

January 18, 2024

The Honorable Guy Guzzone
Chair, Senate Budget and Taxation Committee
3 West, Miller Senate Office Building
Annapolis MD 21401

***Re: Letter of Information – Senate Bill 131 – Transportation – Consolidated
Transportation Program – Categorization and Equitable Distribution of Projects***

Dear Chair Guzzone and Committee Members:

The Maryland Department of Transportation (MDOT) offers the following letter of information for the Committee’s consideration on Senate Bill 131.

Senate Bill 131 requires each major transportation project being considered for inclusion in a draft or final Consolidated Transportation Program (CTP) be assigned one of four categories, as follows: Highway and road projects; Transit projects, including light rail, bus, and rail; Bridge projects; and Miscellaneous facility or infrastructure projects, including parking garages, facilities, and structures. It also requires that when projects are scored in accordance with Chapter 30, the weight of Goal 7, Equitable Access to Transportation, be increased by 45% for projects located in “a minority, rural, or underserved community.” The bill does not indicate which goal should have its scoring decreased in order to offset the increase for Goal 7.

The Maryland Commission on Transportation Revenue and Infrastructure Needs (TRAIN Commission) was established by Chapter 455, Acts of 2023, to review, evaluate, and make recommendations on the prioritization and funding of transportation projects. The TRAIN Commission issued an interim report in January 2024. This report is attached for reference. Recommendations 4, 5, and 6 of the report relate to the CTP and project prioritization. MDOT is working to address these recommendations, which includes developing a new draft prioritization process to present to the TRAIN Commission this year with the goal of implementation for the FY 2026-2031 draft CTP.

Interim changes to these programs while the TRAIN Commission is active may complicate their efforts and future project prioritization review cycles. The TRAIN Commission will continue to meet in 2024 and their work includes evaluating how equity and other transportation policy priorities can inform project decision-making and future formal prioritization decisions. Any ultimate changes to project prioritization will be done in partnership in the General Assembly.

The Honorable Guy Guzzone
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The Maryland Department of Transportation respectfully requests the Committee consider this information during its deliberations of Senate Bill 131.

Respectfully submitted,

Pilar Helm
Director of Government Affairs
Maryland Department of Transportation
410-865-1090

ATTACHMENT:

- Maryland Commission on Transportation Revenue and Infrastructure Needs Interim Report, January 2024



Maryland Commission on
Transportation Revenue
and Infrastructure Needs

Annapolis, Maryland
January 2024

Maryland Commission on Transportation Revenue and Infrastructure Needs

**Annapolis, Maryland
January 2024**

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THE MARYLAND GENERAL ASSEMBLY
ANNAPOLIS, MARYLAND 21401

January 2024

The Honorable Wes Moore
Governor of Maryland

The Honorable Bill Ferguson
President of the Senate

The Honorable Adrienne A. Jones
Speaker of the House

Dear Governor Moore, President Ferguson, and Speaker Jones:

On behalf of the Maryland Commission on Transportation Revenue and Infrastructure Needs, I am pleased to transmit to you the commission's 2023 interim report. The commission was established by Chapter 455 of 2023 to review, evaluate, and make recommendations concerning:

1. the current State funding sources and structure of the Maryland Transportation Trust Fund;
2. the methods that other states are employing to fund state transportation operating and capital programs including toll revenue, vehicle-mile-traveled fees, fees on zero-emission vehicles, and nontransportation-related revenue options;

3. short-and long-term construction and maintenance funding needs for transit, highway, pedestrian, bicycle, heavy rail, shipping, air travel, and other transportation needs;
4. options for public-private partnerships, including partnerships with local governments, to meet transportation funding needs, including funding options;
5. changes in transportation technology and trends that will impact transportation infrastructure needs and costs to the State;
6. existing practices for prioritizing project funding and options to better prioritize needs, including local and legislative priorities;
7. the structure of regional transportation authorities and the ability of these authorities to meet transportation needs in various regions in the State;
8. options for sustainable, long-term revenue sources for transportation; and
9. options for improving the ability and capacity of the Maryland Department of Transportation (MDOT) to deliver major capital projects.

During our deliberations, the commission faced an unexpected challenge with the release of MDOT's draft *Consolidated Transportation Program (CTP)* in September, revealing a funding shortfall exceeding \$2 billion over the next six years. This shortfall, coupled with the unprecedented nature of the situation, prompted the commission to divert its immediate attention to policy updates and discussions on new transportation revenue and fee options.

While the commission recognizes the urgency of addressing the funding shortfall for MDOT's existing projects, it is important to emphasize that our primary focus remains on the broader aspects of transportation policy and funding on a statewide scale. The recommendations presented in this interim report are aimed at providing early insights for the General Assembly's consideration in the 2024 legislative session.

It is crucial to note that the commission's recommendations should not be construed as preempting the essential work of the Administration, the General Assembly, and MDOT in minimizing the impact of the proposed cuts outlined in the recent draft CTP. Our recommendations are complementary to, rather than exhaustive of, the options available to address the current challenges.

Looking ahead, the commission is committed to continuing its work in the 2024 interim, with a focus on the remaining aspects outlined in the commission's charge. I extend my sincere appreciation to the commission members, MDOT staff, and the Department of Legislative Services

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staff for their invaluable time, expertise, and assistance in advancing the interim work of the commission.

Should you have any questions or require further information, please do not hesitate to contact me directly.

Sincerely,

A handwritten signature in black ink, appearing to read 'Frank J. Principe, Jr.', with a long horizontal stroke extending to the right.

Frank J. Principe, Jr.
Chair

FJP/CC:MKL/acl

Maryland Commission on Transportation Revenue and Infrastructure Needs 2023 Membership Roster

Frank J. Principe, Jr., Chair

Senators

Pamela Beidle (November 2023-present)
Melony G. Griffith (July 2023-October 2023)
Guy Guzzone
Stephen S. Hershey Jr.

Delegates

Mark S. Chang
Jessica Feldmark
Marc Korman

Nonlegislative Members

Paul J. Wiedefeld, Secretary, Maryland Department of Transportation
Helene T. Grady, Secretary, Department of Budget and Management
Kevin Anderson, Secretary, Department of Commerce
Rebecca L. Flora, Secretary, Department of Planning
Charlie Scott, Washington Metropolitan Area Transit Authority
Holly Arnold, Maryland Transit Administration
Chrissy Nizer, Motor Vehicle Administration
Nick Henninger-Ayoub, Greater Baltimore Committee
Mary D. Kane, Maryland Chamber of Commerce
Jon M. Laria, Central Maryland Transportation Alliance
Oluseyi Olugbenle, Department of Public Works and Transportation, Prince George's
County Josh Tulkin, Maryland Sierra Club
Antoine M. Thompson, Greater Washington Region Clean Cities Coalition
Ragina Ali, AAA Mid-Atlantic
Cathrin Banks, The Maryland and Delaware Railroad Company
Thomas Huesman, The Fraley Group Corporation
Calvin Ball, Maryland Association of Counties
David Winstead, Maryland Municipal League
Mike Sakata, Maryland Transportation Builders and Materials Association
Patricia Stevens, Worcester County Bicycle and Pedestrian Coalition

Jon Haines, American Federation of State, County and Municipal Employees
Greg Akerman, Baltimore-DC-Metro Building Trades
Todd R. Mohn, PE, Department of Public Works and Transportation, Queen Anne's County
James Kercheval, Greater Hagerstown Committee

Department of Legislative Services Staff to the Workgroup

Carrie Cook
Michele K. Lambert
Steve D. McCulloch
Daneen Banks
Patrick T. Tracy
Kenneth B. Weaver

Maryland Department of Transportation Staff to the Workgroup

David A. Sohns
Michelle Vrikkis
Caleb E. Weiss

Introduction

Chapter 455 of 2023, the State and Federal Transportation Funding Act, established the Maryland Commission on Transportation Revenue and Infrastructure Needs (TRAIN). The commission was created to review, evaluate, and make recommendations on current and future needs to finance operations and capital projects across the State’s transportation system. The Act requires that the commission submit an interim report by January 1, 2024, and a final report by January 1, 2025.

Summary of the Commission’s Work during the 2023 Interim

Chapter 455 outlined specific topics of study for the commission. During the 2023 interim, commissioners made progress on meeting six of the nine statutory requirements, as shown below in **Exhibit 1**.

Exhibit 1 Progress on the Charge of the TRAIN Commission

<u>Charge of the TRAIN Commission (Ch. 455 of 2023, Section 2(g))</u>	<u>2023 Interim</u>
Review, evaluate, and make recommendations concerning:	
1. the current State funding sources and structure of the Maryland Transportation Trust Fund (TTF)	√
1.1 revenue trends that demonstrate weaknesses in the stability of the TTF	√
1.2 trends in operating and capital expenditures, and how existing resources have constrained programming	√
1.3 trends in the General Fund and general obligation support for State transportation expenditures and an analysis of whether this approach to support should continue or transportation expenditures should solely be supported by the TTF	
2. the methods that other states are employing to fund state transportation operating and capital programs including toll revenue,	√

<u>Charge of the TRAIN Commission (Ch. 455 of 2023, Section 2(g))</u>	<u>2023 Interim</u>
vehicle-miles-traveled fees, fees on zero-emission vehicles, and nontransportation-related revenue options	
3. short-and long-term construction and maintenance funding needs for transit, highway, pedestrian, bicycle, heavy rail, shipping, air travel, and other transportation needs	Discussion Started
4. options for public-private partnerships, including partnerships with local governments, to meet transportation funding needs including funding options	
5. changes in transportation technology and trends that will impact transportation infrastructure needs and costs to the State	Discussion Started
6. existing practices for prioritizing project funding and options to better prioritize needs, including local and legislative priorities	√
7. the structure of regional transportation authorities and the ability of these authorities to meet transportation needs in various regions of the State	
8. options for sustainable, long-term revenue sources for transportation	Discussion Started
9. options for improving the Maryland Department of Transportation's ability and capacity to deliver major capital projects	

Source: Department of Legislative Services

The commission met five times during the 2023 interim. These meetings included presentations by the Maryland Department of Transportation (MDOT), the Department of Legislative Services, local governments, transportation officials from other states, and subject matter experts from research organizations, industry groups, and independent consulting firms. The agendas for the 2023 meetings are included in this report as **Appendix 1**. Activities in 2023 comprised:

- August – a broad overview of transportation operations and capital programming in the State, as well as analyses on the sustainability of the motor fuel tax revenue, impact of

federal Infrastructure Investment and Jobs Act funding, and long-term funding challenges for transit agencies across the country;

- September – a presentation from MDOT on MDOT’s draft 2024-2029 *Consolidated Transportation Program* including presentations from each modal administration;
- October – an overview of concerns from Maryland counties and municipalities and presentations from transportation officials from other states on the implementation of transportation funding prioritization systems;
- November – a presentation on revenue impacts of electric and hybrid vehicles and an overview of tolling in Maryland; and
- December – the discussion and adoption of interim findings and recommendations.

At the December meeting, the commissioners also suggested topics to be considered in 2024. These proposals are summarized in **Appendix 2**.

This interim report presents the commission’s findings and recommendations to the Governor and the General Assembly for consideration.

Interim Findings and Recommendations

Part I – Motor Fuel Tax and Electric/Hybrid Vehicles

At its first meeting, the Maryland Commission on Transportation Revenue and Infrastructure Needs heard from the Department of Legislative Services (DLS) about the sources and uses of the Transportation Trust Fund (TTF). Motor fuel taxes make up the largest share of funding to the TTF (24%), while other major sources of funding include federal funds (20%) and titling taxes (19%).

The motor fuel tax has served as the primary source of funding for transportation projects in the United States for almost 100 years because it was an efficient proxy for a direct user fee. However, at its first meeting, the commission heard from Ed Regan, a transportation consultant with 45 years of experience working for various transportation-related consulting firms, that, because of increasing fuel efficiency and the dramatic shift toward electric vehicles (EVs), Maryland may have reached its peak of revenue from the motor fuel tax. In Maryland, total fuel sales experienced a large decrease in 2020 due to the COVID-19 pandemic, and in both 2021 and 2022 total fuel sales continued to be lower than the 2019 motor fuel sales. This trend in Maryland is similar to motor fuel sales statistics in other states like Delaware, New York, Pennsylvania and Virginia. The commission heard that the United States likely reached peak fuel consumption in 2019 and that as EV sales begin to surge, future fuel consumption and motor fuel tax revenues will continue to decline significantly.

At its first meeting, the commission also heard about the nationwide trends in EV sales for both battery EVs and plug-in hybrid EVs. Between 2017 and 2020, new EV sales in the United States averaged 300,000 per year. By 2021, annual EV sales had more than doubled to 635,000. That increase has continued in 2022 to a total of 915,000, and EV sales are on track to reach 1.3 million in 2023. In Maryland, EV registrations have increased from less than 10,000 vehicles in 2016 to almost 70,000 in 2022. As of 2022, Maryland ranked twelfth in the country for the highest number of EVs per 1,000 residents, at 9.16. Additionally, in March 2023, Governor Wes Moore announced Maryland's adoption of California's Advanced Clean Cars II rule, which requires manufacturers to continuously increase the share of EVs they sell so that by model year 2035 EVs will account for 100% of passenger car and light truck sales.

The decrease in revenue from the motor fuel tax is a reality for the TTF. At its second meeting, the commission heard from the Maryland Department of Transportation (MDOT) that the fiscal 2024-2029 draft *Consolidated Transportation Program* (CTP) submitted in September 2023 was not balanced, in that programmed capital spending exceeds projected funding by \$2.1 billion over the six-year program. This results from the combination of decreased revenues

and additional operating spending to address employee compensation, contract escalations, and collective bargaining costs.

At its fourth meeting, the commission had a discussion related to collecting an additional fee on EVs and hybrid vehicles to generate funding to supplant lost revenue to the TTF from the motor fuel tax because drivers of EV and hybrid vehicles use the roads but contribute little or nothing in gas tax for the TTF. The commission heard from Deron Lovaas, Chief of Environment and Sustainable Transportation with MDOT, and Colleen Turner, Associate Vice President and Senior Project Manager with Michael Baker International, that 33 states have enacted an EV registration fee, and 11 states have proposed an EV registration fee. The average EV fee is \$128 while the average hybrid vehicle fee is \$63. Some commissioners raised the concern that an increased registration fee for EVs may discourage individuals from choosing to purchase an EV or hybrid vehicle. However, according to MDOT, that concern has not been validated in states with EV registration fees.

The commission also heard from MDOT about different revenue projections if Maryland were to enact an additional registration fee on EVs or hybrid vehicles. In looking at modeling options, the Motor Vehicle Administration (MVA) determined that a \$220 fee per EV registration would be an accurate proxy for the average annual gas tax payment by a non-EV Maryland vehicle owner. If MVA was authorized to collect a \$200 registration fee for EVs and hybrid vehicles, the fee could potentially generate \$40 million in additional revenue in fiscal 2025 and would increase to \$118 million in fiscal 2029. Under a different model with a fee of \$200 for EVs and \$100 for hybrid vehicles, MVA projected an additional \$39 million in fiscal 2025, increasing to \$110 million in fiscal 2029. Although this would provide a significant new source of revenue to the TTF and create more equity by assessing a fee to all vehicles, the commission noted that this new revenue alone would not sufficiently supplant funding lost from the decrease in motor fuel tax revenue. In follow up materials to the commission from MDOT, the department explained that an increase of \$10 in vehicle registration fee generates approximately \$45 million in annual revenue.

Some states have started to add fees based on the number of miles a vehicle travels, referred to as a vehicle-miles-traveled (VMT) fee, road user charge, or a mileage-based user fee. The federal Fixing America's Surface Transportation Act (FAST Act) created the Surface Transportation System Funding Alternatives (STSFA) program to provide grants to states to demonstrate user-based alternative revenue mechanisms to maintain the long-term solvency of the Highway Trust Fund. The FAST Act authorized \$95 million for this program over federal fiscal 2016 to 2020. The federal Infrastructure Investment and Jobs Act renamed STSFA as the Strategic Innovation for Revenue Collection (SIRC) and expanded eligibility to include metropolitan planning organizations and local governments. According to the Federal Highway Administration, a total of \$73.9 million of funding through STSFA was awarded to 14 states for various pilot studies and programs with many of the awards received on behalf of groups of states

jointly carrying out the studies and programs. Maryland has not applied for funding through STSFA/SIRC nor conducted any pilot studies. It is, however, a member of The Eastern Transportation Coalition (TETC), which has been active in this effort. TETC, formerly the I-95 Corridor Coalition, is a partnership of 17 states and the District of Columbia focused on connecting public agencies across modes of travel to increase safety and efficiency. MDOT indicates it has committed to being part of the exploratory work being coordinated by TETC in Phase 5 of its STSTA grant.

In discussing a recommendation option related to EV fees, commissioners voiced the pros and cons about requiring MVA to collect a new fee. While other states considered or adopted a wide range of EV and hybrid vehicle fees, commissioners agreed that they could not determine the specific appropriate fee for MVA to collect, how to differentiate fees for EVs and hybrid vehicles, or whether MVA should instead increase registration fees on all vehicles to compensate for the decrease of revenues to the TTF from EVs and hybrid vehicles. Commissioners were cognizant that the imposition of a fee might have a negative impact on the State's effort to encourage adoption of EVs, but the commission felt that the immediate need of the TTF warranted making a recommendation and that the State would need to continue to explore other revenue options. The commission intends to consider policies related to VMT fees during the 2024 interim.

Recommendation 1: In response to the urgency of the need to find revenue for the fiscal 2025 budget, the commission recommends that the General Assembly consider, in the 2024 legislative session, options to collect additional revenue to help account for the loss of revenue to the TTF from the increased adoption of EVs and/or plug-in hybrid vehicles. These options could include adding a new registration fee for electric and/or plug-in hybrid vehicles or increasing registration fees for all drivers (acknowledging current commitments of registration fees outside of transportation, including the surcharge collected and allocated under §§ 13-954 and 13-955 of the Transportation Article).

Recommendation 2: The commission recommends that MVA explore different fee amounts or payment options for low-income individuals.

Part II – Tolls

Since 1971, the Maryland Transportation Authority (MDTA) has been responsible for constructing, managing, operating, and improving the State's toll facilities and for financing new revenue-producing transportation projects. Generally, MDTA may issue revenue bonds without obtaining the consent of any instrumentality, agency, or unit of the State and without any proceedings or the happening of any condition or terms other than those specifically required by

State law. MDTA is a nonbudgeted State agency, meaning that its budget is not subject to the General Assembly's appropriation process.

MDTA has the authority to set tolls on transportation facilities projects under its supervision. Tolls must provide funds that, when combined with bond proceeds and other available revenues, are sufficient to (1) pay maintenance, repair, and operating costs for transportation facilities projects that are not otherwise paid for; (2) pay the interest and principal of any outstanding bond issues; (3) create reasonable reserves for these purposes; and (4) provide funds for the cost of replacements, renewals, and improvements. Toll revenues are deposited into the Transportation Authority Fund, which is wholly separate from the TTF. However, any funds collected by MDTA from rentals, rates, fees, tolls, and other charges and revenues that are not needed to meet the obligations of the Transportation Authority Fund and the trust agreement between MDTA and bond holders or to provide adequate and complete payment of all principal and interest on all bonds issued in connection with specified transportation facilities projects may be transferred to the TTF, upon the recommendation of the Secretary of Transportation and approval by the Board of Public Works.

At its second meeting, the commission heard from MDTA regarding their 2024-2029 CTP, for which MDTA's budget includes 180 projects totaling \$2.7 billion. MDTA explained that, because MDTA is a nonbudgeted agency solely supported by self-generated revenue and tolls were last raised nearly a decade ago, MDTA has significant operating costs and may be facing a toll increase in the coming years. When asked by commissioners, MDTA explained that toll reductions in 2015 reduced MDTA's revenue by more than \$500 million in anticipated revenues over the past eight fiscal years. Although a plan was adopted at the time of the reductions to help mitigate the impact of the toll reductions, it was assumed that toll increases would resume in fiscal 2024. Commissioners asked what increased revenue for MDTA could be generated from increasing tolls. For illustrative purposes only, DLS completed an analysis of an increase of \$0.50 for all vehicles that would yield \$81.4 million in additional revenue to MDTA.

At the commission's fourth meeting, DLS provided an analysis that a \$0.50 increase applied only to out-of-state vehicles would yield \$26.7 million in additional revenue to MDTA. Although MDTA already applies a discounted rate for two-axle vehicles with a Maryland-issued E-ZPass transponder at many of its tolled facilities (compared to vehicles using an E-ZPass transponder from another state), commissioners were interested in how increased revenue from passenger vehicles with non-Maryland-issued E-ZPass transponders could be deposited into a special fund as a revenue source for transportation-related purposes unrelated to the tolled highway.

After the commission's fourth meeting, the Chair asked for a letter from the Attorney General's office regarding the legality of the proposal to use revenue from out-of-state

E-Z Passes for Maryland's broader transportation system outside of MDTA. The Attorney General's office determined that at least two federal circuit courts (the First and Third) have found that the federal Intermodal Surface Transportation Efficiency Act (ISTEA) of 1991 authorizes states to enact legislation that allocates highway toll revenues for certain transportation-related purposes unrelated to tolled highways. The ISTEA authorizes state public authorities to use toll revenues for "any other purpose for which Federal funds may be obligated by a State under [Title 23 of the U.S. Code]" if the public authority "certifies annually that the tolled facility is being adequately maintained." 23 U.S.C. § 129(a)(3)(A)(v). Both Pennsylvania and New York have used toll revenues for nontoll road projects. The United States District Court for Rhode Island found that Rhode Island's tolling scheme was unconstitutional, notwithstanding the congressional authorization contained in the ISTEA, because the state's tolling scheme, in both purpose and effect, discriminated against out-of-state interests in favor of in-state interests. That case is currently pending in the Court of Appeals for the First Circuit. No cases out of the Fourth Circuit have considered the questions, and the U.S. Supreme Court has not yet addressed the issue.

The letter with the full analysis by the Attorney General's office can be found in **Appendix 3**.

Recommendation 3: The Commission recommends that the General Assembly consider requiring MDTA to adjust toll rates, including on out-of-state E-Z Passes, to maximize toll revenues to generate new revenue to support projects in Maryland's broader transportation system outside of MDTA.

Part III – Consolidated Transportation Program

Maryland law establishes a decades-old process for developing the CTP that includes the submission of county priority letters, the publication of a draft CTP by September 1, a visit to each county and Baltimore City to review the draft CTP as part of the fall CTP tour, and submission of the final CTP in January as part of the Governor's budget submission.

More recently, Chapter 30 of 2017 required MDOT to develop a project-based scoring system model for ranking major transportation projects for inclusion in the CTP. While MDOT uses the model to evaluate, score, and rank proposed projects for inclusion in the CTP, MDOT is not required to use the model to prioritize projects for inclusion in the CTP.

The annual scoring cycle begins in January. Applications must be completed and submitted by proposing entities by March 1. In the four months following application submission, MDOT processes applications, validates project information and eligibility, collects necessary technical

data, and completes all modeling and forecasting. Beginning in July, MDOT utilizes the modeling results and technical data to evaluate each project across nine goals and 23 measures (established in statute), calculate the scores, and determine the final ranking of projects. The final ranking then helps inform the development of the draft CTP in August. The draft CTP is made public in early September. The final project scores and rankings are included as an appendix in the draft CTP and are also posted on MDOT's website.

During the commission's meetings over the 2023 interim, MDOT sent a survey to stakeholders to solicit input on CTP development and the project prioritization process to generate feedback. Although MDOT only received 33 responses, the themes in the responses were similar to concerns commissioners expressed during presentations around the prioritization process. Common concerns were that the processes are not transparent, it is unclear why a project is or is not funded, and the scoring results are not reflected in projects selected for inclusion in the CTP and the overall fairness and ability of using one scoring system to compare multiple types of projects. During presentations from the Maryland Association of Counties and the Maryland Municipal League, the commission heard recommendations related to the benefits around standardization, the need for clearer and earlier information in project selection, and the need for local input in prioritization.

At its third meeting, the commission heard from North Carolina and Illinois about the development and implementation of each state's specific transportation project prioritization system. Although each system must be uniquely tailored to the needs to the state, commissioners generally agreed that a prioritization process is important for transportation project selection to (1) make informed decisions; (2) make the most of limited resources; (3) be transparent and accountable; and (4) equally evaluate projects in a diverse transportation system.

Recommendation 4: The commission recommends that MDOT develop a new draft prioritization process to present to the commission during the 2024 interim, with the goal of implementing the new prioritization process for the 2026-2031 CTP. The current process lacks consistency and uniformity and can be improved to promote fairness. While the commission was interested in prioritization processes in Illinois, North Carolina, and Virginia, the commission was not comfortable recommending the implementation of a specific prioritization process and agrees that MDOT should develop a new draft prioritization process with the goal of implementing the new prioritization process for the fiscal 2026-2031 CTP. The commission believes that a new process should attach funding decisions to statewide priorities.

Recommendation 5: The commission further recommends that the prioritization process have performance metrics related to safety, accessibility and mobility, climate change and the environment, equity, economic factors, and land use. The commission recommends that the new prioritization process also take into consideration:

- the goals set forth in the Maryland Transportation Plan and regional long range transportation plans and modal strategic and long-range plans;
- providing a meaningful role for stakeholders;
- the appropriate allocation of funds to expand and improve our roads, bridges, rail transit, and bus transit;
- the role of active transportation;
- emphasizing a comprehensive approach to road projects that (1) enables mobility and alternative transportation options rather than focusing on just the road project itself; (2) improves how communities are served, connected, and integrated with safe systems; (3) addresses equity; (4) furthers economic development; and (5) results in a more comprehensive transportation network;
- the different needs of rural and urban counties; and
- the use of separate scoring systems for roads/bridges and transit.

Recommendation 6: In developing a prioritization process, MDOT should standardize local priority letters, create a process to provide comments to local governments related to request projects, and always present a balanced draft CTP in September prior to the local road show.

Appendix 1. Meeting Agendas



August 24, 2023 1:00 – 4:00 p.m.
Appropriations Committee Hearing Room
Room 120, House Office Building

Meeting Agenda

- | | | |
|----|--|--|
| 1. | Welcome and Opening Remarks | Frank N. Principe Jr.
<i>Chairman</i> |
| | | Paul J. Wiedefeld
<i>Secretary of Transportation</i> |
| 2. | Introduction of Members | Frank N. Principe Jr.
<i>Chairman</i> |
| 3. | Organizational Matters and Commission Work Plan | Jaclyn Hartman
<i>Maryland Department of Transportation</i> |
| 4. | Transportation Overview | Steve McCulloch
<i>Department of Legislative Services</i> |
| 5. | MDOT Capital Program Overview | Joe McAndrew
<i>Maryland Department of Transportation</i> |
| 6. | Fiscal Cliff Looming for Transit Agencies | Ward McCarragher
<i>American Public Transportation Association</i> |
| 7. | 2023 Outlook on Fuel Tax Sustainability | Ed Regan
<i>Transportation Consultant</i> |
| 8. | IIJA in Action: Transportation Construction and Market Conditions Update | Dr. Josh Hurwitz
<i>American Road & Transportation Builders Association</i> |
| 9. | Closing Remarks and Adjournment | Frank N. Principe Jr.
<i>Chairman</i> |

Livestreaming and public notice of meetings will be posted on the Maryland General Assembly's Public Hearing Schedule (<https://mgaleg.maryland.gov/mgawebsite/Meetings/Month>) and the Commission's website (www.mdot.maryland.gov/commission).
Meeting materials will be posted on the Commission's website (www.mdot.maryland.gov/commission).



Meeting Agenda

September 13, 2023 9:00 a.m. – 12:00 p.m.
Appropriations Committee Hearing Room
Room 120, House Office Building, Annapolis, Maryland

- | | |
|---|--|
| 1. Opening Remarks | Frank J. Principe
<i>Chairman</i> |
| 2. FY 2024 – 2029 Draft Consolidated Transportation Program | Paul J. Wiedefeld
<i>Secretary of Transportation</i>

Holly Arnold
<i>Maryland Transit Administration</i>

Drew Morrison
<i>Washington Area Transit Office</i>

William Pines
<i>State Highway Administration</i>

Joseph Sagal
<i>Maryland Transportation Authority</i>

Ricky Smith
<i>Maryland Aviation Administration</i>

Brian Miller
<i>Maryland Port Administration</i>

Christine Nizer
<i>Motor Vehicle Administration</i> |
| 3. Development of the Consolidated Transportation Program | Joe McAndrew
<i>Maryland Department of Transportation</i> |
| 4. Closing Remarks and Adjournment | Frank J. Principe
<i>Chairman</i> |



Meeting Agenda

October 18, 2023 1:00 p.m. – 4:00 p.m.
Appropriations Committee Hearing Room
Room 120, House Office Building, Annapolis, Maryland

1.	Opening Remarks	Frank J. Principe <i>Chairman</i>
2.	MDOT Project Prioritization Survey Results	Steve McCulloch <i>Department of Legislative Services</i> Caleb Weiss <i>Maryland Department of Transportation</i>
3.	Perspective from Local Government: Counties	Michael Sanderson <i>Maryland Association of Counties</i> The Honorable Calvin Ball <i>Maryland Association of Counties</i> Siera Wigfield <i>Garrett County</i> Bruce Gartner <i>Howard County Department of Transportation</i>
4.	Perspective from Local Government: Municipalities	Bill Jorch <i>Maryland Municipal League</i>
5.	Planning to Prioritization: A National Perspective	Matthew Hardy <i>Spy Pond Partners</i>
6.	Case Study: North Carolina Constructing a Prioritization System	Brian M. Wert <i>North Carolina Department of Transportation</i>
7.	Case Study: Illinois Data Driven Decisions	Holly Bienman <i>Illinois Department of Transportation</i>
8.	Closing Remarks	Frank J. Principe <i>Chairman</i>

Livestreaming and public notice of meetings will be posted on the Maryland General Assembly's Public Hearing Schedule (<https://mgaleg.maryland.gov/mgawebsite/Meetings/Month>) and the Commission's website (www.mdot.maryland.gov/commission). Meeting materials will be posted on the Commission's website (www.mdot.maryland.gov/commission).



Meeting Agenda

November 6, 2023 2:00 p.m. – 4:00 p.m.
Appropriations Committee Hearing Room
Room 120, House Office Building, Annapolis, Maryland

1.	Opening Remarks	Frank J. Principe <i>Chairman</i>
2.	Fees on Electric and Hybrid Vehicles	Deron Lovaas <i>Maryland Department of Transportation</i> Colleen Turner <i>Michael Baker International</i> Christine Nizer <i>Maryland Department of Transportation</i>
3.	Tolling in Maryland	Percy Dangerfield <i>Maryland Transportation Authority</i> Deborah Sharpless <i>Maryland Transportation Authority</i> Carrie Cook <i>Department of Legislative Services</i> Richard Duncan <i>Department of Legislative Services</i>
4.	Closing Remarks	Frank J. Principe <i>Chairman</i>

Livestreaming and public notice of meetings will be posted on the Maryland General Assembly's Public Hearing Schedule (<https://mgaleg.maryland.gov/mgaweb/Meetings/Month>) and the Commission's website (<https://www.mdot.maryland.gov/commission>). Meeting materials will be posted on the Commission's website (<https://www.mdot.maryland.gov/commission>).



Meeting Agenda

December 13, 2023 1:00 p.m. – 4:00 p.m.
Appropriations Committee Hearing Room
Room 120, House Office Building, Annapolis, Maryland

1.	Opening Remarks	Frank J. Principe <i>Chairman</i>
2.	Discussion of Draft Recommendations	Steve McCulloch <i>Department of Legislative Services</i> Michele Lambert <i>Department of Legislative Services</i>
3.	Discussion of 2024 Interim Activities	Steve McCulloch <i>Department of Legislative Services</i> Michele Lambert <i>Department of Legislative Services</i>
4.	Closing Remarks	Frank J. Principe <i>Chairman</i>

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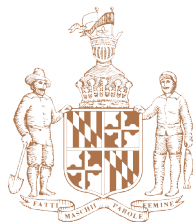
Appendix 2.
Commissioner Recommendations for Further Study in 2024

The following topics were proposed for further study in 2024:

- expansion of speed camera program and tolling statewide (Commissioner Henninger-Ayoub);
- what other states are doing to develop a vehicle-miles-traveled (VMT) fee (Commissioner Winstead);
- how road user charges or VMT fee could be integrated into the E-ZPass system (Commissioner Sakata);
- developing revenue generating opportunities surrounding transit stations and exploring other funding sources (Commissioner Ackerman); and
- consideration of seeking Maryland voter approval of a bond initiative similar to the Clean Water, Clean Air, and Green Jobs Environmental Bond Act approved by New York voters in 2022 (Commissioner Thompson).

Appendix 3. Attorney General Letter

ANTHONY G. BROWN
ATTORNEY GENERAL



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ASSISTANT ATTORNEY GENERAL

THE ATTORNEY GENERAL OF MARYLAND
OFFICE OF COUNSEL TO THE GENERAL ASSEMBLY

November 20, 2023

Ms. Michele Lambert, Senior Committee Counsel
House Appropriations Committee
121 House Office Building
Annapolis, Maryland 21401
Via email

Dear Ms. Lambert:

You asked for advice about using excess toll revenues to support the Transportation Trust Fund (“TTF”). Specifically, you asked whether the General Assembly can authorize the Maryland Transportation Authority (“MdTA”) to: (1) set tolls at or near an “optimal tolling rate” and (2) transfer some or all of the excess toll revenues to the TTF.

Without the details of a specific proposal to review, I cannot say how a court might rule if an optimal tolling rate scheme implemented by MdTA were challenged. That said, it is my view that legislation could be structured in a way that would significantly limit the chances that a constitutional challenge would be successful. The most likely grounds for a legal challenge include impairment of contract and a violation of the dormant Commerce Clause.

Aside from the constitutional issues, there is the question of how the bond market and bond rating agencies will react to any proposal. The potential impact on the bond market and bond rating agencies is beyond the scope of this letter.

Optimal Tolling

The basic concept of “optimal tolling,” as I understand it, is similar to what was proposed in House Bill 74 / Senate Bill 412 of 2023. That bill defined “optimal tolling” to mean “a tolling rate for a transportation facilities project that maximizes revenue, as determined by [MdTA].” The bill directed MdTA to set toll rates that achieve “near optimal tolling,” which was defined to mean “a tolling rate that provides 95% or more of the maximum revenue possible based on a transportation facilities project’s optimal tolling,” exclusive of toll rates for the I-495/I-270 public-private partnership and commuter discount rates fixed by MdTA.

To the extent an optimal tolling proposal would limit MdTA's discretion to set toll rates at its facilities, that would raise an impairment of contract issue under the Contract Clause of Article 1, § 10 of the United State Constitution. The Contract Clause does not prohibit all laws that impair a private or government contract. Rather, courts apply the following three-part test: first, a court must determine whether the state law has impaired a contract; second, a court must determine whether the contract was "substantially impaired"; and third, if the law is a substantial impairment of a contract, a court must determine "whether the impairment is nonetheless permissible as a legitimate exercise of the state's sovereign powers." *Baltimore Teachers Union v. Mayor and City Council of Baltimore*, 6 F.3d 1012, 1015 (4th Cir. 1993) (citing *United States Trust Co. v. New Jersey*, 431 U.S. 1,17 (1977) and *Allied Structural Steel Co. v. Spannaus*, 438 U.S.234,244 (1978)).

Pursuant to § 4-311 of the Transportation Article, MdTA has entered into a trust agreement to provide security for the payment of its revenue bonds and to furnish its bondholders with certain protections. *Second Amended and Restated Trust Agreement by and between Maryland Transportation Authority and The Bank of New York*, dated September 1, 2007 ("Trust Agreement"). Under Section 6.14 of the Trust Agreement, MdTA "covenants ... that it will fix, revise, charge and collect rentals, rates, fees, tolls and other charges and revenues ... in order to produce Net Revenues in each Bond Year in an amount not less than the sum of (a) one hundred twenty percent (120%) of the amount of the Debt Service Requirements ... and (b) 100% of the amount set forth in the Annual Budget to be deposited to the credit of the Maintenance and Operations Reserve Account."

It has been suggested that legislative control of toll rates would, in itself, violate the Trust Agreement. Letter to the Hon. David D. Rudolph from AAG Kathryn M. Rowe, July 5, 2011 (citing 70 *Opinions of the Attorney General* __ [Opinion No. 85-005 (February 13, 1985) (Unpublished)]. Nonetheless, if an optimal tolling proposal protects the financial interests of MdTA's bondholders, a court likely would not find a substantial impairment of the Trust Agreement, even if there were a technical breach. See *City of Charleston v. Pub. Serv. Comm'n of W. Virginia*, 57 F.3d 385, 392 (4th Cir. 1995) ("In determining whether an impairment is substantial and so not 'permitted under the Constitution,' of greatest concern appears to be the contracting parties' actual reliance on the abridged contractual term. Specifically, the Supreme Court has examined contracts to determine whether the abridged right is one that was 'reasonably relied' on by the complaining party ... or one that 'substantially induced' that party 'to enter into the contract.'"). Moreover, if the proposal simply *authorizes* MdTA to set rates at or near the optimal tolling level (rather than require that it do so), that approach arguably would preserve MdTA's rate-setting discretion under the Trust Agreement, meaning that the proposal would not even amount to a technical breach of the Trust Agreement, let alone a substantial impairment of it. Of course, the legal analysis ultimately will turn on the specific details of any proposal and the extent of MdTA's discretion to set and adjust toll rates independent of legislative control.

Transfer of Excess Toll Revenues to the Transportation Trust Fund

The second part of the proposal – authorizing MdTA to transfer excess toll revenues to the TTF – raises issues under both the dormant Commerce Clause and the Contract Clause.

Dormant Commerce Clause

The dormant Commerce Clause “prohibits state laws that unduly restrict interstate commerce.” *Tennessee Wine & Spirits Retailers Ass’n v. Thomas*, 139 S. Ct. 2449, 2459 (2019). If a state statute discriminates against interstate commerce, either “‘facially, in its practical effect, or in its purpose,’ ... [it] will be struck down unless the state demonstrates ‘both that the statute serves a legitimate local purpose, and that this purpose could not be served as well by available nondiscriminatory means.’” *Yamaha Motor Corp., U.S.A. v. Jim’s Motorcycle, Inc.*, 401 F.3d 560, 567 (4th Cir. 2005) (citations omitted). If, on the other hand, a state statute “regulates evenhandedly to effectuate a legitimate local public interest, and its effects on interstate commerce are only incidental, it will be upheld unless the burden imposed on such commerce is clearly excessive in relation to the putative local benefits.” *Pike v. Bruce Church, Inc.*, 397 U.S. 137, 142 (1970).

Even when a state law burdens interstate commerce, there is no dormant Commerce Clause violation if Congress has specifically authorized the state action. *White v. Massachusetts Council of Const. Emps., Inc.*, 460 U.S. 204, 213 (1983). At least two federal circuit courts (the First and Third) have found that Congress, through the Intermodal Surface Transportation Efficiency Act of 1991 (“ISTEA”), has authorized states to enact legislation that allocates highway toll revenues for certain transportation-related purposes unrelated to the tolled highway. *See Owner Operator Indep. Drivers Ass’n, Inc. v. Pennsylvania Tpk. Comm’n*, 934 F.3d 283, 292-294 (3d Cir. 2019) (rejecting dormant Commerce Clause challenge to Pennsylvania tolling scheme because Congress, through the ISTEA, “expressed its ‘unmistakably clear’ intent that the Defendants could use toll revenues for non-toll road projects”) (citation omitted); *Am. Trucking Associations, Inc. v. New York State Thruway Auth.*, 886 F.3d 238, 245-247 (2d Cir. 2018) (finding it “unmistakably clear” that the ISTEA authorized the New York State Thruway Authority to allocate excess revenues from highway tolls to the New York Canal System).

The ISTEA authorizes state public authorities to use toll revenues for “any other purpose for which Federal funds may be obligated by a State under [Title 23 of the U.S. Code]” if the public authority “certifies annually that the tolled facility is being adequately maintained.” 23 U.S.C. § 129(a)(3)(A)(v). Thus, when a state allocates toll revenues for a purpose for which federal funds may be obligated under Title 23, the collection and use of those funds arguably does not violate the dormant Commerce Clause, assuming tolls are levied in a way that does not discriminate against out-of-state interests.¹ However, I am not aware of any cases out of the Fourth Circuit that have considered the question, and the Supreme Court has not yet addressed the issue.

¹ In *American Trucking Associations, Inc. v. Alviti*, 630 F. Supp. 3d 357 (D.R.I. 2022), the United States District Court for the District of Rhode Island found that the ISTEA did not completely insulate Rhode Island from a dormant Commerce Clause challenge to a tolling scheme that allocated toll revenues to transportation-related purposes other than the tolled highways. The court held that the state’s tolling scheme was unconstitutional, notwithstanding the congressional authorization contained in the ISTEA, because the state’s tolling scheme, in both its purpose and effect, discriminated against out-of-state interests in favor of in-state interests. That case currently is pending before the Court of Appeals for the First Circuit.

Impairment of Contract

Authorizing MdTA to transfer surplus toll revenues to the TTF also raises a potential impairment of contract issue, given the terms of the Trust Agreement and the covenants therein. Among the various protections for bondholders are those set forth in Section 4 of the Trust Agreement. Section 4.05 establishes an Operating Account into which all revenues collected by MdTA must be deposited, and it further provides that all funds in the Operating Account are subject to a lien for the benefit of bondholders. Section 4.06 governs the disbursement of funds from the Operating Account. It requires MdTA to withdraw funds from the Operating Account monthly (except for a portion that may be held back to fund Current Expenses) and to set aside those funds for the credit of various accounts and subaccounts. If there is any remaining balance after making the required disbursements, the balance (less the amount retained for Current Expense) is credited to the General Account. Section 4.11 governs the use of funds in the General Account. It provides that, in addition to other permissible uses of funds in the General Account, MdTA may “deposit any such moneys in ... a special fund created and designated by the Enabling Legislation, or any other fund permitted by law, upon the receipt of a certified copy of a resolution duly adopted by [MdTA] directing the transfer or payment.”

If legislation were to authorize MdTA to transfer excess toll revenues to the TTF, then the TTF would constitute an “other fund permitted by law” under Section 4.11, into which remaining toll revenues could be deposited after making the disbursements required by the Trust Agreement. Assuming the priority of payments required by Section 4.06 of the Trust Agreement is preserved and distributions to the TTF are otherwise consistent with the Trust Agreement, transferring excess toll revenues to the TTF would not amount to an unconstitutional impairment of contract.

We reached a similar conclusion in our Bill Review Letter on Senate Bill 907 of 2016 (“Transportation – Harry W. Nice Memorial Potomac River Bridge – Replacement”), a copy of which is attached.² That bill established a Harry W. Nice Memorial Potomac River Bridge Replacement Fund (“Bridge Fund”) and directed MdTA to deposit \$75 million of toll revenues into the Bridge Fund each year, but it allowed MdTA to reduce the annual deposit by up to \$25 million in the event of an “emergency circumstance.” Notwithstanding the fact that the bill *required* MdTA to make the annual deposit to the Bridge Fund, we concluded that a court likely would determine that the bill does not violate the Contract Clause because it preserved the priority of payments required by Section 4.06 of the Trust Agreement, did not authorize MdTA to use General Account funds in a way that is inconsistent with the Trust Agreement, and allowed MdTA to reduce the distribution to the Bridge Fund to remain in compliance with the Trust Agreement.

If the General Assembly were to consider legislation authorizing MdTA to transfer excess toll revenues to the TTF, Senate Bill 907 and the associated Bill Review Letter could serve as a useful starting point for any proposed legislation.

In addition to the Trust Agreement, MdTA has entered into a Transportation Infrastructure Finance and Innovation Act loan with the United States Department of Transportation to finance

² Senate Bill 907 passed the General Assembly but was vetoed by the Governor.

the construction of the new Governor Harry W. Nice Memorial/Senator Thomas “Mac” Middleton Bridge. It is my understanding that, per the loan agreement, MdTA has made certain financial commitments, such as keeping on hand a minimum amount of unencumbered cash. The terms of that loan agreement also should be considered when developing a legislative proposal.

Finally, I note that when MdTA issues bonds, it makes certain public disclosures. As with any legislation that would modify MdTA’s governing statute, that could trigger a requirement that MdTA make new disclosures to bondholders.

As I noted at the outset, the constitutionality of any proposal will turn on the specific details. We would be happy to review any draft legislation for constitutionality and legal sufficiency.

Sincerely,

A handwritten signature in black ink, appearing to read "David W. Stamper", with a long horizontal flourish extending to the right.

David W. Stamper
Assistant Attorney General

