



**ROBINSON & COLE** LLP  
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**BUILDING INFRASTRUCTURE WITH THE FEDERAL STIMULUS PACKAGE:**

**MASSACHUSETTS IS OFF ON THE RIGHT FOOT,**

**BUT THERE IS ROOM FOR IMPROVEMENT**

**February 17, 2009**

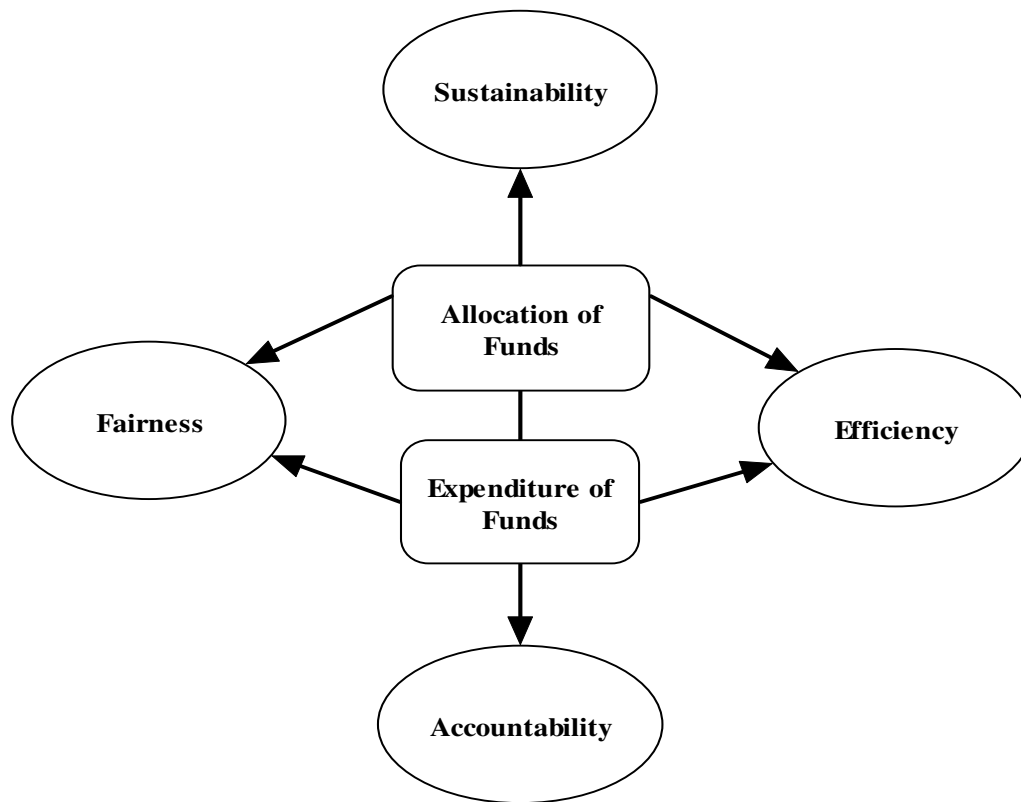
**Introduction**

Massachusetts stands to receive billions in overall stimulus funds under the \$787 billion *American Recovery and Reinvestment Act of 2009* that President Obama signed earlier today. As much as \$2 billion will be available for spending in the next 6 to 12 months on so-called “shovel-ready” infrastructure projects within the Commonwealth. The Act contemplates a rapid deployment of federal funds nationwide for public infrastructure at a magnitude not seen since the 1930s.

The Commonwealth’s residents and businesses have a keen interest in ensuring that the processes for project selection, fund disbursement, and actual construction of improvements all have the desired effect of creating jobs and stimulating the economy without the costly inefficiencies, delays, and mismanagement that have sometimes occurred with past public projects in Massachusetts. While the potential rewards and risks are undeniably substantial with “shovel-ready” pure public infrastructure projects, such as road resurfacing, bridge repair, transit extension projects, and refurbishing and construction of governmental buildings and other facilities, this interest is actually greatest with respect to those public-private partnership projects that can be referred to as “*market smart*” projects — those expected to have high synergistic value

and dramatic economic multiplier effects – designed to revitalize communities and stimulate struggling economies in our towns and cities.

To maximize the value and impact of these projects, it is essential that Massachusetts adopt and implement a new policy implementation approach, the hallmarks of which are sustainability, efficiency, fairness, and accountability. These four principal objectives can be guideposts to ensure that the Commonwealth is pursuing projects that maximize the broad benefits intended by these new stimulus funds in a way that supports Massachusetts’ short- and long-term fiscal health and fosters economic and environmental sustainability.



Extraordinary coordination and cooperation among local and state government, public authorities, the Legislature, and private developers will be crucial if the most worthy public-

private infrastructure projects are to be selected, advanced, and constructed within the expedited time frame required under the Act. The public and private sectors, working in true partnership, must exhibit a much higher level of transparency and accountability than any of the Commonwealth's prior efforts in major public works.

Over the past six to eight weeks, the Patrick-Murray Administration has expended considerable effort to steer the Commonwealth's stimulus spending. The administration established ten task forces in the substantive areas of education, energy, information technology, municipal, private development, state facilities and courts, transportation, permitting, procurement, and workforce. The task forces were intended to better position Massachusetts to rapidly deploy and account for the forthcoming federal stimulus funds. On February 11, 2009, Governor Patrick appointed Jeffrey Simon to be the Commonwealth's director of infrastructure investment, or "stimulus czar." On February 12, 2009, the combined report of the Task Forces, entitled "*Mobilization for Federal Economic Recovery Infrastructure Investments -- Task Force Reports*," was released online.<sup>1</sup> At over 450 pages of text, graphics, and appendices, including an initial list of candidate projects for funding (described as "state-reviewed"), the Mobilization Report is a comprehensive attempt to establish a readiness plan for the Commonwealth. The Mobilization Report describes the task forces' work to date, and specific to infrastructure investment, sets forth criteria for further project selection and refinement of the initial project list, identifies potential impediments to project advancement, makes clear recommendations on how to address those impediments, and evaluates the metrics required for efficient project delivery.

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<sup>1</sup> The Web site of the Massachusetts Recovery and Reinvestment Plan is at <http://www.mass.gov/recovery>.

The Patrick-Murray Administration should be commended for the significant and proactive considerations reflected in the Mobilization Report. It gives impressive attention to public-private projects in which public infrastructure is a significant part of the overall development plan. Indeed, the report contemplates an ongoing role for the Private Development Task Force in overseeing these types of projects and making additional implementation recommendations regarding the public-private coordination and cooperation required to quickly begin and ultimately complete such projects. The focus on public-private projects differentiates the Massachusetts approach from many other states, where the focus is reportedly on purely public infrastructure projects. That being said, the Mobilization Report could be further strengthened by incorporating the following six recommendations.

### **1. Public Input into Project Selection – The Missing Voice**

The project selection process, which thus far has been confined to the individual Project Delivery Task Forces, has now entered the public arena with the release of the Mobilization Report. Where the process moves from here will depend in large part on the stimulus czar's ability to manage the ongoing efforts of the Task Forces, while at the same time balancing the interests of public and private stakeholders and moving selected projects along as quickly as possible. The urgency of the current economic situation demands that every effort be made to expedite project selection and implementation; however, it is also important that the selection process be as transparent as possible rather than conducted behind closed doors, without clear criteria or in a "black box."

Massachusetts must embrace and adopt new and innovative approaches to resolve the inherent tension between public input and scrutiny on the one hand and the essential requirement of

expediency with respect to these projects. For instance, technology could allow public input into the project selection process to be solicited and managed through a specially designed, interactive Web page linked to the Massachusetts Recovery and Reinvestment Plan Web site. This type of project assessment tool would allow members of the public the opportunity to share their thoughts and opinions through survey responses and discussion forums. Additionally, interactive blogs focusing on topics such as project location, project participants, project value, project impacts and project mitigation would allow further public contribution and input in a familiar and efficient manner. While survey results and citizen opinions would not directly determine project selection decisions, they would be posted on the website and thus inform the decision-making process. The Web site would thus function as a needed forum for public comment and opinion, which might otherwise be lost in the expedited permitting and approval process suggested below.

## **2. Local Permits and Approvals – Sticks and Carrots**

The Permitting Task Force's report demonstrates a firm grasp of the *state-level* permitting issues and roadblocks, and includes a host of specific recommendations for administrative and legislative actions; however, the report takes a hands-off approach to *local* permitting and approval issues, falling back instead on half-measures, such as calling for a single municipal point of contact for projects that still require local permits. This omission is surprising for two reasons. First, a great many projects listed in the Mobilization Report still require multiple local permits and approvals to be truly “shovel-ready.” Second, the local permitting and approval process is often the greatest source of delay for public-private projects. Therefore, there is a compelling need for communities to take specific and meaningful measures to accelerate the

local permitting process if they aspire to host stimulus-funded projects. This acceleration should (i) include shortened review, decision, and public comment periods, (ii) require that action be taken within 30 days on all permit applications, and (iii) request that all necessary permits and approvals be issued within 60 days. If a community is unable or unwilling to accelerate its permitting processes to meet these policies and deadlines, the stimulus czar should be authorized by statute to rescind funding for projects located in that municipality and reallocate those funds to compliant communities. For projects with potential impact across adjacent municipal boundaries and/or that are located within newly created “federal stimulus funding zones,” funding decisions should also take into account the level of commitment adjacent communities have expressed for cooperating with the host community on advancing those projects on the same expedited timelines.

Another aspect of making the project selection process more transparent would be to introduce a peer assessment process, whereby state and local agencies use a real-time public database to rate each other’s cooperation, performance, and efficiency. This mechanism could help ensure that funding reaches the projects and communities that are best prepared to use it for the intended purpose of rapid job creation and economic stimulus. The Legislature might consider providing incentives such as increased staffing, funding, or other benefits to agencies that demonstrate high levels of performance and cooperation in this regard. These ratings would foster comparison and accountability and could be adjusted in real time, reflecting the urgency of the stimulus package’s objectives.

### **3. Sustainability and Redevelopment – Core Values**

The Mobilization Report says some of the right things about sustainability.<sup>2</sup> For example, under the heading “Follow Established Infrastructure Priorities,” it expressly ties one of the guiding concepts for project evaluation to the Commonwealth’s own Sustainable Development Principles.<sup>3</sup> In the current context of economic development promotion under the Patrick-Murray Administration’s Executive Office of Housing and Economic Development, the concept of sustainability represents a deepening and broadening of the smart growth agenda begun by the Office of Commonwealth Development under the prior administration. Considered in the framework of public infrastructure, sustainability is a reaction to the decades-long expansion of infrastructure systems at the developing fringe to serve far-flung suburban development at the expense of maintaining and incrementally improving regional cores statewide. Perhaps the most prominent example of this “expansion first” neglect in the Bay State is the Longfellow Bridge, whose long-deferred maintenance and ultimate replacement reached crisis proportions last summer when one traffic lane in each direction was closed and Red Line trains were ordered to a slow crawl to avoid catastrophe as the bridge’s structural integrity was analyzed. Hamstrung by the enormous legacy costs of the Big Dig, the Commonwealth has found it difficult to make meaningful headway in the backlog, even as we enter the sixth year of an essentially “fix it first” approach to public infrastructure.

In the context of economic and real estate development, the central goals of Massachusetts’ Sustainable Development Principles are to (i) support the revitalization of city and town centers

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<sup>2</sup> The United Nations World Commission on Environment and Development provided the most widely referenced general definition of “sustainability” as “development that meets the needs of the present without compromising the ability of future generations to meet their own needs.”

<sup>3</sup> Massachusetts’ Sustainable Development Principles may be found at [http://www.mass.gov/Agov3/docs/smart\\_growth/patrick-principles.pdf](http://www.mass.gov/Agov3/docs/smart_growth/patrick-principles.pdf).

and neighborhoods by promoting development that is compact, conserves land, protects historic resources, and integrates uses and (ii) encourage remediation and reuse of existing sites, structures, and infrastructure rather than new construction in undeveloped areas.<sup>4</sup> These central goals give preference to projects that reduce energy consumption and/or greenhouse gas emissions, are located in the Patrick-Murray Administration’s designated Growth Districts and Gateway Plus cities, or that support other smart growth development projects.<sup>5</sup>

Where the Mobilization Report falls short, however, is in failing to expressly make the connection that *redevelopment* projects are the best embodiment of the state’s own Sustainable Development Principles. In other words, the Sustainable Development Principles give their greatest priority to the redevelopment of previously developed vacant or underutilized parcels with connections to existing transportation and utility infrastructure systems and relatively little impact on the environment. In addition to encapsulating the Sustainable Development Principles, redevelopment projects are “market-smart” because of the way in which they provide multiple benefits to a community beyond those immediately gained by the project itself.

Redevelopment projects are typically located in urban areas that are surrounded by existing development. A redeveloped area results in tangible benefits to the surrounding community by increasing property values of neighboring properties; bringing people to the area, which results in economic benefits to neighborhood businesses; and attracting other investment capital to communities. Accordingly, redevelopment projects ought to be the most heavily prioritized for

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<sup>4</sup> Massachusetts’s Sustainable Development Principles, which may be found at [http://www.mass.gov/Agov3/docs/smart\\_growth/patrick-principles.pdf](http://www.mass.gov/Agov3/docs/smart_growth/patrick-principles.pdf).

<sup>5</sup> For example, the Station Landing project at Wellington Station and the Southfield Project at the South Weymouth Naval Air Station.

stimulus funding given these acknowledged multiplier effects to the broad stimulus benefits that accrue from those types of projects.<sup>6</sup>

#### **4. Accountability, Audit, and Oversight – A Real Watchdog**

The attorney general, the inspector general, and the state auditor all attended Governor Patrick’s press conference announcing the appointment of the stimulus czar. Their attendance emphasized that the Patrick-Murray Administration recognizes the importance of accountability, audit, and oversight at all levels. Further details about specific controls should be released in the coming weeks, beyond those already in existence or recently announced, regarding such measures as posting comprehensive project information on a central Web site. These controls could include enhanced whistleblower protections, increased criminal penalties for fraud and abuse of stimulus funds, and truly adequate funding for “real-time” auditing, investigation, and enforcement.

#### **5. The Legislature’s Role – A New Way Forward**

The Mobilization Report recognizes that the Legislature must play a role in stimulus project implementation; however, the report refrains in certain cases from specifically addressing what legislation would be required or how the Legislature could be directly engaged to become an active partner. The Legislature’s prompt attention and input into the process is imperative for two reasons. First, as the Mobilization Report acknowledges, legislative action is needed to provide the Patrick-Murray Administration and municipalities with the tools and authority necessary to move local and regional projects forward with the speed required by the “use it or lose it” provisions in the federal stimulus program. Second, and perhaps less apparent, broad and

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<sup>6</sup> Brian W. Blaesser and Thomas P. Cody, editors, *Redevelopment* (ABA Publishing: American Bar Association: 2008).

visible legislative participation will help to build public confidence for selected federally funded stimulus projects, particularly those that cross municipal boundaries or that have effects at the regional level or beyond.

The types of envisioned proactive legislation that will assist the successful implementation of the federal stimulus funds could include the following:

1. Provide explicit power and authority to the Governor, or his delegate, to rescind any and all federal stimulus funds for all projects located in any municipalities that refuse to accelerate local permitting processes to meet the policies and deadlines recommended above and allow for the immediate reallocation of those funds to compliant communities.
2. Provide explicit power and authority to the Governor, or his delegate, to preempt local zoning and other land use controls in connection with particular redevelopment projects that have been selected to receive federal stimulus dollars and are located in areas of particular interest to the Commonwealth, such as in the designated Growth Districts, in the Gateway Plus Cities, or in newly created “Federal Stimulus Funding Zones” that would be drawn around specific public-private projects wherein the public infrastructure component has been selected to be funded through the federal stimulus program.

To date, the Massachusetts Legislature appears to have had limited input into the funding process, having been preoccupied most recently with leadership transitions and organizing for the new session. However, new House Speaker Robert DeLeo named his leadership and committee assignments team last week, and the Senate’s committee assignments have now been finalized. In addition, the House and Senate have reportedly just agreed to the establishment of

an eighteen-member Standing Committee on Federal Stimulus Oversight that will be led by the respective chairs of the House and Senate Post Audit and Oversight Committees (respectively, Representative Linsky and Senator Pacheco).<sup>7</sup> With the creation of this standing committee, it appears that the Legislature is now positioned to quickly begin focusing its attention on the legislation required to maximize the opportunities provided by the federal stimulus package. To ensure that the people of Massachusetts get the most effective use of the Commonwealth's share of the stimulus funding, the Legislature will need to proceed with the same urgency and diligence as the federal government and the Patrick-Murray Administration have shown is possible in recent weeks. Creativity, leadership, and personal investment will be necessary to shepherd the legislative process through and, ultimately, to pass the legislation needed to make the most of the federal funds. The current economic crisis, coupled with the unprecedented availability of this massive influx of stimulus funding (albeit with some restrictions), provides a unique opportunity for the Legislature. It also provides a challenge to "business as usual" on Beacon Hill.

## **6. Paving the Way – The Measurement of Success**

Each task force has developed its own factors for measuring success within its specific area. So far, however, there has been no proposal for a set of unified standards by which the ultimate success of the Commonwealth's efforts and results can be measured. Standards are needed that will illuminate accomplishments while at the same time indentifying and exposing areas where

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<sup>7</sup> Vice chairs of the new standing committee are reportedly Representative Kulik and Senator Chandler, as vice chairs of their respective Ways and Means Committees, while the remaining members will be drawn from the chairs of the Joint Committees on Economic Development and Emerging Technologies; Transportation; Education; State Administration and Regulatory Oversight; Labor and Workforce Development; and Bonding, Capital Expenditures, and State Assets; and representatives of the Republican legislative minorities in both houses.

improvement is needed. The stimulus funding package provides an opportunity to alleviate job loss and provide a much-needed boost to the Massachusetts economy. If successful, the stimulus projects provide an unprecedented opportunity to reverse the decline in the Commonwealth's long-ignored infrastructure and will set the stage for continued economic recovery for years to come.

In the final analysis, the value to the Commonwealth of successful implementation of the federal stimulus package may include not only the completion of the federally funded stimulus projects over the next 12 months but also the creation of new approaches and a new framework for cooperation among municipalities, the Patrick-Murray Administration, the Legislature, involved stakeholders, and the public at large that will extend those gains far into the future. The Commonwealth can make this work, but new challenges require new rules and new approaches. The challenges are to depoliticize the deployment of the stimulus funds while adding meaningful new accountability to the process. Embracing new thinking in critical areas, while potentially unsettling to the *status quo*, is what is needed. We think the Commonwealth is up to the challenge, but there is no time to lose.

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