

NO. 72719-2-I

**COURT OF APPEALS, DIVISION
OF THE STATE OF WASHINGTON**

WASHINGTON STATE DEPARTMENT OF TRANSPORTATION,

Respondent,

v.

CITY OF SEATTLE,

Appellant.

BRIEF OF RESPONDENT

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COURT OF APPEALS DIV 1
STATE OF WASHINGTON

ORIGINAL

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I. INTRODUCTION

State law gives Washington State Department of Transportation (WSDOT) sole authority over the design and construction standards used in the construction of state highways. The City of Seattle (Seattle) regulates local construction in part through its grading code, which is part of its local building and construction code. The grading code allows Seattle to require compliance with Seattle's design and construction standards on regulated projects. Seattle wants to require grading permits for part of the construction of State Route (SR) 520, specifically the construction of work bridges that are located on temporary construction easements. Seattle relies on a single sentence in the Growth Management Act to conclude that its authority over state highway design and construction standards is superior to that of WSDOT. The trial court correctly concluded that the general requirement that state agencies follow local development regulations did not supersede WSDOT's authority to design and construct highways; rather, WSDOT's authority is an exception to the general requirement of the Growth Management Act.

Seattle's municipal code specifically exempts work done in state highway right of way from the local grading code. To avoid state preemption, the Seattle grading code must be understood to accommodate state law definitions for state highway right of way and WSDOT's

authority over highway design and construction. Seattle's ad hoc attempt to apply its grading code to a portion of SR 520 therefore must be rejected as inconsistent with the plain language of the grading code and inconsistent with Seattle's own responsibility to interpret its code in a way that complies with state law to avoid unnecessary preemption.

The trial court correctly concluded that "state highway right of way" includes the temporary construction easements, that WSDOT has plenary authority over highway construction, and that the grading permits were invalid. This Court should affirm.

II. STATEMENT OF FACTS

WSDOT is rebuilding the structures that make up the SR 520 corridor between I-5 and Medina (the SR 520 project). Construction of the floating bridge across Lake Washington began in April 2012. Moving west toward I-5, the next segment is the West Approach Bridge, which connects the floating bridge to the Montlake Interchange. The West Approach Bridge will be rebuilt in segments, with the first being the West Approach Bridge–North segment that is now under construction.¹

The West Approach Bridge–North is an elevated structure, part of which passes over water that is too shallow for barge access. The contractor has built temporary work bridges to access that part of the

¹ See the SR 520 project webpage for a graphic of these projects. <http://www.wsdot.wa.gov/Projects/SR520Bridge/>.

project. CP 279-80. Rather than purchase the property needed for these work bridges in fee and then surplus that property after construction, WSDOT acquired only a temporary interest for the duration of the construction. WSDOT acquired these temporary construction easements from the City of Seattle, the University of Washington, and the Washington Department of Natural Resources (DNR). CP 43-51; CP 96.

WSDOT obtained all necessary environmental permits for the entire SR 520 project in 2012, before starting work on the new floating bridge. These included a shoreline substantial development and conditional use permit for the West Approach Bridge that was issued by Seattle. In consultation with Seattle regarding any needed modifications to this permit prior to starting work on West Approach Bridge--North, WSDOT was told it would need to apply for grading permits under Seattle's building and construction code for those portions of the project that are on "temporary construction easements" rather than on property owned by the State in fee. CP 83-85. Rather than risk potential interference with its contractor, WSDOT chose to apply for the permits and try to resolve the matter before the start of construction. CP 86-87. WSDOT appealed the permits under the Land Use Petition Act,

RCW 36.70C.² The King County Superior Court granted WSDOT's petition and invalidated the permits. CP 286-89.

III. ISSUES PERTAINING TO ASSIGNMENTS OF ERROR

1. Do Seattle's grading permit decisions constitute an error of law because the grading code specifically exempts development on "state highway right of way," which must be defined under state law in order to avoid pre-emption of the grading code?
2. Is the statutory grant of authority to WSDOT over the design and construction of state highways an exception to the general requirement in the Growth Management Act provision that state agencies comply with local development regulations?
3. Was Seattle's conclusion that grading permits were required for any aspect of the SR 520 project a clearly erroneous application of the law to the facts?
4. Was Seattle's conclusion that grading permits were required for the SR 520 project not supported by substantial evidence when viewed in light of the whole record?

² The procedural posture in this LUPA challenge is unusual because WSDOT is challenging a permit it successfully obtained. Nevertheless, the challenge is appropriate since Seattle's insistence that WSDOT obtain the permit was an erroneous interpretation of the law. For that reason, this LUPA appeal is not moot and the trial court agreed. Seattle has not challenged that conclusion, and it is therefore the law of the case. A matter is not moot if a court can provide any effective relief. *City of Sequim v. Malkasian*, 157 Wn.2d 251, 260-261, 138 P.3d 943 (2006). Because the court invalidated the permits, relieving WSDOT from any further compliance, it was able to grant effective relief.

5. Were the grading permit decisions outside the authority of the planning director because Seattle's authority to require grading permits on a state highway construction project is pre-empted by State law?

IV. ARGUMENT

A. Standard of Review

The Land Use Petition Act (LUPA) establishes the applicable standard of review. RCW 36.70C.130. The appellate court stands in the place of the trial court, and applies the LUPA criteria directly to the record that supported the local agency decision. *Griffin v. Thurston County*, 165 Wn.2d 50, 54-55, 196 P.3d 141(2008).

A LUPA petitioner has the burden to establish that one of six standards is met based on the local agency's record. In this case, the applicable standards are:

- (b) The land use decision is an erroneous interpretation of the law, after allowing for such deference as is due the construction of a law by a local jurisdiction with expertise;
- (c) The land use decision is not supported by evidence that is substantial when viewed in light of the whole record before the court;
- (d) The land use decision is a clearly erroneous application of the law to the facts;
- (e) The land use decision is outside the authority or jurisdiction of the body or officer making the decision;

RCW 36.70C.130(1). The petitioner need not prove that the local agency's decision was arbitrary and capricious. RCW 36.70C.130(2).

Whether the local agency decision-maker erroneously interpreted the law is a question of law that is reviewed de novo. *Lord v. Pierce Cnty.*, 166 Wn. App. 812, 818, 271 P.3d 944 (2012). Whether the local agency misapplied the law to the facts is reviewed under the clearly erroneous standard, and the court will uphold the decision unless it is “left with a definite and firm conviction that a mistake has been committed.” *Id.* at 819; *Cingular Wireless, LLC v. Thurston Cnty.*, 131 Wn. App. 756, 768, 129 P.3d 300 (2006).

In reviewing whether the decision is supported by substantial evidence in light of the entire record, the court determines whether there is “a sufficient quantity of evidence to persuade a fair-minded person of the truth or correctness of the order.” *City of Redmond v. Central Puget Sound Growth Mgmt. Hearings Board*, 136 Wn.2d 38, 46, 959 P.2d 1091 (1998) (quoting *Callecod v. Washington State Patrol*, 84 Wn. App. 663, 673, 929 P.2d 510 (1997)). The court views the evidence “in the light most favorable to . . . ‘the party who prevailed in the highest forum that exercised fact-finding authority,’” *City of University Place v. McGuire*, 144 Wn.2d 640, 652, 30 P.3d 453 (2001) (quoting *State ex rel. Lige & Wm. B. Dickson Co. v. County of Pierce*, 65 Wn. App. 614, 618, 829 P.2d 217 (1992)).

Whether a decision-maker acted outside of his or her authority is a question of law that the court reviews de novo, giving deference to the decision-maker's expertise. *Quality Rock Products, Inc. v. Thurston Cnty.*, 139 Wn. App. 125, 133, 159 P.3d 1 (2007).

Unchallenged conclusions of law are treated as law of the case. *King Aircraft Sales, Inc. v. Lane*, 68 Wn. App. 706, 716, 846 P.2d 550 (1993).

B. Seattle Committed an Error of Law in Interpreting Its Grading Code to Require Grading Permits for SR 520 Work Performed on Temporary Construction Easements Because the Grading Code Exempts Work in State Highway Right of Way

Seattle's grading code sets out the requirement for grading permits. SMC 22.170.060. *See* Appendix A. This same section also contains a list of exemptions to the grading permit requirement, which include a specific exemption for WSDOT:

A grading permit is not required for the activities listed in subsection 22.170.060.B.

...

14. Development undertaken by the Washington State Department of Transportation in state highway right-of-way that complies with standards established pursuant to Chapter 173-270 Washington Administrative Code, the Puget Sound Highway Runoff Program;

SMC 22.170.060.B.14.

All of the SR 520 construction work, including the work bridges, complies with the standards in the Puget Sound Highway Runoff Program, and Seattle has never contended otherwise. Those regulations require WSDOT to use its Highway Runoff Manual to comply with the regulatory requirements pertaining to highway stormwater management.³

WSDOT has its own design and construction standards that apply to state highway construction work, including those that address construction and highway stormwater runoff.⁴ WSDOT is obligated as a holder of a stormwater discharge permit to comply with its own design and construction standards relating to control and treatment of stormwater runoff.⁵ The same is not true of a private developer, whose construction activity must be regulated by the local government to insure compliance with the local government's stormwater permit.

The state regulation requiring WSDOT to develop and comply with the Highway Runoff Manual applies the standards in that manual to "stormwater management for [WSDOT's] existing and new facilities and

³ WSDOT's Highway Runoff Manual is approved by the Washington Department of Ecology as the equivalent of Ecology's own standards for management of stormwater runoff. WAC 173-270-030.

⁴ WSDOT's website contains links to its design and construction standards that are contained in publications such as its standard specifications, design manual, standard plans, hydraulic manual, construction manual, and materials manual.
<http://www.wsdot.wa.gov/Publications/Manuals/default.htm>.

⁵ WSDOT's NPDES Municipal Stormwater Permit and other supporting information are available on the Washington Department of Ecology's website at <http://www.ecy.wa.gov/programs/wq/stormwater/municipal/wsdot.html>.

rights of way in the Puget Sound basin.” WAC 173-270-030(1). “Facilities” and “rights of way” are used broadly to accomplish the purpose of regulating the quality of stormwater runoff from impervious surfaces. The work bridges are also impervious surfaces, and it would make no sense to exclude them from the scope of these terms simply because they are temporary or because they are located on property not owned by the State in fee.

WSDOT also has its own design and construction standards that apply to all state highway construction work and that are incorporated into construction contracts. The grading code exemption recognizes these differences between state highway projects and other development. Those same differences—application of WSDOT stormwater permit requirements and use of WSDOT design and construction standards—apply regardless of the underlying property interest, and regardless of whether the area is open to pedestrians or vehicles.

- 1. Seattle did not challenge the trial court’s conclusion that state highway right of way includes the temporary construction easements, and that WSDOT has statutory authority to determine what constitutes highway right of way.**

The trial court concluded as a matter of law:

“State highway right of way” means any land needed for highway purposes, including temporary construction easements needed for highway construction. WSDOT has

statutory authority to determine what constitutes state highway right of way pursuant to RCW 47.01.260 and RCW 4.12.010.

CP 287. Seattle did not challenge this conclusion, and it should be treated as the law of the case.

2. **In order to avoid pre-emption of Seattle’s grading code, “state highway right of way” must be interpreted according to state law to include all property used for highway construction, regardless of the interest in the property acquired by the State and regardless of whether it is in the travelled roadway.**

Seattle maintains that it has authority to define what constitutes “state highway right of way” for the purposes of the city grading code exemption, and that it may carve out certain portions of a state highway construction project and require permitting under its building and construction codes. However, this is in direct conflict with WSDOT’s statutory authority to design and construct state highways and to apply its own design and construction standards. If Seattle has authority to require permits for the work bridges on the SR 520 project, then there is no legal reason why it could not delete the exemption for state highway work altogether and require local building and grading permits for all state highway construction, requiring that its own design and construction standards be followed rather than WSDOT’s. There is no rationale for Seattle being able to piecemeal a state highway construction project and

require a grading permit for part of the project. Either it has this authority or it does not.

There is a direct conflict between WSDOT's statutory authority to design and construct state highways, using its own design and construction standards and contract specifications, and Seattle's desire to impose its own standards through its grading code. Because of that conflict, WSDOT's authority grounded in state statute must prevail, and Seattle's authority to impose its own design and construction standards on state highway construction is pre-empted. The only way that Seattle can avoid pre-emption of its grading code is to interpret the term "state highway right of way" in the grading code exemption according to state law.

3. Seattle's definitions of "highway" and "right of way" are in conflict with state law.

Seattle has taken different positions to justify its requirement that the SR 520 project obtain grading permits, none of which is consistent with state law. First, Seattle relied on the fact that the work bridges are built on easements rather than on land owned by the State in fee. Confronted with evidence that other state highways are actually located on easements, Seattle abandoned that theory and argued to the trial court that the temporary easements are not "highway right of way" because they are not open to traffic. After WSDOT pointed out that many features of

highway rights of way are not open to vehicles or pedestrians, such as medians, drainage ditches, and temporary substructures underneath bridges, Seattle now tries to distinguish the work bridges adjoining the SR 520 structures from other non-travelled highway elements. But now the only way that Seattle can make this distinction is to go back to its original argument that the work bridge area is not highway right of way because WSDOT has a temporary ownership interest in that property. This is an erroneous interpretation of the term “state highway right of way” as that term is used both in the grading code exemption and in state law.

WSDOT’s statutory authority in RCW Title 47 includes multiple uses of the term “right of way.” To start with, WSDOT has statutory authority to acquire right of way on behalf of the State for state highway purposes:

Whenever it is necessary to secure any lands or interests in land for a right of way for any state highway, . . . or for any other highway purpose, together with right-of-way to reach such property and gain access thereto, the department of transportation is authorized to acquire such lands or interests in land in behalf of the state by gift, purchase, or condemnation.

RCW 47.12.010. (Appendix B). This section supports inclusion of the work bridge areas as highway right of way. First, the statute allows WSDOT to acquire “interests in lands,” which include permanent or temporary easements. Second, it allows WSDOT to acquire “right of way

to reach such property and gain access thereto,” which would include property needed to gain access to the over-water construction area being used to build the West Approach Bridge–North. Thus, under the plain wording of RCW 47.12.010, the term “right of way” is limited neither to land owned in fee nor to the traveled roadway.

The term “right of way” can have different meanings, and often simply refers to a public right of passage over particular land. However, when used in the context of public agency land ownership, it more often refers to the entire area of land or interests in land held by the owner. The United States Supreme Court stated in an early railroad case:

The ordinary signification of the term “right of way,” when used to describe land which a railroad corporation owns or is entitled to use for railroad purposes, is the entire strip or tract it owns or is entitled to use for this purpose, and not any specific or limited part thereof upon which its main track or other specified improvements are located.

St. Louis, Kansas City, & Colorado R.R. Co. v. Wabash R.R. Co., 217 U.S. 247, 253, 30 S. Ct. 510, 54 L. Ed. 752 (1910). RCW 47.12.010 is consistent with this Supreme Court definition, and establishes that “state highway right of way” includes not only the traveled way or the structure being built, but also those lands or interests in lands that are needed to gain access to the structure. Under both the state statute and the Supreme Court’s definition of “right of way,” the temporary construction easement

areas are part of the SR 520 right of way.

Seattle argues that the easement areas themselves are separate parcels, while the rest of SR 520 is presumably a giant single linear parcel of land. However, highways are all made up of hundreds of individual parcels, or portions thereof, that are acquired by the State and assembled into the highway right of way. It makes no more sense to single out the easement areas as separate “parcels” than it does to identify the parcels that make up interchanges as separate parcels.

Nor does the acquisition of easements rather than fee title make a difference. Entire state highway segments are built on easements. Bridges crossing state-owned aquatic lands, such as the SR 520 floating bridge, are built on aquatic land easements acquired from the Washington Department of Natural Resources under RCW 47.12.026. Highways that cross tribal trust land on Indian reservations are built on easements obtained from tribes. *See, e.g., State v. Pink*, 144 Wn. App. 945, 953, 185 P.3d 634 (2008) (tribe granted state an easement for construction and maintenance of state highway). If an entire highway built on easement is still “right of way,” then there is no reason that a portion of the right of way may not be on an easement, particularly if it is needed only for construction.

4. Seattle has incorrectly quoted and misconstrued RCW 47.12.010.

Seattle has construed the language of RCW 47.12.010 to mean that WSDOT may acquire “right of way” and also may acquire “sites” to work on that right of way. However, Seattle does so by excising words from the statute that completely change its meaning.

Seattle quotes RCW 47.12.010 to say that WSDOT may acquire land or interests in land for right of way, or for “any site for the construction and maintenance of structures and facilities adjacent to, under, upon, within, or above the right-of-way of any state highway” City of Seattle’s Opening Brief (Seattle Br.) at 25-26. However, Seattle excised from that quote the operative language of that phrase, replacing with an ellipsis the words “for exclusive or nonexclusive use by an urban public transportation system.” Thus the “sites” that WSDOT may acquire are not “sites for constructing and maintaining structures for highway right-of-way;” rather they are sites for the construction and maintenance of structures “for exclusive or nonexclusive use by an urban public transportation system.”⁶ Seattle’s misinterpretation of RCW 47.12.010 by elimination of essential terms in the statute must be rejected.

⁶ “Urban public transportation system” is defined in RCW 47.04.082 as “a system for the public transportation of persons or property by buses, streetcars, trains, electric trolley coaches, other public transit vehicles, or any combination thereof operating in or through predominantly urban areas and owned and operated by the state,

5. WSDOT is the only agency allowed by statute to define what constitutes state highway right of way for a state highway project.

RCW 47.01.260(1) defines WSDOT's authority regarding establishment and operation of the State highway system:

The department of transportation shall exercise all the powers and perform all the duties necessary, convenient, or incidental to the planning, locating, designing, constructing, improving, repairing, operating, and maintaining state highways, including bridges and other structures, culverts, and drainage facilities and channel changes necessary for the protection of state highways,

The Washington Supreme Court has held that the predecessor statutes to RCW 47.01.260 provided broad and comprehensive authority to WSDOT (and its predecessor agencies) over the siting, designing, and construction of state highways. Addressing an issue regarding the location and construction of I-90 in Spokane, the court stated:

We know of no other agency or public officers having this power or duty The state has thus, for the time being, vested in the Highway Commission, the director, and officers, its sovereign authority to build and maintain highways And, it is the state which will become the owner and wield exclusive jurisdiction over the right of way against everyone except the United States.

any public agency, any city or county or any municipal corporation of the state, including all structures, facilities, vehicles and other property rights and interest forming a part of such a system.”

Deaconess Hosp. v. Washington State Highway Comm'n, 66 Wn.2d 378, 393, 403 P.2d 54 (1965).⁷ Where RCW 47.01.260(1) gives WSDOT sole authority for the design and construction of state highways, it necessarily gives WSDOT sole authority to determine what property and what interests in that property will be needed for a highway project.

In an early bond validation case dealing with state highway financing, the Washington Supreme Court addressed which agency had authority to determine the scope of a project being financed by the state Toll Bridge Authority, another of WSDOT's predecessor agencies.⁸ *State ex rel. Washington Toll Bridge Authority v. Yelle*, 197 Wash. 110, 115, 84 P. 2d 688 (1938). The statute authorized the Toll Bridge Authority to “provide for the establishing and constructing of toll bridges upon any public highways of this state together with approaches thereto” *Id.* The State Auditor questioned the inclusion of the “approaches” that he believed were too far removed from the toll bridge being financed. The court held that the statute provided the Toll Bridge Authority with “definite powers and broad discretion in the construction of toll bridges and their approaches,” that was “comprehensive in scope.” *Id.* at 115.

⁷ WSDOT succeeded to the powers and duties of the Highway Commission in 1977. RCW 47.01.031.

⁸ The legislature also assigned “all powers, duties and functions” vested in the Toll Bridge Authority to WSDOT in 1977. RCW 47.01.031.

WSDOT's decisions regarding the acquisition and disposal of property are governed by RCW 47.12. RCW 47.12.010 authorizes WSDOT to acquire property that it determines to be necessary for a highway purpose. The selection of property or property interests that are needed for a state highway project is based on engineering expertise. *See State ex rel. Lange v. Superior Court*, 61 Wn.2d 153, 157, 377 P.2d 425 (1963). An agency's determination that it is necessary to condemn certain property is conclusive in the absence of fraud or arbitrary conduct amounting to constructive fraud. *State v. Brannan*, 85 Wn.2d 64, 68, 530 P.2d 322 (1975). To show constructive fraud, the challenger must show arbitrary and capricious conduct, which is:

[W]illful and unreasoning action, without consideration and regard for facts or circumstances. Action, when exercised honestly, fairly, and upon due consideration is not arbitrary and capricious, even though there [may] be room for a difference of opinion upon the course to follow, or a belief by the reviewing authority that an erroneous conclusion has been reached.

City of Tacoma v. Welcker, 65 Wn.2d 677, 684-85, 399 P.2d 330 (1965)(citation omitted). WSDOT thus has broad statutory authority to determine what property or property interests are needed for highway purposes. No state law requires local agency approval of these decisions.

WSDOT has authority to acquire property for the roadway itself as well as for property that is needed "to reach such property or gain access

thereto.” RCW 47.12.010. Depending on project needs, property needed for temporarily for construction may be acquired in fee and then sold as surplus property when no longer needed. In *HTK Management, L.L.C. v. Seattle Popular Monorail Authority*, the condemning agency sought to condemn a downtown Seattle parking garage for construction of a monorail station, even though it would not likely need all of the property after construction was complete. 155 Wn.2d 612, 121 P.3d 1166 (2005). As part of the question of whether the condemnation was necessary for a public use, the court looked at whether acquisition of a fee interest was necessary. 155 Wn.2d at 635. Based on the length of time that the property would be needed and the cost involved, the court concluded that the acquisition of a fee interest was justified. *Id.*

Here, WSDOT determined that it did not need the temporary easement areas long term, and that a more prudent use of resources allowed acquisition of only temporary construction easements rather than a fee interest that would have to be surplussed after construction. Nothing requires a condemning agency to acquire more than it needs:

Neither statute nor decisional law of this state requires a condemnor to acquire a greater interest in property than that which is required for the use of the facilities for which condemnation is sought.

Municipality of Metropolitan Seattle, King County v. Kenmore Properties, Inc., 67 Wn.2d 923, 929, 410 P.2d 790 (1966). This decision to acquire only temporary easements was within WSDOT’s discretion, and did not change the nature of the property as state highway right of way.

6. State Highway Statutes Use the Term “Right of Way” to Denote More Than the Traveled Roadway

Seattle argued to the trial court that “‘Right-of-way’ is not defined in the highway statute.” CP 235. In its opening brief to this Court, Seattle again ignores the state law definition, and instead creates a definition of its own by combining unrelated municipal code definitions of “highway” and “right of way.” It fails to address the fact that RCW Title 47 contains numerous uses of “right of way” in the state highway context, including a broad definition at RCW 47.14.020(1): “Right-of-way” means the area of land designated for transportation purposes.”

The question here is which agency, Seattle or WSDOT, has authority to determine the definition of “state highway right of way” as it applies to a state highway construction project. Normally in a LUPA appeal, the court would give deference to Seattle’s interpretation of its own code. However, in this case, the code uses a term--“state highway right of way”—that is not defined in the grading code or elsewhere in the city code, and that must necessarily be defined by state law. The

legislature has defined “right of way” and has used it consistently throughout Title 47. All of the usages of that term allow WSDOT to determine what constitutes state highway right of way. No statute gives local agencies that authority. Seattle erred as a matter of law in failing to rely on the statutory definition and uses of the term “right of way” in relation to state highways.

In this case, the Court should defer to WSDOT’s definition of “state highway right of way,” since it is defined in RCW Title 47, which is administered by WSDOT. Courts defer to an agency’s interpretation of the statute it administers so long as the interpretation is not an error of law. WSDOT’s interpretation of Title 47 as defining “right of way” and as using the term to describe more than just the traveled portion of the roadway is not an error of law. *Kadlec Regional Medical Center v. Dep’t of Health*, 177 Wn. App. 171, 178, 310 P.3d 876 (2013) (citing *Univ. of Wash. Med. Ctr. v. Washington State Dep’t of Health*, 164 Wn.2d 95, 102, 187 P.3d 243 (2008)).

Seattle argues for a “plain meaning” approach to defining “state highway right of way.” Seattle Br. at 23-24. However, the question is whether that plain meaning must be discerned from the Seattle municipal code, or from state law that is applicable to state highway right of way and construction. In this case, the meaning of “right of way” can be readily

discerned both from its definition in RCW 47.14.020 and from its usage throughout Title 47.

This court reviews questions of statutory interpretation *de novo*. In interpreting statutes, we strive to discern and implement the legislature's intent. Where the plain language of a statute is unambiguous, and “the legislative intent is apparent, . . . we will not construe the statute otherwise.” However, plain meaning may be gleaned “from all that the Legislature has said in the statute and related statutes which disclose legislative intent about the provision in question.”

Henne v. City of Yakima, 182 Wn.2d 447, 453, 341 P.3d 284 (2015) (citations omitted). “[A]ll that the Legislature has said” regarding state highway right of way in Title 47 indicates a legislative intent that to include all property interests that are integral to the highway project.

“Right of way” is defined specifically as “the area of land designated for transportation purposes.” RCW 47.14.020. This section of RCW Title 47 addresses donation of right of way; however, it is consistent with the use of the term in all other sections of Title 47. In addition to being unambiguous on its face, the definition in RCW 47.14.020(1) is consistent with the uses of the term “right of way” in other related statutes, particularly those that relate to property acquisition by WSDOT.

Statutes that are *in pari materia* should be read together. [W]here two statutes relate to the same subject matter, the court will, in its attempt to ascertain the legislative purpose, read the sections as constituting one law to the end that a

harmonious total scheme which maintains the integrity of both is derived.

Leschi Imp. Council v. Washington State Highway Comm., 84 Wn.2d 271, 306, 525 P.2d 774 (1974). RCW 47.14 and RCW 47.12 both relate to the same subject matter, which is acquisition of state highway right of way. They should thus be considered *in pari materia*. In addition, both chapters are part of Title 47, much of which pertains to both acquisition and use of state highway right of way. Thus, the definition in RCW 47.14.020(1) is important in interpreting other uses of “right of way” in RCW Title 47.

A number of other sections of RCW Title 47 use the term “right of way” consistently with its definition in RCW 47.14.020(1), and use it to describe property outside of the traveled roadway. For example, RCW 47.04.040 vests title to primary and secondary state highways in the State of Washington. In doing so, the statute describes the following:

All public highways in the state of Washington which have been designated to be primary state highways or secondary state highways or classified as primary roads . . . shall operate to vest in the state of Washington all right, title, and interest to the right of ways thereof, including the roadway and ditches and existing drainage facilities, together with all appurtenances thereto

(Emphasis added.) Included in the “right of way” of state highways is not only the “roadway,” but also “ditches and existing drainage facilities.” Areas in which ditches and drainage facilities such as detention ponds are

located are not typically open to the public or allowed to be driven on by vehicles or walked on by pedestrians. Nevertheless, this statute treats them as part of the state highway right of way.

RCW 47.24 governs state highways that also function as city streets. Among other things, this statute sets out which agency is responsible for street or highway maintenance, and states that in some circumstances:

[T]he state, when necessary for public safety, shall assume, at its expense, responsibility for the stability of the slopes of cuts and fills and the embankments within the right-of-way to protect the roadway itself.

RCW 47.24.020(6) (emphasis added). This section describes “the slopes of cuts and fills and the embankments” as being “within the right of way.” Slopes and embankments along roadways are not typically areas in which the public is allowed, for safety reasons. This section also refers to “the roadway itself” as being separate from the slopes and embankments. Thus, the “roadway” and the “right of way” are not one and the same.

RCW 47.24 also addresses acquisition of right of way for state highways that are also city streets, and states:

Title to all such rights-of-way so acquired shall vest in the city or town: PROVIDED, That no vacation, sale, rental, or any other nontransportation use of any unused portion of any such street may be made by the city or town without the prior written approval of the department; and all

revenue derived from sale, vacation, rental, or any nontransportation use of such rights-of-way shall be shared by the city or town and the state in the same proportion as the purchase costs were shared;

RCW 47.24.020(15). This section addresses “unused” portions of rights of way that may be disposed of by the city or town. If the right of way is “unused,” then it has not been incorporated into the street or highway. However, this statute still describes that land as “right of way.”

RCW 47.28.020 sets out the standard width of state highways:

From and after April 1, 1937, the width of one hundred feet is the necessary and proper right-of-way width for state highways unless the department, for good cause, adopts and designates a different width.

This statute does not require that the entire 100-foot-width of “right of way” be paved, nor does it require it to all be entirely accessible to the public. In addition, this statute allows WSDOT to determine what constitutes the highway right of way.

WSDOT’s interpretation of the meaning of “highway right of way” is based not only on an express definition in WSDOT’s statutes, it is also based on uses in other statutes that pertain to acquisition or use of state highway right of way. Seattle, on the other hand, has cobbled together a definition using definitions of “highway” and “right of way” that are contained separate local code provisions that are unrelated to either the grading code or to state right of way acquisition or highway construction.

Its definition of “highway” comes from Seattle’s traffic code, which is necessarily focused only on the traveled roadway. *See* SMC 11.14.245; Seattle Br. at 24. And its definition of “right of way” comes from Seattle’s land use code, which states that “The definitions in this chapter provide the meanings of terms used in *this title*. . . .” SMC 23.84A.001.A (emphasis added); Seattle Br. at 23-24. Neither is helpful in determining what “state highway right of way” means in the context of the grading code exemption, and neither can be used to supersede state law.

The state statutes use the term “right of way” to denote more than the traveled roadway and to include easements. Seattle has not identified any state law to the contrary. The trial court correctly held that “right of way” means any land needed for a transportation purpose, as defined in RCW 47.14.020(1), and correctly concluded that the temporary construction easements are highway right of way.

7. State Highway Right of Way Includes Project Areas That Are Not Accessible by the Public

The fact that an area is considered by WSDOT to be state right of way does not mean that all persons must have access to the entirety of the property at all times. For example, use of highways by bicycles and pedestrians may be limited, or may be prohibited altogether depending on

safety needs. *See* RCW 46.61.160 (WSDOT may restrict pedestrian and bicycle use of limited access highways).

Based on the definition now being used by Seattle, the property adjoining the pavement of most highways—locations of drainage ditches, medians, and barriers—is not part of the “highway right of way” and therefore is subject to regulation under Seattle’s grading and building codes. This would include the medians on I-5, as well as those of other interstate and state highways that are divided highways. It is not legal to drive on the medians. RCW 46.61.150.

It makes no sense to apply different agency’s construction standards based on where the highway construction work is located, and the legislature recognized this in giving this authority to WSDOT. Much of the construction work on state highways and bridges occurs in areas that are not accessible to the public, such as the substructure and superstructure of bridges. The fact that such an area is not accessible to the public does not make it any less part of the state highway right of way. Under Seattle’s definition, the pontoons that make up the SR 520 floating bridge are not “highway right of way.” While the surface of the bridge deck is open to traffic, the pontoons themselves are not. Seattle now concedes that the pontoons are part of the state highway right of way. Seattle Br. at 27.

This is not a situation, as in some of the cases Seattle cites, in which none of the right of way is open as a matter of right. There is no question that SR 520 is a state highway that is open to the public for vehicular use. The only question is whether a portion of the project needed for replacement of a bridge can be segmented out and declared not to be “highway right of way” because that portion of the project will not be open to vehicles. However, it makes no more sense to segregate out work bridges that are constructed next to the bridge than it does to segregate out the temporary structures needed during construction underneath the bridge structure. Both are integral parts of the highway construction project. The same section of the SR 520 Final Environmental Impact Statement that describes the work bridges also describes the “falsework,” other temporary structures that will be built under the bridge to temporarily support the bridge during construction. CP 279-80. Seattle did not demand that grading or building permits be obtained for the falsework construction, despite the fact that these areas will not be accessible to the public.

The trial court correctly concluded that WSDOT is the agency with authority to determine what constitutes state highway right of way. Seattle did not challenge that conclusion. The trial court also correctly concluded that the work bridge areas are part of the state highway right of way.

Based on these conclusions, the trial court correctly found that Seattle's decision to require grading permits for SR 520 was an error of law.

C. The Siting and Design of State Highways Are Governmental Functions.

Seattle contends that the state highway construction project is a “proprietary” function, and that therefore Seattle's own regulatory function must supersede WSDOT's authority to build and maintain the highway system. This is a new argument that was not raised in the trial court, and this court should refuse to consider it. RAP 2.5. In addition, it is incorrect; construction and operation of highways is a “traditional and essential” governmental function. *State ex rel. Washington State Toll Bridge Authority v. Yelle*, 61 Wn.2d 28, 46, 377 P.2d 466 (1962) (quoting *Gross v. Washington State Ferries*, 59 Wn.2d 241, 243-44, 367 P.2d 600 (1961)) (state ferries and toll bridges are part of the state highways system and therefore are part of a traditional and essential governmental function); *see also Boskovich v. King Cty.*, 188 Wash. 63, 66, 61 P.2d 1299 (1936) (county roads are “a most important governmental function to meet the necessities of the people”); *State ex rel. Case v. Howell*, 85 Wash. 281, 290, 147 P. 1162 (1915) (governmental functions include construction of highways); *Wheaton v. Golden Gate Bridge, Highway, and*

Transportation Dist., 559 F.3d 979, 985 (9th Cir. 2009) (maintenance of highways is “well established” to be a governmental function).

D. Seattle Incorrectly Relies on Statutes That Address Environmental Permitting Even Though the Grading Permits Are Issued Under the Local Building and Construction Code.

Seattle confuses its building and grading regulatory program with the multiple environmental permits that actually do apply to state highway construction. This case is not about whether environmental permits apply to highway construction. WSDOT obtained all applicable environmental permits for this project, and Seattle has not argued to the contrary.

Seattle relies on its interpretation of an environmental statute that expired nine years ago to argue that state law requires that highway construction projects be permitted under its local building and construction code. The cited statutes established what was known as the Transportation Permit Efficiency and Accountability Committee. Former RCW 47.06C.010 (2001). This multi-agency committee was charged with developing reforms for transportation project environmental permitting “through a streamlined approach to *environmental* permit decision making.” *Id.* (emphasis added). *See* Laws of 2001, 1st Ex. Sess., ch. 2 § 1. The legislature directed the committee to “conduct three environmental permit streamlining pilot projects” and develop a “one-stop” environmental permitting process for state transportation projects. *Id.*

The legislation establishing this committee expired in 2006. Laws of 2003, ch. 8 § 3.

This program addressed *environmental* permits, such as those required by the state Shoreline Management Act. It had no applicability to permits issued under the building and construction code, such as the grading permits in this case. Therefore, those statutes have no bearing on whether a local agency may regulate state highway construction through its building and construction regulations. None of those statutes references programs such as Seattle’s grading code.

Seattle also relies on a section from the Growth Management Act, RCW 36.70A.420, which addresses coordination among agencies for transportation project environmental permitting. In its quote of this section, Seattle excised the word “environmental.” Seattle Br. at 22 (“these jurisdictions’ present . . . permitting authority” as compared to the statutory language, “these jurisdictions’ present *environmental planning and permitting* authority”) (emphasis added). This section addresses “*environmental* planning and permitting,” and directs local agencies to “coordinate their regulatory decisions by considering together the range of local, state, and federal requirements for major transportation projects.” Because this section addresses environmental permitting requirements, it

does nothing to support Seattle's contention that it should be able to regulate highway construction through its building and construction codes.

Similarly, Seattle's reliance on RCW 47.01.300 does not support its position. This section requires WSDOT to cooperate with "environmental regulatory authorities" regarding environmental permitting for highway projects. Neither this section nor RCW 47.01.290, which was part of the same legislation, mentions local agencies. Also, contrary to Seattle's description of RCW 47.01.300, it does not require WSDOT to "develop methods for initiating review of permit applications," but rather requires environmental permitting agencies to do so. RCW 47.01.300(6).

E. Seattle's Requirement of Grading Permits for a Portion of the SR 520 Project Was an Erroneous Application of the Law to the Facts Because the Exemption Should Apply to All Property Used for the Highway Construction Project

The result of Seattle's requirement that the work in the temporary easement areas be subject to Seattle grading permits is that Seattle expects that its own grading and building standards will apply to the construction of the work bridges rather than WSDOT's own standards. The trial court concluded that the permit requirement was an erroneous application of the law to the facts in part "in light of the practical complications of having

inconsistent standards applicable to a single state highway construction contract.” CP 287.

Seattle’s grading code allows it to condition grading permits:

A permit may be granted with or without conditions. Conditions may include, but are not limited to: restricting grading work to specific seasons, months or weather conditions; limiting vegetation removal; sequencing of work; requiring that recommendations contained in the geotechnical investigation are followed; requiring observation by a licensed civil or geotechnical engineer; requiring special inspection pursuant to Section 22.170.130; requiring structural safeguards; specifying methods of erosion, sedimentation, and drainage control; specifying methods for maintenance of slope stability; retaining existing trees; requiring revegetation and grass seeding and/or long term maintenance activities;

SMC 22.170.110.A (Appendix C). Under Seattle’s permit scheme, the contractor would have been required to apply two different agencies’ standards depending on where its work was located. For example, WSDOT expects its construction contractor to determine the sequence of the work.⁹ However, SMC 22.170.110.A allows Seattle to dictate the sequencing of work through the grading permit conditions. This is a direct conflict between the authority of WSDOT and local agencies. It would make contract compliance more difficult for the contractor, and make contract administration more difficult for WSDOT. The trial court

⁹ See Standard Specifications for Road, Bridge, and Municipal Construction, section 1-08.3(1) (2014 ed.), found on WSDOT’s webpage at <http://www.wsdot.wa.gov/Publications/Manuals/M41-10.htm>.

correctly held that this is an erroneous application of the grading code to the facts of this case.

F. Seattle’s Conclusion That Property Acquired as a Temporary Construction Easement Is Not Part of “State Highway Right of Way” Is Not Supported by Substantial Evidence

Seattle’s administrative record demonstrates that the temporary easement areas are part of the SR 520 right of way. The right of way plans submitted to Seattle by WSDOT designate all aspects of the right of way for this segment of SR 520, and include the temporary construction easements. CP 43-51. There is nothing in the record that supports Seattle’s contention that the temporary construction easement areas are not part of the highway right of way. The trial court correctly held that Seattle’s decision was not supported by substantial evidence in the record.

G. Seattle’s Decisionmaker Exceeded His Authority in Determining That Seattle Has Authority to Require Grading Permits for State Highway Projects

By asserting authority over a portion of the SR 520 West Approach Bridge–North project, Seattle has put itself in the position of determining what design and construction standards apply to state highway construction work in the temporary construction easement areas. Where RCW 47.01.260 gives WSDOT sole authority over the design and

construction of state highways, Seattle has no authority to impose its own standards on that work.¹⁰

The Washington Supreme Court held with regard to the second I-90 bridge across Lake Washington:

Interstate 90 is designated as a state route in RCW 47.17.140. As a limited access facility, its title is vested in the State, which has full jurisdiction, responsibility and control over it

Seattle Bldg. and Constr. Trades Council v. City of Seattle, 94 Wn.2d 740, 747, 620 P.2d 82 (1980). Specifically, with regard to the extent of local control over the limited access highway facility, the court stated:

As between state and local governments, the State has plenary control over its limited access facilities, and local governments have only those rights and powers which the legislature has seen fit to accord them.

Id. at 748. The court noted that the legislature provided a means for local government to be involved in the decisions for siting limited access highways. *Id.* at 747. However, the legislature has not provided a means for local agencies to be involved in directing WSDOT in the manner of constructing limited access highways, or in directing WSDOT's contractors on means and methods of construction. By asserting authority to require grading permits for the construction of the work bridges that

¹⁰ Seattle asserts that in this case, it did not impose different standards. While WSDOT disagrees, this issue was not developed in the record. However, if Seattle imposed no requirements under the permit, it raises the question of why it was needed at all.

will be used by the contractor to access the West Approach Bridge, Seattle is effectively asserting control over the manner in which the limited access highway will be built. Seattle's planning director exceeded his authority in assuming this degree of control over the highway construction project.

H. Seattle's Application of its Grading Code to State Highway Construction is Pre-empted by State Law.

Because Seattle has wrongly interpreted the express exemption for state highway construction projects in its grading code, it is not necessary for the court to reach the issue of whether the grading code is pre-empted by state law. However, to the extent that SMC 22.170.060 could be interpreted to require grading permits for any portion of work on a state highway construction project, it is pre-empted by RCW 47.01.260(1).

A city has the authority to "make and enforce within its limits all such local police, sanitary and other regulations as are not in conflict with general laws." Const. art. XI, § 11. A city's regulatory authority is co-extensive with that of the legislature only to the extent that the local regulation does not conflict with the general laws of the state. *Snohomish County v. State*, 97 Wn.2d 646, 649, 648 P.2d 430 (1982). An ordinance conflicts with state law if it permits that which the statute forbids or prohibits that which the statute authorizes. *Id.* An ordinance will also be found to be in conflict with state law if there is an indication that the

legislature intended to preempt the particular field of legislation. *State v. Mason*, 34 Wn. App. 514, 520, 663 P.2d 137 (1983); *see also Snohomish County v. State*, 97 Wn.2d at 648, 650 (DSHS had plenary power to construct and maintain a prison facility, pre-empting local zoning authority) *and State v. City of Seattle*, 94 Wn.2d 162, 166, 615 P.2d 461 (1980) (legislature had given to the Board of Regents “full control of the university and its property of various kinds” and Seattle landmarks ordinance did not apply to building project).

In enacting RCW 47.01.260, the legislature expressed a clear intent to solely authorize WSDOT to site, design, and construct the state highway system. The Washington Supreme Court addressed WSDOT’s sole jurisdiction over the state highway system in *City of Union Gap v. Carey*, 64 Wn.2d 43, 390 P.2d 674 (1964) (city regulations affecting use of state highway were subject to highway commission approval). The court found that former RCW 47.01.050 evidenced the legislature’s clear intention to “preempt the regulatory field of state highways, both within and without the boundaries of incorporated cities and towns.” *Id.* at 48 (emphasis added). The court quoted former RCW 47.01.050:

The state highway commission is hereby vested with all powers, authority, functions and duties vested in or required to be performed by the director of highways or the state department of highways as of July 1, 1951. Full and complete jurisdiction and authority over the administration

of state highways and all matters connected therewith or related thereto is hereby granted the said state highway commission except only insofar as the same may have been *heretofore* or may be hereafter *specifically granted to* the director or department of licenses, the public service commission, the state commission on equipment, the Washington state patrol or its chief, the Washington toll bridge authority, or *the governing bodies of cities and towns*.

Union Gap, 64 Wn.2d at 47 (emphasis in original). The legislature repealed RCW 47.01.050 in 1977, and enacted RCW 47.01.031, creating WSDOT:

All powers, duties, and functions vested by law in the department of highways, the state highway commission, the director of highways, the Washington toll bridge authority, the aeronautics commission, the director of aeronautics, and the canal commission, planning and community affairs agency, are transferred to the jurisdiction of the department, except those powers, duties, and functions which are expressly directed elsewhere in this or in any other act of the 1977 legislature.

RCW 47.01.031. Unless power to regulate state highways is expressly granted to another entity by an act of the legislature, WSDOT has jurisdiction over state highways. Because the statute requires that the grant of authority must be express, it cannot be simply inferred in another statutory scheme. A requirement for city grading permits for state highway construction work, and the resulting imposition of city construction standards, conflicts with WSDOT's sole authority to design and construct the highway, and is therefore pre-empted by state law.

I. The Growth Management Act Did Not Repeal or Amend RCW 47.01.260, and WSDOT Has the Same Authority to Site, Design, Build, and Operate the State Highway System as Before Enactment of the Growth Management Act

Seattle relies heavily on its contention that one sentence in the Growth Management Act (GMA) impliedly repealed RCW 47.01.260 and much of RCW Title 47, and requires that state highway projects be subject to city building and construction code regulations. However, this is inconsistent with the rules of statutory construction.

RCW 47.01.260(1) states:

The department of transportation shall exercise all the powers and perform all the duties necessary, convenient, or incidental to the planning, locating, designing, constructing, improving, repairing, operating, and maintaining state highways, including bridges and other structures, culverts, and drainage facilities and channel changes necessary for the protection of state highways, and shall examine and allow or disallow bills, subject to the provisions of RCW 85.07.170, for any work or services performed or materials, equipment, or supplies furnished.

Prior to enactment of the Growth Management Act, RCW 36.70A, in 1989, RCW 47.01.260 and its predecessor statutes had been interpreted by the Washington Supreme Court as pre-empting local control of state highways. *See, e.g., Deaconess Hosp. v. Washington State Highway Comm'n*, 66 Wn.2d 378, 393, 403 P.2d 54 (1965) (Highway Commission had sole authority to build and maintain state highways); *Seattle Bldg. and Constr. Trades Council v. City of Seattle*, 94 Wn.2d 740, 747, 620 P.2d 82

(1980) (State has plenary control over limited access facilities, and cities have only the rights and powers granted to them with regard to highways). There are no cases construing RCW 47.01.260 after enactment of the Growth Management Act.

The Growth Management Act is a broad, general statute that requires a certain level of land use planning by cities and counties. It includes the following sentence:

State agencies shall comply with the local comprehensive plans and development regulations and amendments thereto adopted pursuant to this chapter except as otherwise provided in RCW 71.09.250(1) through (3), 71.09.342, and 72.09.333.

RCW 36.70A.103. The exceptions noted in this sentence refer to the Special Commitment Center operated by the Department of Social and Health Services (DSHS) on McNeil Island. *See* Laws of 2001, 2nd Ex. Sess., ch. 12, § 203; *see also* 3ESSB 6151 Final Bill Report. CP 281-85. These were added by amendment when DSHS was having difficulty obtaining local permits to build the Special Commitment Center and “secure transition facilities,” both of which were required by a federal court injunction. Because the inclusion of these exceptions was a response to that specific issue, they cannot be read to limit the interpretation of the original Growth Management Act language. The bill itself made it clear that it was not intended to imply any other changes to the law. Laws of

2001, 2nd Ex. Sess., ch.12, § 203 (“The provisions of this act do not affect the state’s authority to site any other essential public facility under RCW 36.70A.200 in conformance with local comprehensive plans and development regulations adopted pursuant to chapter 36.70A.RCW.”).

Seattle’s position would mean that all development regulations and comprehensive plans apply to all state agency projects, and could not be pre-empted by other law. For example, zoning regulations are “development regulations,” yet they do not and cannot apply to the siting of state highways; they are pre-empted by state law. Local agencies cannot create zones in which state highways are allowed and zones in which they are not. Nor can local agencies restrict the siting of state highways through their comprehensive plans. In addition to being inconsistent with RCW 47.01.260, this interpretation is inconsistent with RCW 47.52, which gives WSDOT sole authority to site and construct limited access highways such as SR 520. *See Seattle Bldg. and Constr. Trades Council v. City of Seattle*, 94 Wn.2d 740, 747, 620 P.2d 82 (1980) (“RCW 47.52 provides the exclusive method under state law for determining whether a limited access route will be built, and, if so, where it will be located.”).

When two statutes are truly in conflict with one another, the more specific statute controls regardless of when either was enacted. *Wark v.*

Washington Nat'l Guard, 87 Wn.2d 864, 867, 557 P.2d 844 (1976) (“It is the law in this jurisdiction, as elsewhere, that where concurrent general and special acts are *in pari materia* and cannot be harmonized, the latter will prevail, unless it appears that the legislature intended to make the general act controlling.”).

In a challenge to the state’s energy facility siting process, project opponents argued that this same provision of the Growth Management Act superseded the preemption language in the earlier-enacted Energy Facilities Site Locations Act (EFSLA):

Twenty years after enacting EFSLA, the legislature enacted the GMA in order to coordinate and plan economic growth and development among communities, local governments, and corporations. . . . The GMA requires that “[s]tate agencies shall comply with the local comprehensive plans and development regulations and amendments thereto adopted pursuant to this chapter except as otherwise provided in [provisions under chapter 71.09 RCW].” Petitioners contend that this language supersedes and therefore governs over the preemption language in EFSLA.

Residents Opposed to Kittitas Turbines v. State Energy Facility Site Evaluation Council (EFSEC), 165 Wn.2d 275, 308, 197 P.3d 1153 (2008) (citations omitted). The energy facility statute, EFSLA, contained an express preemption of the field of energy facility siting: “The state hereby preempts the regulation and certification of the location, construction, and operational conditions of certification of the energy facilities included

under RCW 80.50.060 as now or hereafter amended.” RCW 80.50.110(2). Project opponents argued that this express preemption language was superseded by the Growth Management Act’s later-adopted general requirement that state agencies comply with local development regulations. The court found that the two statutes were in direct conflict with one another, and resolved the issue using rules of statutory construction:

Under the general-specific rule, a specific statute will prevail over a general statute. As this court recognized in *Wark*, “It is a fundamental rule that where the general statute, if standing alone, would include the same matter as the special act and thus conflict with it, the special act will be considered as an exception to, or qualification of, the general statute, whether it was passed before or after such general enactment.” Furthermore, if the general statute was enacted after the specific statute, this court will construe the original specific statute as an exception to the general statute, unless expressly repealed.

EFSEC, 165 Wn.2d at 308 (citing *Wark*, 87 Wn.2d at 867; other citations omitted). The court thus concluded that the energy facility siting statute was an exception to the requirements of the later-enacted Growth Management Act. *Id.*

The statutes giving WSDOT sole authority to design and build state highways, RCW 47.01.260 and RCW 47.52, were enacted in 1979 and 1977 respectively. The Growth Management Act was enacted in 1990. However, the statutes giving a single state agency authority over a

particular type of development are considerably narrower and more specific than the language about state agencies complying with local development regulations generally. To the extent that RCW 36.70A.103's requirement of state agency compliance with development regulations may be considered to otherwise apply to WSDOT's design and construction of state highways, it is in direct conflict with the provisions of RCW Title 47. Thus, RCW 47.01.260, giving WSDOT sole authority to design and build the state highway system, and RCW 47.52, giving WSDOT sole authority over limited access highways, must be treated as exceptions to the general language in the Growth Management Act. The trial court correctly reached this conclusion.

RCW Title 47 does not contain the same express preemption language as the energy facility siting statute, RCW 80.50.110(2). In particular, the energy facility siting statute creates a "one-stop" permitting process for energy facilities. WSDOT must obtain applicable environmental permits from individual permitting agencies.¹¹ Regardless, the Washington Supreme Court has consistently interpreted the highway statutes as giving WSDOT sole authority to site, design, and build the state highway system. The Growth Management Act, including RCW

¹¹ Those applicable permits cannot "preclude the siting of an essential public facility," although they may impose reasonable conditions, such as environmental mitigation requirements.

36.70A.103, is a general statute that does not supersede that specific authority. Seattle has not addressed the issue of specific statutes prevailing over general statutes at all, relying only on the fact that the Growth Management Act was enacted after RCW 47.01.260.

Furthermore, the Growth Management Act does not expressly or impliedly repeal any of RCW Title 47. It provides that local agencies may not preclude the siting of essential public facilities, and includes state highways among several examples of essential public facilities. RCW 36.70A.200(1). “Essential public facilities include those facilities that are typically difficult to site, such as airports, state education facilities and state or regional transportation facilities” *Id.* (emphasis added). The fact that a particular public facility is not included as an example in the statute does not mean that it is not an essential public facility. The list by its own terms was not intended to be exclusive. And the fact that a facility is included in this list does not mean that permit requirements apply that otherwise would not. This section is a limitation on local permitting authority over essential public facilities rather than the expansion of authority that Seattle advocates. It assumes that local agencies already have certain permitting authority, and then limits how that authority may be exercised over essential public facilities. It does not make permits applicable that otherwise were pre-empted by state law.

If WSDOT were building an office building, it would apply for a local building permit. Local agencies regulate the construction of buildings. They implement the International Building Code, which contains detailed standards for grading and for building construction. However, it does not contain standards for highway and bridge construction. WSDOT has extensive, detailed standard plans and specifications, in addition to special contract provisions for individual projects, all of which apply to highway and bridge construction. It simply makes no sense to allow a local agency without expertise to supersede the agency that not only has legislative direction to design and build highways, but actually has the expertise to do so.

J. The Seattle Municipal Code Should Not Be Interpreted to Violate the State Constitution

Seattle is advocating for an interpretation of its grading code that would be in violation of article XI, section 11 of the Washington Constitution, which allows cities to enact laws that are “not in conflict with general laws.”

An ordinance also violates Const. art. XI, § 11 if it directly and irreconcilably conflicts with a state statute. If the two enactments can be harmonized, however, no conflict will be found. Unconstitutional conflict is found where an ordinance permits that which is forbidden by state law, or prohibits that which state law permits.

Rabon v. City of Seattle, 135 Wn.2d 278, 292, 957 P.2d 621 (1998). To the extent that SMC 22.170.060 must be interpreted to require local grading and building code permitting of state highway projects, it must be found to be in conflict with RCW 47.01.260 and RCW 47.52, and therefore unconstitutional. However, because the provisions can be harmonized to be consistent with state law simply by giving effect to the highway construction exemption in the grading code, there is no reason for the court to determine that the municipal code is unconstitutional and pre-empted by state law.

The Seattle grading code by its own terms exempts construction projects on state highway right of way from its provisions. It does not allow Seattle to piecemeal a state construction project and determine that part requires grading permits while other parts do not. The exemption does not contain provisions limiting it to only those portions of a state highway project that are open to traffic, nor does it limit its application to land owned in fee by the State. If its terms are interpreted consistently with state law, particularly RCW Title 47, then this code provision has no constitutional problems. If Seattle interprets it by superseding state law with its own definitions, then the code provisions are in conflict with state law and are unconstitutional. Because a court should interpret a law to be constitutional if such an interpretation exists, the only interpretation that

may be given “state highway right of way” is the definition and usages found in RCW Title 47.

V. CONCLUSION

The express exemption in Seattle’s grading code for state highway construction projects must be interpreted as applying to all aspects of a highway construction project. Seattle’s decision to require grading permits for portions of the SR 520 construction work was based on an error of law. If applied to state highway projects, the grading code is in conflict with state law, particularly RCW 47.01.260, and is pre-empted. If this Court agrees that the grading code exemption for state highway construction work covers all aspects of the SR 520 highway construction project, including the work bridges, then there is no need to consider whether the grading code is pre-empted or whether it is unconstitutional. The trial court correctly found that the exemption does apply to the SR 520 project and that the grading permits are invalid, and its decision should be affirmed.

RESPECTFULLY SUBMITTED May 22, 2015.

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22.170.060 - Grading Permit Required

- A. Grading Permit Required. Except as otherwise specifically provided in this code, a grading permit shall be obtained from the Director before commencing any activity for which a permit is required as specified in subsection 22.170.060.A. The required grading permit may be a component of a building permit, and, in this case, a separate grading permit is not required. The provisions of this chapter apply to a grading permit that is a component of a building permit except as expressly otherwise stated. Actions exempt from the requirement for a grading permit are specified in subsection 22.170.060.B.
1. General. A grading permit is required prior to any of the actions in subsection 22.170.060.A.1, whether or not the site is subject to any other provision of subsection 22.170.060.A:
 - a. Changing existing grade at any location more than 4 feet measured vertically, if the combined volume of excavation, filling, and other movement of earth material on a site is more than 50 cubic yards;
 - b. Changing the existing grade at any location more than 4 feet measured vertically, if the grading will result in a permanent slope steeper than 3 horizontal to 1 vertical;
 - c. Changing the existing grade at any location more than 4 feet measured vertically, if there will be a temporary slope steeper than 1 horizontal to 1 vertical;
 - d. Any grading if the combined volume of excavation, filling, and other movement of earth material exceeds 500 cubic yards;
 - e. One acre or more of land disturbing activity on a site;
 - f. Two thousand square feet or more of new plus replaced impervious surface.
 2. Shoreline District. In the Shoreline District as established in Section 23.60.010 a grading permit is required:
 - a. If there will be any grading of lands covered by water;
 - b. If there will be any land disturbing activity within 100 feet of the ordinary high water mark;
or
 - c. If the combined volume of excavation, filling, and other movement of earth material is more than 25 cubic yards in the area between 100 and 200 feet of the ordinary high water mark.
 3. Environmentally Critical Areas and Buffers. A grading permit is required for:
 - a. Any land disturbing activity in riparian corridors, wetlands, wetland buffers, and shoreline buffers;
 - b. Land disturbing activity in liquefaction-prone areas, abandoned landfills, seismic hazards areas, peat settlement-prone areas, and volcanic hazard areas, if any threshold in subsection 22.170.060.A.1 is met or exceeded;
 - c. Land disturbing activity in any Environmentally Critical Area not listed in subsections 22.170.060.A.3.a and 22.170.060.A.3.b, if the combined volume of excavation, filling, and other movement of earth material is more than 25 cubic yards or grading reaches any threshold in subsection 22.170.060.A.1.
 - 4.

Potentially Hazardous Locations. A grading permit is required for any volume of excavation, filling, or other movement of earth material in potentially hazardous locations as defined in Section 22.170.050.

5. In-Place Ground Modification. A grading permit is required for any in-place ground modification. The Director may waive the requirement for a grading permit if the Director determines the in-place ground modification will be insignificant in amount or type.
 6. Temporary Stockpiles. A grading permit is required for temporary stockpiles that meet or exceed any applicable threshold of subsection 22.170.060.A.1 through 22.170.060.A.5 and that are not located on sites for which a valid grading permit has been issued.
 7. Grading Near Public Places. A grading permit is required to excavate or fill in excess of 3 feet, measured vertically, on private property within any area between the vertical prolongation of the margin of a public place, and a 100 percent slope line (45 degrees from a horizontal line) from the existing elevation of the margin of a public place to the proposed elevation of the private property. See Sections 15.44.020 and 15.44.030.
- B. Exemptions. A grading permit is not required for the activities listed in subsection 22.170.060.B.
1. Activity conducted in the public right of way by a City agency, or under a street use permit that specifically authorizes the activity;
 2. Excavation and filling of cemetery graves;
 3. Exploratory excavations that comply with the requirements of subsection 22.170.190.N;
 4. Operation of sewage treatment plant sludge settling ponds;
 5. Operation of surface mines for the extraction of mineral and earth materials subject to the regulations and under a permit of the State of Washington;
 6. Stockpiling and handling of earth material when the earth material is consumed or produced in a process that is the principal use of the site and that complies with the requirements of subsection 22.170.190.M;
 7. Maintenance or reconstruction of active tracks and yards of a railroad in interstate commerce within its existing right-of-way;
 8. Maintenance or reconstruction of the facilities of parks and playgrounds including work required for the protection, repair, replacement or reconstruction of any existing paths, trails, sidewalks, public improvement or public or private utility, and the stockpiling of material for these maintenance and reconstruction activities;
 9. Excavation and filling of post holes;
 10. Trenching and backfilling for the installation, reconstruction or repair of utilities on property other than a public right-of-way;
 11. Grading done as part of a City public works project (see also Section 22.800.070);
 12. Public works and other publicly funded activities on property owned by public entities, when all of the following conditions are satisfied:
 - a. Stormwater discharges from the property do not enter the public drainage control system or the public combined sewer system;
 - b. The project will not undercut or otherwise endanger adjacent property; and
 - c. The Director has waived grading permit requirements by interagency agreement.
 - 13.

Underground storage tank removal and replacement that is subject to regulation by a state or federal agency, unless any grading is done on a potentially hazardous location. See subsection 22.170.060.A.

14. Development undertaken by the Washington State Department of Transportation in state highway right-of-way that complies with standards established pursuant to Chapter 173-270 Washington Administrative Code, the Puget Sound Highway Runoff Program;
 15. On-site work required for construction, repair, repaving, replacement or reconstruction of an existing road, street or utility installation in a public right-of-way.
- C. Compliance Required. All grading and other land disturbing activity, whether or not it requires a grading permit, shall comply with the provisions of this code, the Stormwater Code, and all other applicable laws.

(Ord. 123107, § 1, 2009.)

RCW 47.12.010

Acquisition of property authorized — Condemnation actions — Cost.

Whenever it is necessary to secure any lands or interests in land for a right-of-way for any state highway, or for the drainage thereof or construction of a protection therefor or so as to afford unobstructed vision therefor toward any railroad crossing or another public highway crossing or any point of danger to public travel or to provide a visual or sound buffer between highways and adjacent properties or for the purpose of acquiring sand pits, gravel pits, borrow pits, stone quarries, or any other land for the extraction of materials for construction or maintenance or both, or for any site for the erection upon and use as a maintenance camp, of any state highway, or any site for other necessary structures or for structures for the health and accommodation of persons traveling or stopping upon the state highways of this state, or any site for the construction and maintenance of structures and facilities adjacent to, under, upon, within, or above the right-of-way of any state highway for exclusive or nonexclusive use by an urban public transportation system, or for any other highway purpose, together with right-of-way to reach such property and gain access thereto, the department of transportation is authorized to acquire such lands or interests in land in behalf of the state by gift, purchase, or condemnation. In case of condemnation to secure such lands or interests in land, the action shall be brought in the name of the state of Washington in the manner provided for the acquiring of property for the public uses of the state, and in such action the selection of the lands or interests in land by the secretary of transportation shall, in the absence of bad faith, arbitrary, capricious, or fraudulent action, be conclusive upon the court and judge before which the action is brought that said lands or interests in land are necessary for public use for the purposes sought. The cost and expense of such lands or interests in land may be paid as a part of the cost of the state highway for which such right-of-way, drainage, unobstructed vision, sand pits, gravel pits, borrow pits, stone quarries, maintenance camp sites, and structure sites or other lands are acquired.

[1977 ex.s. c 151 § 46; 1967 c 108 § 4; 1961 c 13 § 47.12.010. Prior: 1937 c 53 § 25, part; RRS § 6400-25, part.]

Notes:

Urban public transportation system defined: RCW 47.04.082.

Right-of-way donations: Chapter 47.14 RCW.

22.170.110 - Granting or Denial of Grading Permits

A. Granting.

1. If the Director finds that an application for a grading permit complies with the requirements of this code and rules promulgated hereunder, that the fees specified in the Fee Subtitle have been paid, and that the applicant has satisfied all other conditions precedent imposed by or pursuant to this code, the Stormwater Code, and rules promulgated under those codes, the Director shall issue a permit to the applicant. A permit may be granted with or without conditions. Conditions may include, but are not limited to: restricting grading work to specific seasons, months or weather conditions; limiting vegetation removal; sequencing of work; requiring that recommendations contained in the geotechnical investigation are followed; requiring observation by a licensed civil or geotechnical engineer; requiring special inspection pursuant to Section 22.170.130; requiring structural safeguards; specifying methods of erosion, sedimentation, and drainage control; specifying methods for maintenance of slope stability; retaining existing trees; requiring revegetation and grass seeding and/or long term maintenance activities; requiring compliance with SMC Chapter 25.09, Regulations for Environmentally Critical Areas, and other regulations of the City or other agencies with jurisdiction.
2. The Director may require that plans and specifications be stamped and signed by a licensed civil engineer or geotechnical engineer to indicate that the grading and proposed structure comply with the conclusions and recommendations of any required investigation or report.

B. Denial. The application for grading permit may be denied if the Director determines that the plans or proposed activity do not comply with the requirements of this code and rules promulgated hereunder, or do not accomplish the purposes of this code, or the grading or other land disturbing activity is inconsistent with the proposed development on the site, or the plans or other proposed activity do not comply with other applicable federal, state and local laws and regulations, or that the applicant has failed to satisfy any condition precedent to issuance of the permit imposed by or pursuant to this code, the Stormwater Code or rules promulgated under either code.

C. Limitations. The issuance or granting of a grading permit shall not be construed to be permission for, or an approval of, any violation of any of the provisions of this code or rules promulgated hereunder, or of any other law or regulation. A grading permit does not remove the need to obtain any other permit or approval required under any other law, ordinance or regulation.

(Ord. 123107, § 1, 2009.)

NO. 72719-2-I

**COURT OF APPEALS, DIVISION II
OF THE STATE OF WASHINGTON**

WASHINGTON STATE
DEPARTMENT OF
TRANSPORTATION,

Respondent,

v.

CITY OF SEATTLE,

Appellant.

**CERTIFICATE OF
SERVICE**

I, Danielle Oliver, an employee of the Transportation & Public Construction Division of the Office of the Attorney General of Washington, certify that on the date indicated below, true and correct copies of the Brief of Respondent and this Certificate of Service were served on the following parties via E-mail pursuant to an electronic service agreement:

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COURT OF APPEALS DIV I
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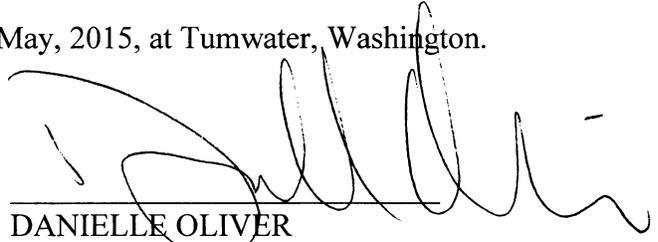
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I certify under penalty of perjury under the laws of the State of
Washington that the foregoing is true and correct.

DATED this 22nd day of May, 2015, at Tumwater, Washington.



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