EXAMINING VIRGINIA'S PUBLIC PRIVATE TRANSPORTATION ACT EXPERIENCE: HISTORY, PROCEDURES & ISSUES REGARDING ACQUISITION OF REAL PROPERTY INTERESTS UNDER THE ACT

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INTRODUCTION

Real estate lawyers – and especially those engaged in eminent domain litigation or negotiations for the acquisition of real property interests under the threat of eminent domain – need to be aware of the trend to finance and build transportation infrastructure as often as possible using Public Private Partnerships [PPP or P3] in Virginia in the place of traditional methods of funding.

This paper examines the experience in Virginia of utilizing a state Public Private Transportation Act [PPTA or the Act][1] to promote funding for and enable construction of new infrastructure and improvements to existing facilities. Virginia's Act is an initiative that federal highway officials have held out as a model for public private partnership legislation.[2] Federal highway researchers have performed an exhaustive 28-point analysis of Virginia's PPTA and found it to be extremely flexible.[3] Across the United States, especially in the current decade, transportation professionals have begun to turn to Public Private Partnerships [P3 or PPP] to fund infrastructure in the face of "growing concerns about the size of federal and state budget deficits, the long-term viability of financing the nation's highway and transit systems through motor-fuel taxes... future mandatory commitments to Social Security and Medicare... [recognizing the] need to ... ensure that transportation investments maximize the benefits of each federal dollar invested."[4] Virginia has been able to accelerate some substantial projects without the use of federal highway construction funds by converting federal projects to PPP status. Virginia's pioneer use of legislation to draw the private sector into building highway infrastructure dating back to 1988 for construction of the Dulles Toll Road[5] should afford the Commonwealth some advantage in the market for

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* This paper represents only the personal views and research of the author as a transportation studies scholar and researcher, and in no way represents an official position or opinion of either the Virginia Department of Transportation or the Office of the Attorney General of Virginia as agencies served by the author's law firm.

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[1] *See* VA. CODE § 56–556 et seq. (1950, as amended, first effective in 1995).

[2] Letter from Hon. Norman Y. Mineta, Secretary of Transportation, to Hon. Thomas E. Petri, Chair, Subcommittee on Highways, Transit & Pipelines of Committee on Transportation Infrastructure, U.S. House of Representatives 1 (May 24, 2006) [hereinafter cited as Mineta Letter].

[3] PPP Legislation, Analysis for State of Virginia, *available at* http://www.fhwa.dot.gov/ppp/legis_virginia.htm.

[4] Government Accountability Office, Report to Congressional Committees, Highway and Transit Investments, Options for Improving Information on Projects' Benefits & Costs & Increasing Accountability for Results, GAO–05–172 (Jan. 2005) [hereinafter cited as GAO–05–172].

[5] Benjamin G. Perez & James W. March, *Public-Private Partnerships and the Development of Transport Infrastructure: Trends on Both Sides of the Atlantic*, First International Conference on Funding

P3 investments. In the United States growth accompanied by competition in the P3 market is expected. Experience with investors likely is an asset since then federal Transportation Secretary Mineta, as far back as 2006, stated that in the future "every highway project in the planning phases [in the United States costing] over $500 million [is] expected to be a toll road."[6]

This article reviews Virginia's PPTA project history. It will briefly review use of the PPP concept and tolls in the United States. The paper will then focus on recent PPTA developments in Virginia, including the $548 million concession arrangement concluded in June 29, 2006 with an Australian toll operator to manage and maintain the Pocahontas Parkway 8.8-mile tolled highway near Richmond.[7] The article also will note other PPTA projects underway, under contract or expected in the near future.

Finally, this paper will present some conclusions about the Virginia P3 experience and provide information about a new agency and new procedures within the Virginia Department of Transportation [VDOT] that intend to promote PPTA project growth, provide adequate project oversight and retain responsibility for initiating and handling right of way eminent domain litigation within VDOT for P3 ventures.

THE HISTORY OF PUBLIC PRIVATE PARTNERSHIPS IN VIRGINIA

Virginia was a pioneer in promoting Public-Private Partnerships: it conceived the Dulles Greenway project and enacted the Highway Corporation Act of 1988 to enable its birth.[8] Some would argue that this early effort to draw private capital into building a tolled highway was not a PPP in the purest sense. In the early years the Greenway experienced a financial crisis but survived "after restructuring its debt ... and has since seen revenues grow steadily."[9] The Dulles Greenway "was the first purely private toll road in the United States in over 100 years."[10] Currently there are projects underway for the Dulles Road's improvement, maintenance and toll operations[11] as well as an extensive new 23-mile light rail project known as Dulles Metrorail extending the D.C. Metro Orange Line from East Falls Church Station along a Tyson's Corner-Reston-Herndon-Dulles Airport-Eastern Loudon County Corridor.[12] As far back as April 28, 2005, then VDOT Commissioner Philip Shucet signed a Comprehensive Agreement for a PPTA project to provide High-Occupancy Toll (HOT) lanes for I-495 on the Capital Beltway "between Springfield and the Dulles Toll Road."[13]

Since 2002 Virginia has completed three PPTA projects: (1) Route 288 extends approximately 30 miles with several interchanges running from I-95 south of Richmond northwest through heavily

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Transportation Infrastructure, Institute of Public Economics, University of Alberta, Banff Centre, August 2–3, 2006.

[6] Mineta Letter, *supra* note 2, at 2.

[7] FHWA Case Study, Virginia Route 895 (Pocahontas Parkway), *available at* http://www.fhwa.dot.gov/PPP/pocahontas.htm.

[8] Government Accountability Office (then known as General Accounting Office), Report to Congressional Requesters, Highways and Transit, Private Sector Sponsorship of and Investment in Major Projects Has Been Limited, GAO–04–419 (Mar. 2004) [hereinafter cited as GAO–04–419].

[9] Interview with senior VDOT Central Office Management (upon agreement not to reveal identities). *See also* Perez and March, *supra* note 5, at 10.

[10] Perez & March, *supra* note 5, at 10.

[11] Dulles Toll Road, *available at* http://www.virginiadot.org/projects/dullesHome.asp.

[12] Dulles Metrorail, *available at* http://www.dullesmetro.com/about/index.cfm.

[13] VDOT website, *available at* http://www.vdot.virginia.gov/projects/ppta-defaultHOTLANES CapitalBeltway.asp.

populated Chesterfield and Henrico Counties to I-64 West of Richmond; (2) the 8.8 mile Pocahontas Parkway with a high bridge over the James River; and (3) Jamestown 2007 or Route 199, a five-phase $31.8 million PPP converted from a federal project in order to build the project well before the traffic anticipated for the 400th Celebration of the Jamestown Settlement.[14]

Other projects currently either under procurement, under contract or under construction include: the Route 28 freeway in Northern Virginia with a combined commitment in excess of $200 million with six interchanges that will be expanded to ten; the I-95 & 395 HOT Lanes; the Coalfields Expressway in the Bristol District; Route 58, a 36-mile design/build job between Hillsville and Stuart; I-81 improvements to separate car and truck traffic; and the Downtown Tunnel/Mid-Town Tunnel/MLK extension between Portsmouth and Norfolk. VDOT also has five major P3 projects "under research and development."[15] The financing for the Route 28 Project is provided by state highway funds and proceeds from revenue bonds. These bonds will be repaid by taxes assessed to residents and properties in the Special Route 28 tax district that benefit from this construction.[16]

The Pocahontas Parkway near Richmond was a major project valued in excess of $318 million, with $300 million of that amount funded by a revenue bond issue not encumbering the credit of the state to be repaid from tolls.[17] The cost of the Pocahontas project accelerated when the design called for a bridge over the James River high enough to accommodate ships without stopping traffic by opening a draw and tolls proved in the short run to be inadequate to service the bond debt.[18] On June 29, 2006 following 18 months of negotiations, a 99-year concession was awarded to Transurban USA, a private Australian toll operator for a price of $548 million.[19] A consortium of banks from Ireland, Spain and Germany provided new Pocahontas financing and upon the award of a $150 million federal TIFIA[20] loan, Transurban will construct a new 1.58 mile four-lane road connecting the project to Richmond International Airport, refinance $95 million long-term debt and upgrade electronic tolling systems.[21] Pocahontas P3 is the first project where TIFIA funds have been used to refinance long-term debt,[22] but Congress established "the TIFIA Credit Program… to leverage Federal funds by attracting substantial private and other non-Federal co-investment in critical improvements to the nation's surface transportation system."[23]

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[14] *See* VDOT website, *at* www.vdot.virginia.gov/business/ppta-CompletedProjects.asp (PPTA Completed Projects). The author was involved deeply in acquisition of right of ways for routes 288 and 199 and has also worked on some aspects of right of way acquisition for the new Richmond Airport road connection between Richmond International Airport and the Pocahontas Parkway.

[15] *See* Virginia Office of P3 website, *at* www.vappta.org/projects.asp (PPTA Active Projects).

[16] *See* Route 28 PPP Website, *at* http://www.28freeway.com/index.html.

[17] *See* National Council for Public-Private Partnerships website, *at* http://www.ncppp.org/cases/pocahontas.shtml. The NCPPP is a trade organization promoting the merits of PPP operations and awards of contracts and did not report the lagging tolls for this project that encouraged VDOT to look for an investor toll operator to take over the facility.

[18] Interview with senior VDOT Management (Nov. 8, 2006).

[19] Federal Highway Administration (FHWA), PPP Case Studies, *at* http://www.fhwa.dot.gov/PPP/pocahontas.htm.

[20] Transportation Infrastructure Finance and Innovation Act of 1998, 23 U.S.C. §§ 601–609.

[21] *See* FHWA, PPP Case Studies, http://www.fhwa.dot.gov/PPP/pocahontas.htm.

[22] *See* FHWA, PPP Case Studies, http://www.fhwa.dot.gov/PPP/pocahontas.htm.

[23] FHWA, Manual for Using Public-Private Partnerships on Highway Projects 10 (2005). *See also* http://www.fhwa.dot.gov/ipd/tifia.

VDOT[24] continues actively to seek PPTA projects, and a number of possible projects are shown in the footnotes.[25] These projects in current dollars are estimated to cost in the range of \$6–\$12 billion if they could be built today. (The Mid-Town/Downtown Tunnel project between Norfolk & Portsmouth is now under contract.)

FUNDING INFRASTRUCTURE THROUGH PPP INNOVATIONS: THE POLITICAL & ECONOMIC CLIMATE AT THE NATIONAL LEVEL AND ITS INFLUENCE ON THE VIRGINIA EXPERIENCE

Beginning in 1792, when Pennsylvania chartered the Philadelphia and Lancaster Turnpike, private investors financed many roads by tolls until about half way through the 19th century.[26] A 2004 GAO compilation of statistics shows our most recent data on tolling:

(a) 4 million total miles of roads;

(b) Approximately 437,000 arterial miles of roads;

(c) 4,611 miles of public-owned toll roads—about 1% of arterial mileage;

(d) 15 privately owned toll roads—only 111 miles (10 of these for property/vacation area access);

(e) 15 privately owned toll bridges.[27]

From the above, it is obvious that America has little infrastructure that is publicly or privately tolled. While 2,102 miles of in-place toll roads were allowed to be a part of the Interstate System in 1956, when "construction of the Interstate System began, proposals for additional toll roads languished.... [In] 1963 the last of the toll roads planned before the Interstate System ... opened, and few additional proposals were seriously considered for many years."[28]

P3 projects in the U. S. often have not involved tolled facilities but have been "Design-Build or Management Contract" approaches.[29] However, with Secretary Mineta's admonition announcing the

[24] VDOT stands for the Virginia Department of Transportation.

[25] *See* VDOT website, *at* www.vdot.virginia.gov/business/ppta-UpcomingProjects.asp. The Southeastern Parkway and Greenbelt proposes to extend from the interchange of Interstates 64 and 464 in Chesapeake easterly to a point on I-264 near Oceana Naval Air Station. The Midtown Tunnel Corridor features a new Norfolk-Portsmouth tunnel serving the congested area near the large Portsmouth Marine Terminal and the even larger Maersk Marine Terminal and is now under contract. The proposed Route 460 toll road running westerly from Suffolk to I-95 would provide: a safer limited access road, an additional emergency evacuation route from Hampton Roads in the event of a severe hurricane or a coordinated terrorist attack on the area's port facilities or Armed Forces bases, and a route to mitigate the projected doubling of truck traffic from new port capacity; it is now under procurement. *See also supra* note 16.

[26] U.S. DOT, Report to Congress on Public-Private Partnerships 15 (Dec. 2004).

[27] GAO–04–419, *supra* note 8, at 7–8.

[28] U.S. DOT, Report to Congress 16 (Dec. 2004). The writer recalls the celebrations in Hampton Roads when tolls were removed from the Elizabeth River tunnels and the Virginia Beach Expressway.

[29] U.S. DOT, Federal Highway Administration, Synthesis of Public-Private Partnership Projects for Roads, Bridges & Tunnels From Around The World – 1985–2004, at 31–36 (Aug. 30, 2005) (prepared by AECOM Consult, Inc.) [hereafter cited as FHWA, PPP Around the World Synthesis].

current decade as a new era when large projects likely will be tolled,[30] the market nationally for PPP tolled infrastructure has been expanding and is expected to continue to increase. Virginia can hope to be a P3 leader on a larger scale in such expansion as a growing federal deficit and other demands remain a major concern for transportation professionals competing for available resources.[31] With the support of Governor Robert McDonnell's administration to promote and advance the use of P3s, Virginia has established a new agency under its Secretary of Transportation that began operations in the summer of 2011 as the Office of Transportation Public-Private Partnerships.[32]

VIRGINIA'S PPP PERSPECTIVE

Turning now to transportation funding in Virginia, this state's motor fuel tax is among the lowest in the nation at 17.5 cents per gallon, has not been raised since 1986, and in the intervening 25 years "these revenues have lost 40% of their purchasing power as a result of inflation."[33] In light of this declining purchasing power of fuel taxes, the VDOT Fiscal Year 2007 Business Plan enunciated by then Acting Commissioner Gregory Whirley[34] accepted the call of Virginia's political leaders to engage the private sector and reported on the strength of the Agency's Innovative Project Delivery Unit that promotes and shepherds PPTA projects from conception through completion.[35] VDOT's Innovative Project Delivery Unit has been involved with P3 projects for some years now and will work closely with the new Office of Transportation P3s under the Secretary of Transportation.[36] Since the unveiling of its FY 2007 Business Plan, VDOT has been committed to remaining "nimble and flexible as a business to respond to changing conditions" (*i.e.* declines in funding or effects of inflation) to deliver the best transportation programs, systems and management possible with the resources at hand.[37]

Striving to utilize the PPP concept to the fullest, VDOT in May 2005 signed its first PPTA Comprehensive Agreement *to include the contribution of private equity*[38] (HOT Lanes, I-495) and announced on January 6, 2006 the execution of nine comprehensive agreements for PPTA projects valued at $2 billion.[39] VDOT's former Commissioner, David Ekern, appointed in late September 2006, announced early in his administration that he held as a top priority working "with the private sector and … federal, state and local partners to speed innovative 21st century traffic management improvements to

[30] Mineta Letter, *supra* note 2, at 2–6. Every project currently planned for "more than $500 million [is] expected to be a toll road." *See also supra* note 3.

[31] GAO–05–172, *supra* note 4, at 2. The nation must deal with servicing the debt the federal deficit represents, managing increasing Medicare and Social Security benefits for an aging population, the aftermath of natural and environmental disasters, the ground wars in Iraq and Afghanistan, domestic security measures and the effects of inflation on static fuel taxes.

[32] *See* www.vappta.org/about_the _office.asp.

[33] VDOT website, Funding Trends, www.virginiadot.org/about/resources/FactBookFunding Trends.pdf. *See also* Motor Fuel Excise Tax Rates, Federation of Tax Administrators, http://www.tax admin.org/FTA/rate/motor_fl.html.

[34] Whirley is now the permanent VDOT CEO and known by the new title "Commissioner of Highways" after legislation from the 2011 Session of the General Assembly.

[35] VDOT Business Plan Overview 7, 22–24 (Sept. 2006).

[36] Interviews with VDOT management (summer 2011).

[37] VDOT Business Plan Overview 5 (Sept. 2006).

[38] Emphasis added.

[39] VDOT Agency Strategic Plan 3 (Jan. 2006).

the congested areas of the state" at the same time announcing that he had signed an interim PPTA agreement "to bring innovative high-occupancy toll (HOT) lanes to Interstates 95 and 395."[40]

ANALYSIS AND CONCLUSIONS

With several billion dollars in infrastructure in place or proceeding through the PPTA process and the prospect of projects in the billions presently under future consideration, Virginia stands on the threshold as ready as any state to use PPPs to deliver and finance transportation infrastructure. Because Virginia has had significant experience with PPPs, it has dealt with problems and met challenges. Elliott Sclar, one of the best known American scholars on privatization, has noted that "[o]versight is a classic problem in public contracting… [and] the terms of the contract itself… [can make]… the nature of oversight vague."[41] At least partly because of lack of experience with P3 oversight, VDOT had to defend a substantial counterclaim in a lawsuit that arose from the Route 199 PPTA project in Williamsburg where VDOT allowed a project corporate property owner to build a privately-owned sound barrier on VDOT owned right of way land.[42] In the early days before conversion to P3 status when Route 199 had been a federal project, FHWA was requiring VDOT to construct certain sound barriers that were not required when Route 199 became a PPP.[43] Such litigation arising from changing conditions can be avoided in the future with better attention to contract terms and keener oversight. To this end VDOT has created a new Chapter 10 in the Right of Way Manual of Instructions for Right of Way Acquisition that includes a helpful matrix and attachments detailing the handling of P3 land acquisition for both Design/Build PPTA Projects and Concession Projects that will be tolled. The VDOT Special Projects Section, which was expanded in 2009 as the Right of Way & Utilities Division was reorganized, will now have teams in the field as well as in VDOT's Central Office operating under the guidelines of the new Chapter 10 and assisting with Design Build and PPTA toll facility concessionaires as well as Urban Construction Initiatives of local governments. [44]

Under the new acquisition procedures for P3 projects whether the mode is design/build or concessionaire, VDOT retains the ultimate responsibility to determine if settlement is appropriate or whether to file suit to condemn the property rights required in the event that an amicable settlement is not reached with any landowner. The new procedures have been approved by the FHWA and stipulate that VDOT retains sole authority to provide notices to FHWA that P3 project right of way has been cleared. For P3 projects, VDOT provides the funds for land or property rights acquired by eminent domain since the Private Partners – as the concession operators that will collect tolls – have no interest in assuming the risk involved in contested land value litigation. Within the past 12 years, land acquisition costs generally for all highway construction are conceded to have averaged approximately 50% of the cost of every major transportation project in Virginia.[45] Because land acquisition is such a significant part of transportation infrastructure costs and recouping land costs would require much higher tolls, the Private Partners do not wish to assume the risk that higher tolls might reduce traffic and revenue for their project.

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[40] VDOT Press Release CO-0655, *available at* http://www.virginiadot.org/infoservice/news/newsrelease.asp?ID=CO-0655.

[41] ELLIOTT D. SCLAR, YOU DON'T ALWAYS GET WHAT YOU PAY FOR/THE ECONOMICS OF PRIVATIZATION 34 (Cornell University Press paperback ed. 2001).

[42] CTC v. Williamsburg Landing, Inc., Civil Action No. 10736 (Williamsburg/James City County, Va. Cir. Ct.).

[43] *Id.*

[44] *See* VDOT Right of Way & Utilities Division, Manual of Instructions, Right of Way Acquisition ch. 10 (3d ed. Jan. 1, 2011) (Special Projects Section).

[45] Interviews with various transportation consultants in Virginia and VDOT Managers from 2006–2011.

VDOT senior managers have, with the benefit of hindsight, considered whether the design of the extremely high bridge feature of the original Pocahontas toll road may have pushed project costs and debt to limits that contributed to the financial problems that were resolved only by the current P3 concession awarded to Transurban USA.[46] One sees where experience with contract administration opens minds, and the Virginia experience is burgeoning.

Prior to the PPP innovations contained in the SAFETEA-LU[47] federal legislation, recent federal research had concluded that nationally "active private sector sponsorship and investment seem unlikely to stimulate significant increases in the funding available for highways and transit."[48] Before SAFETEA-LU the federal toll emphasis was on "pricing" to control congestion. With its new allocation of federal funds for tolled infrastructure construction costs, SAFETEA-LU has prompted transportation scholars to suggest that "the federal government is beginning to recognize the need … to use tolling to undertake new highway … expansions."[49] In Virginia the PPP concept has not yet attracted new private capital to the extent that officials hope to generate over time—although the I-495 HOT Lanes did bring, for the first time, significant private money for construction. The Pocahontas Parkway lease of June 29, 2006 also brought significant private capital investment to the state. Critics who say that the PPTA in Virginia has so far offered nothing new in the way of infrastructure finance[50] need to consider the HOT Lanes and Pocahontas examples.

Any analysis of state PPP infrastructure funding must address the fact that the Virginia experience with PPP finance has been typically American. One cannot ignore that "the United States … has a strong appetite for public debt and has structured its tax code … [to create incentives for] the use of tax-free municipal bonds to develop public infrastructure."[51] In the past the desirability of tax-free bonds has added a dimension to American infrastructure finance that distinguishes the American experience from that of Europe and is likely the chief reason why American PPPs had not attracted significant private capital when GAO–04–419 was published. The tax exempt bonds held by Virginians that have so far been a main source of funding for PPP highway projects have admittedly cost Virginia amounts ranging from \$1–\$3 million in lost tax revenue.[52] However, as far back as 2006, Virginia's PPP experience included more than \$2 billion in new infrastructure that would have been deferred but for VDOT's goal shared with the General Assembly to make Virginia a leader in PPP infrastructure building.

Under the strain of the current national budget crisis in the United States, the future of state and municipal bonds for transportation infrastructure is in doubt. State and local governments struggle to fund operations with the reduced and shrinking federal and/or state funds available. With fewer state and

[46] Interview with Senior VDOT Manager (Nov. 7, 2006). *See also supra* note 20.

[47] Safe, Accountable, Flexible, Efficient Transportation Act: A Legacy for Users, Pub. L. No. 109–59, 119 Stat. 1144 (signed by the President on Aug. 10, 2005).

[48] GAO–04–419, *supra* note 8, at 30.

[49] Perez & March, *supra* note 5, at 15. *See also* FHWA Manual for Using Public-Private Partnerships on Highway Projects 38–43 (2005) (explaining new provisions for bonds and flexibility for toll use, broadened TIFIA funding, State Infrastructure Bank provisions, Toll Pilot Programs, Express Lanes Demonstration Program, etc., all designed to make "it easier and more attractive for the private sector to participate in highway infrastructure projects").

[50] James J. Regimbal, Jr., *An Analysis of the Evolution of the Public-Private Transportation Act of 1995* (Southern Environmental Law Center, Jan. 2005). Regimbal's analysis is for an environmental advocacy group and at the time of publication did not have the advantage of later published data cited herein.

[51] Perez & March, *supra* note 5, at 15. *See also* FHWA, PPP Around the World Synthesis, *supra* note 29, at 35–36.

[52] GAO–04–419, *supra* note 8, at 18.

federal funds available to balance budgets and make bond payments, local governments in the future may find it more difficult to obtain bond ratings that make their bonds desirable investments even though tax free.

Scholars who have examined various public-private partnerships have seen "movement toward closer partnerships, involving joint financing and responsibility… [in the fields of] transportation, energy and applied technology research."[53] If, as expected, there is a decline in traditional sources of funding for transportation infrastructure, this movement will likely intensify. Caution from a writer who reviewed extensive literature directs attention to the possibility that "when partnerships fail through bankruptcy, inability to meet goals [etc.] … government is the provider of last resort … [and] when partnering involves essential services… is expected to fulfill the … responsibilities of failed private sector partners [references omitted]."[54] Virginia's public employee transportation professionals appear aware of the state's ultimate responsibility for essential services and the need for strong private partners.[55]

Virginia can point to several billion dollars of PPP projects completed, under construction or under contract. Its rising PPTA experience is significant among the 50 states because from 1985:

> PPP projects represent a $104 billion investment in infrastructure… of which $42 billion is for roads, bridges and tunnels. This [$42 billion] represents 13 percent of the total PPP funding for highway-related projects worldwide… [but] what is new is the growing interest in and variety of funding, financing, and project delivery approaches that are emerging under the guise of public private partnerships. … Even in the United States, where a substantial dedicated funding mechanism long supported a robust highway development program, there is growing recognition that traditional infrastructure funding and delivery approaches are inadequate to meet the increasing economic development and mobility needs of citizens and businesses alike, while keeping the existing highway system in a state of good repair.[56]

Some transportation scholars, consultants and lawyers are in quandary over the proposed amendment to Section 11 of Article 1 of the CONSTITUTION OF VIRGINIA about whether it will affect the future use of the P3 vehicle for infrastructure financing and development.[57] The proposed amendment allows eminent domain to be used to acquire private property only for "public use," but in the present form of the Amendment, public use does not include any situation where "the primary use is for private gain, private benefit, private enterprise."[58] Some argue that tolled P3 highway facilities are essentially for private gain, benefit or enterprise of the Private Partner and thus do not meet the definition of "public use." A secondary argument is that toll roads are not truly open to the "public" – because the facilities are only open for those persons who can afford the tolls.

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[53] Pauline Vaillancourt Rosenau, *The Strengths and Weaknesses of Public-Private Policy Partnerships*, 43 AMERICAN BEHAVIORAL SCIENTIST, No. 1, at 26 (Sept. 1999).

[54] *Id.* at 21.

[55] *See* www.virginiadot.org/business/ppta-Guidelines.asp. Virginia's Pocahontas PPP experience has also demonstrated the need for strong partners.

[56] FHWA, PPP Around the World Synthesis, *supra* note 29, at 35–36.

[57] Informal discussions at the 2010 & 2011 CLE International Eminent Domain Annual Seminars at Tides Inn & Richmond, respectively. *See* H.J. Res. 693, Ch. 757, 2011 Gen. Assem., Reg. Sess (Va.) (agreed to by the Virginia House of Delegates, Feb. 23, 2011 and agreed to by the Virginia Senate, Feb. 22, 2011, 2011).

[58] H.J. Res. 693, 2011 Gen. Assem., Reg. Sess. (Va.). *See supra* note 57.

The author has interviewed, face-to-face, three knowledgeable and senior elected officials in Virginia government; two of them have said that there is no danger that transportation infrastructure P3 projects would be subject to challenge as not being "public uses" "since the General Assembly wishes to see an expanded use of P3s in Virginia and had no intention to restrict or hamper P3 projects." These two officials are confident that no Virginia court would hold that the "primary use" of a P3 is for private gain or profit. The third elected official interviewed said that he was aware of the concern that if the Amendment remains in its present form some might advance a legal argument that a P3 model for a tolled facility is not a "public use." The same official stated that the final form of the proposed amendment, if and when it goes to the voters, will make it clear that P3 transportation projects for toll roads are to be considered "public uses" in Virginia. If the proposed Amendment to the Virginia Bill of Rights became law in its present form, then motions to dismiss might be filed in some eminent domain proceedings by landowners whose property is needed for a P3 project where the landowners are tempted to use any defense available wish to stop a project from causing them to give up any property or property rights.[59] The 2012 Session of the Virginia General Assembly may address the issue directly, as the third official cited above has stated will be the case. Transportation officials, consultants, lawyers for condemnors and landowners and indeed landowners themselves will be following this proposed change to the law of Virginia.

Virginia's challenge is to dedicate and appropriate sufficient state funds so as fully "to promote PPPs for new infrastructure under the ... SAFETEA-LU reauthorization of the Federal-Aid Highway Program."[60] The Virginia experience thus far suggests that the widest, most ambitious use of P3 relationships will still require significant transportation monies from the state treasury because the Private Partners will look to government—the Public Partner—to provide all funds for acquisition of land or other real property rights needed for any tolled project.[61]

[59] The National Conference of State Legislatures has now provided a 106-page Public-Private Partnerships for Transportation Toolkit for Legislators that gives access online to a wealth of material that will prove helpful to legislators and others involved with PPPs facing issues that will arise. The Toolkit can be accessed at www.ncsl.org.

[60] FHWA, PPP Around the World Synthesis, *supra* note 29, at 36.

[61] Eric Weiss, WASHINGTON POST, Oct. 23, 2006, *available at* http://www.washingtonpost .com/wp-dyn/content/article/2006/10/22/AR2006102201081_pf.html. For example, this article entitled, *Rising Costs Strain Private Partners*, about HOT Lanes between Springfield and Georgetown Pike on the Virginia portion of the Capital Beltway explains the likely need for $100 million in state funds for this PPP to succeed.