

No. 83349-4

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IN THE SUPREME COURT  
OF THE STATE OF WASHINGTON

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KEMPER FREEMAN, JIM HORN, STEVE STIVALA, KEN COLLINS,  
MICHAEL DUNMIRE, SARAH RINLAUG, 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.

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BRIEF OF RESPONDENT  
CENTRAL PUGET SOUND REGIONAL TRANSIT AUTHORITY

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CENTRAL PUGET SOUND  
REGIONAL TRANSIT AUTHORITY

Desmond L. Brown, WSBA # 16232

CENTRAL PUGET SOUND  
REGIONAL TRANSIT AUTHORITY  
401 South Jackson  
Seattle, WA 98104  
(206) 398-5000

K&L GATES LLP

Paul J. Lawrence, WSBA # 13557  
Matthew J. Segal, WSBA # 29797  
Jessica A. Skelton, WSBA # 36748

K&L Gates llp  
925 Fourth Avenue, Suite 2900  
Seattle, WA 98104  
(206) 623-7580

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## I. INTRODUCTION

Petitioners' request that this Court exercise its original writ jurisdiction based on an alleged violation of the 18<sup>th</sup> Amendment to the Washington Constitution (article II, section 40) should be denied because this case does not involve a ministerial act that would be subject to a writ.

Petitioners assert that the 18<sup>th</sup> Amendment prevents the conversion of the two Interstate 90 ("I-90") center lanes to light-rail use because motor vehicle funds were used for the State's less than 15 percent share of the cost to construct the I-90 segment between Seattle and Bellevue. But, Sound Transit will reimburse the Motor Vehicle Fund for the fair market value of any motor vehicle taxes used to construct the center lanes, and will pay fair market rental value to lease lanes for light-rail use. No motor vehicle funds will be used to construct light rail in the I-90 center lanes. Sound Transit also will pay the cost to provide two replacement high occupancy vehicle ("HOV") lanes on the outer roadway.

The 18<sup>th</sup> Amendment is concerned with how motor vehicle funds are used, not how highways are used. The fact that less than 15 percent of the cost of the I-90 segment was drawn from the Motor Vehicle Fund does not require that the center lanes, originally dedicated for transit use through a 1976 multi-jurisdictional memorandum agreement ("Memorandum Agreement") be used for automobile traffic in perpetuity. Full and

fair reimbursement of the Motor Vehicle Fund investment is all that the 18<sup>th</sup> Amendment requires. Petitioners' 18<sup>th</sup> Amendment claim regarding a 2009 legislative appropriation to value the center lanes is even more attenuated. This appropriation was made for a valid highway purpose, to assure that the value of the lanes was fairly calculated to reimburse the Motor Vehicle Fund for any motor vehicle fees or gas taxes that may have been invested in the center lanes.

Nor, as Petitioners finally argue, do the various sale and lease statutes applicable to property held by the Washington State Department of Transportation ("WSDOT") justify issuance of a writ. These general statutes do not apply to the I-90 center lanes because the use and disposition of those lanes are governed by specific legislative provisions authorizing the 1976 Memorandum Agreement and its amendments. Even if the cited statutes did apply to the center lanes, a writ is not justified because the statutes are satisfied.

Petitioners are longtime opponents of light rail.<sup>1</sup> But the Legislature, local governments, and the United States government have worked

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<sup>1</sup> See Katherine Long, *Kemper Freeman Is Suing to Stop Light-Rail Expansion to Eastside*, SEATTLE TIMES, May 2, 2010, at A1, A20, available at [http://seattletimes.nwsourc.com/html/localnews/011756951\\_kemper02m.html](http://seattletimes.nwsourc.com/html/localnews/011756951_kemper02m.html). In this same news article, Petitioners' counsel refers to light rail as "nuts." *Id.* at A20.

together for decades to reach common ground on how I-90 should be constructed and operated, which includes light rail in the center lanes. Local voters affirmed this decision when they overwhelmingly approved funding for the construction of a light-rail system to be operated in the center lanes.<sup>2</sup> A writ should not issue to override these discretionary policy determinations.

Because Petitioners fail to establish a right to extraordinary relief under this Court's original writ jurisdiction, relief should be denied, and the case dismissed.

## **II. COUNTERSTATEMENT OF ISSUES**

- A. Should Petitioners be denied a writ because the writ of mandamus they now seek is different than the writ of prohibition in their petition, and because they cannot identify any ministerial act subject to mandamus?
- B. Are the requirements of the 18<sup>th</sup> Amendment to the Washington Constitution, which dictates only that motor vehicle funds be used exclusively for highway purposes, met where (1) no motor vehicle funds will be used to construct light rail in the I-90 center lanes,

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<sup>2</sup> See AF ¶ 23, Ex. E (*Sound Transit 2: A Mass Transit Guide*) at 7 (illustrations depicting the current I-90 design and the proposed design with light rail in the center transit lanes and HOV lanes moved to outer lanes). The plan was approved by voters in November 2008. AF ¶ 23.

and (2) Sound Transit will pay the appraised value of the State's investment from the Motor Vehicle Fund before converting those lanes to light rail, plus the fair market rental value to lease the transit lanes?

- C. Are the general sale and lease statutes in chapter 47.12 RCW inapplicable to the use of the I-90 center lanes for light rail, when the Legislature has adopted more specific statutory authority governing the use and transfer of the lanes for exclusive transit purposes?
- D. Should Petitioners' request for attorney fees under the common fund doctrine be denied, when Petitioners have not prevailed in preventing the expenditure of any motor vehicle funds, and no common fund will be created?

### **III. COUNTERSTATEMENT OF FACTS**

Before construction began, the I-90 center lanes between Seattle and Bellevue were dedicated to transit use, ultimately agreed upon as light rail. This process occurred through a series of legislatively-authorized agreements between the State and local jurisdictions dating back over thirty years, beginning with the 1976 Memorandum Agreement.

Following that Agreement, the federal government conditioned its funding grant (which paid for more than 85 percent of the costs to construct the I-90 segment between Seattle and Bellevue), in part, on the State's

agreement to permanently dedicate the center lanes for transit. In 2004, following substantial planning and analysis, Sound Transit, WSDOT, and local jurisdictions amended the 1976 Memorandum Agreement and resolved that the ultimate configuration of I-90 was high-capacity transit (defined as light rail, monorail, or the equivalent) in the center lanes with HOV lanes on the outer roadways. A project to provide the additional HOV lanes on the outer roadway, R-8A, was approved in part because it would best accommodate rail transit in the center transit lanes.

In 2008, local voters approved funding for light rail in the center transit lanes. The Legislature identified a process to value the center lanes. WSDOT and Sound Transit followed this process, agreed on the compensation to be paid, and began constructing the new HOV lanes and related improvements. Now, decades after the original policy decision to construct the center lanes to be convertible to fixed guideway transit use, and with construction of R-8A underway, Petitioners seek a writ of prohibition to restrain use of the center lanes for light rail.

**A. The Center Lanes Were Permanently Dedicated to Transit Use Before Construction of the Seattle-Bellevue Segment.**

Long before they were built, the I-90 center lanes between Bellevue and Seattle were dedicated to transit use as a legislatively-sponsored compromise. Starting in 1944 and continuing into the 1960s, the State proposed to build, under the terms of the Federal-Aid Highways

Act, 23 U.S.C. § 101 *et seq.*, a new section of I-90 between existing Interstates 5 and 405. *See Lathan v. Volpe*, 455 F.2d 1111, 1114 (9th Cir. 1971) (“*Lathan I*”). In 1957, the Washington Department of Highways (predecessor to WSDOT) began engineering and design studies on improvement of the Seattle-Bellevue segment. *Seattle Bldg. & Constr. Trades Council v. City of Seattle*, 94 Wn.2d 740, 742, 620 P.2d 82 (1980).

By 1963, the State had selected the location for the new I-90 segment, but construction was delayed by various legal proceedings concerning relocation, environmental, and transportation statutes and regulations. *See Lathan I*, 455 F.2d at 1114; *Seattle Bldg.*, 94 Wn.2d at 743-44 & n.2; *Lathan v. Volpe*, 350 F. Supp. 262, 264-65 (W.D. Wash. 1972) (“*Lathan II*”), *vacated in part by Lathan v. Brinegar*, 506 F.2d 677, 681 (9th Cir. 1974); *Adler v. Lewis*, 675 F.2d 1085, 1088 (9th Cir. 1982).

A final design emerged in 1971, and was then subject to statutory review hearings. *Seattle Bldg.*, 94 Wn.2d at 743. After those hearings, WSDOT adopted the proposed design, but the City of Seattle objected and requested further hearings before a Board of Review.<sup>3</sup> *Id.* The Board reviewed the design and issued findings. *See id.*; *see also* RCW 47.52.180.<sup>4</sup>

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<sup>3</sup> *See* RCW 42.52.137, .139.

<sup>4</sup> *See* Appendix F for the text of Washington Constitution article II, section

Notwithstanding the Board of Review's decision, "serious differences of opinion" about the I-90 segment remained between the various local governments, some of which "pertained to the subject of mass transit." *Seattle Bldg.*, 94 Wn.2d at 743-44; *see also* AF ¶ 4. By 1975, nearly twenty years after the original studies of the segment began, the Legislature passed a law "designed to terminate the debate." *Seattle Bldg.*, 94 Wn.2d at 744. The Legislature proclaimed that "further protracted delay in establishing the transportation system (I-90) is contrary to the interest of the people of this state and can no longer be tolerated as acceptable public administration." *Id.* (quoting RCW 47.20.645); *see also* RCW 47.20.647. Three public hearings on the proposed I-90 segment then commenced in early 1976. *Adler*, 675 F.2d at 1089.

In the meantime, negotiations regarding the proposed segment continued between the State; the cities of Seattle, Mercer Island, and Bellevue; King County; and the Municipality of Metropolitan Seattle. *Id.*; *Seattle Bldg.*, 94 Wn.2d at 745. The negotiations culminated in a December, 1976 "Memorandum Agreement."<sup>5</sup> AF ¶ 5, Ex. A; *Seattle Bldg.*, 94 Wn.2d at 745.

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40; RCW 47.04.081-.083; RCW 47.12.120; RCW 47.20.645, .647; RCW 47.52.090; and RCW 47.52.180, cited herein.

<sup>5</sup> By resolution in November 1976, the Washington Highway Commission authorized approval of the Memorandum Agreement subject to final

In the Memorandum Agreement, the jurisdictions agreed to support construction of a “facility which will accommodate no more than eight motor vehicle lanes,” with “two lanes designed for and permanently committed to transit use.” AF, Ex. A ¶¶ 1 and 1(b) (emphasis added).

The Agreement further established criteria to modify I-90’s mode of operation as circumstances dictated:

The subsequent mode of operation of the facility shall be based upon existing needs as determined by the [Highway] Commission in consultation with the affected jurisdictions, pursuant to paragraph 14 of this agreement.<sup>6</sup> That determination will consider efficient transit flow, equitable

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environmental review. *See* Appendix A.

<sup>6</sup> Paragraph 14 of the Memorandum Agreement limits future actions in contravention of the Memorandum Agreement as follows:

This agreement represents substantial accommodations by the parties of positions held heretofore. Such accommodations were made in order to achieve a unanimous agreement upon which to proceed with the design and construction of I-90 and related projects. This agreement, therefore, sets forth the express intent of the existing governing bodies that the parties to this agreement understand that their respective governing bodies are limited in the degree to which they can bind their successors . . . .  
*Accordingly, the Commission will take no action which would result in a major change in either the operation or the capacity of the I-90 facility without prior consultation with and involvement of the other parties to this agreement, with the intent that concurrence of the parties be a prerequisite to Commission action to the greatest extent possible under law.*

(Emphasis added.)

access for Mercer Island and Bellevue traffic, and traffic-related impacts on Seattle.

*Id.*, ¶ 1(e). The Agreement also provided that the two transit lanes “shall be designed and constructed so that conversion of all or part of the transit roadway to fixed guideway is possible.” *Id.*, ¶ 2 (emphasis added).

**B. The State and Federal Governments Support the Plan for Transit Use of I-90.**

After the State and local jurisdictions signed the Memorandum Agreement, the Legislature amended RCW 47.52.180 (the Board of Review statute) to provide that “the proposed plan by the board of review might thereafter be further modified by a stipulation of the parties.” *Seattle Bldg.*, 94 Wn.2d at 745 (citing Laws of 1977, ch. 77, s 3). In response to this enactment, the Washington Transportation Commission (successor to the Highway Commission), passed a resolution adopting the Memorandum Agreement as part of the approved plan for I-90. *See* Appendix B. “The decision of the board, as well as the memorandum agreement, approved the design of the highway as a limited access facility with provision for mass transit.” *Seattle Bldg.*, 94 Wn.2d at 748.

In 1978, U.S. Secretary of Transportation Brock Adams issued a Decision on I-90 (“Decision Document”) approving federal funding to construct the proposed I-90 segment. AF ¶ 6 & Ex. B. The Decision Document noted that the State proposed “to build a unique interstate

facility which includes both highway and transit elements, funded with 90 percent federal funds.” *Id.*, Ex. B at 1. The Decision Document also acknowledged that the local, regional, and State support for the I-90 project, as evidenced by the Memorandum Agreement, was “critical” to Secretary Adams’ decision to approve funding for the project. *Id.* at 4. As a result, Secretary Adams conditioned his approval of federal funding, in part, on the State’s commitment in the Memorandum Agreement that “public transportation shall permanently have first priority in the use of the center lanes” of I-90. *Id.* at 6 (emphasis added).

The I-90 tunnel, road, and bridge structures between Seattle and Bellevue were operationally complete in 1993. AF ¶ 3. The U.S. Department of Transportation paid \$1.035 billion (85.49 percent), and the State paid \$175.7 million (14.51 percent) of the construction costs. AF ¶ 8; *see also* AF ¶ 31, Ex. H at 54 (addendum to appraisal entitled “WSDOT Cost of I-90 Seattle to Bellevue Way,” also attached hereto as Appendix C). Since the completion of the I-90 center lanes, their use has been restricted to HOVs, including buses, carpools, and vanpools, and to general traffic traveling to or from Mercer Island. AF ¶ 11.

**C. Sound Transit, WSDOT, and Local Jurisdictions Agree to “R-8A” and the Use of the I-90 Center Lanes for Light Rail.**

In 1992, the Legislature authorized certain urban counties to establish regional transit authorities to develop and operate high-capacity

transportation systems. RCW 81.112.030. Under this statute, the King, Pierce, and Snohomish County Councils voted to create the Central Puget Sound Regional Transit Authority (“Sound Transit”). AF ¶ 13. In 1996, local voters approved the *Sound Move* plan, which provides the foundation of Sound Transit’s mass transit system of regional express buses, commuter rail, and light rail. *See Pierce County v. State*, 159 Wn.2d 16, 23, 148 P.3d 1002 (2006); AF, ¶ 13.

The *Sound Move* plan included an Interstate 90 Two-Way Transit and HOV Operations Project. *See Sound Move*, Appendix A-9, attached hereto as Appendix D. This project to convert the center transit lanes from one-way reversible lanes to two-way HOV operations was abandoned because the parties to the 1976 Memorandum Agreement, whose approval was required, did not approve the project as originally proposed. *See* Sound Transit Resolution R2004-09 at 3, attached hereto as Appendix E.<sup>7</sup>

Because the 1976 Memorandum Agreement required WSDOT to consult with the local jurisdictions before modifying I-90 operations, the I-90 Steering Committee was created to guide development of an acceptable transit/HOV alternative in 1998. *See id.* at 1. The Committee’s members included the parties to the 1976 Memorandum Agreement, along

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<sup>7</sup> Also available at <http://www.soundtransit.org/About-Us/Board-of-Directors/Resolutions/2004-Resolutions.xml>.

with Sound Transit, the Federal Highway Administration, and the Federal Transit Administration. *Id.* From 1998 to 2004, Sound Transit, in conjunction with WSDOT, planned and conducted environmental review of potential two-way transit and HOV operations on the I-90 segment between Seattle and Bellevue. AF ¶ 14. An environmental impact statement then evaluated five alternatives for the center transit lanes. AF ¶ 17 (Record of Decision at 1).<sup>8</sup>

In 2003, the Steering Committee selected the alternative designated “R-8A” as the approved design. App. E (Sound Transit Resolution R2004-09) at 4. R-8A added new HOV lanes on the I-90 outer roadway and continued reversible HOV lanes in the center transit lanes. *See id.* at 2. In approving R-8A, the Steering Committee did not identify the reversible HOV operations as the final use of the center transit lanes; rather, it identified “its ultimate configuration for I-90 [to be] high-capacity transit in the center roadway with Alternative R8-A as the first step toward achieving its ultimate configuration for I-90.” *Id.*

In May 2004, after completing the environmental review process, Sound Transit, WSDOT, and the Federal Highway Administration issued a final environmental impact statement (“FEIS”) identifying the preferred

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<sup>8</sup> Available at [http://www.soundtransit.org/documents/pdf/projects/bus/i90/I-90\\_Record\\_of\\_Decision\\_September\\_2004.pdf](http://www.soundtransit.org/documents/pdf/projects/bus/i90/I-90_Record_of_Decision_September_2004.pdf).

configuration of I-90 between Bellevue and Seattle as alternative “R-8A.”

AF ¶ 15.

In August 2004, the Washington State Transportation Commission, Sound Transit, and the local governments that signed the 1976 Memorandum Agreement, amended the Agreement to reflect their decision that “the ultimate configuration for I-90 between Bellevue, Mercer Island, and Seattle should be defined as High Capacity Transit in the center roadway and HOV lanes in the outer roadways.” AF ¶ 16, Ex. C at 2. The 2004 Amendment defines High Capacity Transit as “a transit system operating in dedicated right-of-way such as light rail, monorail, or substantially equivalent system.” *Id.* The parties to the 2004 Amendment resolved that “[c]onstruction of R-8A should occur as soon as possible as a first step to the ultimate configuration” and “[u]pon completion of R-8A, [the parties would] move as quickly as possible to construct High Capacity Transit in the center lanes.” *Id.* at 3 (emphasis added).<sup>9</sup>

**D. The Federal Government Approves the Plan for R-8A, and Local Voters Approve Funding for Light Rail on I-90.**

One month after the 2004 Amendment was completed, the Federal Highway Administration issued a Record of Decision (“ROD”) selecting

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<sup>9</sup> In its resolution authorizing execution of the 2004 Amendment, the Sound Transit Board also amended the *Sound Move* plan to provide for implementation of R-8A with high-capacity transit deployed in the center

R-8A as the alternative to be built for the Interstate 90 Two-Way Transit and HOV Operations Project. AF ¶ 17. Petitioners erroneously contend that “R-8A provided for ten, not eight, lanes for general vehicular traffic” and that the ROD “promised” that R-8A would retain existing reversible operations in the center roadway. Brief of Petitioners (“Pet. Br.”) at 9; *see also id.*, n.7. The ROD confirms, however, that a key reason R-8A was selected was that it “would accommodate the ultimate configuration of I-90 (High Capacity Transit in the center lanes). Alternative R-8A adds HOV lanes on the outer roadways which would provide for reliable transit and HOV operations with the ultimate roadway configuration.” AF ¶ 17 (ROD at 10).<sup>10</sup> Thus, the ROD recognized and relied upon the ultimate dedication of the I-90 center lanes to high-capacity transit, as agreed in the Memorandum Agreement and 2004 Amendment.<sup>11</sup> AF ¶ 5, Ex. A ¶¶ 1(b) and (2); AF ¶ 16, Ex. C at 2.

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lanes. *See* App. E (Sound Transit Resolution R2004-09) at 4.

<sup>10</sup> Available at [http://www.soundtransit.org/documents/pdf/projects/bus/i90/I-90\\_Record\\_of\\_Decision\\_September\\_2004.pdf](http://www.soundtransit.org/documents/pdf/projects/bus/i90/I-90_Record_of_Decision_September_2004.pdf). *See also* FEIS at Summary, S-20 (“Alternative R-8A would be the most adaptable alternative in terms of compatibility for conversion of the I-90 center roadway to light rail use. Alternative R-8A would reduce both the construction impacts and long-term impacts of light rail operations on I-90. Alternative R-8A would prepare the corridor for future light rail in the I-90 center roadway . . .”), *available at* <http://www.soundtransit.org/x1290.xml>.

<sup>11</sup> *See also* ROD at 11-12 (stating that R-8A was selected in part because

Between 2004 and 2008, Sound Transit conducted additional planning, environmental review, and conceptual engineering to evaluate high-capacity transit between Seattle and Bellevue over I-90. *See* AF ¶¶ 23, 25. In 2008, local voters approved, by a 57 percent majority vote, funding for the *Sound Transit 2 Regional Transit Plan* (“*ST 2*”), which includes 36 miles of new light rail from Lynnwood to Federal Way, and from Seattle to Mercer Island, Bellevue, and Overlake/Redmond (“*East Link*”) using the I-90 center transit lanes to cross Lake Washington. *See* AF ¶ 23, Ex. E at 6-7. The *ST 2* plan encompasses sufficient funding to complete the construction of the new R-8A HOV lanes on the I-90 outer roadway. *See id.* at 29. The *ST 2* proposal to voters expressly included the placement of light rail in the I-90 center transit lanes. *See id.* at 7.

In December 2008, Sound Transit, WSDOT, and the Federal Transit Administration released a draft environmental impact statement (“*DEIS*”) for *East Link*. AF ¶ 25. The public comment period for the *DEIS* has ended, and a final environmental impact statement is now pending. *See DEIS Appendix B at B-9.*<sup>12</sup>

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of it was consistent with the 1976 Memorandum Agreement).

<sup>12</sup> Available at <http://www.soundtransit.org/Projects-Home/East-Link-Project/East-Link-DEIS-App.xml>.

According to 2008 data, the I-90 bridge carries an average of approximately 142,500 vehicles per day, with 132,750 vehicles traveling on the outer roadways and 9,720 traveling in the center transit lanes. AF ¶ 3. The DEIS confirms that the use of the I-90 center transit lanes for light rail will not reduce capacity or access, or increase travel times.<sup>13</sup>

**E. The Legislature Establishes a Process to Value the Use of the I-90 Center Lanes for Light Rail.**

During the 2009 session, the Legislature passed Engrossed Senate Substitute Bill 5352 (“ESSB 5352”), which appropriated funds for a legislatively defined process to determine the value of the I-90 center transit lanes. AF ¶ 30. The legislation appropriated \$300,000 “for an independent analysis of methodologies to value the reversible lanes on

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<sup>13</sup> The DEIS undertook a comprehensive analysis of the traffic consequences of converting the I-90 center lanes for light rail. *See* DEIS at 3-1, available at <http://www.soundtransit.org/Projects-Home/East-Link-Project/East-Link-DEIS.xml>. The DEIS found that adding light rail to the center lanes would improve vehicle throughput in the reverse-peak direction and maintain similar vehicle throughput in the peak direction, with future improvements likely. *Id.* at 3-38 (Table 3-19) and 3-39. Overall person throughput, which is a superior measure of system efficiency, would be significantly increased with the addition of light rail. *Id.* at 3-28-3-29, 3-35 and Exhibit 3-16. Light rail riders would experience improved travel times and travel times for automobiles and trucks would improve or remain similar. *Id.* at 3-20, 3-39. Petitioners incorrectly state that a WSDOT study concluded that “placing light rail on Interstate 90 will reduce overall vehicle capacity, including freight capacity, and increase travel time for drivers crossing Lake Washington on Interstate 90.” Pet. Br. at 14, n. 15. In fact, this study did not evaluate light rail in the center lanes, whereas the more recent DEIS did.

Interstate 90 to be used for high capacity transit pursuant to [the *ST 2* plan] approved by voters in November 2008.” *Id.*, Ex: G at 7 (ESSB 5352, Laws of 2009, ch. 470, § 204(3)). The Legislature included the following condition on certain appropriations to WSDOT:

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. Such agreement shall be completed no later than December 1, 2009.

*Id.* at 43 (Laws of 2009, ch. 470, § 306(17)).

A draft of the independent analysis called for by the Legislature was completed on July 20, 2009. *See* AF ¶ 31. The Joint Transportation Committee of the Legislature administered the appropriated funds and paid a total of \$250,000 for the work authorized by the Legislature, with the final payment made in November 2009. *See* Commissioner’s Ruling Denying Motion for Stay (April 12, 2010) at 6 (finding that Respondents had shown the last payment already has been made and that Petitioners had not shown otherwise).

After reviewing the independent analysis required by ESSB 5352, both WSDOT and Sound Transit issued instructions to an independent appraiser. AF ¶ 31. The appraisal prepared for Sound Transit, which

followed the appraisal instructions developed by the independent consultants, valued a permanent easement on the I-90 center transit lanes. AF ¶ 31, Ex. H at 8-10. Based on its current value, the appraisal valued the State's 14.51 percent investment of motor vehicle funds in the overall existing I-90 improvements between Bellevue and Seattle at \$69.2 million. *Id.* at 53. The appraisal valued a permanent easement to use the center roadway for light rail at \$31.6 million. *Id.*

WSDOT directed the appraiser to follow the Uniform Standards of Professional Appraisal Practice, the Code of Professional Ethics and the Standards of Professional Appraisal Practice of the Appraisal Institute, and Chapter Four of the WSDOT Right-of-Way Manual. *See* AF ¶ 32, Ex. I at 8. The WSDOT appraisal valued an unencumbered fee interest in the land under the center roadway at \$70.1 million and valued a 20-year lease of the center roadway at \$49.4 million. *See id.* at 20.

In the meantime, the U.S. Department of Transportation confirmed that the Federal Highway Administration ("FHWA") would not require reimbursement of the more than 85 percent federal share of funds used to construct the I-90 center transit lanes if the lanes were converted to light-rail use. AF ¶ 33, Ex. J. A December 1, 2009 letter from the FHWA states that "the use of the center lanes of the bridge for transit was contemplated when the bridge received Federal approval. Use of

this portion of the bridge for light rail is consistent with both the letter and the spirit of the original Record of Decision.” *Id.*

**F. Sound Transit and WSDOT Agree on Just Compensation for Use of the Center Lanes for Light Rail and Begin to Construct R-8A.**

In January 2010, WSDOT and Sound Transit tentatively agreed, subject to approval of a final contract, to the principal terms by which Sound Transit will use the center transit lanes for light rail. *See* AF ¶ 34, Ex. K. In summary, Sound Transit will pay WSDOT the following:

- (a) an amount equal to the current value of the State’s share of the cost to construct the center lanes (\$69.2 million) to reimburse the State for any gas or motor vehicle excise taxes used to construct the center lanes; plus
- (b) the 40-year rental value of the lanes at the time light-rail service begins on I-90. *Id.* at 2-3. In exchange, WSDOT will lease the center transit lanes to Sound Transit for 40 years, with an option to renew for an additional 35 years by mutual agreement. *Id.* at 2.

The rental value for the lease will be based on the \$70.1 million land value contained in the independent appraisal prepared for WSDOT, updated to the then current land value on the date light-rail service begins. *Id.* at 2. Sound Transit’s payments to fund the construction cost to provide two-way eastbound and westbound HOV lanes on the I-90 outer roadway

to replace the center lanes will be credited against the amounts owed WSDOT for the light rail use of the center transit lanes. *Id.*

The center transit lanes will not be used for light rail until the two replacement HOV lanes are complete and open to traffic. *Id.* at 5; *see also* AF ¶¶ 19-21. Thus, although Sound Transit has commenced the planning, environmental and engineering design work required before the center lanes will be closed, construction to convert the center transit lanes to light rail will not occur until approximately 2015. *See* AF ¶ 34, Ex. K at 5.

Sound Transit also will pay for the construction work necessary to add two HOV lanes (eastbound and westbound) and access ramps to I-90 between Seattle and Bellevue before construction on the center transit lanes begins. *See* AF ¶¶ 18-21. The access ramp and new westbound HOV lane between Mercer Island and Bellevue are complete and open to vehicular traffic. AF ¶ 19.<sup>14</sup> The eastbound HOV lane and access ramp between Mercer Island and Bellevue are scheduled to be complete in late 2011. AF ¶ 20. Sound Transit has agreed to pay WSDOT to construct this lane and access ramp. *Id.*

The new eastbound and westbound HOV lanes between Seattle and Mercer Island are currently in the engineering design phase. AF ¶ 21.

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<sup>14</sup> Sound Transit agreed to contribute \$25.8 million, but ultimately paid \$24.8 million, reflecting the actual cost to construct this lane and ramp.

These lanes are scheduled to be completed in December 2014. AF ¶ 34, Ex. K at 5. Sound Transit has agreed to pay \$113.1 million of the \$123.7 million estimated total cost to design and build these lanes. AF ¶ 21. WSDOT will pay \$10.6 million of the engineering design costs of these highway lanes. *Id.*

Construction to convert the center transit lanes to light-rail use is scheduled to begin in 2015, and end by 2020. AF ¶ 34, Ex. K at 5.<sup>15</sup>

**G. Petitioners File an Original Action Seeking a Writ of Prohibition to Restrain Use of the Center Lanes for Light Rail.**

Several months after the Legislature appropriated funds to value the center transit lanes, Petitioners filed this Petition Against State Officer (“Petition”) as an original action before this Court. *See generally* Petition. The Petition requested a “writ of prohibition” preventing Governor

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*See* AF ¶ 19.

<sup>15</sup> Sound Transit’s light-rail project has been on schedule and under budget since 2001. In 2001 the baseline cost estimate for light rail was established as \$2.4369 billion. The project’s estimated final cost is \$2.3 billion, with a projected surplus of \$137 million. Light rail from Seattle to Tukwila opened on schedule on July 18, 2009, and to Sea-Tac Airport on December 10, 2009. *See* Agency Progress Report at 33, available at [http://www.soundtransit.org/Documents/pdf/projects/regional/apr/201003/Link\\_light\\_rail.pdf](http://www.soundtransit.org/Documents/pdf/projects/regional/apr/201003/Link_light_rail.pdf). The 15-mile line from Seattle to Sea-Tac Airport carries approximately 18,000 daily riders through March 2010. Despite the recession, Sound Transit may meet its 2010 projection of 26,600 daily riders by year’s end. The publication cited by Petitioners includes the wrong date. *See* Pet. Br. at 7, n.6. Sound Transit projects 32,600 daily riders for 2011, not 2010.

Christine O. Gregoire and Secretary Paula J. Hammond (“State Respondents”) “from taking or authorizing any action with respect to the sale, lease, or occupancy of any portion of Interstate 90 to Sound Transit for the purpose of a railway system.” Petition, ¶¶ 4.1-4.2.

This Court has since granted Sound Transit’s motion to intervene, retained consideration of the Petition, and requested that the parties prepare an Agreed Statement of Facts (which they have done).

Petitioners’ opening brief seeks a writ of mandamus rather than a writ of prohibition. *See* Pet. Br. at 21. Two days after filing their brief, Petitioners moved for injunctive relief in a motion entitled Motion for Stay Pursuant to RAP 8.3 (“Injunction Motion”). In denying the motion, Commissioner Goff determined that Petitioners had failed to rebut evidence that “the last payment from the \$300,000 [legislative] appropriation was made in November 2009, and that [Respondents] are unaware of any move to appropriate motor vehicle funds for light rail purposes on I-90” and that “[w]ithout some threat to the fund, petitioners have shown no need for an injunction in this regard.” Ruling Denying Motion for Stay (April 12, 2010) at 6. The Commissioner also seriously questioned whether the Court could issue a writ barring WSDOT from leasing the lanes because under the general leasing statute, RCW 47.12.120, because the decision to lease “calls for the exercise of discretion or judgment, and

by statute that decision seems to be lodged in the department. If that is the case, this court cannot substitute its judgment for that of the department.”

*Id.* at 7.<sup>16</sup>

#### IV. ARGUMENT

##### A. **Petitioners Abandoned Their Claim for a Writ of Prohibition and Are Not Entitled to a Writ of Mandamus Because They Seek to Undo a Discretionary Decision.**

Petitioners have abandoned their claim for a writ of prohibition and now request a writ of mandamus restraining the use of the center lanes for light rail, relief that far exceeds the scope of their original Petition. Petitioners also attempt to undo a discretionary decision in violation of the basic principles of mandamus.

Petitioners originally asked this Court to grant a “writ of prohibition,” preventing the State Respondents “from taking or authorizing any action with respect to the sale, lease, or occupancy of any portion of Interstate 90 to Sound Transit for the purpose of a railway system.” Petition, ¶¶ 4.1-4.2. Petitioners now concede that they are not entitled to a writ of prohibition. *See* Pet. Br. at 21 (opting to pursue a writ of mandamus because “a constitutional writ of prohibition will usually

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<sup>16</sup> For reasons discussed in Section IV(C), *infra*, Sound Transit does not believe that the general leasing statute (RCW 47.12.120) even applies in light of the more specific legislatively approved plan for I-90 as reflected in the 1976 Memorandum of Agreement and 2004 Amendment, and authorized by other specific statutes.

issue against a state officer only if the officer's challenged act is judicial or quasi-judicial in nature" (citing *Citizens Counsel Against Crime v. Bjork*, 84 Wn.2d 891, 893, 529 P.2d 1072 (1975)).<sup>17</sup> A writ of prohibition should not be issued on this basis alone.

Indeed, Petitioners are correct that a writ of prohibition is a "drastic remedy" that is proper only when targeted at a judicial or quasi-judicial body that is about to act in excess of its jurisdiction. *City of Olympia v. Bd. of Comm'rs*, 131 Wn. App. 85, 91, 125 P.3d 997 (2005); see also *Barnes v. Thomas*, 96 Wn.2d 316, 318, 635 P.2d 135 (1981) (a writ of prohibition may issue "only where the tribunal is clearly and inarguably acting in a matter where there is an inherent, entire lack of jurisdiction"). Petitioners have failed to allege, let alone establish, that the State Respondents are judicial or quasi-judicial bodies subject to such a writ or that they are about to act without jurisdiction. To the contrary, as discussed in Section IV(B), *infra*, both the appropriation in ESSB 5352 and the decision to use the I-90 center lanes for light rail are lawful acts not subject to this Court's original jurisdiction. Thus, to the extent

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<sup>17</sup> Petitioners do contend that "[t]he law on whether the constitutional writ of prohibition may only issue as to judicial or quasi-judicial officers is far from clear," but then cite a string of cases that Petitioners admit only summarily grant a writ of prohibition without discussing the constitutional authority to do so. See Pet. Br. at 21, n.20.

Petitioners still seek a writ of prohibition, they have not established any basis for this Court to issue one.

Having failed to identify a basis for a writ of prohibition, the Petitioners now seek, for the first time in their opening brief, a writ of mandamus. But in *SEIU Healthcare 775NW v. Gregoire*, No. 82551-3, 2010 WL 1380168, at \*5 (Wash. Apr. 8, 2010), this Court reaffirmed that “the writ cannot be any more specific than the petition.” (quoting *Walker v. Munro*, 124 Wn.2d 402, 423, 879 P.2d 920 (1994)). In *Walker*, this Court held that “without a request in the petition for a specific writ . . . we will not, on our own, craft such a remedy.” *Id.* Having failed to request a writ of mandamus in their Petition, Petitioners cannot request one now.

Moreover, a writ of mandamus is an extraordinary remedy that “may not be used to compel the performance of acts or duties which involve discretion on the part of a public official.” *Walker*, 124 Wn.2d at 410. Petitioners contend, however, that “mandamus is an appropriate remedy where a petitioner seeks to prohibit a mandatory duty.” Pet. Br. at 21 (quoting *Wash. State Labor Council v. Reed*, 149 Wn.2d 48, 55, 65 P.3d 1203 (2003)). But Petitioners cite only half of the legal standard. In addition to establishing a mandatory duty, this Court confirmed in *SEIU Healthcare* that Petitioners must demonstrate that “the law prescribes and

defines the duty to be performed with such precision and certainty *as to leave nothing* to the exercise of discretion or judgment” such that “the act is ministerial.” *SEIU Healthcare*, 2010 WL 1380168, at \*\*2-3 (quoting *State v. City of Seattle*, 137 Wash. 455, 461, 242 P. 966 (1926) (emphasis in original)).

If the act is not ministerial, it is irrelevant whether or not a mandatory duty exists. *SEIU Healthcare*, 2010 WL 1380168, at n. 8. Petitioners fail to identify any ministerial act to compel through mandamus. Instead, they seek to *undo prior discretionary decisions* of the Legislature, local governments, and local voters, including the legislatively-approved Memorandum Agreement, the 2004 Amendment, and approval of ST2 funding. *See Seattle Bldg.*, 94 Wn.2d at 742-45; *see also* AF ¶ 5 Ex. A; AF ¶ 16, Ex. C.

Petitioners actually seek a declaration that these prior discretionary determinations were invalid, relief that is unavailable under this Court’s writ jurisdiction. *See, e.g., Walker*, 124 Wn.2d at 411 (original jurisdiction does not include declaratory judgment action). Because mandamus does not lie to declare past discretionary decisions invalid, Petitioners request for a writ should be denied.<sup>18</sup> Moreover, as addressed below,

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<sup>18</sup> Petitioners expend significant effort in arguing that this Court should issue a writ, despite prudential limitations, on equitable grounds. *See* Pet.

relief also should be denied because the challenged decisions were entirely lawful.

**B. The 18<sup>th</sup> Amendment Is Not Violated Because Motor Vehicle Funds Will Not Be Used for Light Rail and Sound Transit Will Reimburse the Motor Vehicle Funds Used to Construct the I-90 Segment.**

There is no substantive legal basis to issue a writ. Petitioners allege that the use of the I-90 center transit lanes for light rail would violate the 18<sup>th</sup> Amendment. But the 18<sup>th</sup> Amendment governs the expenditure of motor vehicle funds, not the manner in which WSDOT chooses to operate specific highway lanes or the duration those lanes remain in highway service. After the Motor Vehicle Fund is repaid, the 18<sup>th</sup> Amendment does not require that a highway lane permanently be used for highway purposes because at one time motor vehicle funds partially funded construction of the highway segment. If the motor vehicle funds used to construct a highway lane are returned to the state highway fund,

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Br. at 24-30. As a matter of equity, even if mandamus were an available remedy here, this Court should exercise its judicial discretion to refuse to issue a writ. “A mandamus action lies in equity, and the court may refuse to grant relief where private rights would be unwisely advanced at the expense of public interests.” *SEIU Healthcare*, 2010 WL 1380168, at \*3. Here, voters approved, and the Washington Legislature sanctioned, the plan to construct light rail in the I-90 center transit lanes. *See* AF ¶ 23; *see also* RCW 47.52.090; RCW 47.52.180. Thus, Petitioners should not be permitted to enforce their preferences over the will of the people and its elected representatives, and this Court should further deny Petitioners’ requested relief on this prudential ground.

then a highway lane can be transferred to a third party without violating the 18<sup>th</sup> Amendment.

**1. The 18th Amendment Does Not Perpetually Restrict the Use of Highway Lanes.**

The text of the 18<sup>th</sup> Amendment provides that certain taxes and fees will be applied to a special fund to be disbursed for highway purposes:

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 . . . .

Const., art. II, § 40 (“18<sup>th</sup> Amendment”).

The “special fund” designated in the 18<sup>th</sup> Amendment is the motor vehicle fund, which is codified in RCW 46.68.070:

There is created in the state treasury a permanent fund to be known as the motor vehicle fund to the credit of which shall be deposited all moneys directed by law to be deposited therein. This fund shall be for the use of the state, and through state agencies, for the use of counties, cities, and towns for proper road, street, and highway purposes, including the purposes of RCW 47.30.030.

While the 18<sup>th</sup> Amendment and RCW 46.68.070 provide for limitations on the use of motor vehicle excise taxes and gas taxes, neither restricts how property purchased with those funds may be used in the future if the taxes are repaid before the property is removed from highway use.

This Court has held that the 18<sup>th</sup> Amendment “should be read according to the natural and most obvious import of its framers, without resorting to subtle and forced construction for the purpose of limiting or extending its operation.” *State ex rel. Heavey v. Murphy*, 138 Wn.2d 800, 811, 982 P.2d 611 (1999) (internal citation and quotation marks omitted); *see also State ex rel. O’Connell v. Slavin*, 75 Wn.2d 554, 558, 452 P.2d 943 (1969) (“the words of [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* ... should be used to provide roads, streets and highways on which they could drive.” (emphasis added)). The natural and obvious import of the framers 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.

The history of and commentary surrounding the 18<sup>th</sup> Amendment confirms that its purpose is to prevent the diversion of motor vehicle and gas taxes. Between 1933 and 1943, approximately \$10.5 million of Washington gas tax revenue was diverted to non-highway purposes, mostly to retire the Emergency Relief Bond Issue of 1933.

WASHINGTON’S HIGHWAY, ROAD AND STREET PROBLEM; A REPORT BY  
THE JOINT FACT-FINDING COMMITTEE ON HIGHWAYS, STREETS AND

BRIDGES, 31<sup>st</sup> Sess., at 15 (1949).<sup>19</sup> In response to that diversion, the Legislature enacted the 18<sup>th</sup> Amendment in 1943, and voters adopted the provision in 1944. *See* Laws of 1943, House Joint Resolution No. 4, at 938. The concise statement in the 1944 Voters Pamphlet characterized the proposed amendment as “limiting exclusively to highway purposes the use of motor vehicle license *fees*, excise *taxes* on motor fuels and *other revenue* intended for highway purposes only.” 1944 Voters Pamphlet at 45 (emphasis added).

By 1948, 19 states had enacted analogous constitutional amendments. NATIONAL HIGHWAY USERS CONFERENCE, STATE CONSTITUTIONAL AMENDMENTS DEDICATING SPECIAL MOTOR VEHICLE TAXES TO HIGHWAY PURPOSES 4 (1948). These amendments, including Washington’s, arose from a nationwide effort, led by groups such as the National Highway Users Conference, to encourage the adoption of constitutional provisions limiting the use of motor vehicle and gas taxes to highway purposes. *See id.* at 4, 7-8. The National Highway Users Conference advocated that such constitutional amendments should be “limited to one subject – the protection of highway monies.” *Id.* at 8. The Conference identified three types of diversion, which these constitutional

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<sup>19</sup> *See* Appendix G for copies of the historical materials and commentary cited in this section.

amendments were to address: direct diversion, which occurs when “there is an outright transfer of money from highway revenues to . . . general governmental purposes”; indirect diversion, which occurs when motor vehicle funds are used for “marginal” purposes such as police expenses and street cleaning; and dispersion, which occurs when motor vehicle funds are disbursed to local governments without adequate safeguards. NATIONAL HIGHWAY USERS CONFERENCE, DEDICATION OF SPECIAL HIGHWAY REVENUES TO HIGHWAY PURPOSES 6 (1941). None of these diversions are at issue here.

Accordingly, the plain language, the history of, and the commentary on the 18<sup>th</sup> Amendment reflect a single purpose: to prevent the expenditure of motor vehicle *funds* for non-highway purposes. There is no support for the interpretation that the 18<sup>th</sup> Amendment was intended to provide for a permanent restriction against the lease or transfer of any state improvement purchased in whole or in part with motor vehicle funds, if the funds are repaid so that the highway funds are no longer invested in the property.

**2. Petitioners Have Failed to Establish Any Diversion of Funds in Violation of the 18<sup>th</sup> Amendment.**

Petitioners devote most of their legal argument to the premise that light rail is not a “highway purpose” under the 18<sup>th</sup> Amendment. *See* Pet. Br. at 35-45. There is no dispute on this point. Respondents agree that

light rail is not a dedicated highway purpose under current law. The real issue is whether two transit lanes of an eight-lane highway may be used for light rail after motor vehicle funds are repaid and two replacement lanes are created. Under the 18<sup>th</sup> Amendment, the answer is yes.

Petitioners argue that WSDOT's agreement to allow Sound Transit to use the center transit lanes for light rail purposes would "indirectly" violate the 18<sup>th</sup> Amendment. Pet. Br. at 45-47. Tellingly, Petitioners cite no legal authority and identify no facts to support this conclusion. In a footnote, Petitioners mischaracterize a Washington Attorney General Opinion<sup>20</sup> that directly conflicts with their position.<sup>21</sup> See Pet. Br. at 47, n.31. In this opinion, the Attorney General considered the following question:

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<sup>20</sup> Petitioners concede that Washington Attorney General Opinions, while not binding, are "entitled to great weight from this Court." Pet. Br. at 31, n.26; see also *Wash. Fed'n of State Employees, Council 28, AFL-CIO v. Office of Fin. Mgmt.*, 121 Wn.2d 152, 164, 849 P.2d 1201 (1993) ("Opinions of the Attorney General are entitled to considerable weight, but are not controlling upon this court.").

<sup>21</sup> Rather than addressing the actual conclusion of AGLO 1975 No. 62 that property purchased with motor vehicle funds may be transferred for appropriate consideration, Petitioners state that the opinion requires that the property "must follow the usual process of surplusizing such properties." See Pet. Br. at 47, n.31. For the reasons discussed in Section IV(C), *infra*, there is no requirement that the I-90 center lanes be "surplused." Regardless, the issue of whether property must be surplusized is entirely distinct from the issue of whether lease or transfer in exchange for appropriate consideration satisfies the 18<sup>th</sup> Amendment.

What, if any monetary or other valuable consideration is necessary in order to permit the state highway department to lease or sell to a county or city land previously acquired by the department for highway purposes with money from the state motor vehicle fund?

AGLO 1975 No. 62, at \*1.<sup>22</sup>

In considering this question, the opinion discusses Washington Attorney General Opinion 1951-53 no. 376, in which the Attorney General concluded that land purchased with motor vehicle funds could be transferred to a city for use as a park for no monetary consideration. *Id.* at \*2 (citing AGO 1951-53 No. 376). The 1952 Attorney General Opinion concluded that monetary consideration was not required because “the subject park will be of benefit to the motor vehicle user in much the same way as roadside improvements, which may be constructed by the commission from motor vehicle funds” and, thus, “there would be consideration of an indirect nature returning to the motor vehicle users.” AGO 1951-53 No. 376, at \*2.

Drawing on that opinion, the 1975 Attorney General Opinion concluded that 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,

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<sup>22</sup> See Appendix H for copies of the Washington and out-of-state attorney general opinions cited in this section.

under the particular factual circumstances involved, to avoid an unlawful diversion of motor vehicle funds.” AGLO 1975 No. 62, at \*3. Such consideration may take various forms and “need not necessarily be monetary or be precisely equivalent to the fair market rental or sale value of the subject lands.” *Id.* Thus, as long as necessary consideration is provided, highways paid for with motor vehicle funds may be transferred for non-highway purposes.

Other states with analogous constitutional provisions have not placed substantive restrictions on the lease or transfer of property purchased with funds earmarked for highway purposes, so long as appropriate compensation is paid. For example, in Arizona Opinion of the Attorney General No. I79-319, the Department of Transportation asked whether transfer of a building constructed with motor vehicle funds to the Department of Public Safety required that the fund be reimbursed. The opinion concluded that because the building was purchased with funds earmarked for highway uses only, the highway users’ fund must be reimbursed for the fair market value of the building. Ariz. Op. Att’y Gen No. I79-319, at \*\*1-2 (Dec. 31, 1979); *see also* Penn. Op. Att’y Gen. No. 40, at 103 (June 1, 1973) (department of transportation can lease airplane for highway purposes and allow its employees to use the airplane for non-

highway purposes, so long as the fair market rental value of the non-highway use is returned to the Motor License Fund).

In sum, WSDOT may lease or transfer property purchased with funds earmarked for highway purposes.<sup>23</sup> Any constitutional concerns under the 18<sup>th</sup> Amendment are resolved by the payment of appropriate compensation for property purchased with motor vehicle funds.

**3. Sound Transit Has Committed to Reimburse the Current Market Value of the Funds Used for the Center Lanes, which Satisfies the 18<sup>th</sup> Amendment.**

Sound Transit will fully compensate the Motor Vehicle Fund for the transfer and lease of the center lanes for transit use. The Term Sheet between Sound Transit and WSDOT obligates Sound Transit to fully reimburse WSDOT and the Motor Vehicle Fund for the current fair market value of the State's share of the \$69.2 million cost to construct the two center transit lanes at issue. AF ¶ 34, Ex. K at 3. And Sound Transit will prepay the market value for a 40- year lease when the lease begins in 2015. *Id.* at 2, 5. Had the lease been executed in 2009, that value would

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<sup>23</sup> While these opinions reflect that this issue frequently arises in cases where a state department of transportation is seeking to sell or transfer surplus property, there is also no suggestion in any of these opinions that the department may not transfer property purchased with motor vehicle funds unless it is surplus. For the reasons set forth in Section IV(C), *infra*, there is no requirement that WSDOT determine that the I-90 center transit lanes are surplus, because the lanes already have been dedicated to light rail use in a legislatively-approved process.

have been \$70.1 million. *Id.* at 2. As part of the compensation, Sound Transit will pay the full cost of building two new outer HOV lanes and access ramps for R-8A, at an estimated cost of \$153.2 million. *Id.* at 1.

The amount of Sound Transit's reimbursement was determined by an independent appraiser, using the appraisal instructions developed in the independent analysis directed by the Legislature. AF ¶ 31, Ex. H at 8-10. The appraiser applied accepted appraisal principles (*e.g.*, Replacement Cost and Across-the-Fence) and methodologies designed to ensure that the State is fully reimbursed. *See id.* at 1; AF ¶ 31, Ex. K at 1. For example, the appraisal considered whether the people carrying capacity of the I-90 center lanes would be reduced by the new configuration (it is not). AF ¶ 31, Ex. H at 17. The appraisal also valued the State's interest as if it was owned in fee simple, when in fact, in many locations, the State owns only tunnel easements. *Id.* at 24; AF ¶ 32, Ex. I. at 8. As between the Sound Transit appraisal and WSDOT appraisal, the higher value WSDOT appraisal was applied to determine the compensation. AF ¶ 34, Ex. K at 2. Although AGLO 1975 No. 62 states that consideration under the 18<sup>th</sup> Amendment "need not necessarily be monetary or be precisely equivalent to the fair market rental or sale value of the subject lands," here full and fair market value will be paid. AGLO 1975 No. 62, at \*3.

The Court should disregard Petitioners' unsupported pretext and "slippery slope" arguments that any lease or transfer of the center lanes for light rail would "set a precedent for any municipality to put in motion a procedure to obtain a portion of Interstate 90 for an arguably 'beneficial' but non-highway purpose." *See* Pet. Br. at 46. Such speculation is particularly inapplicable here because the I-90 center lanes originally were "designed for and permanently committed to transit use," AF ¶ 5, Ex. A ¶ 1(b), and were constructed primarily with federal funds conditioned, in part, on this dedication to transit use. AF ¶ 6, Ex. B at 6. Before building the lanes, the State agreed that the center lanes must be designed and constructed to be convertible to fixed guideway for mass transit. AF ¶ 5, Ex. A ¶ 2. The conversion of the I-90 center transit lanes to light rail is the culmination of a process set in motion more than three decades ago, arising from a consensus-building effort between local affected jurisdictions, and approved by the Legislature. *See Seattle Bldg.*, 94 Wn.2d at 742-44.

Moreover, less than 15 percent of the funds used to construct the entire I-90 segment originated from the Motor Vehicle Fund, while only two of the eight existing lanes of I-90 will be used for light rail. *See* App. C. Thus, based on the record before the Court that the federal government paid for more than 85 percent of construction costs and required that the

two center lanes be used for public transit, it is unclear that *any* motor vehicle funds were even used to construct the two center lanes. *See* RCW 47.04.083 (declaring it to be a “highway purpose to use motor vehicle funds . . . to pay the full proportionate highway, street or road share of the costs of design, right-of-way acquisition, construction and maintenance of any highway, street or road to be used jointly with an urban public transportation system.”). Nonetheless, Sound Transit has agreed to provide “consideration as is necessary, under the particular factual circumstances involved.” AGLO 1975 No. 62, at \*3. This is all the 18<sup>th</sup> Amendment requires, and defeats any claim that a writ should issue.

**4. The Already Spent 2009 Appropriation Was for a Valid Highway Purpose, and Does Not Justify a Writ.**

Petitioners suggest that the ESSB 5352, § 204(3) appropriation to value the I-90 center lanes itself violates the 18<sup>th</sup> Amendment. *See* Pet. Br. at 28, n.25; *see also* AF, Ex. G at 7-8 (ESSB 5352, Laws of 2009, ch. 470, § 204(3)). But no relief can be granted on this claim because the appropriated funds already have been disbursed to pay for the work performed last year. Nothing is left for this Court to restrain or prohibit with respect to the appropriation. *See* Commissioner’s Ruling Denying Motion for Stay at 6.

This Court’s basis for determining that the appropriation in *O’Connell* was improper also is distinguishable. In *O’Connell*, this Court

determined that an appropriation for the planning, engineering, financial and feasibility studies for the preparation of a comprehensive public transportation plan was not a “highway purpose” within the meaning of the 18<sup>th</sup> Amendment. *Id.* at 555, 562. Here, the appropriation in § 204(3) was to value the lanes to determine how much to repay the Motor Vehicle Fund, not to fund any portion of the plan to construct light rail.<sup>24</sup>

In sum, there is no constitutional prohibition on the use of the I-90 center transit lanes for light rail, because the State will be repaid the current value of any motor vehicle or gas tax investment in the lanes. The Legislature’s appropriation of funds to value the center lanes does not justify a prospective writ to bar “any action with respect to the transfer of any portion of Interstate 90 to Sound Transit for the purpose of its East Link Project,” as it was for the valid purpose of assuring repayment of the highway fund. Pet. Br. at 53; *see also SEIU Healthcare*, 2010 WL 1380168, at \*5 (declining to convert nonjusticiable writ claim relating to past appropriation into broad claim for prospective relief).

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<sup>24</sup> Even if the appropriation did raise an 18<sup>th</sup> Amendment issue, it could be remedied by reimbursing the motor vehicle fund in the amount actually expended to value the center lanes. Notably, Petitioners have not requested reimbursement of the appropriation or established that reimbursement would be within this Court’s original writ jurisdiction.

**C. Petitioners Have Not Sought, and Are Not Entitled To, Relief on Any Other Statutory Basis.**

Although the request for relief in the Petition is limited to a writ *preventing* the State Respondents from taking actions to sell, lease, or occupy the I-90 center lanes in violation of the 18<sup>th</sup> Amendment, at the close of their brief Petitioners suggest that WSDOT must *take* certain actions in order to use the lanes for light rail, including complying with the requirements of chapter 47.12 RCW. *Compare* Petition, ¶¶ 4.1-4.2, with Pet. Br. at 48-50. Petitioners assert, without citation to authority, that “[a]ny lease or sale statutes must be read consistently with the strong anti-diversionary policy of the 18<sup>th</sup> Amendment.” *See* Pet. Br. at 47, n.32.

Legally, however, the question of what must be done to satisfy the 18<sup>th</sup> Amendment is entirely distinct from what must be done to satisfy statutes governing the disposition of property. *See* AGLO 1975 No. 62, at \*2 (distinguishing the two). As discussed in Section IV(B), *supra*, the 18<sup>th</sup> Amendment neither dictates when property purchased with motor vehicle funds may be leased or sold, nor places any other substantive limitation on the use of such property other than the requirement that any non-highway use or transfer must be supported by consideration. *See id.* at \*3.

Petitioners are, therefore, not entitled to a writ compelling compliance with the separate statutory requirements in chapter 47.12 RCW because they have not petitioned for any relief beyond the 18<sup>th</sup> Amendment.

*See SEIU Healthcare*, 2010 WL 1380168, at \*5. Moreover, even had such relief been requested, the statutes cited by Petitioners need not be applied for WSDOT to allow Sound Transit's use of the I-90 center transit lanes.

**1. Chapter 47.12 RCW Need Not Be Applied Because WSDOT, with Legislative Approval, Already Has Determined, Subject to Appropriate Environmental Review, How the Center Transit Lanes Should Be Used.**

Petitioners contend that WSDOT and Sound Transit must comply with the sale and lease provisions in RCW 47.12.063 and RCW 47.12.120. Because RCW 47.12.063 governs the sale of certain WSDOT property, this statute does not apply on its face. The Term Sheet provides for an air space lease, and not the sale of the lanes. AF ¶ 34, Ex. K at 2; *see also Warnek v. ABB Combustion Eng'g Servs., Inc.*, 137 Wn.2d 450, 457-58, 972 P.2d 453 (1999) (where the plain meaning precludes applicability of a statute, courts may not read into the statute something that is not there).

RCW 47.12.120 generally governs the lease of certain WSDOT property and provides that “[t]he 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.” But here, other more specific statutory provisions govern the use of the I-90 center transit lanes for light rail.

a. **RCW 47.52.090 Authorizes WSDOT to Enter Into Agreements with Local Governments Like Sound Transit to Use Highways to Operate Mass Transit Systems Such as Light Rail.**

The Legislature has separately authorized WSDOT to enter agreements with local governments to use highways for urban public transportation systems. In 1967, before the construction of I-90, the Legislature adopted RCW 47.52.090, which provides that:

The highway authorities of the state, counties, incorporated cities and towns, and municipal corporations owning or operating an urban public transportation system are authorized to enter into agreements with each other, or with the federal government, respecting the financing, planning, establishment, improvement, construction, maintenance, use, regulation, or vacation of limited access facilities in their respective jurisdictions to facilitate the purposes of this chapter. Any such agreement may provide for the exclusive or nonexclusive use of a portion of the facility by streetcars, trains, or other vehicles forming a part of an urban public transportation system and for the erection, construction, and maintenance of structures and facilities of such a system including facilities for the receipt and discharge of passengers.

RCW 47.52.090; *see also* RCW 47.04.081 (WSDOT may join financially in the planning, development, and establishment of a public transportation system in conjunction with new or existing highways); RCW 47.04.083 (declaring that it is state policy to encourage and pursue joint planning,

construction, and maintenance of highways and public transportations systems)).<sup>25</sup>

In *Peden v. City of Seattle*, 9 Wn. App. 106, 107, 510 P.2d 1169 (1973), this Court relied on RCW 47.52.090 to reject a claim, based in part on the 18<sup>th</sup> Amendment, that exclusive use of certain highway ramps by the “Blue Streak” bus system violated the Washington Constitution. This Court held that in RCW 47.52.090 the Legislature authorized the Highway Commission to enter into an agreement with the City of Seattle to use a portion of the highway for an urban public transportation system as a proper exercise of the police power. *Id.* at 108.

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<sup>25</sup> An “urban public transportation system” is defined as “a system for the public transportation of persons or property by buses, streetcars, trains, electric trolley coaches, other public transit vehicles, or any combination thereof operating in or through predominantly urban areas and owned and operated by the state, any city or county or any municipal corporation of the state, including all structures, facilities, vehicles and other property rights and interest forming a part of such a system.” RCW 47.04.082. As described in this statute, Sound Transit is a municipal corporation that owns and operates a transit system including buses and trains, through a predominantly urban area. *See* RCW 81.112.030; *see also* *Roza Irrigation Dist. v. State*, 80 Wn.2d 633, 635, 497 P.2d 166 (1972) (construing municipal corporation broadly to effectuate the purpose of the Legislature). In this case, it is the purpose of the Legislature “to encourage wherever feasible the joint planning, construction and maintenance of public highways and urban public transportation systems serving common geographical areas as joint use facilities.” RCW 47.04.083; *see also* RCW 81.112.010.

Similarly, here, RCW 47.52.090 authorizes WSDOT to enter into agreements for the use of the center lanes for light rail, including the 1976 Memorandum Agreement, 2004 Amendment, and 2010 Term Sheet. *See Peden*, 9 Wn. App. at 107 (stating that RCW 47.52.090 allows for agreements regarding the use of highways for urban public transportation systems). This specific legislative authority supplants any general requirements in RCW 47.12.120 regarding whether highway lands may be leased. *In re Estate of Black*, 153 Wn.2d 152, 164, 102 P.3d 796 (2004) (even if more than one statute applies, “the specific statute will supersede the general statute”).

**b. RCW 47.52.180 Establishes the Process for Operating I-90 and Converting the Center Transit Lanes to Rail Use.**

The Legislature also specifically sanctioned and authorized the Washington State Highway Commission to approve the plan in the 1976 Memorandum Agreement through RCW 47.52.180 (“Any modification of the proposed plan of the department of transportation made by the board of review may thereafter be modified by stipulation of the parties.”). *See also* RCW 47.20.645, .647; *Seattle Bldg.*, 94 Wn.2d at 745 (discussing amendment of RCW 47.52.180), 748 (“[T]he memorandum agreement . . . approved the design of [I-90] as a limited access highway with provision

for mass transit.”).<sup>26</sup> The Memorandum Agreement required that the segment of I-90 between Seattle and Bellevue be designed to permit conversion of all or part of center lanes to fixed guideway. AF ¶ 5, Ex. A at ¶ 2. The Agreement also expressly authorized WSDOT to determine the future operation of the segment “based on existing needs *as determined by the Commission* [now WSDOT] in consultation with the affected jurisdictions...” *Id.* at ¶ 1(e) (emphasis added). In the 2004 Amendment, made pursuant to the terms of the Memorandum Agreement, WSDOT and the local jurisdictions agreed that “the ultimate configuration for I-90” was High Capacity Transit (defined as light rail, monorail, or the equivalent), in the center transit lanes and HOV lanes on the outer roadways. AF ¶ 16, Ex. C at 2. The additional specific statutory authority provided through RCW 47.52.180 renders the application of RCW 47.12.120 unnecessary. *See Seattle Bldg.*, 94 Wn.2d at 744-45.

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<sup>26</sup> The State has confirmed its understanding that the Memorandum Agreement governs the process to convert the I-90 center lanes to light rail. In a 2006 letter to Sound Transit, Governor Gregoire reiterated the State’s obligations under the Agreement: “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.” AF ¶ 22, Ex. D; *see also* n.5, *supra*, (State resolution adopting Memorandum Agreement).

**2. Even If RCW 47.12.120 Applies, It Authorizes the Lease of the Center Transit Lanes for Light Rail.**

Even if RCW 47.12.120 does apply to the lease of the I-90 center lanes, the statute grants WSDOT the discretion to determine that the center lanes “are not presently needed.” RCW 47.12.120. The statute further provides that “[t]he rental or lease . . . [m]ust be upon such terms and conditions as the department may determine.” RCW 47.12.120(1). WSDOT already has preliminarily determined (subject to consideration of final environmental review and completion of R-8A), in consultation with the other parties to the Memorandum Agreement, that the I-90 center lanes may be used for light rail. *See* AF, Exs. A, C, and K.

Petitioners implicitly acknowledge that RCW 47.12.120 would not bar this course of action. Far from identifying a mandatory duty imposed by this statute, Petitioners refer to the statute as “sketchy at best,” and ask the Court to depart from the plain language of RCW 47.12.120 and fold additional requirements such as quantitative vehicle analysis into the statute. *See* Pet. Br. at 48-49. The plain language of the statute does not require any such addition. *See State v. Watson*, 146 Wn.2d 947, 955, 51 P.3d 66 (2002) (courts will not add or subtract from a statute’s plain language unless necessary to make a statute rational). Here, RCW 47.12.120 does not compel any quantitative determination about traffic use of highways, but rather allows for a qualitative, discretionary deter-

mination by WSDOT as to whether a highway is presently needed.<sup>27</sup> To hold otherwise would require the Court to substitute its judgment for the agency that has the expertise and has been vested with the authority to manage I-90 under the Memorandum Agreement and chapter 47.52 RCW.

Thus, if RCW 47.12.120 applies at all, it affords WSDOT the discretion to do what it already has done – preliminarily determine that the I-90 center lanes may be used for light rail. A writ action is not a basis to second guess that inherently discretionary decision, one that the Memorandum Agreement requires be made after consulting with and seeking consensus from the local jurisdictions. *See SEIU*, 2010 WL 138 0168, at \*2 (“[M]andamus may not be used to compel the performance of acts or duties which involve discretion on the part of a public official.” (quoting *Walker*, 124 Wn.2d at 424)). Accordingly, any relief Petitioners have requested on this statutory basis also should be denied.

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<sup>27</sup> Petitioners’ reliance on WAC 468-30.110(7) also does not assist their argument. The title of this regulation is “Nonhighway use of airspace on state highways.” WAC 468-30-110(7) provides that “[n]o 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.” This safety-oriented regulation simply ensures that nonhighway uses do not interfere with the safe use of the highway. Nothing in the language of WAC 468-30.110(7) prohibits leasing for light rail.

**D. Petitioners Are Not Entitled to Attorney Fees Because They Have Not Prevailed in Preserving a Common Fund.**

Petitioners' request for an award of attorney fees at public expense should be denied. Under Washington law, each party bears its own attorney fees and costs in the absence of contract, statute, or recognized ground of equity providing for such fees or costs. *See, e.g., Wagner v. Foote*, 128 Wn.2d 408, 416, 908 P.2d 884 (1996). Petitioners seek an award of fees under the equitable "common fund" doctrine, which allows for a fee award, in the court's discretion, only when a party creates or preserves a common fund for the benefit of others as well as themselves. *See Bowles v. Wash. Dep't of Retirement Sys.*, 121 Wn.2d 52, 70-71, 847 P.2d 440 (1993). Under the doctrine, "the award of fees is borne by the *prevailing* party, not the losing party," and the fees are determined by allocating a percentage of the recovery. *Id.* at 70, 73 (emphasis in original).

The common fund doctrine cannot apply here because Petitioners have failed to create or preserve any fund from which a fee award may be drawn. Petitioners rely on *Weiss v. Bruno*, 83 Wn.2d 911, 914, 523 P.2d 915 (1974), but that case is distinguishable on the basis that the *Weiss* petitioners prevailed in restraining the *expenditure of funds* for an unconstitutional purpose. Here, Petitioners challenge the use of the I-90 center lanes for light rail, as well an appropriation that already has been disbursed. Even if their challenge is successful, Petitioners will not have

prevailed in preventing the expenditure of any motor vehicle funds and, thus, no common fund will be created. Accordingly, Petitioners' request for fees should be denied.

V. CONCLUSION

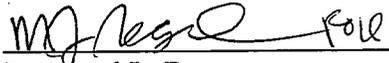
Petitioners invite this Court to be the final arbitrator of a policy debate about whether the center transit lanes of I-90 should be used for light rail. But the debate has already been resolved by lawful legislative actions supported by local voters. Because the use of the I-90 center transit lanes for light rail will be compensated with appropriate consideration, Petitioners have failed to establish that any of these actions violate the 18<sup>th</sup> Amendment. Petitioners also have failed to establish any statutory entitlement to relief. There is no legal basis for the Court to issue a writ in this case.

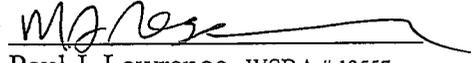
Accordingly, Sound Transit respectfully requests that this Court deny Petitioners' request for a writ of prohibition and/or a writ of mandamus and dismiss this proceeding.

RESPECTFULLY SUBMITTED this 10th day of May, 2010.

CENTRAL PUGET SOUND REGIONAL  
TRANSIT AUTHORITY

K&L GATES LLP

By   
Desmond L. Brown, WSBA # 16232  
Attorneys for Respondent  
Sound Transit

By   
Paul J. Lawrence, WSBA # 13557  
Matthew J. Segal, WSBA # 29797  
Jessica A. Skelton, WSBA # 36748  
Attorneys for Respondent  
Sound Transit

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A	WA State Highway Commission Resolution No. 2950, adopted November 29, 1976.
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C	WSDOT Cost of I-90 Seattle to Bellevue Way, Exhibit to Sound Transit Appraisal, <i>see</i> AF ¶ 31, Ex. H.
D	<i>Sound Move: The Ten-Year Regional Transit System Plan</i> , adopted May 31, 1996- Excerpt.
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G	18 <sup>th</sup> Amendment to Washington Constitution, select history and commentary.
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# **APPENDIX A**

RESOLUTION NO. 2950

WHEREAS, the department of highways, pursuant to a judgment of the Ninth Circuit Court of Appeals dated August 27, 1974 conducted a new corridor-design hearing on the segment of SR 90 (I-90) between SR 5 in Seattle and the South Bellevue Interchange, in January and February 1976 at which the total impact of the project as a whole was considered, including whether it should be built at all, as well as whether, if it is to be built, it should be built in the previously selected corridor, and the proper size, capacity and design of the facility; and

WHEREAS, said hearing was conducted pursuant to 23 U.S.C. § 128 and regulations promulgated thereunder by the Federal Highway Administrator, and such regulations (23 CFR, Part 790) provide for informal meetings with local public officials and agencies in addition to formal hearings to coordinate the planning of the corridor and design of federal-aid highways; and

WHEREAS, the adoption of a new design of this section of SR 90 would necessarily require a revision of the limited access plan for the highway previously adopted by the highway commission pursuant to state law (Chapter 47.52 RCW) and that in this connection state statutes contemplate conferences between the department of highways and cities and counties in which a limited access highway is proposed for the purpose of achieving tentative agreement regarding the design thereof between the state and the county and city officials; and

WHEREAS, federal regulations (23 CFR 771.18) require that following the public hearing at which the draft environmental impact statement is available, the highway agency shall select an alternative design for the highway project as the proposal for which the final environmental impact statement is to be prepared; and

WHEREAS, the Director of Highways, representing the highway commission has met in a series of meetings with representatives of the city councils of Seattle, Mercer Island, and Bellevue and the county council of King County and the council of the Municipality of Metropolitan Seattle (Metro) to discuss (1) whether this section of SR 90 should be built (or whether it should be withdrawn from the interstate system and other projects substituted therefore) and (2) the design, size and capacity of the facility, if it is to be built, taking into consideration the need for fast, safe, and efficient transportation (including public transportation) together with the highway cost, traffic safety benefits, public service to the communities involved, anticipated economic, social, and environmental effects of alternatives under consideration; and

WHEREAS, the department of highways having considered at length the extensive testimony and written statements of governmental officials and the public received at the corridor-design public hearing in January and February of 1976 and having considered the joint and unanimous recommendations of the representatives of the city councils of Seattle, Mercer Island and Bellevue; the county council of King County; and the Metro Council regarding the design of the section of SR 90

between SR 5 in Seattle and the South Bellevue Interchange and having through the Director of Highways, recommended the selection of an alternative design for the highway section as the proposal for which the final environmental impact statement is to be prepared and has recommended that the commission enter into a Memorandum Agreement with the cities of Seattle, Mercer Island and Bellevue, King County and Metro tentatively approving the selection of such design as the commission's proposal to be submitted to the Federal Highway Administration for federal interstate funding, now therefore

IT IS HEREBY RESOLVED by the Washington State Highway Commission:

1. Pursuant to Section 771.18 of Title 23, Code of Federal Regulations, the below described design for the construction of SR 90 between SR 5 and the South Bellevue Interchange is selected as the proposal for which the final environmental impact statement for said project will be prepared.

The proposed design for this section of highway is described as follows:

An eight-lane facility consisting of three general-purpose motor vehicle lanes in each direction with provision for necessary weaving lanes and an acceleration lane from the South Bellevue Interchange which will terminate prior to the exit ramp at the East Mercer Interchange. The facility shall also include two transit lanes with termini which facilitate access to downtown Seattle and downtown Bellevue. This proposal will incorporate the provisions for community amenities and for reducing adverse environmental impacts as contained in the limited access plans adopted by the Commission for the segment of SR 90 from the West Shore of Mercer Island to the East Channel Bridge and for the segment from SR 5 to the West Shore of Mercer Island as the latter plan was

modified by the Findings and Order of the Board of Review, dated March 26, 1973, and the Stipulation to Resolve Certain Issues, incorporated therein. The proposal will include improvements of South Norman Street between 20th Avenue South and 23rd Avenue South to provide access to the Judkins neighborhood, in lieu of the development of South Judkins Street as provided in the Commission's adopted plan as modified by the Findings and Order of the Board of Review. The proposal will provide for a continuous park/pedestrian link between Judkins Park and the lid over I-90 west of the Mt. Baker Ridge Tunnel.

2. The proposed design of the highway section described hereinabove, constituting the unanimous recommendations of the cities of Seattle, Mercer Island and Bellevue; King County; and Metro, as embodied and described in the Memorandum Agreement dated December 21, 1976 is hereby tentatively accepted and agreed to by the commission as are the additional provisions contained in said Memorandum Agreement and the Director of Highways is hereby authorized to execute on behalf of the commission said Memorandum Agreement upon the execution of said document by the other parties thereto.

3. As set forth in paragraph 13 of said Memorandum Agreement, the approval of that document by the commission is tentative pending review of (1) the final environmental impact statement to be filed in connection with the project and (2) the hearing record being prepared in connection with the corridor-design public hearing held in January and February, 1976. By this it is meant that before the commission makes its final decision with respect to the design of the section of highway, it will receive and consider in depth the final environmental impact statement giving appropriate weight to the content of that document, including the comments received on the draft environmental impact statement and the responses

thereto; and will receive and consider in depth the hearing record of the corridor-design hearing held in January and February 1976, including the oral and written submissions of members of the public as well as governmental agencies and other organizations, and the responses to the comments and questions there presented. Only after such review and consideration and the giving of full and appropriate weight to such information as well as the recommendations of the local jurisdictions as contained in the Memorandum Agreement, will the commission make its final decision with respect to whether the section of highway should be built, as well as whether if it is to be built, it should be built in the previously selected corridor and in accordance with the design contained in the Memorandum Agreement.

ADOPTED this 29th day of November, 1976.

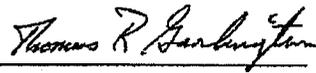
WASHINGTON STATE HIGHWAY COMMISSION

  
HOWARD SORENSEN, CHAIRMAN

ATTEST:

  
LUE CLARKSON, SECRETARY

APPROVED AS TO FORM:

  
ASSISTANT ATTORNEY GENERAL

# **APPENDIX B**

WHEREAS, by Resolution No. 2950 dated November 29, 1976, the Washington State Highway Commission, predecessor to the Washington State Transportation Commission, tentatively approved the Memorandum Agreement dated December 21, 1976, between the City of Seattle, City of Mercer Island, City of Bellevue, King County, the Municipality of Metropolitan Seattle and the Washington State Highway Commission, which Memorandum Agreement embodies an agreed design and location of that section of I-90 between I-5 and I-405; and

WHEREAS, the approval of the said Memorandum Agreement by the Washington State Highway Commission Resolution was stated to be "tentative pending review of (1) the final environmental impact statement to be filed in connection with the project and (2) the hearing record being prepared in connection with the corridor-design public hearing held in January and February, 1976;" and

WHEREAS, the Washington State Transportation Commission as successor to the Washington State Highway Commission and the Secretary of Transportation have reviewed the final environmental impact statement filed in connection with the project and the hearing record prepared in connection with the corridor-design public hearing held in January and February, 1976; and

WHEREAS, the Washington State Transportation Commission finds that the project as described and agreed to in said Memorandum Agreement, and as described in the final environmental impact statement represents the most advantageous intermodal facility for safe and efficient transportation of persons and goods between the City of Seattle and the City of Bellevue and other areas of the state, consistent with the social, economic, and environmental policies of the state; and

WHEREAS, the Washington State Transportation Commission finds that said design is compatible with the alternative proposals for priority transit access into downtown Seattle and downtown Bellevue (as enumerated in paragraph 3 of the said Memorandum Agreement);

NOW, THEREFORE, BE IT RESOLVED by the Washington State Transportation Commission that:

1. The Memorandum Agreement dated December 21, 1976, relating to the section of I-90 between I-5 and I-405, is hereby approved.

2. The design and corridor location of I-90 (SR 90) between I-5 (SR 5) and I-405 (SR 405) as described in the said Memorandum Agreement and as described in the final environmental impact statement is hereby approved.

ADOPTED this 23<sup>rd</sup> day of January, 1979.

WASHINGTON STATE TRANSPORTATION COMMISSION

  
RAY A. ZARDAL, CHAIRMAN

ATTEST:

  
LUE CLARKSON, ADMINISTRATOR

APPROVED AS TO FORM:

  
THOMAS R. BURLINGTON  
ASSISTANT ATTORNEY GENERAL

# **APPENDIX C**

**WSDOT COST OF I-90 SEATTLE TO BELLEVUE WAY**

**McKee & Schalka**

Real Estate Appraisal Services & Consultants, Inc.

I-90: Seattle (Airport Way ramp) to Bellevue Way

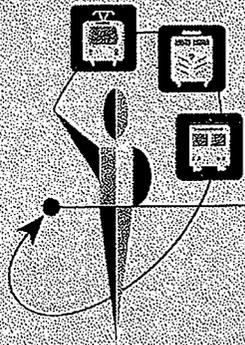
(not including: RIA, Bellevue Way, Rainier)

WIN	Revision	14-01-103	Work Order	Fed Aid #s	Contract #	Project Title	Completion Date	Total \$	PE \$	CN \$	Total WSDOT \$	Total FHWA \$	Total Other \$	WSDOT %
A09011B	003213		ACIR-90-1 (298)	ID-90-1 (298)	013213	23rd Ave So to Lake Washington WB and Center Structures	9/26/1990	77,433,134.12	12,405,350.84	1,118,033,104.06	175,751,244.22	70,102,546.00	18,140.00	9.45%
A09011C	003213		I-90-1 (345)		013565	Seattle Lid - ChivilStructure	9/26/1992	12,405,350.84	12,405,350.84	1,118,033,104.06	175,751,244.22	70,102,546.00	18,140.00	9.45%
A09011D	003685		I-90-1 (340)		013571	23rd Ave So to Lake Washington EB Roadway, Structure and Tunnel	9/26/1992	50,931,497.37	50,931,497.37	1,118,033,104.06	175,751,244.22	70,102,546.00	18,140.00	9.45%
A09011E	003571		I-90-1 (283)		013105	23rd Ave S to ML King Way EB Structure	8/20/1991	17,262,821.12	17,262,821.12	1,118,033,104.06	175,751,244.22	70,102,546.00	18,140.00	9.45%
A09011F	003105		I-90-1 (283)		013105	23rd Ave S to ML King Way S WB and Center Lids	12/16/1988	18,973,332.24	18,973,332.24	1,118,033,104.06	175,751,244.22	70,102,546.00	18,140.00	9.45%
A09011G	004050		I-90-1 (275)		014050	23rd Ave S to Yakima Ave S Landscape	6/30/1997	3,608,416.06	3,608,416.06	1,118,033,104.06	175,751,244.22	70,102,546.00	18,140.00	9.45%
A09011H	004050		I-90-1 (275)		014050	23rd Ave S to Yakima Ave S Landscape	10/21/1991	180,847.59	180,847.59	1,118,033,104.06	175,751,244.22	70,102,546.00	18,140.00	9.45%
A09011I	002973		I-90-1 (242)		012973	23rd Ave S to Delour	5/29/1986	2,670,902.08	2,670,902.08	1,118,033,104.06	175,751,244.22	70,102,546.00	18,140.00	9.45%
A09011J	002973		I-90-1 (242)		012973	23rd Ave S to Delour	6/21/1988	45,098,106.32	45,098,106.32	1,118,033,104.06	175,751,244.22	70,102,546.00	18,140.00	9.45%
A09011K	002973		I-90-1 (242)		012973	23rd Ave S to Delour	12/17/1988	1,478,616.04	1,478,616.04	1,118,033,104.06	175,751,244.22	70,102,546.00	18,140.00	9.45%
A09011L	003334		ID-90-1 (317)		013334	3rd Lake Washington Floating Br Approaches and Transition Spans	6/17/1987	12,192,679.00	12,192,679.00	1,118,033,104.06	175,751,244.22	70,102,546.00	18,140.00	9.45%
A09011M	003334		ID-90-1 (317)		013334	3rd Lake Washington Floating Br Approaches and Transition Spans	6/17/1987	42,293.00	42,293.00	1,118,033,104.06	175,751,244.22	70,102,546.00	18,140.00	9.45%
A09011N	002640		I-90-1 (229)		012640	3rd Lake Washington Floating Br Approaches and Transition Spans	4/6/1984	477,947.31	477,947.31	1,118,033,104.06	175,751,244.22	70,102,546.00	18,140.00	9.45%
A09011O	002647		I-90-1 (371)		012647	Lk Wash Float Br Pontoons Stage 2	8/6/1984	846,922.94	846,922.94	1,118,033,104.06	175,751,244.22	70,102,546.00	18,140.00	9.45%
A09011P	004013		I-90-1 (371)		014013	Lk Wash Float Br Pontoons Stage 2	9/19/1987	39,678,341.68	39,678,341.68	1,118,033,104.06	175,751,244.22	70,102,546.00	18,140.00	9.45%
A09011Q	003566		I-90-1 (344)		013566	60th Ave SE to 76th Ave SE Landscape	7/24/1987	4,193,192.74	4,193,192.74	1,118,033,104.06	175,751,244.22	70,102,546.00	18,140.00	9.45%
A09011R	003192		I-90-1 (284)		013192	60th Ave SE to 76th Ave SE Landscape	7/22/1982	114,830.46	114,830.46	1,118,033,104.06	175,751,244.22	70,102,546.00	18,140.00	9.45%
A09011S	003192		I-90-1 (284)		013192	60th Ave SE to 76th Ave SE Landscape	7/15/1989	3,569,089.75	3,569,089.75	1,118,033,104.06	175,751,244.22	70,102,546.00	18,140.00	9.45%
A09011T	004074		I-90-1 (376)		014074	74th to Island Crest Way EB Roadway	9/17/1995	1,822,852.94	1,822,852.94	1,118,033,104.06	175,751,244.22	70,102,546.00	18,140.00	9.45%
A09011U	004074		I-90-1 (376)		014074	74th to Island Crest Way EB Roadway	8/5/1984	134,718.55	134,718.55	1,118,033,104.06	175,751,244.22	70,102,546.00	18,140.00	9.45%
A09011V	002659		I-90-1 (256)		012659	76th Ave SE to Luther Burbank Lnd Landscape	11/30/1988	37,476,105.52	37,476,105.52	1,118,033,104.06	175,751,244.22	70,102,546.00	18,140.00	9.45%
A09011W	002655		I-90-1 (256)		012655	76th Ave SE to Luther Burbank Lnd Landscape	9/26/1989	797,956.51	797,956.51	1,118,033,104.06	175,751,244.22	70,102,546.00	18,140.00	9.45%
A09011X	003725		I-90-1 (324)		013725	North Mercer Comm/76th Ave SE	9/09/1989	23,661,599.02	23,661,599.02	1,118,033,104.06	175,751,244.22	70,102,546.00	18,140.00	9.45%
A09011Y	003429		ACI-90-1 (335)		013429	North Ave and Island Crest Way Usings	9/09/1989	29,621,841.59	29,621,841.59	1,118,033,104.06	175,751,244.22	70,102,546.00	18,140.00	9.45%
A09011Z	003190		I-90-1 (296)		013190	Bush Place to 23rd Ave S EB & Center Roadway	11/21/1988	468,373.89	468,373.89	1,118,033,104.06	175,751,244.22	70,102,546.00	18,140.00	9.45%
A09012A	004529		ID-90-1 (402)		014529	Bush Place to 23rd Ave S EB & Center Roadway	2/15/2000	1,811,781.83	1,811,781.83	1,118,033,104.06	175,751,244.22	70,102,546.00	18,140.00	9.45%
A09012B	004529		ID-90-1 (402)		014529	Bush Place to 23rd Ave S EB & Center Roadway	4/16/1998	357,399.80	357,399.80	1,118,033,104.06	175,751,244.22	70,102,546.00	18,140.00	9.45%
A09012C	004750		NH-0901 (411)		014750	Corridor Completion Erosion Cont.	5/30/1997	58,670.65	58,670.65	1,118,033,104.06	175,751,244.22	70,102,546.00	18,140.00	9.45%
A09012D	004750		NH-0901 (411)		014750	Corridor Completion Erosion Cont.	5/30/1997	1,110,340.37	1,110,340.37	1,118,033,104.06	175,751,244.22	70,102,546.00	18,140.00	9.45%
A09012E	004750		NH-0901 (411)		014750	Corridor Completion Erosion Cont.	5/30/1997	133,229.17	133,229.17	1,118,033,104.06	175,751,244.22	70,102,546.00	18,140.00	9.45%
A09012F	004750		NH-0901 (411)		014750	Corridor Completion Erosion Cont.	5/30/1997	175,155.31	175,155.31	1,118,033,104.06	175,751,244.22	70,102,546.00	18,140.00	9.45%
A09012G	004750		NH-0901 (411)		014750	Corridor Completion Erosion Cont.	5/30/1997	3,369,500.48	3,369,500.48	1,118,033,104.06	175,751,244.22	70,102,546.00	18,140.00	9.45%
A09012H	004750		NH-0901 (411)		014750	Corridor Completion Erosion Cont.	5/30/1997	643,539.15	643,539.15	1,118,033,104.06	175,751,244.22	70,102,546.00	18,140.00	9.45%
A09012I	004750		NH-0901 (411)		014750	Corridor Completion Erosion Cont.	5/30/1997	219,871.95	219,871.95	1,118,033,104.06	175,751,244.22	70,102,546.00	18,140.00	9.45%
A09012J	004750		NH-0901 (411)		014750	Corridor Completion Erosion Cont.	5/30/1997	20,805.77	20,805.77	1,118,033,104.06	175,751,244.22	70,102,546.00	18,140.00	9.45%
A09012K	004750		NH-0901 (411)		014750	Corridor Completion Erosion Cont.	5/30/1997	18,198,057.73	18,198,057.73	1,118,033,104.06	175,751,244.22	70,102,546.00	18,140.00	9.45%
A09012L	004750		NH-0901 (411)		014750	Corridor Completion Erosion Cont.	5/30/1997	24,753,974.15	24,753,974.15	1,118,033,104.06	175,751,244.22	70,102,546.00	18,140.00	9.45%
A09012M	004750		NH-0901 (411)		014750	Corridor Completion Erosion Cont.	5/30/1997	333,370.61	333,370.61	1,118,033,104.06	175,751,244.22	70,102,546.00	18,140.00	9.45%
A09012N	004750		NH-0901 (411)		014750	Corridor Completion Erosion Cont.	5/30/1997	3,956,652.91	3,956,652.91	1,118,033,104.06	175,751,244.22	70,102,546.00	18,140.00	9.45%
A09012O	004750		NH-0901 (411)		014750	Corridor Completion Erosion Cont.	5/30/1997	2,045,905.50	2,045,905.50	1,118,033,104.06	175,751,244.22	70,102,546.00	18,140.00	9.45%
A09012P	004750		NH-0901 (411)		014750	Corridor Completion Erosion Cont.	5/30/1997	39,726,738.08	39,726,738.08	1,118,033,104.06	175,751,244.22	70,102,546.00	18,140.00	9.45%
A09012Q	004750		NH-0901 (411)		014750	Corridor Completion Erosion Cont.	5/30/1997	1,110,340.37	1,110,340.37	1,118,033,104.06	175,751,244.22	70,102,546.00	18,140.00	9.45%
A09012R	004750		NH-0901 (411)		014750	Corridor Completion Erosion Cont.	5/30/1997	151,052.75	151,052.75	1,118,033,104.06	175,751,244.22	70,102,546.00	18,140.00	9.45%
A09012S	004750		NH-0901 (411)		014750	Corridor Completion Erosion Cont.	5/30/1997	643,539.15	643,539.15	1,118,033,104.06	175,751,244.22	70,102,546.00	18,140.00	9.45%
A09012T	004750		NH-0901 (411)		014750	Corridor Completion Erosion Cont.	5/30/1997	219,871.95	219,871.95	1,118,033,104.06	175,751,244.22	70,102,546.00	18,140.00	9.45%
A09012U	004750		NH-0901 (411)		014750	Corridor Completion Erosion Cont.	5/30/1997	20,805.77	20,805.77	1,118,033,104.06	175,751,244.22	70,102,546.00	18,140.00	9.45%
A09012V	004750		NH-0901 (411)		014750	Corridor Completion Erosion Cont.	5/30/1997	18,198,057.73	18,198,057.73	1,118,033,104.06	175,751,244.22	70,102,546.00	18,140.00	9.45%
A09012W	004750		NH-0901 (411)		014750	Corridor Completion Erosion Cont.	5/30/1997	24,753,974.15	24,753,974.15	1,118,033,104.06	175,751,244.22	70,102,546.00	18,140.00	9.45%
A09012X	004750		NH-0901 (411)		014750	Corridor Completion Erosion Cont.	5/30/1997	333,370.61	333,370.61	1,118,033,104.06	175,751,244.22	70,102,546.00	18,140.00	9.45%
A09012Y	004750		NH-0901 (411)		014750	Corridor Completion Erosion Cont.	5/30/1997	3,956,652.91	3,956,652.91	1,118,033,104.06	175,751,244.22	70,102,546.00	18,140.00	9.45%
A09012Z	004750		NH-0901 (411)		014750	Corridor Completion Erosion Cont.	5/30/1997	2,045,905.50	2,045,905.50	1,118,033,104.06	175,751,244.22	70,102,546.00	18,140.00	9.45%
A09013A	004750		NH-0901 (411)		014750	Corridor Completion Erosion Cont.	5/30/1997	39,726,738.08	39,726,738.08	1,118,033,104.06	175,751,244.22	70,102,546.00	18,140.00	9.45%
A09013B	004750		NH-0901 (411)		014750	Corridor Completion Erosion Cont.	5/30/1997	1,110,340.37	1,110,340.37	1,118,033,104.06	175,751,244.22	70,102,546.00	18,140.00	9.45%
A09013C	004750		NH-0901 (411)		014750	Corridor Completion Erosion Cont.	5/30/1997	151,052.75	151,052.75	1,118,033,104.06	175,751,244.22	70,102,546.00	18,140.00	9.45%
A09013D	004750		NH-0901 (411)		014750	Corridor Completion Erosion Cont.	5/30/1997	643,539.15	643,539.15	1,118,033,104.06	175,751,244.22	70,102,546.00	18,140.00	9.45%
A09013E														



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# **APPENDIX D**



# ***Sound Move***

**Launching a Rapid Transit System  
for the Puget Sound Region**

*Appendix A: Detailed description of  
facilities and costs*

*The Ten-Year  
Regional Transit  
System Plan*

As adopted May 31, 1996

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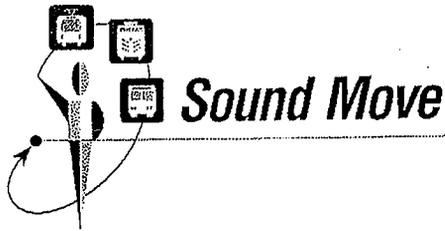
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# Sound Move

All figures in 1995 \$millions

	Capital	O&M	Combined
<b>Community Connections —</b>			
Bellevue Transit Center	\$15	-	\$15
Bothell / Canyon Park flyer stop	\$5	-	\$5
Bothell Branch Campus Access @ 195th/I-405	\$5	-	\$5
Issaquah Transit Center	\$10	-	\$10
Kirkland Transit Center	\$10	-	\$10
Mercer Island Station/Park & Ride	\$10	-	\$10
Newcastle Transit Center	\$5	-	\$5
Willows HOV (Redmond)	\$5	-	\$5
Overlake Transit Center / Park & Ride (NE 40th)	\$5	-	\$5
Woodinville Arterial HOV Enhancements	\$5	-	\$5
Small cities transit access	\$3	-	\$3
Unincorporated King Co. Transit Access	\$5	-	\$5
I-90 two-way center roadway	\$15	-	\$15
SR-522 HOV enhance. (Woodinville to Bothell)	\$11	-	\$11
<b>Total -</b>	<b>\$109</b>	<b>-</b>	<b>\$109</b>
<b>Debt service —</b>	<b>-</b>	<b>\$14</b>	<b>\$14</b>
<b>Reserves —</b>	<b>-</b>	<b>\$10</b>	<b>\$10</b>
<b>Regional fund —</b>	<b>\$11</b>	<b>\$20</b>	<b>\$31</b>
<b>Grand Total —</b>	<b>\$413</b>	<b>\$154</b>	<b>\$567</b>

# **APPENDIX E**

## **SOUND TRANSIT**

### **RESOLUTION NO. R2004-09**

A RESOLUTION of the Board of the Central Puget Sound Regional Transit Authority amending Sound Move to provide for two-way transit and HOV operations in the outer roadways of I-90 between Seattle and Bellevue and to select Alternative R-8A as the project to be built for the I-90 Two-Way Transit and HOV Project.

WHEREAS, a Regional Transit Authority, hereinafter referred to as Sound Transit, has been created for the Pierce, King, and Snohomish County region by action of their respective county councils pursuant to RCW 81.112.030; and

WHEREAS, on November 5, 1996, at a general election held within the Sound Transit district, the voters approved local funding for Sound Move, the ten-year plan for high-capacity transit in the Central Puget Sound region; and

WHEREAS, Sound Move includes an I-90 two-way center roadway project; and

WHEREAS, the I-90 roadway between I-405 and I-5 is the subject of a 1976 Memorandum Agreement signed by King County, the City of Seattle, the Municipality of Metropolitan Seattle, the City of Mercer Island, the City of Bellevue, and the Washington State Transportation Commission (Commission). The 1976 agreement provides that "the Commission will take no action which will result in a major change in either the operation or the capacity of the I-90 facility without prior consultation with and involvement of the other parties to this agreement, with the intent that concurrence of the parties be a prerequisite to Commission action to the greatest extent possible under law"; and

WHEREAS, in 1998, Sound Transit created an I-90 Steering Committee to guide implementation of the I-90 Two-Way Transit and HOV Project (I-90 Project). The Steering Committee consists of the signatories to the 1976 agreement, Sound Transit, the Federal Highway Administration (FHWA), and the Federal Transit Administration; and

WHEREAS, the purpose of the I-90 Project is to provide reliable and safe two-way transit and HOV operations between Bellevue and Seattle while minimizing impacts on the environment and other users and transportation modes; and

WHEREAS, FHWA, WSDOT, and Sound Transit have prepared an Environmental Impact Statement (EIS) for the I-90 Project in compliance with the National Environmental Policy Act and State Environmental Policy Act; and

WHEREAS, the EIS process included opportunities for public involvement, including community outreach and scoping meetings to solicit input on potential project alternatives and environmental impacts to be addressed in the EIS. A Draft EIS was issued in April 2003 for public review and comment and widely distributed to local jurisdictions, regional, state, and federal agencies, tribes, community organizations, and other interested groups and individuals. Three open houses/public hearings were held in May 2003 to receive comments on the Draft EIS. The Draft EIS evaluated five alternatives, including a no-action alternative; and

WHEREAS, on July 15, 2003, the I-90 Steering Committee identified its ultimate configuration for I-90 with high-capacity transit in the center roadway with Alternative R-8A as the first step towards achieving its ultimate configuration for I-90, as identified in letters to the Sound Transit Board. Alternative R-8A provides for two-way transit and HOV operations in the outer roadways of I-90 between Seattle and Bellevue and continuation of reversible lane operations in the center roadway. The Steering Committee rejected Alternative R-2B, which would have converted the center roadway to two-way transit and HOV operations; and

WHEREAS, following review of the Draft EIS, public comments received, the I-90 Steering Committee's recommendations and other information, the Sound Transit Board identified Alternative R-8A as its preferred alternative for inclusion in the Final EIS and directed staff to negotiate an amendment to the 1976 Memorandum Agreement for I-90 to address the Steering Committee's recommendations; and

WHEREAS, WSDOT, FHWA, and Sound Transit issued the Final EIS on May 21, 2004. The Final EIS considers and responds to the comments received on the Draft EIS and evaluates the environmental impacts of the preferred alternative and other project alternatives. The Final EIS also includes information on potential project mitigation measures; and

WHEREAS, Sound Move provides for conversion of the center roadway of I-90 from reversible lanes to two-way operations throughout the day. Conditions changed, however, after Sound Move was adopted. Two-way operation in the center roadway is not feasible at this time because the parties to the 1976 agreement rejected the proposed operational change to I-90 that is described in Sound Move. Consequently, Sound Transit cannot obtain the required approvals to construct the improvements and implement two-way operations in the center roadway. Proceeding with the project as described in Sound Move is therefore impractical to accomplish; and

WHEREAS, in addition, transportation studies discussed in the Final EIS and Motion No. M2003-99 conclude that given current and projected traffic conditions, the conversion of the center roadway to two-way transit and HOV operations would degrade transit and HOV operations and increase roadway congestion; and

WHEREAS, after due consideration of the planning, environmental, engineering, and other issues relevant to the I-90 Project, the Board concludes that Alternative R-8A, which provides for two-way transit and HOV operations on the I-90 outer roadways, will best achieve the stated goals of the Sound Move transit plan to improve I-90 transit operations; and

WHEREAS, in order to best achieve the stated goals of the Sound Move transit plan under the changed circumstances, the Board finds that it is in the best interest of the citizens of the Sound Transit district and the region to select Alternative R-8A as the alternative to be built for the I-90 Two-Way Transit and HOV Operations Project; and

WHEREAS, by separate Motion No. M2004-63, the Sound Transit Board is authorizing the Chief Executive Officer to execute an amendment to the 1976 Memorandum Agreement

governing I-90. That amendment establishes guiding principles regarding future development of the I-90 corridor between Seattle and Bellevue, including Alternative R-8A with High-Capacity Transit deployed in the center lanes as the ultimate configuration, subject to the outcome of studies and funding approvals; and

WHEREAS, the Board reiterates that the state is responsible for funding and construction of the HOV lane system, including the HOV component of the "ultimate configuration" for the I-90 corridor, in accordance with its freeway HOV policy; and

WHEREAS, implementation of Alternative R-8A, which provides for two-way transit and HOV operations in the I-90 outer roadways, requires an amendment to the Sound Move transit plan, and said amendment is consistent with the amendment guidelines adopted in Resolution No. R98-22.

NOW, THEREFORE, BE IT RESOLVED by the Board of the Central Puget Sound Regional Transit Authority as follows:

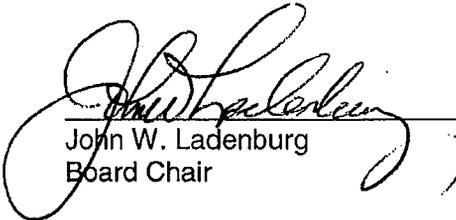
Section 1: Alternative R-8A, as described in the Final EIS for the I-90 Two-Way Transit and HOV Operations Project, is hereby selected as the I-90 Two-Way Transit and HOV Project alternative to be constructed.

Section 2: Sound Move is hereby amended accordingly to include Alternative R-8A.

Section 3: The Sound Transit Board directs staff to work with the Washington State Department of Transportation (WSDOT) to prepare or have its consultants prepare additional analyses of (1) pavement options for noise reduction and (2) wire mesh and/or plexiglass screening along the shared use bike/pedestrian path on the East Channel Bridge. Staff will evaluate the cost, advantages, disadvantages, and feasibility of each of these measures during the final design stage of the project and report back to the Board on the results. The Board will consider the results but is not bound to take any particular action based on the outcome of the analyses. Furthermore, to the extent the Board is interested in implementing any additional measures, it

can only do so subject to the approval of WSDOT and the Federal Highway Administration,  
which have jurisdiction over the I-90 roadway.

ADOPTED by not less than a 2/3 majority vote of the Board of the Central Puget Sound  
Regional Transit Authority at a regular meeting thereof held on August 12, 2004.



John W. Ladenburg  
Board Chair

ATTEST:



Marcia Walker  
Board Administrator

# **APPENDIX F**

**C**

West's Revised Code of Washington Annotated Currentness

Constitution of the State of Washington (Refs &amp; Annos)

▣ Article 2. Legislative Department (Refs &amp; Annos)

→ § 40. Highway Funds

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 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 cost and expense of (1) acquisition of rights-of-way, (2) installing, maintaining and 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 obligation 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:

*Provided*, That this section shall not be construed to include revenue from general or special taxes or excises not levied primarily for highway purposes, or apply to vehicle operator's license fees or any excise tax imposed on motor vehicles or the use thereof in lieu of a property tax thereon, or fees for certificates of ownership of motor vehicles.

## CREDIT(S)

Adopted by Amendment 18 (Laws 1943, H.J.R. No. 4, p. 938, approved Nov. 1944).

Current through amendments approved 11-3-2009

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RCW 47.04.081

Urban public transportation systems — Participation in planning, development, and establishment.

The department is empowered to join financially or otherwise with any public agency or any county, city, or town in the state of Washington or any other state, or with the federal government or any agency thereof, or with any or all thereof for the planning, development, and establishment of urban public transportation systems in conjunction with new or existing highway facilities.

[1984 c 7 § 89; 1967 c 108 § 13; 1965 ex.s. c 170 § 63.]

Notes:

**Severability -- 1984 c 7:** See note following RCW 47.01.141.

Urban public transportation system defined: RCW 47.04.082.

RCW 47.04.082

Urban public transportation systems — Defined.

As used in \*this act the term "urban public transportation system" shall mean a system for the public transportation of persons or property by buses, streetcars, trains, electric trolley coaches, other public transit vehicles, or any combination thereof operating in or through predominantly urban areas and owned and operated by the state, any city or county or any municipal corporation of the state, including all structures, facilities, vehicles and other property rights and interest forming a part of such a system.

[1967 c 108 § 1.]

Notes:

**\*Reviser's note:** For codification of "this act" [1967 c 108], see Codification Tables, Volume 0.

RCW 47.04.083

Urban public transportation systems — Declaration of public policy — Use of motor vehicle, city street, or county road funds.

The separate and uncoordinated development of public highways and urban public transportation systems is wasteful of this state's natural and financial resources. It is the public policy of this state to encourage wherever feasible the joint planning, construction and maintenance of public highways and urban public transportation systems serving common geographical areas as joint use facilities. To this end the legislature declares it to be a highway purpose to use motor vehicle funds, city and town street funds or county road funds to pay the full proportionate highway, street or road share of the costs of design, right-of-way acquisition, construction and maintenance of any highway, street or road to be used jointly with an urban public transportation system.

[1967 c 108 § 2.]

RCW 47.12.120

Lease of unused highway land or air space.

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 charge the transit authority only for commercial space.

[2003 c 198 § 2; 1977 ex.s. c 151 § 50; 1969 c 91 § 1; 1961 c 13 § 47.12.120. Prior: 1949 c 162 § 1; Rem. Supp. 1949 § 6400-122.]

RCW 47.20.645

Interstate 90 corridor — Legislative finding.

The legislature finds that the department initiated route studies for the location of that segment of the national system of interstate and defense highways (interstate system) between south Bellevue and state route No. 5 in Seattle in 1957 culminating in a corridor public hearing and adoption of a corridor in 1963; that thereafter the department, utilizing a multidisciplinary design team and soliciting the broadest public participation, developed a series of designs culminating in a public design hearing in 1970, a public limited access hearing in 1971, and adoption of a design and limited access plan for the facility in 1971; that commencing in 1970 the proposed facility has been the subject of numerous lawsuits and administrative proceedings that have prevented advancement of the project to construction; that since further development of the project was enjoined by federal courts in 1971 the cost of constructing the project has increased by more than one hundred million dollars; that the traffic congestion and traffic hazards existing in the existing highway corridor between south Bellevue, Mercer Island, and the city of Seattle are no longer tolerable; that after more than seventeen years of studies the public interest now requires that final decisions regarding the appropriate system for meeting the transportation requirements between south Bellevue and the city of Seattle be made promptly and in accordance with a prescribed schedule.

It is therefore the sense of the legislature that further protracted delay in establishing the transportation system to be constructed between south Bellevue and state route No. 5 in the city of Seattle is contrary to the interest of the people of this state and can no longer be tolerated as acceptable public administration. Accordingly the schedule for finally determining the character of transportation modes between south Bellevue and state route No. 5 in the city of Seattle as set forth in RCW 47.20.645 through 47.20.653 and 47.20.900 is adopted as the public policy of this state.

[1984 c 7 § 149; 1975 1st ex.s. c 272 § 1.]

Notes:

**Severability -- 1984 c 7:** See note following RCW 47.01.141.

RCW 47.20.647

Interstate 90 corridor — Withdrawal of local governments from project — Effect on use of state funds.

(1) The Puget Sound council of governments (until July 1, 1975, known as the Puget Sound governmental conference) now engaged in a study of the withdrawal from the interstate system of that segment of state route No. 90 between the south Bellevue interchange and the Connecticut street interchange on state route No. 5 and the substitution of public mass transit projects in lieu thereof as authorized by section 103(e)(4) of Title 23, United States Code, is directed to complete all phases of the study by November 1, 1975.

(2) No later than January 15, 1976, the city councils of Seattle, Mercer Island and Bellevue and the county council of King County shall each by resolution either approve or disapprove a request to withdraw from the interstate system the segment of state route No. 90 between south Bellevue interchange and the Connecticut street interchange on state route No. 5. Nothing in this subsection shall be construed as requiring the city or county councils to adopt by January 15, 1976 any proposal for substitute mass transit projects.

(3) If at least three of the four city and county councils request withdrawal from the interstate system of the designated segment of state route No. 90 by January 15, 1976, and such request is thereafter concurred in by the governor and the Puget Sound council of governments, such determination shall be final as it relates to the state of Washington and except as may be required to terminate the project in an orderly manner, no moneys shall thereafter be expended from the motor vehicle fund for further development of the designated section of highway as an interstate highway without further express authorization of the legislature.

(4) If fewer than three of the four city and county councils request withdrawal from the interstate system of the designated segment of state route No. 90 by January 15, 1976, or if the governor does not concur in the withdrawal request, then no tax revenues collected by the state of Washington shall thereafter be expended for the construction of substitute public mass transit projects in the Seattle metropolitan area pursuant to section 103(e)(4) of Title 23, United States Code, without further express authorization of the legislature.

[1975 1st ex.s. c 272 § 2.]

## RCW 47.52.090

Cooperative agreements — Urban public transportation systems — Title to highway — Traffic regulations — Underground utilities and overcrossings — Passenger transportation — Storm sewers — City street crossings.

The highway authorities of the state, counties, incorporated cities and towns, and municipal corporations owning or operating an urban public transportation system are authorized to enter into agreements with each other, or with the federal government, respecting the financing, planning, establishment, improvement, construction, maintenance, use, regulation, or vacation of limited access facilities in their respective jurisdictions to facilitate the purposes of this chapter. Any such agreement may provide for the exclusive or nonexclusive use of a portion of the facility by streetcars, trains, or other vehicles forming a part of an urban public transportation system and for the erection, construction, and maintenance of structures and facilities of such a system including facilities for the receipt and discharge of passengers. Within incorporated cities and towns the title to every state limited access highway vests in the state, and, notwithstanding any other provision of this section, the department shall exercise full jurisdiction, responsibility, and control to and over the highway from the time it is declared to be operational as a limited access facility by the department, subject to the following provisions:

(1) Cities and towns shall regulate all traffic restrictions on such facilities except as provided in RCW 46.61.430, and all regulations adopted are subject to approval of the department before becoming effective. Nothing herein precludes the state patrol or any county, city, or town from enforcing any traffic regulations and restrictions prescribed by state law, county resolution, or municipal ordinance.

(2) The city, town, or franchise holder shall at its own expense maintain its underground facilities beneath the surface across the highway and has the right to construct additional facilities underground or beneath the surface of the facility or necessary overcrossings of power lines and other utilities as may be necessary insofar as the facilities do not interfere with the use of the right-of-way for limited access highway purposes. The city or town has the right to maintain any municipal utility and the right to open the surface of the highway. The construction, maintenance until permanent repair is made, and permanent repair of these facilities shall be done in a time and manner authorized by permit to be issued by the department or its authorized representative, except to meet emergency conditions for which no permit will be required, but any damage occasioned thereby shall promptly be repaired by the city or town itself, or at its direction. Where a city or town is required to relocate overhead facilities within the corporate limits of a city or town as a result of the construction of a limited access facility, the cost of the relocation shall be paid by the state.

(3) Cities and towns have the right to grant utility franchises crossing the facility underground and beneath its surface insofar as the franchises are not inconsistent with the use of the right-of-way for limited access facility purposes and the franchises are not in conflict with state laws. The department is authorized to enforce, in an action brought in the name of the state, any condition of any franchise that a city or town has granted. No franchise for transportation of passengers in motor vehicles may be granted on such highways without the approval of the department, except cities and towns are not required to obtain a franchise for the operation of municipal vehicles or vehicles operating under franchises from the city or town operating within the corporate limits of a city or town and within a radius not exceeding eight miles outside the corporate limits for public transportation on such facilities, but these vehicles may not stop on the limited access portion of the facility to receive or to discharge passengers unless appropriate special lanes or deceleration, stopping, and acceleration space is provided for the vehicles.

Every franchise or permit granted any person by a city or town for use of any portion of a limited access facility shall require the grantee or permittee to restore, permanently repair, and replace to its original condition any portion of the highway damaged or injured by it. Except to meet emergency conditions, the construction and permanent repair of any limited access facility by the grantee of a franchise shall be in a time and manner authorized by a permit to be issued by the department or its authorized representative.

(4) The department has the right to use all storm sewers that are adequate and available for the additional quantity of run-off proposed to be passed through such storm sewers.

(5) The construction and maintenance of city streets over and under crossings and surface intersections of the limited access facility shall be in accordance with the governing policy entered into between the department and the association of Washington cities on June 21, 1956, or as such policy may be amended by agreement between the department and the association of Washington cities.

[1984 c 7 § 241; 1977 ex.s. c 78 § 8; 1967 c 108 § 11; 1961 c 13 § 47.52.090. Prior: 1957 c 235 § 4; 1947 c 202 § 8; Rem. Supp. 1947 § 6402-67.]

## Notes:

**Severability -- 1984 c 7:** See note following RCW 47.01.141.

Urban public transportation system defined: RCW 47.04.082.

RCW 47.52.180

State facility through city or town — Hearing — Findings of board — Modification of proposed plan by stipulation.

At the conclusion of such hearing, the board shall consider the evidence taken and shall make specific findings with respect to the objections and issues within thirty days after the hearing, which findings shall approve, disapprove, or modify the proposed plan of the department of transportation. Such findings shall be final and binding upon both parties. Any modification of the proposed plan of the department of transportation made by the board of review may thereafter be modified by stipulation of the parties.

[1977 ex.s. c 151 § 65; 1977 c 77 § 3; 1961 c 13 § 47.52.180. Prior: 1957 c 235 § 10.]

# **APPENDIX G**

*Washington's  
Highway, Road and Street  
Problem*

A REPORT BY

THE JOINT FACT-FINDING COMMITTEE ON  
HIGHWAYS, STREETS AND BRIDGES

TO THE

WASHINGTON STATE LEGISLATURE  
THIRTY-FIRST SESSION

OLYMPIA, WASHINGTON

MEMBERS OF THE COMMITTEE

SENATE

J. H. ROBERTSON, *Chairman*  
VIRGIL R. LEE  
DON T. MILLER  
LESLIE V. MORGAN  
LESTER T. PARKER  
JOHN N. TODD

HOUSE

ROBERT M. FRENCH, *Vice Chairman*  
JULIA BUTLER HANSEN, *Secretary*  
W. J. BEIERLEIN  
W. Y. DENT  
HAROLD B. KELLOGG  
W. C. RAUGUST

LORENZ GOETZ, *Executive Secretary*

ways and streets.  
 onal uniform pro-  
 e.  
 ury funds and ad-  
 s of vehicles, the  
 cents per gallon  
 per vehicle to a  
 to a total fee of  
 al fee of \$9.00 per

*Recommended Fees  
 For Trailers and  
 Semi-Trailers*

- \$ 5.00
- 24.00
- 44.00
- 63.00
- 83.00
- 102.00
- 122.00
- 141.00
- 162.00
- 201.00
- 250.00
- 308.00
- 371.00
- 441.00
- 542.00
- 605.00

ent of those shown for

roviding roads and  
 nd towns. These  
 mprovement com-  
 re without means  
 road funds. The  
 heavy drain on  
 needed facilities

It is recommended that unincorporated areas with the characteristics described above be authorized to finance roads, streets and related improvements through the formation of Local Improvement Districts.

**Return of \$10,500,000 Borrowed for Relief Bonds**

By Amendment No. 18, the Constitution of the State of Washington recognizes the principle that motor vehicle fuels tax revenue and other special taxes and fees paid by highway users should be expended only for highway and street purposes. Any permanent diversion of revenue from these sources to other uses is an injustice to the highway-using taxpayers.

Approximately \$10,500,000 in motor vehicle fuels tax revenue was diverted to non-highway purposes between 1933 and 1943. These funds were used for servicing and retirement of the Emergency Relief Bond Issue of 1933. The 1949 Legislature should return this amount to the Motor Vehicle Fund from other sources and should allocate it to the state, county and city highway and street systems in the same proportion as present fuel tax revenues. Doing this will permit all jurisdictions to correct at least some of their most critical deficiencies immediately.

# An Amendment to the State Constitution

To Be Submitted to the Qualified Electors of the State for Their Approval or Rejection at the

## GENERAL ELECTION

TO BE HELD ON

Tuesday, November 7, 1944

## CONCISE STATEMENT

**PROPOSED** amendment to Article II of the Constitution, by adding a new section to be known as Section 40, limiting exclusively to highway purposes the use of motor vehicle license fees, excise taxes on motor fuels and other revenue intended for highway purposes only; providing for their payment into a special fund of the State Treasury; defining highway purposes; and excepting from its provisions certain other designated fees and taxes.

### HOUSE JOINT RESOLUTION NO. 4

*Be it Resolved by the Senate and the House of Representatives of the State of Washington in Legislative Session Assembled:*

That, at the general election to be held in this state on the Tuesday next succeeding the first Monday in November, 1944, there shall be submitted to the qualified voters of this state for their adoption and approval or rejection an amendment to Article II of the Constitution of the State of Washington, by adding thereto a new section to be known as section 40 to read as follows:

Section 40. 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 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 cost and expense of (1) acquisition of rights-of-way, (2) installing, maintaining and operating traffic signs and signal lights, (3) policing by the State of public highways, (4) operation of movable span bridges, and (5) operation of ferries which are a part of any public highway, county road, or city street;

(c) The payment or refunding of any obligation 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:

*Provided*, That this section shall not be construed to include revenue from

*An Amendment to the State Constitution*

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general or special taxes or excises not levied primarily for highway purposes, or apply to vehicle operator's license fees or any excise tax imposed on motor vehicles or the use thereof in lieu of a property tax thereon, or fees for certificates of ownership of motor vehicles.

*Be It Further Resolved*, The Secretary of State shall cause the foregoing proposed amendment to be published for at least three (3) months next preceding the election in a weekly newspaper in every county where a

newspaper is published throughout the state.

Passed the House March 8, 1943.

EDWARD J. REILLY,  
Speaker of the House.

Passed the Senate March 8, 1943.

VICTOR A. MEYERS,  
President of the Senate.

---

STATE OF WASHINGTON—ss.

Filed in the office of the Secretary of State, March 13, 1943.

BELLE REEVES,  
Secretary of State.

#### ARGUMENT FOR HOUSE JOINT RESOLUTION NO. 4

We believe the Good Roads Amendment to Article II of the State Constitution should be adopted for the following reasons:

At the request of farm, civic, labor, business, officials, motor owners, and Good Roads organizations, the Legislature approved and referred to the voters a Constitutional Amendment to limit definitely the use of gasoline taxes and automobile registration fees to street and highway construction, maintenance and safety. This does not include the excise taxes levied for school purposes.

There are 467 towns and communities in Washington which have no rail service and which are completely dependent upon highway transportation for their existence.

Their 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, 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.

Growing acceptance of such amendments is revealed by the fact that fourteen states have adopted such legislation. These include the western states of Nevada, Colorado, Idaho, Oregon and California.

By conserving highway funds motor vehicle taxes will be kept down, making property and other taxes for highway construction unnecessary. Vote yes on the proposed amendment.

#### WASHINGTON STATE GOOD ROADS ASSOCIATION

By *S. M. MORRIS, President,*  
*DOUGLAS A. SHELOR, Secretary*

STATE OF WASHINGTON—ss.

Filed in the office of the Secretary of State, September 10, 1943.

*BELLE REEVES,*  
*Secretary of State.*

*State Constitution*

ALL MOTOR VEHICLE  
TAXES SHALL BE USED  
FOR HIGHWAY PURPOSES  
ONLY.

APPROVED  
BY THE  
PEOPLE OF  
AMERICA

TEXTS OF  
STATE  
CONSTITUTIONAL  
AMENDMENTS

Dedicating  
SPECIAL MOTOR VEHICLE TAXES  
to HIGHWAY PURPOSES



E-10-40  
NATIONAL HIGHWAY USERS CONFERENCE

NATIONAL PRESS BUILDING  
WASHINGTON 4, D. C.

1. Automobile - Taxation - U.S.
2. Highway finance - U.S.

ED

STATE  
CONSTITUTIONAL  
AMENDMENTS

Dedicating

SPECIAL MOTOR VEHICLE TAXES  
to  
HIGHWAY PURPOSES



National Highway Users Conference, *Washington, D.C.*  
National Press Building  
Washington 4, D. C.

\* C p.v.

## INTRODUCTION

Great gains recently have been made in the protection of special motor vehicle taxes from expenditure for non-highway purposes. These advances reflect the determination of the public that such revenues from now on shall be used only for the purposes which they are levied and for no other.

These gains also reflect public concern over the consequences of past diversion, which have intensified postwar highway problems. The public's desire that postwar highway improvements not be hampered by diversion of necessary highway revenues has also been made evident.

A total of 20 states now have amendments in their Constitutions designed to substantially dedicate special motor vehicle taxes to road use. Several other states have taken steps to set up in their state laws, temporary guards against diversion. But because no legislature can bind a successor legislature, Constitutional Amendments are regarded as the surest safeguard against diversion of highway funds.

In addition to the twenty states which have already amended their Constitutions by often-overwhelming votes of the people, several other states are preparing for such referendums on full prohibition of diversion.

In the light of this situation, the National Highway Users Conference hopes it will be helpful to highway users and others to have available the text of the amendments already adopted as well as the text of pending amendments, which are reproduced in this book.

*Arthur C. Butler*

ARTHUR C. BUTLER, Director  
NATIONAL HIGHWAY USERS CONFERENCE

January, 1948

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CITATIONS AND DATES OF ADOPTION OF  
STATE CONSTITUTIONAL AMENDMENTS  
DEDICATING HIGHWAY REVENUES  
TO HIGHWAY PURPOSES

State	Constitutional Citation	Date
California	Article XXVI	Nov. 8, 1938
Colorado	Article X, Section 16	Nov. 6, 1934
Idaho	Article VII, Section 17	Nov. 5, 1940
Iowa	Article VII, Section 8	Nov. 3, 1942
Kansas	Article XI, Sections 5 and 10	Nov. 6, 1928
Kentucky	Section 230	Nov. 6, 1945
Maine	Article IX, Section 22	Sept. 11, 1944
Michigan	Article X, Section 22	Nov. 8, 1938
Minnesota	Article XVI, Section 3	Nov. 2, 1920
Missouri	Article IV, Section 30 (superseding earlier Section 44a, adopted Nov. 6, 1928)	Feb. 27, 1945
Nevada	Article IX, Section 5	Nov. 5, 1940
New Hampshire	Article VIa	Nov. 8, 1938
North Dakota	Article LVI	June 25, 1940
Ohio	Article XII, Section 5a	Nov. 4, 1947
Oregon	Article IX, Section 3	Nov. 3, 1942
Pennsylvania	Article IX, Section 18	Nov. 6, 1945
South Dakota	Article XI, Section 8	Nov. 5, 1940
Texas	Article VIII, Section 7-a	Nov. 5, 1946
Washington	Article II, Section 40	Nov. 7, 1944
West Virginia	Article VI, Section 52	Nov. 7, 1944

RECORD OF VOTE ON AMENDMENTS

STATE	RECORD OF VOTE		RATIO
	In Favor	Against	
California	670,810	296,952	2 1/4 to 1
Colorado	160,482	132,944	1 1/5 to 1
Idaho	108,358	41,145	2 2/3 to 1
Iowa	433,917	56,472	7 2/3 to 1
Kansas	444,806	136,719	3 1/4 to 1
Kentucky	160,533	42,458	3 4/5 to 1
Maine	139,805	33,172	4 1/4 to 1
Michigan	794,528	517,187	1 1/2 to 1
Minnesota (original date of vote Nov. 2, 1920)	526,936	199,603	2 1/2 to 1
(present date of amendment Nov. 4, 1924)	520,769	197,455	2 1/2 to 1
Missouri	670,299	503,861	1 1/3 to 1
Nevada	16,543	4,609	3 3/5 to 1
New Hampshire	96,631	23,851	4 to 1
North Dakota	91,149	49,331	1 4/5 to 1
Ohio	1,025,800	662,579	1 1/2 to 1
Oregon	125,994	86,324	1 2/5 to 1
Pennsylvania	644,613	99,975	6 1/2 to 1
South Dakota	141,792	108,256	1 1/3 to 1
Texas	231,834	58,555	4 to 1
Washington	358,581	160,898	2 1/4 to 1
West Virginia	218,652	38,196	5 1/2 to 1
Totals: 20 States	7,582,832	3,450,542	2 1/5 to 1

---

### SUGGESTED FORM OF AMENDMENT

The text of a constitutional amendment to dedicate special motor vehicle taxes to highway purposes obviously must conform to the form and constitutional requirements in the particular state. However, experience has indicated certain desirable points to be considered in the drafting of an amendment. The amendment should be (1) brief, (2) clear, and (3) limited to one subject—the protection of highway monies. Where other matters (such as limitation of tax rates, for example) have been included in the amendment, a confusion of issues has ensued with the result that the anti-diversion amendment has failed. In the light of the foregoing considerations, the following text and amendment is offered for consideration:

“No moneys derived from fees, excises, or license taxes relating to registration, operation, or use of vehicles on the public highways, or to fuels used for the propulsion of such vehicles, shall be expended for other than cost of administering such laws, statutory refunds and adjustments provided therein, payment of highway obligations, cost for construction, reconstruction, maintenance, and repair of public highways and bridges, and expense of state enforcement of traffic laws.”

---

### TEXT OF AMENDMENTS

On the following pages appears the text of amendments to 20 state constitutions dedicating special motor vehicle imposts to highway purposes.

#### California

On November 8, 1933, the people of California adopted the following amendment:

“Article XXVI. Motor Vehicle Taxation and Revenues. Section 1. (a) From and after the effective date of this article, all moneys collected from any tax now or hereafter imposed by the State upon the manufacture, sale, distribution, or use of motor vehicle fuel, for use in motor vehicles upon the public streets and highways over and above the costs of collection, and any refunds authorized by law shall be used exclusively and directly for highway purposes, as follows:

“(1) The construction, improvement, repair and maintenance of public streets and highways, whether in incorporated or unincorporated territory, for the payment for property, including but not restricted to rights of way, taken or damaged for such purposes and for administrative costs necessarily incurred in connection with the foregoing.

“(2) As now or hereafter may be provided by law, the net revenue from not more than twenty per cent of one cent per gallon tax on such motor vehicle fuel may be expended under any act of the Legislature for the payment, redemption, discharge, purchase, adjustment, contributing to or refunding of special assessments or bonds or coupons issued for street or highway purposes as set forth in this section and which special assessment districts were initiated by an ordinance or resolution of intention adopted prior to January 1, 1933.

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DEDICATION  
OF  
SPECIAL HIGHWAY REVENUES  
TO  
HIGHWAY PURPOSES

★ ★ ★

An Analysis of the Desirability of Protecting  
Highway Revenues Through Amendments  
to State Constitutions

NATIONAL HIGHWAY USERS CONFERENCE  
National Press Building  
Washington, D. C.

**FIVE YEAR DIVERSION OF HIGHWAY USER TAXES\***

**1935-1939**

1935	_____	\$147,142,000
1936	_____	169,344,000
1937	_____	161,413,000
1938	_____	157,516,000
1939	_____	181,654,000
		<hr/>
		\$817,069,000

\*As reported by the United States Public Roads Administration.

The diversion of highway funds to non-highway purposes in these five years is more than the total of \$811,656,000 spent on maintenance and construction of all state roads in the United States during 1939, the last year of that period.

## *Foreword*

Dedication of special motor vehicle taxes to highway purposes is of concern to every highway user.

Increased demands of national defense on highway transportation have brought into bold relief the needs of our highway system. These would be few in this time of defense activities if all revenue from special motor vehicle taxes had been profitably and wisely expended on roads.

In past years, with increasing seriousness during the last decade, approximately \$1,500,000,000 has been directly diverted to "other than highway purposes." This vast sum of money, if available today, would more than bring the 78,000-mile strategic system of defense highways up to requirements set by the War Department and the Public Roads Administration.

Originally intended for a specific purpose—the building of highways—these taxes were accepted by the highway user as his contribution for the use of the roads.

Dedication of highway funds to road purposes means that the highway user will get his dollar value in highways for the taxes he pays. Use of these funds for non-highway purposes means that too many highways are incomplete, unsafe and inadequate, while other needed highways remain unbuilt because money collected for them has been spent for other purposes.

Experience has demonstrated that the only certain means of protecting highway funds is by adoption of properly drafted amendments to state constitutions dedicating these funds for road purposes.

This booklet has been prepared to call attention again to the desirability of dedicating highway funds to highway purposes and the menacing practice of improper use of road money and its far-reaching implications.

CHESTER H. GRAY, Director,  
National Highway Users Conference.

August, 1941

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The motorists' special taxes must be dedicated exclusively to highway purposes:

- (1) to carry out the program of adequate highways for which he is now paying;
- (2) to strengthen national defense;
- (3) to save thousands of lives through elimination of existing hazards;
- (4) to increase employment, and lastly
- (5) in the interest of common honesty.

The improper use of funds raised by special taxes on a special class of citizens for a special purpose, cannot be justified from either an ethical or practical standpoint.

### HIGHWAY PLANNING

Need for greater and more efficient highway planning is recognized from experience and is projected by the present defense program. Highway users will need to avail themselves of information being assembled by the highway planning surveys now in progress in all the states, and the District of Columbia, to assure maximum benefits from future expenditure of highway money. The data will show the amount and source of highway revenue available, what roads, based on traffic needs, should be built or improved first, the type of construction most suitable and the ability of the highway beneficiaries to meet costs of improvements.

### TYPES OF DIVERSION

Improper use of highway taxes has divided itself into three major classifications that are generally referred to as "direct diversion," "indirect diversion" and "dispersion."

The first term is used in cases where there is an outright transfer of money from highway revenues to a direct transfer or allocation of highway revenues to general governmental purposes.

There are many forms of indirect diversion, such as the use of convict labor on road work where in some instances free labor would be more economical. Meeting general police expenses, street cleaning, highway lighting, construction and maintenance of sidewalks, gen-

eral state advertising and other marginal uses may also be cited as frequent indirect diversions.

Dispersion is the word used to describe the allocation of highway revenues to local subdivisions of government without adequate safeguard that they will be used for highway purposes. The history of this practice shows that quite often these funds are not used for highway purposes, and in other cases that a maximum return is not received from road monies when expended by local governmental units.

### CONGRESS CONDEMNS DIVERSION

The Federal Government registered its opposition toward improper use of motor vehicle funds for other than highway purposes in October, 1932, in the Report of the Federal Oil Conservation Board to the President of the United States. This report was signed by the Secretary of the Interior, the Secretary of War, the Secretary of Navy and the Secretary of Commerce. Here is what they said:

"In many states proceeds of gasoline taxes have been used for purposes having no relation to the use of automobiles on the highways. \* \* \* Such uses of funds derived from gasoline taxes are at variance with the purpose of the tax at its inception. Therefore, the fourth essential feature of a successful uniform gasoline tax law is that no part of the revenue derived from the tax shall be diverted to uses other than for the benefit of automotive motor vehicles."<sup>1</sup>

More recently, the United States Congress repeatedly declared its opposition to the principle of diversion. Its position is clearly stated in the Hayden-Cartwright Act of 1934 as follows:

"Since it is unfair and unjust to tax motor-vehicle transportation unless the proceeds of such taxation are applied to the construction, improvement, or maintenance of highways, after June 30, 1935, Federal aid for highway construction shall be extended only to those States that use

<sup>1</sup> An excerpt from Report V of the Federal Oil Conservation Board to the President of the United States, October, 1932.

# **APPENDIX H**

Wash. AGLO 1975 NO. 62, 1975 WL 165801 (Wash.A.G.)

Office of the Attorney General  
State of Washington

**AGLO**

**1975**

**No**

**62**

July 17, 1975

OFFICES AND OFFICERS -- STATE -- HIGHWAYS DEPARTMENT -- DISPOSITION OF CERTAIN SUR-  
PLUS HIGHWAY LAND.

(1) In those instances in which the highway lands (including air space) purchased with motor vehicle fund moneys are to be leased or sold to a county or city for nonhighway purposes, the purchaser or lessee, even though it is also a governmental agency, will be required to provide such monetary or other consideration as is necessary, under the particular factual circumstances involved, to avoid an unlawful diversion of motor vehicle funds.

(2) On the other hand, if the lands and/or air space are required to be used by the acquiring county or city for such "highway" purposes as could, constitutionally, be the direct object of motor vehicle fund expenditures themselves, no other consideration will constitutionally be necessary in order to justify the transaction under the provisions of Article II, § 40 (Amendment 18).

Honorable P. J. Gallagher  
State Representative, 29th District

Dear Sir:

By recent letter you requested our opinion on a question which we paraphrase as follows:

What, if any, monetary or other valuable consideration is necessary in order to permit the state highway department to lease or sell to a county or city land previously acquired by the department for highway purposes with moneys from the state motor vehicle fund?

We answer this question in the manner set forth in our analysis.

ANALYSIS

We begin our response to your question by noting three pertinent sections of chapter 47.12 RCW which relate, gen-

erally, to the disposition of property previously acquired for state highway purposes.

First, RCW 47.12.070 provides that:

“If the Washington state highway commission deems that any land is no longer required for state highway purposes and that it is in the public interest so to do, said highway commission may negotiate for the sale of the land to a city or county of the state. The state highway commission shall certify the agreement for the sale to the governor, with a description of the land and the terms of the sale, and the governor may execute and the secretary of the state shall attest the deed and deliver it to the grantee.

“Any moneys received pursuant to the provisions of this section shall be deposited in the motor vehicle fund.”

Next, RCW 47.12.120 states that:

“The highway commission is authorized, subject to the provisions and requirements of zoning ordinances of political subdivisions of government, to rent or lease any lands, improvements, or air space above or below any lands, including those used or to be used for both limited access and conventional highways which are held for highway purposes but are not presently needed, upon such terms and conditions as the highway commission may determine.”

And thirdly, RCW 47.12.125, a statute enacted in conjunction with RCW 47.12.120, provides, in essentially the same manner as the concluding paragraph of RCW 47.12.070, *supra*, that:

\*2 “All moneys paid to the state of Washington under any of the provisions of RCW 47.12.120 shall be deposited in the motor vehicle fund.”

The motor vehicle fund to which reference is made in these statutes, as provided for by RCW 46.68.070, is a special fund which has been established by the legislature in accordance with the mandate of Article II, § 40 (Amendment 18) of our state constitution. This provision, which was adopted in 1944, requires that:

“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....”

As you will readily discern, neither RCW 47.12.070 nor RCW 47.12.120, *supra*, specifies any particular form or quantum of consideration which must be provided by a county or city either in purchasing land no longer required for highway purposes or in renting or leasing land or improvements above or below limited access or conventional highways. Instead, both statutes provide, in effect, that the terms of any such sales or leases are to be determined by negotiation between the highway commission and the municipal purchaser or lessee.

Insofar as any constitutional requirement for some form of consideration is concerned, it is well settled that Article VIII, § 5 of our constitution which, among other things, prohibits gifts of state funds or property, is inapplicable to intergovernmental transactions. See, Anderson v. O'Brien, 84 Wn.2d 64, 524 P.2d 390 (1974). Where, however, as in the cases contemplated by your question, the lands involved were acquired with moneys from the constitutionally restricted motor vehicle fund, it appears to us that a somewhat different view must be taken with regard to this issue. In AGO 51-53 No. 376 (copy enclosed), which was written to the state highway commission on August 13, 1952, we addressed ourselves to the question in the context of a proposed conveyance of surplus highway lands to King county for park purposes under RCW 47.12.070, *supra*. After quoting that statute and noting its derivation from § 1, chapter 146, Laws of 1945, we said, in overall response to the question posed:

“This statutory authorization clothes the commission with broad discretionary powers in its negotiations for the sale of lands no longer required for highway purposes. We believe, however, that the term ‘negotiation’ as used therein implies that it was not the intent of the legislature to authorize the commission to give away the subject lands without something in the way of consideration being returned to the motor vehicle fund. It would seem at the outset that if unused lands were given to a city or county for no monetary consideration it would constitute an unlawful diversion of motor vehicle funds, as such land is purchased from a definite fund provided by the motor vehicle users. However, if the establishment of the subject park will be of benefit to the motor vehicle users in much the same way as roadside improvements, which may be constructed by the commission from motor

vehicle funds pursuant to section 88, chapter 53, Laws of 1937, RCW 47.40.010, then in that event there would be consideration of an indirect nature returning to the motor vehicle users.

\*3 "It is therefore our opinion that section 1, chapter 146, Laws of 1945, supra, authorizes the Highway Commission to convey the subject property for a consideration other than that of a monetary nature and that said section grants to the Commission substantial powers in their determination of such consideration, that in the instant case if in their opinion the highway users are to be benefited by the establishment of the subject park, which benefit will provide sufficient consideration for their entering into the transaction, then they may so convey to King County for such a use.

"We would further suggest that the deed conveying the property include a reversionary clause whereby the land would revert to the State of Washington in the event the park is not established and maintained by King County."

We adhere, at this time, to the foregoing analysis of RCW 47.12.070. Likewise, we adopt this same analysis with respect to the question of consideration in connection with leases made by the highway commission under RCW 47.12.120. What this basically means, in terms of your present question, is thus as follows:

(1) In those instances in which the highway lands (including air space) purchased with motor vehicle fund moneys are to be leased or sold to a county or city for nonhighway purposes, the purchaser or lessee, even though it is also a governmental agency, will be required to provide such monetary or other consideration as is necessary, under the particular factual circumstances involved, to avoid an unlawful diversion of motor vehicle funds.

(2) On the other hand, if the lands and/or air space are required to be used by the acquiring county or city for such "highway" purposes as could, constitutionally, be the direct object of motor vehicle fund expenditures themselves, [FN1] no other consideration will constitutionally be necessary in order to justify the transaction under the provisions of Article II, § 40 (Amendment 18), supra.

In those cases where other consideration is constitutionally required, because the lands are to be used for other than highway purposes, such consideration may take various forms. It need not necessarily be monetary or be precisely equivalent to the fair market rental or sale value of the subject lands. It is conceivable, for example, at least in the case of a lease or a qualified sale subject to a reversion clause, that some part of the consideration to the highway department could be in the form of a performance of maintenance services, or the like, upon the property by the lessee or qualified grantee. Or, perhaps, a part of the consideration in such a case involving a lease might be in the form of valuable improvements to the property by the lessee which, upon reverting to the state upon termination of the lease, would retain a significant residual value in terms either of future state use of the property or for future sale or lease purposes.

It is hoped that the foregoing will be of some assistance to you.

Very truly yours,  
\*4 Slade Gorton  
Attorney General

Philip H. Austin  
Deputy Attorney General

[FN1]. E.g., a roadside park in the nature of a "rest stop" for highway users or a "park and ride" facility such as was upheld by our court in the recent case of Highway Commission v. O'Brien, 83 Wn.2d 878, 523 P.2d 190 (1974).

Wash. AGLO 1975 NO. 62, 1975 WL 165801 (Wash.A.G.)  
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Wash. AGO 1951-53 NO. 376, 1952 WL 44990 (Wash.A.G.)

Office of the Attorney General  
State of Washington

AGO 51-53 No. 376

August 13, 1952

CONSIDERATION FOR THE TRANSFER OF STATE HIGHWAY LANDS TO A COUNTY FOR A PARK.

The Highway Commission of the State of Washington is authorized to dispose of state lands under the control of the Highway Department which are no longer necessary for highway purposes to a county for the purpose of developing a park without monetary consideration provided the establishment of the park will be of sufficient benefit to the traveling public to justify such a non-monetary [[[nonmonetary]]] conveyance.

Washington State Highway Commission

Attention: Mr. H. C. Higgins  
Secretary

Gentlemen:

You stated in your recent letter that the State of Washington is the owner of certain property on Mercer Island purchased by the Highway Department for a maintenance site, which property is adjacent to Primary State Highway No. 2 and lies near the west approach to the East Channel Bridge. You further state that because of opposition by local residents to the establishment of this type of an operation in that locality, the property has never been developed as a maintenance site. King County now desires to secure title to this property to develop a public park. Based upon this factual situation, your question is whether the Washington State Highway Commission has the authority by law to dispose of this state owned property to King County for development as a public park without monetary consideration.

Our conclusion may be summarized as follows:

The Highway Commission of the State of Washington is authorized by section 1, chapter 146, Laws of 1945, RCW 47.12.070, to dispose of state lands under the control of the Highway Department which are no longer necessary for highway purposes to a county for the purpose of developing a park without monetary consideration, provided the establishment of the park will be of sufficient benefit to the traveling public to justify such a non-monetary [[non-monetary]] conveyance.

ANALYSIS

RCW 47.12.070, as derived from section 1, chapter 146, Laws of 1945, provides in part:

“If the director deems that any land is no longer required for state highway purposes and that it is in the public interest, he may negotiate for the sale of the land to a city or county of the state. He shall certify the agreement

for the sale to the governor, with a description of the land and the terms of the sale, and the governor may execute and the secretary of state shall attest the deed and deliver it to the grantee. \* \* \*

It is further provided that if any moneys are received pursuant to the sale of said highway lands, said moneys will be deposited in the motor vehicle fund.

Section 4, chapter 247, Laws of 1951, RCW 43.27.100, vests the former powers, authorities, functions and duties of the Director of Highways in the State Highway Commission.

Lands for highway purposes other than those donated or granted or transferred from a municipal subdivision or the United States government are purchased with motor vehicle funds.

\*2 This statutory authorization clothes the commission with broad discretionary powers in its negotiations for the sale of lands no longer required for highway purposes. We believe, however, that the term "negotiation" as used therein implies that it was not the intent of the legislature to authorize the commission to give away the subject lands without something in the way of consideration being returned to the motor vehicle fund. It would seem at the outset that if unused lands were given to a city or county for no monetary consideration it would constitute an unlawful diversion of motor vehicle funds, as such land is purchased from a definite fund provided by the motor vehicle users. However, if the establishment of the subject park will be of benefit to the motor vehicle users in much the same way as roadside improvements, which may be constructed by the commission from motor vehicle funds pursuant to section 88, chapter 53, Laws of 1937, RCW 47.40.010, then in that event there would be consideration of an indirect nature returning to the motor vehicle users.

It is therefore our opinion that section 1, chapter 146, Laws of 1945, supra, authorizes the Highway Commission to convey the subject property for a consideration other than that of a monetary nature and that said section grants to the Commission substantial powers in their determination of such consideration, that in the instant case if in their opinion the highway users are to be benefited by the establishment of the subject park, which benefit will provide sufficient consideration for their entering into the transaction, then they may so convey to King County for such a use.

We would further suggest that the deed conveying the property include a reversionary clause whereby the land would revert to the State of Washington in the event the park is not established and maintained by King County.

Very truly yours,  
Smith Troy  
Attorney General

Paul Sinnitt  
Assistant Attorney General

Wash. AGO 1951-53 NO. 376, 1952 WL 44990 (Wash.A.G.)  
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Ariz. Op. Atty. Gen. No. I79-319, 1979 WL 23386 (Ariz.A.G.)

Office of the Attorney General  
State of Arizona

I79

319  
(R79-029)

December 31, 1979

Mr. L. W. Matlock  
Manager, Condemnation Services

Dear Mr. Matlock:

In your letter of January 22, 1979, you informed us that the Arizona Department of Transportation (ADOT) has been approached by the Department of Public Safety (DPS) regarding acquisition of the Motor Vehicle Division's drivers' license building at 2339 North 20th Avenue. In this regard, you requested our opinion on the following questions:

1. May ADOT convey real property without a public auction?
2. Does such a conveyance require that the highway users' fund be reimbursed? If so, on what basis (fair market value, original cost, historical FMV, etc.)?

I

ADOT is not required to hold a public auction in order to convey the Motor Vehicle Division's building to DPS. The general authority for the Department to dispose of real property is found in A.R.S. § 28-1865.G which, in pertinent part, provides:

The director may dispose of real property of any right, title or interest therein, when he determines that it is no longer needed or used for transportation purposes. The director may, after the establishment, laying out or substantial completion of a transportation improvement, convey out any such real property or any interest therein which was acquired pursuant to subsection D of this section and which it determines is not necessary for such improvement. Such conveyance shall be made to the highest and most responsible bidder at a public sale held for that purpose. (Emphasis added.)

Under this provision, the determination of whether a public sale must be held in order to convey ADOT real property depends upon the circumstances under which the property was acquired. If the real property was acquired pursuant to A.R.S. § 28-1865.D, a public auction must be held in order to convey it, even if the prospective grantee is a state agency. A.R.S. § 28-1865.D provides for the acquisition of real property for future needs in connection with adopted and approved plans for state highways and airports. [FN1] The property on which the Motor Vehicle Division building is located is not within this category. Accordingly, a public sale does not have to be held in order to convey it. [FN2]

II

In answer to your second question, the highway users' fund must be reimbursed because the building and real property on which the building was constructed was purchased with highway funds. [FN3] The basis of reimbursement to the highway fund should be the fair market value of the property.

Under the Arizona Constitution, the highway users' fund may only be used for limited purposes. [FN4] Ariz. Const., Art. 9, § 14. See Arizona Highway Commission v. Nelson, 105 Ariz. 76, 459 P.2d 509 (1969); Ariz. Att'y Gen. Op. Nos. 76-39, 71-37 and 67-21. The Arizona Supreme Court has noted that the fund is not available for general state appropriations:

\*2 [I]t is important to emphasize that it was the voters themselves who created the state highway fund in 1952, irrevocably earmarking certain motor vehicle taxes and fees for highway uses only and specifically providing for their expenditure for 'highway obligations'. The state highway fund is not available for general state appropriations.

State Highway Commission v. Nelson, 105 Ariz. at 79, 80 (1969)

Accordingly, in Ariz. Att'y Gen. Op. No. 67-21, we opined:

[I]t is therefore, the opinion of this office that while Highway Department supplies, materials and equipment may be transferred to other budget units under the provisions of A.R.S. § 35-131.12.B.4 [FN5] the State Highway Fund from which they were purchased, and which is held in public trust for the taxpayers of the State, must be fully reimbursed by the current value of the item of disposal.

As noted in that opinion, ADOT should not receive less than the current fair market value for the Motor Vehicle Division building. That the real property should not be disposed of for less than its current fair market value is implicit in the legislative mandate that the Director justify each acquisition or disposal of real property under this section by at least one appraisal report, in sufficient scope to document and justify the economic basis for the acquisition or disposal. A.R.S. § 28-1865.I.

We disagree with the suggestion in your opinion request that DPS may have to contribute only 89% of the purchase price of the building because it receives, as part of its annual budget, a percentage of the anticipated highway users' revenue funds. It does not follow, as a matter of accounting, that because DPS receives 11% of the anticipated highway fund income they need only reimburse ADOT 89% of the purchase price of the building. The reason is that this would probably not result in ADOT receiving the full fair market value of the building as the statutes and the Constitution mandate. Further, the source of funds from which DPS compensates ADOT is a matter within the sound discretion of the Legislature, and does not pose a problem at this time.

If you have any questions concerning the foregoing, please let us know.

Sincerely,  
BOB CORBIN  
Attorney General

[FN1] A.R.S. § 28-1865.D reads as follows:

The authority conferred by this section to acquire real property for transportation purposes includes authority to acquire for future needs provided the transportation board has an adopted and approved state route plan or airport site location for such transportation showing a reasonable need for such property. (Emphasis added.)

[FN2] We note, however, that the Director may hold a public sale in this situation if, in the exercise of his discretion as trustee of the lands, he deems it to be in the public interest.

[FN3] This information was provided by Dana Parsells, ADOT Property, Accounting Section Manager.

[FN4] The limitation on the expenditure of highway funds is contained in Ariz. Const., Art. 9, § 14, which the Legislature implemented by creating a state highway fund. A.R.S. §§ 28-1821 et seq.

[FNS] This provision has been repealed. Such transfers are now authorized by A.R.S. § 41-814.4.

Ariz. Op. Atty. Gen. No. I79-319, 1979 WL 23386 (Ariz.A.G.)  
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ing meetings, conventions and other functions of and on behalf of the intermediate unit."

Specifically, in some school districts the words "upon the presentation of an itemized, verified statement of such expenses" have not been construed to mean that documentation of such expenses is required, but merely a list of expenditures must be submitted.

Please be advised that it is our opinion that the above-quoted sections of the School Code do require documentation of expenditures and that the "verification" called for by the statute should be supplied by such things as receipted hotel bills, copies of bus, taxi, airplane tickets and the like, turnpike or parking lot receipts, or affidavits where other verification is not readily available. We note that is standard procedure for verification of expenses and we have no reason to believe that the Legislature intended anything less in the above-quoted sections of the School Code. See *Rules and Regulations Governing the Preparation and Submission of Travel and Subsistence Accounts Payable From Commonwealth Funds*, Executive Board, March 26, 1969, as amended.

Sincerely yours,  
 MARK P. WIDOFF  
*Deputy Attorney General*  
 ISRAEL PACKEL  
*Attorney General*

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OFFICIAL OPINION No. 40

*Article VIII, §11 of the Pennsylvania Constitution—Administrative Code §2003(d), 71 P.S. §513(d)—Administrative Code 507(c)(3), 71 P.S. §187(c)(3)—Motor License Fund.*

1. The Department of Transportation has the statutory authority to lease an aircraft in conjunction with the performance of its highway construction and maintenance functions and the Department, under Article VIII, §11 of the Pennsylvania Constitution, can expend Motor License Fund monies as part of the "cost and expenses incident thereto" in performance of such function.
2. The Department may incidentally allow its own personnel or other departments to use the aircraft on non-highway matters so long as the Department charges a fair market rental value of such use in order to reduce the charge to the Motor License Fund.

Harrisburg, Pa.  
 June 1, 1973

Honorable Jacob G. Kassab  
 Secretary  
 Department of Transportation  
 Harrisburg, Pennsylvania  
 Dear Secretary Kassab:

Receipt is acknowledged of your request for our opinion regarding the authority of your Department to lease an aircraft to

perform its statutory duties of constructing, reconstructing, maintaining and repairing public highways and projects and air navigation facilities. It is our opinion and you are hereby advised that the Department has statutory authority to lease an aircraft in conjunction with the performance of the aforementioned duties and that the Department, under Article VIII, §11 of the Pennsylvania Constitution, can expend Motor License Fund monies as part of the "cost and expenses incident thereto" in performance of such functions.

The Department of Transportation intends to lease an aircraft for the use of Department officials and employees engaged in State highway work in order to expedite and more efficiently carry out the work of the Department as it relates to highway construction and maintenance. Bids for the lease of the aircraft have been solicited from three companies engaged in this business. The bid has not yet been awarded pending this request for legal advice in order that all requisite statutory and constitutional provisions have been followed. The Department also advises that there will be time when the leased aircraft will not be needed for the use of officials or employees on highway business. In order to mitigate the rental costs to the Motor License Fund, the Department proposes to permit its use for non-highway purposes by officials or employees of the Department and charge the organizational budget of such official or employee the fair rental value thereof. Furthermore, if the plane is not needed by Department employees for highway business or for other purposes connected with the business of the Department, the Department suggests that it might be used by other departments charging them the fair market rental value for such use.

Section 2003(b) of the Administrative Code, 71 P.S. §513(b) expressly authorizes the Department of Transportation to purchase aircraft "... to expedite and more efficiently to carry out the work of the department..." Furthermore, Section 507(c)(3) of the Administrative Code, 71 P.S. §187(c)(3) enables the Department to "[r]ent machinery and other equipment and devices..." for the purpose of performing its statutory function. Given the general understanding that the terms "machinery" and "equipment" includes vehicles used for transportation [See, *Franz v. Sun Indemnity Co. of N.Y.*, 7 So. 2d 636, 641, 644 (La. App. 1942); *Dependent School District No. 13 v. Williamson*, 325 P. 2d 1045 (Okl. 1958); *I.C.C. v. Mitchell Bros. Truck Lines*, 250 F. Supp. 636, 638 (D. Ore. 1966); *Dorsett v. State Dept. of Highways*, 144 Okl. 33, 289 P 298, 302 (1930)], it is our conclusion that Sections 507(c)(3) and 2003(b) of the Administrative Code, 71 P.S. §§187(c)(3) and 513(b) authorize the Department of Transportation to rent aircraft for the purpose of carrying out its statutory function.

With reference to the usage of monies out of the Motor License Fund in order to defray the cost of rental, it is noted that

such monies will be expended for use of the aircraft by the Department only in conjunction with the construction, reconstruction, maintenance and repair of and safety on public highways, bridges and air navigation facilities. In view of this limitation, it is our conclusion that this expenditure of Motor License Fund monies is constitutionally appropriate as "... costs and expenses incident thereto..." within the meaning of Article VIII, Section 11 of the Pennsylvania Constitution.

The only remaining question is whether or not the Department can permit the usage of the aircraft by its own personnel for non-highway maintenance purposes and other administrative departments, boards and commissions where such bodies reimburses the Department at the fair market rental value with the money being returned to the Motor License Fund. Just as the Department has authority to rent an airplane under Section 507 (c)(3) of the Administrative Code, 71 P.S. §187(c)(3), so also other administrative bodies may rent the usage of the aircraft from the Department. Furthermore, the departments "... shall, as far as practical, cooperate with each other in the use of... equipment." Section 501 of the Administrative Code, 71 P.S. §181. Since the Department has the power to lease the aircraft for highway purposes, it has the incidental power to reduce its ultimate costs by receiving compensation for the use of the aircraft for other Commonwealth purposes.

In summation, it is concluded that 1) the Department may lease an aircraft from the lowest responsible bidder; 2) the Department may expend Motor License Funds for leasing an aircraft which is used by its employees in conjunction with highway construction and maintenance; and 3) the Department may incidentally allow its own personnel or other departments to use the aircraft on non-highway matters so long as the Department charges a fair market rental value of such use in order to reduce the charge to the Motor License Fund.

Very truly yours,  
RICHARD J. ORLOSKI  
*Deputy Attorney General*  
ISRAEL PACKEL  
*Attorney General*

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OFFICIAL OPINION No. 41

*State Athletic Commission—Female boxers and wrestlers—Equal Rights Amendment*

1. Section 310 of the State Athletic Code, 4 P.S. §30.310, which bars females from being licensed as boxers or wrestlers, has been repealed by Article I, Section 27 of the Pennsylvania Constitution providing that equality of rights under the law shall not be denied or abridged in the Commonwealth because of the sex of the individual.