



Texas Conservative Coalition Research Institute

Comments to the Texas Transportation Committee re: the Draft of the 2021 Uniform Transportation Program

I. Background

Securing funding to meet Texas' transportation infrastructure needs continues to be a challenge to the state's policymakers. This challenge is the result of several factors: a rapidly-increasing population, significant inflation in construction costs, motor fuels taxes failing to keep pace with inflation, and the oil and gas boom of the last few years that imposed greater demands on roads in certain parts of the state. In addition, the outlook for the state budget for the remainder of the 2020-21 biennium (and perhaps future biennia) has been adversely affected due to the economic downturn caused by the COVID-19 pandemic ("COVID"). Although the state has made great progress in addressing transportation funding in recent years, the state will require substantial additional revenue in the coming years to meet its infrastructure demands. In response to these challenges, the state's policymakers should consider alternative financing mechanisms to meet these demands, in particular public-private partnerships ("P3s").

The state's rapid population growth is perhaps the most important contributing factor to the state's growing need for transportation funding. Texas continues to be one of the fastest-growing states in the country. As of July 1, 2019, Texas was home to approximately 29 million people.ⁱ From mid-2018 to mid-2019, Texas' population grew by 367,000, substantially outstripping the second fastest-growing state (Florida, 230,000).ⁱⁱ Based on migration patterns from 2010-2015, the Texas Demographic Center projected in 2019 that the state's population will grow to 47.4 million by 2050.ⁱⁱⁱ While Texans can justifiably be proud of their economy and the way it attracts people from around the country and even the world, this population growth puts additional strain on Texas infrastructure. This rapid growth is part of a long-term trend; in 1990, Texas' population stood at only 17 million.^{iv}

Although Texas' population has soared over the last few decades, and average daily miles driven in the state have increased by 70 percent since 1990,^v since 1999 its revenue from motor fuels taxes has actually declined in inflation-adjusted terms.^{vi} This decline in real terms is crucial because much of the revenue from motor fuels taxes is dedicated to the State Highway Fund (SHF). As of 2019, Texas's motor fuels tax imposed a tax of 20 cents on a gallon of gasoline, one of the lowest state rates in the country.^{vii} The decline in inflation-adjusted motor fuels tax revenue is not surprising given that Texas has not raised

its motor fuels tax rate since 1991.¹ Motor fuels tax revenue is also less from what it would otherwise be due to welcome innovations in fuel efficiency in automobiles.

The funding challenges which the Texas Department of Transportation (“TxDOT”) faces are even more significant when taking into account the inflation within the construction industry. As the Comptroller’s Office noted in 2019:

The Federal Highway Administration’s National Highway Construction Cost Index, used by planners and policymakers to calculate the inflation of highway construction costs for items such as asphalt and machinery, has risen by *84 percent* since 2003, far surpassing the general inflation rate of 33 percent during the same period.^{viii}

Additionally, the oil and gas boom in the last few years is another contributing factor to the pressure on Texas’ transportation budget. Horizontal drilling and fracking impose heavy demands on local transportation systems. As one news source notes:

Drilling a single long-lateral well can now require more than 500 tons of steel pipe, a 14-football-fields-long string of sand-carrying railcars and enough water to fill more than 35 Olympic-size swimming pools. The cumulative stress of moving so much mass over a concentrated set of asphalt roads in 50,000-pound (or heavier) truckloads causes enormous wear and tear that many rural counties cannot afford to repair.^{ix}

Unsurprisingly, this heavy wear and tear on rural roads means upgrades and repairs are necessary to a greater extent than they would otherwise be. In light of the substantial inflows of oil and gas taxes to the state’s Economic Stabilization Fund from oil and gas production in recent years, many residents in rural parts of the state (such as the Permian Basin) believe that the state is benefitting from the oil and gas boom without shouldering a fair share of the related costs in the area of transportation infrastructure.^x

In summary, several factors currently combine to place great pressure on the state’s transportation budget. Faced with this dilemma, the state must consider all feasible options for financing transportation.

II. Some Suggested Solutions Are Not Feasible

Three initial possibilities for addressing the state’s need for transportation funding are: (1) diverting existing tax revenue to transportation, (2) raising additional tax revenue for transportation, and (3) increasing TxDOT’s efficiency in completing projects.

With respect to channeling existing revenue to transportation, the Legislature has already taken significant steps in recent years to accomplish this goal. The 83rd Legislature (2013) passed Senate Joint Resolution 1 and House Bill 1 (83S3) to allow for the transfer of certain oil and gas severance tax revenues to the SHF. SJR 1 (in the form of Proposition 1) was approved by voters in November 2014. The 84th Legislature (2015) went even further, passing Senate Joint Resolution 5 to allow for the transfer of up to \$2.5 billion of state sales tax revenues and (potentially) a portion of the motor vehicle sales and rental tax to the SHF each year. SJR 5 (in the form of Proposition 7) was approved by voters in November

¹ The separate federal excise tax on gasoline is imposed at a rate of 18.4 cents per gallon.

2015. As a result of these actions taken by legislators and approved by voters in 2014 and 2015, \$8.9 billion in additional funding was budgeted for transportation in the 2020-21 biennium.^{xi} While not all of these funds are budgeted for construction projects, all are directed to transportation costs, such as payments on transportation-related bonds.^{xii}

Table 1 below illustrates the growth in All Funds funding for TxDOT over the last five biennial budgets and the additional funds that have been directed towards transportation as a result of Proposition 1 and Proposition 7.

Table 1: Estimate of All Funds, Texas Department of Transportation, in each of the Last Five General Appropriations Acts (numbers are in billions unless otherwise noted)

Biennium	All Funds	Funding Increase Over Previous Biennium	Prop. 1 Funds	Prop. 7 Funds	Combined Funds from Props. 1 and 7
2012-13	\$19.801	-	-	-	-
2014-15	\$20.945	5.8%	*	-	-
2016-17	\$23.052	10.1%	\$2.414	-	\$2.414
2018-19	\$26.595	15.4%	\$2.510	\$2.905	\$5.415
2020-21	\$30.782	15.7%	\$3.903	\$5.000	\$8.903

Source: Applicable General Appropriations Act

*SJR 1 (83S3, 2013), which led to Proposition 1, was enacted after the General Appropriations Act for the 2014-2015 biennium was enacted earlier in 2013. Thus, although the initial transfer of funds to the SHF pursuant to Proposition 1 took place in FY 2015, the budget for the 2014-15 biennium did not reflect that. According to the Legislative Budget Board, transfers to the SHF in FY 2015 pursuant to Proposition 1 totaled \$1.74 billion.

As the table illustrates, the transportation budget has increased significantly from biennium to biennium, and especially in the last two biennia as the effects of Propositions 1 and 7 began to be seen. From the 2012-13 biennium to the 2021-21 biennium, budgeted All Funds, Transportation increased by a healthy 55.5 percent. The Legislature's increased funding for transportation deserves praise, especially since it was done without imposing new taxes on Texans. Asking the Legislature to devise yet more new ways to shift existing tax revenue to transportation would risk leaving other critical functions of state government underfunded.

A second possibility- creating additional tax revenue streams or increasing the motor fuels tax- should be disregarded. Texas' championing of low taxes and limited government involvement in the economy has played a critical role in the "Texas Miracle." The welcoming economic environment of the state continues to attract individuals and families from all around the country. Before the COVID pandemic struck, the state was on pace for a solid 2020 fiscal year; the monthly year-over-year increase in total tax collections for the first six months of the 2020 fiscal year (i.e., September 2019 to February 2020) were -1.06 percent, 5.53 percent, 4.31 percent, 5.87 percent, 9.30 percent, and 8.63 percent, respectively.^{xiii} While the pandemic has caused significant harm to the economy, Texas' relatively light tax burden will likely play a key role in helping the state weather the economic storm. As a former president of the Dallas Federal Reserve remarked in June 2020:

Before the coronavirus struck, the tax, cost-of-living, regulatory and pro-business climate in Texas was draining capital and jobs (and Congressional apportionment) from the Northeast, the Midwest and California, as well as investment from abroad. Should Texas smartly and safely navigate Covid recovery, the movement of capital and people (and political power) will further accelerate.^{xiv}

Rather than increasing the tax burden on families across the state when unemployment is high and job security is uncertain, policymakers should continue to emphasize the policies that have made the state the nation's job-creation engine. While increased funding pressures have caused the majority of states to raise their motor fuels taxes since 2013^{xv}, Texas voters will likely expect policymakers to find alternative solutions. A 2019 poll which explored voters' thoughts on how to obtain additional funding for public education found that 72 percent of Texans opposed raising the motor fuel tax.^{xvi}

A third possibility is to demand greater efficiency from TxDOT in the hope that the state can get "more bang for its buck" when it comes to transportation spending. However, a glance at TxDOT's recent performance indicates that this course of action would be an inadequate solution. The construction projects for which TxDOT is responsible are a massive undertaking. The agency has more than 9,000 construction projects which are underway or will begin soon, which carry an estimated cost of more than \$31 billion.^{xvii} An additional 5,644 are scheduled to begin within the next four years, with an estimated cost of more than \$35 billion.^{xviii}

In each General Appropriations Act, the Legislature sets performance measures for TxDOT. The 2016 Sunset Commission report for TxDOT noted the agency's "well-documented inefficiencies in its project development pipeline, which have led to persistent over-time and over-budget highway projects."^{xix} Fortunately, the agency's performance appears to have improved since then. Table 2 below illustrates TxDOT's recent performance in fiscal year 2019.

Table 2: Performance Measures for Project Development and Delivery, FY 2019:

Performance Measure	Target	Result	Outcome
Percent of Design Projects Delivered on Time	79%	85%	Exceeds target
Percentage of Construction Projects Completed on Budget	85%	83.82%	Falls short of target
Percent of Two-lane Highways 26 Feet or Wider in Paved Width	49.6%	52.5%	Exceeds target
Percent of Construction Projects Completed on Time	65%	64.96%	Falls short of target
Number of Construction Project Preliminary Engineering Plans Completed	680	849	Exceeds target
Dollar Volume of Construction Contracts Awarded in Fiscal Year (Millions)	\$2,602	\$2,963	Exceeds target
Number of Projects Awarded	768	825	Exceeds target

Source: TxDOT Performance Results Summary, FY 2019^{xx}

As the table illustrates, TxDOT's performance met all of its project development and delivery targets except for percentage of construction budgets completed on budget and percent of construction projects completed

on time. The failure to meet the latter standard, however, was an extremely close matter; completing 64.96 percent of completed projects on time is more than 99.9 percent of the goal of 65 percent.

TxDOT's failure to satisfy the benchmark rate of 85 percent of construction projects completed on budget was more noticeable, but additional context, provided in Table 2 below, indicates that the agency is not significantly overspending on construction projects in the aggregate. TxDOT data indicates that 1,094 construction projects were completed between September 1, 2018 and February 29, 2020. Contracts for these projects totaled \$5.4 billion, and adjustments of approximately \$300 million were made due to change orders (i.e., positive or negative changes to project costs attributable to third parties revising estimates once the project is underway). The total amount paid on completion of these contracts was just over \$5.7 billion. The total dollars paid under these contracts is just 0.23 percent greater than the total dollar value of contracts awarded (as adjusted to reflect change orders²). Thus, while TxDOT failed to reach the 85 percent benchmark for completing projects on budget, in the aggregate there was very little spending beyond what was budgeted.

Table 3: TxDOT Spending on Projects, FY 2019 and First Half of FY 2020:

	# of Projects	Total Contract Awards	Total Change Orders	Total Paid
First half of FY 2019	391	\$1.921 billion	\$107.7 million	\$2.029 billion
Second half of FY 2019	322	\$1.538 billion	\$91.3 million	\$1.642 billion
First half of FY 2020	381	\$1.941 billion	\$100.4 million	\$2.042 billion
Totals	1,094	\$5.400 billion	\$299.5 million	\$5.713 billion

Texas Department of Transportation^{xxi}

In light of TxDOT meeting its performance goals, or falling just short of them, it is not realistic to expect the agency to solve the state's transportation funding problems simply by making the agency's performance more efficient. Faced with the challenges noted above- strong population growth, slow growth (if any) in motor fuels tax revenue, and significant inflation in construction costs- the Legislature should consider any non-traditional means of financing transportation that have proven to be successful at other times or in other states. P3s are one such way of financing transportation projects and have been implemented successfully in Texas before. Before examining the merits and costs of P3s, however, this testimony will review how the COVID pandemic has exacerbated the pressures on transportation funding in the state.

III. The Draft of the Uniform Transportation Program and COVID's Effects on Transportation Budgeting

The Texas Transportation Commission recently released a draft of its 2021 Uniform Transportation Program (UTP), which states in part:

The UTP is the Texas Department of Transportation's (TxDOT's) 10-year plan that guides the development of transportation work across the state. Organized into 12 funding

² If total dollars awarded under contracts are not adjusted to reflect subsequent change orders, then, aggregating all contracts, TxDOT spent 5.8 percent more on projects than was budgeted over the specified period.

categories, with each one addressing a specific type of work, the UTP authorizes the distribution of construction dollars expected to be available over the next 10 years. Within the UTP framework, TxDOT works with elected officials, local planning organizations, and the public to select and fund the state's highest priority transportation projects.^{xxii}

Each year, TxDOT's Financial Management Division prepares a 10-year cash flow forecast. As the UTP notes, these projections incorporate various assumptions about the performance of the different sources of TxDOT funding. Unfortunately, the COVID pandemic has adversely affected some of the funding sources upon which TxDOT relies.

The draft of the 2021 UTP contains a cash planning forecast for each fiscal year from FY 2021 to FY 2030. However, this information was based in part on estimates in the Comptroller's Biennial Revenue Estimate (BRE) for the 2020-21 biennium from January 2019 and the Comptroller's Certification Revenue Estimate (CRE) in October 2019. Thus, the UTP does not reflect the economic effects of COVID on TxDOT's long-range cash planning forecasts. Predicting the long-term economic effects of COVID at this time is little more than speculation. However, if the analysis is confined to the remainder of the biennium, some tentative conclusions are possible. The Comptroller's revised CRE from July 2020 (the "Revised CRE") considers the estimated economic effects of COVID for the remainder of the 2020-21 biennium. The Revised CRE indicates that the cash forecast in the draft of the 2021 UTP will be adversely affected in four ways.

First, the projected deposits to the SHF during the 2020-21 biennium pursuant to Proposition 1 are now projected to be \$90 million less than originally anticipated in the Biennial Revenue Estimate (BRE) for 2020-21 and \$490 million less than what was projected in the CRE. In the BRE, the Comptroller estimated that \$1.4 and \$1.46 billion in severance taxes would be deposited to the SHF in FYs 2020 and 2021, respectively (\$2.86 billion in all). In the CRE, the Comptroller boosted those estimates to \$1.67 and \$1.59 billion (\$3.26 billion total). However, in the Revised CRE, the Comptroller estimated that those numbers would instead be \$1.67 billion and \$1.10 billion (\$2.77 billion in all). In addition, the Comptroller predicts that there will be a significant drop in oil and gas tax revenue during FY 2021, which will lead to a relatively small deposit of \$620 million in severance tax revenue to the SHF during FY 2022. This in turn will increase the need for alternative sources of revenue for transportation during the 87th Session.

Second, dedicated allocations of motor vehicle registration fees to the SHF will be less than anticipated. The BRE estimated these allocations would be \$1.60 billion and \$1.64 billion in FY 2020 and FY 2021, respectively. The CRE contained virtually identical projections, but the Revised CRE lowered those projections to \$1.35 billion and \$1.64 billion. This revision results in an estimated allocation that is \$250 million less than what the BRE projected.

Third, and perhaps most importantly, dedicated allocations of motor fuel tax revenue to the SHF will be less than anticipated. The BRE estimated these allocations would be \$2.79 billion and \$2.84 billion in FY 2020 and FY 2021, respectively. Again, the CRE contained virtually identical projections, but Revised CRE lowered those projections to \$2.54 billion and \$2.52 billion. This revision results in an estimated allocation that is \$570 million less than what the BRE projected.

Fourth, the projected revenue from Proposition 7 will be slightly less than anticipated. The anticipated \$35 million deposit to the SHF that is attributable to certain motor vehicle sales and rental tax revenue will not be

realized.³ Fortunately, this loss of \$35 million is a small figure in the context of the overall transportation budget. More positively, the BRE predicted that \$2.5 billion of general sales tax revenue would be deposited to the SHF in each of FY 2020 and FY 2021 in accordance with Proposition 7. The CRE echoed this prediction, as did the Revised CRE. However, as the latter points out, the full deposit of \$2.5 billion for FY 2021 will not be made until September 2021, which is the first month of FY 2022. Table 4 below summarizes the above information.

Table 4: Effects of COVID on Comptroller’s Revenue Projections for Allocations to the SHF during the 2020-21 Biennium, all numbers in billions unless otherwise noted, numbers may not add precisely due to rounding

Source of Transportation Funding*	BRE (January 2019)	CRE (October 2019)	Revised CRE	Projected Decline in Revenue Due to COVID Compared to BRE	Projected Decline in Revenue Due to COVID Compared to CRE
Proposition 1 (severance taxes)	\$2.86	\$3.26	\$2.77	\$90 million	\$490 million
MV registration fees	\$3.24	\$3.22	\$2.99	\$250 million	\$230 million
Motor Fuel Taxes	\$5.63	\$5.61	\$5.06	\$570 million	\$550 million
Proposition 7 (general sales tax and MV** sales and rental taxes)	\$5.00	\$5.04	\$5.00	0	\$35 million
TOTAL	\$16.73	\$17.13	\$15.82	\$910 million	\$1.31

Source: Comptroller’s Data from the BRE, CRE, and Revised CRE

*Only major sources of allocations to the SHF are listed.

** “MV” stands for “motor vehicle”

As the table illustrates, the economic effects of COVID will reduce SHF funding sources for the current biennium by an estimated \$910 million compared to what the BRE projected and by \$1.31 billion compared to what the CRE projected. Furthermore, as noted above, reduced severance taxes in FY 2021 will reduce Proposition 1’s contribution to the budget during the 2022-23 biennium. Given COVID’s damage to the transportation budget for the current biennium, policymakers should consider all transportation financing methods with an established track record.

IV. Public Private Partnerships⁴

Over the last two decades, P3s have been a viable and important infrastructure investment tool for state and local governments in Texas and across the world. P3s involve contracts between a public entity and a private investment consortium to build and operate public infrastructure. These partnerships allow for the sharing of both resources and risks and have been used to finance of variety of needs such as roads, bridges, and facilities for water treatment, energy generation, and even recreation.^{xxiii}

³ The BRE from January 2019 did not project any motor vehicle sales tax revenue to be directed to the SHF during the 2020-21 biennium, but the CRE did. Had it happened, it would have been the first time that a deposit of this type was made to the SHF in accordance with Proposition 7.

⁴ The portion of this testimony on P3s draws heavily from TCCRI’s previous testimony on the issue.

In many P3s, the private group provides the design, development, construction, and operation of the project. The public agency will typically retain ownership of the project, oversee its operation, and manage the private group's involvement, often involving a decades-long contract. Projects are financed through combinations of state contributions, private activity bonds (PABs), and equity investment by the private developers. Over the course of the project term, the private partner's investment and a return on this investment are repaid through tolls, designated revenues, cost savings, and/or lease agreements. Additional revenue that is accrued can either go directly to the private partner or be split between the private and public partners, depending on the terms of the contract.

Texas has a history of utilizing P3s to help finance public projects. The 82nd Legislature (2011) passed the Public Private Facilities Infrastructure bill (SB 1048) allowing the use of P3s for infrastructure development projects at the state, county, city, and school-district levels. While transportation projects were not included in SB 1048, legislative action in 2007 (SB 792, 80R) had already authorized the limited use of private sector investment in transportation infrastructure projects, and Senate Bill 19 (82R, 2011) established a streamlined process for local toll projects.

TxDOT uses a version of P3s called Comprehensive Development Agreements (CDAs) to partner with private companies to design, finance, and maintain tolled highways.^{xxiv} A variety of CDA arrangements have been used throughout the state, including the construction, financing, and maintenance of the 17-mile LBJ-635 corridor expansion in Dallas and the North Tarrant Express Project (NTE) in Tarrant County. The benefits to the state from these projects are significant. For the LBJ-635 project, the state contributed \$490 million, but ultimately received a \$2.6 billion investment in new road capacity for one of the most congested areas of the DFW region.^{xxv} The improvement project was completed three months ahead of schedule and opened in September 2015.^{xxvi} For the NTE, which opened in November 2014, a 13.3-mile corridor along the north loop of I-820 and SH-121/183, from I-35W in north Fort Worth to FM 157 in eastern Tarrant County, was substantially improved. During the construction phase, general-purpose lanes were rebuilt, frontage roads were rebuilt and expanded, and four managed toll lanes were added. By the end of 2015, the completed project handled almost 200,000 vehicles daily.^{xxvii}

Both the LBJ and NTE projects utilize "Texpress" lanes, which are able to dynamically manage traffic in real time through variable toll pricing. At the same time, pre-existing lanes were not tolled, but were, in fact, rebuilt and improved as part of the projects. These lanes remain free for all vehicles. Notably, Texas law makes clear that TxDOT may not operate a non-tolled state highway as a toll road, or transfer operation of that highway to an entity which will operate it as a toll road, unless:

- The Texas Transportation Commission designated the highway as a toll project before the contract to construct the highway was awarded;
- The project was, among other things, designated as a toll project on or before September 1, 2005;
- The highway is reconstructed so that the number of non-tolled lanes on the highway is greater than or equal to the number before the reconstruction; or
- A road is constructed adjacent to the highway such that the number of non-tolled lanes on the converted highway and the new road is greater than or equal to the number on the highway before the conversion.^{xxviii}

Bob Poole of the Reason Foundation reported high levels of satisfaction among drivers using the LBJ and NTE projects: one year after NTE's completion, 70 percent of users of the overall highway (general purpose and electronic toll lanes) gave it a favorable rating.^{xxix} And users of the LBJ rated that corridor even higher one

year after project completion, at 76 percent.^{xxx} Importantly, tolls did not discourage middle-class Texans from making use of the toll roads:

Local officials in Austin, Dallas, Houston, and elsewhere support continued use of tolling and P3s for much-needed congestion-relief projects...And as we see on express toll lanes around the country, on LBJ and NTE only 15 percent of the cars are luxury brands. Toyota, Ford, and Honda are the most common vehicles in toll lanes.^{xxxi}

P3s can also offer valuable improvements to the transportation system by bringing private sector expertise to the public arena. Private companies often have substantial expertise in financing and asset management, thereby successfully leveraging billions of dollars for investment into public infrastructure. P3s are able to accelerate and guarantee the completion of large and complex projects in ways which are often superior to the delivery model of state and local governments.^{xxxii} As the U.S. Department of Transportation has explained, “FHWA [the Federal Highway Administration] encourages the consideration of public-private partnerships (P3s) in the development of transportation improvements. Early involvement of the private sector can bring creativity, efficiency, and capital to address complex transportation problems facing State and local governments.”^{xxxiii}

Additionally, the option to include long-term maintenance of the project in addition to the design and construction can make P3s a very appealing solution to public infrastructure needs. Despite these benefits, the use of P3 projects nationwide and in Texas is relatively limited. In its 2018 Roadway Inventory Annual Report, TxDOT reported that the state had only 732 miles of tollway mileage, compared to 314,648 total centerline miles, of which 80,455 are defined as “highway” miles.^{xxxiv}

Furthermore, P3s have the benefit of integrating various phases of a project, such as the design portion and the construction portion. This integration can properly align the incentives of parties to maximize efficiency. A January 2020 report by the Congressional Budget Office (CBO) on P3s recognizes this potential and is worth quoting at length:

Partnerships [i.e., P3s] can facilitate quicker or cheaper completion of a project by bundling two or more elements of a project because information that would otherwise be known at only one stage is more likely to be shared among stages. A traditional contract does a relatively poor job of addressing the risks that arise from privately held or incomplete information. For example, having separate contracts for designing and building a facility exposes the project’s owner to constructability risk—the risk that the design produced will not be the most cost-efficient option to build or will not match the builder’s abilities. If such a mismatch occurs, the project’s owner must first pay the builder to fix the resulting problem and then attempt to collect from the designer compensation for any added costs—which requires proving that the designer had legal liability because of a design that became more difficult and costly to complete than had been expected.

When the stages of an infrastructure project are consolidated under one project manager, that manager has an incentive to reduce the cost of the other stages of the project for which it is responsible. So a private partner that not only designs and builds but also operates and maintains a piece of infrastructure will be motivated to design it in a way that improves its long-term performance and reduces life-cycle costs (for example, by using more expensive but longer-lasting materials). Thus, when the same firm builds and maintains a project, it is motivated to use materials and methods to minimize costs over the life of a project, not just in its construction. Partnerships will be most cost-

effective when the partner can realize substantial savings from keeping costs low over the life of the facility.^{xxxv}

Despite the success of projects such as the LBJ-635 and NTE, opposition to tolling as well as opposition to private sector entities operating public infrastructure has resulted in TxDOT turning away from the P3 infrastructure delivery method at a time when other states, like Virginia and Maryland, have used P3s to develop billions in infrastructure. In Texas, the 84th Legislature (2015), 85th Legislature (2017), and 86th Legislature (2019) did not authorize new CDAs. Meanwhile, in 2016, Virginia approved the I-66 “Outside the Beltway” managed lanes project that will deliver a \$2.5 billion dollar project with no state investment, and includes an upfront payment of more than \$500 million that can be spent on other transportation priorities in the corridor.^{xxxvi} And just last year Maryland’s governor announced he plans to let \$9 billion in P3 transportation projects as public private partnerships.^{xxxvii} Earlier this year, Maryland authorized use of P3s to relieve congestion by widening parts of the Beltway.^{xxxviii} In Pennsylvania, policymakers made creative use of P3s in the recently-concluded Rapid Bridge Replacement Project, which “bundled” the repair of more than 550 bridges in poor condition under a single contract.^{xxxix}

The Texas Transportation Code still authorizes CDAs as a method of developing transportation infrastructure projects^{xl}; ensuring that the statute is utilized should remain part of Texas’s approach to addressing the congestion challenges on Texas highways. Indeed, tackling congestion is something to which privately-financed projects are well-suited. As one commentator in *Forbes* magazine observed in 2017:

Another thing Texas' toll roads have accomplished is greater mobility. The Dallas and Houston metros, in particular, have been the nation’s two fastest-growing metros by net population since 2010. But their congestion levels are not as bad as similar-size metros, according to traffic studies by Inrix and TomTom. This is because they've expanded highway capacity to accommodate population growth, acknowledging that the laws of supply and demand apply to roads like with anything else. Perhaps more crucially, though, they've priced the use of these roads, to avoid a tragedy of the common...The most congested portions of Texas' cities, meanwhile, are the major roads that follow the generic socialized model, rather than this private one.^{xli}

It should also be underscored that there is no inherent risk to the State of Texas if its highways are funded with private capital. Indeed, the recent experience with State Highway 130 near Austin underscores this point. While the private company that oversaw the project – SH 130 Concession Company – filed for bankruptcy, the state committed no funds to the project and was not liable for any of the outstanding debt associated with the project.^{xlii} At the same time, the highway remains open to vehicular traffic and provides a valuable part of central Texas’s transportation infrastructure south of Austin.^{xliii} As the above-referenced *Forbes* article explained:

But what the government is not forced to do for Texas' public-private toll roads is assume much of the risk. If a road fails—such as one stretch did along a rural portion between San Antonio and Austin—it is shuttered, and the costs eaten by the private investors. Contrast this with most other major U.S. roadways, which don't have this level of user-fee-based accountability. Instead, they are funded--without question and in perpetuity--by gas tax revenue (and increasingly, general fund revenue). Without any market correction process, such roads don't endure the same scrutiny about whether they are even justified. Money for them just keeps rolling in, footed by taxpayers.^{xliv}

All of which is to say that the state should continue to value the options available through public-private approaches to its transportation infrastructure challenges.

While P3s are a valuable tool for complex and expensive projects, they are of course not a panacea. They can involve substantial transaction costs, such as the legal costs of negotiating a deal with the private investors. P3s typically involve contracts lasting several decades; because of the substantial risk of unforeseen problems arising over the course of this long period, private investors will demand a higher rate of return on their investment than they otherwise would. The January 2020 report by the Congressional Budget Office identified a trend beginning in 2009 in which private investors increasingly rely on “availability payments” for a large portion of their return on investment, rather than relying exclusively on toll revenue.^{xlv} Availability payments are a series of installment payments made by state or local government to the private partner in the P3 project, regardless of whether traffic flows and toll revenue meet estimated projections. This trend was apparently driven by private investors in some pre-2009 cases going bankrupt due to their overestimates of toll revenues generated by the P3 projects. Since then, private investors have become more cautious and have sought to safeguard their investment by securing a more predictable stream of payments. This trend makes it critically important that the public partner in a P3 project hire sophisticated legal and financial counsel that are well versed in negotiating these types of agreements- a failure to do so could result in a one-sided agreement which burdens the public partner and its taxpayers for years.

At a time when other states are embracing new and innovative project delivery methods such as public-private partnerships, Texas, once a leader in innovative project delivery, has turned its back on utilizing private investment in infrastructure in favor of more traditional methods, which by themselves are insufficient to meet the state’s needs. While P3s are not a cure-all, they should have a place in the state’s transportation plans because of their potential to relieve congestion in especially crowded areas and to harness the expertise of the private sector. Indeed, a recent report focused on the state’s response to the COVID-19 pandemic underscores the need to consider all financing options for transportation infrastructure. A joint report from the University of Texas and the University of Houston concluded that, as part of its COVID response the state should “[a]llow for more private capital to be utilized to build infrastructure through comprehensive development agreements.”^{xlvi}

V. Conclusion

Several factors combine to place consistent pressure on the Texas transportation budget. The Legislature in recent years has made great efforts to provide new streams of funding for transportation projects, which has led to billions of dollars in additional funding. But still more funding is needed, and traditional solutions by themselves are likely to prove inadequate even in normal times, but especially now in light of COVID’s effects on the state’s finances. Policymakers should strive to make sure that increased use of P3s is at least part of the solution to this problem. P3s have a track record of sound performance in Texas and elsewhere and offer some advantages over traditional transportation financing. With COVID reducing transportation funding sources by perhaps more than \$900 million over the remainder of the current biennium compared to what the Comptroller projected in the January 2019 BRE, the Legislature should consider turning to private funds to ensure that Texas’s transportation infrastructure is able to accommodate the state’s economic growth and ever-growing population.

ENDNOTES

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- ⁱ United States Census Bureau, “QuickFacts: Texas,” available at <https://www.census.gov/quickfacts/TX> (data as of July 1, 2019).
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