

UC Berkeley

Working Papers

Title

Flexibility in California Transportation Funding Programs and Implications for More Climate-Aligned Spending

Permalink

<https://escholarship.org/uc/item/5wz0z0jz>

Authors

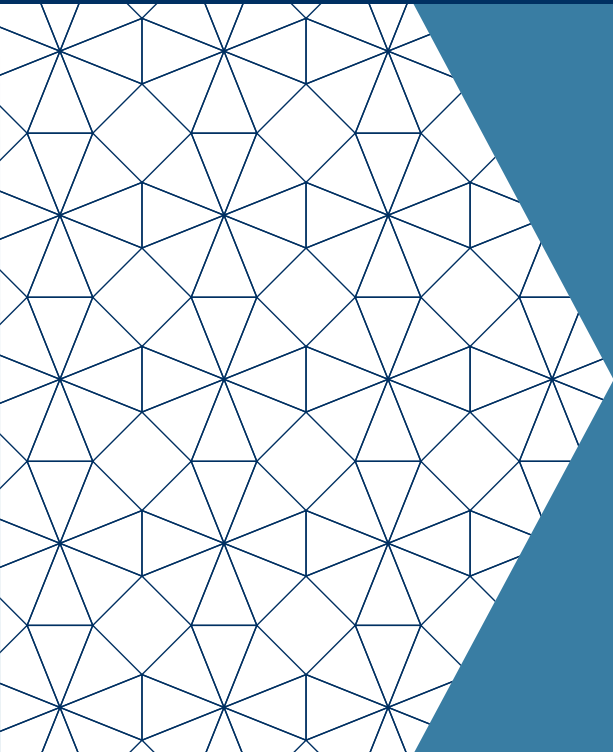
Segal, Katie
Elkind, Ethan
Lamm, Ted

Publication Date

2021-12-01

DOI

10.7922/G2ZW1J73



Flexibility in California Transportation Funding Programs and Implications for More Climate-Aligned Spending

WHITE PAPER

Katie Segal, Ethan Elkind, Ted Lamm
University of California, Berkeley School of Law

October 2021

DOI: [10.7922/G2ZW1J73](https://doi.org/10.7922/G2ZW1J73)



Flexibility in California Transportation Funding Programs and Implications for More Climate-Aligned Spending

This research was conducted with funding, in part, from the State of California Strategic Growth Council. The opinions expressed herein are those of the authors and not necessarily those of the Strategic Growth Council.

WHITE PAPERS IN THE SERIES INCLUDE:

Evaluation of California State and Regional Transportation Plans and Their Prospects for Attaining State Goals: Summary and Synthesis

A Brief History of Transportation Policies and Institutions

Review of Statewide Transportation Plans for California

MPO Planning and Implementation of State Policy Goals

Examination of Key Transportation Funding Programs in California and Their Context

Forward

Assembly Bill (AB) 285 (Friedman, 2019) requires the California Strategic Growth Council (SGC) to submit a report to the Legislature by January 31, 2022, that includes the following:

- An overview of the California Transportation Plan (CTP) 2050
- An overview of all regional Sustainable Communities Strategies and any alternative planning strategies, as needed
- An assessment of how the implementation of the CTP and regional plans “will influence the configuration of the statewide integrated multimodal transportation system”
- A “review of the potential impacts and opportunities for coordination” of key state funding programs” to be conducted in consultation with the administering agencies
- Recommendations for improving these programs and other relevant transportation funding programs to better align the programs to meet long-term common goals, including the goals outlined in the CTP

In spring 2021, the SGC contracted with the University of California (UC) to provide materials supporting their report to the Legislature. Researchers at the UC Berkeley, UC Davis, and UCLA Institutes of Transportation Studies and the UC School of Berkeley Law joined forces to prepare a series of white papers to provide the evidentiary basis for the project. Elizabeth Deakin, the UC Berkeley principal investigator, coordinated the work.

Background

California has adopted ambitious goals for its transportation systems. The state has pledged to reduce greenhouse gas (GHG) emissions by 40 percent compared to 1990 levels and by 80 percent by 2050, and has also committed to achieve carbon neutrality by 2045. With transportation a major emitter, substantial changes in transportation vehicles, fuels, operations, and user choices must be achieved to meet these goals.

As pressing as climate change goals must be, other goals remain important. California has pledged to maintain its transportation infrastructure in a state of good repair, provide for safe operations, support economic development, meet air quality standards, protect the state’s natural environment, coordinate urban transportation with housing policies, and do so in a way that is equitable for all. This ambitious set of goals places considerable responsibility on transportation planners and decision-makers.

A series of state initiatives has moved the state toward zero-emissions vehicles, cleaner fuels, and planning for transportation and land use measures that reduce vehicle miles traveled (VMT). Nevertheless, a 2018 assessment by the California Air Resources Board (CARB) found that the State of California is at risk of missing its 2030 GHG emissions reduction target for transportation-related emissions, in part due to increases in VMT. Since then, CARB has taken steps to tighten its requirements, the California Department of Transportation (Caltrans) has updated its plans and planning guidance, and metropolitan planning agencies and their partners (transit agencies, county transportation commissions, cities) have updated their plans and programs, which include both transportation and land use elements.

California's transportation plans for the most part have been developed in a context of anticipated growth in population and the economy. In a business-as-usual context, such growth is associated with increases in VMT. Nationwide, for example, the Federal Highway Administration has projected that VMT will continue to increase as the result of population increases, rising disposable income, increased GDP, growth in the goods component of GDP, and relatively steady fuel prices. For California to buck these trends would require a large-scale, concerted effort.

However, in the past two years, the COVID-19 pandemic has disrupted daily life and led to massive changes in travel behavior. As recovery from the pandemic occurs in fits and starts, whether and to what extent pandemic-induced changes in travel will persist remains in question. Major issues include whether telecommuting and e-commerce will remain popular and whether avoidance of shared modes will continue.

At the same time, new transportation options, from high-speed rail to bike sharing, are being added to California's transportation systems, and transportation technologies continue to evolve—electrification and automation are examples. Such changes need to be considered in plans that aim to steer actions for 20, 30, or even 50 years, along with other driving forces, including fuel prices and turnover rates for the vehicle fleet. How these factors are dealt with in plans can make a difference in how well the plans comport with actual experiences in the future.

The UC team has evaluated California's state and metropolitan transportation plans, financing for transportation, and the legal framework in this broad and uncertain context while taking into consideration the legacies of successive transportation technologies and the institutions that shaped and were shaped by them and the implications for change.

Research Methods

The UC team carried out its work based on 1) reviewing and analyzing previous research on the topic, including government reports, assessment document, and scholarly literature; 2) discussions with SGC staff and the staff of state agencies involved in transportation planning and related activities in California; and 3) interviews with key informants. A series of white papers was prepared to address the topics to be included in the report to the Legislature.

White Papers and Summary

Each white paper is designed to be read as a stand-alone document. In addition, a separate summary synthesizes the findings and recommendations.

Evaluation of California State and Regional Transportation Plans and Their Prospects for Attaining State Goals: Summary and Synthesis pulls together the key findings and recommendations of all the white papers. It assesses the prospects for achieving the state's diverse goals through its transportation planning and programming processes and identifies strengths and weaknesses of current policies and practices. It also provides the authors' recommendations for changes to policy and practice that could improve overall system performance and achievement of state goals for climate, equity, environment, safety, infrastructure, and the economy.

A Brief History of Transportation Policy and Institutions presents the development of transportation systems in the United States, with particular attention to California. The review includes key technological advances in transportation and the institutions that were developed to implement them. The paper also discusses the problem of organizational inertia and the issues associated with changing organizational culture to better reflect the problems of the day. **Review of Statewide Transportation Plans for California** reviews the most recently adopted CTP and other key transportation plans adopted by state agencies, discusses the special attention given to new technologies in the CTP, and presents the findings from over 80 interviews with stakeholders across California who were asked to weigh in on the strengths and weaknesses of transportation planning practices in the state.

MPO Planning and Implementation of State Policy Goals evaluates California metropolitan planning organizations' regional transportation plans and sustainable communities strategies and looks at the relationship between MPO plans and what is actually funded through transportation improvement programs.

Examination of Key Transportation Funding Programs in California and Their Context assesses the congruence between funding programs and state goals for transportation. Particular attention is given to major funding sources, such as the State Operation and Protection Program, and programs designed to promote key state goals, including the Affordable Housing and Sustainable Communities program, the Transit and Intercity Rail Capital Program, the Transformative Climate Communities program, and the Sustainable Transportation Planning Grant program.

Flexibility in California Transportation Funding Programs and Implications for More Climate-Aligned Spending examines key features of the legislative authority for transportation planning and finance in California, including local option sales taxes for transportation, and assesses the amount of flexibility that current laws and practices allow for reprioritizing projects as problems and priorities change.

Executive Summary

UC Berkeley School of Law researched the following questions.

- How do state and local funding programs identify limitations for the use of funds on certain types of projects?
- How much flexibility do local, regional, or state decision-makers have in allocating funding away from traditional projects and toward active or public transportation projects? If flexibility exists, how can decision-makers reallocate funding, modify prior commitments, or reprioritize projects?
- What are the implications under the California Environmental Quality Act (CEQA) of policy or analytical developments that arise after the original CEQA review? If decision-makers do modify transportation plans, would those modifications trigger or reopen a CEQA analysis?
- Where is there flexibility in spending transportation project funds on greenhouse gas (GHG)-reducing projects rather than auto-oriented projects? Can funding for auto-oriented transportation projects be directed toward low-emission forms of transportation instead, or are there requirements for spending on roads, highways, and other automobile-oriented infrastructure?

Five key findings emerged from the research process.

1. In some cases, the state can improve the flexibility to direct funds toward projects aligned with state priorities by modifying interpretations of a statute rather than initiating changes to the statute itself.

State agencies can improve the prioritization of certain types of transportation projects, such as public and active transportation, through the interpretation of statutory criteria. We found that for laws already in effect, changing language in agencies' implementation guidance—where permitted by statute and grounded in state vehicle miles traveled (VMT) and GHG reduction priorities—can be more straightforward than changing the law itself. However, changing statute might be appropriate in certain cases.

2. Political barriers to overcoming flexibility in local projects and sales tax measures might be more challenging than legal barriers.

A substantial amount of political inertia characterizes transportation planning and funding processes, making it difficult to chart a new course for a project once it is set in motion. Even where flexibility might exist from a legal perspective, entities will encounter multiple impediments to more proactive funding redistribution at the local and regional levels, particularly where the public has approved a program via a tax measure. Transportation planning is a multi-year process. By the time a project is considered for funding, it has gained substantial political support, including from powerful political constituencies. Projects included in regional transportation plans (RTP) 20 years ago, or even 10 years ago, might now be out of sync with the latest technologies, demographic needs, and environmental realities. Still, there could be tension between state VMT and GHG reduction goals and community investment preferences, and it might be

politically infeasible to overturn these priorities at the local level. Officials responsible for decision-making under an RTP might face competing priorities.

3. State law affords local governments the authority to craft fairly flexible transportation spending measures, in particular through categorical or priority-based (rather than project-specific) approaches and built-in processes for agency adaptation to new circumstances.

Under the constitutional and legal provisions derived from Propositions 13, 62, and 218, local governments are fairly circumscribed in how they can authorize new revenue-raising measures that could fund transportation investment; “special” taxes to fund specific priorities require the approval of two-thirds of voters. However, state law generally allows local governments to build flexibility into the plans that voters approve. Specifically, measures can describe the project priorities or project types to be funded rather than the specific projects to be funded, allowing transportation agency leaders to craft spending plans that respond to new policy imperatives. Measures can also include detailed processes (such as supermajority board votes) for agency modification of spending plans under specified circumstances. However, the level of specificity and flexibility might affect the likelihood of passage by voters. If measures do not include flexible language from the outset, local governments likely cannot change projects or spending allocations without reissuing the measure for voter approval. Therefore, local governments should incorporate enough flexibility into measure language to allow changes as needed, provided that the changes are consistent with the original intent of the ballot measure.

4. CEQA does not typically require agencies to undertake new review based on post-certification analysis or policy changes. However, transit agencies seeking to reprioritize projects for funding in a manner that goes beyond the terms of their original spending program or plan will typically need to undergo supplemental or subsequent CEQA review.

Under CEQA, once a project has undergone and obtained certification of its environmental review, the lead agency typically is not required to conduct further environmental review unless the agency makes a subsequent discretionary decision to modify the project. The subsequent issuance of environmental analysis or guidance, or amendments to CEQA itself, that would have affected the environmental review had they been in place at the time generally do not require an agency to take subsequent action. If a lead agency elects to undertake a discretionary action and update the environmental review, it will likely be required to prepare a subsequent or supplemental Environmental Impact Report (EIR) on the new impacts and project modifications, including full public review and comment processes. (In the case of truly minor changes to the project, a limited process addendum might be an option.) As a result, time- or funding-constrained agencies will likely be hesitant to reprioritize projects in this manner.

5. There is little consistency in how state and local funding sources address flexibility.

Flexibility is usually implemented by deleting some projects and substituting others, proceeding with existing projects and mitigating their impacts, or reprioritizing projects by expediting GHG-reducing projects so that they generate benefits sooner. However, several different approaches for defining flexibility exist within state and local funding source requirements. For example, some local funding sources are restricted to projects included in a list or voter-approved plan, while others fund projects through a nomination process or allow a local entity to use its discretion, providing it has met certain requirements. There is also variation between state and local approaches, primarily due to state and local entities’ different authorities, funding resources, and capacities. Any state action to increase consistency should be tailored to specific state and local funding measures and programs rather than generally stated, and cover multiple spending strategies.

Recommendations

Decision-makers can implement several actions to leverage existing flexibility or build new flexibility into funding requirements. In each case, flexibility should be structured to facilitate shifting of transportation funds away from outdated investment priorities and toward GHG- and VMT-reducing, safety- and public-health-supporting, and equity- and accessibility-promoting projects.¹

State agencies should prioritize updates to state-level program guidance to include more funding flexibility, with specific guidance to prioritize projects that reduce VMT and GHG emissions, promote public health, and prioritize equity.² Legislators should build flexibility into the language of newly created funding programs but not so much flexibility that the program loses its ability to target a particular need or goal.

The state could also require local entities and metropolitan planning agencies to advance projects that prioritize VMT and GHG reduction, public health benefits, and equity considerations to receive state matching funds.

The state could also condition new funding on regional and local transit leaders adopting new metrics to select projects for funding based on VMT- and GHG-reduction performance, among other factors.³ Local governments pursuing new tax measures should consider program- and priority-focused measures that identify options aligned with state goals (including climate, health, equity, and other goals), as well as appropriately structured review and revision mechanisms where appropriate.

¹ See, e.g., Caltrans, California Transportation Plan 2050 (February 2021), pp. 71-79 (outlining eight goals of state's transportation vision), available at <https://dot.ca.gov/-/media/dot-media/programs/transportation-planning/documents/ctp-2050-v3-a11y.pdf>. The eight goals are safety, climate, equity, accessibility, quality of life and public health, economy, environment, and infrastructure. While these goals are critically important policy priorities for state transportation planning and investment, unlike GHG emission reduction, they are not established legal mandates. See Assembly Bill 32 (Núñez, Chapter 488, Statutes of 2006) and Senate Bill 32 (Pavley, Chapter 249, Statutes of 2016), Cal. Health & Safety Code § 38566. Therefore, while this paper aims to incorporate other goals into as many aspects of the discussion as possible, there may be some instances in which the discussion focuses only on legally mandated GHG emission reduction targets rather than broader policy priorities. The authors encourage policymakers to consider ways to build this larger set of goals into decision points, even where not explicitly required.

² For example, health and equity metrics and indicators could include the SB 1 Emerging Performance Metrics.

³ The California Transportation Plan 2050 goals are a potential option for defining such metrics. Caltrans, *supra*.

Introduction and Research Questions

Transportation project funding sources almost always define limitations on how recipients can spend dollars. Common limitations include transportation mode (for example, spending allowed only on rail projects), geography (such as spending allowed only in a particular county or region), or local characteristics (spending allowed only in cities with certain population levels) as well as delineation of specific, named projects or project lists.

Local, regional, and state transportation planners must account for and, in some cases must contend with, these restrictions as they select and execute projects. Certain funding restrictions might push local entities toward auto-oriented transportation projects, such as highway lane expansions rather than projects that align with local and state climate change and environmental goals.

This section examines the nature and extent of funding limitations that direct resources toward auto-oriented projects or away from public transportation and active transportation alternatives that could help regions reduce greenhouse gas (GHG) emissions and local air pollution. This section asks the following questions.

- How do state and local funding programs identify limitations for the use of funds on certain types of projects?
- How much flexibility do local, regional, or state decision-makers have in allocating funding? If flexibility exists, how can decision-makers reallocate funding, modify prior commitments, or reprioritize projects?
- If decision-makers do modify transportation plans, what are the implications under the California Environmental Quality Act (CEQA). Would certain modifications trigger or reopen a CEQA analysis?
- Where is there flexibility in spending transportation project funds on GHG-reducing projects rather than auto-oriented projects? Can funding for auto-oriented transportation projects be directed toward low-emission forms of transportation instead, or are there requirements for spending on roads, highways, and other automobile-oriented infrastructure?

To address these questions, we conducted desk research and a series of expert interviews. The desk research included a review of approximately 30 local, state, and federal transportation funding sources, as well as an assortment of legal resources and research publications. Table 1 lists the funding sources considered. We evaluated each program or measure on the following criteria: statutory origin, funding administrator, funding source, funding recipients, eligibility, purpose, and limitations.

Table 1. Funding sources evaluated for flexibility

State Level

Highway Safety, Traffic Reduction, Air Quality, and Port Security Bond Act of 2006, California Government Code §§ 8879.20-8879.37
Local Partnership Program, Streets and Highways Code § 2032; Streets and Highways Code § 2033; Gov. Code §§ 8879.66-8879.76
Low Carbon Transit Operations Program, Public Resources Code § 75230
Road Maintenance and Rehabilitation Program, Streets and Highways Code §§ 2030-2038
Solutions for Congested Corridors Program, Streets and Highways Code §§ 2390-2397
State Highway Operation and Protection Program, California Government Code §§ 14526.4-14526.7; Streets and Highways Code §§ 164.6, 800. 2030, and 2032.5
State Transportation Improvement Program, California Government Code §§ 14525, 14529, 14530
Trade Corridor Enhancement Program/Trade Corridors Improvement Fund, Streets and Highways Code § 2192
State Fuel Excise Tax, Revenue and Taxation Code §§ 7360, 8651
State Sales Tax, Revenue and Taxation Code §§ 6051, 6357.3, 6357.7
Transportation Improvement Fee, Revenue and Taxation Code, §§ 11050-11053
Truck Weight Fees, Vehicle Code § 9400
Zero-Emission Vehicle Registration Fee, Vehicle Code § 9250.6

Local Level

Bay Area Regional Measure 2
Bay Area Regional Measure 3
Fresno County Measure C
Los Angeles County Measure M
Los Angeles County Measure R
Los Angeles County Proposition A
Los Angeles County Proposition C
Orange County Measure M/OC Go
San Diego Transnet
Tulare County Measure R
Stanislaus County Measure L

Federal Level

Congestion Mitigation and Air Quality Improvement Program, 23 USC § 149
Federal Fuel Excise Tax, 23 USC §§ 4081, 4083
Federal Highway Tolling Program, 23 USC § 301
Highway Safety Improvement Program, 23 USC § 148
National Highway Freight Program, 23 USC § 167
National Highway Performance Program, 23 USC § 119
Surface Transportation Block Grant Program, 23 USC § 133

Table 1 is not meant to be a comprehensive list of all possible funding sources; rather, it provides a selection of examples that illustrate how California transportation funding may or may not be locked into certain projects or project types, especially those that contribute to the transportation sector’s GHG emissions. Some California transportation funding sources are directed entirely to rail, public transit, or active transportation. We did not investigate the flexibility of such programs because the purpose of this white paper is to identify funds that are currently directed toward auto-oriented transportation but which might be rerouted to support lower-emission projects.

First, we describe examples of transportation programs and revenue streams that stipulate certain funding conditions. Next, we discuss different approaches for defining limitations, including percentage-based versus formula-based allocations. We then summarize the legal framework underpinning local and state transportation funding sources, such as local tax measures. Finally, we offer recommendations for policy or legal changes that could overcome barriers to funding climate-aligned transportation projects.

Legal Considerations and Limitations for Spending Flexibility

A wide array of California law governs the extent to which state and local entities can exercise flexibility in their spending decisions. This section describes two key sources of law that limit flexibility. First, the state constitution and legal provisions governing local tax measures limit the possible amendments to project lists and funding allocations identified in tax measures. Second, CEQA provisions governing environmental review restrain the extent to which projects can be modified after environmental review is complete. Neither of these sources of law completely circumscribes transit agency flexibility. However, they both introduce noteworthy guardrails that might bolster projects from earlier planning processes, which tend to be less aligned with climate priorities.

Local Funding Sources

Local option transportation sales taxes are a popular method of raising revenue for local transportation priorities. Local governments must balance the needs of their constituents at the time of voter approval with the need for accountability and flexibility over the long time horizons defined in sales tax measures, which often span decades.⁴ Local transportation tax measures are typically governed by provisions of the California Constitution that impose restrictions on state and local tax powers, including local governments’ general taxation authority (imposed for general government purposes, spent at the discretion of the legislative body) and their special tax authority (imposed for specific purposes).⁵ (Tolls and user fees, which can also be used to fund transportation system maintenance and investment, are governed separately and with fewer restrictions.)

⁴ Martin Wachs et al., *Balancing Accountability and Flexibility in California’s Local Option Sales Taxes*, Pacific Southwest Region University Transportation Center and UCLA Institute of Transportation Studies, (March 2020), available at https://www.metrans.org/assets/research/psr-18-33_to-012_wachs_final-report.pdf. For a database of selected California LOST measures used for transportation funding, see Martin Wachs et al., “LOST Promises Measure Data database,” <https://docs.google.com/spreadsheets/d/1PAs62StlclFJXSxABsasVTvAMgQhirtxMA6cuGnxCf/edit#gid=207788548>.

⁵ Articles XIII A-C and associated statutes (enacted via Propositions 13 [1978], 62 [1986], and 218 [1996]). There may be significant policy implications in a local government’s choice to use a simple majority general tax or a supermajority special tax. While the latter is more easily linked to specific transportation funding needs, it might be easier to approve the former due to the lower vote threshold required.

Under the constitutional and legal provisions that derive from Propositions 13, 62, and 218, local governments are fairly circumscribed in how they can authorize new revenue-raising measures that could fund transportation investment. However, state law generally allows local governments to build flexibility into the plans that voters approve. Specifically, measures can describe the project priorities or project types to be funded rather than the specific projects to be funded, allowing transportation agency leaders to craft optimal spending plans. Measures also can include detailed processes (such as supermajority board votes) for agency modification of spending plans under specified circumstances. State law ultimately requires some specificity in local special tax measure design, and while it also requires local agencies to adhere to the specific purposes outlined in a measure, they still maintain significant flexibility in how those purposes are defined (including categorical lists of transportation investments) and in allocating funds among them.

California uses local option sales taxes (LOST) to fund transportation more than any other U.S. state.⁶ There is substantial diversity within California as to how jurisdictions write measures and select projects to fund. A region's priorities dictate whether sales tax revenue will fund road and highway projects or public transportation projects. For example, due to land use patterns and local travel needs that typically predominate in different regions, urban jurisdictions might prefer to spend more on active and public transportation while some rural areas might choose to allocate more funding toward local roads.⁷ A 2020 analysis by Martin Wachs and colleagues noted that LOSTs in California "vary sufficiently from one county to another to reflect their diverse demographics, topography, and politics while revealing a clear tendency toward achieving a balance between accountability and flexibility."⁸ The Wachs study reviewed voter-approved transportation sales tax measures across time and assessed the tradeoffs between promising certain projects to voters versus allowing for flexibility as priorities shift and conditions inevitably change over time. The study notes that promises made in voter-approved plans sometimes are impossible or undesirable to fulfill, and jurisdictions must make changes to plans, such as when "a critical environmental review or a court decision [results] in the cancellation of a project that was included in an expenditure plan or in changes to a proposed project that are so extensive that it barely resembles the project based on which voters considered the measures."⁹

⁶ Martin Wachs et al., *Balancing Accountability and Flexibility in California's Local Option Sales Taxes*, supra.

⁷ Id at p. x.

⁸ Martin Wachs et al., *Balancing Accountability and Flexibility in California's Local Option Sales Taxes*, supra, pp. x–xi.

⁹ Martin Wachs et al., *Balancing Accountability and Flexibility in California's Local Option Sales Taxes*, supra, pp. 2–3.

The Wachs study similarly found that amending local tax measures was generally feasible but highly restricted in practice. Specifically, they conclude:

“Amendments to expenditure plans that have been approved by voters were found to be allowable and possible but subject to systematic hurdles that are clearly intended to make them rare and thus to occur only when there is widespread agreement that they are necessary and appropriate. While procedures differ from one county to another, expenditure plan changes must in some cases be approved by citizens’ advisory committees, by a supermajority vote of a supermajority of city councils in a county, by a two-thirds supermajority of county transportation authorities, and in some cases by a supermajority of county supervisors. And, some measures restrict the frequency of consideration of amendments to periods as infrequent as once in two years or once in a decade. All measures require that some of the most sweeping changes to the nature of the tax—like the rate of taxation or a measure’s length in years a measure will be in effect—be resubmitted to the voters for approval.”¹⁰

The Wachs study ultimately recommends creating a clearinghouse of tax measure information for use by local officials and researchers, reflecting the significant variety and local specificity among the substantial number of measures adopted to date.

Both general tax and special tax ballot measures (if initiated by the local legislative body) must be approved by the voters in a public election, with a simple majority needed to approve a general tax and a two-thirds supermajority needed to approve a special tax.¹¹ Ballot measures that specify the uses of their revenues (rather than simply adding to the general fund), which include those designed to fund local and regional transit agency projects, are typically structured as special taxes with categorical or detailed project lists (or, in some cases, with reference to an existing detailed investment plan). State law (discussed below) details the basic requirements for the level of specificity required of a special tax and the limitations on how its revenues can be spent.

¹⁰ Martin Wachs et al., *Balancing Accountability and Flexibility in California’s Local Option Sales Taxes*, supra, p. 40.

¹¹ Recent decisions by the California Supreme Court in *California Cannabis Coalition v. City of Upland*, 3 Cal. 5th 924 (2017), and the Court of Appeal in *City and County of San Francisco v. All Persons Interested in Matter of Proposition C*, 51 Cal. App. 5th 703 (Cal. Ct. App. 1 Dist. [2020]) and *City of Fresno v. Fresno Building Healthy Communities*, 59 Cal.App.5th 220 (Cal. Ct. App. 4 Dist. [2020]), clarified that the two-thirds supermajority requirement for special taxes does not apply to voter-initiated measures—i.e., those that are initially placed on the ballot by public vote in a prior special election—but only to measures initially placed on the ballot by the legislature. Transportation funding measures have traditionally been legislatively initiated due to the inherent complexity of the investment planning and spending processes involved. (By comparison, the measures at issue in the recent litigation concerned approval and taxation of marijuana dispensaries, a commercial property tax to fund homeless services, and a sales tax to fund parks.) As a result, the implications for this recent line of decisions—which could lead to increased use and passage of voter-initiated special tax ballot measures—for transportation funding purposes is unclear.

The core “accountability measure” requirements for special taxes define how they can be spent, including:¹²

- a) a statement of the specific purposes of the special tax;
- b) a requirement that the proceeds of the tax be applied only to that specific purpose;
- c) a separate account to hold the special tax funds; and
- d) an annual report stating fund and project status.

Additionally, special tax revenues can “be used only for the purpose or service for which [the tax] was imposed, and for no other purpose whatsoever.”¹³

Together, these provisions establish fairly clear limitations on the use of local transportation tax funds: They can be spent only on the specific purpose stated in the tax measure. The nature of these limitations was tested in *Jensen v. Santa Clara Valley Transportation Authority* (2018), which involved a challenge to a Santa Clara County ballot measure (Measure B) on the grounds that it failed to state an adequately specific purpose and expenditure-limiting requirement.¹⁴

The pertinent parts of Measure B identified the purpose of the tax as “To repair potholes and fix local streets; finish the BART extension through downtown San Jose and to Santa Clara; improve bicycle and pedestrian safety; increase Caltrain capacity, in order to ease highway congestion, and improve safety at crossings; relieve traffic on the expressways and key highway interchanges” and stated that “VTA shall allocate the Program Tax Revenues to the following categories of transportation projects: Local Streets and Roads; BART Phase II; Bicycle and Pedestrian; Caltrain Grade Separation; Caltrain Capacity Improvements; Highway Interchanges; County Expressways; S.R. 85 Corridor; and Transit Operations.”¹⁵

The court held that Section 50075.1’s “specific purpose” requirement does not require a single specific purpose or disallow broadly stated purposes—rather, it requires only a level of specificity that distinguishes it from general governmental purposes—and thus Measure B satisfied the requirement. In addition, the court held that a provision allowing VTA to modify the spending program “for any prudent purpose” following a detailed notice and voting procedure did not violate the Section 50075.1(b) and 53724(e) “specific purpose” fund use restrictions because the measure allows for flexible use of funds among the projects and programs specified but not for diversion of funds to other non-specified purposes.

Thus, while Sections 50075.1 and 53724 require some specificity in local special tax measure design and require local agencies to adhere to the specific purposes outlined in a measure, they still offer significant flexibility in how local leaders can define those purposes (including categorical lists of transportation investments) and allocate funds among them.

In addition, provisions of the California Public Utility Code enacted by the 1987 Local Transportation Authority and Improvement Act identify parameters for local transportation authorities wishing to amend LOST expenditure plans. State and local laws restrict how local transportation authorities can amend transportation expenditure plans, which often serve as the foundation for tax measures and revenue expenditure priorities. Under Public Utilities Code Section 180207, authorities “may annually review and propose amendments to the county transportation expenditure plan adopted pursuant to Section 180206 to provide for the use of additional federal, state, and local funds, to account for unexpected revenues, or to take into consideration unforeseen circumstances. The authority shall notify the board of supervisors and the city council of each city in the county and provide them with a copy of the proposed amendments.

¹² Cal. Govt. Code § 50075.1.

¹³ Cal. Govt. Code § 53724(e).

¹⁴ 2018 WL 5075160, Cal. Ct. App. 6 Dist. (Oct. 18, 2018).

¹⁵ *Id.*

The proposed amendments shall become effective 45 days after notice is given.”¹⁶ This provision applies to all jurisdictions in California, but each local government can also impose its own restrictions on amendments to local measures if it chooses to do so. For some local examples, see page 17.

Expert interviews indicated that local and regional governments craft special tax measures by conducting advance polling to identify a scope of investment that is likely to garner the requisite two-thirds public approval and then building a project list or spending plan to match it. Additionally, while agencies are permitted to adjust spending plans (within the scope of the original measure) through board voting procedures, another option is to require a public vote for major changes in the project list to build public trust in the investments. (Conversely, one pathway to greater flexibility—passing a general tax measure with a simple majority vote and then passing an ordinance or law to direct the use of general funds for transit uses—has the potential to degrade public trust if it is seen as an end run around the special tax requirements.)

California’s 18 metropolitan planning organizations (MPO) and rural regional transportation planning agencies (RTPA) conduct regional transportation planning. MPOs and RTPAs are legally responsible for developing regional transportation plans (RTP), which outline a 20-year blueprint for transportation needs in the region.¹⁷ RTPs allow MPOs to elevate region-specific needs and priorities, because transportation solutions applicable to one area might not be appropriate for another. However, regional entities aim to ensure that RTPs align with other local and statewide goals through coordination with external state and local agencies. For example, MPOs communicate with the California Air Resources Board (CARB) when reviewing their RTPs, and CARB comments on the intended investments in the context of GHG and vehicle miles traveled (VMT) reductions.¹⁸

“The RTP establishes the basis for programming local, state, and federal funds for transportation projects within a region.”¹⁹ Projects that are not included in an RTP (or parallel federal required document, FTIP) are ineligible for state and federal funding. For example, the California Transportation Commission “cannot program projects in the State Transportation Improvement Program (STIP) that are not identified in an RTP.”²⁰

Climate change and environmental requirements do not appear to be stringent for RTP development. However, SB 375 “requires the 18 MPOs in the state to identify a forecasted development pattern and transportation network that, if implemented, will meet GHG emission reduction targets specified by [CARB] through their RTP planning processes.”²¹ RTPs prepared for nonattainment areas under the federal Clean Air Act (that is, areas that exceed pollution limits for National Ambient Air Quality Standards) must meet stricter requirements and must be updated at more frequent intervals than RTPs for attainment areas. Nonattainment areas must also coordinate with CARB to ensure that their RTPs are consistent with air pollution reduction requirements. However, SB 375 efficacy is limited because the law and resulting planning documents are not binding on local governments, who retain land use authority that can undermine SB 375 goals by enabling sprawl and making transit-oriented infill development illegal, hindering progress toward

¹⁶ Cal. Pub. Util. Code § 180207.

¹⁷ MPOs are federally mandated, and MPOs nationwide must complete RTPs per federal statute (Title 23 U.S.C. Section 134). In California law, requirements for RTPs are defined in Cal. Govt. Code § 65080 and 23 U.S.C. § 134, AB 69 (Chapter 1253, Statutes of 1972). Subsequent legislation has refined the RTP development process. For example, SB 375 “requires that the RTP Guidelines are to be developed pursuant to California Government Code Sections 14522 and 65080.” California Transportation Commission, *2017 Regional Transportation Plan Guidelines for Metropolitan Planning Organizations*, supra, p. 9. Section 65080 requires that RTPs include a sustainable communities strategy (SCS).

¹⁸ Interview with MPO Staff 1, (August 30, 2021).

¹⁹ California Transportation Commission, *2017 Regional Transportation Plan Guidelines for Metropolitan Planning Organizations*, p.15, (January 2017), available at <https://dot.ca.gov/-/media/dot-media/programs/transportation-planning/documents/fooo9312-2017rtpguidelinesformpos-a11y.pdf>.

²⁰ California Transportation Commission, *2017 Regional Transportation Plan Guidelines for Metropolitan Planning Organizations*, supra, p. 21.

²¹ California Transportation Commission, *2017 Regional Transportation Plan Guidelines for Metropolitan Planning Organizations*, supra, p. 10.

affordable and sustainable housing and other development.²² There have been numerous attempts to overcome these problems, including by allowing development in priority areas, near transit stations, and along key corridors; however, attempts to address these issues have not succeeded in the legislature.

Environmental Review Considerations

In utilizing flexibility to redistribute or reprioritize funds, transportation officials who modify plans may implicate CEQA. Given its significant process requirements and potential litigation risks, CEQA review can pose a barrier to project and program revision, potentially locking agencies into actions that do not reflect current climate or environmental priorities.

This section summarizes the CEQA implications of leveraging any available flexibility, including conditions or modification that might trigger a new or supplemental CEQA analysis. This section does not cover specific mitigation options under CEQA. In general, transportation officials are not likely to trigger CEQA review in modifying projects funded under existing transportation plans as long as those modifications were contemplated in the original environmental review (that is, the modification would not substantially deviate from the approved project in ways that would result in significantly greater environmental impacts). Post-approval policy and analytical developments typically do not mandate changes to the project or to the environmental review process.

Under CEQA, once a project has undergone and obtained certification of its environmental review, the law does not typically require a lead agency to conduct subsequent or further environmental review unless the agency makes a subsequent discretionary decision that modifies the project. If the state subsequently issues new environmental guidance or develops new policy or amendments to CEQA itself (or if a state or local entity conducts new environmental analysis) that would have affected the original environmental review at the time it was certified, lead agencies generally do not need to modify the original review. However, if a lead agency elects to undertake a discretionary action to modify the project (and thus update or “reopen” the environmental review), the agency has a set of options to update the original review. If circumstances or information that could not have been known at the time of the original review emerge, or in the case of changes to the original plan, the agency might be able to conduct a subsequent review, supplemental review, or addendum to the Environment Impact Report (EIR), the latter of which can be prepared with limited public notice and review. This streamlined new analysis can focus only on impacts anticipated from the new circumstances, “tiering” off the original review of impacts that will still remain unchanged. If the agency wishes to materially amend its project and analysis to address subsequent, post-certification factual or policy developments, however, the agency likely must reopen the EIR, which could pose more significant administrative challenges and potentially result in additional mitigation measures.

²² For more information about SB 375 and its implementation, see Sarah Mawhorter et al., *California’s SB 375 and the Pursuit of Sustainable and Affordable Development*, Turner Center at UC Berkeley (July 2018), available at https://turnercenter.berkeley.edu/wp-content/uploads/2020/08/SB375_July_2018_Final.pdf.

CEQA analysis is required anytime an RTP is updated. Planning authorities are legally required to update RTPs every four years in nonattainment areas or every five years in attainment areas.²³ Beginning in 2020, projects undergoing CEQA review are subject to SB 743. Projects fall into one of three categories in terms of their relationship with SB 743, organized from greatest to least flexibility for project modification.

1. Projects that are yet to undergo environmental review are subject to SB 743 at the time of their review. These are the most straightforward to modify or reprioritize, and therefore should be the first projects considered for modification or deprioritization.
2. Projects undergoing environmental review now are SB 743 “test cases” and might raise various opportunities or challenges that could be incorporated into future projects’ environmental review processes. These have some potential for modification and can still pivot funds without rescoping entirely.
3. Projects that completed environmental review before SB 743 went into effect and therefore were not subject to SB 743 have little flexibility to change course or make modifications. If the project has not already secured funding, changes would face an additional barrier because the project would need to rescope, raising political challenges and further limiting flexibility. Local entities might choose to deprioritize a project by not directing funding toward it or scaling back its urgency in an RTP, but these actions do not eliminate the project entirely.

While SB 743 (and other CEQA amendments) does not apply retroactively to already certified projects, nonetheless some lead agency leaders might consider whether it is appropriate to reassess their projects considering the new focus on VMT and induced travel.²⁴ What would be the pros and cons of requiring these projects to reopen the EIR to account for induced travel? How much flexibility do decision-makers have in—and what are the CEQA implications of—modifying prior commitments either by modifying projects that appear to be problematic or by lowering their priority for funding?²⁵

In the absence of subsequent discretionary approvals for a given project, there is a presumption of finality for certified EIRs and generally no revision or amendment will be considered necessary unless a legal challenge is timely filed: “An EIR is conclusively presumed valid unless a lawsuit has been timely brought to contest its validity This presumption acts to preclude reopening of the CEQA process even if the initial EIR is discovered to have been fundamentally inaccurate and misleading in the description of a significant effect or the severity of its consequences. After certification, the interests of finality are favored over the policy of encouraging public comment.”²⁶

CEQA requires a lead agency to issue revisions to finalized and certified environmental review documents under certain specified circumstances. The requirement to prepare a subsequent environmental document applies only where a new discretionary approval must be granted: “Once a project has been approved, the lead agency’s role in project approval is completed, unless further discretionary approval on that project is required. Information appearing after an approval

²³ California Transportation Commission, *2017 Regional Transportation Plan Guidelines for Metropolitan Planning Organizations*, supra.

²⁴ The potential development of mitigation banks or exchanges for VMT impacts could affect how lead agencies assess and mitigate VMT; however, these mechanisms have not yet been developed and are beyond the scope of this analysis. For more information, see Ethan Elkind et al., *Implementing SB 743: An Analysis of Vehicle Miles Traveled Banking and Exchange Frameworks*, (October 2018), available at <https://www.law.berkeley.edu/wp-content/uploads/2018/09/Implementing-SB-743-October-2018.pdf>.

²⁵ ITS researchers have found that some highway projects in California (including widening and HOV projects on routes 1, 99, 101, 210, and 405) either entirely fail to assess induced travel in their environmental review documents or significantly undercount the anticipated induced VMT (as compared to calculations from an induced VMT model), potentially leading to overestimation of congestion relief and underestimation of environmental impacts. Jamey M.B. Volker et al., “Induced Vehicle Travel in the Environmental Review Process,” *Transportation Research Review* 2020, Vol. 2674(7) 468–479.

²⁶ *Committee for Re-Evaluation of the T-Line Loop v. San Francisco Municipal Transportation Agency*, 6 Cal. App. 5th 1237 (1st Dist. 2016), citing *Laurel Heights Improvement Assn. v. Regents of University of California*, 6 Cal. 4th 1112 (1993).

does not require reopening of that approval.”²⁷ Hence, a post-approval EIR revision must be motivated by a new approval, not simply by an interest in reexamining the project. (If the lead agency determines “with certainty that there is no possibility that the activity in question may have a significant effect on the environment,” no further CEQA review is required.²⁸)

Revisions might arise under the following circumstances:

- “Substantial changes” to the project or the circumstances of the project will give rise to “new significant environmental effects or a substantial increase in the severity of previously identified significant effects” or
- New information “which was not known and could not have been known with the exercise of reasonable diligence at the time the previous EIR was certified” shows new or more severe significant environmental impacts or newly feasible mitigation measures.²⁹

Under these circumstances, the agency must generally prepare one of three revisions.

- A subsequent EIR or negative declaration must be prepared in the default case.
- A supplement to an EIR can be prepared if the conditions for a subsequent EIR are met but “only minor additions or changes would be necessary to make the previous EIR adequately apply.”³⁰
- An addendum to an EIR or negative declaration can be prepared if some changes are required but none of the subsequent or supplement conditions are met.³¹

In particular, new information must consist of newly emerged information, not reexamination of previously available information, to motivate a subsequent or supplemental review: “In the interests of finality, CEQA does not require reopening of a project approval based on new information after an EIR is certified. Once an EIR is certified, reconsideration is thus not required or proper based on subsequent scientific reports or expert opinions that are not based on newly emergent facts and do not disclose new or more severe impacts. Where new information is not significant, a subsequent EIR is not required”³² For example, California courts have consistently held that the adoption of new GHG emission guidelines, and even new legal designations of endangered species, are insufficient to mandate reopening a project if the underlying information was known at the time of the EIR: “The adoption of guidelines for analyzing and evaluating the significance of data does not constitute new information if the underlying information was otherwise known or should have been known at the time the EIR was certified.”³³

In fact, one California court interpreting the subsequent EIR requirements recently held that “CEQA *prohibits* the agency from requiring further EIRs” unless one of the three conditions (changed project, changed circumstances, or new information that could not have been known at the time) arises.³⁴ Thus, it appears that an interest in revisiting the induced travel analysis of a prior EIR or negative declaration to revise or reprioritize a project list based on the

²⁷ 14 Cal. Code Regs. § 15162(C); see Cal. Pub. Res. Code § 21166.

²⁸ 14 Cal. Code Regs. § 15061-15062.

²⁹ 14 Cal. Code Regs. § 15162(a).

³⁰ 14 Cal. Code Regs. § 15163.

³¹ 14 Cal. Code Regs. § 15164. Public review is required for subsequent and supplemental EIRs and negative declarations; no public review is required for addenda.

³² Miller and Starr California Real Estate 4th, § 26:20.

³³ *Concerned Dublin Citizens v. City of Dublin* (2013) 214 Cal.App.4th 1301, 1320 (air quality district’s issuance of CEQA significance guidelines for GHG impacts after certification of EIR that did not examine GHGs did not require lead agency to reopen EIR to conduct a new assessment); see, e.g., *Fort Mojave Indian Tribe v. California Department of Health Services* (1995) 38 Cal.App.4th 1574 (designation of critical species habitat post-EIR did not require new impact assessment).

³⁴ *Committee for Re-Evaluation of the T-Line Loop* at 1246 (citing Cal. Pub. Res. Code § 21166) (emphasis added).

emergence of new legal guidance relevant to one of the project’s impacts would generally not trigger a subsequent or supplementary EIR requirement. However, in practice agencies might decide to complete a supplement EIR, even if it is not required, out of an abundance of caution.

The EIR addendum option can be used to incorporate minor changes that do not raise significant new issues about environmental impacts. A lead agency may analyze substantive changes to a project via an addendum, so long as the analysis of or anticipated actual environmental impacts do not deviate from those reflected in the original document. For example, an airport agency could issue an EIR addendum analyzing the size and location of cargo facilities and size of taxiways in response to adjusted travel and cargo demand forecasts, so long as it showed substantial evidence that no increased or previously undisclosed environmental impacts would result.³⁵ Similarly, a lead agency might exercise discretion to change substantially or remove altogether a mitigation measure because it has become “impracticable or unworkable” subsequent to EIR certification, so long as it “state[s] a legitimate reason for deleting an earlier adopted mitigation measure, and [supports] that statement of reason with substantial evidence.”³⁶

However, where a county adopted a fee-based mitigation plan for woodland management where the original EIR contemplated an integrated natural resources management plan, or approved for mining development a site previously designated for agriculture, preparation of an EIR was required to examine the newly created environmental impacts.³⁷

As a result, CEQA’s procedural and substantive requirements might serve as a damper on agencies’ efforts to revise transportation projects to align with evolving climate priorities. A lead agency seeking to modify a project purely due to new induced travel analysis most likely would be required to prepare a subsequent or supplemental EIR unless it could show that the changes are “minor,” with no increased or newly identified environmental impacts—likely a challenge because the change in policy post-SB 743 would be the motivation in this case. An agency seeking to add new induced travel mitigation measures to a previously approved project would likely also be required to prepare a new (or subsequent/supplemental) EIR unless those measures were deemed not to constitute a discretionary approval. However, because subsequent policy developments generally do not require new environmental review, a lead agency moving to add new mitigation measures might be unlikely.

Limiting Language in Transportation Programs and Revenue Streams

This section describes limitations in how funding may be allocated as written in law or guidelines, in operation for implementing entities, and in practice.

³⁵ *Citizens Against Air Pollution v. City of San Jose*, 227 Cal. App. 4th 788 (6 Dist. 2014).

³⁶ See *Lincoln Place Tenants Association v. City of Los Angeles* (2005) 130 Cal.App.4th 1491, 1509; *Sierra Club v. Cty. of San Diego*, 231 Cal. App. 4th 1152, 1165–66; *Napa Citizens for Honest Government v. Napa County Bd. of Supervisors* (2001) 91 Cal.App.4th 342, 358–359.

³⁷ *Center for Sierra Nevada Conservation v. County of El Dorado*, 202 Cal. App. 4th 1156 (3 Dist. 2012); *Sierra Club v. County of Sonoma*, 6 Cal. App. 4th 1307 (1 Dist. 1992).

Limitations as Written

This paper identifies several examples of transportation funding programs and revenue streams that restrict funding to certain auto-oriented uses, as well as several that specify pathways to flexibility. Of the approximately 30 programs reviewed (Table 1), 5 were selected as representative examples of how transportation laws and guidelines have created restrictions or, in some instances, have allowed flexibility. Three state-level and two local-level funding examples are discussed here. These examples are intended to paint a picture of how funding restrictions manifest for major sources of California transportation dollars.

The five programs reviewed do not constitute a comprehensive list of programs that restrict funds or offer limited flexibility; many other sources of funding identify similar restrictions. However, these programs serve to illustrate the issues. Moreover, they are not entirely restricted to auto or transit; instead, they include mixed allocations of funding, directing some dollars to auto-oriented transportation.

The high-level analysis revealed little consistency in flexibility definitions, which substantially hinders the ability to conduct a thorough comparative analysis. However, the five examples presented here serve as a partial menu of options for state or local leaders designing future programs as they consider approaches to flexibility. Planners can use these examples to understand the nature of funding restrictions and seek funding sources appropriate for specific goals and projects.

State-Level Examples

The following examples illustrate different mechanisms to define flexibility limitations of transportation funding.

Road Maintenance and Rehabilitation Program

The Road Maintenance and Rehabilitation Program (RMRP) institutes a measurement-based threshold to award additional flexibility for use of funds. It was created “to address deferred maintenance on the state highway system and the local street and road system. Funds made available by the program shall be prioritized for expenditure on basic road maintenance and road rehabilitation projects, and on critical safety projects.”³⁸ Eligible projects include, but are not limited to, active transportation, safety improvement, road maintenance and rehabilitation, and railroad grade separations.³⁹

RMRP integrates flexibility into its requirements using a metric-based threshold. The program specifies that “a city or county may spend its apportionment of funds under the program on transportation priorities other than those allowable pursuant to this chapter if the city’s or county’s average Pavement Condition Index (PCI) meets or exceeds 80.”⁴⁰ As a result, cities and counties with a high PCI are not excluded from the program but instead entitled to spend on a wider variety of transportation priorities, thus incentivizing good practice with regard to road maintenance and enabling

³⁸ Cal. Sts. and High. Code § 2030(a).

³⁹ Cal. Sts. and High. Code § 2030(b)(1).

⁴⁰ Cal. Sts. and High. Code § 2037; The PCI grades road quality on a scale of 0 to 100, where 100 is best. For more information, see <https://mtc.ca.gov/operations/programs-projects/streets-roads-arterials/pavement-condition-index>. According to the 2020 California Statewide Local Streets and Roads Needs Assessment, no California county has achieved an average PCI exceeding 80 since at least 2008, and the average PCI for California roads is between 55 and 69. California State Association of Counties et al., *California Statewide Local Streets and Roads Needs Assessments* (August 2021), available at <https://www.savecaliforniastreet.org/wp-content/uploads/2021/09/Statewide-2020-Local-Streets-and-Roads-Needs-Assessment-Final-Report-August-2021.pdf>.

transit-focused jurisdictions to benefit equally from the state program. Other programs could include similar flexibility guidance based on specific, widely used metrics, including health, equity, safety, accessibility, and other similar metrics.⁴¹ For example, funding could be prioritized in jurisdictions with low scores in the California Healthy Places Index.⁴²

Solutions for Congested Corridors Program

Where statutory guidance is not restrictive and permits agency discretion to prioritize climate and other related priorities, agencies can use their guideline documents to interpret statute in a more targeted manner conducive to implementation.⁴³

Under the Solutions for Congested Corridors Program (SCCP), the California Transportation Commission (CTC) allocates funds “to projects designed to achieve a balanced set of transportation, environmental, and community access improvements within highly congested travel corridors throughout the state.”⁴⁴ Eligible projects must be included in a comprehensive corridor plan “designed to reduce congestion in highly traveled corridors by providing more transportation choices for residents, commuters, and visitors to the area of the corridor while preserving the character of the local community and creating opportunities for neighborhood enhancement projects.”⁴⁵ SCCP further designates eligibility in the context of a project’s GHG emissions, air pollution emissions, and VMT contribution, stating that “highway lane capacity-increasing projects funded by this program shall be limited to high-occupancy vehicle lanes, managed lanes as defined in Section 14106 of the Government Code, and other non-general purpose lane improvements primarily designed to improve safety for all modes of travel, such as auxiliary lanes, truck climbing lanes, or dedicated bicycle lanes.”⁴⁶ The CTC evaluates projects based on several criteria, including, but not limited to, safety, congestion, accessibility, and alignment with air quality and GHG standards.⁴⁷

The statutory definitions of eligible projects for the SCCP were general and suggestive, and the evaluation criteria did not extend to specific performance levels. This left room for broad interpretation by the implementing agency, the CTC. CTC produced a guidance document allowing a broad range of eligible projects, offering increased flexibility in the program’s eligibility criteria. The CTC guidelines maintain the original intent of the statute while permitting a wider range of potential recipients to benefit from the program. This example illustrates that when presented with broad, fairly general statutory guidance, agencies can build additional flexibility into program implementation through their guideline documents.⁴⁸ However, there is a risk of defining eligibility so broadly that it is difficult to target or prioritize the projects that are most closely aligned with state goals. The Climate Action Plan for Transportation Infrastructure (CAPTI) plan aims to address this issue and prioritize projects consistent with climate goals.

Senate Bill 486

The legislature can promote alignment between spending and state goals by reducing discretion and placing stricter limitations on project selection.

⁴¹ See, e.g., Caltrans, California Transportation Plan 2050 (February 2021), pp. 71–79 (outlining eight goals of state’s transportation vision), available at <https://dot.ca.gov/-/media/dot-media/programs/transportation-planning/documents/ctp-2050-v3-a11y.pdf>.

⁴² Public Health Alliance of Southern California, “The California Healthy Places Index” (webpage), available at <https://healthyplacesindex.org>.

⁴³ All agency guidance processes are subject to obligations and/or restrictions in authorizing statutes, and all agency rulemaking procedures are subject to the California Administrative Procedure Act, Cal. Govt. Code § 11340 et seq., 1 Cal. Code Regs. § 1 et seq. In particular, where an agency is required by statute to adopt a regulation under APA procedures rather than permitted to issue guidance documents, the agency must exercise care not to issue an “underground regulation” in violation of the APA. See 1 Cal. Code Regs. §§ 250–280.

⁴⁴ Cal. Sts. and High. Code § 2391.

⁴⁵ Id.

⁴⁶ Id.

⁴⁷ Cal. Sts. and High. Code § 2394.

⁴⁸ Interview with State Agency Staff 4, (September 9, 2021).

Caltrans is required by law to develop the Interregional Transportation Improvement Program (ITIP). In combination with RTPs, the ITIP informs the STIP and specifies capital projects prioritized for funding. Caltrans must also produce the State Highway Operation and Protection Program (SHOPP) for repair and maintenance projects on California’s highways. CTC then approves both the STIP and the SHOPP. CTC is allowed to “allocate transportation capital funds to specific projects contained in the [STIP], but not the [SHOPP], which is managed by the [Caltrans].”⁴⁹

Senate Bill 486⁵⁰ mandated consistency between projects included in the ITIP and the Interregional Transportation Strategic Plan (ITSP). SB 486 builds in guardrails for project approval by requiring a detailed budget and timeline for each project and “specifically authoriz[ing] [CTC] to decline to adopt the program if it determines that the program is not sufficiently consistent with the asset management plan.”⁵¹ Requiring alignment between projects and the asset management plan ensures consistency and allows the state to pivot away from projects that do not serve broader state goals such as those promoting climate, public health, equity, accessibility, and safety.⁵² Linkage between programmed projects’ selection and prioritization with the plans’ core issues allows for a more strategic process that retains flexibility.

Local-Level Examples

Local jurisdictions also administer transportation funding programs and tax measures intended to raise revenue for transportation projects. The following examples illustrate different mechanisms for local governments to define flexibility limitations of transportation funding.

Bay Area Regional Measure 3

Local measures sometimes are tied to specific plans, with projects and funding amounts already identified at the time of voter approval. Building such specificity into measures might unnecessarily restrict funding flexibility. For example, Bay Area Regional Measure 3 implements the Bay Area Traffic Relief Plan, “a set of 35 projects and programs to reduce auto and truck traffic; relieve crowding on BART; unclog freeway bottlenecks; improve bus, ferry, BART and commuter rail service; and enhance bicycle and pedestrian mobility in the bridge corridors.”⁵³ Each project had a designated funding amount at the time of the measure’s approval. Identified funds are often insufficient to complete the project, and state or federal matching funds are called upon to bridge funding gaps.

Jurisdictions must balance the need for specificity—which is valuable for building momentum and support for a particular measure—with the need to remain nimble as conditions inevitably change throughout the course of project construction. If a measure is too vague, it risks failing because voters and local officials need to understand how proposed projects will impact communities. However, if a measure is so specific that it locks in funding for projects without any type of flexibility clause, it threatens to tie a region to a plan that might not be suitable as conditions evolve.

Certain entities implementing LOST measures specify provisions for project amendments. For example, the Metropolitan Transportation Commission (MTC) specifies that “any amendment to a county transportation expenditure plan proposed by the [MTC] is subject to approval by the advisory committee [appointed by counties that approve a tax, as described in Section 131200 (a), for the purpose of advising expenditure plan implementation]. An amendment which

⁴⁹ SB 486 (DeSaulnier, Chapter 917, Statutes of 2014); Cal. Govt. Code §§ 14526, 14526.5, 14524.3, 14524.4, 14526.4, 14526.6.

⁵⁰ SB 486 (DeSaulnier, Chapter 917, Statutes of 2014).

⁵¹ *Id.*

⁵² See, e.g., Caltrans, California Transportation Plan 2050, pp. 71–79.

⁵³ Metropolitan Transportation Commission, “Regional Measure 3: Bay Area Traffic Relief Plan,” (June 2018), available at https://mtc.ca.gov/sites/default/files/RM_3_Ballot_Description_041218_Corrected.pdf.

adds or deletes a project, or is of major significance, shall be submitted for approval in the same manner the adopted plan was approved.... Amendments may provide for the use of additional federal, state, and local funds to account for unexpected revenue fluctuations or to take into consideration unforeseen circumstances. Any amendment shall take into account that all appropriate actions shall be taken to give highest priority to the projects in the initial plan, and any amendments shall not delay or delete any project in the initial plan without the approval of the project sponsor.”⁵⁴

When crafting local measures, jurisdictions should consider including flexible language. This can be achieved through a periodic review process, a voting requirement for major changes (even if just a vote of the local council or board), or a clause describing the implementing agency’s ability to redirect funds as deemed necessary if still accomplishing the purpose of the original measure.

Los Angeles County Measures R and M

Los Angeles enacted Measure R in 2008 and Measure M in 2016 to generate revenue for major transportation improvement projects in the County. Measure R institutes a half-cent sales tax over a 30-year timeframe for traffic relief and rail expansion. Measure M also implements a half-cent sales tax, but the tax will increase to one cent in 2039 when Measure R sunsets.⁵⁵ Measure M does not specify an end date.

Like MTC, the Los Angeles County Metropolitan Transportation Authority (MTA or Metro) is subject to specific provisions governing the local expenditure plan amendment process. PUC Division 12, Chapter 4, Section 130350.4 states that “because it is in the interest of the people of the County of Los Angeles and the people of the State of California to ensure that the net revenues derived from the tax pursuant to this act are expended efficiently, and in a manner consistent with the adopted expenditure plan, the MTA shall notify the Legislature prior to the adoption of amendments to the adopted expenditure plan.”⁵⁶

Measure R and Measure M each describe processes for amendments or redirection of expenditures. Measure R allows surplus revenue from any projects completed under budget to be “credited to the Transit Capital Subfund and expended for Capital Projects located within the same subregion of the project so completed.”⁵⁷ Measure R includes language allowing Metro to amend the ordinance “for any purpose, including as necessary to account for the results of any environmental review required under [CEQA] of the individual specific projects listed in Attachment A. Any such amendments shall be approved by a vote of not less than two-thirds (2/3) of the Metro Board of Directors.”⁵⁸ However, the ordinance prohibits amendments that reduce “total Net Revenues allocated to the sum of the Transit Capital Subfund and the Highway Capital Subfund.”⁵⁹

A similar provision is included for the Operations and Local Return Subfunds. The ordinance further specifies that Metro can revise the section of the ordinance that addresses amendments “if such amendments are approved by a vote of not less than two-thirds (2/3) or the Metro Board of Directors and are approved by a simple majority vote of the electors voting on a measure to approve the amendment.”⁶⁰ Measure M directs Metro to conduct an assessment of projects in

⁵⁴ Cal. Pub. Util. Code § 131203.

⁵⁵ Los Angeles County Metropolitan Transportation Authority - Measure M Independent Taxpayers Oversight Committee of Metro, Draft Annual Report on Fiscal Year 2020 Audits, (June 2021), available at <https://media.metro.net/2020/Draft-MMITOC-Annual-Report-FY20.pdf>.

⁵⁶ Cal. Pub. Util. Code § 130350.4.

⁵⁷ Los Angeles County Metropolitan Transportation Authority, “Ordinance # 08-01: Traffic Relief and Rail Expansion Ordinance,” (2008), available at <http://media.metro.net/measureR/images/ordinance.pdf>.

⁵⁸ Id.

⁵⁹ Id.

⁶⁰ Id.

the expenditure plan once every 10 years beginning in 2027.⁶¹ If Metro’s assessment is approved by two-thirds of the Metro Board of Directors, new projects and programs can be added to the existing expenditure plan “so long as such additions do not delay the Groundbreaking Start Date, Expected Opening Date, or amount of Measure M Funding 2015\$ of any other Expenditure Plan Major Project or Multi-Year Program. No Expenditure Plan Major Projects or Multi-Year Subregional Programs may be added to the Expenditure Plan except through the decennial process described herein.”⁶²

Stanislaus County Measure L

Stanislaus County’s Measure L will generate revenue for local transportation projects via a half-cent sales tax over a 25-year period. Measure L passed in November 2016 with 71.95 percent of voters in favor. The measure implements the local transportation authority’s expenditure plan, with 65 percent of revenues under local control, and 28 percent under regional control. The remaining 7 percent of revenue is reserved for transit services. The local control portion of the plan directs 50 percent of revenue from the sales tax to local roads and streets, 10 percent to traffic management, and 5 percent to bike and pedestrian improvements. The regional portion allocates funds to a wide array of proposed projects, including construction of auxiliary lanes on State Route 99 and construction of a four-lane expressway.⁶³ The transit portion will fund point-to-point services for residents (especially seniors, veterans, and persons with disabilities), pedestrian and bike pathways, and public transit infrastructure, operations, and maintenance, as well as linkages between public transit offerings and existing rail services in the region.⁶⁴

To ensure accountability, the Stanislaus Council of Governments (StanCOG) convenes a citizen oversight committee “to ensure that all voter mandates are carried out and that the financial integrity and performance of the program is maintained.”⁶⁵ Section 16 of Measure L describes the process for any amendments to the expenditure plan on which the measure is based.⁶⁶ The local authority can propose any changes to the Expenditure Plan on an annual basis “to provide for the use of additional federal, state, and local funds, to account for unexpected revenues, or to take into consideration unforeseen circumstances.”⁶⁷ A two-thirds majority of electors must vote to approve any changes to expenditure allocations. Measure L requires revisions to the expenditure plan “every ten years that the sales tax is in effect to reflect current and changing priorities and needs in the County, as defined by the duly elected local government representatives on the Authority Board. Any changes to the Expenditure Plan must be adopted with current law in effect at the time of the update and must be based on findings of necessity for change by the Authority.”⁶⁸ By clearly defining review procedures and periodic updates, Measure L allows StanCOG and local governments in the County to adapt to changing needs while remaining consistent with the original intent of the expenditure plan.

Federal-Level Examples

Federal funding is crucial for transportation projects in California. However, federal funding tends to be more inflexible than state funding. Federal funding for state and local surface transportation projects is primarily governed by 23 USC § 101 et seq. Recent major federal bills to authorize new funding for surface transportation were MAP-21 (Moving Ahead

⁶¹ Los Angeles County Metropolitan Transportation Authority, “Proposed Ordinance # 16-01: Measure M, Los Angeles County Traffic Improvement Plan,” (2016), available at <http://libraryarchives.metro.net/dpctl/MeasureM/201609-proposed-ordinance-16-01-county-traffic%20improvement-plan.pdf>.

⁶² Id.

⁶³ StanCOG, “Stanislaus Council of Governments Measure L Expenditure Plan,” available at <http://stanislausmeasurel.com/wp-content/uploads/2018/11/Measure-L-Exp-Plan.pdf>.

⁶⁴ StanCOG, “Stanislaus Council of Governments Measure L Expenditure Plan,” supra.

⁶⁵ StanCOG, “Stanislaus Council of Governments Measure L Expenditure Plan,” supra p. 11.

⁶⁶ StanCOG, “Measure L: Local Roads First Transportation Funding Measure,” Ordinance #16-01, available at <http://www.stancog.org/pdf/committees/measure-l/final-ordinance.pdf>.

⁶⁷ StanCOG, “Measure L: Local Roads First Transportation Funding Measure,” supra, p. 8.

⁶⁸ StanCOG, “Measure L: Local Roads First Transportation Funding Measure,” supra, p. 9.

for Progress in the 21st Century Act, P.L. 112-141), which funded surface transportation programs at over \$105 billion for fiscal years 2013 and 2014, and the FAST Act (Fixing America’s Surface Transportation Act, Public Law 114-94), which added \$305 billion for fiscal years 2016 through 2020. The new infrastructure bill (2021) could provide California an additional \$50–60 billion in transportation funding over the next five years.

Two examples of federal-level programs with flexibility include the Surface Transportation Block Grant Program and the Congestion Mitigation and Air Quality Improvement Program (23 USC § 104(b)). The Surface Transportation Block Grant Program was established to “provide flexible funding to address State and local transportation needs.”⁶⁹ Eligible projects include highway and road projects as well as transit capital projects eligible for funding under the Federal Public Transportation Funding Program (49 USC § 5301 et seq), among several other eligibility categories. The Congestion Mitigation and Air Quality Improvement Program funds projects located in “an area in the State that is or was designated as a nonattainment area for ozone, carbon monoxide, or particulate matter under section 107(d) of the Clean Air Act” and is likely to contribute to achieving attainment (including through VMT reduction), is part of a SIP, improves traffic flow/reduces congestion, or “if the project or program shifts traffic demand to nonpeak hours or other transportation modes, increases vehicle occupancy rates, or otherwise reduces demand for roads through such means as telecommuting, ridesharing, carsharing, alternative work hours, and pricing.”⁷⁰ Both of these programs offer examples of federal funding available to state and local governments for multiple types of projects.

Limitations in Operation

The research team found that flexibility parameters were inconsistent across funding programs, offering few overarching trends or common approaches. Programs typically indicate restrictions on funding by establishing a specific percentage in law (such as 40 percent of a certain revenue source must be used for public transit) or applying a formula or metric (for example, the RMRP indicates that funds can be used for purposes other than those originally intended if the jurisdiction’s average PCI meets a certain threshold).⁷¹ In some cases, funding is disbursed proportionally by population size or region. For example, the STIP contains both a regional program and an interregional program, which receive 75 percent and 25 percent of total funding, respectively. Within the regional program, funds are divided by county, and “county shares are available solely for projects nominated by regions in their RTIPs” to prevent diversion of funds from county or regional projects to statewide projects.⁷²

Some sources allow flexibility after baseline requirements have been met by the funding recipient. For example, counties receive funds from the Transportation Development Act (TDA). TDA specifies that if counties of a certain size demonstrate that they have met all their transit system needs, funds can be used for any road purpose, even though the funds were originally appropriated for transit systems.⁷³

A substantial portion of state and federal funding is allocated through competitive grant processes, and these dollars are required to be used for the project which won the grant. For example, grants received from the Federal Transit

⁶⁹ 23 USC § 133.

⁷⁰ 23 USC § 149(b).

⁷¹ Interview with State Agency Staff 1, 2, and 3, (September 10, 2021).

⁷² California Transportation Commission, *Draft STIP Guidelines*, p. 5, (June 2021), available at <https://catc.ca.gov/-/media/ctc-media/documents/programs/stip/2022-stip/draft-2022-stip-guidelines-tab-17-4-36-a11y.pdf>; See also, California Transportation Commission, *2020 State Transportation Improvement Program*, (March 25, 2020), available at <https://catc.ca.gov/-/media/ctc-media/documents/programs/stip/2020-stip/2020325-2020-stip-resolution-a11y.pdf>.

⁷³ Interview with MPO Staff 1, (August 30, 2021).

Administration (FTA) likely are intended for a particular project and cannot be redirected elsewhere.⁷⁴ Some projects are identified through a nomination process, like the corridor-based freight projects funded by the Trade Corridor Enhancement Program.⁷⁵ Where projects have been identified through nomination or competition, it might be more difficult to divert funds to a new project, unless the new project undergoes the same competitive process.

Many programs include a clear definition of which projects can or cannot be funded. For example, the Solutions for Congested Corridors Program funds projects nominated by regional transportation agencies and Caltrans. It prohibits the use of funds for highway general purpose lanes, while projects like auxiliary lanes, managed lanes, or dedicated bicycle lanes are eligible.⁷⁶

While this portion of the research emphasizes opportunities to redirect funding from auto-oriented projects toward climate-aligned projects, not all auto-oriented projects constitute increases in GHG emissions. For example, some projects resurface roads, which does not directly impact VMT.

Limitations in Practice

Where flexibility exists, can decision-makers add, accelerate, or delay projects to meet priorities?

After assessing the types of flexibility within California's transportation funding framework, the research team investigated the ease with which government leaders can leverage that flexibility to modify existing project plans or funding packages. Modifications could include adding new projects to (or deleting existing projects from) a jurisdiction's already-funded project portfolio, expediting a project's funding timeline, or delaying a project by withholding funding.

One MPO interviewee calculated that 91 percent of the \$11.5 billion allocated to their county over a 24-year period was inflexible. Its purpose had been designated at the time the funding was awarded. The remaining 9 percent allowed some flexibility between modes of transit, but 6 of that 9 percent was already devoted to public transit with only 3 percent promised to highway projects and feasibly movable toward lower-emission projects. The interviewee did not believe that moving the highway funds would make a meaningful difference in improving alignment with climate goals, and noted the difficulty of planning and operating under such constraints.⁷⁷

Decision-makers' ability to modify project plans depends on both the legal and political context in which they are operating. Communities, leaders, activists, and jurisdictions can be so entrenched in a particular project—especially as many transportation projects unfold over a multi-decadal timespan—that it might be impossible or politically impractical to modify a project, even if there are no legal prohibitions against doing so. One interviewee remarked that the MPO's calculation of 91 percent inflexible funding seemed plausible only if MPO leaders were unable or unwilling to take the political risk necessary to advocate for reallocation of funding.⁷⁸ If local planners feel that change is difficult, risky, or

⁷⁴ In addition, the resources and capacity often required for an agency to prepare for and win a competitive grant in the first place can lead to inequitable results, with high-need but low-resource jurisdictions potentially missing out on vital funding for multimodal projects due to limited agency capacity in terms of staffing, time, and funding.

⁷⁵ California Transportation Commission, *2020 Trade Corridor Enhancement Program Guidelines*, (April 2020), available at <https://catc.ca.gov/-/media/ctc-media/documents/programs/senate-bill-1/tcep/2020-trade-corridor-enhancement-program-guidelines-a11y.pdf>.

⁷⁶ California Transportation Commission, "Solutions for Congested Corridors Program (SCCP)" (webpage), available at <https://catc.ca.gov/programs/sb1/solutions-for-congested-corridors-program>.

⁷⁷ Interview with MPO Staff 1, (August 30, 2021).

⁷⁸ Interview with former MPO Staff 1, (August 30, 2021).

even impossible, it is unlikely that they will be motivated to advocate for difficult project adjustments, even if such adjustments would further important goals.

A substantial amount of political inertia exists within transportation planning and funding processes, making it difficult to chart a new course for a project once it is set in motion. This is especially true in local projects and sales tax measures. Interview subjects described two impediments to bolder funding redistribution at the local and regional levels. First, the processes by which local and regional entities seek funding—such as through RTPs or tax measures—are multi-year processes with several layers of approval. Creating an RTP takes several years, from reaching consensus on priority projects to conducting initial analyses. The RTP itself covers a 20-year funding time horizon. By the time a project has gained enough traction to be included in an RTP or otherwise be considered for funding, there often will be a critical mass of supporters advocating for the project—or a powerful advocate. Therefore, it will likely be difficult, controversial, and undesirable to overturn the project from a political perspective. Nevertheless, the projects included in RTPs 20 years ago, or even 10 years ago, tend to be out of sync with the latest technologies, research, demographic needs, and environmental realities. Yet some local council or MPO decision-maker bodies are conservative in their decision-making about what constitutes a beneficial project and are generally hesitant to incorporate more innovative concepts or adjust long-standing plans. This makes it difficult for leaders to respond to the fast-changing transportation landscape with innovative or nimble approaches.

Several interviewees identified the San Diego Association of Governments (SANDAG) as an MPO breaking through flexibility barriers and collecting returns from political risk.⁷⁹ SANDAG is pursuing projects that align with the region's current needs and diverting funding away from road expansion projects. Several interviewees noted that SANDAG has navigated through political obstacles successfully to reprioritize and accelerate public transit projects, including completing an overhaul of its RTP and voter-approved plan while maintaining compliance with the measure.⁸⁰

Executive Order N-19-19 directed CalSTA to leverage transportation spending to reduce transportation sector GHG emissions.⁸¹ CalSTA is tasked with reprioritizing both discretionary and competitive state transportation funding.⁸² To accomplish this, among other suggested actions, CalSTA has recommended program guideline modifications that reinterpret statute without requiring statutory changes. For example, CalSTA has recommended the CTC (CAPTI S1.1) “prioritize SCCP projects that enable travelers to opt out of congestion.”⁸³ One way to accomplish this without statutory change would be to more specifically define the statutory evaluation criteria to prioritize projects that reduce VMT and provide additional travel options. Adjusting language even slightly—for example, calling for “reduced congestion” rather than “expanded lanes”—can open up opportunities for increased flexibility.⁸⁴ Therefore, statutory language should be precise enough to define specific goals but broad enough to allow varying interpretations for implementation.

⁷⁹ Interview with MPO Staff 1, (August 30, 2021); Interview with former MPO Staff 1, (August 30, 2021).

⁸⁰ Interview with former MPO Staff 1, (August 30, 2021).

⁸¹ E.O. N-19-19 (Gov. Gavin Newsom), available at <https://www.gov.ca.gov/wp-content/uploads/2019/09/9.20.19-Climate-EO-N-19-19.pdf>.

⁸² Interview with State Agency Staff 4, (September 9, 2021).

⁸³ Interview with State Agency Staff 4, (September 9, 2021).

⁸⁴ Interview with State Agency Staff 4, (September 9, 2021).

Recommendations

Decision-makers can implement several actions to leverage existing flexibility or build new flexibility into funding requirements to meet state climate, public health, and equity goals. In general, this would mean that the flexibility is used to promote active and public transportation projects and transition away from automobile-centric projects, and not the other way around. First, state agencies should prioritize updates to state-level program guidance to include more funding flexibility (to the extent authorized by statutory mandates) with specific guidance to prioritize projects that reduce VMT and GHG emissions, reduce public health risks, and promote equity, accessibility, and safety, among other state transportation priorities.⁸⁵ Legislators should build flexibility into the language of any newly created funding programs, but not so much flexibility that the program loses its ability to target a particular need or goal.

The state could also require local entities and MPOs to advance VMT- and GHG-reducing projects to receive state matching funds. The state could also condition new funding on regional and local transit leaders adopting new metrics to select projects for funding based on VMT- and GHG-reduction performance, among other factors.

Acknowledgments

The authors are grateful for the input of time and expertise from the transportation experts whom we interviewed for this paper. We also would like to thank our colleagues at UCLA, UC Davis, and UC Berkeley for their input during the research process, as well as Megan Jennings of Coblenz Patch Duffy & Bass LLP, who provided valuable input on CEQA requirements.

⁸⁵ See, e.g., Caltrans, California Transportation Plan 2050 (February 2021), pp. 71-79.