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SUPREME COURT  
OF THE STATE OF WASHINGTON

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KEMPER FREEMAN, JIM HORN, STEVE STIVALA,  
KEN COLLINS, MICHAEL DUNMIRE, SARAH RINLAUB,  
AL DEATLEY, JIM COLES, BRYAN BOEHM, EMORY BUNDY,  
ROGER BELL, EASTSIDE TRANSPORTATION ASSOCIATION,  
a Washington nonprofit corporation, MARK ANDERSON,

Appellants,

v.

STATE OF WASHINGTON, CHRISTINE O. GREGOIRE, Governor,  
PAULA J. HAMMOND, Secretary, Department of Transportation;  
CENTRAL PUGET SOUND TRANSPORTATION DISTRICT,

Respondents.

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BRIEF OF APPELLANTS

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A. INTRODUCTION

The State of Washington Department of Transportation (“WSDOT”) has transferred the two center lanes of Interstate 90 to the Central Puget Sound Regional Transit Authority (“Sound Transit”) for its East Link Light Rail Transit Project (“East Link Project”). WSDOT is barred from doing so under the provisions of the 18<sup>th</sup> Amendment to the Washington Constitution, article II § 40, as interpreted by this Court in *State ex rel. O’Connell v. Slavin*, 75 Wn.2d 554, 452 P.2d 943 (1969) (rail transportation is not a highway purpose under the 18<sup>th</sup> Amendment). Interstate 90 was built in part with moneys from the Motor Vehicle Fund (“MVF”); the fund the 18<sup>th</sup> Amendment requires must receive motor fuel tax revenues. Sound Transit intends to use the Interstate 90 center lanes for light rail in its East Link Project. Both WSDOT and Sound Transit *admit* light rail is not a highway purpose under the 18<sup>th</sup> Amendment.

The trial court adopted WSDOT’s and Sound Transit’s argument that the reach of the 18<sup>th</sup> Amendment essentially ends at the point a MVF-paid highway facility like Interstate 90 is completed. This is a far too narrow interpretation of the 18<sup>th</sup> Amendment.

Moreover, the trial court also adopted WSDOT’s and Sound Transit’s interpretation of RCW 47.12.120, WSDOT’s authority to lease highway facilities. The trial court concluded that RCW 47.12.120 was not

animated by the 18<sup>th</sup> Amendment's anti-diversionary policy. Instead, WSDOT could conclude, without public notice or hearing or formal, appealable decision, that a highway facility was no longer needed for highway purposes *after* its transfer to a public or private entity, rather than objectively *before* its transfer. Any judicial review of the WSDOT's decision was confined to whether the decision was in bad faith or fraudulent. In effect, the trial court deferred to WSDOT's decision to circumvent the 18<sup>th</sup> Amendment to assist light rail, an admittedly unconstitutional purpose.

This Court should reject the trial court's analysis, which would eviscerate the anti-diversionary policy of the 18<sup>th</sup> Amendment, allowing bureaucrats to ignore the 18<sup>th</sup> Amendment whenever they wish and threaten the continued vitality of our state's highway system, which the 18<sup>th</sup> Amendment was enacted to protect.

B. ASSIGNMENT OF ERROR

(1) Assignment of Error

1. The trial court erred in entering the order granting intervenor's and defendant's motion for summary judgment and denying the taxpayers' motion on March 29, 2012.

(2) Issues Pertaining to Assignment of Error

1. Does the anti-diversionary policy of the 18<sup>th</sup> Amendment apply to efforts by government agencies like WSDOT to sell or lease highway facilities in Washington built with MVF monies? (Assignment of Error Number 1).

2. In making a decision to lease highway facilities built with MVF monies under RCW 47.12.120, must WSDOT analyze the question of whether the highway facilities is presently needed for highway purposes objectively before the lease is made? (Assignment of Error Number 1).

3. In reviewing the decision of WSDOT to lease a highway facility built with MVF funds, must the courts defer to WSDOT's determination that the facility is no longer needed for highway purposes, particularly where WSDOT has made no record or public decision to that effect? (Assignment of Error Number 1).

4. Are the taxpayers entitled to an award of attorney fees under the common fund exception to the American Rule at trial and on appeal? (Assignment of Error Number 1).

C. STATEMENT OF THE CASE

This is the second time many of the issues in this appeal have been before this Court. *Freeman v. Gregoire*, 171 Wn.2d 316, 256 P.2d 264

2011) (“*Freeman I*”).<sup>1</sup> The appellants are citizens and taxpayers affected by any decision to transfer the center lanes of Interstate 90 to Sound Transit for light rail (“taxpayers”).

The core facts in the case are undisputed,<sup>2</sup> particularly as many of those core facts were part of the agreed facts before this Court in *Freeman I*. Interstate 90 is a component of the national system of interstate highways. CP 107. Its construction and subsequent maintenance was financed by federal highway funds and state MVF moneys. CP 108. Interstate 90 is designated as a state route in RCW 47.17.140 and is a limited access facility as defined in RCW 47.52.010. CP 106. Interstate 90 is also a designated highway of statewide significance. RCW 47.05.021(3). Under that provision, as part of the interstate highway system, Interstate 90 is “needed to connect major communities across Washington and support the state’s economy.” *Id.* The Legislature

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<sup>1</sup> This Court also addressed the many political and legal battles associated with Interstate 90’s original construction in *Seattle Bldg. & Constr. Trades Council v. City of Seattle*, 94 Wn.2d 740, 620 P.2d 82 (1980), and Sound Transit’s checkered history of inflated ridership projections, cost overruns, and construction delays with respect to light rail in *Sane Transit v. Sound Transit*, 151 Wn.2d 60, 85 P.3d 346 (2004).

<sup>2</sup> There are *numerous* disputed issues of fact in this case pertaining to such matters as the consideration given by Sound Transit to WSDOT for the 75-year lease of the center lanes and the present need of WSDOT for those lanes, if the Court goes beyond WSDOT’s admissions regarding the need for the lanes as highways. But the taxpayers believe that there are no genuine issues of *material* fact. CR 56(c). As will be discussed *infra*, the trial court here took a number of the facts in a light most favorable to WSDOT and Sound Transit. As such, if those facts are *material*, summary judgment was improper.

deemed Interstate 90 to be of importance to the *whole state of Washington*, not just commuters on Sound Transit. RCW 47.06.140.

Interstate 90 is a vital corridor for movement of people and freight. CP 107. It is used by trucks moving freight across Washington State and between the United States, Asian, and Pacific markets, among others, using port facilities located on Puget Sound. *Id.* Interstate 90 serves as the only connection between Mercer Island and Bellevue and Seattle and during an average weekday carries approximately 142,500 vehicles per day, according to the WSDOT. *Id.* King County Metro and Sound Transit operate local and regional bus service on Interstate 90, connecting Seattle, Mercer Island, and communities east of Lake Washington. CP 109.

In the vicinity of Lake Washington, Interstate 90 extends from Bellevue across the East Channel Bridge to Mercer Island and two floating bridges (the Homer M. Hadley Memorial Bridge and the Lacey V. Murrow Memorial Bridge) to an interchange with Interstate 5. CP 107. Across Lake Washington, Interstate 90 currently operates with three general purpose lanes in each direction and the two-lane reversible center roadway providing for additional traffic flow in the peak direction from Mercer Island through the Mt. Baker Tunnel to Seattle. CP 108. The primary peak flow direction is westbound in the morning and eastbound in the afternoon. *Id.* The center lanes are restricted to High Occupancy

Vehicles ("HOV"), including buses, carpools, vanpools, but it also handles all general traffic destined to and from Mercer Island. *Id.*

There are certain documents pertaining to Interstate 90 and its center lanes about which there is no dispute between the parties. In constructing Interstate 90, the many political battles were resolved by the December 21, 1976 Memorandum of Agreement ("MOA"). CP 107-08. Sound Transit was not party to the MOA because Sound Transit did not then exist.

The MOA emphasized the importance of Interstate 90 to the Puget Sound region and the entire state of Washington. CP 124-26. The MOA specifically provided for the eight-lane configuration for Interstate 90 referenced above CP 126-27, as well as the use of the two center lanes as reversible lanes for peak hour traffic. *Id.* Those lanes were "designed for and permanently committed to transit use," *id.*, although the MOA also specifically described what the use of the lanes actually meant:

The parties agree that the transit lanes shall operate initially in a two-way directional mode, at no less than 45 mph average speed, with the first priority to transit, the second to carpools, and the third to Mercer Island traffic. In the direction of minor flow, the transit lane shall be restricted to busses. The parties further agree that the initial operation of the East Channel bridge shall consist of only three general purpose auto lanes in each direction in addition to the transit lanes. In addition, there will be an acceleration lane from the South Bellevue Interchange which will terminate prior to the exit ramp at the East

Mercer Interchange. The subsequent mode of operation of the facility shall be based upon existing needs as determined by the Commission in consultation with the affected jurisdictions, pursuant to paragraph 14 of this agreement. That determination will consider efficient transit flow, equitable access for Mercer Island and Bellevue traffic, and traffic-related impacts on Seattle.

CP 127-28. The MOA did not define transit use as light rail; the only reference to light rail in the MOA was:

The I-90 facility shall be designed and constructed so that conversion of all or part of the transit roadway to fixed guideway is possible.

CP 128. The MOA did not commit the center lanes to permanent and exclusive light rail use to the exclusion of all motor vehicle traffic nor were the lanes restricted exclusively to "transit use." *Id.* Since the completion of the Interstate 90 center lanes, their use has been restricted to high occupancy vehicles, including buses, carpools, vanpool, and to general traffic traveling to or from Mercer Island. CP 109.<sup>3</sup>

The United States Department of Transportation approved this configuration in 1978. CP 108, 138-43. Secretary Brock Adams approved federal funding conditioned on the agreement that "public transportation have first priority use of the center lanes." CP 143. *Nowhere* in that

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<sup>3</sup> Use of the center lanes for light rail displaces all buses and other HOV traffic as well as all Mercer Island traffic and will compel such traffic to use the remaining 8 lanes, once the R-8A reconfiguration is completed.

decision is there a reference to rail, nor is public transportation defined as rail use. CP 138-43.

Given the increases in traffic and congestion in the Interstate 90 corridor, transportation and transit agencies initiated studies to assess alternatives to address traffic and transit. Beginning in 1998, Sound Transit initiated preliminary engineering and environmental analysis to study two-way transit and HOV operations on the Interstate 90 corridor across Lake Washington. CP 109. WSDOT, Sound Transit and the Federal Highway Administration ("FHA") found that traffic volumes on Interstate 90's general purpose lanes exceeded 90 percent of the available capacity during both peak periods and in both directions. CP 1490.

Ultimately, various alternatives were studied and in September 2004, FHA issued a Record of Decision selecting a preferred alternative ("R-8A") for the Interstate 90 two-way transit and operations project, was based upon the approved FEIS for the Interstate 90 corridor project. CP 1419-47.

The Record of Decision for the R-8A alternative provided for ten, not eight, lanes for general vehicular traffic by restriping Interstate 90 with narrower lanes. CP 1431. Under the proposed configuration, Interstate 90 would have HOV lanes on the outside roadways and retain the existing reversible lanes in the center roadway, with both center lanes operating in

the same direction, westbound in the morning and eastbound in the afternoon. *Id.* The Record of Decision specifically promised that this alternative “will retain the existing reversible operations in the center roadway. . .” *Id.*

R-8A never indicated that light rail over Interstate 90 was the preferred means of delivering public transit services; in fact, the R-8A Decision made no reference to light rail on Interstate 90 *at all*. CP 1419-47. The main reason for the selection of R-8A as the preferred alternative was the reduction in congestion and travel times. CP 1433. The Record of Decision compared reductions in travel times in the Interstate 90 corridor between R-8A and the No Build Alternative through 2025, finding:

Alternative R-8A would have the greatest reduction in person hours of travel of all alternatives, a reduction of 15% in year 2015 and 35% in year 2025, as compared to the No Build Alternative.

*Id.* The selection of the R-8A configuration promised improved travel times in the Interstate 90 corridor. *Id.*

Subsequent to R-8A process, later in 2004, without a public process like the one attendant upon the selection of the R-8A alternative, Sound Transit and the signatories to the 1976 MOA agreed to amend the 1976 MOA. CP 145-48. That amendment committed the parties to the

earliest possible conversion of center roadway to two-way "High Capacity Transit" based on outcome of studies and funding approvals." CP 146. High Capacity Transit was then defined *for the first time* in an amendment to the MOA as "a transit system operating in dedicated right-of-way such as light rail, monorail or a substantially equivalent system." *Id.* The amendment committed WSDOT to provide the center roadway to Sound Transit for light rail use. CP 147.

That amendment was followed by private agreements between State officials and Sound Transit leading to the commitment of the State to give the Interstate 90 center lanes to Sound Transit. Governor Christine Gregoire sent a letter dated July 13, 2006 to John Ladenburg, chair of the Sound Transit board, expressing her commitment to allowing Sound Transit to use the Interstate 90 corridor for high capacity transit. CP 150-51. Although the Governor allegedly had no preference as to the mode of such transportation in the Interstate 90 corridor, she directed WSDOT Secretary Douglas MacDonald not to participate in the Sound Transit board's vote on that agency's preferred choice of mode for high capacity transit in the center lanes of Interstate 90. *Id.* The Governor, nevertheless, made her actual preference clear:

I also accept and support the state's previous commitment,  
consistent with the 1976 I-90 Memorandum of Agreement

as amended in 2004, to dedicate the center roadway to light rail or light rail convertible bus rapid transit.

*Id.* Similarly, Sound Transit sent a July 23, 2008 letter to WSDOT expressing their joint agreement that High Capacity Transit was the equivalent of light rail: “WSDOT and ST now agree that the HCT mode will be light rail (East Link) and therefore R-8A must be construed in order to implement light rail.” CP 2629.

Sound Transit undertook to build light rail over Lake Washington to Bellevue and Redmond. In December 2008, Sound Transit released a draft EIS for East Link for light rail travel across Lake Washington in the center roadway lanes of Interstate 90 and operating in a dedicated right-of-way between Seattle and Redmond along an 18-mile long corridor. CP 112. East Link required exclusive dedication of the Interstate 90 center roadway lanes to Sound Transit for light rail, to the exclusion of all forms of vehicular traffic. CP 113. Under that configuration, the current Interstate 90 roadway would be re-stripped to make the shoulder and general purpose lanes narrower in order to add an HOV lane to the outside roadway, but the two center lanes of Interstate 90 would be permanently lost to general vehicular traffic. *Id.* Capacity during peak commute periods would be reduced from five lanes (three general purpose and two reversible lanes) to four lanes (three general purpose and one HOV). If

the R-8A configuration applied, capacity would be reduced from six lanes (three general purpose, one HOV, two reversible) to four lanes. CP 114.

To advance East Link, the 2009 Legislature inserted provisions in the 2009 transportation budget, ESSB 5352, conducive to the project and the transfer of Interstate 90 to Sound Transit. *Id.* Section 204(3) of the bill appropriated \$300,000 from the MVF created under the 18<sup>th</sup> Amendment “for an independent analysis of methodologies to value the reversible lanes on Interstate 90 to be used for high capacity transit pursuant to Sound Transit proposition 1 approved by voters in November 2008 and further provided in Section 306(17) for the completion of negotiations between WDOT and Sound Transit for the sale or lease of the center roadway of Interstate 90.” *Id.*

To facilitate the transfer of the center lanes, WSDOT valued them. The consultants it chose opted for a valuation methodology that was favorable to Sound Transit, confining the valuation to the portion of Interstate 90 paid for with state funds, and largely ignoring the replacement cost for lanes on Interstate 90. CP 278-80. The evaluation did not purport to reimburse the MVF for monies paid over the years to *maintain* Interstate 90. *Id.*

The appraiser then prepared valuations according to the consultants’ instructions for valuation. CP 267. Ultimately, the appraiser

set the land value at \$31.6 million. *Id.* The appraiser found a value of \$70.1 million for the State's fee interest in the land. CP 396.

WSDOT and Sound Transit entered into a "Term Sheet" on January 20, 2010 setting forth their agreement for the transfer of Interstate 90's two center lanes to Sound Transit. Sound Transit had the right to "lease" the "air rights" for the center lanes for 40 years, with an option to renew for 35 years. CP 591-95.

The taxpayers challenged WSDOT's decision to transfer the center lanes to Sound Transit in this Court, in an original action. In *Freeman I*, this Court ruled that the expenditure of \$300,000 to value the center lanes did not violate the 18<sup>th</sup> Amendment, but the Court declined to reach whether the transfer of the center lanes was proper because the writ of mandamus could not extend to future actions:

Although petitioners argue that the eventual transfer of the center lanes will violate Article II section 40...the duty must exist at the time the writ is sought. ...[T]he petition for a writ is premature.

*Freeman I*, 171 Wn.2d at 333. The Court also suggested that the relief requested by the taxpayers was more in the nature of a declaratory judgment. *Id.*

Subsequent to the Court's decision in *Freeman I*, WSDOT and Sound Transit entered into an "Umbrella Agreement" on November 3,

2011 that addressed all of the issues relating to the transfer of the center lanes. Without public notice or hearing or an appealable decision, WSDOT determined that the Interstate 90 center lanes were no longer needed for highway purposes stating:

3. WSDOT's Determination to Lease Highway Property. WSDOT has determined that the Center Roadway will not be presently needed for highway purposes after the R8A Project is completed, the new improvements are open to vehicular traffic, and to the extent not already satisfied, all necessary actions and obligations identified in this Agreement and the exhibits *Exhibits D-1 and D-2* attached hereto are completed for the relevant lease. This determination is based upon, including but not limited to analyses contained in the: I-90 Two-Way Transit and HOV Operations FEIS and ROD; I-90 Two-Way Transit and HOV Access Point Decision Report; WSDOT I-90 Center Roadway Study; East Link FEIS and ROD; East Link/I-90 Interchange Justification Report; I-90 Bellevue to North Bend Corridor Study; the WSDOT Highway System Plan 2007-2026, and the legislative history reflected in the 2009 Engrossed Senate Substitute Bill 5352, § 204(3) and § 306(17). This determination is consistent with the policy decision reflected in the 1976 Memorandum of Agreement and the 2004 Amendment to the 1976 Agreement.

CP 1010, 1382-1401. Further, by this Agreement, WSDOT transferred the two center lanes to Sound Transit for its East Link light rail project:

1. Purpose of Agreement. This Agreement provides for WSDOT's completion of the R8A Project, and for WSDOT's lease of the I-90 Center Roadway to Sound Transit for the construction and operation of the light-rail system. This Agreement sets forth the Parties' agreement with respect to their funding obligations for the completion of the R8A Project, the lease terms for the use of the Center

Roadway including all property and improvements necessary for the construction of the East Link Project from Seattle across Lake Washington to Bellevue Way, including the access and exit ramps, and other property required for the construction, testing, and maintenance of the light-rail system under the temporary construction airspace lease, and the property and improvements required for the operation and maintenance of the light rail system under the 40-year airspace lease (the temporary construction airspace lease and the 40 year airspace lease are referred to collectively as the "CRP Leases"). This Agreement also provides for the award of land bank credits, and establishes the administrative procedure to be followed by the Parties in the signing and delivery of the CRP Leases.

CP 1382.

The taxpayers filed the present action on May 18, 2011, in the Kittitas County Superior Court seeking declaratory relief and a writ of mandamus to prevent the transfer of the center lanes to Interstate 90 by WSDOT to Sound Transit. CP 1. Sound Transit intervened. CP 29. In the course of discovery, WSDOT *admitted* Interstate 90 was presently needed for highway purposes, CP 2664, just as its counsel admitted in oral argument before this Court in *Freeman I*. CP 634.

On cross-motions for summary judgment, the trial court, the Honorable Michael E. Cooper, issued a memorandum decision. CP 3184-94. The trial court concluded that WSDOT had discretionary authority to factually determine that the center lanes would not be needed for highway purposes in the future. CP 3191. It then concluded that as long as the

MVF was reimbursed in some fashion, the transfer was permissible. *Id.* The trial court determined that WSDOT's factual determination that the center lanes would not be needed could only be challenged on the basis that it was arbitrary and capricious, in bad faith, or fraudulent. CP 3193. The court then granted the motions by WSDOT and Sound Transit, and denied the taxpayers' motion by a memorandum decision issued on March 5, 2012. CP 3184-94. The Court entered a judgment on March 29, 2012, CP 3198-3202, and this timely appeal followed. CP 3195.

D. SUMMARY OF ARGUMENT

The anti-diversionary policy of the 18<sup>th</sup> Amendment requires that highway facilities built and maintained with MVF resources continue to be used as highway facilities until such time as they are no longer needed for the constitutionally-prescribed highway purposes. The 18<sup>th</sup> Amendment is not merely an accounting directive as to transportation taxes and fees. It is designed to ensure that such revenues are used to retain a highway system for motorists' use.

RCW 47.12.120, a statute allowing lease of highway facilities when no longer needed for highway purposes, is animated by the 18<sup>th</sup> Amendment's anti-diversionary purpose. The determination that a highway facility is no longer needed for highway purposes must be analyzed objectively and factually *before* the transfer of the facility

occurs. RCW 47.12.120's language regarding lands presently needed for highway purposes does not require agency expertise to decipher. The question of whether a facility is presently needed for highway purposes is factual, not legal. Courts need not defer to WSDOT's determination regarding whether a highway is presently needed.

Here, transfer of the Interstate 90 center lanes for light rail is unconstitutional and violates RCW 47.12.120. The center lanes of Interstate 90 continue to serve a vital highway purpose, as WSDOT has admitted. They cannot be diverted to a non-highway use until they are not presently needed for highway purposes.

Even if this Court adopts the analysis of WSDOT/Sound Transit that the need for a highway facility can be justified after the fact of transfer, fact issues abound here preventing summary judgment. WSDOT/Sound Transit claim that after light rail is built, the center lanes will be unneeded because "person throughput" will increase. However, the record shows that vehicular throughput, which is the purpose of a highway, will decrease, and traffic will become worse.

The taxpayers are entitled to attorney fees at trial on appeal under the common fund exception to the American rule.

E. ARGUMENT<sup>4</sup>

(1) The 18<sup>th</sup> Amendment's Anti-Diversionsary Policy Does Not End with the Construction of a Highway Facility

Despite the plain language of the 18<sup>th</sup> Amendment itself and *O'Connell*, Sound Transit argued, and the trial court agreed, that there is effectively a time limit on the express anti-diversionary policy of the 18<sup>th</sup> Amendment. Once the MVF funds are spent for roads and highways, bureaucrats may then freely disregard the people's direction in the 18<sup>th</sup> Amendment to promote the construction *and use* of roads and highways for motor vehicles and instead may turn *needed* roads and highways over the organizations like Sound Transit for an *admittedly non-highway purposes*. This Court should reject such an analysis of the 18<sup>th</sup> Amendment that effectively eviscerates it.

Constitutional provisions must be construed to effectuate the people's intent.<sup>5</sup> *Malyon v. Pierce Cy.*, 131 Wn.2d 779, 799, 935 P.2d

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<sup>4</sup> This Court is well-aware of the standards governing review of summary judgments. The Court reviews orders on summary judgment de novo. *Dowler v. Clover Park Sch. Dist. No. 400*, 172 Wn.2d 471, 484, 258 P.3d 676 (2011). A party is entitled to summary judgment only if there is no genuine issue of material fact and it is entitled to judgment as a matter of law. CR 56(c). As to whether there is a genuine issue of material fact, the facts and all reasonable inferences from them are considered in a light most favorable to the taxpayers as the non-moving party. *Wilson v. Steinbach*, 98 Wn.2d 434, 437, 656 P.2d 1030 (1982).

<sup>5</sup> The interpretation of the 18<sup>th</sup> Amendment is a de novo decision for this Court. *Seattle Sch. Dist. No. 1 of King County v. State*, 90 Wn.2d 476, 496-97, 585 P.2d 71, 83-84 (1978). "Both history and uncontradicted authority make clear that 'it is emphatically the province and duty of the judicial department to say what the law is.'" *In re Juvenile Director*, 87 Wn.2d 232, 241, 552 P.2d 163, 169 (1976), quoting *Marbury v. Madison*, 5

1272 (1997) (courts' "objective is to define the constitutional principle in accordance with the original understanding of the ratifying public so as to faithfully apply the principle to each situation which might thereafter arise.").

The people's intent in adopting the 18<sup>th</sup> Amendment in 1944 was unambiguous. The Washington State Good Roads Association was the proponent of the measure in the 1944 Voters Pamphlet. That organization stated the following rationale for the amendment in the Voters Pamphlet:

[Towns and communities'] ability to expand, to accommodate new industries, to support bigger payrolls, is dependent upon good roads – upon the ability of trucks, buses and passenger automobiles to transport people and products to and from these communities. By insuring good roads, the amendment will assure the continued existence and prosperity of these communities.

Between 1933 and 1943 in this state, in excess of \$10,000,000 of your gas tax money was diverted away from street and highway improvement and maintenance for other uses. Several hundred miles of good, paved, sale highway would have been built to save money in motor vehicle operation had this special motor tax money been used as it was intended. These were highways and streets

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U.S. (1 Cranch) 137, 176, 2 L.Ed. 60 (1803)). This is true when that interpretation serves as a check on the activities of another branch or is contrary to the view of the constitution taken by another branch. *Powell v. McCormack*, 395 U.S. 486, 549, 89 S. Ct. 1944 (1969); *City of Tacoma v. O'Brien*, 85 Wn.2d 266, 534 P.2d 114 (1975). Deciding whether a matter has in any measure been committed by the Constitution to another branch of government, or whether the action of that branch exceeds whatever authority has been committed, is itself a delicate exercise in constitutional interpretation, and is a responsibility of this Court as ultimate interpreter of the Constitution. *Baker v. Carr*, 369 U.S. 186, 82 S. Ct. 691 (1962). Further, the effect of a judicial interpretation of the constitution may not be modified or impaired in any way by the Legislature. See *Haines v. Anaconda Aluminum Co.*, 87 Wn.2d 28, 34, 549 P.2d 13 (1976).

we paid for, but didn't get! Now you can stop further diversion.

AGO 2001 No. 2 (quoting 1944 Voters Pamphlet). The proponents' intent was plainly to advance the construction of highways and roads to prevent the diversion of vehicle-related taxes to non-highway purposes.

The operative language of the 18<sup>th</sup> Amendment is clear:

All fees collected by the State of Washington as license fees for motor vehicles and all excise taxes collected by the State of Washington on the sale, distribution or use of motor vehicle fuel and all other state revenue intended to be used for highway purposes, shall be paid into the state treasury and placed in a special fund<sup>6</sup> to be used exclusively for highway purposes.

The people confined the use of MVF monies *exclusively* to highway purposes. Consistent with the 18<sup>th</sup> Amendment's anti-diversionary purpose, its definition of "highway purposes" is specific and prescriptive:

Such highway purposes shall be construed to include the following:

- (a) The necessary operating, engineering and legal expenses connected with the administration of public highways, county roads and city streets;
- (b) The construction, reconstruction, maintenance, repair, and betterment of public highways, county roads, bridges and city streets; including the costs and expense of (1) acquisition of right-of-way, (2) installing, maintaining and

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<sup>6</sup> The special fund designated by the first sentence of the 18<sup>th</sup> Amendment to be used exclusively for highway purposes is the MVF, a fund created for the purpose of receiving all license fees for motor vehicles and excise taxes on the sale, distribution or use of motor vehicle fuel. RCW 46.68.070.

operating traffic signs and signal lights, (3) policing by the state of public highways, (4) operation of movable span bridges, (5) operation of ferries which are a part of any public highway, county road or city street;

(c) The payment or refunding of any obligations of the State of Washington, or any political subdivision thereof, for which any of the revenues described in section 1 may have been legally pledged prior to the effective date of this act;

(d) Refunds authorized by law for taxes paid on motor vehicle fuels;

(e) The cost of collection of any revenues described in this section.

This Court has been restrictive in its interpretation of highway purposes.<sup>7</sup>

Plainly, "highway purposes" do not end at the point a facility is built. A highway purpose includes the reconstruction, maintenance, repair, and betterment of highways. It also encompasses bridges and ferry operations, as well as on-going law enforcement. Obviously, 18<sup>th</sup> Amendment's reach does not end once a highway facility is constructed. In fact, once Interstate 90 was built, millions of MVF dollars were spent

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<sup>7</sup> E.g., *State ex rel. Bugge v. Martin*, 38 Wn.2d 834, 232 P.2d 833 (1951) (moneys from the MVF could be used to pay the debt service for the Agate Pass Bridge); *Automobile Club of Wash. v. City of Seattle*, 55 Wn.2d 161, 346 P.2d 695 (1959) (MVF could not be used to pay tort judgments because such an expenditure bore no relationship to the construction, operation, maintenance, or betterment of the public highway or bridges of the state); *Wash. State Highway Comm'n v. Pacific Northwest Bell Telephone Co.*, 59 Wn.2d 216, 367 P.2d 605 (1961) (cost of relocating utility facilities located on highway rights-of-way was not an expenditure exclusively for highway purposes); *State ex rel. Heavey v. Murphy*, 138 Wn.2d 800, 982 P.2d 611 (1999) (Court again reaffirmed that the language of the 18<sup>th</sup> Amendment as to "highway purposes" was unambiguous.).

on its upkeep, for which the MVF is not being reimbursed by the lease agreement between WSDOT and Sound Transit. CP 278-80.

An additional critical fact here overlooked by the trial court is that the transfer of the center lanes to Sound Transit will effectuate what both WSDOT and Sound Transit *admit* is a non-highway purpose, CP 2664, a light rail project. Washington law has long forbidden expenditures of MVF monies for rail. In AGO 57-58 No. 104, the Attorney General addressed a situation where WSDOT was proposing wider medians on Interstate 5 (than in the planning stage) to "provide sufficient median width to accommodate a rapid rail transit system on the highway right of way." The Attorney General was specifically asked if MVF moneys could be used to purchase expanded rights of way that might be used for rail transportation. The State would acquire the rights of way and undertaken construction of the highway and rail transit would be constructed in the right of way. The Attorney General opined that such an expenditure was improper:

In the situation at hand the purchase of the extra right-of-way would not serve any highway purpose, since such right-of-way would be exclusively for the rapid rail transit system. Therefore, it is the opinion of this office that expenditure of motor vehicle funds for the purpose of additional right-of-way in order for rapid transit system to be built upon the median strip would constitute an expenditure of motor vehicle funds in violation of Amendment 18 of the Washington State Constitution.

In *State ex rel. O'Connell v. Slavin*, 75 Wn.2d 554, 452 P.2d 943 (1969), this Court specifically held that public transportation is not a "highway purpose." A \$250,000 appropriation to Metro Transit for planning, engineering, financial and feasibility studies incident to the preparation of a comprehensive public transportation plan was unconstitutional under article II, § 40. The Court held that the language of the 18<sup>th</sup> Amendment was plain and unambiguous, *id.* at 558, noting that the term "highway purposes" was clearly defined in article II, § 40:

But all of the purposes which are listed pertain to highways, roads and streets, all of which are by nature adapted and dedicated to use by operators of motor vehicles, both public and private, and none of them pertain to other modes of transportation, such as railways, waterways, or airways. Nor is there any authorization for the expenditure of these funds for the purchase or maintenance of any type of vehicles for public transportation purposes.

*Id.* at 558-59. The Court also rejected the notion that a public transportation system was somehow a highway purpose:

What is a public transportation system? It is not a "way" at all, but is a number of buses, trains, or other carriers each holding a number of passengers which may travel upon the highways or may travel upon rails or water, or through the air, and which are owned and operated, either publicly or privately, for the transportation of the public. The mere fact that these vehicles may travel over the highways, or that, as the appellant points out, may relieve the highways of vehicular traffic, does not make their construction,

ownership, operation or planning a highway purpose, within the meaning of the constitutional provision.

*Id.* at 560.<sup>8</sup>

This Court's critical observation in *O'Connell*, however, was that the purpose of the 18<sup>th</sup> Amendment was not to facilitate a mere accounting purpose, as the trial court concluded, but to ensure the *preservation of the State's highway system*. MVF expenditures were limited "to those things which would directly or indirectly benefit the highway system." *Id.* at 561. Such benefits for the highways intended by the people in enacting the 18<sup>th</sup> Amendment were clear: "It is obvious that it was the desire to secure the building and maintenance of highways so they could be used . . ." *Id.* The Courts therefore conclude that MVF funds could not be used constitutionally under the 18<sup>th</sup> Amendment to provide subsidies for planning, construction, owning or operating public transportation systems like Sound Transit's light rail:

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<sup>8</sup> This decision is in accord with the interpretation of similar constitutional provisions by other high courts. *In re Opinion of the Justices*, 85 N.E.2d 761 (Mass. 1949) (under Massachusetts' constitutional provision limiting the use of fuel taxes and license fees to the payment of "highway obligations," the cost of "construction, reconstruction, maintenance and repair of public highways and bridges," and enforcement of traffic laws, a legislative effort to define the subways, tunnels, viaducts, elevated structures, and rapid transit extensions of Boston's Metropolitan Transit Authority as "public highways or bridges" was unconstitutional); *New Hampshire Motor Transport Ass'n v. State*, 846 A.2d 553 (N.H. 2004) (use of highway funds to design and construct a railroad station and park-and-ride facility, complete construction of the rail project, procure a train, and provide a three-year operating subsidy for the railroad was unconstitutional); *Automobile Club of Oregon v. State*, 840 P.2d 674 (Or. 1992) (Court invalidated an "emission fee" payable along with the registration of certain motor

. . .the words of this provision (the 18<sup>th</sup> Amendment) are unambiguous, and in their commonly received sense lead to a reasonable conclusion, that the people in framing this provision intended to insure that certain fees and taxes paid by them for the privilege of operating motor vehicles should be used to provide roads, streets and highways on which they could drive those vehicles.

*Id.* at 559. That why the proponents of the 18<sup>th</sup> Amendment in 1944 focused on the loss of roads:

Several hundred miles of good, paved, safe highway would have been built to save money in motor vehicle operation had this special motor tax money been used as it was intended. These were highways and streets we paid for, but didn't get! Now you can stop further diversion.

Intrinsic to the people's determination was that motor vehicle fees and taxes not be diverted to "general purpose" or "marginal purposes" or local governments, and that those revenues must be available for the purposes of *constructing and maintaining highways for motor vehicle use*. The 18<sup>th</sup> Amendment was not merely designed to prevent the diversion of revenue, it was intended to secure that revenue for a distinct *purpose*—highway construction and maintenance.

Sound Transit argued below that under the 18<sup>th</sup> Amendment the "state is allowed to alter the use to a non-highway purpose where the

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vehicles to be used to fund projects aimed at improving air quality such as public transportation).

state's motor vehicle fund investment is repaid to the fund." CP 1615. It is wrong. Contrary to Sound Transit's claim below (CP 1613) that highways built with MVF moneys were not intended to "be dedicated as highways forever," the people intended that roads and highways built with motor vehicle taxes be used as roads and highways for motor vehicle traffic so long as the roads and highways were needed as such.

Sound Transit argued below, and the trial court agreed, that the 18<sup>th</sup> Amendment is not implicated if the MVF is reimbursed by the person or entity buying or leasing the highway or road. CP 3191. It further contended that it fully reimbursed WSDOT for the fair market value of the two center lanes by allegedly paying \$69.2 million for them. *Id.* This argument transforms the MVF into a funding source for non-highway purposes. That figure obviously ignores the replacement cost of two freeway lanes across Lake Washington. Interstate 90 built in the 1960's and 1970's with federal matching dollars at a 90-10 ratio to state MVF dollars clearly would require a huge investment of state dollars' to replace it. It ignores the maintenance of Interstate 90 over the years from the MVF.

At its most basic, given the anti-diversionary policy of the 18<sup>th</sup> Amendment, the MVF was never intended to be a ready source of funding for what ultimately are non-highway purposes forbidden by the 18<sup>th</sup>

Amendment. If Sound Transit could not directly borrow funds from the MVF to facilitate light rail, how do the 18<sup>th</sup> Amendment and *O'Connell* permit it to do so indirectly?

Under Sound Transit's analysis, although MVF moneys could not be expended *directly* for a non-highway purpose, MVF moneys could build a highway facility, but within days or months of its construction, WSDOT could turn the facility over to an entity for a non-highway purpose for "consideration" and not violate the 18<sup>th</sup> Amendment.

In sum, the trial court erred in its interpretation of the 18<sup>th</sup> Amendment. The reach of that constitutional provision does not end once a highway facility is constructed by its very terms. WSDOT and Sound Transit could not agree to circumvent the 18<sup>th</sup> Amendment and this Court's decision in *O'Connell* by declaring the two center lanes of Interstate 90 to be surplus and thereby benefitting light rail, a non-highway purpose. At a minimum, this Court must interpret RCW 47.12.120 in a fashion that honors the 18<sup>th</sup> Amendment's clear policy.

- (2) RCW 47.12.120 Authorizes the Lease of Highway Facilities Built with MVF Monies Only If Such Facilities Are Objectively No Longer Needed for Highway Purposes Prior to Their Lease<sup>9</sup>

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<sup>9</sup> This is an issue of statutory interpretation. This Court interprets statutes de novo. *Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002); *State v. J.M.*, 144 Wn.2d 472, 480, 28 P.3d 720 (2001). The Court's primary objective is to ascertain and carry out the Legislature's intent, and if the statute's meaning is plain on

In order to honor the policy of the 18<sup>th</sup> Amendment that highway facilities built with MVF monies continue to be used *for highway purposes*, RCW 47.12.120, authorizing the lease of highway facilities by WSDOT, must be construed to allow leasing of such facilities only if they are objectively not needed for highway purposes prior to their lease.<sup>10</sup> Replacement of a facility is not the equivalent of necessity. Here, the trial court condoned the agreement of WSDOT and Sound Transit, made without public notice, public hearings, or a formal decision, that Interstate 90's center lanes would, in the future *after their transfer*, no longer be needed for highway purposes. CP 3215.<sup>11</sup> The trial court apparently

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its face, this Court must give effect to that plain meaning as an expression of legislative intent. *Dep't of Ecology*, 146 Wn.2d at 9-10.

Courts derive a statute's plain meaning from the language of the statute as a whole. *Id.* at 11. When interpreting statute, courts must to give effect to every word and phrase. *Davis v. Dep't of Licensing*, 137 Wn.2d 957, 963, 977 P.2d 554 (1999). Statutory interpretation must not render any word superfluous. *Id.* Only if the statute's meaning cannot be gleaned from its plain language do courts look to construction aids such as legislative history to resolve ambiguities. *Cockle v. Dep't of Labor & Indus.*, 142 Wn.2d 801, 808, 16 P.3d 583 (2001).

<sup>10</sup> Although WSDOT/Sound Transit characterize the transfer of the center lanes as a 40-year "lease," Justice Jim Johnson observed in prior oral argument that the transfer is a de facto sale, because it continues for the entire useful life of the structure. CP 633. The statute restricting WSDOT's ability to sell highway land, RCW 47.12.080, allows only the sale of "unused" land.

<sup>11</sup> The illogic of the defendants' ex post facto rationalization is manifest. Notwithstanding the obvious need of the motoring public for Interstate 90 between Ellensburg and Vantage, WSDOT, according to defendants' logic, could build a two-lane state highway with stoplights and then declare Interstate 90 unneeded for highway purposes and sell it to an entrepreneur for a bicycle trail. Despite the increase in traffic and travel times this would create, WSDOT claim that this Court would be obliged to

found irrelevant the fact that WSDOT *admitted* the center lanes were presently needed for highway purposes. CP 3214. By this logic, roads and highways could be leased for non-highway purposes at the whim of WSDOT, so long as WSDOT could allege that sometime in the future they would no longer be needed.

(a) Interpretation of RCW 47.12.120

The specific statute controlling WSDOT's ability to lease highway lands is RCW 47.12.120. *RCW 47.12.120 does not grant WSDOT discretion to determine whether the center lanes are not presently needed for highway purposes.* The statute reads in its entirety:

The department may rent or lease any lands, improvements, or air space above or below any lands that are held for highway purposes but are not presently needed. *The rental or lease:*

- (1) Must be upon such terms and conditions as the department may determine;
- (2) Is subject to the provisions and requirements of zoning ordinances of political subdivisions of government;
- (3) Includes lands used or to be used for both limited access and conventional highways that otherwise meet the requirements of this section; and
- (4) In the case of bus shelters provided by a local transit authority that include commercial advertising, may

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defer to WSDOT's "discretion" that the two-lane highway had rendered Interstate 90 not presently needed for highway purposes.

charge the transit authority only for commercial space.

RCW 47.12.120 (emphasis added). Thus, the statute grants WSDOT discretion whether to lease and to establish the terms and conditions of a proposed lease, but says *nothing* about discretionary authority over whether lands are “not presently needed.” The highway facility must objectively not be presently needed for highway purpose before its transfer. That is not a discretionary matter because, as a matter of law, the 18<sup>th</sup> Amendment requires no less.

The language of RCW 47.12.120 is plain. The words “presently” and “needed” are not ambiguous or susceptible to interpretation. “Presently” means “at the present time, now.” MERRIAM WEBSTER’S COLLEGIATE DICTIONARY 982 (11<sup>th</sup> ed. 2004). “Needed” means “to be needful or necessary.” *Id.* at 829. Thus, WSDOT is only authorized to lease highway lands that are unnecessary for highway purposes now, not at some point *after* the disposition of the center lanes has occurred. WSDOT’s analysis is not only illogical, it is contrary to the statute’s terms.

Even if this Court were to determine that the language of RCW 47.12.120 is not plain, an analysis of its history reveals that the statute was enacted to eliminate the temptation to dispose of needed highway lands.

The statute was enacted in 1949, not long after the people's adoption of the 18<sup>th</sup> Amendment. Laws of 1949, ch. 162, § 1. The original language stated:

The Director of Highways is authorized to rent or lease any lands, including improvements thereon, which are held for state highway purposes and are not presently needed therefor, upon such terms and conditions as the Director may determine, and to maintain and care for such property in order to secure rent therefrom.

*Id.* Any monies received from the sale or lease of unneeded highway lands were required to be deposited into the MVF, the fund established to fulfill the 18<sup>th</sup> Amendment's anti-diversionary purpose. Laws of 1949, ch. 162, § 2. At the same time, the Legislature restricted the lease of land to cities and counties only for a four-year terms. Former RCW 47.12.070.

Thus, at its inception, RCW 47.12.120 was conceived of as a temporary and more efficient use of unneeded highway lands in a way that would benefit the motor vehicle fund, and thus fulfill the 18<sup>th</sup> Amendment's strictures. Although these restrictions were lessened in later legislative enactments, nothing in the history of these statutes suggests that *needed* highway lands could ever be subject to WSDOT's disposal.

Nothing in WSDOT's regulations, WAC 468-30-060 and 468-30-110, address or expound upon the meaning of the plain language of RCW 47.12.120 regarding whether lands are presently needed for highway

purposes. WAC 468-30-060 discusses WSDOT's leasing process, WAC 468-30-110 addresses the issue of air space over state highway lands.

The Attorney General has also addressed the statute on isolated occasions, but again has never discussed the issue of how to determine whether highway lands are needed for highway purposes. At most, the Attorney General has concluded that if unneeded highway lands were sold or leased to a city or county for non-highway purposes, compensation would still be due to the motor vehicle fund, and that air rights over highway lands could not be leased without a legislative enactment. Wash. Att'y Gen. Letter Op. 1975 No. 62 (1975); Wash. Att'y Gen. Op. 1959-60 No. 7 (1959).<sup>12</sup>

Nevertheless, WSDOT/Sound Transit argued for its radical re-writing of the 18<sup>th</sup> Amendment based partly on Attorney General opinions from Washington and elsewhere. CP 1615-16. However, AGO 51-53 No. 376 specifically states that before WSDOT could dispose of highway property it had to be "no longer necessary for highway purposes." Sound Transit vastly overreads AGLO 1975 No. 62, an opinion based on AGO 51-53 No. 376. A careful reading of that letter opinion indicates that its

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<sup>12</sup> Courts are not bound by AGOs. *Wash. Fed. of State Employees, Council 28, AFL-CIO v. Office of Finan. Mgmt.*, 121 Wn.2d 152, 164-65, 849 P.2d 1201 (1993). This is particularly true as to issues of statutory construction. *Id.* Attorney General letter opinions are even less authoritative than formal attorney general opinions because, as the

author focused on the issue of consideration and *assumed* that the property in question was no longer needed for highway purposes, specifically referencing that same assumption from AGO 51-53 No. 376. The AGLO, like AGO 51-53 No. 376, *presumes* the lands are not needed for highway purposes. It does not define that phrase, nor does it assume WSDOT has discretion to make such a determination. In the case of the AGOs Sound Transit cites from Arizona and Pennsylvania, it is clear that the building (Arizona) was not needed for highway purposes, unlike Interstate 90 here, and the lease of the aircraft (Pennsylvania) was possible only when it was not needed for highway purposes.

But WSDOT/Sound Transit *admit* that the two center lanes of Interstate 90 are presently needed for highway purposes. CP 2664. They want to excise the words “presently needed” out of RCW 47.12.120 by arguing that “replacing” the two center lanes with two HOV lanes on the outer decks will somehow render the center lanes redundant. The syllogism they propose is this: (1) the bridge currently carries eight lanes of vehicular traffic, (2) the R-8A alternative, post-transfer, results in eight lanes, therefore, (3) the R-8A alternative renders the center lanes “unneeded.”

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Attorney General's website states, they are usually the opinion of a single assistant AG and are not personally approved by the Attorney General.

According to WSDOT/Sound Transit's *own evidence*, the center lanes will still be "needed" regardless of Sound Transit's attempt to "replace" them with single HOV lanes on the outer bridge decks. The notion that the restriping plan will render the center lanes unneeded contradicts WSDOT's study that finds vehicular traffic congestion will be worse after the conversion of the center lanes to light rail. CP 707. It is also contradicted by the Record of Decision on R-8A, which found that traffic times would be improved after the addition of HOV lanes, *with the preservation* of the two center lanes for use by vehicles. CP 1431. The problem with respect to Interstate 90 is heavy traffic and slow travel time during peak hours, which will increase in the future. CP 1424. R-8A presumed *10 lanes*, not 8, were needed to address this traffic flow on Interstate 90. CP 1431.

WSDOT/Sound Transit's assertion that 8 lanes are all that is "needed" is both contrary to logic and the record. It is undisputed that there is already heavy traffic on the bridge, particularly with the diverted traffic from the SR 520 tolling. It is undisputed that the vehicular traffic demand will increase in the future. It is also undisputed that in the current configuration, each peak direction has five lanes available for vehicular traffic, including two lanes for HOV, bus, and Mercer Island traffic. It is also undisputed that after the transfer of the two center lanes to Sound

Transit, each peak direction will have only four lanes available, with only one lane for HOV, bus, and Mercer Island traffic. Under R-8A's original configuration, with the two center lanes preserved for vehicular traffic, then there would have been six lanes available in each direction for vehicular traffic, to meet the growing capacity demand. CP 1431. Sound Transit/WSDOT cannot demonstrate that R-8A, with the transfer of the center lanes, will render the center lanes unneeded. The R-8A's original configuration will simply keep up with the undisputed demand that will increase in the future.

Sound Transit/WSDOT's claim that light rail will render the center lanes unneeded still ignores the word "presently" in RCW 47.12.120. If the center lanes will only be unneeded *after* light rail is installed, then they will be presently needed at the time WSDOT proposes to convey them to Sound Transit. Even setting aside the fact that RCW 47.12.120 was enacted to ensure enforcement of the 18<sup>th</sup> Amendment, WSDOT may not directly violate *any* existing statute. *Finch v. Matthews*, 74 Wn.2d 161, 443 P.2d 833 (1968).

WSDOT has not obeyed, and does not plan to obey, the clear, specific, plain statutory language governing its proposed lease of the two center lanes of Interstate 90 to non-highway purposes. Sound Transit/WSDOT cannot present any evidence that any part of Interstate

90, the a highway of statewide significance directly linking Seattle to Mercer Island and Bellevue and all of the eastern United States, is not presently needed for highway purposes. As a matter of law, they also cannot maintain their claim that when the R-8A configuration is complete, which envisions 10 lanes for vehicular traffic, the center lanes will no longer be needed.

Moreover, there is a glaring flaw in logic in the WSDOT/Sound Transit analysis. The question of whether a facility is surplus or “presently” needed for highway purposes, must be determined objectively *before* the facility is transferred to another use. Both agencies analyze the question *after the transfer*. This writes the word “presently” out of the statute, and allows WSDOT and Sound Transit to rationalize eliminating vital highway lands.

WSDOT and Sound Transit would also like to excise the words “highway purposes” from RCW 47.12.120. They acknowledge that vehicular traffic will suffer from the conversion of the center lanes, but insist that “person throughput” will increase. CP 707. However, they concede that vehicular traffic will worsen, and do not point to any authority stating that “person throughput” is the purpose of highways. Such an argument contradicts this Court’s ruling in *O’Brien* that highway

purposes are served only if traffic congestion is reduced and highway efficiency is improved. *O'Brien*, 83 Wn.2d at 882.

Sound Transit contended, and the trial court agreed, that WSDOT has “plenary authority” to lease highway facilities constructed with MVF dollars and still needed for vehicular traffic. According to the trial court, such leases may even be for non-highway purposes that violate the 18<sup>th</sup> Amendment.

Under the plain language of RCW 47.12.120, WSDOT cannot convert to light rail highway lands that are presently needed, and in the future will also be needed, for highway purposes. Summary judgment in favor of WSDOT/Sound Transit must be reversed.

(b) WSDOT Does Not Have Discretion Under RCW 47.12.120 to Determine Whether Lands Are Needed for Highway Purposes

In addition to misreading the basic language of RCW 47.12.120, the trial court posited a completely deferential standard of review for decisions by WSDOT under that statute.<sup>13</sup> Despite the lack of any public

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<sup>13</sup> The taxpayers herein have decried the lack of a formal WSDOT decision on whether Interstate 90 is presently needed for highway purposes. RCW 34.05.010(3) exempts WSDOT’s decision whether to lease from the Administrative Procedures Act and its extensive judicial review provisions. The determination of “presently needed” would not fall within that statutory exemption.

It is also important to note that in eminent domain proceedings like those in *Deaconess Hospital* and *Agee*, extensive procedural protections attend the government’s “public use and necessity,” and property evaluation decisions. *Deaconess*, 66 Wn.2d at 403; RCW 35.22.288.

notice, hearing, or decision on whether the center lanes were presently needed,<sup>14</sup> the trial court upheld WSDOT's "discretionary" decision about whether the center lanes were presently needed that was found in the umbrella agreement with Sound Transit, the beneficiary of WSDOT's illegal actions. The trial court concluded that WSDOT's decision would be upheld unless it was arbitrary or capricious, in bad faith, or fraudulent, citing *Deaconess Hospital v. Wash. State Highway Comm'n*, 66 Wn.2d 378, 403 P.2d 54 (1965) and *State ex rel. Agee v. Superior Court*, 58 Wn.2d 838, 365 P.2d 16 (1961), eminent domain cases. CP 3214-15.

The trial court, however, did not address *Sperline v. Rosellini*, 64 Wn.2d 605, 606, 392 P.2d 1009 (1964), which is controlling here. In *Sperline*, the Legislature passed special legislation permitting the State Highway Commission to transfer highway lands to the State Parks and Recreation Commission, as long as they were "not required for highway purposes." *Id.* The statute, like RCW 47.12.120 here, did not grant the Commission discretion to make the determination. The record showed that the lands were in fact needed for highway purposes. *Id.* This Court applied that "clear and unambiguous" statute to the facts and concluded

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<sup>14</sup> Although the trial court touted the many public hearings and decisions that have led up to the decision to transfer the center lanes, there has never been a public hearing nor judicial determination of the *factual assertion* that light rail or R-8A will render the center lanes unneeded for highway purposes.

that the Highway Commission could not transfer the lands as long as they were needed for highway purposes. *Id.* Thus, this Court interpreted the statutory language and applied it to the *facts*. It afforded no deference to the Highway Commission's decision at all. *Id.*

The statute at issue in *Agee*, on the other hand, *did* expressly grant the director discretion to make the determination in question. "That from and after the taking effect of this act, the width of one hundred feet is the necessary and proper right of way width for primary state highways *unless the director of highways, for good cause, may adopt and designate a different width.*" *Agee*, 58 Wn.2d at 839. Thus, *Agee* stands only for the proposition that when the Legislature explicitly vests discretion to make a decision with an agency, that agency's determination is subject to court deference. *Id.*

*Sperline*, not *Agee*, applies here. If a statute providing for the disposition of unneeded highway lands does not *explicitly* grant discretion to WSDOT to determine whether those lands are needed, then the issue is one of judicial statutory construction, not administrative deference. *Sperline*, 64 Wn.2d at 606. *Sperline* establishes that the question of whether under RCW 47.12.120, the center lanes of Interstate 90 are needed for highway purposes is a question for this Court, which must apply the plain language of the statute to the record. *Id.*

In sum, the trial court misread RCW 47.12.120 as conferring plenary authority to WSDOT to lease MVF-funded highway facilities.

(c) There is a Fact Question Regarding the Need for the Center Lanes for Highway Purposes

On summary judgment the trial court must view the facts in the light most favorable to the non-moving party.<sup>15</sup> *Young v. Key Pharmaceuticals, Inc.*, 112 Wn.2d 216, 226, 770 P.2d 182, 188 (1989). If there is a genuine issue of material fact, summary judgment is inappropriate. *Id.*

Here, WSDOT/Sound Transit's evidence that the two center lanes will no longer be needed is that light rail will "improve person throughput in the reverse peak direction while maintaining similar person throughput in the peak direction; overall this would provide more benefit as more people would use I-90." CP 2204. The notion that the R-8A configuration combined with light rail will improve "person throughput" is WSDOT's *central factual justification* for why it is not violating RCW 47.12.120 with its lease of the two center lanes to Sound Transit.

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<sup>15</sup> Here, both sides moved for summary judgment. However, the trial court ruled in favor of WSDOT/Sound Transit, so review of the facts should be in the light most favorable to the taxpayers.

WSDOT's assertion rests on the implicit assumption that the only function of a highway is to move people.<sup>16</sup>

The taxpayers presented evidence that highways are also vitally needed to move commerce, such as freight, that cannot be accommodated by light rail. CP 670-75. WSDOT's own study confirms *admits* that replacing the center lanes with light rail will decrease vehicular throughput, causing increased traffic congestion, *even with* increased person throughput. CP 707.

Highways are meant to carry vehicles, including freight. If preserving the two center lanes will reduce congestion and traffic, and eliminating them will increase congestion and traffic, then the lanes are needed for *highway* purposes, and must not be converted under RCW 47.12.120.

Not only did the trial court completely ignore the taxpayers' evidence, it *adopted wholesale* WSDOT's and Sound Transit's factual assertions about whether the center lanes would be needed for highway purposes in the future. CP 3213-14. While acknowledging the undisputed reality that the center lanes *were* presently needed, CP 3214, the trial court

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<sup>16</sup> If the only purpose of highways is to facilitate person throughput, one wonders why this Court would conclude that light rail is not a highway purpose. The answer is that the purpose of highways is to facilitate the movement of vehicles, including vital freight and other commerce, not merely persons.

accepted as fact that once the R-8A reconfiguration was complete, the lanes would no longer be needed. *Id.*

The question of I-90's capacity, whether viewed in terms of persons or vehicles, is a classic fact issue for trial. The trial court's decision did not rest on the facts taken in a light most favorable to the non-moving party on summary judgment, and reversal is required for a trial on the disputed facts.

(3) WSDOT's Decision Here Is Reviewable in a Declaratory Judgment Action

The trial court concluded that WSDOT's transfer decision was an "administrative decision" not reviewable under RCW 7.24, citing *Bainbridge Citizens United v. Wash. State Dep't of Nat'l Resources*, 147 Wn. App. 365, 198 P.3d 1033 (2008). CP 3215. The trial court was wrong. This is a challenge to an unconstitutional action by WSDOT, not a mere dispute over WSDOT's administration of state highways. More than 45 years ago, our Supreme Court held in *Heavens v. King County Rural Library District*, 66 Wn.2d 558, 404 P.2d 453 (1965) that aggrieved taxpayers could file a declaratory judgment action to challenge a library district's local improvement district created by statute and its assessment of a property tax. *See also, Seattle Sch. Dist. No. 1 v. State*, 633 F.2d 1338 (9th Cir. 1980) (school board sought declaratory judgment that I-350 was

unconstitutional).<sup>17</sup> This is consistent with the statutory direction in RCW 7.24.120 that the declaratory judgment statute is *remedial* and subject to *liberal* construction and administration. The taxpayers are not merely challenging the application of RCW 47.12.120, they are questioning the constitutionality of WSDOT's transfer of Interstate 90's center lanes to Sound Transit, as well as WSDOT's interpretation of its statutory authority without regard to the 18<sup>th</sup> Amendment.

WSDOT's principal supporting case, *Bainbridge Citizens United v. Wash. State Dep't of Nat'l Resources*, 147 Wn. App. 365, 198 P.3d 1033 (2008), in fact, supports the plaintiffs' position. In that case, Division II held that a declaratory judgment action was not available to address the application or administration of an enactment. A citizens group sought to compel the Department of Natural Resources to evict, fine, or sue trespassers on state aquatic lands. The court made clear, however, that a declaratory judgment action was available to test the "construction or validity of a law." *Id.* at 374. At its core, the question present in this case involves the 18<sup>th</sup> Amendment and the proper construction of any statutory authority of the WSDOT to dispose of a viable public highway for a

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<sup>17</sup> WSDOT is oblivious to the circumstances under which UDJA has been applied with respect to Sound Transit. For example, in *Pierce County v. State*, 150 Wn.2d 422, 78 P.3d 640 (2003), *appeal after remand*, 148 P.3d 1002 (2006), our Supreme Court had little difficulty in discerning Sound Transit, as an intervenor, could obtain declaratory relief to invalidate I-776 on constitutional grounds.

purpose that even WSDOT and Sound Transit *admit violates the 18<sup>th</sup> Amendment*. The trial court had authority to address this constitutional issue in a declaratory judgment action.

(4) The Taxpayers Are Entitled to Their Fees at Trial and on Appeal

To the extent the taxpayers successfully restrain the illegal expenditure of funds by forestalling the transfer of the two center lanes of Interstate 90 to Sound Transit, they are entitled to recover their attorney fees under the common fund exception to the American rule.

Washington courts have recognized that where a party brings an action to preserve or create a monetary fund, the party may seek reimbursement of the attorney fees expended from the common fund itself. In *Baker v. Seattle-Tacoma Power Co.*, 61 Wash. 578, 112 P. 647 (1911), this Court allowed attorney fees to a stockholder who brought an action to vacate a sale of property where officers of the corporation and certain stockholders transferred the property to themselves at a profit. Similarly, in *Grein v. Cavano*, 61 Wn.2d 498, 379 P.2d 209 (1963), the Court allowed attorney fees to a party who had brought an action for an accounting of the finances of a Teamsters Union local. The principle is aptly described by this Court in the following fashion:

[A] court may, in its discretion, allow counsel fees to a complainant who has maintained a successful suit for the

preservation, protection, or increase of a common fund.  
The rationale of the rule is that the complainant has brought  
“benefit” to the fund.

*Id.* at 505. See also, *Covell v. City of Seattle*, 127 Wn.2d 874, 905 P.2d 324 (1995) (successful challenge to Seattle’s transportation fee).

The common fund exception applies to public funds created or preserved by a litigant. *Weiss v. Bruno*, 83 Wn.2d 911, 912, 523 P.2d 915 (1974). Additionally, the common fund exception has been applied in Washington even when no direct monetary benefit was obtained. See *Grein v. Cavano*, 61 Wn.2d 498, 379 P.2d 209 (1963). Furthermore, there need not be an identifiable existing fund under control or in the registry of the court. *Weiss* at 914. In *Weiss*, the Court granted writs of prohibition against the disbursement of state funds as authorized by two legislated acts and found the challenged statutes, which involved state financial aid to certain categories of students, were unconstitutional. The petitioners then requested the allowance of reasonable attorney fees. The Court noting that the actions of the petitioners not only benefitted all taxpayers by halting the unlawful disbursement of taxpayer funds under an unconstitutional statute, but also protected the constitutional rights of all citizens to the separation of church and state. *Id.* at 914, 523 P.2d 915. The Court formulated a rule authorizing the recovery of a reasonable attorney fee where the court is presented with:

(1) a successful suit brought by petitioners (2) challenging the expenditure of public funds (3) made pursuant to patently unconstitutional legislative and administrative actions (4) following a refusal by the appropriate official and agency to maintain such a challenge.

*Id.* at 914. Under those circumstances, the common fund principle allowed the petitioners to recover their fees. *Id.*

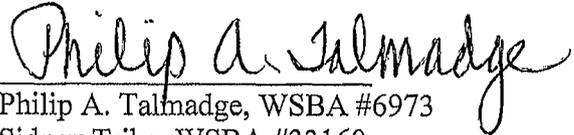
Here, the taxpayers brought the very same kind of action as in *Covell* and *Weiss* when they seek to block the illegal expenditure of public moneys by barring the transfer of the two center lanes by WSDOT to Sound Transit. They are entitled to common fund attorney fees at trial and on appeal. RAP 18.1(a).

#### F. CONCLUSION

Interstate 90 is a highway of statewide significance. It is not surplus. It is presently needed for highway purposes. WSDOT lacks authority under the 18<sup>th</sup> Amendment and RCW 47.12.120 to lease its center lanes for up to 75 years for an admittedly unconstitutional non-highway purpose. This Court should reverse the trial court's judgment with directions to enter summary judgment in favor of the taxpayers, or, alternatively, for a new trial. Costs on appeal, including reasonable attorney fees, should be awarded to the taxpayers.

DATED this 15<sup>th</sup> day of August, 2012.

Respectfully submitted,



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# APPENDIX

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KITTITAS COUNTY  
SUPERIOR COURT CLERK

SUPERIOR COURT OF WASHINGTON FOR KITTITAS COUNTY

KEMPER FREEMAN, JIM HORN, STEVE )  
STIVALA, KEN COLLINS, MICHAEL )  
DUNMORE, SARAH RINLAUB, AL )  
DEATLEY, JIM COLES, BRIAN BOEHM, )  
MARK ANDERSON and EASTSIDE )  
TRANSPORTATION ASSOCIATION, a )  
Washington nonprofit corporation, )

Plaintiffs, )

v. )

STATE OF WASHINGTON, CHRISTINE )  
O. GREGOIRE, Governor, PAULA )  
HAMMOND, Secretary of Transportation, )

Defendants. )

and )

CENTRAL PUGET SOUND )  
REGIONAL TRANSIT AUTHORITY, )

Intervenor. )

No. 11 2 00195 7

MEMORANDUM DECISION

INTRODUCTION

The plaintiffs filed suit against the defendants seeking declaratory relief pursuant to Chapter 7.24 RCW, for a writ of prohibition, for a writ of mandamus, and for injunction. Essentially, the plaintiffs ask this court to determine that the defendant Washington State

Department of Transportation (DOT) may not lease, sell, transfer or otherwise allow Central Puget Sound Regional Transit Authority (Sound Transit) to occupy any portion of Interstate 90 for light rail, a non-highway purpose, and to otherwise prohibit the State from leasing or using Interstate 90 for light rail. The parties are agreed as to the facts and each side seeks summary judgment in its favor.<sup>1</sup>

## FACTS

The parties are in agreement as to the facts as outlined in their pleadings and as previously agreed to in Freeman v. Gregoire, 171 Wn.2d 316 (2011). Those facts are essentially as follows:

Interstate 90 is a state highway route that, in the vicinity of Lake Washington in King County, extends from the City of Bellevue across Mercer Island towards Interstate 5 (I-5), traversing two bridges. The portion of I-90 in dispute consists of eight total lanes: three general purpose lanes in each direction and a two-lane reversible center roadway. The center roadway is currently restricted to high-occupancy vehicles (HOV). I-90 was built in part with motor vehicle fund expenditures.<sup>2</sup> This motor vehicle fund is also used to maintain I-90.

The initial proposal to build the section of I-90 between Bellevue and I-5 was besieged by design and configuration conflicts between state and local jurisdictions. On December 21, 1976, following public hearings, King County; the cities of Seattle, Mercer Island and Bellevue; the municipality of metropolitan Seattle; and the Washington State Highway Commission executed a Memorandum of Agreement (MOA) regarding I-90. The MOA established that two of I-90's lanes be "designed for and permanently committed to transit use."

On September 20, 1978, the United States Secretary of Transportation issued the "decision document" approving federal funding for the proposed I-90 roadway. This decision contained an express condition that "public transportation shall permanently have first priority in the use of the center lanes."

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<sup>1</sup> The State of Washington and Intervenor Sound Transit each move for summary judgment in favor of the defendants/intervenor and support each other's motions for summary judgment. The plaintiffs seek their own summary judgment and opposes the defendants' and the intervenor's motions.

<sup>2</sup> See Article 2, Section 40 Washington State Constitution.

From 1998 to 2004, Sound Transit and the DOT conducted a planning and environmental review process regarding transit and HOV operation on I-90 between Seattle and Bellevue. Sound Transit and DOT identified plan "R8A" as the preferred alternative. One design feature of R8A was the reconfiguration and addition of HOV lanes to the I-90 outer lanes. In August 2004 the signatories to the 1976 MOA amended their original agreement. The amended 2004 MOA states:

"[T]he ultimate configuration for I-90. . . should be defined as High Capacity Transit in the center roadway and HOV lanes in the outer roadways. . . High Capacity Transit for this purpose is defined as a transit system operating in dedicated right-of-ways such as light rail, monorail, or a substantially equivalent system."

Shortly thereafter, the Federal Highway Administration (FHWA) selected R8A as the preferred alternative. On November 6, 2008, Sound Transit submitted the Sound Transit 2 Regional Transit System Plan (ST2) for voter approval. Included in the ST2 plan was a proposal for light rail operations beginning in Seattle, traveling over Mercer Island, and proceeding into Bellevue (east link). The east link portion of ST2 provides funding for placing HOV lanes on the outer roadway of I-90. Unlike the existing, reversible HOV lanes located in the center of I-90, the new HOV lanes would be dedicated to one direction of travel, one eastbound and one westbound, at all times. The east link also provides that the two center lanes of I-90 be used by Sound Transit for light rail. The ST2 plan was approved by the voters.

In 2009 the legislature inserted in the 2009 transportation budget, ESSB 5352, \$300,000 from the motor vehicle fund for an independent analysis of methodologies to value the reversible lanes on I-90 to be used for high capacity transit. Section 306(17) of Chapter 470, Laws of 2009 provided:

"The legislature is committed to the timely completion of R8A which supports the construction of Sound Transit's east link. Following the completion of the independent analysis of the methodologies to value the reversible lanes on Interstate 90 which may be used for high capacity transit as directed in Section 204 of this Act, the Department shall complete the process of negotiations with Sound Transit."

Independent appraisals of the I-90 center lanes were delivered to Sound Transit and DOT. In November 2009, \$250,000 was paid for the work performed on the valuations. Following agreement on the valuation, Sound Transit and DOT engaged in negotiations that produced a "Term Sheet." The Term Sheet is subject to the delivery of a number of future agreements but essentially outlines that Sound Transit in exchange for a 40 year air space lease of the center

lanes of I-90, will pay DOT an amount equal to the current cost to construct the center lanes and the fair market rental value for the lanes as determined by the independent valuation funded by Section 204(3) of Chapter 470, Laws of 2009 (ESSB 5352). The funds DOT receives from Sound Transit, for both construction reimbursement and the value of the lease, will be placed back into the motor vehicle fund.

On December 1, 2009 the Federal Highway Administration confirmed that reimbursement of federal-aid highway funds expended in the construction of the center lanes of I-90 would not be required should the center lanes be used for light rail transit.

In October 2011 DOT and Sound Transit signed a final agreement by which DOT will lease the center lanes to Sound Transit. Sound Transit will pay DOT an amount equal to the current value of the State's share (\$69.2 million) of the cost to construct the center lanes, and thereby reimburse the State for any gas or motor vehicle excise taxes used for that construction; plus pay a 45 year rental value of the lanes to be established one year before light rail construction on I-90 begins. The rental value for the 45 year lease period will be based on the \$70.1 million land value contained in the independent appraisal prepared for DOT, updated to the then current land value for one year before the light rail construction begins. Sound Transit's estimated payment of \$167.5 million to fund the construction of the new two way HOV lanes on the I-90 outer roadway will be credited against the amounts owed DOT for the light rail use of the center lanes. If the cost to add the new transit/HOV lanes exceeds the amounts owed to lease the center lanes for light rail transit, Sound Transit will pay the difference.

The final agreement between DOT and Sound Transit provides that the center lanes will not be closed to traffic until the new bus and HOV lanes are complete and open to traffic and after Sound Transit has repaid the value of the motor vehicle fund investment in the lanes.

The agreement between DOT and Sound Transit provides:

"WSDOT's determination to lease highway property. WSDOT has determined that the center roadway will not be presently needed for highway purposes after the R&A project is completed, the new improvements are open to vehicular traffic, and to the extent not already satisfied, all necessary actions and obligations identified in this agreement and the exhibits D1 and D2 attached hereto are completed for the relevant lease. This determination is based upon, including but not limited to the analyses contained in: I-90 two way transit and HOV operations FEIS and ROD; I-90 two way transit and HOV access point decision report; WSDOT I-90 center roadway study; east link FEIS and ROD; east link/I-90 interchange justification report; I-90 Bellevue to North Bend corridor study; the WSDOT highway system plan 2007-2026, and the legislative history reflected

in the 2009 Engrossed Senate Substitute Bill 5352, Section 204(3) and Section 306(17). This determination is consistent with the policy decisions reflected in the 1976 Memorandum of Agreement and the 2004 amendment to the 1976 agreement.”<sup>3</sup>

In November 2011 a majority of Washington voters rejected Initiative Measure Number 1125 which would have prohibited state government from transferring or using gas tax funded or toll revenue funded lanes on state highways for non-highway purposes. On November 10, 2011 the Federal Transit Administration issued its record of decision finding the requirements of the National Environmental Policy Act had been satisfied for the construction and operation of the east link project. On November 17, 2011, FHA also issued a record of decision for the east link project. The FHA’s record of decision included a statement from the FHA, the FTA, and Sound Transit that because “the existing center roadway HOV lanes will not be converted to light rail until the I-90 two way transit project adding additional HOV lanes has been completed. . . there will be no net loss of HOV lanes.”

The parties specifically agree that light rail is not a highway purpose and that motor vehicles funds cannot be used to fund light rail.

#### ISSUES PRESENTED

1. Whether the 18<sup>th</sup> Amendment (Article 2, Section 40 of the Washington Constitution) bars the leasing of highway right-of-way purchased and/or construction, with motor vehicle funds as authorized by RCW 47.12.120, for non-highway use, such as light rail, when the land is not presently needed for highway purposes and when fair market rent is paid.
2. Whether DOT’s discretionary decision, made under RCW 47.12.120, that I-90’s center lanes presently will be no longer presently needed for a highway purpose and can be leased for light rail after two replacement I-90 HOV lanes are constructed, is so arbitrary and capricious that it amounts to fraud or bad faith, requiring this court to abrogate such decision, when the decision was made after 13 years of engineering, design and traffic studies.
3. Whether this court can substitute its judgment for DOT’s and determine the appropriate lease terms and rent required for a highway property lease to be issued under DOT’s discretionary property management authority.

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<sup>3</sup> See paragraph 3of the Umbrella Agreement. Dye declaration.

## ANALYSIS

1. Law of Summary Judgment. The purpose of a summary judgment is to avoid a useless trial. However, a trial is required and summary judgment must be denied whenever there are genuine issues of material fact. CR 56(c); Jacobsen v. State, 89 Wn.2d 104 (1977). Material facts are those facts upon which the outcome of litigation depends, either in whole or in part. Harris v. Ski Park Farms, 120 Wn.2d 727, 729 (1993). In a summary judgment the burden is always on the moving party regardless of where the burden would lie in the trial of the matter. Peninsula Truck Lines, Inc. v. Tooker, 63 Wn.2d 724 (1961). In ruling on a motion for summary judgment the court must consider all of the evidence and all reasonable inferences from the evidence in favor of the non-moving party. CR 56(c); Ohler v. Tacoma General Hospital, 92 Wn.2d 507 (1979). Summary judgment should be granted only if there is no genuine issue of material fact or if reasonable minds can reach but one conclusion on that issue based on the evidence construed in a light most favorable to the non-moving party. White v. State, 131 Wn.2d 1, 9 (1997); Weatherbee v. Gustafson, 64 Wn.App. 128 (1992).

Although the moving party bears the initial burden of showing the absence of an issue of material fact, once this initial showing is met, the burden shifts to the non-moving party, who must set forth specific, admissible facts showing that there is a genuine issue of material fact for trial. Young v. Key Pharmaceuticals, 112 Wn.2d 216, 225-226 (1989). The moving party can satisfy its initial burden in either of two ways: (1) it can set forth its version of the facts, and allege there is no genuine issue as to those facts; or (2) it can simply point out to the court that no evidence exists to support the non-moving party's case. Howell v. Blood Bank, 117 Wn.2d 619, 624 (1991); Guile v. Ballard Community Hospital, 70 Wn.App. 18, 21 (1993).

2. Decision.

a. Whether the 18<sup>th</sup> Amendment (Article 2, Section 40 of the Washington Constitution) bars the leasing of highway right-of-way purchased and/or construction, with motor vehicle funds as authorized by RCW 47.12.120, for non-highway use, such as light rail, when the land is not presently needed for highway purposes and when fair market rent is paid?

Article 2, Section 40<sup>4</sup> restricts the expenditure of motor vehicle fund moneys. It provides in pertinent part:

“All fees collected by the State of Washington as license fees for motor vehicles and all excise taxes collected by the State of Washington on the sale, distribution or use of motor vehicle fuel and all other state revenue intended to be used for highway purposes, shall be paid into the state treasury and placed in a special fund to be used exclusively for highway purposes. Such highway purposes shall be construed to include the following:  
(a) the necessary operating, engineering and legal expenses connected with the administrative of public highways, county roads and city streets. . . .”

The State Supreme Court in Freeman v. Gregoire, *supra* at 331, held that a valuation performed in anticipation of the eventual transfer or lease of highway land indirectly benefits public highways and serves as a valid highway purpose under Article 2, Section 40. Freeman upheld the appropriation of up to \$300,000 to be expended pursuant to Section 204(3) of Chapter 470 of the Laws of 2009, relying on State Highway Commission v. O'Brien, 83 Wn.2d 878 (1974) and distinguishing State, ex rel. O'Connell v. Slavin, 75 Wn.2d 554 (1969).

The court in Freeman specifically did not broaden its inquiry to view the transaction according to any discretionary decisions that may occur after the valuations obtained. That inquiry is set forth in this litigation. The plaintiffs argue Article 2, Section 40 prohibits the State from entering into any agreement with Sound Transit for the use of the two center lanes of I-90 for light rail and since the center lanes were constructed, in part using motor vehicle fund moneys, any transfer of the lanes for light rail transit would essentially be an unlawful diversion of motor vehicle fund moneys in violation of Article 2, Section 40. The defendants and intervenor argue Article 2, Section 40 of the Washington Constitution does not prohibit the State from leasing highway right-of-way not presently needed for highway purposes as authorized by RCW 47.12.120. They argue the Constitution does not restrict how a highway purchased with motor vehicle funds may be used in the future nor does it restrict use of the property when it is removed from highway use when the value of the State's investment in the highway is repaid to the motor vehicle fund before the property is removed from highway use. The defendants and intervenor assert that the natural, obvious import of the framers of the Constitution is that motor vehicle taxes be used for highway purposes, not that highways built, in part with motor vehicle funds, be dedicated as highways forever.

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<sup>4</sup> As amended by Amendment 18.

The court agrees Article 2, Section 40 restricts the use of motor vehicle excise taxes to the use for highway purposes but it does not restrict the State from eventually declaring the highway surplus and then using it for non-highway purposes, provided, however, that the motor vehicle funds used to construct the highway are in effect repaid to preclude any allegation that the State is circumventing the intent of Article 2, Section 40. Here, the parties agree that light rail is not a highway purpose. That fact does was not disputed in the original action before the State Supreme Court and is not in dispute now. Freeman, supra at 331. The State and Sound Transit agree that motor vehicle funds may not be expended on light rail so Sound Transit has agreed to reimburse the State for any motor vehicle funds expended for the construction of the center lanes of I-90.

Nor does Article 2, Section 40 of the Washington State Constitution limit or interfere with the State's authority to decide where the I-90 HOV lanes are located or how they are operated. The plain language of Article 2, Section 40, as well as the case law interpreting its language, confirms that the constitutional limitation only applies to the expenditure of motor vehicle funds for highway purposes, not to the use or management of the highways. When highway land is purchased with motor vehicle funds it may be leased or sold for non-highway purposes but the purchaser will be required to provide such monetary or other consideration as is necessary under the particular factual circumstances and law involved to avoid an unlawful diversion of motor vehicle funds. AGLO 1975 Number 62. As long as the necessary reimbursement and consideration is provided, highways paid for with motor vehicle funds may be transferred for non-highway purposes. Here, Sound Transit and the State have agreed to appropriate compensation according to a legislatively prescribed process. Article 2, Section 40 has been satisfied and plaintiffs' constitutional attack therefore fails.

b. Whether the State's decision, made under RCW 47.12.120, that I-90 center lanes will be no longer presently needed for a highway purpose and can be leased for light rail after two replacement I-90 HOV lanes are constructed is so arbitrary and capricious that it amounts to fraud or bad faith, requiring this court to abrogate such decision?

RCW 47.12.120 authorizes the State to rent or lease any lands, improvements or air space above or below any lands held for highway purposes are not presently needed. The Umbrella Agreement between the State and Sound Transit makes a specific finding by the State that it has determined that the center roadway of I-90 will not be presently needed for highway purposes

*after* the R8A project is completed, the new improvements are open to vehicular traffic and to the extent not already satisfied, all necessary actions and obligations identified in the agreement are completed for the safe and efficient operation of the highway. The State's determination that the center roadway of I-90 will not be presently needed for highway purposes after the completion of the conditions set forth in the Umbrella Agreement is based upon years of study and analysis set forth in the record including the I-90 two way transit and HOV operations FEIS and ROD; the I-90 two way transit and HOV access point decision report; the DOT I-90 center roadway study; east link FEIS and ROD; east link/I-90 interchange justification report; I-90 Bellevue to North Bend Corridor study; the DOT Highway System Plan 2007-2026; and the legislative history reflected in Sections 204(3) and 306(17) of Chapter 470 Laws of 2009.

The State concedes the center lanes in question will be needed until a future date. The Umbrella Agreement directly addresses the present need by prohibiting the transfer of possession and control of the lanes until the R8A project is complete and its traffic improvements, including the new HOV lanes, are operational. Once the project is completed, the center lanes will no longer be needed for highway purposes as they are replaced by the two new lanes.

The type of highway, its location and the engineering and design details are administrative decisions that will not be abrogated unless they have been arrived at without statutory authority or so arbitrary and capricious as to amount to bad faith or fraud. Deaconess Hospital v. Washington State Highway Commission, 66 Wn.2d 378 (1965). The State has broad discretion to decide whether the highway property is not presently needed for highway purposes and whether a lease of that unused property would impair the highway facility for highway purposes. While the State is not required to lease the land, it is within its discretion to do so as long as it first determines the highway land is not then presently needed for highway purposes. As a part of its overall analysis before leasing the unused right-of-way the State must make sure the lease will not cause undue risk or impair the use of the facility for highway purposes. Finally, while RCW 47.12.120 does not specifically require the payment of a fair market rent for non-highway use of highway land the State does require monetary and other considerations to avoid the unlawful diversion of motor vehicle funds. Here, again the State's decision to determine that the center lanes of I-90 in question, *after* certain conditions are met, will be no longer needed for highway purposes is based upon years of engineering studies, scrutiny by local governments and federal highway administration, public review of environmental documents,

approval of voter's funding Sound Transit work, the legislatively funded independent appraisal methodology and independent appraisals for the leasing of highway property. The decision of whether to transfer or lease lands is inherently a function of the administration of highway property. Freeman, supra at 331. Moreover, the court must defer to the State's expertise in managing the highway system and intervene only in the case of fraud or a gross abuse of discretion. State, ex. rel. Agagee v. Superior Court, 58 Wn.2d 838, 839 (1961). The plaintiffs have not demonstrated the State's actions amount to bad faith or fraud. The State's discretionary decision to declare that the center lanes of I-90 in question will be no longer presently needed for a highway purpose and can be leased for light rail after the two replacement I-90 HOV lanes are constructed and all other conditions of the Umbrella Agreement are met is not arbitrary and capricious requiring the court to abrogate the decision.

c. Whether this court can substitute its judgment for the State and determine the appropriate lease terms and rent required for a highway property lease to be issued under the State's discretionary property management authority?

Whether the State administered RCW 47.12.120 correctly by deciding that the center roadway will not be presently needed upon completion of the R8A project is an administrative decision that is not reviewable under the declaratory judgment action. Bainbridge Citizens United v. Washington State Department of Natural Resources, 147 Wn.App. 365, 374-75 (2008). Declaratory judgment actions are only proper to determine the facial validity of an enactment, as distinguished from its application or administration. Moreover, Chapter 34.05 RCW, the Administrative Procedures Act (APA) does not provide for a review of agency decisions regarding the "purchase, lease, or acquisition by any other means, including eminent domain, of real estate, as well as all activities necessarily related to those functions. . ." RCW 34.05.010(3). Therefore, the court respectfully declines to review the administrative decisions of the State regarding its determination the center lanes of I-90 in question will not be needed for highway purposes upon the completion of the R8A project and fulfillment of the Umbrella Agreement.

## CONCLUSION

Based upon the foregoing, the court denies the plaintiffs' motion for summary judgment and grants the defendants' and intervenor's motions for summary judgment. Please prepare the appropriate orders and either note them for presentation or circulate them for signature.<sup>5</sup>

DATED: March 5, 2012.



JUDGE PRO TEM<sup>6</sup>

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<sup>5</sup> Each side has moved to strike certain declarations and information filed by the other. The plaintiffs' motion is primarily based upon redundancy and irrelevancy. The intervenor's motion to strike is based primarily upon failure to authenticate. As the record contains over 3,500 pages of pleadings, and as the court has reviewed the record more with the intent on determining the legal issues as opposed to the collateral issues on some of the marginal information supplied, the court simply denies both motions to strike.

<sup>6</sup> At oral argument on February 17 the court received the assurance of the parties that it could proceed to hear the case even though the court is now retired (on October 1, 2011) and maintains an inactive status with the bar association. Article 4, Section 7 and RCW 2.08.180 authorize a retired judge to sit as a judge pro tem without the stipulation of the parties if the previously elected judge of the superior court retires leaving a pending case in which the judge has made discretionary rulings. The court made discretionary rulings in this case by denying the motion for an order changing venue (docket entry 54, signed August 15, 2011) and the fact the court is now inactive with the bar association provides no barrier to the court hearing the case as a pro tem. In re Marriage of Dalthorp, 23 Wn.App. 904 (1979).

DECLARATION OF SERVICE

On said day below I mailed and emailed a true and accurate copy of the Brief of Appellants in Supreme Court Cause No. 87267-8 to the following parties:

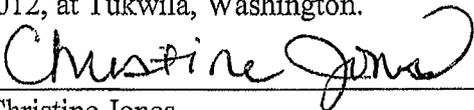
George Kargianis Law Offices of George Kargianis 2121 5 <sup>th</sup> Avenue Seattle, WA 98121-2510	Kristen L. Fisher Law Offices of Joanne R. Werner 2025 1 <sup>st</sup> Avenue, Suite 830 Seattle, WA 98121-2179
Bryce E. Brown, Jr. Doug Shaftel Attorney General of Washington Transportation & Public Construction Div. 7141 Cleanwater Drive SW Olympia, WA 98504-0113	Matthew J. Segal Paul J. Lawrence Jessica A. Skelton Pacifica Law Group 1191 2 <sup>nd</sup> Avenue, Suite 2100 Seattle, WA 98101
Desmond Brown Sound Transit Union Station 401 South Jackson Street Seattle, WA 98104-2826	

Original filed with:

Washington Supreme Court  
Clerk's Office

I declare under penalty of perjury under the laws of the State of Washington and the United States that the foregoing is true and correct.

DATED: August 15, 2012, at Tukwila, Washington.

  
\_\_\_\_\_  
Christine Jones  
Talmadge/Fitzpatrick

## OFFICE RECEPTIONIST, CLERK

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**To:** OFFICE RECEPTIONIST, CLERK  
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Clerk:

Attached for today's filing in Supreme Court no. 87267-8 is Brief of Appellants, *Kemper Freeman, et al. v. State*.

Thank you –

Christine Jones  
Office Manager  
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