



OFFICE OF THE COUNTY EXECUTIVE

Marc Elrich
County Executive

August 9, 2021

Board of Public Works
Louis L. Goldstein Treasury Building
Calvert Street
Annapolis, MD 21401

Dear Governor Hogan, Comptroller Franchot, and Treasurer Kopp:

The Governor, through the Maryland Department of Transportation (MDOT), continues to advance his proposal to add four private toll lanes to I-495 and I-270. I understand that the Board of Public Works (BPW) approval is being sought to enter into a very long-term agreement with a private partner for all of Phase 1 of the project and to formally authorize the private partner to commence the design of Phase 1 South.

The project would be financed by the selected private entity who will pay the State for the right to build lanes in the public right of way, charging travelers for use of these facilities through tolls. The public will, in essence, pay for the new facilities and provide profits to the developer for 50 years. As the County Executive for Montgomery County, I am writing to share my perspective on the I-270 and I-495 Managed Lanes Study (MLS) Public-Private Partnership (P3) agreement. I stand with many other local elected officials, groups representing our residents, and 78 members of the Maryland Senate and House of Delegates in my recommendation to reject the items before you today.

I support improving these corridors and believe there is a viable path to a consensus-based project. Regrettably, however, rejecting the P3 approval for any activity is the only responsible action the BPW can take at this juncture. The P3 approval request is premature as neither the public nor the BPW has the information it needs to ensure that approval of this contract is in the public interest for the following reasons:

- (1) The State has not released the basic analysis of project benefits and impacts for the new Recommended Preferred Alternative needed to inform your decision.
- (2) The State has not conducted project financial analysis to conclude that a decades-long obligation of public right-of-way for private commercial activity is necessary or appropriate to serve the public interest.
- (3) Despite four years of work, the State has failed to adequately engage with the community, local elected officials, federal agencies, state agencies, and other stakeholders to develop consensus around this project.

- (4) This project should not advance without a comprehensive plan for I-270. The P3 agreement provides no traffic relief north of I-370, leaving Frederick County, Washington County, Carroll County, and northern Montgomery County commuters stranded in congestion, shown in MDOT's studies to be worse than it is now. This project does nothing to eliminate the northbound bottlenecks along I-270 and compounds them by adding a convergence of toll lanes, general purpose lanes and ramps from I-370 all in the same location.

The need for transportation investment in this corridor has been a high priority for Maryland residents and businesses for decades. There is little argument about the need for transportation solutions in this problem-plagued corridor, particularly to address the congestion around and condition of the American Legion Bridge and to provide better options for Frederick and northern Montgomery County residents. I even applauded the Governor's willingness to tackle this problem when he announced his intentions in 2017. There is openness to the idea that some type of toll financing might be appropriate (depending on the results of the analysis the Governor failed to do) and that tolls might be a useful demand management strategy.

However, despite the expenditure of over \$140 million and over four years of work, the basic questions about what investment is needed and how to pay for it have not been answered. Most of the State's time and money has been spent steamrolling a preordained solution over the public process and invalidating all other ideas based on self-imposed constraints and requirements. An opportunity for us to move forward together has been squandered.

Only in the last few months has constructive dialog occurred and meaningful analysis been conducted, giving us some hope that a consensus-driven solution can be determined. In the last nine months, the Maryland Department of Transportation (MDOT) made some decisions that improve the project, like starting at the American Legion Bridge and working northward toward I-270 as has been suggested consistently by me and other Montgomery County officials. Further, it appears that MDOT is beginning to take some community concerns about impacts more seriously based on its engagement in preservation of the Moses Morningstar Cemetery near Seven Locks Road.

I commend Secretary Slater for working to improve MDOT's approach to this project. Unfortunately, these positive steps come very late in this project that has been going on for years and the study has been flawed from the very beginning. The State determined its means to implement this project by relying exclusively on a Public Private Partnership (P3) business model before it figured out what improvements make sense. Second, the State has been fixated on building four toll lanes everywhere, all the time, no matter what.

At this time, engagement of a private partner, whose only motivation is to profit from the predetermined outcome, will effectively end further efforts to achieve consensus on a solution that Marylanders can support and be proud of, rather than one that has the potential to unjustly enrich the private partner through the payment of overly high tolls by Maryland travelers. The

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risk to Maryland from proceeding based on ineffective and insufficient work is too great and you should not authorize the contract. Our residents and businesses deserve better from our State.

I do believe there is a way to move forward by aligning the studies with the project MDOT intends to build, by confirming the best financing method for the project openly and thoroughly, and by truly engaging with the affected communities, agencies, utilities and elected representatives to achieve consensus. These steps need not delay work to replace the American Legion Bridge or fulfil the commitments made to Virginia as part of the Bi-State Accord. For your consideration, more detail supporting my conclusion that the proposed lease and P3 agreements should not be approved at this time and more detail about how I think we should proceed are included as Attachment A to this letter.

Sincerely,



Marc Elrich
Montgomery County Executive

Attachment

Attachment A

August 9, 2021, Letter to the Board of Public Works from Montgomery County Officials Concerns with the Phase 1 of I-270/I495 Toll Lanes and the Proposed Path Forward

Project Design and Environmental Study Flaws

Several agencies raised concerns with the study approach at the outset and the State refused to address these structural problems which have plagued the environmental and design process ever since. The project purpose and need and alternatives were too narrowly focused on privately financed toll lanes, forsaking all other options. The most critical and glaring omissions from this work were the meaningful assessment of incremental improvements and management strategies for the highways and the assessment of specific transit services supporting travel in the corridors. These decisions eliminated the ability for the public and the BPW to understand what options, other than four privately financed toll lanes could improve these corridors, by how much, and at what cost. This information is still unknown today.

Just as significantly, dividing I-270 into two parts (with the second part unfunded and not fully planned) fundamentally eliminates the BPW's ability to make rational decisions for the corridor and deprives the public and the BPW of the information it needs to approve the P3 actions now requested. This decision to break the corridor into two parts is artificial and is a fatal flaw for advancing work on any of I-270 for the following reasons:

- The Draft Environmental Impact Statement (DEIS) shows that the project before you is ineffective and exacerbates the northbound bottlenecks on I-270.
- The recommended preferred alternative for Phase 1 South is only based on the connection to the Beltway with toll lanes in all directions on I-495, which has been eliminated as an option. A reassessment of this alternative has not been provided.
- It is unknown if or how the solution for I-270 north of I-370 will work with Phase 1 South. This information is essential to making decisions about changes to the corridor and for understanding the value to the State from the proposed P3 agreement for the whole highway. This project should not proceed until all of I-270 has been studied.

In May 2021, MDOT announced revisions to their Recommended Preferred Alternative (RPA) that eliminated proposed work on I-495 east of Phase 1. This is a welcome change, but MDOT has identified that a Supplemental Draft Environmental Impact Statement (SDEIS) will be needed to confirm this decision and to identify the benefits and impacts of the revised recommendation. This work is not available for public or BPW review.

Notwithstanding the substantial, and in my opinion, fatal flaws of the DEIS, it is completely irresponsible to proceed without completion of this required SDEIS for Phase 1 South. I also believe it is irresponsible to begin work on changing I-270 before having studied all of I-270. At this point, a logical path forward would be to include all of I-270 in the SDEIS and reserve judgement on awarding the P3 contract until a complete plan is in place. With this path, the public and the BPW will have one consolidated analysis that corresponds to Phase 1 of the proposed P3 agreement.

Montgomery County has consistently encouraged the acceleration of the study of I-270 north of I-370 so that a comprehensive plan could be considered, and commute relief provided for those in northern Montgomery, Frederick County, and beyond. To date, the State has not advanced this work, so these critical information gaps persist. Not only does the current approach hamper the ability to make well-founded decisions for the I-270 corridor, but it also points to the possibility of many phases of construction in Phase 1. This means that a Frederick County commuter to anywhere in the core of the region (College Park, Silver Spring, Bethesda, Washington D.C., Northern Virginia) might be facing over 10-years of disruptive construction and travel headaches on I-270, vastly eroding any benefits of the additional capacity provided by the project. For example, just as the trip through North Bethesda and Rockville could improve with Phase 1 South complete, the trip through Gaithersburg, Germantown, Clarksburg and Urbana gets even worse with the rest of Phase 1 in construction.

Although the State is suggesting that a contract should be awarded sooner, the BPW should have the full record of the public environmental process available to it, before bringing commercial interests into the project. In my opinion, the State should complete the entire environmental review before awarding any concession or presumption of a concession to a private partner. Contracting with a commercial entity that will benefit more from building a bigger project introduces inappropriate influence on the outcomes, further jeopardizing the assessment of the public interest by the BPW.

Lack of Evidence for a P3 Financing Plan

Along with many colleagues, I have significant concerns with the reliance solely on P3 options to advance this project. Entering into a P3 at this early stage embeds perverse incentives that are contrary to the public interest. First, for the project to pay for itself, traffic congestion must remain in the no-toll lanes on these highways. Without that continuing congestion, not enough people will pay to use the toll lanes and the toll rates will be too low to provide the required return to the toll lane operator. This motivation encourages operating the toll lanes far below their capacity while disadvantaging the no-toll lanes. In other words, the financing only works if drivers are willing to pay to ride in the toll lanes, and they will only be willing to do so if the no-toll lanes continue to have “soul-crushing” traffic. The DEIS confirms these concerns by showing the toll-free lanes worsen in most segments. This creates a massive equity problem for those who are stuck in this project’s worse congestion and are unable to afford or otherwise access the toll lanes.

Further, MDOT is inappropriately incentivized to develop this project, whether it makes sense or not. MDOT has already committed over \$140 million to this program, which is nearly equal to the entire Development Rights Payment proposed by Transurban for Phase 1. Entering into a Predevelopment Agreement with a Developer will result in even more costs accrued to the project’s balance sheet, as much as \$54 million more just for Phase 1 South. MDOT is likely to bear these costs unless the project is built. This means that it could cost MDOT nearly \$200 million to stop this work, which is a powerful incentive to continue the project even if the project does not make sense for Montgomery County and the rest of the Capital Region. This flawed incentive should not be the motivation to support the project in its current form.

A wide range of financial strategies are available to the State (e.g., federal infrastructure and bridge programs, changes to current trust fund sources, vehicle-miles-traveled charges, regional districts, etc.). However, if toll financing is the best option for advancing improvements on these corridors, the State should provide an unbiased comparison of public toll financing in comparison to private toll financing. It

is possible that the private sector could participate meaningfully in improvements to these corridors, but the State's approach has eliminated consideration of public options for tolling and strategies that might be physically feasible to address the travel demands on this corridor but do not fit neatly into a private financing model. In other words, if the state locks into a private contract, they are locking into one design without being able to make cost-effective, environmentally friendly or travel-efficient changes.

The State should consider strategies that might require some investment of public funds, toll-generated or from other sources, to improve the corridor's performance but avoid a massive, multiyear construction project that will surely have negative impacts on adjacent communities and highway users. The BPW should remember that a P3 is a financing strategy but does not provide any funding for these projects. The funds are 100% derived from Maryland residents and travelers within the National Capital Region and used to enrich international conglomerates. The private partner is merely fronting money that our residents will need to repay, along with profits above and beyond the cost of borrowing the money. Additionally, because the project lacks a complete financial analysis, it is not certain that the toll-financing plan will not require investment from the state.

Commitment to a 50-year P3 that is financed solely by toll revenues raises the possibility of either staggering toll prices and/or the state having to bail out the P3 because the financial model was not sustainable. If the state finances a project, the cost of borrowing should be lower because no commercial returns are required. Engaging the private sector in transportation projects can help with efficiency but this State-recommended model may be unrealistically broad and too long lived.

Lack of Consensus Building

Over the last four years, MDOT has developed the DEIS and provided opportunities for public comment as it marched forward with its unrelenting advancement for four toll lanes. MDOT has remained solely set on this outcome as evidenced by refusing to reframe the Purpose and Need, dismissing without detailed analysis all alternatives that did not include priced managed lanes, failing to include transit in the project alternatives in a meaningful way, and failing to address public comment about the project.

For transit, MDOT developed a separate planning process, without commitment to follow up on any of the ideas and without including any of the work in the DEIS. Furthermore, the BPW required the State to develop a Memorandum of Agreement with the County for transit support. Many months ago, the County provided an agreement framework to the State but has not received a constructive response and conversations have not advanced. Further, the DEIS does not address impacts to the roadways that connect to the toll lanes and does not provide sufficient commitment to connecting pedestrian and bicycle facilities on new or reconstructed facilities. It appears that the DEIS was a waste of time and resources since the outcome was known from the start – and it retains the need to make a false “all or nothing” choice about toll lanes that ignores many other important impacts and considerations.

The project's public participation approach falls woefully short of engagement and consensus-building. Suggestions were made by stakeholders, which MDOT either dismissed out of hand or dutifully concluded that they do not comport with its self-determined and flawed study plan. Pronouncements through press releases were made in place of meaningful discussion of tradeoffs and choices with agencies and the public. Additionally, MDOT has been silent about the overwhelmingly negative comments received from agencies at all levels of government, elected officials, advocacy groups, and

the public. As mentioned, only in the last couple of months has there been effort around consensus-building. If a P3 contract is approved, there is little incentive to build consensus going forward.

A Possible Path Forward

Based on my concerns about the overall project strategy, both for NEPA and the P3 procurement, I urge the BPW to reject the proposed predevelopment contract for Phase 1 South with Accelerate Maryland Partners (AMP) led by Transurban and Macquarie Capital. Rejecting this proposed P3 agreement does not mean rejecting efforts to address the needs on these corridors. Montgomery County is eager to work with the State to achieve consensus around the needed investments in transportation infrastructure and services. I offer the following as a possible path forward.

- Limit the P3 agreement and NEPA actions to replacement of the American Legion Bridge, contingent on VDOT implementing the *495 NEXT* project.
 - This would result in a short expansion of the private toll lanes being advanced in Virginia and would address the completion of the most critical piece of the proposed project.
 - Insist that the P3 agreement and Bi-State Accord with Virginia do not directly or indirectly limit MDOT's ability to improve the performance of the toll-free lanes or to participate in other transportation investments in the area.
 - Ensure that the P3 does not prevent the state from entering into agreements that are aimed at reducing the number of single occupant vehicles (SOVs) on the road and increasing the use of transit.
 - Pursue a Federal Funding contribution to this nationally significant project to reduce the burden on toll-payers.
- Complete the NEPA process for all of Phase 1.
 - The study limits should be the American Legion Bridge to I-70 in Frederick County.
 - The new NEPA study should correct the fundamental flaws and omissions of the current DEIS.
 - Financial viability should not be limited solely to private financing.
 - Emissions reduction, environmental restoration, and community enhancement should be incorporated into the Purpose and Need of the project.
 - The DEIS should explore site-specific strategies to avoid encroachment on residential areas and minimize impacts to sensitive resources.
 - Re-emphasize the need for "shockingly" innovative solutions that were promised but are lacking in the current designs.
 - Require installation of master-planned pedestrian and bicycle infrastructure on facilities impacted by this project, extending to logical endpoints.
 - Require study of local road impacts and a commitment to address safety and congestion impacts from additional traffic generated by the project.
 - Incorporate construction-period planning more thoroughly in the analysis.
 - The Recommended Preferred Alternative should include specific recommendations for segments of the highway defined by changes in context, configuration, or traffic (e.g., I-70 to MD 80, MD 80 to MD 121, MD 121 to Watkins Mill Road, Watkins Mill Road to Shady Grove Road, Shady Grove Road to Montrose Road, Montrose Road to MD 190, MD 190 to the American Legion Bridge).

- Incorporate specific transit plans into each build alternative, including supporting facilities.
 - Include detailed consideration of reversible lanes throughout the project limits and enable future conversion if needed.
- Complete a broad and unbiased Financial Assessment to determine the State's most favorable financing plan for the best project.
 - Consider Federal infrastructure funding opportunities.
 - Consider non-toll State financial strategies.
 - Consider public toll-backed financing.
 - Consider private financing.
- Dramatically expand community engagement and collaboration at a much finer geographic scale to build trust and consensus.
 - Conduct working meetings with directly affected neighborhoods and communities.
 - Engage with local elected officials on a regular basis.
 - Respond to comments within a reasonable time of their receipt.
 - Collaborate with local agencies and utilities to address facilities and resources affected by the project.
- Plan to mitigate construction issues now
 - Minimize the limit of disturbance to the maximum extent possible.
 - Minimize construction phases and durations.
 - Provide noise walls and other environmental and community protections ***first***, before reconstruction of the highway begins.
 - Plan for pedestrian and bicycle travel across the construction zones.
 - Provide transit mitigation for ***day one*** of construction.
 - Construct Park and Ride Facilities along the corridor in advance.
 - Construct the Metropolitan Grove Bus Operations Facility (designed by MDOT/MTA for the Corridor Cities Transitway) in advance.
 - Provide a bus fleet at Metropolitan Grove in advance.
 - Implement mitigation bus services from park and rides to major transit nodes.
 - Transition facility and fleet to permanent services after construction.

The concepts outlined above may not be comprehensive, however, I hope it illustrates the detailed thought I have given to how this project could advance. I hope that the BPW sees the significant problems with the State's approach to date and that there is a way we can work together to meet Maryland's needs effectively.