT].

21. REPORT CARD, *supra* note 3, at 76.

22. *Id.* at 76.

23. FAILURE TO ACT, *supra* note 4, at 3–4.

24. REPORT CARD, *supra* note 3, at 7.

25. *Id.* (citing FAILURE TO ACT, *supra* note 4, at 7).

26. *See* REPORT CARD, *supra* note 3, at 88. Existing roadway maintenance is important for public transit because bus riders make up half of transit passenger. *See id.*

27. HIGHWAYS, BRIDGES, AND TRANSIT, *supra* note 20, at 2–21.

margins post-World War II, governments recognized the importance of facilitating sustained transit services.²⁸ However, transit's physical infrastructure (e.g., tracks and signals) currently represents some of the worst infrastructure conditions nationally. Thirty-five percent of guideway elements like tracks and 37% of stations reported by the ASCE are "not in a 'state of good repair.'"²⁹ Transit systems nationwide face a \$90 billion rehabilitation backlog.³⁰ These shortcomings pose severe risks to public safety and harm public perception of transit's dependability.³¹ Although new lines are added annually, only 11% of Americans take public transportation at least once a week.³² This suggests that those who cannot access transit must instead rely on automobiles for non-walkable or non-bikeable distances. Without immediate and continued investment, Americans will not be enticed to increase their use of public-transit, an outcome that would help relieve the burden on America's roads.³³

Despite the clear and imminent risks, deep funding shortages persist.³⁴ State and municipal governments struggle to secure the funds for "maintaining or rebuilding existing infrastructure that currently needs repair or replacement," as well as, "building new infrastructure to service an increasing population that will reach 380 million by 2040, and the expanded economic activity and infrastructure use resulting from this growth and added

28. *Id.*; see also REPORT CARD, *supra* note 3, at 88 (highlighting how even today, the nation's transit lines continue to grow, providing 10.5 billion trips in 2015, or a 33% increase over 20 years).

29. REPORT CARD, *supra* note 3, at 89.

30. *Id.* at 90.

31. See *id.* at 91; see also Jonathan English, *Why Did America Give Up on Mass Transit? (Don't Blame Cars.)*, CITYLAB (Aug. 31, 2018), <https://www.citylab.com/transportation/2018/08/how-america-killed-transit/568825/> [<https://perma.cc/79MG-4WDJ>].

32. REPORT CARD, *supra* note 3, at 88–89 (also noting 49% of American households remain unable to access public transit to complete basic tasks).

33. See Michael L. Anderson, *Subways, Strikes, and Slowdowns: The Impacts of Public Transit on Traffic Congestion*, SEMANTIC SCHOLAR 1, 2 (2013), https://are.berkeley.edu/~mlanderson/pdf/Anderson_transit.pdf [<https://perma.cc/24ZB-C7T9>] (finding an abrupt increase in average road-traffic delays of 47% when Los Angeles transit services ceased).

34. REPORT CARD, *supra* note 3, at 7 ("[T]he U.S. has only been paying half of its infrastructure bill for some time and failing to close that gap risks rising costs, falling business productivity, plummeting GDP, lost jobs, and ultimately, reduced disposable income for every American family.").

demands.”³⁵ The Plan offers one approach, a heavy reliance on the creation of P3 agreements.³⁶ Though necessary to secure funding, P3s often limit public input and are not appropriate for every infrastructure project.³⁷ Passage of comprehensive P3 legislation at the state level could proactively reduce the risk of harm to the public from inappropriate or unsuccessful agreements.

III. A HISTORY IN PUBLIC-PRIVATE PARTNERSHIPS

A. Full-Privatization with Limited Government Oversight

History provides insight into the concerns associated with private investment in public infrastructure. Before the twentieth-century, the private sector exercised sizeable control over the infrastructure development process, ranging from project design to finance and operations.³⁸ This era produced many major infrastructure advancements, but full-privatization produced “poor safety records, . . . labor abuses, corrupt business practices, and unequal distribution of services.”³⁹ The balance of responsibility for infrastructure development, and maintenance shifted from the private-sector to the public-sector by the mid-1900s, as the federal government recognized “high-quality public infrastructure” as an important public-interest concern.⁴⁰

B. Government Controlled Design-Bid-Build Approach

From the 1950s until the late 1970s, the public design-bid-build (“DBB”) approach to infrastructure development created

35. FAILURE TO ACT, *supra* note 4, at 2.

36. See THE PLAN, *supra* note 7.

37. See Siemiatycki & Farooqi, *supra* note 15, at 288; see also Ballati & Robinson, *supra* note 15, at 32–33.

38. Matti Siemiatycki, *The Global Experience with Infrastructure Public-Private Partnerships*, 64 PLAN. & ENVTL. L. 6, 6 (2012) (acknowledging that private entities were subject to *limited* government approval and monitoring).

39. *Id.* at 7.

40. *Id.*

“the Golden Age’ of infrastructure.”⁴¹ Under the public DBB model, government agencies designed projects in-house in consultation with private engineers or planners.⁴² The government then completed a competitive bidding process to choose a private builder able to complete the project to the government’s specifications.⁴³ Under this approach, the public sector considers its own criteria to prioritize investment and finances construction through government debt or bonds.⁴⁴ Rather than imposing new user fees on the public, these funds are repaid via general government revenues.⁴⁵

However, the DBB approach possessed shortcomings. Matti Siemiatycki⁴⁶ describes how the public sector’s involvement at different project stages created a “highly disaggregated” structure.⁴⁷ The public DBB model created multiple contractual-partnerships between the government and public firms, such as design, construction, and finance firms, which caused financial risks to fall on the public partner.⁴⁸ Thus, infrastructure project design, construction, and operation, though publicly controlled, still struggled to protect the public’s economic interests.⁴⁹ By the 1970s, the public sector understood that large, critical infrastructure projects were often prone to “systematic cost overruns and construction delays, followed by poor service quality; construction not always of a high quality, leading to service outages or unavailability; and lower-than-expected financial returns, environmental amelioration, and social equity benefits.”⁵⁰ Fiscally-concerned political aversion towards public-sector debt soon limited the availability of public funds for infrastructure maintenance and expansion.⁵¹

41. *Id.* (citing ALAN ALTSHULER & DAVID LUBEROFF, MEGA-PROJECTS: THE CHANGING POLITICS OF URBAN PUBLIC INVESTMENTS (Brookings Inst. ed., 2003)).

42. *Id.* at 7.

43. *Id.*

44. *Id.*

45. *Id.*

46. Matti Siemiatycki, *Associate Professor Profile*, U. OF TORONTO, <http://geography.utoronto.ca/profiles/matti-siemiatycki/> [<https://perma.cc/AP9M-7ZCX>].

47. Siemiatycki, *supra* note 38, at 7.

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

C. Strengths and Weaknesses of the Modern Public-Private Partnership

Prevailing rhetoric in the late 1970s focused on government's general inefficiency and the public DBB method's failure to support the competition needed "to spur innovation."⁵² Across the world, governments sold off publicly-owned, significant infrastructure operations in bus, rail, freight transportation, and more.⁵³ At the same time, federally-directed deregulation efforts sought to foster competition amongst new private-sector partners.⁵⁴ The mixed outcomes of the resurgence in privatization, as well as ideological disputes over privatization's advantages, led many nations to halt plans for wholesale privatization.⁵⁵ These debates revealed the need for a new model to successfully integrate the relative strengths of both public and private-sector participants into infrastructure agreements.⁵⁶

The contemporary P3 emerged from government experimentation since the 1980s with private-sector involvement in the different stages of public-infrastructure projects.⁵⁷ Siemiatycki describes three basic characteristics of contemporary P3s: (1) the project provides both partners with some mutual benefit; (2) the private sector makes some contractual concession for a mix of design, construction, funding, and future operations; and (3) the project risks are conveyed to the partner most equipped to handle them.⁵⁸ The National Council for Public-Private Partnerships ("NCP3P")⁵⁹ prescribes that all P3s require a contractual agreement between a public agency and a private

52. *Id.*

53. *Id.* at 7.

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.* (P3 agreements can involve the private sector in one or multiple stages, including "design, construction, financing, [future] operation, and maintenance").

58. *Id.*

59. See *About*, NAT'L COUNCIL FOR PUBLIC-PRIVATE PARTNERSHIPS, <https://ncppp.org/about/> [<https://perma.cc/LS4U-F4SK>] ("[The National Council for Public-Private Partnership's mission is to] advocate and facilitate the formation of public-private partnerships at the federal, state and local levels, where appropriate, and to raise the awareness of governments and businesses of the means by which their cooperation can cost effectively provide the public with quality goods, services and facilities.").

entity to share in the delivery of a service or facility for the general public's use.⁶⁰ This model excludes the public DBB approach that seldom involved "private financing upon which meaningful risk transfer [was] predicated," and simultaneously prevents outright privatization (e.g., free enterprises governed through regulation and controlled by the private sector in perpetuity).⁶¹

Experts consider "public-private partnership" . . . an umbrella term that encompasses a wide array of agreements whereby governments contract with private entities for the provision or delivery of facilities or services to the public.⁶² Models of P3 transactions include Build-Own-Operate,⁶³ Design-Build-Operate,⁶⁴ Operate-Maintain-Manage,⁶⁵ Design-Build-Finance,⁶⁶ and the "full-fledged P3" referred to as Design-Build-Finance-Operate-Maintain.⁶⁷ Another commonly used model, the concession contract, requires the public partner to concede some physical infrastructure (e.g., a toll road or bridge) to a private-partner for a certain number of years in return for a single and

60. See *The National Council for Public-Private Partnerships - 7 Keys to Success*, INFORMED CYNIC, <http://www.informedcynic.com/P3/P3-reports/2015%20-NCPPP-7-points-to-successc.pdf> [<https://perma.cc/XX5Z-XF9R>].

61. Siemiatycki, *supra* note 38, at 7.

62. Kelsey Hogan, *Protecting the Public in Public-Private Partnerships: Strategies for Ensuring Adaptability in Concession Contracts*, 2014 COLUM. BUS. L. REV. 420, 425 (2014) (citing John Ziegler, Note, *The Dangers of Municipal Concession Contracts: A New Vehicle to Improve Accountability and Transparency*, 60 PUB. CONT. L.J. 571, 574 (2011)).

63. *Id.* at 425–26 ("where a private contractor builds and operates a facility for public use or for the purpose of providing a public good, without ever transferring ownership to the government or public sector").

64. *Id.* at 426 ("whereby the government awards a single contract to a private firm for the design, construction, and operation of a capital improvement project, but the title to the facility remains with the public sector").

65. *Id.* ("[W]here the government contracts with a private partner to operate, maintain, and manage an existing facility or service.").

66. Rebecca C. Lewis, *New York's Plodding Pace on P3s*, CITY & ST. N.Y. (Mar. 6, 2018), <https://www.cityandstateny.com/articles/policy/infrastructure/new-yorks-plodding-pace-p3s.html> [<https://perma.cc/WD85-2R5M>] (describing a model that integrates private funding into the publicly controlled design-bid-build model).

67. *Id.* ("[T]he private company . . . designs and builds the project, . . . partially finances it, then maintains and operates it for an agreed upon number of years. This takes . . . risk off the state while providing a better end product more quickly than the private company could also better maintain.").

significant up-front payment.⁶⁸ The private-partner recovers the cost of the upfront payment through collection of user fees (e.g., tolls or fares) during the concession period.⁶⁹ The operation and maintenance of the infrastructure typically becomes the private-partner's responsibility.⁷⁰ Thus, a central benefit of P3 use for public entities is the transfer of risk onto the private partners. State P3 legislation should aim to ensure that contractual P3 agreements are structured so that risks and rewards are shared fairly between both parties via contractually dictated requirements for each stage of the project.⁷¹ Integration of Smart Growth's public-interest supportive principles into state P3 legislation and individual P3 agreements could help ensure well-structured P3s for public-infrastructure.

Despite concerns associated with private investment in public infrastructure, another key strength of P3s is its bipartisan reception at the federal and state levels.⁷² Prior to the release of the Plan, the Obama Administration undertook initiatives to explore the use of P3s to fund the nation's infrastructure needs.⁷³ Lawmakers interested in P3s, including members of the bipartisan Congressional Caucus on Public Private Partnerships ("Congressional P3 Caucus"), sought to understand the benefits and challenges with P3 use for public-infrastructure projects.⁷⁴ The federal Department of Transportation ("DOT") and Treasury Department subsequently hosted a summit on September 14, 2014, to gather recommendations on P3s.⁷⁵ In

68. Siemiatycki, *supra* note 38, at 8 (describing a typical concession period that ranges between 25 and 99 years).

69. *Id.*; see also Hogan, *supra* note 62, at 426.

70. Hogan, *supra* note 62, at 426; Siemiatycki, *supra* note 38, at 8.

71. Hogan, *supra* note 62, at 451–52 (discussing the importance of negotiating the concession agreement's terms in response to public demands); Siemiatycki, *supra* note 38, at 8.

72. Siemiatycki, *supra* note 38, at 6 ("[P3s] have been widely accepted across partisan political lines [and] in the United States, both Democrat- and Republican-controlled states have experimented with [P3s]."); see also *Public-Private Partnerships May be Key to Unlock Doors to Potential Investors and Project Opportunities*, 38 CONSTR. CONTR. L. REP. 1, Nov. 7, 2014, at ¶ 242 (discussing the Obama Administration's support of P3s for infrastructure projects) [hereinafter *Key to Unlock Potential Investors*].

73. *Key to Unlock Potential Investors*, *supra* note 72.

74. *Id.*

75. *Id.*

response to the finding that a “lack of unity in P3 enabling laws at the federal and state level inhibited the use of P3s,”⁷⁶ the Bipartisan Policy Center (“BPC”) published the P3 Model State Legislation (“P3 Model Law”).⁷⁷ Based on an examination of P3 best practices nationwide, the four key components of the BPC’s P3 Model Law seek to: (1) enable P3 use in a variety of wide-ranging projects, (2) create a state office dedicated to providing P3 expertise and assistance, (3) standardize and promote best practices, and (4) protect the public interest.⁷⁸

Most states have embraced the P3 model in exchange for the promise of lower costs and faster project completion times.⁷⁹ Through a mixture of legislative and regulatory actions, thirty-six states, the District of Columbia, and Puerto Rico, have authorized some degree of P3 use for the development of public infrastructure.⁸⁰ The value attributed to P3 models derives from “the belief that governments and firms working in meaningful collaboration will deliver major infrastructure projects that have better outcomes than any one party could deliver on their own.”⁸¹ For state and local municipal governments with limited funding sources, the P3 structure shifts the financial burden from

76. *Id.*

77. BIPARTISAN POLICY CTR., PUBLIC-PRIVATE PARTNERSHIP (P3) MODEL STATE LEGISLATION, (Dec. 2015), <https://bipartisanpolicy.org/wp-content/uploads/2019/03/BPC-P3-Enabling-Model-Legislation.pdf> [<https://perma.cc/U827-9XRD>] [hereinafter P3 MODEL LAW]; see also *Model Law Gives Template for State P3 Legislation*, NAT’L COUNCIL FOR PUBLIC-PRIVATE PARTNERSHIPS, <https://ncppp.org/model-law-gives-template-for-state-p3-legislation/> [<https://perma.cc/E5GZ-FVHS>].

78. P3 MODEL LAW, *supra* note 77, at 3.

79. *Key to Unlock Potential Investors*, *supra* note 72; see also Siemiatycki, *supra* note 38, at 9 (citing ALLEN CONSULTING GROUP, FINAL REPORT: PERFORMANCE OF P3S AND TRADITIONAL PROCUREMENT IN AUSTRALIA (2007), https://www.irfnet.ch/files-upload/knowledges/IPA_Performance%20of%20PPPs_2007.pdf [<https://perma.cc/UCV5-2JJ8>] (“With a significant number of [P3s] now completed and in operation, there is emerging evidence that [P3s] do in fact have a better record than traditional design-bid-build projects at delivering infrastructure on time and on budget.”)).

80. See U.S. DEP’T TRANSP. FED. HIGHWAY ADMIN., *State P3 Legislation*, CTR. FOR INNOVATIVE FINANCE SUPPORT, <https://www.fhwa.dot.gov/ipd/p3/legislation/> [<https://perma.cc/3LYQ-5AHA>] [hereinafter *State P3 Legislation*].

81. Siemiatycki & Farooqi, *supra* note 15, at 287.

immediate, upfront costs to periodic payments, later payments, or onto the public through use fees.⁸²

Despite this widespread support, certain concerns are intrinsic to P3 use in public-infrastructure projects. While supporters of P3 agreements claim these models reduce costs, there are doubts about the transfer of financial risk and other financial benefits to the public partner. When a P3 agreement involves the repayment of some or all of a private partner's concession payment through scheduled payments from the public partner, the government becomes subject to substantially higher interest rates than those applied to standard government borrowing.⁸³ Furthermore, P3s may also result in higher base costs than projects delivered through public-procurement because, "the private-sector partner charges a premium for bundling various design and construction functions into a single concession and taking on greater risk."⁸⁴ Third, when investors recover their initial investments through user fees, concerns arise about investors that capture excessive profits.⁸⁵ In such agreements, the private partner assumes the project's revenue risk and public-partners regularly lose control over fee rates, service coordination, and integration of the project into the wider network—all to the detriment of public users.⁸⁶ When repayment depends on tolls and user fees, disputes between a private-partner and a future government over an agreement made by the preceding government regarding user fee rates, service quality, and public desires to upgrade contractually-conceded infrastructure are common.⁸⁷

Another common concern with P3 use is limited public input. Commercial confidentiality requirements, a private partner's desire to limit costs, and the contracting government's possible interest in capitalizing on a one-time concession payment can collectively limit meaningful public input in contract formation and project development.⁸⁸ Limitation of public involvement at

82. Siemiatycki, *supra* note 38, at 8.

83. *Id.* at 9 ("This amounts to an additional \$20 to \$40 million in financing costs for every \$100 million that the private-sector partner borrows over a 35-year concession period.").

84. *Id.*

85. *Id.*

86. *Id.* at 10.

87. *Id.*

88. Siemiatycki & Farooqi, *supra* note 15, at 288.

conceptualization, planning, and approval stages creates transparency and accountability issues and risks the development of infrastructure that fails to meet public needs.⁸⁹ The public's social, economic, and environmental interests in infrastructure development are great and varied.⁹⁰ Infrastructure projects, which consider how best to meet public needs from early development stages, are more likely to succeed at producing successful infrastructure that provide adequate financial returns.⁹¹ The possible influence of public input on a project's success supports the need for state P3 legislation that seeks to ensure early public involvement and consultation in project development.⁹²

Critics further worry that contractual P3 agreements lack flexibility and create unstable partnerships.⁹³ Siemiatycki states that, "a common critique of [P3s] has been . . . the risk of present decision makers locking in the policy options of future governments[,]” stifling future project innovation by making “it difficult or costly for governments to retrofit infrastructure . . . over time to meet changing conditions, public demands, or evolving policy objectives.”⁹⁴ If key risks are not properly divided between the public and private partners and possible circumstantial changes are not provided for in the agreement, an unstable partnership may occur and require expensive contract renegotiations or a cancellation at the public's expense.⁹⁵ Examples

89. Siemiatycki, *supra* note 38, at 9.

90. Robert Puentes, *Why Infrastructure Matters: Rotten Roads, Bum Economy*, BROOKINGS (Jan. 20, 2015), <https://www.brookings.edu/opinions/why-infrastructure-matters-rotten-roads-bum-economy/> [<https://perma.cc/Q8LF-RNCH>]; see Richard Threlfall, *The Importance of Infrastructure Investment*, BBC NEWS (Oct. 29, 2010), <https://www.bbc.com/news/business-11642433> [<https://perma.cc/5F5T-BFE3>].

91. See Hogan, *supra* note 62, at 452 (“The more responsive the government is to the public before a [P3] is signed, the less they will have to undertake costly renegotiation or similar measures after[wards].”).

92. See Chasity H. O’Steen & John R. Jenkins, *We Built it, and They Came! Now What? Public-Private Partnerships in the Replacement Era*, 41 STETSON L. REV. 249, 287–99 (2012) (reviewing how to counteract common contract issue in P3 agreements, including the private-partner’s nonperformance and the public-partners desire to undertake repairs not contractually provided for).

93. Siemiatycki, *supra* note 38, at 11; Siemiatycki & Farooqi, *supra* note 15, at 288.

94. Siemiatycki, *supra* note 38, at 10.

95. *Id.* (highlighting the failed P3 agreement for the State Route 91 express toll lane project in Orange County, California, where financial or performance

exist where private-sector partners have sued to renegotiate after a project failed to generate expected profit and forced the public-partner into a buy-out before the end of the contractual concession period.⁹⁶ Such occurrences have raised questions about whether the public-partner actually remains the ultimate risk holders under the P3 model.⁹⁷ Successful P3 legislation would require P3 agreements to establish explicit policies for renegotiation in case of future changes in circumstances to ensure the flexibility of public-policy throughout the P3 concession period.⁹⁸

A fourth major concern in the formation of P3 agreements is the appropriateness of the P3 model for a given project. A review of the worldwide experience with P3s revealed that “public and private entities must evaluate projects on a case-by-case basis to determine whether a public-private partnership arrangement will benefit both parties and the community in meeting infrastructure needs.”⁹⁹ One of the most common and sizeable mistakes made at the onset of a P3 project is the choice to use P3s on the wrong *type* of project.¹⁰⁰ Arguably, the most recognized major infrastructure developed through government agreements with private companies are toll highways.¹⁰¹ Toll highways allow private investors to recoup their investments through high use fees.¹⁰² Infrastructure projects that present the opportunity for private partners to charge user fees and apply them towards repayment of the private investments are therefore more appropriate than projects that charge the public additional use fees for use of necessary infrastructure, which goes against the public’s

challenges forced the public partner to buy out or take over the private partner’s obligations); see Siemiatycki & Farooqi, *supra* note 15, at 288; see also O’Steen & Jenkins, *supra* note 92, at 302 (describing a successful P3 partnership as a thoughtfully-constructed business plan that clearly establishes the partners’ different responsibilities and provides a process for dispute resolution in case of unexpected challenges).

96. Siemiatycki, *supra* note 38, at 10.

97. *Id.*

98. Siemiatycki & Farooqi, *supra* note 15, at 288; see also Siemiatycki, *supra* note 38, at 10.

99. O’Steen & Jenkins, *supra* note 92, at 302.

100. Ballati & Robinson, *supra* note 15, at 32.

101. *Id.* at 31.

102. *Id.* at 30.

interest.¹⁰³ Since delivery of an infrastructure project through a P3 approach requires significant technical and legal input that creates high transaction costs, prospective partners should determine early in the process whether the size and scope of the project justifies these costs.¹⁰⁴

No one-size-fits-all private funding model works for every infrastructure project.¹⁰⁵ Even when the P3 structure is appropriate for a given project, success will likely only be achieved if both parties establish practical hopes and expectations.¹⁰⁶ Rationally, another element in successful P3 partnerships is the government's selection of a private-sector partner with the best "value" for the project. In this context, value means the private-partner's long-term ability to fulfill contractual duties and obligations under the P3 agreement, not just the private entity that offers the "lowest bid" to complete the project.¹⁰⁷ Some experts suggest that a P3 project will most likely succeed if both partners are willing to invest in extensive legal representation and consultations prior to reaching a concession agreement.¹⁰⁸ Thus, P3s are considered neither "a panacea nor an inescapable recipe for disaster."¹⁰⁹ Their success turns instead on the thoughtful handling of the project's specific circumstances in the formation of the agreement to ensure a fair outcome for both partners.¹¹⁰

A persistent unfamiliarity with P3 models amongst municipal governments poses a final obstacle to successful implementation of P3 models in public-infrastructure projects. Among Sabol &

103. See *Key to Unlock Potential Investors*, *supra* note 73 (citing David Tanner, *DOT Appointee Foxx Downplays Tolling Funding Solution*, LAND LINE MAG. (May 22, 2013), <https://www.texasturf.org/2012-06-01-03-09-30/latest-news/public-private-partnerships/351-foxx-downplays-tolling-but-fan-of-p3s> [<https://perma.cc/5NDK-FQ6V>] ("DOT Secretary Anthony Foxx said he was in favor of using P3s, but that interstate tolling should only be used to add new capacity to the highway system and should not be viewed as a complete solution to the Highway Trust Fund shortfalls.")).

104. See Ballati & Robinson, *supra* note 15, at 33 (offering best practices stakeholders can use to avoid this problem); see also *Key to Unlock Potential Investors*, *supra* note 72.

105. O'Steen & Jenkins, *supra* note 92, at 302.

106. *Id.* at 303.

107. *Id.*

108. Ballati & Robinson, *supra* note 15, at 32–33.

109. Siemiatycki, *supra* note 38, at 6.

110. *Id.*

Puentes' nine P3 recommendations to public leaders is their advice to assemble a competent and skilled public-sector team able to create and carry-out informed procurement decisions while entering into P3 agreements.¹¹¹ Two elements considered common in successful P3 partnerships are: (1) the existence of public-sector commitment to the P3 approach at all levels of government to promote "a stable, predictable, and reliable procurement process"; and (2) active and consistent public-sector involvement in the partnership, including monitoring of the private-sector partner's performance through some form of benchmarking and specified evaluation methodology.¹¹² Perhaps unsurprisingly, the responsibility to fulfill these roles and produce "official reports that evaluate the merits of using [P3] procurement for a given project," often falls on local government planning, engineering, and legal departments.¹¹³

The recent surge of interest in modern P3 models throughout the United States has not yet resulted in comprehensive "public sector understanding of the [P3] landscape."¹¹⁴ Untrained and underprepared municipal staff are much more likely to fail to protect public interests in the formation, implementation, and operations of P3 infrastructure projects. In 2012, Siemiatycki reported that local municipal planners, lawyers, and professionals, less experienced with major P3 deals in infrastructure projects, were underprepared when first engaging with P3 deals.¹¹⁵ Although P3 guidance materials produced through bipartisan federal and state action have encouraged states to enact P3 legislation and regulations, a quarter of states have yet to implement P3 enabling statutes.¹¹⁶ Moreover, not all existing statutes direct state agencies to educate and train municipal

111. See Patrick Sabol & Robert Puentes, *Private Capital, Public Good: Drivers of Successful Infrastructure Public-Private Partnerships*, BROOKINGS (Dec. 17, 2014), <https://www.brookings.edu/research/private-capital-public-good-drivers-of-successful-infrastructure-public-private-partnerships/> [<https://perma.cc/L3ZM-UMMW>].

112. O'Steen & Jenkins, *supra* note 92, at 302.

113. Siemiatycki, *supra* note 38, at 6.

114. Sabol & Puentes, *supra* note 111.

115. Siemiatycki, *supra* note 38, at 6.

116. See generally *State P3 Legislation*, *supra* note 80 (inferring that fourteen of fifty states, or 27%, lack P3 enabling statutes).

governments to undertake contractual negotiations for P3 agreements to fund infrastructure projects.¹¹⁷

In consideration of these shortcomings, comprehensive state-level legislation should seek to minimize financial risks to the public-partner posed by high interest rates and potential loss of control over fee rates and service quality. Legislation should also actively facilitate public input and consultation in P3 agreement formation (possibly through the integration of Smart Growth policy) and aid governments in their determination of the appropriateness of a given project for a P3 model. Lastly, legislation should provide for agreement renegotiation procedures in the event of unforeseen or unfavorable outcomes and facilitate the production of guidance materials from state agencies for local and regional governments to increase municipal familiarity with P3 formation, implementation, and operations.

IV. FEDERAL INFRASTRUCTURE POLICY

A. The 2018 Infrastructure Plan and Federal Smart Growth Policy

Before considering the lessons learned from existing state legislation, this Note will explore how The Plan fails to extend federal support for Smart Growth infrastructure development. The Plan presents a particular image for the future of the nation's infrastructure. This image seems to present two messages: (1) that state and municipal governments should shoulder more responsibility for infrastructure projects and fill the void left by prior federal funds through P3 contracts with private firms, and (2) federal funds should prioritize rural infrastructure, with the Plan explicitly allocating "\$50 billion in no-string-attached spending for communities smaller than 50,000."¹¹⁸ The Plan, based

117. *Id.*

118. Aarian Marshall, *Trump's Infrastructure Plan Threatens to Leave Little Cities Behind*, WIRED (Feb. 14, 2018), <https://www.wired.com/story/trump-infrastructure-plan-leave-little-cities/> [<https://perma.cc/T4GX-E7DF>]

("allocating just \$100 billion in match funds over 10 years for infrastructure projects for the whole country"); see THE PLAN, *supra* note 7, at 3-5; see also Elizabeth McNichol, *It's Time for States to Invest in Infrastructure*, CTR. ON BUDGET & POL'Y PRIORITIES, <https://www.cbpp.org/research/state-budget-and-tax/its-time-for-states-to-invest-in-infrastructure> [<https://perma.cc/M7EE-ZG7T>].

on its core beliefs, not only fails to address known risks of P3 agreements to government entities, but it presents a policy that would actively promote sprawl development, automobile dependency, and the further allocation of funds away from critical urban infrastructure. In doing so, The Plan ignores recent federal Smart Growth policy.

A central element of the Plan, the proposed Rural Infrastructure Program (“R.I.P.”), seeks to “provide for significant investment in rural infrastructure to address long-unmet needs. . . [and] spur prosperous rural economies,” and incentivize states to “partner with local and private investments for completion and operation of rural infrastructure projects.”¹¹⁹ Specifically, the Plan allocates \$50 billion to the R.I.P to “expand access to markets, customers, and employment opportunities with projects that sustain and grow business revenue and personal income for rural Americans.”¹²⁰ However, the Plan makes no separate allocation for the maintenance and repair of high-risk urban infrastructure.¹²¹ This type of policy will certainly channel infrastructure funds towards new development and away from existing urban infrastructure, exacerbating existing issues with urban transit systems.

The Plan’s emphasis on private funding and rural infrastructure expansion suggests that possible negative aspects of P3 infrastructure projects, including limited public input, the inappropriateness of P3 use for certain projects, and the promotion of sprawl development, were inadequately considered. P3 legislation that integrates Smart Growth principles would consider these economic concerns. Explicit integration of Smart Growth review into state P3 enabling legislation, or the passage of separate-but-supporting laws, will aid states and municipalities in protecting public-interests, both environmental and economic, when undertaking development projects via a P3 agreement.

119. THE PLAN, *supra* note 7, at 5.

120. *Id.* at 6.

121. *See generally* THE PLAN, *supra* note 7 (failing to make any specific allocation for federal funds besides those for rural communities with populations under 50,000).

B. Recent Federal Support for Smart Growth Policy

Land use and development policies are traditionally viewed within the exclusive purview of states and localities.¹²² Since the early 2000s, state and local governments have adopted different aspects of Smart Growth policy.¹²³ However, many state and local infrastructure projects have been partially funded through federal grants or supported by non-monetary programs.¹²⁴ Through these programs, federal agencies have supported state-level Smart Growth approaches to development and a de facto national land use policy emerged in the early 1990s.¹²⁵

The Obama Administration was the first to coordinate federal administrative policy on housing, transportation, and the environment to support Smart Growth implementation at all levels.¹²⁶ For the first time, the Department of Housing and Urban

122. Salkin, *supra* note 10, at 381–82 nn.1, 2 (listing state executive orders).

123. *Id.*; *see, e.g.*, Ed Bolen et al., *Smart Growth: A Review of Program State by State*, 8 HASTINGS WEST NORTHWEST J. OF ENVTL. L. & POL'Y 145 (2001) (specifically examining California's adoption of Smart Growth policies at the state and local level).

124. *See* EPA, PARTNERSHIP FOR SUSTAINABLE COMMUNITIES, FIVE YEARS OF LEARNING FROM COMMUNITIES AND COORDINATING FEDERAL INVESTMENTS 2, 5, 21 (Aug. 2014), <https://www.epa.gov/sites/production/files/2014-08/documents/partnership-accomplishments-report-2014-reduced-size.pdf> [<https://perma.cc/9MRQ-U9TH>] [hereinafter FIVE YEARS OF LEARNING]; *see* HUD, CHOICE NEIGHBORHOODS PLANNING GRANTEE LIST 1–5 (Oct. 2018), https://www.hud.gov/sites/dfiles/PIH/documents/CN_Planning_Grantees.pdf [<https://perma.cc/MMR8-NQM4>] (listing communities and the portion of the cumulative \$37,966,500 in CNP Grants each community received); *see also* HUD, CHOICE NEIGHBORHOODS IMPLEMENTATION GRANTEES, https://www.hud.gov/sites/dfiles/PIH/documents/Choice_Neighborhoods_Implementation_Grantees_List.pdf [<https://perma.cc/FU3J-Z53K>] (listing communities and the portion of the cumulative \$862,235,211 in CNI Grants each community received); *see also* 2009-2017: *Awarded Projects*, U.S. DEP'T OF TRANSP., <https://www.transportation.gov/BUILDgrants/all-projects-map> [<https://perma.cc/G6KH-S4M4>] (mapping out TIGER Grant recipients by year).

125. *See* GREGORY K. INGRAM ET AL., SMART GROWTH POLICIES: AN EVALUATION OF PROGRAMS AND OUTCOMES, LINCOLN INSTITUTE OF LAND AND POLICY ix, 7 (Gregory K. Ingram et al. eds., 2009).

126. HUD-DOT-EPA *Partnership for Sustainable Communities*, EPA, https://19january2017snapshot.epa.gov/smartgrowth/hud-dot-epa-partnership-sustainable-communities_.html [<https://perma.cc/D5PB-4HML>]; Elana Schor, *Obama's Partnership for Sustainable Communities will put the Feds' Weight Behind Smart Growth*, GRIST (Feb. 25, 2010), <https://grist.org/article/2010-02-24-obama-admin-wants-to-green-your-local-community/> [<https://perma.cc/ZL22-BCJY>].

Development (“HUD”), the DOT, and the Environmental Protection Agency (“EPA”), worked together to allocate federal funds towards projects with inter-agency interests, including housing located in close proximity to transit and the development of infrastructure for transportation that helps reduce carbon emissions from automobiles.¹²⁷ These actions arose from the desire to uniformly support sustainability at the federal level.¹²⁸ The federal government also recognized that Smart Growth provided opportunities to reduce development and maintenance costs, while simultaneously creating new jobs in the process.¹²⁹

These federal agencies created inter-agency departments, initiatives, and grant programs.¹³⁰ The EPA’s Smart Growth Unit became the Office of Sustainable Communities.¹³¹ HUD created the Office of Sustainable Housing and Communities to distribute grants, worth \$140 million, to local Smart Growth endeavors.¹³² The DOT increased investment in urban infrastructure for high-speed, inter-city rail projects and coordinated with HUD to focus transit investment towards recipients of HUD investments.¹³³ On June 16, 2009, all three agencies announced the formation of the Partnership for Sustainable Communities (“PSC”).¹³⁴ The PSC program coordinated “federal housing, transportation, water, and other infrastructure investments,” in order “to make neighborhoods more prosperous, allow people to live closer to jobs, save households time and money, and reduce pollution.”¹³⁵ Review of agency websites suggests that the PSC program is currently inactive.

127. See *Federal Smart Growth*, LINCOLN INST. OF LAND & POL’Y (Feb. 6, 2010), <https://www.lincolninst.edu/news/lincoln-house-blog/federal-smart-growth> [<https://perma.cc/7K4L-HJYJ>] [hereinafter *Federal Smart Growth*].

128. See *id.*; see also FIVE YEARS OF LEARNING, *supra* note 124, at 6.

129. FIVE YEARS OF LEARNING, *supra* note 124, at 12.

130. See *National Archives, Federal Permitting Improvement Steering Council*, FEDERAL REGISTER, <https://www.federalregister.gov/agencies/federal-permitting-improvement-steering-council>, [<https://perma.cc/EH6S-NJJ4>].

131. *Federal Smart Growth*, *supra* note 125.

132. *Id.*

133. *Id.*

134. FIVE YEARS OF LEARNING, *supra* note 124, at i.

135. *Sustainable Communities Resource Center*, HUD, <https://archives.huduser.gov/scrc/sustainability/partnership.html> [<https://perma.cc/ZC29-U243>].

Federal grant programs have been central to federal support of Smart Growth. Recent inter-agency grant programs included Capacity Building for Sustainable Communities (“CBSC”) and Sustainable Communities Regional Planning (“SCRP”).¹³⁶ The CBSC provided grants to regional and local planning projects that incorporated housing and transportation concerns, and improved the ability for land use and zoning regulations, allowing for private-investments to support sustainable communities.¹³⁷ The DOT and EPA issued SCRП grants to support urban and inter-municipal planning efforts that “consider challenges of economics, energy use, public health, and the environment.”¹³⁸ However, both are listed as inactive in HUD’s 2017 *Major Mortgage, Grant, Assistance, and Regulatory Programs* report.¹³⁹ Additional non-monetary programs have rewarded communities for Smart Growth achievements. In 2002, the EPA first presented the National Award for Smart Growth Achievement (“NASGA”).¹⁴⁰ NASGA “recognize[d] and support[ed] communities that use[d] innovative policies and strategies to strengthen their economies, provide[d] housing and transportation choices, develop[ed] in ways that [brought] benefits to a wide range of residents, and protect[ed] the environment.”¹⁴¹ The EPA no longer presents the NASGA.¹⁴²

Despite the discontinuance of these grants and awards, the EPA still provides information about Smart Growth programs on its website.¹⁴³ The DOT also continues to allocate grants towards

136. U.S. DEP’T OF URBAN HOUS. & DEV., HUD PROGRAMS 2017: MAJOR MORTGAGE, GRANT, ASSISTANCE, AND REGULATORY PROGRAMS 103–04 (2017), <https://www.hud.gov/sites/dfiles/Main/documents/HUDPrograms2017.pdf> [<https://perma.cc/KV8D-STD2>] [hereinafter HUD PROGRAMS 2017].

137. *Id.* at 103.

138. *Id.* at 104–05.

139. *Id.* at 103–05.

140. *National Award for Smart Growth Achievement*, EPA, <https://www.epa.gov/smartgrowth/national-award-smart-growth-achievement> [<https://perma.cc/4L64-JGPN>] [hereinafter *National Award*].

141. *Id.*

142. *Id.*

143. *Smart Growth, supra* note 11; *Regional, State, and Local Opportunities for Funding Smart Growth Projects*, EPA, <https://www.epa.gov/smartgrowth/regional-state-and-local-opportunities-funding-smart-growth-projects> [<https://perma.cc/9ZWN-NXN9>]; *see also Building Blocks for Sustainable Communities*, EPA, <https://www.epa.gov/smartgrowth/building-blocks-sustainable-communities#background> [<https://perma.cc/YY76-HHCJ>].

capital transportation infrastructure development under the Fixing America's Surface Transportation ("FAST") Act.¹⁴⁴ In 2015, the FAST Act extended the Transportation Infrastructure Finance and Innovation Act ("TIFIA") Program, "which provided [f]ederal credit assistance to eligible surface transportation projects, including highway, transit, intercity passenger rail, [and] some types of freight rail False"¹⁴⁵ The FAST Act "authorize[d] \$305 billion over fiscal years 2016 through 2020 for the Department's highway, highway and motor vehicle safety, public transportation, motor carrier safety, hazardous materials safety, [and] rail [investment]."¹⁴⁶ Projects may qualify for TIFIA credit assistance if the project costs are equal to or in excess of \$50 million or is a qualifying project type with a lower cost threshold (e.g., transit-oriented development, rural infrastructure, and local infrastructure projects).¹⁴⁷ A recent project funded by a TIFIA grant that exemplifies Smart Growth principles, and infill development practices, is the Moynihan Train Hall in New York City.¹⁴⁸ Thus suggesting that although the Plan lacked the influence of Smart Growth principles, federal support for Smart Growth policies still continues in some capacity.

While federal policies and programs related to the environment and transportation affect infrastructure development

144. 23 U.S.C. §§ 601–609 (2019).

145. *Id.*; *Fixing America's Surface Transportation Act or "FAST Act": Fact Sheet*, U.S. DEP'T OF TRANSP. FED. HIGHWAY ADMIN., <https://www.fhwa.dot.gov/fastact/factsheets/tifiafs.cfm> [<https://perma.cc/LH85-PNHN>] [hereinafter *FAST Act Fact Sheet*]. Further financial assistance came through secured loans, loan guarantees, and lines of credit to the states, Washington D.C., and Puerto Rico, municipalities, other public authorities, or "private entities undertaking projects sponsored by public authorities." *FAST Act Fact Sheet*, *supra* note 145.

146. *Environmental Review Toolkit*, U.S. DEP'T OF TRANSP. FED. HIGHWAY ADMIN., <https://www.environment.fhwa.dot.gov/legislation/authorizations/FASTact.aspx> [<https://perma.cc/CD9F-V6NY>].

147. 23 U.S.C. §§ 601(a)(12)(E), 601(a)(5), 602(a)(5)(B)(iv) (2019); *FAST Act Fact Sheet*, *supra* note 145.

148. Andrew Bender, *Inside New York City's Moynihan Train Hall: The Future of Penn Station*, FORBES (Oct. 7, 2016), <https://www.forbes.com/sites/andrewbender/2016/10/07/inside-new-york-citys-moynihan-train-hall-the-future-of-penn-station/#5f9a388d2f8a>. [<https://perma.cc/HAA8-AVGB>]; *see also Moynihan Train Hall*, U.S. DEP'T OF TRANSP. (2017), <https://www.transportation.gov/tifia/financed-projects/moynihan-train-hall> [<https://perma.cc/5GGX-KQEA>].

practices, the power to directly regulate development and make development decisions remains predominantly with state and local governments.¹⁴⁹ Leaving these powers with the states is logical. The majority of infrastructure projects concern local and regional systems and the communities that they serve, which means state and local governments are best positioned to determine the projects to prioritize based on the needs and interests of the effected public. For example, of the almost 56,000 structurally deficient bridges across the country, only about 1,900, or 3.4%, are located on the Interstate Highway System.¹⁵⁰ However, smaller-scale, local projects are less appropriate for the P3 model than larger projects on interstate highways and transit-hubs.¹⁵¹ Thus, the shift in federal policy away from Smart Growth suggested, through the reduction in federal programs and lack of integration in the Plan, an increased need for state-sponsored Smart Growth legislation to counteract decreased federal participation. Integration of Smart Growth policies into state-level P3 legislation can help state and local governments ensure public input into P3 agreement development, determine the appropriateness of a P3 model for a given project, allow for the economic benefits of Smart Growth (discussed below), and help maintain the spread of Smart Growth development.

C. Why Smart Growth? How Smart Growth Addresses Disadvantages of P3 Use

When entering into a P3 agreement, the public partner “must protect the public interest and safety while finding ways to finance infrastructure projects.”¹⁵² By supporting public input and minimizing future maintenance costs through limiting sprawl

149. *About Smart Growth*, EPA, <https://www.epa.gov/smartgrowth/about-smart-growth#smartgrowth> [<https://perma.cc/BWS4-WEFP>] [hereinafter *About Smart Growth*].

150. *Nearly 56,000 American Bridges on Structurally Deficient List, New Analysis of Federal Data Shows*, AM. RD. & TRANSP. BUILDERS ASS'N, <https://www.artba.org/2017/02/15/nearly-56000-american-bridges-on-structurally-deficient-list-new-analysis-of-federal-data-shows/> [<https://perma.cc/7QP6-HWYB>].

151. Infrastructure that serves large interstate populations can more easily support the integration of additional user fees and offer private-partners better returns on investments than local or regional infrastructure.

152. *Key to Unlock Potential Investors*, *supra* note 72.

development, the application of Smart Growth policy and practices to agreement formation helps ensure projects create desirable infrastructure to best serve public needs.¹⁵³ Smart Growth practices also minimize environmental harms of infrastructure development by addressing unnecessarily wasteful and impactful patterns of human development.¹⁵⁴ Despite federal support for Smart Growth practices, its principles and methods are largely derived from the sprawl-friendly Plan.¹⁵⁵ State and local governments must therefore work to implement multilateral Smart Growth initiatives to help address the harmful environmental and economic impacts of P3 projects discussed above.

No universal definition exists to describe the group of development and land management policies known as Smart Growth. To the EPA, Smart Growth comprises “a range of development and conservation strategies that help protect our health and natural environment and make our communities more attractive, economically stronger, and more socially diverse.”¹⁵⁶ Academics consider Smart Growth “a necessary, balanced land use planning device.”¹⁵⁷ The Urban Land Institute’s (“ULI”) definition of Smart Growth reads “an evolving approach to development,” with the goal “to balance economic progress with environmental protection and quality of life.”¹⁵⁸ Another organization, the American Planning Association (“APA”), focuses on the creation of community, equitable development, fiscal responsibility, and integration of long-range, regional, and sustainable development

153. See Edward T. Canuel, *Supporting Smart Growth Legislation and Audits: An Analysis of U.S. and Canadian Land Planning Theories and Tools*, 13 MICH. ST. J. INT’L L. 309, 346 (2005) (supporting implementation of Smart Growth regulations despite the critique that developers may find such regulations complex to navigate). Some states, such as Maryland, chose to make Smart Growth review practices encouraged but not mandatory to minimize such critiques. Gerrit-Jan Knapp & Dru Schmidt-Perkins, *Smart Growth in Maryland: Facing a New Reality*, LINCOLN INST. OF LAND & POL’Y 9, 10 (2006), <https://www.lincolninst.edu/publications/articles/smart-growth-maryland> [<https://perma.cc/KES8-ESYN>].

154. See Siemiatycki, *supra* note 38, at 6–7.

155. THE PLAN, *supra* note 7.

156. *About Smart Growth*, *supra* note 149.

157. Canuel, *supra* note 153, at 309.

158. *Id.* at 313.

viewpoints.¹⁵⁹ Each definition reflects the underlying basis of the Smart Growth Principles.

The ten Smart Growth Principles form the policy's methodological basis. P3 agreements that apply these principles during agreement-formation would consider the following practices: integration of mixed land uses, creation of walkable neighborhoods, preservation of open space and critical environmental areas, direction of development toward existing communities, provision of various transportation options, and encouragement of community-stakeholder collaboration.¹⁶⁰ P3 agreements for infrastructure projects that adopt elements of Smart Growth will receive the proven benefits of these considerations, including, but not limited to, the expansion of economic activity and increased environmental protection.¹⁶¹

Regulatory Smart Growth review can provide a list of factors used by parties to determine the adherence of a project to Smart Growth principles.¹⁶² Based on the mantra "Save Money by Taking Better Care of What You Have," compulsory review can save public partners money by supporting the dedication of funds to the maintenance of existing structures and freeing limited funds for

159. See *APA Policy Guide on Smart Growth*, AM. PLAN. ASSOC. (Apr. 14, 2012), <https://www.planning.org/policy/guides/adopted/smartgrowth.htm> [<https://perma.cc/X78W-X34T>] [hereinafter *APA Policy Guide of Smart Growth*].

160. See *What is Smart Growth?*, SMART GROWTH AM. (2017), <https://smartgrowthamerica.org/our-vision/what-is-smart-growth/> [<https://perma.cc/AT3A-BUDH>] (providing the full list of 10 Smart Growth Principles).

161. *The Project for Code Reform*, CONG. FOR THE NEW URBANISM, <https://www.cnu.org/our-projects/project-code-reform> [<https://perma.cc/QJ4X-FZFS>].

162. See N.Y. ENVTL. CONSERV. LAW §§ 6-0101, 6-0105 (McKinney 2010) (establishing the New York State Smart Growth Public Infrastructure Policy Act, which requires review of any infrastructure development for the maximization of "the social, economic and environmental benefits from public infrastructure . . . through minimiz[ation of] unnecessary costs of sprawl development including environmental degradation, disinvestment in urban and suburban communities and loss of open space induced by sprawl facilitated by the funding or development of new or expanded transportation . . . infrastructure"); see also Heidi Mouillesseaux-Kunzman et al., *New York State's Smart Growth Public Infrastructure Policy Act of 2010: Implementation Through 2014 and Significance for Local Government*, 17 *CARDI REPORTS* (May 2015), https://ecommons.cornell.edu/bitstream/handle/1813/55993/CaRDI_Reports-17-final.pdf?sequence=1&isAllowed=y/ [<https://perma.cc/UCC2-SGZT>].

the maintenance and repair of existing infrastructure.¹⁶³ States, municipalities, and private parties that support Smart Growth approaches believe these programs help grow state, regional, and local economies through strategic investment.¹⁶⁴ The APA “recognizes the tremendous economic growth potential” of Smart Growth tools like infill development and suburban corridor retrofit that present “existing suburban corridors with the opportunity to create more efficient development patterns that allow for a wider variety of economic opportunity, access, and placemaking.”¹⁶⁵ These funding and investment policies have been termed “smart lending.”¹⁶⁶

The environmental benefits of Smart Growth infrastructure development are also widely acknowledged. Smart Growth seeks to minimize future environmental harms of infrastructure expansion by addressing unnecessarily wasteful and impactful patterns of human development.¹⁶⁷ The EPA states that, “development guided by [S]mart [G]rowth principles can minimize air and water pollution, reduce greenhouse gas emissions, encourage cleanup and reuse of contaminated properties, and preserve natural lands.”¹⁶⁸ Furthermore, Smart Growth practices that promote compact development, safeguard environmentally sensitive areas, mix land uses, and support public transit can lessen the need for new infrastructure.¹⁶⁹ The affordability of infrastructure maintenance and development relates directly to the unsustainable pattern of suburban sprawl.¹⁷⁰ To address this,

163. *APA Policy Guide on Smart Growth*, *supra* note 159, at 1 (“the [APA] recognizes that maintaining, expanding, and optimizing the use of existing or prior public infrastructure investments resulting in more rational and efficient use of limited public resources and helps to preserve the natural environment”); *see also* SMART GROWTH AM., IOWA SMART TRANSPORTATION: SAVE MONEY AND GROW THE ECONOMY 2 (2011), <https://www.smartgrowthamerica.org/app/legacy/documents/smart-transportation-iowa.pdf> [<https://perma.cc/L23Q-TNN2>] [hereinafter IOWA SMART TRANSPORTATION].

164. *See* IOWA SMART TRANSPORTATION, *supra* note 163, at 3–5.

165. *APA Policy Guide on Smart Growth*, *supra* note 159, at 1.

166. 1 JAMES A. KUSHNER, SUBDIVISION LAW & GROWTH MANAGEMENT § 2.12 (2d ed. 2019).

167. *See* Siemiatycki *supra* note 38, at 6–7.

168. *About Smart Growth*, *supra* note 149, at 4.

169. *Id.*

170. SPRAWL RETROFIT INITIATIVE: THE CONGRESS FOR THE NEW URBANISM, THE UNBEARABLE COSTS OF SPRAWL,

the Smart Growth practice of infill development promotes the redevelopment of existing structures or development on already developed land.¹⁷¹ Another practice, transit-oriented development, focuses on mixed-use projects located near current transit infrastructure or where expansion of transit infrastructure is least impactful.¹⁷² Smart Growth legislation, regulation, and advisory programs that favor infrastructure projects that integrate these practices not only contain sprawl, they function to provide ridership and funding to transit systems, reduce automobile and road usage, and minimize the need for additional highway and roadway infrastructure.¹⁷³ The benefits of Smart Growth policy and practices clearly possess the capability to counter the weaknesses of P3 agreements that can harm the public's interests.

V. EXISTING STATE LEGISLATION: A MARYLAND CASE STUDY

P3 agreements and Smart Growth practices are both necessary tools in the modern era of infrastructure redevelopment. States have already begun to employ aspects of both through legislation, regulation, and administrative guidance. Past experience with P3s around the nation provides insight into the ways that P3 agreements for public infrastructure projects might inherently harm the public's environmental and economic interests. To minimize these harms, state P3 legislation may direct state agencies to adopt specific processes for P3 agreement formation.¹⁷⁴ Such regulations would aid municipal officials in

https://www.cnu.org/sites/default/files/SPRAWL-RETROFIT-UNB_1.pdf
[<https://perma.cc/38KE-DRYE>].

171. *What is Infill and Redevelopment?*, COMPLETE COMMUNITIES TOOLBOX, <https://www.completecommunitiesde.org/planning/landuse/what-is-infill/> [<https://perma.cc/2SPD-RJ9G>].

172. HIROAKI SUZUKI ET AL., TRANSFORMING CITIES WITH TRANSIT: TRANSIT AND LAND-USE INTEGRATION FOR SUSTAINABLE URBAN DEVELOPMENT 37–38 (2013), <http://documents.worldbank.org/curated/en/947211468162273111/pdf/Main-report.pdf> [<https://perma.cc/4TPM-RQQR>]; see also *Transit-Oriented Development*, FEDERAL TRANSIT ADMINISTRATION, <https://www.transit.dot.gov/TOD> [<https://perma.cc/3FDN-J6YV>].

173. See SUZUKI, *supra* note 172, at 13–14 (discussing the substantial capital investments necessary to develop a transit system).

174. Bolen et al., *supra* note 123, at 5–8 (listing states by the Smart Growth efforts each had adopted up until 2001); Canuel, *supra* note 153, at 341–343 (discussing Maryland's Smart Growth legislation and programs).

ensuring that the public's environmental and economic interests are protected.¹⁷⁵ State P3 legislation can also protect less-powerful players in infrastructure development, such as subcontractors and material suppliers concerned with inadequate payment assurances in P3 projects.¹⁷⁶ As of November 2014, nine states "require the private-partner and the prime contractor to provide performance and payment bonds" on P3 projects.¹⁷⁷

Smart Growth legislation that requires regulatory Smart Growth review of all P3 infrastructure projects can further minimize harms to the public. In theory, P3 legislation can integrate Smart Growth considerations to address concerns with P3s, as well as shortcomings, such as the lack of federal funding support for improving and expanding urban-transit. The integration of Smart Practices into P3 legislation and regulation, or passage of separate but complementary legislation, will work to prepare states and municipalities to negotiate P3 agreements, that of which provide for public input in project development and prioritize compact development patterns. The subsequent case study of a recent P3 agreement in Maryland in light of the state's underlying P3 and Smart Growth laws reveals final lessons on how state legislation must be structured to ensure reduction of public harms to the greatest extent possible.

Despite Maryland's extensive history as a state leader in Smart Growth policy, it struggled to protect the public interest in recent state-level P3 agreements due to the structure of the state's P3 legislation.¹⁷⁸ A P3 law intended to bring investments to

175. *Key to Unlock Potential Investors*, *supra* note 72. Some P3 laws already direct contracting partners to contemplate protection of the public interest when providing for risks in P3 agreements, such as when a private partner fails to deliver. *Id.* An example would be if the private operator of toll road cannot pay and files bankruptcy, the contract provides how the toll road still pays at least partly for itself. *Id.*

176. *33 States, Including Maryland, Have Enacted Laws Authorizing Public Agencies to Enter into Private-Public Partnerships*, 38 CONSTR. CONT. L. REP. 6, at ¶ 247.33 (Nov. 7, 2014) (this concern arises when P3 agreements are exempt from mechanic's liens and payment bond requirements) [hereinafter *33 States*].

177. *Id.* (The states that joined Maryland are Florida, Maine, North Carolina, Oklahoma, Texas, Virginia, California, and Ohio.)

178. See Canuel, *supra* note 153, at 341–45; see also Pete Tomao, *Larry Hogan Couldn't Have Canceled the Red Line So Easily if a New Bill Had Been Law*, GREATER GREATER WASH. (Mar. 1, 2016), <https://ggwash.org/view/40913/hogan-couldnt-have-canceled-the-red-line-so-easily-if-a-new-bill-had-been-law> [<https://perma.cc/6WNT-RJXF>] (discussing how Maryland needed new legislation

Baltimore's terminally underfunded urban transit systems, HB 560 (Maryland's P3 Law), instead became the catalyst for the cancelation of existing transit projects in exchange for the expansion of congested highways and the construction of high-speed toll lanes.¹⁷⁹ Maryland's experience with the application of its P3 legislation exemplifies how state legislatures should retain a check on executive control over state-level P3 agreements, and how explicit inclusion of Smart Growth review practices offers one such possible check and P3 laws should not be structured to avoid such review.

The use of Maryland's P3 Law to fund and construct problematic high-speed toll lanes goes against prior Smart Growth policy in Maryland.¹⁸⁰ Since 1997, Maryland incrementally adopted new programs and initiatives that became collectively referred to as the "Smart, Green, and Growing" legislative package under Governor Martin O'Malley, a Smart Growth-friendly Democrat.¹⁸¹ Some praised Maryland's previous Smart Growth program before O'Malley for a structure that used incentives to *encourage* developers to focus development in Priority Funding Areas ("PFAs"), "communities and places where local governments

in 2016 to prevent Hogan from reducing state aid for transit projects and supporting highway projects that promote urban-sprawl); *see also* Press Release, Martin O'Malley, Maryland Dep't of the Env't, Governor Martin O'Malley Announces Legislation to Reduce Global Warming Pollution (Jan. 23, 2009), <https://mde.maryland.gov/programs/Pressroom/Pages/1165.aspx> [<https://perma.cc/4FBU-F9X2>] (on file with author) (asserting that, prior to Hogan's policy changes, O'Malley recognized climate change as a threat to Maryland's public interests that mass transit improvements could help address) [hereinafter *O'Malley Announces Legislation*].

179. H.B. 560, 440th Gen. Assemb. Reg. Sess. (Md. 2009); Erin Cox & Luke Broadwater, *Under State Law, Opponents to Hogan's \$9B Toll Lane Plan Have Little Recourse*, BALTIMORE SUN (Sept. 22, 2017), <https://www.baltimoresun.com/politics/bs-md-hogan-highway-p3-story.html> [<https://perma.cc/5NFP-L7YC>]; Andrew Zaleski, *A \$9 Billion Highway That Promises to Pay for Itself*, CITYLAB (Sept. 26, 2017), <https://www.citylab.com/transportation/2017/09/a-9-billion-highway-that-promises-to-pay-for-itself/541119/> [<https://perma.cc/85KT-XDGD>]; 33 *States*, *supra* note 176, at ¶ 247.33.

180. *See* Tomao, *supra* note 178.

181. *Id.*; *see also* Parris N. Glendening, *Maryland's Smart Growth Initiative: The Next Steps*, 29 *FORDHAM URB. L.J.* 1493, 1493 (2002) (discussing Maryland's Smart Growth initiatives up until 2002); *O'Malley Announces Legislation*, *supra* note 178.

want State funding for future growth.”¹⁸² Critiques of the program’s success of directing growth into the PFAs influenced O’Malley to pass laws “intended ‘to strengthen and reinvigorate the fundamental tools of Smart Growth’” and “to protect the environment of Maryland, promote higher density development in existing communities, and to encourage sustainable growth.”¹⁸³ Through this legislative package, O’Malley sought to support the expansion of transit projects and budgeted nearly \$700 million towards the construction of the Red Line, a “proposed 14-mile east-west light rail line [intended to run] between Woodlawn in Baltimore County and the Johns Hopkins Bayview Medical Center in east Baltimore.”¹⁸⁴ One may reasonably conclude that O’Malley signed P3 legislation with the intent of funding Smart-Growth oriented transit projects.

O’Malley’s infrastructure policies align with generally agreed upon Smart Growth principles that investment in roadway expansions through the addition of high-speed toll lanes offers only a temporary fix to congestion. Not only does funding extensive toll lane expansions fail to address aging urban infrastructure, but widened roadways return to pre-expansion levels of congestion in as little as one-year due to the phenomenon of induced demand.¹⁸⁵

182. David Beste, *Growing Pains: Maryland’s Struggle to Introduce Smart Growth to a Growing Population*, 18 U. BALT. J. ENVTL. L. 79, 88 n.40 (2010) (quoting MD. DEP’T OF PLANNING, SMART, GREEN, AND GROWING PLANNING GUIDE 7 (2010), http://planning.maryland.gov/PDF/OurProducts/Publications/otherPublications/SGG_Guide_09_Web.pdf [<https://perma.cc/7KLJ-X9AY>]; Gerrit-Jan Knapp & Dru Schmidt-Perkins, *supra* note 153; *see also* Canuel, *supra* note 153, at 342, 343.

183. Beste, *supra* note 182, at 83; *see also* Tomao, *supra* note 178.

184. *See* Associated Press, *O’Malley Announces \$690M for Red Line in Baltimore*, DAILY RECORD (Sept. 4, 2013), <https://thedailyrecord.com/2013/09/04/omalley-announces-690m-for-red-line-in-baltimore/> [<https://perma.cc/3PQT-ZV6V>] (reporting O’Malley’s allocation of another \$246 million for the replacement of Baltimore’s 100-rail cars and signaling systems).

185. Gilles Duranton & Matthew A. Turner, *The Fundamental Law of Road Congestion: Evidence from US Cities*, 101 AM. ECONOMIC REVIEW 2616, 2645-46 (2011), <https://pubs.aeaweb.org/doi/pdfplus/10.1257/aer.101.6.2616> [<https://perma.cc/DW3K-R38Z>]; Angie Schmitt, *The Science is Clear: More Highways Equals More Traffic. Why are DOTs Still Ignoring it?*, STREETS BLOG USA (June 21, 2017), <https://usa.streetsblog.org/2017/06/21/the-science-is-clear-more-highways-equals-more-traffic-why-are-dots-still-ignoring-it/> [<https://perma.cc/NZ22-LCJ8>]; Zaleski, *supra* note 179, at 3.

Those who support this perspective say that decreasing the number of cars on existing roadways is the key to congestion reduction.¹⁸⁶ Improving and expanding mass transit to increase availability and ensure reliability, increases transit ridership, helps to reduce the number of auto-commuters, and relieves congestion.¹⁸⁷

The Red Line Project never came to fruition because of the structure of Maryland's P3 Law and the election of Republican Governor Larry Hogan in 2014.¹⁸⁸ Passed in 2013 by then-Governor O'Malley, HB 560 authorized state agencies to "adopt regulations and establish processes. . ." ¹⁸⁹ Drafted by a Democrat-controlled legislature with a Democratic governor, Maryland's P3 Law failed to provide any useful means for later legislatures or administrators to check executive implementation.¹⁹⁰ Instead, Maryland's P3 Law allows any sitting Governor to avoid the state legislature's traditional budgetary approval powers by entering into major P3 agreements solely through Maryland's Transportation's Authority.¹⁹¹ In addition, Maryland's P3 law did not require such projects to adhere to existing Smart Growth policies.

After his election, Hogan used Maryland's P3 Law to facilitate the addition of hundreds of miles of toll lanes to three of the state's most congested highways.¹⁹² Under the loophole provided in

186. Eric Jaffe, *Does Light Rail Really Alleviate Highway Congestion?*, CITYLAB (Feb. 29, 2012), <https://www.citylab.com/transportation/2012/02/does-light-rail-really-alleviate-highway-congestion/1358/> [https://perma.cc/CF34-2FHG] (reviewing Sutapa Bhattacharjee & Andrew R. Goetz, *Impact of Light Rail on Traffic Congestion in Denver*, 22 J. OF TRANSPORT GEOGRAPHY 262 (May 2012)).

187. *Id.*; see also Anderson, *supra* note 33, at 2–4.

188. Christian Schaffer, *Governor Hogan Defends Decision to Cancel the Red Line*, WMAR BALTIMORE (Oct. 30, 2018), <https://www.wmar2news.com/news/political/governor-hogan-defends-decision-to-cancel-the-red-line> [https://perma.cc/R8BQ-TNUU].

189. H.B. 560, 440th Gen. Assemb. Reg. Sess. (Md. 2009); 33 *States, supra* note 176, at 1 (authorizing such agencies as: (1) the Department of General Services; (2) the Maryland Department of Transportation; (3) the Maryland Transportation Authority; (4) and certain higher education institutions); Cox & Broadwater, *supra* note 179.

190. Cox & Broadwater, *supra* note 179.

191. H.B. 560.

192. Cox & Broadwater, *supra* note 179 (discussing Hogan's plan to add four toll-lanes to I-270 at a cost of \$6 to 7 billion, and to have Maryland finance \$1.4 billion of toll lane construction on the Baltimore-Washington Parkway).

Maryland's P3 Law approach, Hogan's plans required approval only from the Board of Public Works, a three-member body comprised of the governor himself and two others.¹⁹³ The P3 legislation allowed for private developer to offer proposals for how, when, and where to build the new lanes that require expansions into abutting communities, with no assurance of Smart Growth review to help ensure community involvement in the plan development process. To fund these agreements, Hogan also cancelled O'Malley's Red Line project.¹⁹⁴ Hogan relied on the immediate economic benefit of the P3-DBF model – that the agreement costs taxpayers nothing *now* – to garner public support.¹⁹⁵ Support resulted despite either the agreement's failure to consider a regional perspective, or failure to integrate public concerns into a determination of which infrastructure developments, through P3 agreements, could fix two problematic situations: the congestion on three of Maryland's major highways and the inadequacies plaguing urban transit and state-wide rails.¹⁹⁶ Thus, the prior legislature's creation of a streamlined approval process for P3 agreements, which failed to integrate the state's existing Smart Growth laws, inadequately provided future legislative or administrative checks over the formation of P3 agreements. Ultimately, this process failed to reflect the Smart Growth-friendly policies of the drafting-legislature. Consequently, states should learn from this and seek to explicitly integrate Smart Growth review for individual agreements into P3 legislation and regulation.

193. H.B. 560.

194. Michael Dresser & Luke Broadwater, *Hogan Says No to Red Line, Yes to Purple*, BALTIMORE SUN (June 25, 2015), <https://www.baltimoresun.com/politics/bs-md-hogan-transportation-20150624-story.html> [<https://perma.cc/6L46-TMGX>] (“By eliminating the expense of the Red Line and scaling back the state’s share of the Purple Line, Hogan freed up hundreds of millions of dollars he plans to use to undertake a significant shift in the state’s transportation priorities from public transit to road projects.”).

195. Pamela Wood, *Maryland Gov. Hogan’s Toll Lane Project in D.C. Suburbs Causes Dissent*, BALTIMORE SUN (June 3, 2019), <https://www.baltimoresun.com/business/bs-md-toll-plan-20190603-story.html> [<https://perma.cc/CT44-JQNF>]; see also Ross Filice, *Maryland Nixed its Options and is Moving Ahead with Road-Widening and Tolls on I-495 and I-270*, GREATER WASHINGTON (Mar. 13, 2019), <https://ggwash.org/view/71262/maryland-is-moving-ahead-with-its-plan-to-widen-highways-and-add-more-tolls> [<https://perma.cc/8FUD-KLHC>].

196. Filice, *supra* note 195; Wood, *supra* note 195.

VI. CONCLUSION

With dwindling funds available for surface transportation projects, many governments depend increasingly on P3 agreements to finance infrastructure projects.¹⁹⁷ In consideration of these shortcomings, state-level legislation should: (1) minimize risks to the public-partner posed by high interest rates and potential loss of control over fee rates and service quality, (2) actively facilitate public input and consultation in P3 agreement formation (possibly through the integration of Smart Growth policy), (3) help governments determine a project's appropriateness a for the P3 model, (4) provide for P3 renegotiation procedures in the event of unforeseen or unfavorable outcomes, and (5) facilitate production of guidance materials by state agencies to improve municipal familiarity with P3s. State legislatures should explicitly require Smart Growth review for all infrastructure projects to help provide a check on executive P3 legislation implementation and ensure the protection of the public's environmental and economic interests to the greatest extent possible.

197. *Public-Private Partnerships (P3s) Popular Globally, Gaining Stature in United States*, 36 CONSTR. CONT. L. REP., July 20, 2012, at ¶115.