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NO. 83349-4

SUPREME COURT OF THE STATE OF WASHINGTON

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

**BRIEF OF RESPONDENTS GOVERNOR GREGOIRE AND
SECRETARY HAMMOND**

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I. ISSUES PRESENTED

The first three issues below relate to the jurisdiction of the Court. The remaining issues arise only if the Court determines that it has jurisdiction to consider them.

1. Should the Petition be dismissed because it fails to invoke the original jurisdiction of the Court in mandamus?
2. Should the Petition be dismissed because even if the Court has original jurisdiction in mandamus, no justiciable controversy is present?
3. Should the new claims in Petitioners' brief, not pled in the Petition, be dismissed because the claims fail to invoke the original jurisdiction of the Court in mandamus?
4. Under Article II, Section 40 (18th Amendment), may real property acquired in whole or in part with motor vehicle funds be sold, leased, or transferred for non-highway purposes upon the payment of consideration?
5. May the Legislature appropriate motor vehicle funds for an independent analysis to determine the value the State should receive for the use of right of way for a non-highway purpose?
6. Should Petitioners' request for attorney fees under the common fund doctrine be denied when none of their claims provide a basis to conclude that any expenditure from the motor vehicle fund was improper, let alone patently unconstitutional?

II. STATEMENT OF THE CASE

A. Procedural Background

Petitioners began this action on July 15, 2009, by filing a Petition Against State Officer ("Petition"), seeking to invoke the original jurisdiction of this Court. Based upon two subsections of the state

transportation budget for the 2009-11 biennium Engrossed Substitute Senate Bill (“ESSB”) 5352, Section 204(3) and Section 306(17), the Petition sought a writ of prohibition against the Governor and the Secretary of the Department of Transportation. The Petition asserted that the two transportation budget provisos, quoted in full at pages 17-18 below, “set[] a date certain by which the sale or lease [of portions of Interstate 90] to Sound Transit is to be accomplished.” Pet. ¶ 2.25. Petitioners alleged that, “[u]nless restrained, the Governor or Washington State Department of Transportation will undoubtedly exercise their purported authority under ESSB 5352 to sell or lease I-90 to Sound Transit by December 1, 2009, in violation of the Washington Constitution Art. II, § 40.” Pet. ¶ 3.3. Petitioners sought a “writ of prohibition prohibiting [Respondents] from taking any action pursuant to ESSB 5352 with respect to the sale or lease of any portion of I-90 to Sound Transit for the purpose of a rail transit system because (1) such action is unconstitutional under the Washington State Constitution Article. II, § 40.” Pet. ¶ 3.1.

By letter of July 20, 2009, the Court Clerk directed Respondents to answer the Petition and address whether the Petition should be retained, transferred, or dismissed. On August 20, 2009, the Respondents filed their Answer and a Memorandum in Support of Dismissal. Respondents sought dismissal of the Petition for the reasons that the Petition neither invoked

the original jurisdiction of the Court, nor presented a justiciable controversy.

On August 20, 2009, Sound Transit filed a Motion To Intervene and at the same time, filed an Answer to the Petition. Respondents answered Sound Transit's Motion to Intervene on August 27, 2009, expressing no opposition to intervention, but objecting to any expansion of the claim in the Petition based upon intervention by Sound Transit. On August 28, 2009, Petitioners filed their reply to Respondents' Memorandum In Support of Dismissal and an Answer to Sound Transit's Motion To Intervene. Petitioners opposed intervention by Sound Transit. On September 1, 2009, Sound Transit filed their Reply in Support of its Motion to Intervene. Petitioners submitted a second Opposition to Respondents' Memorandum In Support of Dismissal on September 14, 2009, and on September 17, 2009, Respondents filed a Reply In Support of Dismissal.

Following an En Banc conference, the Court issued an Order dated December 4, 2009, providing that (1) "the Petition Against State Officer is retained for determination by this Court"; (2) "Sound Transit's Motion to Intervene ... is granted"; and (3) "the parties are requested to approve an agreed statement of facts and provide this Court with the same." The

parties filed an Agreed Statement of Facts with the Court on February 8, 2010.

On March 22, 2010, Petitioners filed a motion seeking a stay pursuant to RAP 8.3. Sound Transit and Respondents jointly opposed Petitioners' stay motion, and the Court Commissioner issued a Ruling Denying Motion for Stay on April 12, 2010.

B. Factual Background

At the request of the Court, the parties prepared and submitted an Agreed Statement of Facts and appended exhibits for the purpose of the Court's consideration of the Petition Against State Officer. The following facts are drawn from the Agreed Statement. Before turning to them, Respondents note a likely apparent but important point. This case concerns an ongoing highway construction project. Over time, including the time during which this matter has been pending, the facts and circumstances surrounding the project have evolved and will continue to evolve.

In 1976, the State of Washington; the cities of Seattle, Mercer Island, and Bellevue; King County; and the Municipality of Metropolitan Seattle, executed a Memorandum Agreement regarding the Interstate 90 ("I-90") corridor across Lake Washington. The Agreement was executed under the authority of RCW 47.52, governing property acquisition, design,

and construction of limited access facilities such as I-90.¹ The Agreement provided for no more than eight motor vehicle lanes. It also provided that two of the lanes would be designed for and permanently committed to transit use. Agreed Statement of Facts (“AF”) ¶ 5, Ex. A at 3-4. Notably, the Agreement stated that the I-90 facility “shall be designed and constructed so that conversion of all or part of the transit roadway to fixed guideway is possible.” *Id.* at 5. When the Memorandum Agreement was later amended in 2004, the parties agreed to the principle that upon completion of the I-90 Two-Way Transit and HOV Operations Project (“R8A”), the parties would “move as quickly as possible to construct High Capacity Transit in the center lanes.” AF ¶ 16, Ex. C at 3. High Capacity Transit was defined in the 2004 Amendment “as a transit system operating in dedicated right-of-way such as light rail, monorail, or a substantially equivalent system.” *Id.* at 2.

Based in part on the 1976 Memorandum Agreement, the United States Secretary of Transportation Brock Adams approved federal funding to construct the disputed section of I-90. One of the conditions for obtaining federal approval and funding for the project was the State of Washington’s agreement that “public transportation shall permanently

¹ The history and the legal authorities behind the establishment of the I-90 corridor as a limited access facility are set forth in *Seattle Bldg. & Constr. Trades Council v. City of Seattle*, 94 Wn.2d 740, 743-48, 620 P.2d 82 (1980).

have first priority in the use of the center lanes” of the roadway. AF ¶ 6, Ex. B at 6.

Of the construction costs for the state’s I-90 facility, the United States Department of Transportation paid \$1.035 billion (85.49%) and the State of Washington paid \$175.7 million (14.51%). AF ¶ 8; *see also* AF ¶ 31, Ex. H (attached as exhibit to appraisal entitled “WSDOT Cost of I-90 Seattle to Bellevue Way”).

I-90 is established as a state highway route in RCW 47.17.140 and is a component of the interstate highway system. AF ¶ 1. I-90 is also a limited access facility as defined in RCW 47.52.010. AF ¶ 1. As a limited access facility, title to I-90 is vested in the State of Washington, which has full jurisdiction, responsibility and control over it pursuant to RCW 47.24.020(2) and RCW 47.52.090. AF ¶ 2. I-90 has also been designated as a highway of statewide significance pursuant to RCW 47.06.140. AF ¶ 1.

On November 4, 2008, local voters approved funding for the *Sound Transit 2 Regional Transit Plan (ST 2 Plan)*. AF ¶ 23, Ex. E. The plan includes a new light rail line from Seattle to Mercer Island, Bellevue, and Overlake/Redmond using the I-90 center lanes to cross Lake Washington (“East Link”). *Id.* As part of the compensation for use of the center lanes for light rail, the *ST 2 Plan* includes funding to complete the

construction of new I-90 high occupancy vehicle (“HOV”) lanes on the outer roadway of the two I-90 bridges and highway corridor between Seattle and Bellevue. *Id.*

Following the voters’ approval of the *ST 2 Plan*, WSDOT’s Director of Environmental Services issued a letter to Sound Transit on November 21, 2008, regarding the light rail project on I-90. AF ¶ 24, Ex. F. The letter identified three issues to be resolved between WSDOT and Sound Transit before the signing of the final environmental impact statement for the proposed light rail project and identified seven other issues that needed to be resolved before construction could begin on the proposed light rail project. AF ¶ 24, Ex. F at 1, 2. The first issue identified in this letter was “[r]eaching agreement on the value of the use of the I-90 center roadway by Sound Transit for the East Link Light Rail project.”

After voters approved the *ST 2 Plan*, Sound Transit, WSDOT, and the Federal Transit Administration released a draft environmental impact statement for the East Link project (including the I-90 center lanes) on December 12, 2008. AF ¶ 25.

On April 25, 2009, the Washington State Legislature appropriated \$300,000 in motor vehicle funds to assist WSDOT and Sound Transit in resolving the question of valuation of the center lanes to be used for light

rail. AF ¶ 30, Ex. G; Declaration of Kathryn W. Taylor (“Taylor Decl.”) at 3 (Appended to Respondents’ Joint Opposition to Petitioners’ Motion for Stay). The transportation budget appropriated the motor vehicle funds “... for an independent analysis of methodologies to value the reversible lanes on Interstate 90 to be used for high capacity transit pursuant to ... [the *ST 2 Plan*] approved by voters in November 2008.” ESSB 5352, Laws of 2009, ch. 470, § 204(3). The Legislature also included in the transportation budget the provision that:

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.

Laws of 2009, ch. 470, § 306(17).

After receipt of the report prepared by the consultants engaged to produce the independent analysis funded by ESSB 5352, both WSDOT and Sound Transit issued separate appraisal instructions to an independent appraiser. AF ¶ 31. Independent appraisals of the I-90 center lanes were issued to Sound Transit and WSDOT on October 15, 2009. *Id.*, ¶¶ 31-32, Exs. H and I. The Joint Transportation Committee of the Legislature administered the appropriated funds, and paid \$250,000 for the work

authorized by the Legislature, with the last payment made in November 2009. Declaration of Joan M. Earl (“Earl Decl.”), ¶ 19 (Appended to Respondents’ Joint Opposition to Petitioners’ Motion for Stay).

Following agreement on valuation of the center lanes, WSDOT and Sound Transit engaged in negotiations culminating in the execution of a Term Sheet on January 20, 2010. AF ¶ 34, Ex. K. The Term Sheet is subject to the execution and delivery of a number of future agreements and instruments. *Id.* at 3. Under the Term Sheet, Sound Transit will pay WSDOT: (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 taxes that were used to construct the center lanes; plus (b) the rental value later calculated based on updated land value. *Id.* at 2-3.² In exchange, WSDOT will lease the center lanes to Sound Transit for 40 years, with an option to renew for an additional 35 years by mutual agreement. *Id.* at 2.

As confirmed by the Term Sheet, construction of light rail in the center lanes is not scheduled to begin until January 2015 and will be

² In 2009, the land value was appraised at \$70.1 million. Sound Transit and WSDOT agreed in the Term Sheet to use the land value reached in WSDOT’s appraisal report. AF ¶ 34, Ex. K at 2. Contrary to Petitioners’ assertions that WSDOT largely ignored the replacement cost for lanes on I-90, WSDOT will receive the current value of the State’s share of the construction costs (\$69.2 million) from Sound Transit out of the State’s prior total contribution of \$175.7 million toward the construction costs for all eight lanes. AF ¶ 31, Ex. H at 42-48; AF ¶ 34, Ex. K at 4.

authorized through WSDOT's issuance of a temporary construction area lease. *Id.* at 2, 5. Between now and 2015, WSDOT and Sound Transit will be working collaboratively to satisfactorily resolve all the issues identified in WSDOT's letter of November 21, 2008. AF ¶ 24, Ex. F. Several of the issues identified in this letter focus on completion of the R8A project. Stage 1 of the project is complete as the access ramp and new westbound HOV lane between Mercer Island and Bellevue are open to traffic. AF ¶ 19. In March 2010, WSDOT awarded a \$12.7 million contract to build Stage 2 - the eastbound HOV lane and access ramp between Mercer Island and Bellevue - which is scheduled to be complete in December 2011. Earl Decl. ¶ 11. The third and final stage of R8A, the new eastbound and westbound HOV lanes between Seattle and Mercer Island, is currently in the engineering design phase. These lanes are scheduled to be completed in December 2014. AF ¶ 34, Ex. K at 5.

Sound Transit contributed \$25.8 million to Stage 1 of R8A. AF ¶ 19. Sound Transit has contributed \$2.15 million toward the design work for Stage 2 and would pay the estimated \$22.9 million in construction costs for the work. AF ¶ 20. The total project cost of Stage 3 is now estimated at \$123.7 million. AF ¶ 21. Except for \$10.6 million in design costs to be paid by WSDOT, Sound Transit would pay the cost to construct Stage 3. AF ¶ 21; AF ¶ 34, Ex. K at 1-2. All of the R8A project

costs paid by Sound Transit will be treated as an offset to the rental associated with Sound Transit's use of the center lanes. AF ¶ 34, Ex. K at 2.

Following the completion of R8A, a temporary construction area lease would be issued by WSDOT for the light rail construction in the center lanes. AF ¶ 34, Ex. K at 5. The term of an airspace lease authorizing the actual operations and maintenance of the center lanes for light rail will not commence until construction of the center lanes for light rail is completed, currently anticipated to be in December 2020. *Id.*

III. SUMMARY OF ARGUMENT

This case was brought as an original action. The Petition pleads that two provisions of the 2009 biennial transportation budget, ESSB 5352, impose a mandatory duty on the Governor and the Secretary of Transportation to sell or lease I-90 to Sound Transit by December 1, 2009. Petitioners' brief filed with the Court eight months later essentially abandons the Petition and presents a new case for the Court to consider – alleging three new claims.

The Petition does not invoke the original jurisdiction of the Court in mandamus and is not justiciable. For these reasons, it should be dismissed. A mandatory duty is a prerequisite to an original action in mandamus. Neither of the transportation budget provisions upon which the

Petition relies for an alleged mandatory duty imposes any duty on the Governor or the Secretary to sell or lease any portion of I-90 for light rail, as the Petition asserts. Rather, the budget provisos relate only to establishing a valuation for the center lanes of I-90 as part of the R8A project and the proposed East Link light rail project. Moreover, there is no justiciable controversy with respect to the transportation budget provisions pled in the Petition. Neither the Governor nor the Secretary of Transportation claim that it is the budget provisos that grant them authority, let alone impose upon them a duty, to sell or lease the center lanes of the I-90 corridor to Sound Transit.

Disposition of highway property is not governed by appropriation provisos, but by a well-established statutory framework in RCW 47.12, and, in the unique circumstances of this case, by a 1976 Memorandum Agreement culminating from the statutory process in RCW 47.52 that governs acquisition, design, and construction of limited access facilities such as I-90.

The new claims in Petitioners' brief similarly do not sound in mandamus. Nor are they otherwise properly before the Court, having not been pled. If the Court nonetheless determines to consider them, Petitioners' new claims also fail on their merits.

Petitioners' first new claim is that under the 18th Amendment to the Washington Constitution, the property acquired in whole or in part with motor vehicle funds may never be sold, leased, or transferred for non-highway purposes. In addition to the fact that this claim simply seeks a declaratory judgment not within the original jurisdiction of the Court, there is no basis in the language or history of the 18th Amendment, or in the jurisprudence of the Court, for Petitioners' assertion. This new claim defies the law, longstanding statutes and practice under the 18th Amendment, and common sense.

Contrary to their first new claim, Petitioners' second new claim, acknowledges WSDOT's statutory authority and discretion to sell, lease, or otherwise transfer for compensation, and for non-highway purposes, property acquired with motor vehicle funds. It challenges the proposed lease of a portion of the I-90 corridor for light rail. Not surprisingly, the Agreed Statement of Facts before the Court is incomplete for purposes of adjudicating this new claim, as it was not pled in the Petition. Nonetheless, the claim fails on the facts that properly are before the Court. Those facts demonstrate that, among other things: (1) since I-90's inception in the 1970s, the center lanes of the corridor at issue were designed for and dedicated to transit; (2) federal funding was predicated in part upon this design and dedication; (3) the motor vehicle fund will be

compensated for the value of the lanes; (4) replacement lanes are being constructed through the R8A project and will be completed with Sound Transit bearing the great majority of the costs before the center lanes are leased for light rail; and (5) use of the lanes will be subject to all of the terms of an airspace lease. Petitioners fail to prove that under WSDOT's statutory authority and the 1976 Memorandum Agreement, a lease of the center lanes of the I-90 corridor to Sound Transit for light rail would constitute fraud or a gross abuse of discretion.

Petitioners' third new claim is that a \$300,000 appropriation for valuing the center lanes of the I-90 corridor was an unlawful diversion of motor vehicle funds. The 18th Amendment expressly authorizes use of the fund to pay expenses connected with the "administration" of public highways. WSDOT's administration of real property under its jurisdiction includes valuing highway property for purposes of ensuring that the fund is properly reimbursed when property acquired with motor vehicle funds is sold or leased.

Petitioners' "common fund" request for attorney fees fails along with their claims.

IV. ARGUMENT

A. The Petition Is Not Within The Original Jurisdiction Of The Court And Should Be Dismissed

An original action “is initiated by filing the petition.” RAP 16.2(b). The Petition in this case pleads that two provisions of the biennial transportation budget, ESSB 5352, Section 204(3) and Section 306(17), impose a mandatory duty on Respondents to sell or lease I-90 to Sound Transit by December 1, 2009. Pet. ¶ 2.25. Indeed, the Petition asserts that: “Unless restrained, the Governor or the Department of Transportation will undoubtedly exercise their purported authority under ESSB 5352 to sell or lease I-90 to Sound Transit by December 1, 2009 in violation of the Washington Constitution Art. II, § 40.” Pet. ¶ 3.3. The Petition seeks a writ to prohibit Respondents “from taking any action pursuant to ESSB 5352 with respect to the sale or lease of any portion of I-90 to Sound Transit.” Pet. ¶ 3.1.

The Petition denominates the writ that it seeks as a writ of prohibition. However, as Petitioners now apparently recognize, this is a misnomer. Pet. Br. at 21.³ Mandamus is the appropriate remedy where, as here, a petition seeks to prohibit the performance of a mandatory duty.

³ “The office of a writ of prohibition is to restrain the exercise of unauthorized judicial conduct.” *City of Seattle v. Rohrer*, 69 Wn.2d 852, 853, 420 P.2d 687 (1966). The original jurisdiction of the Supreme Court in prohibition extends only against acts of judicial or quasi-judicial character. *People v. Hinkle*, 130 Wash. 419, 427, 227 P. 861 (1924).

Washington State Labor Council v. Reed, 149 Wn.2d 48, 55, 65 P.3d 1203 (2003); *City of Tacoma v. O'Brien*, 85 Wn.2d 266, 268, 534 P.2d 114 (1975). A pleading of the nature filed by Petitioners is a petition seeking to invoke the Court's original jurisdiction in mandamus to prohibit the performance of a duty required by law.

In this case, the most fundamental prerequisite to mandamus – a mandatory duty – is not present. The writ of mandamus exists “to compel the performance of an act which the law especially enjoins as a duty resulting from an office” or, as in this case, to prohibit the performance of such a duty. *Washington State Council of Cy. & City Employees v. Hahn*, 151 Wn.2d 163, 166-67, 86 P.3d 774 (2004) (quoting RCW 7.16.160). Mandamus is available only where the duty is clear. *Gerberding v. Munro*, 134 Wn.2d 188, 195, 949 P.2d 1366 (1998), citing *Walker v. Munro*, 124 Wn.2d 402, 407-08, 879 P.2d 920 (1994).

The provisions of the transportation budget upon which the Petition relies to assert that the Governor or the Secretary have a mandatory duty to sell or lease portions of I-90 to Sound Transit for light rail simply do not impose such a mandatory duty. It is not surprising then that neither the Governor nor the Secretary sold or leased any portion of I-90 to Sound Transit by December 1, 2009, as the Petition alleges they were mandated to do.

The first provision of the transportation budget upon which the Petition relies for its alleged mandatory duty to sell or lease part of I-90 for light rail is Section 204(3). This budget proviso appropriates money from the motor vehicle fund “for an independent analysis of methodologies to value the reversible lanes on Interstate 90 to be used for high capacity transit pursuant to sound transit proposition 1 approved by voters in November 2008,” and describes how the independent analysis is to be conducted and reported. It does nothing more.

Section 204(3): \$300,000 of the motor vehicle account--state appropriation is for an independent analysis of methodologies to value the reversible lanes on Interstate 90 to be used for high capacity transit pursuant to sound transit proposition 1 approved by voters in November 2008. The independent analysis shall be conducted by sound transit and the department of transportation, using consultant resources deemed appropriate by the secretary of the department, the chief executive officer of sound transit, and the cochairs of the joint transportation committee. It shall be conducted in consultation with the federal transit and federal highway administrations and account for applicable federal laws, regulations, and practices. It shall also account for the 1976 Interstate 90 memorandum of agreement and subsequent 2004 amendment and the 1978 federal secretary of transportation’s environmental decision on Interstate 90. The department and sound transit must provide periodic reports to the joint transportation committee, the sound transit board of directors, and the governor, and report final recommendations by November 1, 2009.

Laws of 2009, ch. 470, § 204(3).

The second proviso of the transportation budget upon which the Petition relies is Section 306(17). It expresses that “the legislature is

committed to the timely completion of R8A which supports the construction of sound transit's east link," and directs WSDOT to complete negotiations over the value of the roadway by December 1, 2009.

Section 306(17): 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.

Laws of 2009, ch. 470, § 306(17).

These are the provisions upon which the Petition depends for the Governor's or Secretary's alleged mandatory duty to enter into an agreement to sell or lease portions of I-90 for light rail, and thus for the mandatory duty necessary to invoke the original jurisdiction of this Court in mandamus. Neither provision even mentions the word "sale" or "lease," let alone directs the Governor or the Secretary to enter into such an agreement. The language and context of the provisions make it evident that they address establishing a valuation approach for the center lanes of the I-90 corridor as part of a proposed East Link Project. Indeed, that is what occurred pursuant to these budget provisions. WSDOT and Sound Transit undertook an independent valuation process, and while WSDOT and Sound Transit did not reach agreement with respect to valuation of the

roadway by December 1, 2009, the appropriation target date, agreement as to the value was reached in January 2010. AF ¶ 34, Ex. K.

That the transportation budget did not mandate the sale or lease of I-90 for light rail is precisely what one would expect under Washington law. This is because the disposition of highway property by sale or lease is not governed by appropriation bills. Rather, it is authorized by statute, and WSDOT is committed to implementation of the 1976 Agreement using the discretionary authority provided by the four statutes in RCW 47.12 and in accordance with the Term Sheet. There is no mandatory duty for WSDOT to sell or lease highway property under specified circumstances and according to prescribed procedures that is properly the subject of mandamus.

The first, RCW 47.12.120, authorizes WSDOT to rent or lease highway lands, improvements, or airspace above or below them “that are held for highway purposes but are not presently needed.” The second, RCW 47.12.063, authorizes WSDOT to sell real property owned by the state of Washington and under the jurisdiction of WSDOT whenever it “is no longer required for transportation purposes and it is in the public interest to do so.” The third, RCW 47.12.080, authorizes WSDOT to sell “any unused state-owned real property under the jurisdiction of the department of transportation when . . . the transfer and conveyance is

consistent with public interest.” The fourth, RCW 47.12.283, authorizes WSDOT to sell real property owned by the state of Washington and under the jurisdiction of WSDOT through a public auction process when WSDOT determines that it “is no longer required for highway purposes and that it is in the public interest to do so.” None of these statutes imposes a mandatory duty on WSDOT with respect to the disposition of property used for highway purposes. Instead, they plainly confer discretion.⁴

Moreover, while WSDOT has determined to employ the leasing provisions of RCW 47.12.120 for conversion of the transit-designated lanes of the I-90 corridor to light rail, these lanes of the I-90 corridor were designed for and permanently committed to transit use. AF ¶ 5, Ex. A at 3-4. The 1976 Memorandum Agreement specifically provides that the corridor “shall be designed and constructed so that conversion of all or part of the transit roadway to fixed guideway is possible.” *Id.* at 5. In addition, federal approval of and substantial funding for I-90 was contingent upon the State of Washington’s agreement that “public

⁴ The State is not aware of any cases that describe the standard of review regarding WSDOT’s decision to sell or lease the real property under its jurisdiction. However, in the context of reviewing an order adjudicating public use in a condemnation matter, this Court indicated that where a statute authorizes an agency to make a determination of “good cause” without providing in the statute a procedure for making such a determination, the determination “lies within the authorized discretion of the director of highways, and it is not reviewable except for fraud or gross abuse of discretion.” *State ex rel. Agee v. Superior Court*, 58 Wn.2d 838, 839, 365 P.2d 16 (1961).

transportation shall permanently have first priority in the use of the center lanes” of the roadway. AF ¶ 6, Ex. B at 6.

The original action that Petitioners seek to maintain requires them to demonstrate a clear, mandatory, nondiscretionary duty on the part of a state officer. *Brown v. Owen*, 165 Wn.2d 706, 724-25, 206 P.3d 310 (2009). Petitioners have not and cannot make a colorable claim to such a duty. The plain language of the two transportation budget provisions upon which the Petition relies cannot be fairly read to impose on the Governor or the Secretary a mandatory duty to sell or lease the center lanes of I-90 for light rail, let alone by December 1, 2009, as the Petition pled.

For the reasons expressed above, neither the Governor nor the Secretary have a mandatory duty under the transportation budget provisions pled in the Petition to sell or lease I-90 for light rail. The Petition before the Court and this Court’s original jurisdiction in mandamus depend upon such a mandatory duty. The Petition thus does not invoke the Court’s original jurisdiction in mandamus. It should be dismissed.

B. The Petition Does Not Present A Justiciable Controversy

Even if the Petition invoked the Court’s original jurisdiction in mandamus (and for the reasons expressed above it does not) this Court also requires that a justiciable controversy be presented before entertaining a petition for mandamus. See, e.g., *Walker v. Munro*, 124 Wn.2d 402,

427, 879 P.2d 920 (1994) (“This original action is improperly before this court on application for at writ of mandamus and further, is not justiciable at this time.”).

A justiciable controversy requires: “(1) an actual, present and existing dispute, or the mature seeds of one, as distinguished from a possible, dormant, hypothetical, speculative, or moot disagreement, (2) between parties having genuine and opposing interests, (3) which involves interests that must be direct and substantial, rather than potential, theoretical, abstract or academic, and (4) a judicial determination of which will be final and conclusive.” *To-Ro Trade Shows v. Collins*, 144 Wn.2d 403, 411, 27 P.3d 1149 (2001), quoting *Diversified Indus. Dev. Corp. v. Ripley*, 82 Wn.2d 811, 815, 514 P.2d 137 (1973). The Petition fails the justiciability test on at least two of its four elements.

There is no “actual, present and existing dispute, or the mature seeds of one” “between parties having genuine and opposing interests.” *Id.* The Petition seeks to prohibit Respondents from entering into a sale or lease of portions of the I-90 corridor based on provisions of the transportation budget. The Petition asserts that these budget provisos require Respondents to execute a sale or lease agreement for light rail by December 1, 2009. The Petition seeks a writ of mandamus prohibiting Respondents from acting pursuant to the budget provisions to sell or lease

I-90 for light rail on the theory that the 18th Amendment would preclude them from so acting. As previously explained, the budget provisos on which the Petition relies impose no such duty.

Insofar as justiciability is concerned, neither the Governor nor the Secretary claim that either budget provision grants them the authority – let alone mandates them – to enter into a sale or lease agreement with respect to portions of I-90. In fact, they disclaim that the budget establishes such a duty. As previously explained, WSDOT's authority to dispose of highway property, in most instances, is granted and governed by provisions in RCW 47.12 that provide discretionary authority to WSDOT, and not by transportation budget provisos. In this specific instance, WSDOT's authority also is informed by the terms of the 1976 Agreement under which the corridor was designed, funded, and constructed. Accordingly, there is no actual present and existing dispute between Petitioners and Respondents as to Respondents' authority under ESSB 5352, Section 204(3) and Section 306(17) to sell or lease a portion of I-90 for light rail, the predicates for an original action in mandamus. Petitioners and Respondents agree, albeit for very different reasons, that the transportation budget provisos set forth in the Petition do not provide Respondents the authority to sell or lease a portion of I-90 for light rail.

C. The Claims Set Forth In Petitioners' Brief Were Not Pled In The Petition, Are Not Before The Court, And Are Not Within Its Original Jurisdiction In Any Event

Petitioners' brief essentially abandons their Petition and instead presents a new case – alleging three new claims – none of which sounds in mandamus, none of which was pled in the Petition Against State Officer, and none of which is before the Court.

First, Petitioners claim that WSDOT should be prohibited from entering into any agreement with Sound Transit to allow use of the two center lanes of I-90 for light rail. Second, Petitioners claim that despite WSDOT's acknowledged statutory authority and discretion, and the 1976 Agreement, WSDOT may not lease I-90 to Sound Transit as contemplated by the R8A and East Link Project. These two new claims are encompassed in the first issue stated in Petitioners' brief. ("Should WSDOT be prohibited from entering into *any* agreement with Sound Transit to allow exclusive use of two center lanes of Interstate 90 for light rail when those lanes were built, at least in part, with funds from the MVF [Motor Vehicle Fund] created by the 18th Amendment to Washington's Constitution?") Pet. Br. at 2. (Emphasis added.)

These two claims are utterly divorced from the writ requested in the Petition. They are not based on the transportation budget provisions that the Petition pled as imposing a mandatory duty enforceable in

mandamus. They do not ask that the Governor and the Secretary be prohibited from acting pursuant to transportation budget provisos to sell or lease I-90 for light rail, as the Petition did. Instead, these new claims are untethered to that alleged mandatory duty, and the relief that they seek is far broader.

In the new case that Petitioners assert in their brief, they contend with respect to these new claims that article II, section 40, the 18th Amendment (not transportation budget provisos), imposes a mandatory duty on the executive and legislative branches (not the Governor or the Secretary). Pet. Br. at 22. In the new case that Petitioners assert in their brief, they also identify a new mandatory duty. Petitioners express this new mandatory duty as one to expend motor vehicle funds only for highway purposes, or conversely, “not to expend motor vehicle fund moneys for non-highway purposes.” Pet. Br. at 22-23. This is a mere label selected by Petitioners, and it does not convey what Petitioners actually mean. It is clear from Petitioners’ brief that by this alleged mandatory duty – this label – Petitioners *actually mean* a mandatory duty not to sell or lease any property that was acquired in whole or in part with

motor vehicle funds, under any circumstances. No such duty is stated or even implied in the 18th Amendment.⁵

Nor, of course, was this the mandatory duty alleged in the Petition. A mandatory duty imposed by law is essential to a claim in mandamus. The writ is appropriate only to compel a state officer to undertake a clear duty resulting from office. *Walker*, 124 Wn.2d at 407-8. Like the claim actually pled in the Petition, these two new claims also fail to present a mandatory duty imposed by law.

The fact of the matter is that, by these first two new claims, Petitioners simply seek one of two inconsistent judgments from this Court, neither of which sounds in mandamus, and neither of which is before the Court. First, as is apparent from pages 30-45 of Petitioners' brief, Petitioners seek a declaratory judgment from the Court that WSDOT may not sell or lease any portion of I-90 for light rail – under *any* circumstances – because I-90 was built in part with motor vehicle funds,

⁵ As the Court Commissioner recognized in denying Petitioners' motion for a "stay" under RAP 8.3, to the extent Petitioners now suggest that the 18th Amendment prohibits the use of motor vehicle funds for light rail because light rail is not a highway purpose, the argument misses the point. This is so because in a mandamus action, there must be a mandatory, nondiscretionary duty. Here, as the Commissioner recognized, (and as Petitioners acknowledge at pages 47-48 of their brief) RCW 47.12 provides discretion to WSDOT to determine whether highway property is required for highway purposes, and where WSDOT determines that it is not, to sell or lease the property. Ruling Denying Motion for Stay, p. 7. Moreover, as the Commissioner recognized, Petitioners' argument effectively would mean that WSDOT may never dispose of highway property by sale or lease. *Id.* The statutes authorizing the sale or lease of highway property have been on the books since 1937 and 1945, respectively, and have been employed on countless occasions.

and light rail is not a highway purpose under the 18th Amendment. “This court’s original jurisdiction is governed by the constitution and by the plain language of the constitution, does not include original jurisdiction in a declaratory judgment action.” *Walker*, 124 Wn.2d at 411.

Contrary to their first new claim, Petitioners’ second new claim correctly recognizes WSDOT’s authority under the 18th Amendment to sell or lease highway property for non-highway purposes. Petitioners’ second claim is an attack specific to the R8A and the East Link Light Rail Project. Petitioners ask the Court to adjudge that this specific project is not consistent with statutes that plainly authorize WSDOT to sell or lease highway property. Petitioners also assert that the 1976 Agreement providing for the design and construction of the I-90 corridor does not authorize conversion to light rail despite the plain language of the Agreement. Pet. Br. at 6-7. This essentially is a claim that WSDOT is acting beyond its authority and discretion in determining to lease the center lanes of I-90 to Sound Transit, upon full completion of all of the stages of R8A and the agreements contemplated by the Term Sheet. The original jurisdiction of the Court does not extend to such a claim.

Respondents’ objection to the Court’s consideration of this new claim is not solely jurisdictional; nor is it technical. The parties entered into an Agreed Statement of Facts in response to the Court’s request, to

resolve the claim pled in the Petition in this case. The parties did not enter into an Agreed Statement of Facts for purposes of litigating Petitioners' unpled claim that the lease of a portion of I-90 to Sound Transit for light rail is outside the bounds of WSDOT's discretion. In addition, Petitioners disavow a substantial part of the Agreed Statement of Facts – its paragraphs addressing the consideration that Sound Transit has provided, and will provide, in connection with the R8A project, and any lease of the center lanes of I-90 to be executed in the future. Pet. Br. at 3-4, note 3. Petitioners also assert as fact, matters nowhere in the Agreed Statement of Facts.⁶ In other words, based on (1) an Agreed Statement of Facts, compiled to address a different claim, and which, in significant part, Petitioners now disavow, and (2) untested factual assertions nowhere in the record, Petitioners ask the Court to issue a judgment that WSDOT may not enter into an agreement to sell or lease I-90 for light rail in the context of the R8A and East Link Project. Both as a matter of jurisdictional and prudential considerations, Petitioners' first and second new claims should not be considered.

The third new claim that Petitioners present in their brief is stated in its second issue: "Should WSDOT be prohibited from expending 18th Amendment-restricted funds pursuant to ESSB 5352, Section 204(3)

⁶ Pet. Br. at 7, note 6 (newspaper, internet); Pet. Br. at 13, note 14 (internet); Pet. Br. at 15, note 16 (work plan).

which appropriated such funds to establish a valuation of the Interstate 90 center lanes in preparation for transferring the lanes to Sound Transit for exclusive light rail use?" Pet. Br. at 2-3. This issue is decidedly different from the claim pled in the Petition. In fact, the argument Petitioners now make in this regard contradicts the theory of the Petition. In the Petition, Petitioners' claimed that the transportation budget mandated the Governor or the Secretary to sell or lease I-90 to Sound Transit for light rail by December 1, 2009. The Petition did not seek to prohibit the expenditure of motor vehicle funds to establish a method for valuing lanes of I-90. Nor was there any request in the Petition for a writ requiring reimbursement of funds so expended. The Petition states: "Petitioners seek a writ of prohibition prohibiting [the state through the Secretary or the Governor] from selling or leasing any portion of Interstate 90 to Sound Transit for light rail." Petition Against State Officer at 2.

As discussed more fully at pages 37-41 *infra*, even if this new claim had been pled, and it was not, it widely misses the mark. Unlike the appropriation to Metropolitan Seattle for transit planning at issue in *State ex rel. O'Connell v. Slavin*, 75 Wn.2d 554, 452 P.2d 943 (1969), upon which Petitioners rely, the appropriation in ESSB 5352, Section 204(3) is for the benefit of WSDOT. The appropriation was made for the purpose of deriving a value for the center lanes of I-90, in order to ensure that the

motor vehicle fund is fully reimbursed for the value of those lanes if WSDOT leases those lanes for light rail. Ensuring full value to the motor vehicle fund for property acquired in part with revenues from the fund is entirely consistent with the 18th Amendment. In fact, acting to ensure appropriate reimbursement to the motor vehicle fund is what the “anti-diversionary” purpose of the 18th Amendment, oft-repeated by Petitioners, would contemplate.

For all of the reasons expressed above, Petitioners fail to invoke the jurisdiction of this Court in mandamus, and their Petition should be dismissed. If the Court concludes otherwise, and determines to reach any of the new claims raised by Petitioners in their brief, the Court should reject them for the additional reasons expressed below.

D. The 18th Amendment Expressly Provides That Expenses Connected With The Administration of Public Highways Are A Highway Purpose

The Petitioners’ first issue, not pled in the Petition, is: “Should WSDOT be prohibited from entering into *any* agreement with Sound Transit to allow exclusive use of two center lanes of Interstate 90 for light rail when those lanes were built, at least in part, with funds from the MVF [Motor Vehicle Fund] created by the 18th Amendment to Washington’s Constitution?” Pet. Br. at 2. (Emphasis added.) Even if Petitioners’ action invoked jurisdiction in mandamus (and for the reasons expressed at

pages 24-28 supra, it does not), the new claim brought forth by Petitioners has no merit.

Petitioners would have this Court declare that the 18th Amendment prohibits WSDOT from selling or leasing for consideration any real property under its jurisdiction under any circumstances.⁷ Petitioners' new claim flies in the face of approximately 70 years of WSDOT's administration of its real property management program authorized by the Legislature.⁸ This claim also flies in the face of 63 years of WSDOT's ability to determine if it should designate lanes of a limited access facility (like Interstate 5 and Interstate 90) for exclusive or preferential use by public transportation vehicles, privately-owned buses, streetcars, and

⁷ Such a declaration would run contrary to years of leasing state highway property under RCW 47.12 and RCW 47.56. Examples include the Washington State Convention Center, Sound Transit leases for light rail to the airport, I-90 lid recreational leases to the City of Seattle, Washington State Ferry leases/concessions, and leasing for private uses, such as businesses, agricultural, mining, landscape, residential, parking, and wells that monitor environmental contamination. Such a declaration could also arguably affect WSDOT's ability to issue utility franchises under RCW 47.44.

⁸ RCW 47.12.063, initially enacted by Laws of 1937, ch. 53, § 28 (sale/exchange of highway property); RCW 47.12.080, initially enacted by Laws of 1945, ch. 127, § 1 (sale of highway property); RCW 47.12.283, initially enacted by Laws of 1955, ch. 384, § 13 (sale of highway property by auction); and RCW 47.12.120 and .125, initially enacted by Laws of 1945, ch. 146, § 1 (lease). If this Court accepts Petitioners' interpretation of the 18th Amendment, it means the director of highways and the Legislature have been violating the 18th Amendment since its adoption in 1944.

trains.⁹ Even more importantly, Petitioners' new claim flies in the face of the express language of the 18th Amendment.¹⁰

Article II, section 40 of the Washington Constitution was adopted in 1944 as Amendment 18. In pertinent part, Amendment 18 provides:

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;

...

(Emphasis added.)¹¹

⁹ RCW 47.52.025, initially enacted by Laws of 1947, ch. 202, § 2 (Controlling use of limited access facilities – High Occupancy vehicle lanes); RCW 47.52.090, initially enacted by Laws of 1947, ch. 202, § 8 (Cooperative agreements – Urban public transportation systems). See also *Peden v. City of Seattle*, 9 Wn. App. 106, 108-9, 510 P.2d 1169 (1973) (agreements restricting access to highways was a legitimate exercise of the Legislature's power to regulate traffic over the highways).

¹⁰ The test repeatedly applied by this Court to ascertain what activities serve a highway purpose is whether the expenditure directly or indirectly benefits the highway system. *Automobile Club of Washington v. City of Seattle*, 55 Wn.2d 161, 168, 346 P.2d 695, 699-700 (1959) (payment of tort judgment does not serve a highway purpose); *Washington State Highway Comm'n v. Pacific NW Bell Tel. Co.*, 59 Wn.2d 216, 221, 367 P.2d 605, 608 (1961) (relocation of utility facilities does not serve a highway purpose); *State ex rel. O'Connell v. Slavin*, 75 Wn.2d 554, 560, 452 P.2d 943, 947 (1969) (public transportation system does not serve a highway purpose); *State ex rel. Washington State Highway Comm'n v. O'Brien*, 83 Wn.2d 878, 882-884, 523 P.2d 190, 192-93 (1974) (park and ride facilities serve a highway purpose).

¹¹ The "special fund" in the 18th Amendment is the motor vehicle fund, codified in RCW 46.68.070.

1. The Sale Or Lease Of Highway Right Of Way Is An Administrative Function Expressly Authorized By The 18th Amendment

The Petitioners spend 15 pages of their brief arguing that light rail is not a highway purpose and therefore WSDOT should be prohibited from entering into any agreement that would allow light rail on I-90. Pet. Br. at 30-45. From the Respondents' perspective, the issue in this case has never been whether motor vehicle funds may be expended for light rail, which this court repeatedly has held is a non-highway purpose. *State ex rel. O'Connell v. Slavin*, 75 Wn.2d 554, 558-60, 452 P.2d 943, 946 (1969); *State ex rel. Washington State Highway Comm'n v. O'Brien*, 83 Wn.2d 878, 883, 523 P.2d 190, 192 (1974).¹² This Court has unequivocally concluded that expenditures of motor vehicle funds for non-highway purposes are prohibited. *State ex rel. Bugge v. Martin*, 38 Wn.2d 834, 840, 232 P.2d 833, 836 (1951); *Automobile Club of Washington v. City of Seattle*, 55 Wn.2d 161, 168, 346 P.2d 695, 699-700 (1959); *Washington State Highway Comm'n v. Pacific NW Bell Tel. Co.*, 59 Wn.2d 216, 221-222, 367 P.2d 605, 608-609 (1961) ; *State ex rel. O'Connell v. Slavin*, 75 Wn.2d 554, 558-60, 452 P.2d 943, 946 (1969); and *State ex rel. Washington State Highway Comm'n v. O'Brien*, 83 Wn.2d 878, 883, 523 P.2d 190, 192-193 (1974).

¹² See also 1957 Op. Att'y Gen. No. 104 (cannot use motor vehicle funds to purchase additional right of way to accommodate a rapid rail transit system).

Rather, the actual issue advanced by Petitioners is whether real property acquired, in whole or in part, with motor vehicle funds must, in perpetuity, be used either exclusively for highway purposes or remain unused. Noticeably absent from Petitioners' briefing is any case, statute, or Attorney General Opinion that supports their argument that once a penny of motor vehicle funds is expended for real property, that such property must forever be used for highway purposes.¹³ The plain language of the constitution, prior decisions by this Court, and common sense dictate that the answer to Petitioners' issue is no. The proper conclusion to reach is that the sale or lease of highway property comes within the ambit of "administering" the highway system, as expressly provided for in subsection (a) of article II, section 40, and that WSDOT has the discretion to administer such a real property program.

"Rules of construction require that words in the constitution be given their usual, ordinary, and nontechnical meaning." *Washington State Highway Comm'n v. Pacific NW Bell Tel. Co.*, 59 Wn.2d 216, 220, 367 P.2d 605, 608 (1961), citing *Automobile Club of Washington v. City of Seattle*, 55 Wn.2d 161, 167, 346 P.2d 695 (1959). According to Merriam-

¹³ Such an interpretation would lead to absurd results including the permanent removal of real property from the tax rolls, subjecting property to vandalism, trespass, and blight because the property is not being used, and increased maintenance costs to the state that could otherwise be borne by a lessee. It is well-established that "[c]ourts must also avoid constructions that yield in unlikely, absurd or strained consequences." *Kilian v. Atkinson*, 147 Wn.2d 16, 21, 50 P.3d 638, 640 (2002).

Webster's Online Dictionary, the word "administration" means "1: performance of executive duties; MANAGEMENT. . . ." ¹⁴ In light of its "usual, ordinary, and nontechnical meaning" the word "administration," as applied to highway systems, clearly includes the management of highway right of way. A review of the legislation existing at or near the time of adoption of the 18th Amendment shows that the framers recognized and accepted that the exchange, sale, and lease of highway right of way was an administrative function necessary to prudently manage assets acquired with motor vehicle funds. ¹⁵

Petitioners' new claim specific to R8A and the East Link Project should fare no better. Even if the claim properly were before the Court, at best Petitioners' "proof" amounts to little more than speculation and pejorative. Pet. Br. at 46, 50. The record before the Court provides no basis for concluding that Petitioners have met their burden to demonstrate that a lease of the center lanes of the I-90 corridor to Sound Transit under

¹⁴ *Merriam-Webster's Online Dictionary*, available at <http://www.merriam-webster.com/dictionary/administration> (visited April 30, 2010).

¹⁵ Prior to the adoption of the 18th Amendment, the director of highways was already statutorily authorized to convey "useless" right of way to abutting landowners who owned land that was needed for a new highway. Laws of 1937, ch. 53, § 28. Moreover, within a year of adopting the 18th Amendment, the Legislature authorized the director of highways to "negotiate for and issue" permits, leases or licenses to cities or counties for the use of highway rights of way "upon such terms and conditions as [the director] may prescribe." Laws of 1945, ch. 146, § 1 (now expanded and codified at RCW 47.12.120 and .125). This reflects a contemporaneous understanding that the sale and leasing of highway property is entirely consistent with the principles of the 18th Amendment.

the framework set forth in the Term Sheet would constitute fraud or gross abuse of discretion. See *State ex rel. Agee v. Superior Court*, 58 Wn.2d 838, 839, 365 P.2d 16 (1961). The fact of the matter is that (1) since their inception, the center lanes of I-90 were designed for and dedicated to transit; (2) federal funding was predicated in part upon that design and dedication; (3) the motor vehicle fund will be compensated for the value of the lanes; (4) replacement lanes are being constructed through the R8A project and will be completed with Sound Transit bearing a significant majority of the costs before the center lanes are leased for light rail; and (5) and the use of the lanes will be subject to all of the terms of an airspace lease. AF ¶ 5, Ex. A at 3-4; AF ¶ 6, Ex. B at 6; AF ¶ 34, Ex. K; AF ¶¶ 19-21, 34; AF ¶ 34, Ex. K. Under these circumstances, it is well within the authority and discretion of WSDOT to determine that the center lanes are not presently needed for highway purposes under the terms of RCW 47.12.120.¹⁶

¹⁶ Thus, whether WSDOT could have used a cooperative agreement under RCW 47.52.090 to reach the same terms with Sound Transit under RCW 47.52.090 is of little moment.

2. The Legislature's Appropriation From The Motor Vehicle Account For An Appraisal Of The State's Real Property Is a Proper Expense Under The 18th Amendment

In the Petitioners' original Petition filed in July 2009, there was no mention that the 18th Amendment was violated when the Legislature appropriated \$300,000 in motor vehicle funds for the valuation of the center lanes. Now Petitioners' brief identifies this as the second issue for the Court's consideration. Pet. Br. at 2-3. The Petitioners frame the issue as follows:

Should WSDOT be prohibited from expending 18th Amendment-restricted funds pursuant to ESSB 5352, Section 204(3), which appropriated such funds to establish a valuation of the Interstate 90 center lanes in preparation for transferring the lanes to Sound Transit for exclusive light rail use?

Pet. Br. at 2-3.

Petitioners rely heavily on the *O'Connell* case to support their position that the appropriation in ESSB 5352 constitutes an unlawful diversion of motor vehicle funds in violation of the 18th Amendment. Pet. Br. at 39. This Court held in *O'Connell* that motor vehicle funds cannot be used "... for the planning, constructing, owning or operating of public transportation systems, however beneficial such a use of the funds might be to the state and its citizens." *O'Connell*, at 560. Respondents acknowledge and agree with the reasoning of the *O'Connell* court.

However, the appropriation at issue here does not run afoul of the principles announced in *O'Connell*.

In this case, the appropriation in ESSB 5352, Section 204(3) is for the benefit of the state highway system, not Sound Transit's light rail program. The appropriation was made for the purpose of deriving a value for the center lanes of I-90, in order to ensure that the motor vehicle fund is fully reimbursed for the value of the lanes that WSDOT will lease to Sound Transit for light rail. The appropriation came about as a result of a letter issued by WSDOT's Director of Environmental Services to Sound Transit on November 21, 2008, in connection with WSDOT signing the East Link draft environmental impact statement. AF ¶ 24, Ex. F; Taylor Decl. at 2-3.

The letter identified three issues to be resolved between WSDOT and Sound Transit before the signing of the final environmental impact statement for the proposed light rail project:

- 1) **Reaching agreement on the value of the use of the I-90 center roadway by Sound Transit for the East Link Light Rail project;**
- 2) Reaching agreement on the configuration of the I-90 Bellevue Way Interchange; and
- 3) Reaching agreement on many alignment and design issues related to the East Link and I-90 Two-Way Transit project.

AF ¶ 24, Ex. F at 1 (Emphasis added.).

ESSB 5352 included provisions to assist WSDOT and Sound Transit in resolving the very first issue identified in the November 21, 2008, letter – reaching agreement on the value of the use of the I-90 center roadway for light rail. Taylor Decl. at 3. Independent appraisals of the I-90 center lanes were issued to Sound Transit and WSDOT on October 15, 2009. AF ¶¶ 31-32, Exs. H and I. The Joint Transportation Committee of the Legislature administered the appropriated funds, and paid \$250,000 for the work authorized by the Legislature, with the last payment made in November 2009. Earl Decl. ¶ 19. The appraisals formed the basis for further negotiations between WSDOT and Sound Transit and the parties reached an agreement on the valuation figures as reflected in the Term Sheet. AF ¶ 34, Ex. K. Indeed, funding for R8A is the product of determining the value that Sound Transit should pay for the lanes and is testament to the benefit of the valuation to the highway system.

Further, the sale and lease statutes in RCW 47.12 require that any funds received by WSDOT for the sale or lease of highway right of way be deposited into the motor vehicle fund.¹⁷ In this way, the statutes ensure the fund will be reimbursed. The Legislature may then appropriate such funds solely for a new highway purpose. In short, implicit in these real

¹⁷ RCWs 47.12.125, .063, .080, .283.

property transactions is a determination of the fair market value or economic rent of highway right of way to be sold, leased, or transferred, thereby ensuring that the motor vehicle fund is adequately compensated.¹⁸

The ESSB 5352 appropriation is strikingly similar to the expenditure at issue in this Court's decision of *State ex rel. Washington State Highway Comm'n v. O'Brien*, 83 Wn.2d 878, 523 P.2d 190 (1974), decided five years after *O'Connell*. In *O'Brien*, the Washington State Department of Highways entered into an appraisal service contract with a private party to perform services in connection with a proposed property acquisition and construction of a park and ride facility. *Id.* at 879-80. Upon submittal of the first invoice for services rendered, the State Treasurer refused to pay the bill, contending that such payment would be an improper diversion of motor vehicle funds. *Id.* at 880.

The *O'Brien* Court concluded that the park and ride facility served a highway purpose and therefore the expenditure of funds under the appraisal services contract was proper. *Id.* at 883. The Court also expressly stated that *O'Connell* was inapposite as the *O'Connell* case "concerned the use of highway funds for the financing of a public transportation system, including busses, trains or other carriers, each

¹⁸ By Petitioners' reference to 1975 Letter Op. Att'y Gen. No. 62, Petitioners acknowledge that WSDOT may sell or lease properties purchased with motor vehicle funds to public and private entities for non-highway purposes, provided the state receives monetary or other consideration as necessary. Pet. Br. at 47.

holding a number of passengers, which may travel upon highways, or Rails or Water, or Through the air.” *Id.* As it held in *O’Brien*, this Court should uphold the expenditure authorized in ESSB 5352 for the independent analysis conducted to determine the value of the center lanes in order to ensure the motor vehicle fund receives an appropriate reimbursement.

E. Petitioners Are Not Entitled To Attorney Fees

Petitioners argue they are entitled to reasonable attorney fees under the common fund exception to the American rule:

[t]o the extent the petitioners successfully restrain the illegal expenditure of funds under § 204(3) of the 2009 transportation budget, and ban the unconstitutional expenditure of MVF moneys by forestalling the transfer of the two center lanes of Interstate 90 to Sound Transit,

Pet. Br. at 50-51.

Where fees are claimed based on preventing an expenditure of public funds, fees are awarded under this narrow exception only under very limited circumstances, where four strictly defined predicates are met:

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

Seattle School Dist. No. 1 of King Cy. v. State, 90 Wn.2d 476, 544, 585 P.2d 71 (1978), quoting *Weiss v. Bruno*, 83 Wn.2d 911, 914, 523 P.2d

915 (1974). Unlike the circumstances in *Weiss v. Bruno* where the expenditure at issue was for parochial education and thus determined to be “patently unconstitutional” under then well-established constitutional law, Petitioners’ novel claims hardly would provide a basis to conclude that any expenditure from the motor vehicle fund in this case was “patently unconstitutional,” even if the claims had any merit.

Respondents previously have explained the multiple bases – jurisdictional, procedural, and substantive – upon which Petitioners’ claims fail. Petitioners accordingly are not entitled to attorney fees on a common fund or any other theory.

V. CONCLUSION

The Petition should be dismissed and Respondents respectfully request the Court to so rule. If the Court nonetheless considers Petitioners’ new claims, Respondents ask the Court to rule (1) that the 18th Amendment does not prohibit the sale, lease, or transfer of highway property for non-highway purposes; and (2) that Petitioners have failed to demonstrate that the R8A and the East Link Project are contrary to the

authority and discretion of WSDOT under the 1976 Memorandum Agreement and statutes governing the transfer of highway property.

RESPECTFULLY SUBMITTED this 10th day of May, 2010.

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