

# LAD CASE STUDY

March 2026

## Restructuring the Purple Line Project:

*Off the Rails*

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## **Breaking Up and Breaking Down**

In early September 2020, Maryland's Purple Line light rail project was going to court. It wasn't the first time. This time, however, the conflict was existential, because the partnership formed to deliver the Purple Line was coming apart. The court was deciding whether to extend a restraining order preventing the demobilization of the project's contractor, the termination of its concession contract, and the transfer of hundreds of subcontracts from the project concessionaire back to the state of Maryland.

The Purple Line was already facing years of delays and hundreds of millions of dollars in cost increases, and disagreements over the responsibility for those delays and costs were pushing the project's partnership to the brink. Demobilization would likely make things much, much worse. Greg Slater was the Secretary of Transportation for Maryland at the time, which was both suing the consortia contracted to deliver the Purple Line, while simultaneously negotiating with them to try to settle on a solution and prevent a disaster. "Our primary concern at the time was crane demobilization," said Slater. "If that was allowed to proceed, that alone would have meant at least six months of delays."

The ramifications of a complete breakdown would likely extend far beyond the project itself. Thierry Déau was the founder of Meridiam, one of the investors in the Purple Line concession company, and one of the negotiators on its behalf. "We really couldn't have an option in which the project was completely terminated...you can't let that much public money be invested without delivering a project."

## **The Purple Line**

The Purple Line is a 16-mile light rail transit project connecting the growing Washington D.C. suburbs of Silver Spring and Bethesda. Once complete, the line will integrate with Washington Metro's larger rail transit network. A contract to build the Purple Line was awarded by the Maryland Transit Administration (MTA) in 2016.

New transit lines in the United States are typically developed by transit agencies via many different contracts and agreements. They are financed using federal grants and loans along with state and/or local bonds, and designed and built using standard consulting and construction contracts. Once construction is complete, they are maintained and operated via some a combination of agency staff and services contractors.

Maryland's Purple Line was somewhat unique, because it was procured via a public-private partnership (P3), in which a single consortium would be contracted to design, build, finance, and then operate and maintain the new transit line over a 36-year concession. While P3s are slightly more common in other sectors and globally, the Purple Line was just the second rail transit P3 in U.S. history when it was awarded, after Denver's Eagle Rail P3.

## **Rail Transit Development in the United States**

By many measures, the passenger rail sector in the United States is small compared to rail transportation in developed countries in Europe or Asia, and this is the case for both light and heavy rail transit, as well as for regional passenger rail and high-speed rail. American travelers use rail transit comparatively less for both commutes and longer trips. With notable exceptions, major U.S. cities have less rail transit infrastructure than comparable cities in Europe or Asia. Despite decades of planning, high-speed rail is nearly non-existent in the United States outside of the Acela corridor.

Perhaps the only metric in which the American passenger rail infrastructure exceeds those of comparable countries is the industry's unit costs. One recent comparison found the United States to have the sixth highest unit costs for rail transit projects in the world, though even that rank is misleading, because the five countries with higher costs all had rail projects with nearly twice as much tunnelling (65%) compared to the United States (37%).<sup>i</sup> Another recent study estimated the cost per mile of U.S. rail transit to be \$1,347 million for primarily tunneled projects, compared to just \$292 million in South Korea.<sup>ii</sup>

America's lack of rail transit is not due to a lack of political will. Passenger rail transit enjoys strong public and political support in the United States. Recent polling indicates that a supermajority of Americans support passenger rail investment and service expansions, and that support for passenger rail is bipartisan.<sup>iii</sup> Various subsectors of passenger rail also enjoy significant support via federal infrastructure funding. While the United States spends more, in aggregate, on road and highway infrastructure, rail infrastructure projects tend to also receive a high federal cost-share, and transit receives a far higher share of federal funding relative to its share of passenger-trips. When including state and local funding (which is the majority of transportation infrastructure spending), transit's share of national infrastructure spending is even higher.<sup>iv</sup> Passenger rail is arguably one of the most popular public works sectors in the United States.

The American transit sector does face unique challenges related to the development process for large infrastructure projects in the United States. When an infrastructure project requires federal funding or an action by one or more federal agencies, the development process is governed by the National Environmental Policy Act of 1970 (NEPA). For an infrastructure project with significant environmental impacts, NEPA requires the federal agency to complete an Environmental Impact Statement (EIS), which is a study of the project's environmental and social impacts and potential project alternatives.

An EIS is typically an enormous administrative undertaking, which can produce thousands of pages of documentation and take years to complete on average.<sup>v</sup> The EIS also includes a democratic process for taking community input: federal agencies must publish a Draft EIS for a mandatory public review period in order to collect comments on the study from citizens and stakeholder groups. The agency must then publish a Final EIS which includes changes and responses based on the comments received.

The NEPA process also gives stakeholders recourse to federal courts to challenge an environmental study like an EIS. When stakeholders believe that an EIS did not adequately study a particular environmental impact or alternative, they can petition federal courts and request that the project be enjoined until the claimed deficiency is remedied. Federal environmental permitting in the United States has thus evolved significantly over time, as courts produce more federal case law regarding what the NEPA process requires.

The NEPA process and stakeholder intervention via comments or litigation are a pivotal part of American infrastructure development, but NEPA is just one of many laws and regulations that impact the development process or allow for stakeholder intervention. State or local environmental regulations, other federal environmental laws, various property right protections and utility relocation regulations all protect the interests of various stakeholders, and may provide those stakeholders opportunities to intervene in large infrastructure projects. These regulations compound with a very natural element of political risk that comes with infrastructure development in a democracy: elections. Public support for any given infrastructure project may change over time. Political champions may reach a term limit or be voted out, and new administrations may change or outright cancel projects in development.

The NEPA process applies to all federal actions, and only a very small percentage of actions with significant environmental impacts are required to complete an EIS. That includes many large transit infrastructure projects like the Purple Line.

## **Planning the Purple Line**

The contract to deliver the 16-mile light rail Purple Line project was awarded in 2016, but planning for the project began much, much earlier. Montgomery County, Maryland, purchased some right of way for the project in 1988, while exploring the potential for a new rail line between the Washington, D.C. suburbs of Silver Spring and Bethesda. In 1990, the county adopted a new master plan amendment to develop a transit line along the corridor.

For years, the project made very little progress in planning. In the early 2000's, the project gained momentum with political support from Governor Parris Glendening and his successor in Governor Robert Erlich. In 2003, the Maryland Transit Administration (MTA) and Federal Transit Administration (FTA) formally began the NEPA process to study transit alternatives along the corridor. The project scope was also expanded during this period to extend the alignment east past Silver Spring to its present terminus at New Carrollton. See **Exhibit 1** for a map of the Purple Line's planned alignment.

In 2008, a Draft EIS for the project was published, and in 2009 Governor Martin O'Malley's administration selected light rail as the preferred project alternative (Governor Ehrlich briefly explored a bus rapid transit solution). Environmental permitting and early engineering continued through late 2013, when the state published a Final EIS for the project.

Around the same time, Governor O'Malley announced that the state intended to use a unique public-private partnership contract to deliver and operate and maintain the new rail line. In 2014, the FTA published a Record of Decision for the Purple Line, formally ending the NEPA permitting process after roughly 11 years.

The Purple Line EIS studied eight different alternatives for the project, including heavy, medium, and light investment versions of both light rail and a bus rapid transit system, as well as a no build alternative. The EIS also considered a "Transportation System Management" solution, which was essentially a number of minor transit improvements without the development of a new line. Under the preferred "medium investment" light rail alternative, the Purple Line would operate on dedicated or exclusive lanes for 13.9 miles of the 16-mile system. By 2040, the new transit line was forecast to have more than 74,000 daily boardings.<sup>vi</sup> See **Exhibit 2** for a map of the planned Purple Line with integrations to Metro's broader rail transit network.

## **Public-Private Partnerships**

Governor O'Malley's decision to use a P3 to deliver the Purple Line made it one of the first major rail P3s in the United States. A P3 is an alternative way to procure and deliver a public works project, and when the procurement model is applied it is generally for very large, complex projects. P3s are more commonly used to deliver infrastructure in Europe, the United Kingdom, Canada and Australia relative to the United States.

P3s differ from traditional public contracting in a few key ways. In general, a P3 entails a long-term concession contract to Design, Build, Finance, Operate and Maintain (DBFOM) an infrastructure project. Thus, a single contract governs the project's entire lifecycle, rather than many contracts or agencies for various aspects of design, construction and then maintenance. To the extent possible, P3 contracts are also

performance-based, rather than specification-based. In other words, where possible the contract specifies the desired project outcomes, rather than tasks or methods of achieving those outcomes.

Most importantly, however, financing for the project is raised at the project level, rather than as a general obligation financing on the state or city's balance sheet.

This differs significantly from a traditional rail transit project, in which a state or transit agency would deliver the project by managing a large number of disparate contracts and public employees for various services or construction work, with state or local funds raised by selling general obligation bonds.

Not all P3s entail the full spectrum of the DBFOM project life cycle, and each project differs significantly in terms of the risks and responsibilities allocated to the private concessionaire for the project. That allocation of risk and responsibility is one of the main reasons governments use P3s. By using a P3, public sponsors can transfer some risks to the private contractor, and thus create aligned incentives for contractors to deliver the project on time and on budget. P3s are thus often used for larger, complex projects due to their increased risk of cost overruns or delays.

For infrastructure projects that generate funding from operations, such as toll roads or airports, the private partner may be remunerated from all or a portion of revenues from operations. For projects without a dedicated funding source, or which require a significant public subsidy, the private partner is often remunerated by a regular Availability Payment (AP). This was the plan for the Purple Line project.

An AP is calculated using a complex formula, but it represents a regular payment during operations based on the amount of the facility that is "available" to the public sector sponsor during the preceding operating period. Payments can be reduced if the project is down for maintenance or the contractor fails to meet other performance standards.

The eventual concessionaire for the Purple Line would thus not be taking on demand risk, or the risk that there would not be enough paying riders to support the new transit line. The state would, however, be able to transfer some of the risks related to construction or operating cost overruns to the private partner. To get the best proposal possible, and minimize the public AP required to support the project, the MTA would manage a competitive procurement for the Purple Line contract.

## **Procuring the Purple Line**

Normal public construction contracts are let after the government procures detailed designs and specifications for the work, so contractors simply compete by bidding on the already-designed project. In a P3, governments usually select a "shortlist" of 2-5 bidders before having them develop detailed proposals. The firms competing for P3 contracts are also generally consortia of construction firms, investors, design firms, and other service providers. The additional step of qualifying bidders serves to limit competition for the final proposal process, and thus incentivize bidders to invest the considerable time and resources necessary to complete a detailed proposal for the project.

The Purple Line was a novel, massive procurement, so it unsurprisingly attracted substantial competition among leading global infrastructure investors and developers. In January 2014, after reviewing the qualifications of bid teams, the Maryland Department of Transportation (MDOT) published a shortlist of four different consortia, each led by leading infrastructure investment funds and construction firms. The state was expecting the winning concessionaire to invest between \$500 million and \$900 million in the project, with state and federal funding covering the remainder of the estimated \$2.2 billion in project costs. Robert L. Smith, the MTA Administrator at the time, said that the "interest expressed by so many well-regarded

companies is a testament to both the value of the Purple Line as a transportation asset and the power of public-private partnership to deliver value for citizens over a long period.”

When the shortlist was set, MDOT anticipated collecting final proposals from each of the teams in late 2014 and selecting a preferred bidder by early 2015. The final proposal due date ended up being delayed a year to late 2015, and in March 2016, MDOT and the MTA finally announced that they were selecting Purple Line Transit Partners (PLTP) as the preferred bidder for the project. The broader PLTP project team included more than a dozen different companies and consultants and a number of service agreements (**See Exhibit 3**). Equity investors in PLTP were Meridiam at a 70% shareholding, Fluor Enterprises at a 15% shareholding, and Star America at a 15% shareholding. Meridiam and Star America are both prominent infrastructure investors and asset managers, and Fluor is a global infrastructure developer and construction firm with more than 40,000 employees.

As the concessionaire, PLTP was responsible for the delivery and long-term operations and maintenance of the Purple Line, with subcontracts to partners and affiliate firms for project components. The design-build contractor was Purple Line Transit Constructors (PLTC), a joint venture between Fluor Construction, Lane, and Traylor Bothers. Fluor was also a member of the O&M joint venture for the project, along with Alternative Concepts and CAF USA. Atkins was the lead design firm for the project.

The Purple Line concession came together very quickly after MDOT selected PLTP as the preferred bidder for the concession. In April 2016, Maryland’s Board of Public Works (BPW) approved the execution of the project agreement between MDOT, MTA, and PLTP (an event called “commercial close”). The total lifecycle cost budgeted for the contract was \$5.6 billion at the time, making the Purple Line the largest contract in Maryland’s history.<sup>vii</sup>

In June, PLTP closed financing for the Purple Line’s \$2.3 billion in total development costs. Those uses included more than \$2 billion in design-build costs and nearly \$38 million in development expenses. Sources for the financing included an \$875 million federal loan via the Transportation Infrastructure Finance Innovation Act (TIFIA) lending program, \$367 million in proceeds from a Private Activity Bond (PAB) issuance, \$138 million in equity contributions, and \$860 million in progress payments during construction. See **Exhibit 4** for a breakdown of the sources and uses of funding for the Purple Line’s development.

With the financing closed, construction of the Purple Line could finally begin after 14 years of planning and predevelopment. The state planned to complete the new rail project in 2022. See **Exhibit 5** for the Purple Line’s planning and predevelopment milestones.

The financing of the Purple Line was a milestone for the American infrastructure industry as well. It was one of the largest P3s in American history when it closed, and the second rail transit P3 in the country. “When we were competing for the Purple Line procurement, it was what I call the ‘golden age’ of the American P3 sector,” said Thierry Déau, who was working on PLTP’s Purple Line bid. “The procurement model was just emerging and there was an expectation in the development industry that P3s were going to take off. There was probably too much exuberance in the market.”

## **Political Risk**

While the Purple Line’s concession agreement was between the MTA and PLTP as the public and private partners to the project, those were far from the only parties involved in the Purple Line. The project faced a number of interventions and other political risks as the concession agreement came together, and the state and PLTP negotiated some contract provisions to clearly allocate those risks.

In the infrastructure development industry, these risks are sometimes referred to as “third-party risks” because they refer to stakeholders or other groups that are not part of the project agreement, but whose decisions still impact project outcomes. Concession agreements between public sponsors and developers need to account for these contingencies to the extent possible.

When political risks arise during a procurement, in some cases the best solution is to simply delay finalizing the concession agreement until the risk in question is resolved. That was the solution that the project adopted in 2014, as Maryland’s gubernatorial election ramped up. Then-candidate Larry Hogan was highly critical of the project, and even indicated that he would cancel it along with Maryland’s other planned rail transit project – Baltimore’s Red Line. At other points during campaign Hogan signaled that he was open to continuing both projects but was concerned over their costs and generally wanted a “shift in priorities” towards investments in roads rather than transit projects.<sup>viii</sup>

It is not uncommon for large infrastructure projects like the Purple Line to become focal points in an election, and particularly when the project is nearing commercial close. After Governor Hogan won election and took office, MDOT announced that it would be delaying the deadline for final proposals from March to August 2015, while the new administration evaluated project costs. A local official at the time stated that bid teams for the project were supportive of the delay, as it allowed them time to develop value-engineering solutions and to wait for the new administration to commit to the project before investing further in proposal development.<sup>ix</sup>

In the end, Governor Hogan did not elect to cancel the Purple Line, though he did cancel Baltimore’s Red Line over cost concerns. Hogan’s administration also introduced a number of significant cost cutting measures to the project, in what Transportation Secretary Pete Rahn said would scale the Purple Line from a “Cadillac” to a “Chevy.” Combined with an increase in project funding from Montgomery and Prince George’s counties, Hogan announced that the changes would reduce the state’s cost share for the Purple Line from \$700 million to \$168 million.<sup>x</sup>

With Governor Hogan’s support, the Purple Line procurement could move forward. However, Maryland’s gubernatorial election was not the project’s only source of uncertainty. It also faced opposition from various stakeholder groups, each with different interests and varying degrees of both power and motivation. The town of Chevy Chase, a small but wealthy suburb of 3,000 near the Purple Line right of way, was a particularly vocal opponent. The town hired a law firm to assist in its efforts to oppose the project and a consultant to review the Purple Line’s environmental study. After the project’s Final EIS was completed, some Chevy Chase residents voiced concerns that it did not include adequate study of a very small and translucent but endangered shrimp-like creature that had never been seen near the Purple Line but which had been found in another metro area park.<sup>xi</sup>

Some Chevy Chase residents and an organization called Friends of the Capital Crescent Trail (FCCT) also raised concerns over the project’s impacts on the trail, which runs along the Purple Line right of way. Per federal law at the time, stakeholders would have up to 150 days to challenge the permit in federal court once the project’s environmental study was formally approved.

The project’s most formidable opponent was widely considered to be the Columbia Country Club, as the new transit line would need to run through the club’s golf course. The state already had the necessary right of way through the club’s property for the project, but the club was still able to successfully oppose the project for decades. In fall 2013, however, state officials announced that they had reached an agreement with the club. The club agreed to no longer attempt to block the project while the state agreed to slightly adjust the alignment through the club’s property along with a number of other concessions, such as the construction of sound walls.

These were just a few of the stakeholders that the project team would need to navigate in delivering the Purple Line. The project would also require many utility relocations and negotiations with owners or condemnations for additional properties along the route. After the Columbia Country Club agreement was announced, other local communities voiced an interest in similar concessions of their own.<sup>xii</sup>

The project agreement for the Purple Line needed to include provisions to address the risks of those potential third-party interventions, which would still be outstanding when the contract was signed. Many of those provisions included language designed to share risk between the concessionaire and the state, or to allocate risk to the party best able to manage that particular risk. For permitting, for instance, the concession included a list of government permits that MDOT would be responsible for, including the project's NEPA study, but allocated much of the responsibility for obtaining other minor government permits to the concessionaire.

The risk of right of way delays was also shared: the concession included a list of properties that the state would be required to obtain for the project, along with the dates the property would be provided. If the concessionaire identified additional properties that it would need to deliver the project but that would not be part of the system itself, it would be responsible for the costs of obtaining them. If additional properties were needed for utility relocations specifically, MDOT and PLTP would each be responsible for half of those costs.

The concession and design-build agreements also included a failsafe provision if the project suffered from very long delays due to stakeholder interventions or other issues. It stated that either the state or the concessionaire would have the right to make an "unconditional election to terminate" the agreement if the project's critical path was subject to extended delays of more than 365 days.

## **Taking the Train to Court**

The Purple Line was enjoined by a federal court over its EIS in August 2016, roughly one month after the project reached financial close. The injunction stopped construction work and remanded the project to the Federal Transit Administration (FTA) to complete a Supplemental EIS. The ruling came in response to a lawsuit by Friends of the Capital Crescent Trail and two local citizens, which was filed in August 2014, claiming a wide range of deficiencies in the project's environmental study.

Over the next four years, federal district and appellate courts would make dozens of rulings in response to multiple lawsuits and appeals regarding several federal environmental permits for the Purple Line, which covered a wide range of environmental topics. The claim that resulted in the 2016 injunction was related to Purple Line's ridership forecast included in the EIS. FCCT claimed that recent ridership declines in the broader Metrorail transit system meant that the Purple Line ridership forecast should be updated with a Supplemental EIS. The federal district court agreed, and enjoined the project.

That ruling would be amended multiple times, but the Purple Line's injunction would remain in place for nearly a year. Despite the FTA's subsequent determination that the ridership issue did not warrant a Supplemental EIS, the district court disagreed and ordered one in May 2017. In April 2017 Governor Hogan even insinuated a conflict of interest in the case, since the district judge that enjoined the project was a member of the Columbia Country Club.<sup>xiii</sup>

The ridership issue was one of many claims made in various environmental lawsuits opposing the project, all of which were filed by the same plaintiffs. Various claims were made under NEPA, the Endangered Species Act, the Migratory Bird Treaty Act, and the Department of Transportation Act. The lawsuits included claims that several of the cost cutting measures implemented by the Hogan

Administration, such as the removal of “green track” mitigation from the project, would cause new environmental impacts that need to be studied. These other claims were rejected by the district and, later, appellate courts, but the injunction remained in place over the ridership issue.<sup>xiv</sup>

The project was finally able to begin construction after the D.C. Circuit Court of Appeals overruled the district court’s injunction in July 2017. In December 2017, the Court of Appeals further ruled that no Supplemental EIS would be required for the ridership issue.

The Purple Line thus had its groundbreaking in August 2017, after a yearlong of injunction. Environmental lawsuits and appeals over the project would continue to be filed and processed by the federal judiciary until May 2021, when a federal appellate court ruled in favor of the project’s permit under Section 504 of the Clean Water Act.<sup>xv</sup>

## **Off the Rails**

The Purple Line’s NEPA injunction was the first of four major sources of delays and cost increases that plagued the project during its first three years of development. For the injunction, specifically, PLTC would eventually submit a claim for a cost increase of nearly \$131 million and 266 days of project delays.

Three other third-party risks were also sources of delays and cost increases for the Purple Line, and the subject of increasingly contentious negotiations between MDOT and PLTP. Doran Bosso, who joined PLTP as an executive during the negotiations over the injunction costs and delays, described the disagreement over the injunction delays: “The state’s position was that we could have made up the time by working on design and obtaining right of way, but that wasn’t realistic under the injunction. Right of way owners and other third parties had little incentive to work with us while the project itself was enjoined and uncertain.”

Delays in right of way acquisition for the more than 600 parcels listed in the concession agreement were another source of delays and increased costs. These included delays in acquiring right-of-way in some cases and the identification of additional utility easements required in others. PLTC would eventually claim that these right-of-way issues caused 79 days of delays and \$90 million in increased costs.

Another third-party risk came in the form of changes to accommodate CSX, a freight railroad which owned property adjacent to the Purple Line. In early 2018, the MTA amended its third-party agreement the railroad to include some design changes, including the construction of a new crash wall. PLTC’s eventual claim for the design changes included 506 days of delays and \$130 million in additional costs.

The final source of third-party conflict for the Purple Line project was over the Maryland Department of the Environment (MDE) and its application of Maryland Pond Code 378, which governs the creation of impoundments or dams. According to PLTC, the MDE changed its interpretation of the pond code to classify embankments and associated culverts on the project as “unintentional dams” which necessitate design review by the MDE. PLTC claimed that this constituted a Change in Law per the concession agreement, and that the MDE’s new procedure cost the project 470 days of delays and \$167 million in additional costs.

All of these additional cost increases occurred within the first four years of the Purple Line’s construction. MDOT and PLTP negotiated over cost and schedule compensation, and, according to PLTC, nearly reached an agreement in principle in December 2019. However, that proposed agreement in principle broke down in early 2020. Absent a relief agreement, the project’s rising cost increases brought the Purple Line partnership to the brink of collapse.<sup>xvi</sup>

When the Purple Line contract was negotiated, the state and PLTP attempted to clearly allocate responsibility for the project's various third-party risks, but as those risks materialized, and project costs soared, the remaining ambiguity was more than enough room for conflicts between the parties. "In big infrastructure projects, in order to be successful you need to be able to live in the grey areas of contracts," said Slater. "Everything isn't going to be black and white, no matter how big your contract is."

"During those negotiations, we realized that there was a possibility we might not reach an agreement," said Bosso. "There just wasn't a lot of forward progress and we were so far apart."

## **The Purple Line Breaks Down**

The Purple Line partnership began to come apart in May 2020, when PLTC delivered PLTP a notice of unconditional election to terminate the project's construction contract. The letter, which would trigger a similar notice from PLTP to MDOT, cited a clause in the concession agreement and construction contract which gives PLTC the right to terminate the contract should the project experience more than 365 days of delays. According to PLTC's claims, the project had more than 976 days of delays due to the above third-party risks.

The letter invoked a "nuclear option" in a contract claims negotiation, as it would end the partnership, potentially necessitate serious additional transaction costs for the project during a restructuring, and seriously damage the reputation of all of the parties involved. Shortly after receiving the letter from PLTC, PLTP as the concessionaire responded that, in light of the ongoing settlement discussions, "we are deeply disappointed that PLTC chose to take the action contemplated by [the termination letter]." Nevertheless, after reviewing its options and contractual responsibilities to PLTC, PLTP sent its own notice of unconditional election to terminate to MTA on June 23<sup>rd</sup>. The Purple Line public-private partnership was officially coming apart.

After the notice, Erin Hanson, a spokesperson for MDOT, stated that the agency intended to "vigorously protect the interest of the citizens of Maryland and pursue all legal options available to the state." The statement also said that "MDOT disputes PLTP's right to file a Notification of Termination, and considers this action a default."<sup>xvii</sup>

The Purple Line concession included a detailed process for terminating the partnership and transitioning the Purple Line from PLTP/PLTC back to the MTA. It stated that PLTP would develop a Transition Plan jointly with the MTA within 15 days from the termination notice. Within 30 days, PLTP would provide a list of all data and documents that would be part of the transition, the MTA would have the right to step into specific subcontracts to continue construction or design work or to make offers of employment to private sector workers on the project. The transition would be completed within 60 days of the termination notice.

In practice, such a transition is messier, and more contentious. In the case of the Purple Line, the MTA disagreed that PLTP/PLTC had met the requirements for an unconditional election to terminate the project, so all three parties to the Purple Line P3 would spend the summer of 2020 simultaneously negotiating, terminating, and litigating the future of the project. They would, on the one hand, continue the ongoing negotiation over the project's cost and schedule relief claims in the hope of reaching an agreement and salvaging the project. At the same time, they needed to proceed with the transition process and termination despite disagreeing over PLTC's contractual right to do so. And finally, they would be litigating that contractual right in court.

It did not help that the Purple Line termination was happening during a pandemic and the associated lockdowns and travel restrictions. The restrictions in place made travel or in-person negotiation extremely difficult or impossible at times.

Despite disagreeing that the PLTP had a right to terminate, the state and PLTP proceeded, haltingly, through the transfer process. In late July, roughly halfway through the transition period, PLTP wrote MDOT a letter that the concessionaire needed to stick to an “orderly transition” according to the transition schedule “despite [MDOT’s] lack of assistance in finalizing the Transition Plan...”

In the letter, PLTP asked that MTA identify which subcontracts that the state would be taking over no later than August 3<sup>rd</sup>, so that PLTP could begin terminating those subcontracts that the state would not take over.<sup>xviii</sup> On August 5<sup>th</sup>, the state sent letters to 171 subcontractors stating that it planned to take over their subcontracts, and asked them not to leave the project, but had not yet notified PLTP that it would be doing so. On August 7<sup>th</sup>, PLTP wrote to the state requesting a written assumption of subcontracts by August 10<sup>th</sup> or that PLTP would begin terminating them.<sup>xix</sup> It also told the state to “cease and desist” contacting subcontractors before taking over the subcontracts in writing.

“We were trying desperately to salvage things before the official termination,” said Déau. “We knew the consequences would be dire, but our construction team and the public sponsor were moving apart rather than coming together on a negotiated solution.”

The state taking over the project would have been enormously complex even absent the ongoing dispute, because major construction on the Purple Line was well underway across the project. By the summer of 2020, nearly \$1.4 billion had already been spent on the project. Utility relocations, major noise wall construction, and aerial and underpass structures were underway along the corridor. Bridges and cut-and-cover sections of the line were mid-construction. On some parts of the line, electrical, HVAC and communications work was starting as well.

On August 10<sup>th</sup>, MDOT filed a breach of contract lawsuit against PLTP and received a temporary restraining order preventing the concessionaire from demobilizing and stopping work on the project. The restraining order would expire on 14 September, after the court held hearings over whether or not it could be extended.<sup>xx</sup>

The state’s lawsuit claimed that PLTP/PLTC had not actually met the requirement that would allow them to unconditionally terminate the concession, because PLTP had not yet established that more than 365 days of delays had occurred according to the concession’s dispute resolution process. In other words, the concessionaire would need to establish, through MDOT’s agreement or via the dispute resolution process in the project agreement, that 365 days of extended delays had, in fact, occurred, before it could terminate the concession.

Little progress was made in the weeks after the temporary restraining order, and the court scheduled hearings on the order in early September. The subject of the hearings was the state’s request to extend the order preventing PLTP from terminating the concession. Work on the project was technically ongoing, but the Purple Line partnership was in tatters.

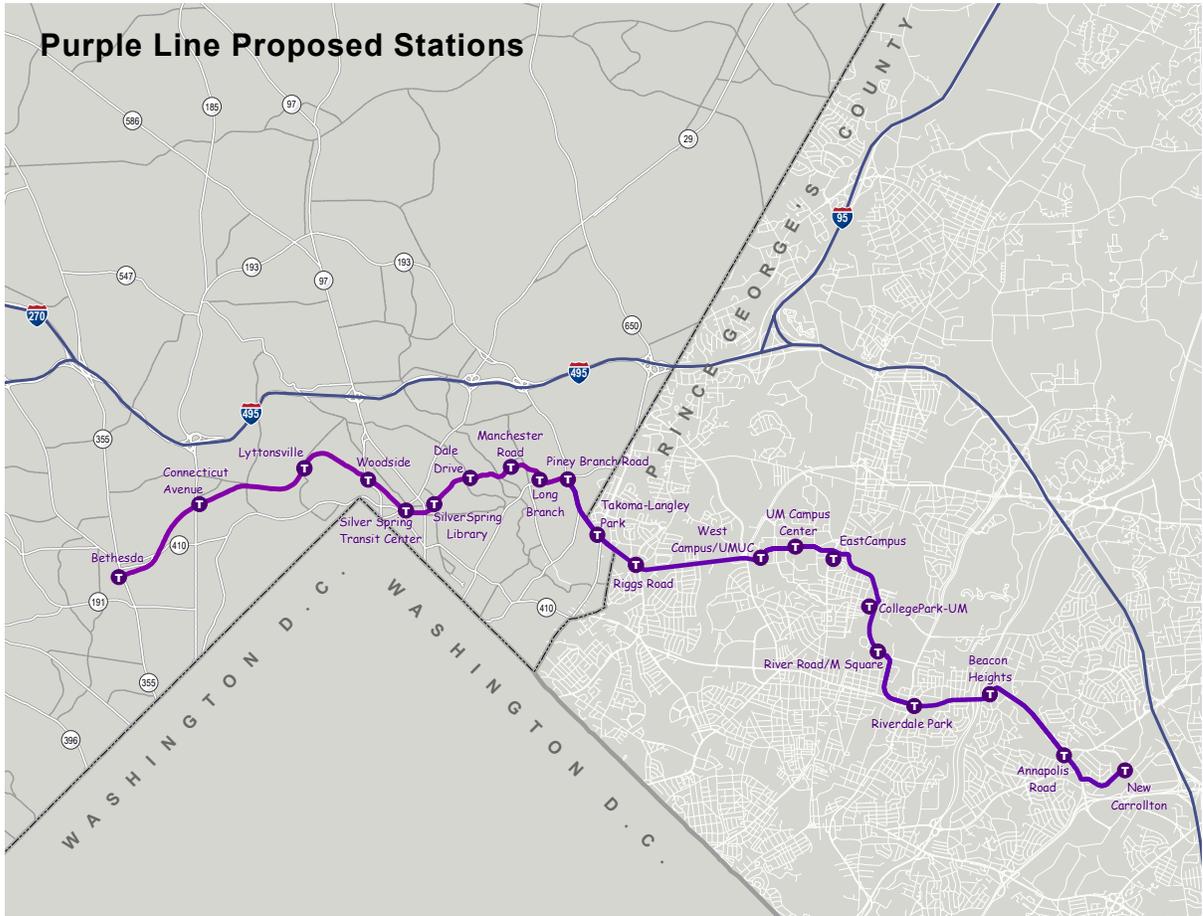
One week after receiving the temporary restraining order, MDOT sent PLTP its final decisions regarding two of the largest claims in the dispute: the costs and delays of the NEPA injunction and the costs and delays associated with right-of-way acquisition. For the NEPA injunction, MDOT granted a 160-day schedule delay (far less than that requested by PLTP), but denied all claims for additional costs. For the right-of-way delays, MDOT denied all claims in full.

After the restraining order, State Delegate Marc Korman of Montgomery County told local news that if “reconciliation is possible, we need to get there quickly.” He added that if “it’s a divorce, we need to get to that end game quickly too...”<sup>xxi</sup>

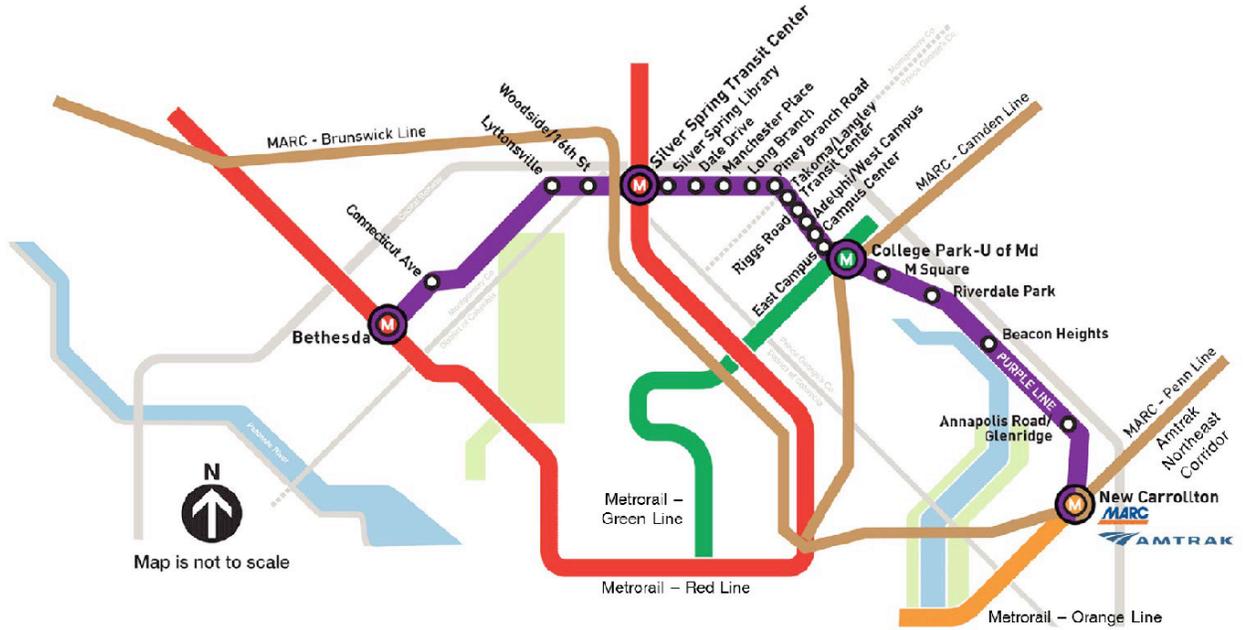
## Study Questions

1. What were the primary drivers of cost increases on the Purple Line project? Is there anything that the public sponsor or private partner could have done differently to prevent those cost increases from occurring in the first place?
2. Evaluate the initial contractual structure of the Purple Line? Can you identify any potential changes to the project contractual structure or risk allocation that may have prevented or mitigated the project's cost increases? Would there have been a way to ensure certain risks were more clearly allocated to prevent the eventual dispute?
3. Several of the risks that impacted the Purple Line were third-party risks. How can public sponsors or private partners mitigate these risks during the early planning and predevelopment of a large infrastructure project like the Purple Line?
4. Why did negotiations over the cost claims break down in the Spring of 2020? Why do you think the parties were unable to reach a settlement before the dispute became public with the notice of termination?
5. Why was the actioned termination clause included in the original P3 contract, and were there any alternative clauses that could have been included in its place?
6. After the termination letter, MDOT and PLTP had a very limited amount of time to negotiate a compromise and avoid a messy, disputed termination. What could either party have done to change the status quo of the negotiation at that point, and potentially avoid termination? What were the biggest impediments to a negotiated solution?

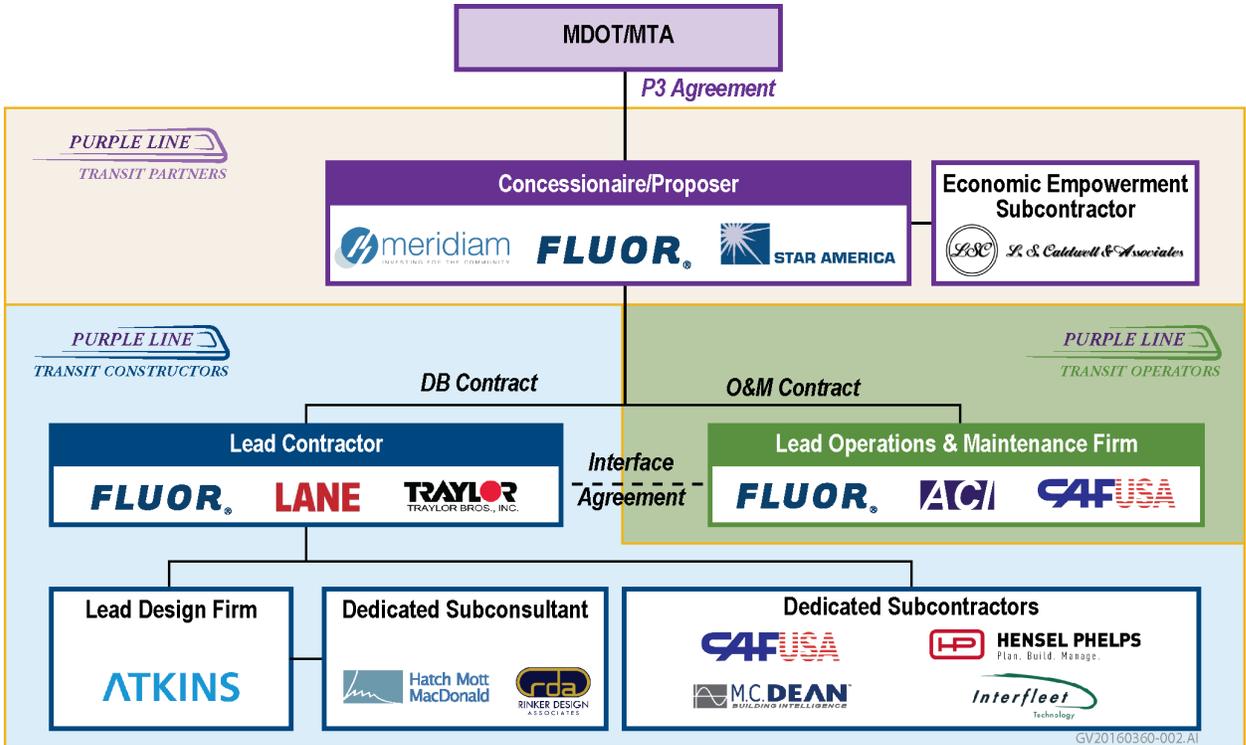
**Exhibit 1: Purple Line Proposed Station Map (Source: Montgomery County Planning)**



**Exhibit 2:** Map of Purple Line with Metro Interconnections (Source: Purple Line 2016 Private Activity Bonds Official Statement)



**Exhibit 3: Organizational Chart of the Purple Line Project (2016)**



**Exhibit 4: Planned Sources and Uses of the Purple Line Project (2016)**

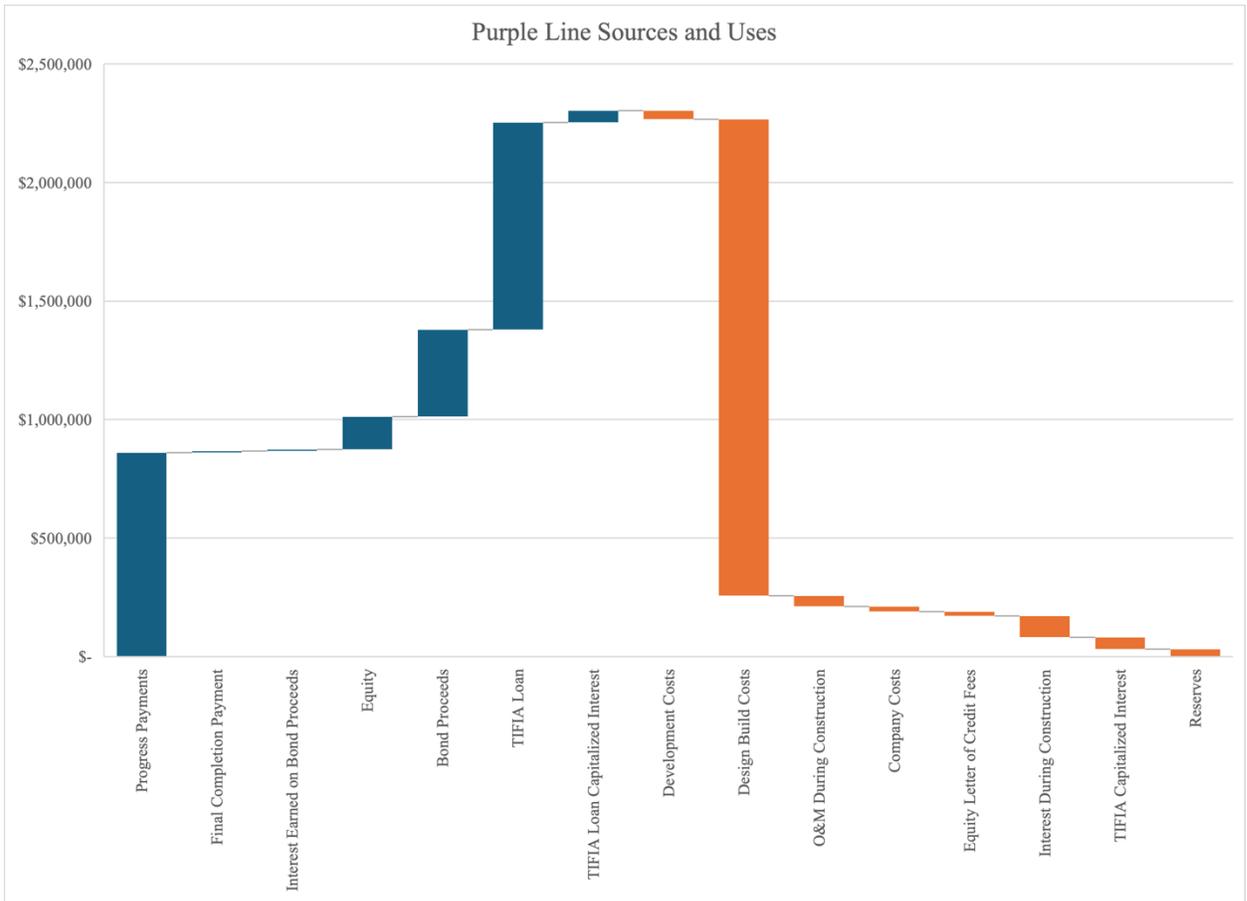
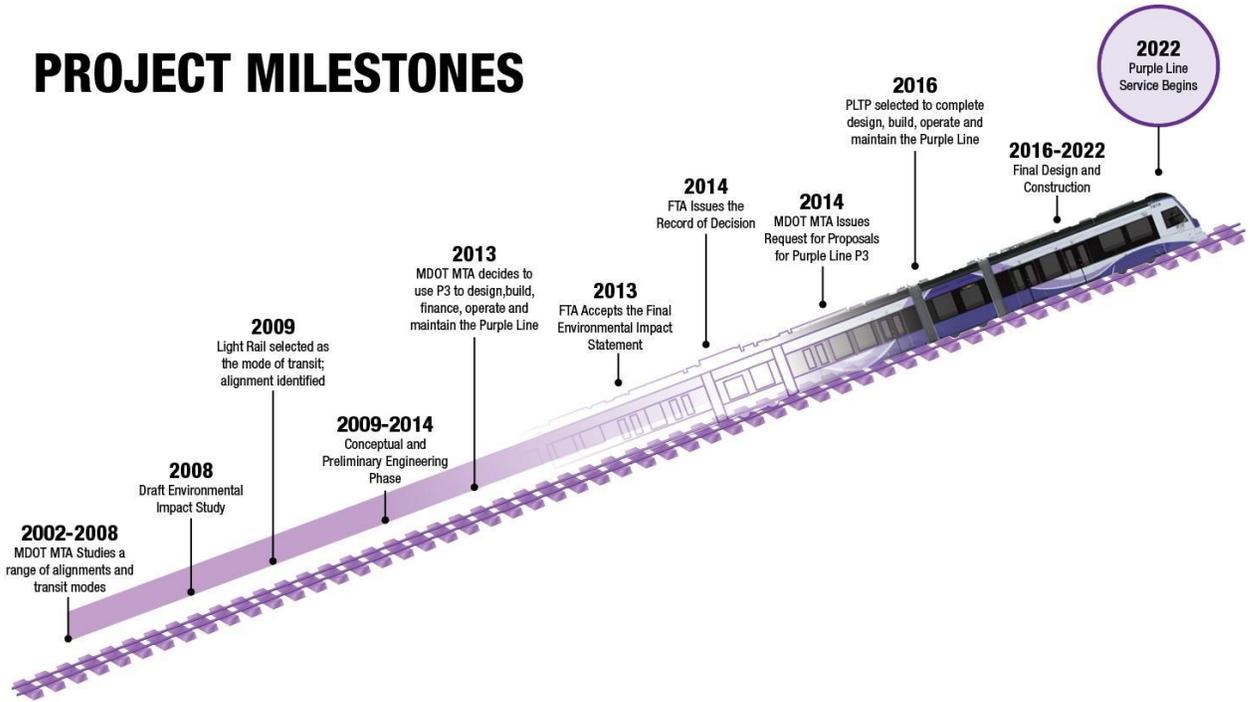


Exhibit 5: Purple Line Planning and Development Milestones (2016)

# PROJECT MILESTONES



## Endnotes

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<sup>x</sup> Robert McCartney and Bill Turque, “Maryland Gov. Larry Hogan Says Purple Line Will Move Forward,” *Washington Post*, June 25, 2015, [https://www.washingtonpost.com/local/2015/06/25/a255fe8c-1b4d-11e5-93b7-5eddc056ad8a\\_story.html](https://www.washingtonpost.com/local/2015/06/25/a255fe8c-1b4d-11e5-93b7-5eddc056ad8a_story.html).

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<sup>xii</sup> Katherine Shaver, “Purple Line Route Changed to Spare Part of Columbia Country Club Golf Course,” *Washington Post*, September 25, 2013, [https://www.washingtonpost.com/local/trafficandcommuting/purple-line-route-changed-to-spare-part-of-columbia-country-club-golf-course/2013/09/25/91cf55e4-252d-11e3-b75d-5b7f66349852\\_story.html](https://www.washingtonpost.com/local/trafficandcommuting/purple-line-route-changed-to-spare-part-of-columbia-country-club-golf-course/2013/09/25/91cf55e4-252d-11e3-b75d-5b7f66349852_story.html).

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<sup>xiv</sup> Richard Leon, FRIENDS OF THE CAPITAL CRESCENT TRAIL et al., Plaintiffs, v. FEDERAL TRANSIT ADMINISTRATION et al., Federal, Defendants. v. STATE OF MARYLAND, Defendant-Intervenor., 255 F. Supp. 3d 60 \*; 2017 U.S. Dist. LEXIS 89049 (United States District Court for the District of Columbia 2017). (This ruling from the District Court ruled on many claims in the Purple Line litigation, but the injunction remained in place regarding the ridership issue.)

<sup>xv</sup> Keenan, FRIENDS OF THE CAPITAL CRESCENT TRAIL; JOHN MACKNIGHT FITZGERALD; LEONARD SCENSNY, Plaintiffs - Appellants, v. UNITED STATES ARMY CORPS OF ENGINEERS; COL. JOHN T. LITZ, Commander and District Engineer United States Army Corps of Engineers; CHIEF JOSEPH P. DAVIA, Chief, Maryland Section, Northern United States Army Corps of Engineers, Defendants - Appellees, and MARYLAND DEPARTMENT OF TRANSPORTATION, MARYLAND TRANSIT ADMINISTRATION Intervenor/Defendant - Appellee., No. 20-1544 (UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT May 13, 2021).

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