



Committees: Appropriations Subcommittee on Transportation and Environment
Budget and Taxation Subcommittee on Public Safety, Transportation and Environment

Testimony on: Phase 1 P3 Agreement, I-495 & I-270 Relief Plan

Position: Oppose

Hearing Date: June 29, 2021

We have reviewed the I-495 & I-270 Relief Plan Phase 1 P3 Agreement or “predevelopment contract” – planned to be signed by Maryland Department of Transportation (MDOT) with a Transurban-led consortium (Accelerate Maryland Partners) – consisting of:

1. [Phase P3 Agreement](#)
2. [Phase 1 P3 Agreement Exhibits](#)
3. [Phase 1 P3 Agreement Exhibit 6 – Predevelopment Work Requirements](#)
4. [Phase 1 P3 Agreement Exhibit 8 – Section P3 Agreement Term Sheet](#)

We have also reviewed the additional pertinent information available in these two documents.

5. [Phase-P3 Agreement-Report to the General Assembly](#)
6. [MDTA Board Materials for the June 8, 2021 Meeting](#)

In our view, this is not an advantageous deal for Maryland or its taxpayers, and the project appears to be designed to fulfill private sector goals of high revenue and large-scale build not local public sector [goals](#) of transit first, reducing vehicle miles traveled, and sustainable and equitable land use, transit, and demand management.

Before we can comment on the specifics of the contract, we must express our extreme concern that entering into the contract with Transurban is even being contemplated, given the extraordinary level of uncertainty now surrounding the I-495 & I-270 toll lane project. Following the May 2021 announcement that the project would no longer include I-495 east of the I-270 eastern spur, this month, this project received a nonconcurrency from the Maryland-National Capital Park and Planning Commission (M-NCPPC) and was [removed](#) by the National Capital Region Transportation Planning Board (TPB) from the regional *Visualize 2045* Long Range Transportation Plan.

The M-NCPPC [nonconcurrency letter](#) on the new Recommended Preferred Alternative mentioned the lack of detail SHA has provided on the project. It reiterated:

“concerns regarding the absence of a specific and binding commitment to a meaningful transit component; the failure to fully analyze opportunities for transportation demand management; the flawed scope of the project’s stated purpose and need, the inadequate

consideration of environmental justice concerns; and the need to address impacts to Commission parkland and other cultural and historic resources within Phase 1.

Those are not words that apply to a project ready for any kind of approval, including preliminary or conditional.

Furthermore, a project using any state funds should have to have a completed Final Environmental Impact Statement (FEIS) before a contract with a developer is signed. An FEIS allows the state to know the impacts and costs of a project, and therefore should always be completed before making commitments. This project, due to its scale and sensitivity, all the more urgently requires a knowledge of the facts ascertained through a completed FEIS. A completed FEIS certainly must precede signing a binding framework agreement for a 60-year contract.

The [Frederick Douglass Tunnel B&P Tunnel Replacement](#) in Baltimore has just been approved to go forward after an FEIS and Record of Decision, and it is one 1.4 mile tunnel. Phase 1 South of this project [entails](#) an interstate bridge replacement (American Legion) over a biodiversity hotspot, construction of six major interchanges and eight minor interchanges, and 42 new lane miles of toll lanes. Yet, this complex and extensive project is possibly weeks away from signing a 60-year framework predevelopment contract and has not even published the required Supplemental Draft Environmental Impact Statement much less an FEIS and ROD.

This project already has failed to meet NEPA requirements in several fundamental areas. The basis of this project, its purpose and need, is fundamentally flawed and biased. This has been acknowledged by [M-NCPPC](#) and [many others](#), and decisions contained in this predevelopment contract violate NEPA and Section 106 by foreclosing consideration of design, mitigation, and modal alternatives. Alternatives must be reformulated and reexamined due to the project's change in scope and new post-pandemic context. See Appendix A for more details and additional significant concerns.

Also problematic is the fact that Phase 1 South (American Legion Bridge up to I-270 up to I-370) would worsen traffic congestion and bottlenecks on northbound I-270 north of Shady Grove and at the I-270-Beltway merge at Wisconsin Avenue. The Draft Environmental Impact Statement traffic analyses all assume construction of toll lanes on the Beltway all the way to MD 5, so the severity of these impacts has not yet been modeled. This is one of a number of concerning impacts of the Hogan Administration's plan. Virginia has already experienced issues with [bottlenecks](#) like these; we should not knowingly be engineering ourselves into new or worse bottlenecks, that will contractually take solutions out of the State's hands or trigger compensation events for Transurban in order to get resolved.

The TPB action makes it [highly unlikely](#) for this project to receive federal approval. The financial and legal ramifications of moving forward on this project in such a context are mindboggling. There is significant uncertainty that the TPB vote could be reversed and even less certainty that a reversal could happen in time for this project to be placed back on the necessary list of projects in time for the federally required air quality conformity analysis.

Lastly, we have concerns about the competitiveness of the solicitation based on available [information](#) regarding the [January 29, 2019 Development Framework Agreement](#) and the Capital Beltway Accord. More should be investigated and disclosed on that matter before proceeding to any contracts related to this project. Additionally puzzling, the contract contains hundreds of blacked out pages (for example pages 106-450 of the [electronic Exhibits document](#)). Public confidence in this project is lacking and should be addressed with transparency.

As to the contract itself, we find that it disadvantages the state of Maryland and its residents while giving overwhelming advantage to the private sector partner. Consider the 30 compensation and relief events (Appendix B), each of which entails ongoing costs to the state and places the profit of the private sector above the interests and needs of Maryland taxpayers and highway users. Just this month it was [reported](#) that a Transurban project in Australia is facing \$4 billion AUS in cost overruns, due to utility relocation costs, delays, and lack of attention to environmental impacts associated with contaminated soil.

This experience is now being replicated in this project: the cost for the initial phase of the project, Phase 1 South, nearly doubled in three months. It went from approximately [\\$3.7 billion](#) on February 18, 2021 to [\\$6 billion](#) on May 19, 2021. For the same project footprint with the same concessionaire. This near doubling does not give confidence in the project cost estimates.

We discourage support or approval of this contract. It would needlessly subject the state and its residents to excessive, long-term financial and physical risk and harm.

Thank you.

Josh Tulkin
State Director
Sierra Club, Maryland Chapter

Appendix A. Additional Significant Concerns in the I-495 and I-270 Toll Lanes Predevelopment Contract

- 1) It is still not fully clear what state assets and extent of right of way would be leased under what terms. That should be clearly, explicitly stated in the contract.** Project personnel should clarify where in the contract this information can be found and if it is not there, it should be added.

- 2) The contract, like the Draft EIS, is biased against transit.** The contract ([Phase 1 P3 Agreement](#), p. 25) states: “MDOT shall ensure that the cost and scope of the Transit Service Improvements that are to be delivered under a Section P3 Agreement are not of an amount that prevents the Section from being Financially Viable.” Yet on the page before, it clarifies that even committed section proposals (toll lanes) don’t have to be financially viable as long as MDOT agrees to it.
 - “(ii) subject to Section 11.3(b)(v), each Committed Section Proposal must be Financially Viable (unless agreed by MDOT in writing);
 - (iii) subject to Section 11.3(b)(v), each Committed Section Proposal for Phase South A must be delivered with evidence satisfactory to MDOT that all Sections of Phase South A will be Financially Viable (unless agreed by MDOT in writing);”

- 3) The apparent contractual arrangements between Virginia and Maryland could [preclude](#) rail over the American Legion Bridge. It is entirely premature to make irretrievable commitments that would foreclose an important and viable alternative that, unlike the toll lanes project, would be important toward mitigating climate change impacts.** Clarifications in this regard would be welcome.

- 4) According to the contract, the State building additional lanes or a lane-based bus rapid transit system (such as the Corridor Cities Transitway, which was removed on August 23, 2019 from the Consolidated Transportation Plan) would constitute “Competing Facilities” that would trigger a Compensation Event for Transurban. That may not be compatible with Maryland law.** The contract ([Term Sheet](#), pp. 16-17) states: “MDOT's or MDTA's construction or expansion of a Competing Facility will, however, constitute a Compensation Event for which relief is available as described above.” A Competing Facility refers to “additional traffic lanes to be a part of I-495 or I-270 constructed or created on property within or immediately adjacent to the Section's Permanent ROW during the Term.” Not mentioning a carve out for transit in this context could be a violation of [Maryland law](#), which stipulates that there can be no non-compete clauses against transit, and would also violate NEPA by prejudicing this viable and important alternative prior to the completion of the NEPA process.

- 5) It appears that MDOT can allow Section P3 contracts to go forward without BPW approval for 6 months and then terminate or modify the contract, if needed, to meet BPW demands.** The predevelopment contract ([Phase P3 Agreement](#), Section 11.7, p. 26) says that MDOT can allow the Section P3 contract to be signed six months (“180 days”) before the Board of Public Works gives approval. That appears to mean that construction can start without BPW approval and go forward for six months without BPW approval. This does not align with the information that has been publicly [presented](#), which consistently mentions BPW approval as being needed prior to “commence with final design and construction on any portion of Phase 1.” This misleading public information should be corrected immediately before any action is taken to approve the project.

- 6) The contract does not appear to mention or provide language regarding avoidance and protection of [Plummers Island](#) (an island of national and international importance and which contains rare and endangered species) immediately downriver of the American Legion Bridge. It**

also fails to require adequate protection for the Reconstruction-Era African American Morningstar Tabernacle No. 88 Cemetery and Hall, which has been named [one of America's 11 Most Endangered Historical Places in 2021](#). We would ask that such language be explicit in the contract.

7) The contract mentions “Additional Properties” and “Permanent Additional Properties” and has added more since earlier versions of the contract ([MDTA Board Materials](#), pp. 96, 108). Where will these seemingly large facilities be located and why are they not mapped? These large facilities are likely to be placed on land where right of way is already scarce and is precious valued by homeowners, business owners, environmental groups, historic preservation advocates, federal agencies, and overseers of parkland. The location of such facilities should be made explicit before a contract is signed.

8) There have been some significant changes to the project that affect required certifications. The major contract certifications were signed on December 17, 2020 by Jennifer Aument, then the North American President of Transurban. She is no longer a Transurban employee. After 16 years with the company, her departure was announced on January 18, 2021. The project cost has now increased by billions and some phasing details have changed, and yet the certifications have not been updated. Those key pages of the contract (pages 489-559 of the [electronic Exhibits document](#)) should be signed in 2021 by a current employee of Transurban qualified to testify to those important assurances and certifications.

9) It does not appear that the certifications in Section 6.1(i) can be met due to recent actions and challenges. The contract signers must certify under [Phase P3 Agreement](#), (Section 6.1(i), p. 10) that “There is no action, suit, proceeding, investigation, or litigation pending or, to the knowledge of the Phase Developer or any PD Equity Member, threatened, that... challenges the validity or enforceability of this Agreement.” Both the bidder protest and the recent action by the Transportation Planning Board challenge the validity of this Agreement.

10) The contract fails to incorporate significant recent changes to the project, and reflects a project scope that would create serious bottlenecks. Despite the new Recommended Preferred Alternative’s indication of a smaller project footprint, the contract is written with full expectation that Priced Managed Lanes will be extended eastward on the I-495 Beltway as part of a future phase ([Exhibit 6](#), 1.5(g)(iv)-(vii)). As a result, the maximum lanes possible will feed into I-495 east of the spur, which creates a bottleneck if the lanes are not extended. This is poor design when Montgomery County and MDOT past studies ([West Side Mobility Study](#), C.2, p. 21) have clearly indicated the right of way in Maryland is too constrained, particularly in that area, for two-lane a side widening. As noted in the body of this letter, a traffic bottleneck will be created on the Beltway at the terminus of the toll lanes.

Tolls will be applied on I-495 not just up to the I-270 spur but east all the way to MD 187 (Old Georgetown Road) ([Exhibit 6](#), 1.5(g)(i), p. 10) and the determination of the I-495 Section Limit can happen as late as one year after the Section P3 Agreement Effective Date ([Exhibit 6](#), 1.5(g)(iii), p. 10). That level of uncertainty in the limits of the project has not been effectively communicated to the public.

11) The “for convenience” removal of Phase 1 North (also called “Phase North, i.e. I-270 north of I-370 to I-70) would make a severe bottleneck permanent (where north of Shady Grove seven lanes would reduce to five and then two), illustrating why I-270 needs to be treated as a single system in the NEPA process. In a section entitled “Reduction in Scope of the Agreement” ([Phase P3 Agreement](#), Section 27, page 73), it states: “MDOT may, by notice to the Phase Developer, remove Phase North from the scope of this Agreement at any time for convenience prior to Commercial Close of

the first Section of Phase North.” Other contract language suggests the Phase 1 North is unlikely to go forward as it remains an Uncommitted Section and its Section Viability has not been established. The decision to split I-270 just north of Shady Grove for the purposes of NEPA review constitutes improper segmentation, as described more in these [Sierra Club et al. Draft EIS comments](#) (p. 13-14). The lower and upper parts of I-270 need to be addressed as a single system.

12) The contract appears to give Transurban-led Accelerate Maryland Partners (AMP) decision-making authority in relation to the Phase 1 North NEPA process in asking it to “support MDOT with the environmental process for Phase North.” MDOT ([GA Phase P3 Agreement-Report](#), p. 15) has repeatedly asserted that “the Phase Developer will not have any decision-making authority for the NEPA processes for Phase 1 South or Phase 1 North.” Yet, in the contract ([Exhibit 6](#), p. 14-15), AMP is being asked to “support MDOT with the environmental process for Phase North” including doing work for the purpose of “(i) defining the Phase North alternatives and completing the NEPA alternative analysis and review process; ... (iv) developing the design of the preferred alternative to a higher level of detail if the lead agencies agree that it is warranted under 23 USC §139(f)(4)(D).”

Alternatives define the nature and extent of possible project outcomes, and an entity with a financial interest in the outcome of a project should not have decision making authority in the NEPA process. In the end, there would be no way to know or disentangle the extent of Transurban/AMP’s *de facto* decision-making authority -- for a project it would go on to have right-of-first-refusal to build.

13) Contract clauses about payment for Phase 1 North bias the NEPA process. In the contract ([Phase P3 Agreement](#), Section 10.4(c)(iii), p. 20), it states: “If the NEPA approvals for Phase North do not permit Priced Managed Lanes then: ... the Phase Developer will not be entitled to any compensation for work performed on Phase North, except for work performed in support of NEPA for Phase North in accordance with Section 10.4(b).” This contract clause conditioning payment for work on approvals for Priced Managed Lanes is concerning, because it incentivizes a single mode and undercuts and forecloses the consideration of multimodal, demand management, non-P3, or no-build alternatives, or other alternatives to be proposed during future NEPA reviews, which would diverge from MDOT’s preferred alternative of Priced Managed Lanes.

In this way, the contract would bias the NEPA process when it still has several major steps to go – Supplementary Draft Environmental Impact Statement, Final Environmental Impact Statement, and Record of Decision. According to the contract, there are expected to be revision(s) needed after the Record of Decision ([Exhibit 6](#), mentions of “Environmental Summary/NEPA Re-evaluation” pp. 16, 91-92)

14) Steep financial penalties of up to \$50 million dollars for a no-build decision and early termination of the project also appear to bias the NEPA process.

15) There are inconsistencies around timing of property acquisitions. The contract states ([Exhibit 6](#), Section 8.6.3, p. 136): “Phase Developer shall notify MDOT if certain property interests or parcels are needed to be acquired prior to the ROD and contingent on MDOT’s approval.” This is inconsistent with the Board of Public Works’ [June 5, 2019 pledge](#) (p. 192) regarding timing of property acquisitions, which affirmed: “No property acquisitions related to Traffic Relief Plan may take place before BPW final approval of the P3 agreement.” Approval of P3 Section Agreements is conditioned on a Final Environmental Impact Statement. In the case of this project, it has been announced that the FEIS and ROD will be concurrent. So, this seems to be giving MDOT authority to approve property acquisitions before BPW approval of the Section Agreement.

Appendix B. Compensation Events and Relief Events

The problem with this extensive list of 30 compensation and relief events is that they entail financial risk that will be borne by taxpayers and future generations of taxpayers. The list also serves as a point of leverage for forcing the state to concede to building new toll lane extensions in exchange as a barter to not be liable for the hefty sums that will be associated with compensation and relief events.

The below paragraphs are sourced verbatim from pages 13-17 of the [Contract Term Sheet](#):

To the extent a Compensation Event or a Relief Event directly causes an adverse cost or schedule impact on the Section Developer, the Section Developer may claim an extension to applicable deadlines for performance or relief from compliance with its obligations. Notice of such claim must be provided within 30 days after the date the Section Developer first became aware (or should reasonably have become aware) that the relevant Compensation Event or Relief Event had occurred.

If such adverse impact is caused by a Compensation Event, the Section Developer may also claim compensation which places the Section Developer in a "no better/no worse" position, as compared to immediately prior to the occurrence of the Compensation Event.

The Section P3 Agreement will include "Compensation Events" addressing the following matters, among others:

- a) breach of the Section P3 Agreement by MDOT or MDTA (including a failure by MDOT to provide the Section Developer with access to each MDOT Provided Parcel in accordance with the access schedule agreed under Section 7 (Right of Way));
- b) violation of law by MDOT or MDTA;
- c) Discriminatory Change in Law;
- d) suspension of the Work (except as permitted by Section 38 below) or suspension of tolls in the Priced Managed Lanes (except as permitted by Section 38.A below);
- e) issuance of directive letters;
- f) physical damage to the Work caused by other MDOT capital works projects [or VDOT capital works projects]4 in the immediate vicinity of the Section (excluding work undertaken by a Section Developer Related Entity);
- g) MDOT's or MDTA's exercise of step-in rights except in cases of Section Developer's breach;
- h) the discovery of any Unknown Utility during the carrying out of the Construction Work;
- i) the discovery of any Unknown Hazardous Environmental Conditions during the carrying out of the Construction Work;
- j) the discovery of any Unknown Endangered Species during the carrying out of the Construction Work;
- k) the discovery of any Unknown Archaeological Remains during the carrying out of the Construction Work;
- l) issuance of injunctions or restraining orders relating to the Section or the P3 Program that prohibits the performance of a material part of the Work under the Section P3 Agreement or materially and adversely affects a Party's performance under the Section P3 Agreement;
- m) release of Hazardous Materials caused by an MDOT Related Entity;
- n) signing by MDOT or MDTA of new or amended Utility Framework Agreement, Utility Agreement, or Third Party MOU on terms different to the Setting Date MOUs, except to the extent caused by a change to the design made by the Section Developer after the Setting Date (and "Setting Date MOUs" means (i) the MOUs or agreements executed by MDOT or MDTA and the relevant utility/third party and made available to the Phase Developer prior to the Setting Date and

- (ii) Utility Framework Agreement, Utility Agreement, or Third Party MOU in a form that has not yet been executed at the Setting Date but that has been agreed as between MDOT and the Phase Developer as the form of MOU or agreement that the Phase Developer will base its pricing on at the Setting Date);
- o) construction or expansion of a Competing Facility as defined in Section 37 below;
- p) an extended Force Majeure Event, to the extent MDOT elects to treat it as a Compensation Event in lieu of termination;
- q) with respect to the 495 NEXT Project, breach by the 495 NEXT Developer or VDOT of certain defined interface obligations set forth in the Section P3 Agreement;
- r) any suspension, termination, amendment, or variation to the terms and conditions of any MDOT Provided Approval, except to the extent that such suspension, termination, amendment, or variation results from failure of any Section Developer-Related Entity to locate or design the Section or carry out the Work in accordance with the relevant MDOT-Provided Approval (including any differences between the Section Developer's design and the design used for the MDOT-Provided Approvals);
- s) an MDTA Outage occurs that constitutes a Compensation Event in accordance with Section 26 (System Faults and Failures) of the Tolling Services Agreement Term Sheet; and
- t) changes are made to any of the toll rate setting terms that constitute a Compensation Event in accordance with Section 36 (Change Orders) of the Tolling Services Agreement Term Sheet, except, in each case, to the extent attributable to any breach of the Section P3 Agreement, applicable law, or any governmental approval by, or negligent act or negligent omission of, a Section Developer-Related Entity and subject to such other limitations and conditions as will be set forth in the Section P3 Agreement.

The Section P3 Agreement will include "Relief Events" addressing the following matters, among others:

- a) any Changes in Law other than Discriminatory Changes in Law;
- b) Force Majeure Events (as defined in Section 40);
- c) floods in excess of the Base Flood, fires, explosions, earthquakes causing ground acceleration in excess of AASHTO design standards, tornadoes, named windstorms, and ensuing storm surges;
- d) riot or civil commotion;
- e) blockade or embargo;
- f) strikes or labor unrest affecting the construction industry generally;
- g) a failure by a Utility Owner to comply with its obligations under its Utility Framework Agreement or Utility Agreement or to cooperate with the Section Developer in relation to a Utility Adjustment where, in each case, such failure continues for a period of [λ] 5 days or more after the Section Developer has issued a request for assistance and continues to satisfy certain conditions to assistance under the Section P3 Agreement;
- h) a delay in obtaining any Major Governmental Approval due to delays in receiving responses from the relevant permitting agency that exceed the applicable Major Governmental Approval Period to the extent that such delay is beyond the reasonable control of any Section Developer-Related Entity;
- i) Pandemic Event; and
- j) the release of Hazardous Materials onto the Site that is not caused by a Section Developer-Related Entity, except, in each case, to the extent attributable to any breach of the Section P3 Agreement, applicable law, or any governmental approval by, or negligent act or negligent omission of, a Section Developer-Related Entity and subject to such other limitations and conditions as will be set forth in the Section P3 Agreement.