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CLERK SUPREME COURT
OF THE STATE OF WASHINGTON

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

Petitioners,

v.

CHRISTINE O. GREGOIRE, a state officer in her capacity
as Governor of the State of Washington, and PAULA J. HAMMOND,
a state officer in her capacity as Secretary of the Washington
State Department of Transportation,

Respondents,

and

CENTRAL PUGET SOUND
REGIONAL TRANSIT AUTHORITY,

Intervenor.

AMICUS CURIAE BRIEF OF SAVE MI SOV

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A. IDENTITY AND INTEREST OF AMICUS CURIAE

Save MI SOV is a Washington nonprofit corporation formed in 2004 by a Mercer Island citizens group to preserve and protect rights of access to Interstate 90's two center lanes. Save MI SOV was the sponsor of a referendum petition signed by over 4,750 Mercer Island registered voters within 20 days of the Mercer Island City Council passing its Resolution #1337 wherein the city council agreed to amend the 1976 Memorandum of Agreement with the cities of Seattle, Bellevue, King County, and the Washington State Highway Commission to permit conversion of the Interstate 90 center highway lanes to exclusive use by high capacity transit (light rail).

King County Records & Elections certified the Save MI SOV referendum for inclusion on the November 2004 general election ballot. The League of Women Voters of Washington (Seattle) and four Mercer Island proponents of light rail sued King County Records & Elections in King County Superior Court Cause No. 04-2-23547-2SEA, to prevent Mercer Island residents from being able to vote on the referendum. Save MI SOV was allowed to intervene in the action by court order.

Without question, elimination of highway use of the two center lanes will negatively impact Mercer Island residents' mobility and access to their homes, jobs, health care, businesses, not to mention access to area

commercial, recreational, and entertainment opportunities. It will also negatively impact Mercer Island businesses and property values, as well as negatively impact off-island residents and businesses who travel to or from Mercer Island in single occupancy vehicles, business and service vehicles.

B. STATEMENT OF THE CASE

Save MI SOV agrees with the statement of the case previously set forth by the Petitioners.

C. ISSUE PRESENTED

Save MI SOV adopts the arguments set forth by the Petitioners in their briefs regarding violation of the 18th Amendment and will confine the issue in this brief to whether the Washington Department of Transportation can lease highway lands presently needed for highway purposes in violation of its statutory authority.

D. ARGUMENT

(1) WSDOT Cannot Dispose of Highway Lands Presently Needed for Highway Purposes

The Washington Department of Transportation (WSDOT) does not dispute that it intends to lease the center lanes of Interstate 90 to Sound Transit for exclusive light rail use, an admitted non-highway purpose. Nor does it dispute that the 18th Amendment of the Washington State

Constitution prohibits using highway facilities for non-highway purposes. See Brief of Respondent WSDOT at 33. Instead, WSDOT asserts that the sale or lease of highway right of way is an administrative function that is authorized by the 18th Amendment and the highway sales/leasing statutes and that it may exercise its discretion in determining whether or not the center lanes are presently needed for highway purposes. See Brief of Respondent WSDOT at 33-36.

That kind of opportunistic reasoning would allow WSDOT to eviscerate the purpose of the 18th Amendment --- which is to protect and preserve road investments for highway purposes only. WSDOT's flexible reasoning would allow it to convert protected road investments into non-highway uses simply by labeling lanes "not presently needed" even when in fact the highway lanes are heavily used by highway traffic, and to highway users, obviously needed.

The 1976 Memorandum of Agreement provided for two reversible highway lanes in the center roadway of Interstate 90, lanes commonly known as the "I-90 express lanes." The 1976 Memorandum of Agreement designated the lanes for shared use by buses, carpools and single occupancy vehicles traveling to or from Mercer Island. See Memorandum of Agreement Section 1(e). The Agreement did not designate the center lanes for exclusive use by transit or by rail.

The Memorandum of Agreement set out priority of shared use --- first to transit (buses), second to carpools and third to Mercer Island single occupancy vehicles. Such sharing priority could easily be managed by ramp metering or increased carpool occupancy eligibility, if either were ever needed. Under the Memorandum of Agreement, Mercer Island single occupancy traffic had priority access.

While the Memorandum of Agreement stated that the two High Occupancy Vehicle lanes (misnamed “transit” lanes) shall be constructed so that rail is “possible”, that does not mean that there was agreement that rail was “permissible.” If the Memorandum of Agreement had stated that rail was “permissible,” an interpretation that Sound Transit and WSDOT appear to be proposing, it would have been illegal under the 18th Amendment for the State of Washington to use state motor vehicle tax trust fund monies to pay for the construction of Interstate 90. Rail is not a highway use under Washington law. Obviously, the word “possible” in the context of the 1976 Memorandum of Agreement’s reference to rail, meant physically possible.

The power to change Washington’s constitution is vested in the people of the entire state of Washington. That power is not vested in three cities’ councils (Bellevue, Seattle, Mercer Island), nor in the King County

council, the Washington State Transportation Commission, WSDOT, Sound Transit or the Governor's office.

According to Sound Transit and Washington State Department of Transportation's jointly authored 2004 Final Environmental Impact Statement on the I-90 Two-way Transit and HOV Operations project ("FEIS"), as of 2001, motor vehicle traffic in Interstate 90's general purpose lanes exceeded 90% of capacity in both directions of traffic and in both peak rush hours (a.m. and p.m.). See page 1-5 of FEIS ("Current Use and Operations of I-90") (available at : <http://www.soundtransit.org/x1290.xml>).

According to the FEIS, as of 2001 there were over 150,000 motor vehicle trips per average weekday on Interstate 90. See page 3.2-4 of FEIS. Of that total, there were over 65,000 vehicle trips per day on Interstate 90 going to and from Mercer Island. *Id.* Mercer Island traffic made up 45% to 50% of the total center roadway traffic during the AM and PM peak rush periods, and approximately 18% of the total traffic on I-90. *Id.*

The Record of Decision on the I-90 Two-way Transit and HOV Operations project, issued September 2004, further evidences that the two center lanes of Interstate 90 are presently needed for highway purposes. The Record of Decision states that the ten (10) highway lanes of R-8A ---

which is an increase of two highway lanes over the existing roadway configuration --- “best improves regional mobility.” See page 10 of Record of Decision (available at http://www.soundtransit.org/documents/pdf/projects/Record_of_Decision_September_2004.pdf). The Record of Decision further states:

- In year 2005, Alternative R-8A would result in the lowest travel times for transit in the reverse-peak direction...[and] result in the best improvements in transit reliability in the reverse-peak direction.
- In the peak periods, transit ridership would be improved....In the off-peak periods, for the year 2025, transit ridership is predicted to be greatest with Alternative R-8A.
- HOV usage is predicted to be the highest with Alternative R-8A for both year 2005 and year 2025.

See page 11 of Record of Decision.

In addition, the Record of Decision states:

“Among the alternatives, Alternative R-8A has the **greatest** effect in minimizing impacts to other users and transportation modes and would greatly improve conditions as compared to the No Build Alternative:

- For other freeway users, Alternative R-8A is predicted to result in the lowest travel times for both the AM and PM peak periods.
- Alternative R-8A would reduce the existing approximately 8 hours of congestion to less than 2 hours(remaining at less than 2 hours by year 2025), unlike the other alternatives which maintain or increase hours of congestion as compared to the No Build Alternative.
- Alternative R-8A would have the greatest reduction in person hours of travel of all alternatives, a reduction of 15% in year 2005 and 32% in year 2025 as compared to the No Build Alternative.
- Alternative R-8A would reduce delay for persons traveling on transit by the greatest percentage as compared to all alternatives.

- Alternative R-8A would have the lowest delay for persons traveling in the general purpose lanes of all alternatives.”

Id.; see also Appendix A charts derived from WSDOT’s 2006 I-90 Traffic Studies.

Sound Transit and WSDOT admit that “[t]he added capacity with Alternative R-8A [which provides for ten motor vehicle lanes across the floating bridges rather than just eight, which would be the case if light rail took over the two center lanes] would allow for increased flow and consequently, better travel times through the project corridor.” See page 3.2-33 of the FEIS. That was Sound Transit and WSDOT’s joint determination as of May 2004 and through the design period of 2025 ---- a determination contrary to the recent assertions of WSDOT that the center lanes are “not presently needed”.

RCW 47.12.120, governing leases of highway land, specifically states that the lands can only be leased if they are “not presently needed” for highway purposes. Unlike RCW 47.12.063, which governs the sale of surplus highway lands and includes explicit statutory language that WSDOT is authorized to make the determination whether lands are needed for a highway purpose, RCW 47.12.120 does not give WSDOT the discretion to determine that the center lanes, which continue to be used by tens of thousands of carpools, vanpools, buses and single occupant

vehicles to and from Mercer Island, are not presently needed.

When a statute is clear on its face, courts must give effect to its plain meaning and should assume the legislature means exactly what it says. “The court may not add language to a clear statute, even if it believes the Legislature intended something else but failed to express it adequately.” *State v. Chester*, 133 Wn.2d 15, 21, 940 P.2d 1374 (1997).

Likewise, WAC 468-30-110, which also governs leases of airspace on state highways for nonhighway use, states:

(7) No use of such space shall be allowed which subjects the highway facility or the public to undue risk or impairs the use of the facility for highway purposes.

(emphasis added). Again, WAC 468-30-110, like RCW 47.12.120, does not contain any language giving the WSDOT the sole discretion to determine whether use of highway airspace impairs the use of the facility for highway purposes. There can be no argument that the lease of the Interstate 90 center lanes will not only impair, but completely eliminate the use of the center lanes for highway purposes.

(2) The Interstate 90 Center Lanes are Presently Needed for a Vital Highway Purpose

The Final Environmental Impact Statement (FEIS) for the I-90 Two-Way Transit/HOV Operations project states that there were over 12,500 vehicle trips per weekday on Interstate 90’s center lanes on the

floating bridges, which amount to approximately 8.3 percent of the weekday corridor volume. See FEIS at page 3.2-4. Clearly, there should be no argument that the center lanes of Interstate 90 are surplus lands lying idle. They are heavily used highway lanes which provide a vital connection and mobility for the residents, schools and businesses of Mercer Island, as well as vital highway lanes for residents of other communities who use the center lanes between Seattle and Mercer Island as single occupancy drivers, carpools, vanpools and bus riders.

WSDOT's plan to re-configure the center lanes for exclusive use by light rail will have a profound negative impact on Mercer Island residents and other I-90 highway users when the total lane capacity of Interstate 90 is reduced from ten (10) lanes to eight and all motor vehicle traffic is displaced out of the center roadway. Sound Transit and WSDOT admit in the 2004 FEIS that added capacity of ten (10) motor vehicle lanes is needed and necessary.

Under the current configuration (before the R8-A roadway project is completed), during peak commuting hours motor vehicle drivers have a total of five highway lanes in the peak direction (three general purpose lanes and two HOV lanes). Under the planned R8-A configuration, there would be six highway lanes flowing in the peak direction (three general purpose lanes and one new HOV lane in the outer bridge decks and two

reversible HOV lanes in the center roadway with Mercer Island traffic continuing to share the two center lanes).

With light rail in the center lanes, eliminating highway use of those two lanes, there would be a 20% reduction in lane capacity during the morning and afternoon peak commute hours from the current lane capacity/configuration, and a 33% percent reduction in lane capacity during the morning and afternoon peak commute hours from the needed 10 lane configuration of R8-A.

Concurrent with loss of highway lane capacity is an increase in travel time and highway congestion. Light rail is predicted to increase vehicle delay on the Interstate 90 bridge by 27% during the morning commute and 24% in the afternoon commute. See Michael Ennis, *Part IV: Light Rail and Interstate 90* (available at www.washingtonpolicy.org/Centers/transportation/policynote/07_ennis_partiv.html) (based on data from Interstate 90 Center Roadway Study completed by WSDOT in July 2006). This added congestion will not only affect those who live on Mercer Island but those who work, go to school, deliver goods and services, and do business there as well. The economic effect on property values and the desirability of Mercer Island as a location for homes and business will be likewise negatively impacted by the loss of highway use of the two center lanes.

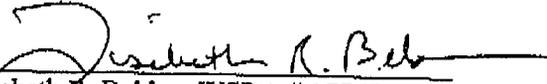
D. CONCLUSION

WSDOT lacks the authority to lease the existing and heavily used highway lanes of Interstate 90 to Sound Transit for a non-highway use by fabricating a determination that the lanes are not presently needed. The center lanes are vitally important to and obviously presently needed for highway purposes.

WSDOT is not proposing here to lease an unused grassy medium strip, or vacant and unused highway lands. The I-90 express lanes are existing, paved and used highway road lanes that have been heavily used since they were first built with protected 18th Amendment funds, and they would continue to be heavily used by highway vehicles for the lifetime of the floating bridges.

Leasing the two center lanes to Sound Transit for exclusive rail use --- a non-highway use --- would permanently impair the highway lanes for highway purposes, in violation of Washington law. The elimination of the center lanes would have a severe negative effect on Mercer Island and on other users of Interstate 90. The Court should grant the petitioners' writ and prohibit WSDOT from acting in violation of the Constitution and its statutory authority.

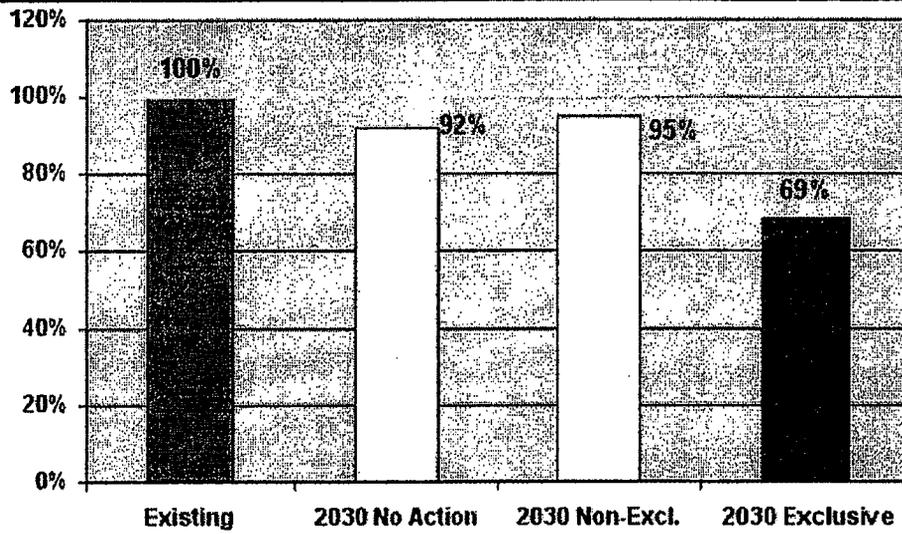
Dated this 16th day of August 2010.

By: 
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APPENDIX A

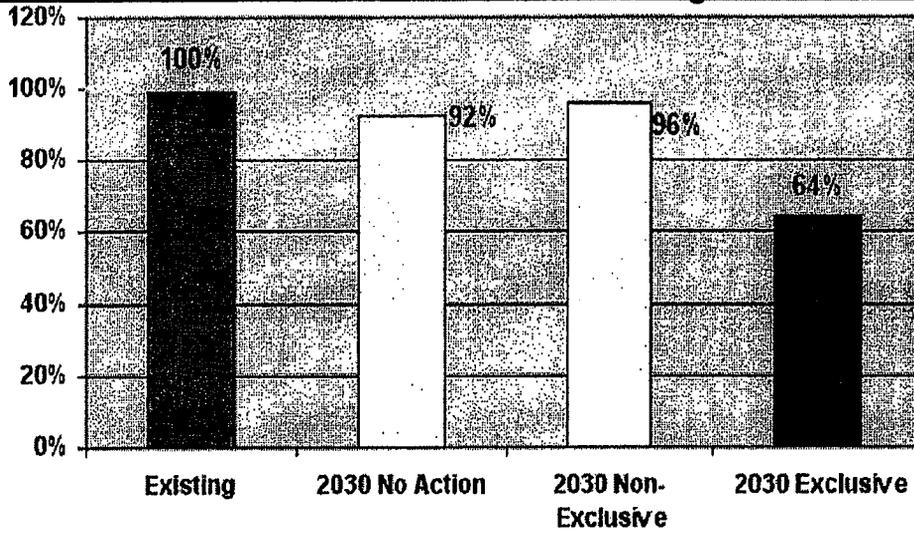
Change in Vehicle Through-put

AM Peak Hour westbound, I-90 at East Channel Bridge



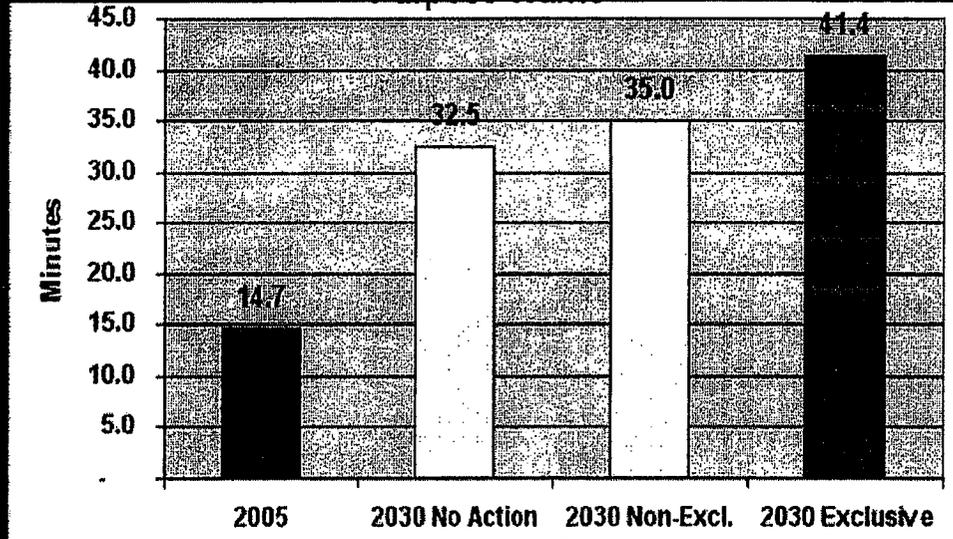
Change in Truck Through-put

AM Peak Hour, Westbound at East Channel Bridge



Increased Trip Time

AM Peak Trip Time, Eastgate to Seattle, General Purpose Traffic



Change in Person Through-put

Change in Person Through-Put, AM Peak Hour, Westbound at East Channel Bridge
(Transit Maintains Existing Market Share)

