



November 28, 2016

Mr. Eric R. Backes
Regulations Coordinator
Maryland Department of Transportation
7201 Corporate Center Drive
Hanover, Maryland 21076

Dear Mr. Backes,

The Maryland Association of Counties (MACo) respectfully submits these comments on the Maryland Department of Transportation (MDOT)'s draft regulations, COMAR 11.01.18.01 and 11.01.18.02, filed with the Maryland General Assembly's Joint Committee on Administrative, Executive and Legislative Review (AELR), implementing the much-discussed Maryland Open Transportation Investment Decision Act of 2016.

As we testified before the AELR Committee on November 18, MACo supports making every effort to develop regulations, and any follow-up guidance, to implement this new law in the most reasonable fashion. MDOT could do so by offering flexibility in determining the population to be served by a project and implementing the scoring based upon differing project conditions and local government input. Our recommendations 1 and 2, below, provide more preferable options for these required terms. These are also summarized in our AELR testimony (attached).

Our subsequently numbered recommendations include suggestions for terms not required for inclusion in these regulations, but which are still appropriate for incorporation in order to facilitate more reasonable implementation. We understand that MDOT may follow up these formal regulations with additional policy and implementation documents, and these subsequent concerns may be addressed therein. We remain hopeful that this forthcoming process can be collaborative and productive, as counties have a variety of concerns on how MDOT will implement the Maryland Open Transportation Investment Decision Act of 2016.

We hope you will consider our suggestions listed below.

1. Define the Population Served More Accurately. As you know, the law tasks MDOT with defining the “area served by the project” as a component of a population factor for project scoring. The resulting number dramatically affects a project’s final score. The draft regulations simply define this as “the county housing the project.”

MACo does not support the notion that transportation projects in more populated counties deserve significantly greater priority than projects in less dense counties. Nor do we agree that all projects impact only their county, or even their entire county. MACo would welcome any statistical method which factors in ridership and use data to normalize this analysis accounting for the vast differentials in project type within MDOT’s Consolidated Transportation Program (CTP) and throughout our counties. **Regulations should allow for determining a project’s "area served" in a manner that recognizes the nature, size, and location of the project. Counties should have an opportunity to assert that their priority projects benefit a greater population than just their own residents.**

2. Score Different Projects Differently. A one-size-fits-all scoring system does not take into account the varying size, location, nature, and scope of each project. These factors will vary significantly across the jurisdictions and should be treated accordingly to reflect the impact they would have on a project. The draft regulations provide one set of weights for the nine goals and 23 required measures, when nothing in the law prohibits MDOT from applying differing weights to the goals and measures based upon varying categories of projects. MACo recommends at least six categories of project types and different weights for each, as more specifically described on the enclosed attachment. However, we welcome alternative approaches, such as variation by geographical region, similar to the State of Virginia’s Smart Scale program. **In either case, we support the goal of making the eventual project scores as sensible and credible as can be effected through this law.**
3. Allocate Responsibility Effectively. MDOT has the opportunity to spell out in regulations the measures for which it will seek support from the counties, and those which it will analyze itself. Counties should provide some, but not all, of the information required to score those MDOT projects they prioritize. While counties are well-positioned to provide qualitative analyses for scoring projects under some measures, they do not have access to the data or other resources essential for measuring MDOT’s projects under others. Using their specific planning and economic development plans, documents and policies, counties are willing to provide brief, qualitative analysis required for the following measures:

- a. The degree to which the project is projected to increase the use of walking, biking, and transit;
- b. The degree to which the project enhances existing community assets;
- c. The degree to which the project furthers the affected community's plans for revitalization;
- d. The projected increase in furthering non-speculative local economic development strategies in existing communities;
- e. The projected economic development impact on low-income communities;
- f. The degree to which the project leverages additional local and private sector transportation investment; and
- g. The degree to which the project supports local government plans and goals.

MDOT should continue to serve as the primary agent for other inputs and analyses and provide other information required to carry out this law. Again, counties welcome an opportunity to collaborate with MDOT on this process.

4. Clarify When A Rational Basis Exists. The law provides that MDOT may prioritize a project with a lower score over one with a higher score if "it provides in writing a rational basis for the decision."
 - a. Counties should be encouraged to provide materials to support a "rational basis" for prioritizing their choice projects through their priority letters. Since the Department is granted this broad authority, counties should naturally be enabled to offer elements of such a basis.
 - b. We acknowledge that the law, as written, grandfathers in CTP projects which have already begun construction, but not other previously programmed CTP projects. We welcome regulatory language that clarifies that in the Department's interpretation, an inherently rational basis exists to move forward with other historically prioritized projects which have already received significant investment of planning, engineering, right-of-way, or county resources.
 - c. MDOT might consider clarifying in the regulations that the rational basis standard generally applicable under Constitutional law is analogous here.

The rational basis test means that courts will not overturn government action unless the ... treatment ... is so unrelated to the achievement of any combination of legitimate purposes that [the court] can only conclude that the [government's] actions were irrational.

Warren v. City of Athens, 411 F.3d 697, 710 (6th Cir. 2005).

5. Specify What Counts. MDOT should consider using the regulations to refine the definition of "Major Transportation Project" such that it only refers to location-specific projects. CTP items which are not location-specific, such as the Sidewalk Program, cannot reasonably be scored under the law's requirements.

Counties offer the above recommendations in the spirit of cooperation. At the AELR hearing on the subject regulations, MACo affirmatively committed to working with MDOT, and potentially other stakeholders, on developing a scoring process that works, and if necessary working with the Maryland General Assembly to modify the law to accommodate a more pragmatic approach. We stand by that commitment and hope to work with you in the near future toward an implementation of this law that maximizes its effectiveness and flexibility.

Sincerely,



Michael Sanderson
Executive Director
Maryland Association of Counties

Attachment

CC: Scott Flanigan, President, County Engineers Association of Maryland
The Honorable Roger Manno, Senate Chair, Joint Committee on AELR
The Honorable Samuel Rosenberg, House Chair, Joint Committee on AELR
Heather Murphy, Director, Office of Planning & Capital Programming, MDOT
Pete K. Rahn, Secretary, MDOT
The Honorable Steve Waugh, Maryland Senate
Sam Malhotra, Chief of Staff, Office of the Governor

Attachment "A"

Sample Major Transportation Project Types

MACo recommends at least six categories of project types for scoring under the Maryland Open Transportation Investment Decision Act of 2016 (the "Major Transportation Project Types" or "MTP Types"):

1. Four MTP Types for State Highway Administration (SHA) capacity-increasing/improving projects:
 - a. MTP Type 1: Large rural highways, including functional classifications 1 – Interstate, 2 – Other Principal Arterial, and 6 – Minor Arterial;
 - b. MTP Type 2: Local rural highways, including functional classifications 7 – Major Collector, 8 – Minor Collector, and 9 – Local;
 - c. MTP Type 3: Large urban highways, including functional classifications 11 – Interstate, 12 – Other Freeways and Expressways, and 14 – Other Principal Arterial; and
 - d. MTP Type 4: Local urban highways, including functional classifications 16 – Minor Arterial, 17 – Collector, and 19 – Local; and
2. Two MTP Types for Maryland Transit Administration (MTA) improvements:
 - a. MTP Type 5: Station-specific improvements, and
 - b. MTP Type 6: Corridor/multi-station improvements.

Goals and measures should be weighted differently based upon MTP Type. Below are simply three examples illustrating how some measures should be applied differently. MACo is more than willing to work with MDOT on setting forth a system based on this approach.

1. SHA's Complete Streets Policy does not generally apply to MTA improvements; this measure should not be weighted heavily for MTP Types 5-6. It also should not be weighted heavily for MTP Type 1.
2. MTP Types 1 and 2 will not likely meaningfully "support connections between different modes of transportation and promote multiple transportation choices;" "increase the use of walking, biking and transit;" nor significantly "enhance access to critical intermodal locations for the movement of goods and services." While rural roads may in some cases improve intermodal connections, such measures do not adequately capture these improvements' true intent to ensure safe connectivity throughout the statewide transportation network. Therefore, these measures should be given lesser weight for these MTP Types.

3. While cost effectiveness is a desirable goal for all projects, the measure to quantify this by “estimated travel time savings divided by the project cost” does not accurately capture this for all MTP Types. Not all projects will improve travel time savings, but still may be very cost-effective. A transit station improvement, for example, may not result in travel time savings, but may still greatly enhance mobility and accessibility options (among other notable measures). For this reason, at least MTP Type 5 should not be weighted heavily by “the estimated travel time savings divided by the project cost.”