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SUPREME COURT
OF THE STATE OF WASHINGTON

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

Appellants,

v.

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

Respondents.

REPLY BRIEF OF APPELLANTS

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Appendix A to this brief was stricken by the opinion dated 9/12/2013 (see page 21 of the opinion)

Note: Pursuant to Page 21 of the 9/12/2013 opinion, the references to Appendix A on pages 4-6 and 43-43 were stricken and not considered by the Court. In addition, the references to online and newspaper articles on pages 4-6, 21 and 28 were stricken and not considered by the Court.

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A. INTRODUCTION

The State of Washington Department of Transportation (“WSDOT”) and Central Puget Sound Regional Transit Authority (“Sound Transit”) have signed an agreement to divert the two center lanes of the Interstate 90 (“I-90”) between Seattle and its Eastside to a non-highway use, light rail. Citizens and taxpayers affected by the loss of this vital highway facility (“taxpayers”) have challenged the propriety of the transfer under article I, section 40 of the Washington Constitution (“the 18th Amendment”) and under the limited authority granted to WSDOT under leasing statutes.

Sound Transit/WSDOT have responded, arguing that the citizens who enacted the 18th Amendment were not concerned with maintaining and improving needed highways, but only with the preservation of funds in a state account. They also claim that this Court has limited authority to interpret a statute they claim gives WSDOT effectively unlimited discretion to proclaim that, in the future, the two center lanes will no longer be “presently needed.”

The Washington Constitution protects the expenditure of highway funds as a means of protecting the construction and maintenance of needed highways. The 18th Amendment is not merely an accounting

mechanism, but a declaration that that highways are a public necessity that may not be diverted or neglected by the State.

The leasing statute under which WSDOT claims authority to dispose of these highway facilities affords the agency no discretion to make a determination that the facilities are not presently needed for highway purposes. The Legislature is certainly capable of giving WSDOT such discretion, but chose not to do so. This Court, applying the plain meaning of the statute to the facts, can only conclude that the two center lanes are presently needed for highway purposes, and may not be transferred to Sound Transit.

B. REPLY ON STATEMENT OF THE CASE

In their opening brief, the taxpayers laid out the history and importance of I-90. Br. of Appellants at 4-15. That factual recitation is herein incorporated by reference.

In its response to those facts, WSDOT seeks to elevate bureaucratic "groupthink" on transportation into "fact." In so doing, it offers this Court a misleading conception of the history of I-90 and public transportation. Similarly, Sound Transit in its response attempts to convert this case into a referendum on the virtues of light rail and downplays its own checkered history of inflated ridership estimates and

rosy fiscal analysis. The taxpayers here offer this Court clarification of certain facts referenced in the WSDOT and Sound Transit briefs.

Sound Transit/WSDOT extol the virtues of light rail, and list the various constituencies that believe diverting the two center lanes of I-90 from highway use to light rail will benefit the public. Sound Transit br. at 5-13, WSDOT br. at 3-4. In particular, Sound Transit claims that its projected ridership numbers for light rail will render the two center lanes unneeded for highway purposes, as it will alleviate ever-increasing vehicular traffic. Sound Transit br. at 17. Sound Transit also claims that its environmental impact statement (“EIS”) for East Link concluded that impacts to freight and vehicular travel over I-90 would be limited. Sound Transit br. at 18. Sound Transit suggests that the EIS is somehow a superior assessment of light rail’s impact on travel times than the evidence to the contrary that the taxpayers provided. Sound Transit br. at 50. However, the EIS was prepared by Sound Transit, and relies on many of the same faulty ridership assumptions as its other public documents. CP 2204, 2213 (“overall the East Link Project is forecasted to contribute between 48,000 and 52,500 daily riders in 2030”). Also, these disputed facts were decided on summary judgment, without a trial.

However, there are ample reasons to be concerned about the promises Sound Transit has made about light rail ridership improving

travel times for vehicles. The history of Sound Transit's failure to deliver on its promises for light rail and its massive cost overruns is detailed in this Court's decision in *Sane Transit v. Sound Transit*, 151 Wn.2d 60, 85 P.3d 346 (2004) (21-mile line scaled back to 14 miles; 13 years to construct rather than 10 years as promised; cost escalation from \$1.8 billion (in 1995 dollars) to \$4.164 billion).

Light rail ridership has been underwhelming and Sound Transit's estimates have been a moving target. It has estimated 26,610 daily riders between the Airport and downtown Seattle by 2010 and 45,000 by 2020. Mike Lindblom, "Who Will Ride Sound Transit Light-Rail Trains?" *Seattle Times*, May 17, 2009. But Sound Transit averaged under 15,000 daily ridership as of 2010. Mike Lindblom, "Sea-Tac Station Boosts Light Rail Use," *Seattle Times*, January 12, 2010.

A new performance audit of Sound Transit conducted by State Auditor Brian Sonntag criticized its overoptimistic ridership projections through 2030 and concluded that Sound Transit's past ridership assumptions are "no longer valid" and should be "adjusted." State Auditor's Office, "Sound Transit: Performance Audit of the Citizen Oversight Panel, Adjustments to Planned Investments, Construction Management, and Ridership Forecasts," Report No. 1008277 at 4 (October 25, 2012), attached hereto at Appendix A ("Auditor Report"). The

Auditor found that “Assumptions used to support 2011 forecasts have proven unreliable, and if not adjusted, some may cause Sound Transit to overestimate future ridership.” *Id.* at 53.¹ In 2011, Sound Transit’s total ridership was 32% lower than forecasted. *Id.*

Emblematic of Sound Transit’s inflated promises is the statement of Dave Earling, Sound Transit’s board chairman in a September 2000 magazine article:

When the Link light rail system opens in 2006, its ridership is projected to be immediately higher than just about any other light rail system in the nation. By the end of this decade [2010], more than 125,000 passengers will ride it every day . . . Those numbers weren’t pulled out of thin air to sound impressive.

David Earling, *Why Rail Works*, Open Spaces Quarterly, Vol. 3, No. 3, 2000, available at <http://www.open-spaces.com/article-v3n3-earling.php>.

Unsurprisingly, flawed ridership projections have also led to flawed revenue projections. The Auditor also noted that between Sound Transit has already downgraded its 2009-2023 revenue forecast by 25%. Auditor Report at 35. Although Sound Transit’s 2009 budget envisioned that light rail fare box revenue would be \$3 million, actual collections in 2009 were \$2.426 million. Light rail operational costs in 2009 were \$21.4

¹ The Auditor did not explicitly find that Sound Transit was overestimating ridership on purpose, but noted that Sound Transit did not have any trouble forecasting ridership numbers for its bus or train services. *Id.* at 50.

million. Despite a long range Sound Transit goal of 40% recovery of operating costs from fare box revenues, the actual results for 2009 were 11%. <http://www.bettertransport.info/pitf>.

Sound Transit also touts the 2008 public vote in favor of ST2, which included the I-90 light rail link. Sound Transit br. at 13. What Sound Transit does not tell this Court is that it advanced it seriously flawed ridership and revenue projections as it promoted ST2 to the public, that have now been shown to be false. CP 2546-47; Auditor Report at 35, 53.

The Auditor Report also finds that the vast majority of light rail riders will be *current bus riders*, not current drivers who forego their cars in favor of riding light rail. Auditor Report at 64. Sound Transit *admits this* in its response to the Auditor's Report: "FTA has always emphasized that the primary benefit of most transit investments accrues to existing transit riders, and that measurement of those benefits is the best surrogate for estimation of the overall benefits of a transit investment." Joni Earl, Agency Response, appended to Auditor Report at 73.

These facts contradict Sound Transit/WSDOT's claim that light rail will render the two center lanes unneeded for highway purposes. Sound Transit br. at 17; WSDOT br. at 15. Carrying vehicular traffic is the "highway purpose" that the center lanes serve. If light rail ridership

will be significantly lower than predicted, *and* if bus passengers will make up the bulk of its riders, vehicular traffic will not be decreased at the rate Sound Transit/WSDOT claim. Thus, the assertion that converting the center lanes will “increase vehicle throughput” is unsustainable. Sound Transit br. at 17.

Although it does not – and cannot – argue *res judicata* or failure to exhaust administrative remedies in its argument, WSDOT in its statement of the case takes umbrage at the fact that the taxpayers did not appeal from various federal rulings in 2011 “endorsing light rail on I-90.” WSDOT br. at 16-17. To the extent that WSDOT is suggesting the taxpayers have somehow been slow to act or failed to provide notice to the state, it is important to note that this litigation has been ongoing since 2009. They are not required by any principle of law to fight this issue of state law on multiple state and federal fronts, as WSDOT might prefer. Rather, this case has a sharp state law focus – WSDOT’s proposed transfer of the I-90 center lanes to Sound Transit for a non-highway purpose violates the Washington Constitution and Washington statutes.

Specifically, any contention by WSDOT or Sound Transit that this case is affected by the East Link EIS is misplaced. The taxpayers were not required to appeal the adequacy of the EIS under the State Environmental Policy Act (“SEPA”), RCW 36.70C, in order to preserve

their rights in this case. A SEPA appeal with respect to an EIS only addresses the adequacy of the information in the possession of the decision-makers as they evaluate a major action affecting the environment. *Norway Hill Preservation and Protection Ass'n v. King County Council*, 87 Wn.2d 267, 277-78, 552 P.2d 674 (1976).² Such an appeal would not address the legality and constitutionality of WSDOT's action.

Most of the other relevant facts in this appeal are undisputed. WSDOT *admits* I-90 was built and is maintained using funds from the Motor Vehicle Fund ("MVF") established in RCW 46.68.070. CP 108. It also *admits* that I-90 is a "highway of statewide significance" under RCW 47.06.140, and is the only direct highway connection between Seattle, Mercer Island, and the Eastside. CP 107.

WSDOT *admits* that the two center lanes of I-90 are presently needed for highway purposes, and have never been surplus property. CP 2664; WSDOT br. at 35. WSDOT has agreed to lease the presently needed center lanes to Sound Transit. WSDOT br. at 9. It also *concedes* that light rail is not a "highway purpose" under the 18th Amendment. CP 56.

² Notably, neither WSDOT nor Sound Transit appealed the EIS associated with Interstate 405 improvements in which light rail was rejected as the high occupancy vehicle modality for the I-90 and I-405 corridor. <http://www.wsdot.wa.gov/Projects/I405/corridor/library/feistoc.htm>, section 3.12 at 46.

The Record of Decision for the R-8A alternative provided for ten, not eight, lanes for general vehicular traffic.³ CP 2408. R-8A directed the restriping of I-90 with narrower lanes with HOV lanes on the outside roadways but specifically retaining the existing reversible lanes in the center roadway. *Id.* Also, under R-8A single occupancy vehicles would still use the center roadway between Rainier Avenue and Island Crest Way. *Id.*

Importantly, R-8A did not specifically indicate that light rail over I-90 was the preferred means of delivering public transit services. While the 2004 Amendment to the 1976 MOA refers to light rail as the “ultimate configuration,” R-8A not only does not set forth rail as the preferred method, it made no reference to light rail on I-90 *at all*.⁴ CP 2408-20. The main reason for the selection of R-8A as the preferred alternative was the reduction in congestion and travel times. *Id.* The Record of Decision

³ Sound Transit/WSDOT have claimed that the transfer of the two center lanes of I-90 will implement R-8A and will continue to allow for 8 lanes of general vehicular traffic. This is inaccurate. Instead of 10 lanes for vehicular traffic, there will be 8 after the transfer. Of the eight lanes remaining, 2 will be dedicated to HOV traffic. All Mercer Island traffic will then be wedged into the general purpose lanes, exacerbating congestion in those general purpose lanes.

⁴ The July 23, 2008 letter of Joni Earl, Sound Transit’s CEO to WSDOT Secretary Paula Hammond, indicates at 3 that the two agencies agreed *on their own* to light rail, separate from the R-8A: “WSDOT and Sound Transit now agree that ... R8A must be construed in order to implement light rail.” http://www.wsdot.wa.gov/partners/erp/ltr_sec_hammond072308.pdf.

compared reductions in travel times in the I-90 corridor between R-8A and the No Build Alternative through 2025, finding:

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

CP 2410.⁵ The selection of the R-8A configuration, with the ten lanes including reversible center lanes, promised improved travel times in the I-90 corridor.⁶ *Id.*

Regarding their proposed “reimbursement” of the MVF, Sound Transit/WSDOT claim that the taxpayers presented no evidence that the agreed figure is inadequate. On the contrary, the taxpayers presented evidence and argument on this point, which includes the appraisal itself. CP 77, 1053-1112, 3162. For example, the taxpayers argued, and Sound Transit has now admitted, that MVF funds expended on maintenance were not included in the so-called “reimbursement” figure. WSDOT br. at 37.

⁵ Alternative R-8A contemplates the addition of two lanes to I-90 for a total of ten with all of those lanes being available for vehicular traffic at least through 2025 for maximum congestion relief. Had the Record of Decision intended the center roadway to be dedicated exclusively to light rail, the analysis of congestion reduction would be drastically different. The 2004 Amendment is, in fact, contrary to the R-8A configuration approved by the Federal Highway Commission, and would defeat the congestion-reduction purpose of R-8A.

⁶ Alternative R-8A would reduce the existing approximately 8 hours of congestion to less than 2 hours (remaining at less than 2 hours by year 2025) unlike the other alternatives which maintain or increase hours of congestion as compared to the No Build Alternative. CP 2410.

The taxpayers, on the other hand, submitted expert evidence that a *conservative* maintenance figure would be \$440,000 per year. CP 3162. The expert clarified that the figure estimated only those actual, regular expenditures based on a “triage system” where WSDOT funded only the most vital projects it could afford. *Id.* It did not included needed maintenance that might occasionally be done on an critical need basis, but which may or may not be allowed in a particular budget cycle. *Id.*

Also, Sound Transit/WSDOT’s own evidence of “reimbursement” is smoke and mirrors that could not survive the scrutiny of a factfinder. Sound Transit is not actually “reimbursing” *any* money into the MVF. Sound Transit is instead funding a portion of the cost of the R-8A project, *which Sound Transit admits will only be constructed on the condition that the two center lanes are diverted to light rail.* Sound Transit br. appendix A at 2, Sound Transit br. at 21. The MVF is paying for the other \$44 million in costs for the R-8A project. Sound Transit br. appendix A at 2.

In other words, the proposed “reimbursement” is funding of a project that, but for diversion of the center lanes, taxpayers would not have to fund. Rather than “reimbursing” taxpayers \$165 million, Sound Transit is forcing taxpayers to invest another \$44 million in I-90 so that Sound Transit can divert the center lanes.

Also, the cost methodology in the appraisal takes purportedly into account MVF funds expended since 1980 plus inflation, but then subtracts \$23 million for “depreciation” of the bridge based on obsolescence. CP 1100, 1106. The amount of money taxpayers spent to build I-90 does not depreciate along with the asset. Nowhere does Sound Transit explain why the value of taxpayer funds expended should be depreciated in its appraisal.

Finally, the appraisal does not consider what would be the actual cost to replace the two center lanes today. CP 1100-06. WSDOT calls this a “conclusory assertion,” WSDOT br. at 26, but it is actually an undisputed fact. CP 1100-06. It is undisputed that merely to complete the R-8A project – simply restriping and moving some ramps as opposed to major construction across a large body of water – will cost over \$200 million. CP 1384. By contrast, building the two new lanes of SR-520 across lake Washington – which the appraiser admits is the only true comparable (CP 1103) – is estimated at \$4.6 billion. <http://www.wsdot.wa.gov/Projects/SR520Bridge/financing.htm>. Of that amount, only \$120 million is currently being provided by the federal government. *Id.*

C. SUMMARY OF ARGUMENT IN REPLY

This Court has broad authority to review the legal issues raised in this case. Questions of constitutional and statutory interpretation are ultimately for this Court, not WSDOT, to decide.

The 18th Amendment is not restricted to preserving money in the MVF. The taxpayers and citizens of Washington who enacted it were primarily concerned with ensuring a good system of highways that they could use. They could not have been more clear: they wanted good roads, not merely a highway fund. The diversion of vitally needed highway facilities to a non-highway use thwarts and dismantles the purpose of the 18th Amendment just as surely as direct misuse of MVF funds does.

Unless a statute specifically affords an executive agency discretion to make a determination regarding the necessity of highway facilities, then this Court reviews that statutory language *de novo* and applies it to the facts. RCW does not confer discretion on WSDOT to determine whether highway property is “presently needed.” Thus, this issue is a matter of statutory interpretation, and this Court need not defer to WSDOT’s interpretation regarding the meaning of the words “presently needed” in RCW 47.12.120.

The words “not presently needed” in the leasing statute are plain and clear: WSDOT only has authority to lease highway lands if they are not required for use as highways *now*. Sound Transit/WSDOT *admit* that

the two center lanes are *presently needed*, and their claim that they can lease the lanes based on a projection that they will not be needed later is unsustainable under the plain meaning of the statute, as long as 142,500 motor vehicles per day drive across I-90 between Seattle and Bellevue.

Whether viewed from the standpoint of the Constitution or the statutory restrictions on WSDOT's authority, WSDOT cannot transfer needed highway facilities to a non-highway purpose. The trial court's decision should be reversed.

D. ARGUMENT IN REPLY

- (1) Unless and Until the 18th Amendment to the Washington Constitution Is Repealed, or the Statute's Governing WSDOT's Authority Is Amended, This Court Has Broad Authority to Interpret Them

Although they do not explicitly raise the argument in their briefing, both Sound Transit and WSDOT imply that because they, the Legislature, counties, and cities have expressed a desire for light rail, this Court should affirm summary judgment in their favor. Sound Transit br. at 8-14, 39; WSDOT br. at 5-9. They detail a history of various government entities that have either expressly or implicitly approved of light rail. *Id.* That "agreement" on policy is unavailing to them.

When the Legislature, or any executive agency, acts directly, its action is subject to judicial review to prevent the transgression of

constitutional limitations on its power. *State ex rel. Showalter v. Goodyear*, 30 Wn.2d 834, 842, 194 P.2d 389, 394 (1948). The Legislature cannot preclude that scrutiny and determination by any declaration or legislative finding. *Id.* A legislative declaration or finding is subject to independent judicial review upon the facts and the law by courts of competent jurisdiction, which are charged with ensuring that the Constitution as the supreme law is respected. *Id.* The Legislature also cannot escape constitutional scrutiny by authorizing its agent to make findings that the agent has kept within that limitation. *Id.*

Just as the Constitution limits the power of executive agencies, their power is also circumscribed by the statute that grants them authority. An administrative agency created by statute has only those powers expressly granted or necessarily implied by that statute. *Barendregt v. Walla Walla Sch. Dist. No. 140*, 26 Wn. App. 246, 249, 611 P.2d 1385, review denied, 94 Wn.2d 1005 (1980). This is especially true “where the public treasury will be directly affected.” *State ex rel. Bain v. Clallam County Bd. of County Commr's*, 77 Wn.2d 542, 548, 463 P.2d 617 (1970) (citing *State ex rel. Thurston County v. Dept of Labor Indus.*, 167 Wash. 629, 9 P.2d 1085 (1932)).

Thus, no matter how fond particular government entities may be of a certain policy, it cannot be enacted if doing so contravenes the

Constitution or a particular statute. Thus, any legislative or executive branch endorsement of light rail is irrelevant to the legal issues before this Court.

(2) The Purpose of the 18th Amendment to Create, Maintain, and Improve the Highway System Is Violated by the Transfer of Critical, Needed Highway Facilities to Non-Highway Use

The taxpayers argued in their opening brief that diversion of highway facilities funded by the MVF thwarts the anti-diversionary purpose of the 18th Amendment as readily as diverting the funds themselves. Br. of Appellants at 26-27. They argued that WSDOT cannot do indirectly what it is constitutionally prohibited from doing directly. *Id.*

(a) The 18th Amendment Is Concerned With Maintaining and Improving Our Highways, Not Simply Accounting for Funds

Sound Transit/WSDOT argue that the 18th Amendment is only concerned with the expenditure of highway funds, and not the preservation of highways themselves. Sound Transit br. at 27; WSDOT br. at 23. They claim that once highways are built using constitutionally dedicated funds, those highways can be disposed of at WSDOT's discretion regardless of how vital they are to the taxpayers who use them. WSDOT br. at 27-29. They assert that as long as WSDOT makes a showing that it paid fair

market value for the diverted highway lands, the intent of the people in enacting the 18th Amendment has been fulfilled. Sound Transit br. at 31.

Sound Transit/WSDOT's argument eviscerates the 18th Amendment, relegating it to the status of mere accounting device. By their reasoning, WSDOT can evade the Amendment's purpose of ensuring good highways to facilitate light rail, an admittedly non-highway purpose, at the whim of bureaucrats. Plainly, if this true for light rail, it is also true for a variety of other non-highway purposes. There is no limit on WSDOT's ability to facilitate non-highway uses of highway facilities.

The purpose of preserving MVF monies for building and maintaining highways is so that those highways may be *used as highways*. This Court in *State ex rel. O'Connell v. Slavin*, 75 Wn.2d 554, 452 P.2d 943 (1969) stated that MVF expenditures were limited "to those things which would directly or indirectly benefit the highway system." *Id.* at 561. Such benefits for the highways intended by the people in enacting the 18th Amendment were clear: "It is obvious that it was the desire to secure the building and maintenance of highways *so they could be used . . .*" *Id.* (emphasis added).

The notion that the 18th Amendment is not concerned with exploitation of needed highway facilities because it does not specifically declare such a purpose ignores reality. Under Sound Transit/WSDOT's

logic, the State could build an entire highway system with public funds and then sell the system to a private entity for “fair market value” without offending the Constitution. Then, that private entity could dispose of those lands in any way it saw fit, depriving highway users of roads they paid for. The State’s coffers would be full of money, but the purpose of that money – highways for motor vehicle users – would be rendered a dead letter.

Money is fungible, highway facilities in critical corridors are not. Even if Sound Transit/WSDOT could prove that it had somehow “reimbursed” the MVF the cost of the I-90 corridor, the damage that the 18th Amendment sought to prevent is irreversible. Citizens who pay their gas taxes with the constitutional assurance those taxes will provide them good highways will lose those facilities forever.

Even if a constitutional language may be strained or confined to fit a particular policy position, courts uphold the Constitution by reading the natural language of its provisions in their historical context. The Ohio Supreme Court recently had an opportunity to do just that recently. *Beaver Excavating Co. v. Testa*, __ N.E.2d __, 2012 WL 6200036 (December 7, 2012). In that case, the Legislature applied a commercial activity tax on revenues applying to sales of motor vehicle fuel. *Id.* at *2. However, the Ohio Constitution’s anti-diversionary provision, similar to

Washington's 18th Amendment, requires that taxes relating to motor vehicle fuel sales be spent only on highways. *Id.* at *7. The Ohio Supreme Court looked at the history of its citizens' decision to enact such a provision, particularly their frustration with the state's broken promises to spend gas taxes on roads and streets. *Id.* at *8. The Ohio Court concluded that the broad language of that state's amendment, coupled with the clear intent of its citizens to ensure good highways, could lead to no other reading but a broad one: "The evident purpose here was to ensure that these objects of fees and taxation would not be narrowed or diminished through any legislative efforts to statutorily redefine the terms as an attempted end-run to the amendment." *Id.* at 12-13.

Here, Sound Transit/WSDOT are looking for a similar end-run around our Constitution. They ask this Court to ignore the *purpose* of the 18th Amendment and adopt a narrow reading that the Amendment is only concerned with preserving funds in an account, rather than with protecting critical, needed highway facilities from diminishment or destruction.

However, this Court has already held that a narrow reading of the 18th Amendment is unsustainable. On the contrary, this Court has observed, the 18th Amendment is *implicitly* concerned with "efficient utilization in the operation of highways and reducing congestion and hazardous driving conditions," even though those purposes were not

“specifically spelled out” in the Amendment. *State ex rel. Washington State Highway Comm'n v. O'Brien*, 83 Wn.2d 878, 882, 523 P.2d 190, 193 (1974). Even Sound Transit cannot avoid this reality, noting parenthetically this Court’s admonishment in *O’Connell* that the people in framing the 18th Amendment wanted not mere funds, but for those funds to provide good roads. Sound Transit br. at 28.

In affirming the ultimate purpose of the 18th Amendment as a guarantor of a good highway system, this Court has enforced the will of the people in enacting the Amendment. The proponents of the 18th Amendment wanted good highways available for use by Washington taxpayers, not simply tidy accounting practices, as Sound Transit/WSDOT argue. For example, the proponents were incensed that tax moneys diverted from highway use deprived them of needed highways:

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.

CP 2653. This argument over the bureaucratic shuffling of funds, or even for preserving the MVF, as Sound Transit/WSDOT contend. The people wanted gas tax money to be *spent on good roads to drive on*, and did not

want that goal thwarted by short-term political, private, or budgetary considerations. *Id.*⁷

Sound Transit/WSDOT completely miss the intent of the 18th Amendment's anti-diversionary policy. Intrinsic to that policy is the people's determination, not only that motor vehicle fees and taxes not be diverted to "general purposes" or "marginal purposes" or local governments, but that those revenues must be available for the purposes of *constructing and maintaining highways for motor vehicle use*. This Court in *O'Connell* squarely understood this focus. The 18th Amendment was not merely designed to prevent the diversion of revenue, it was intended to secure that revenue for a distinct *purpose* – highway construction and maintenance.

The argument that the framers of the 18th Amendment wanted to guarantee only the proper expenditure of highway funds, as opposed to the continued existence of the highways themselves, is specious. The notion that Washington citizens were so concerned about having good highways that they *amended their Constitution to ensure it*, but had no concern for whether those highways would actually be maintained for use as highways once built and in heavy use, strains credulity.

⁷ Indeed, some are now advocating the use of MVF funds for education. Jerry Cornfield, "State road money may be used to fund school buses," Herald Net, www.heraldnet.com (December 8, 2012).

Sound Transit claims that the taxpayers' argument should not import into the 18th Amendment the "not presently needed" for "highway purposes" language of RCW 47.12.120. Sound Transit br. at 30. It argues that the statute "makes no reference to the 18th Amendment" and must be read independently from the Amendment. *Id.*

However, Sound Transit/WSDOT themselves argue that the 18th Amendment and RCW 47.12.120 must be read in conjunction with each other. Sound Transit br. at 32; WSDOT br. at 28. WSDOT admits that RCW 47.12.120 was enacted with the 18th Amendment in mind, less than a year after the Amendment was approved by voters. WSDOT br. at 28 n.7. Both claim that before WSDOT leases highway facilities under RCW 47.12.120, the MVF must be reimbursed for its investment in the facilities. Sound Transit br. at 32; WSDOT br. at 28. However, RCW 47.12.120 says *nothing about reimbursing the MVF*. If, as Sound Transit/WSDOT claim, the statute affords plenary discretion and need not be read in conjunction with the 18th Amendment, why do they and the 2001 AGO believe *any* reimbursement of the MVF is required?

RCW 47.12.120 must be read in conjunction with the 18th Amendment. The Legislature's primary mechanism within that statute for protecting highway lands in the statute was to prohibit WSDOT from leasing lands presently needed for highway purposes, not to simply require

reimbursement to the MVF. Thus, the Legislature implicitly acknowledged that diverting needed highway lands to non-highway use would violate the 18th Amendment as surely as misusing MVF funds.

All parties now acknowledge that RCW 47.12.120 must be interpreted with 18th Amendment in mind. Thus, WSDOT's attempt to lease highway facilities presently needed for highway purposes violates the Amendment.

(b) “Reimbursing” the Fund Does Not Remedy the Constitutional Violation, Particularly When the Reimbursement Is Inadequate

Sound Transit argues that the 18th Amendment is not implicated if the MVF is reimbursed by the person or entity buying or leasing the highway or road. Sound Transit argues that the 18th Amendment and RCW 46.68.070 are satisfied as long as the non-highway lessee “repa[ys] the *value of the highway* so that no highway funds remain invested in the road.” Sound Transit br. at 28 (emphasis added). Sound Transit further contends that it reimbursed WSDOT for the fair market value of the two center lanes by paying \$165 million to build R-8A,⁸ and, claims that the

⁸ That figure does not reflect the replacement cost of two freeway lanes across Lake Washington. I-90, built in the 1960's and 1970's with federal matching dollars at a 90-10 ratio to state MVF dollars clearly would require a huge investment of state dollars to replace it. If the construction costs of SR 520 are any indication, that expense is hundreds of millions of dollars per lane.

record contains no evidence to the contrary. Sound Transit cites opinions of attorneys general of this state and others regarding the notion that its claim of reimbursement satisfies any constitutional concerns, and criticizes the taxpayers for not citing contrary case law.⁹ Sound Transit br. at 33. Sound Transit essentially claims that MVF funds have not been diverted because the MVF has been repaid. Sound Transit br. at 28-35. Sound Transit repeatedly suggests that the money it paid somehow “reimbursed” the actual MVF funds expended in constructing and maintaining the two center lanes.¹⁰ Sound Transit br. at 28 (transfer permitted “after the motor vehicle fund is repaid”); Sound Transit br. at 29 (18th Amendment irrelevant after “full repayment of the highway fund”); Sound Transit br. at 31 (“Sound Transit has agreed to reimburse the current value of the motor vehicle funds invested”).

It also ignores the millions invested in maintenance of the lanes by Washington taxpayers over 50 years, which WSDOT now *admits* were not considered by its appraiser. WSDOT br. at 37.

⁹ The taxpayers would be happy to be able to cite a judicial opinion addressing the issues before this Court. They cannot, because never in the history of Washington has WSDOT attempted to convert what is arguably the most vital, heavily travelled highway in the most populous region in the State to an *admittedly* non-highway use. Also, the AGLO upon which Sound Transit relies *presumes* that the property to be diverted to non-highway use is unneeded for highway purposes. AGLO 1975 No. 62 at *2. The opinion makes no comment about the taking of a vital highway of statewide significance and diverting it to a non-highway use.

¹⁰ Sound Transit also suggests that its agreement to pay for the R-8A restriping of the outer decks to allow closure of the center lanes counts as part of the funds reimbursement. This nonsensical, circular argument is addressed *infra*.

Setting aside the problem that the purpose of the 18th Amendment is to provide good roads, what Sound Transit/WSDOT have agreed to do is not “reimbursement” of the MVF. To “reimburse” is to “pay back someone...to make restoration or payment of an equivalent to.” MERRIAM WEBSTER’S COLLEGIATE DICTIONARY 1049 (11th ed. 2004). Therefore, the meaning of reimburse is “synonymous with the definition of ‘restitution’: ‘an act of restoring or a condition of being restored.’” *State v. Von Thiele*, 47 Wn. App. 558, 563, 736 P.2d 297, 301, *review denied*, 108 Wn.2d 1029 (1987) quoting Webster, *Third New International Dictionary* 1936 (1981).

If, as Sound Transit/WSDOT claim, the purpose of 18th Amendment is fulfilled by “reimbursement” of the MVF for funds expended on the two center lanes, then one would expect the appraisal of the lanes to be a catalogue of all MVF funds spent building and maintaining the center lanes over 50 years. This would be the only way to “restore” to the MVF to all of the funds expended for highway lands that will now be diverted to non-highway uses.

However, WSDOT’s evidence of “reimbursement” does not contain such an accounting, and there is a question of fact regarding the adequacy of Sound Transit’s claimed “reimbursement” of the MVF. The appraisal WSDOT ordered reveals that the amount it paid for the two center lanes was not “reimbursement” of MVF funds paid. CP 1631,

1643-47. Sound Transit admits in its brief that these methodologies were used to value the land, not to determine the amount of MVF monies paid. Sound Transit br. at 35-36. Sound Transit claims that the appraisal accounts for the cost to “construct” the center lanes, Sound Transit br. at 36, but says nothing about the MVF funds used over the last 50 years to maintain, improve, or repair the lanes. The taxpayers offered evidence regarding the millions of dollars in maintenance that Sound Transit/WSDOT have ignored. CP 3162.

The MVF funds invested in I-90 include more than just its fair market value, or the initial cost of the bridge to build. In the decades of I-90's existence, MVF funds have been expended to maintain the highway. CP 3162; *Freeman v. Gregoire*, 171 Wn.2d 316, 320, 256 P.3d 264, 266 (2011) (“*Freeman I*”). This investment by taxpayers ensured the continued use of the lanes by motor vehicles, yet Sound Transit *admits* these funds are not figured into the “reimbursement” appraisal. Sound Transit br. at 37 n.16. Sound Transit also admits that the replacement cost of building two freeway lanes across Lake Washington would be in the hundreds of millions of dollars. Sound Transit br. at 37; CP 1682-88. However, its appraisal only accounts for the “state’s 14.1 percent investment” in the lanes. *Id.* Unfortunately, Sound Transit’s appraisal made no mention of whether, today, the other 85.9 percent funding from

the federal government would again be made available. Bluntly stated, Washington could not replicate I-90 without paying billions of state tax dollars.¹¹

Sound Transit also makes the absurd argument that its partial payment for restriping the outer decks under R-8A, constitutes MVF "reimbursement." Sound Transit br. at 36-37. Sound Transit admits that, without agreement to divert the center lanes to light rail, the R-8A project would not go forward. Sound Transit br. at 21. It is stunningly circular to argue that partially paying for a project which has the sole purpose of allowing diversion of the center lanes is "reimbursement" of the MVF. Sound Transit claims to "reimburses" the motor vehicle fund by partially paying for a project that, *but for WSDOT's action in diverting the center lanes*, would not be contemplated. It also does not deduct from this "reimbursement" amount the \$44 million to be paid for R-8A from the MVF.

This kind of bureaucratic smoke and mirrors should not be permitted in a state whose citizens were so concerned about having good roads, *they amended their Constitution to protect them*. The MVF cannot be used to fund non-highway purposes. If Sound Transit could not

¹¹ I-90 was built at a time when the federal government matched state freeway construction dollars on a 90-10 basis. That match no longer exists.

directly borrow funds from the MVF to facilitate light rail, how do the 18th Amendment and *O'Connell* permit it to do so indirectly?

The import of Sound Transit/WSDOT's 18th Amendment argument is not a concern reserved solely for the facts of this case. Some people, including Seattle's mayor, want SR 520 to be built with an "accommodation" for light rail. Mike Lindblom, *Council Says Move Forward on 520 Bridge, Deal with Rail Later*, *Seattle Times*, April 15, 2010. SR 520 could be built with MVF moneys with a tacit understanding that its highway lanes will later be transferred to Sound Transit, again frustrating the good roads mandate of the 18th Amendment.

It is for this reason that Sound Transit's interpretation of the 18th Amendment, that closing needed highways is permissible as long as a token amount is paid to the MVF is wrong. Contrary to Sound Transit's claim, the people intended that roads and highways built with motor vehicle taxes be used as roads and highways for motor vehicle traffic so long as the roads and highways were needed as such.

- (3) The Center Lanes of I-90 Are "Presently Needed" for "Highway Purposes" Based on the Plain Meaning of Those Words and the Admissions By Sound Transit/WSDOT. Thus Transfer of the Lanes Is Statutorily Prohibited

The taxpayers argued in their opening brief that this Court interprets *de novo* the meaning of the words "not presently needed" in

RCW 47.12.120, and then applies the meaning of those words to the facts. Br. of Appellant at 27 n.9. Those facts include admissions by Sound Transit/WSDOT that the two center lanes are, in fact, *presently* needed. CP 2664.

As a threshold matter, it must be clarified that this Court did *not* resolve this issue in *Freeman I*, 171 Wn.2d at 320, contrary to WSDOT's assertion in its brief at 31-32. In that opinion, this Court simply ruled that WSDOT is "DOT is statutorily authorized to sell, transfer or lease highway lands within certain statutory restrictions. Whether this potential lease specifically complies with these statutory provisions is not before us at this time...." *Freeman I*, 171 Wn.2d at 334.

Now, the issue of whether WSDOT has complied with the statutory restrictions on its ability to transfer lands *is* before this Court. The taxpayers have previously noted (Br. of Appellants at 35) that WSDOT's interpretation of RCW 47.12.120 makes little sense. If the term "presently needed" is analyzed after the transfer of the transportation facility, the facility will *never* be "presently needed." Once the facility is gone, a bureaucratic rationale can always be offered *ex post facto*. The only sensible reading of the statutory phrase "presently needed" consistent with the 18th Amendment's core directive that highways be built and

maintained for use by the motoring public, is that courts must objectively analyze the needfulness of the highway facility *before* its transfer occurs.

This Court also has not yet ruled upon whether the lease at issue, as Justice James Johnson observed in oral argument in *Freeman I*, is a *de facto* sale because it covers the entire useful life of the bridge. CP 633-34. Unfortunately the trial court did not rule on the matter. If on remand the trial court concludes that as a matter of fact and law the “lease” is really a “sale,” the applicable statute, RCW 47.12.080, mandates that WSDOT prove the highway land is “unused” before it is sold or transferred. This is an even heavier burden than proving that the facility is not “presently needed.”

Assuming *arguendo* that the lease is properly considered a lease and not a sale, this Court applying RCW 47.12.120 can only conclude that that two center lanes of I-90 are presently needed for highway purposes and cannot be diverted for light rail use.

(a) This Court Interprets Statutory Language *De Novo* and In Accordance With Its Plain Meaning

Sound Transit/WSDOT argue that this Court’s review is limited, because RCW 47.12.120 grants WSDOT broad discretion to decide when highway facilities are not presently needed for highway purposes. Sound Transit br. at 38-46; WSDOT br. at 31-40. WSDOT claims that this

Court's authority is limited to determining whether its actions were arbitrary and capricious. WSDOT br. at 42. Sound Transit goes farther, claiming that this Court must uphold summary judgment unless the taxpayers produce evidence of fraud or gross abuse of discretion. Sound Transit br. at 42.

The first weakness of Sound Transit/WSDOT's position on the standard of review is revealed in the fact that even they do not agree on what it is. Their confusion stems from a misapprehension of the taxpayers' argument. The taxpayers are asking this Court to interpret a provision of the Constitution and a statute. Both of these matters fall squarely within the province of this Court's de novo review powers. "Both history and uncontradicted authority make clear that " '(i)t is emphatically the province and duty of the judicial department to say what the law is.' " *In re Juvenile Director*, 87 Wn.2d 232, 241, 552 P.2d 163, 169 (1976), quoting *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 176, 2 L.Ed. 60 (1803)); *Dep't of Ecology v. Campbell & Gwinn, L.L.C.*, 146 Wn.2d 1, 9, 43 P.3d 4 (2002).

In support of their claim of statutory discretion, Sound Transit/WSDOT cite the language of RCW 47.12.120 and apply it to this Court's decision in *State ex rel. Agee v. Superior Court*, 58 Wn.2d 838, 365 P.2d 16 (1961). WSDOT notes that RCW 47.12.120 states that it

“may” rent or lease lands not needed for highway purposes, suggesting that the use of the word “may” is a grant of discretion to make the determination as to whether those lands are needed. WSDOT br. at 34.

Sound Transit/WSDOT are wrong in suggesting that RCW 47.12.120 affords discretion regarding the determination of whether highway lands are needed for highway purposes. The plain language of that statute affords *WSDOT no such discretion*. The statute reads in its entirety:

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

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

RCW 47.12.120 (emphasis added). Thus, the statute grants WSDOT discretion to decide (1) whether or not to lease presently unneeded lands, and (2) to *establish* the terms and conditions of a proposed lease.

However, the statute does not give WSDOT discretion to determine whether lands are “not presently needed.” *Id.* It says WSDOT may lease lands that “are held for highway purposes but are not presently needed.” *Id.* It does not say WSDOT may determine *whether* such lands are presently needed.

If statutory language is unambiguous, this Court gives effect to that language and that language alone, because it presumes the Legislature “says what it means and means what it says.” *State v. Radan*, 143 Wn.2d 323, 330, 21 P.3d 255 (2001). The Legislature is presumed to know the meaning of the words used in writing its enactments. *State v. Zornes*, 78 Wn.2d 9, 19, 475 P.2d 109 (1970).

Another elementary rule of statutory construction is that where the Legislature uses certain statutory language in one instance, and different language in another, there is a difference in legislative intent. *Koker v. Armstrong Cork, Inc.*, 60 Wn. App. 466, 471, 804 P.2d 659, 663, *review denied*, 117 Wn.2d 1006 (1991), citing *United Parcel Serv., Inc. v. Dep't of Revenue*, 102 Wn.2d 355, 362, 687 P.2d 186 (1984).

The Legislature has shown itself perfectly capable of writing a statute that grants an agency the discretion to classify lands. In fact, it has done so within the very same statutory framework, under RCW 47.12.063. In that statute, the Legislature granted WSDOT discretion to sell lands

“Whenever the department determines that any real property owned by the state of Washington and under the jurisdiction of the department is no longer required for transportation purposes....” RCW 47.12.063. Such an express grant of authority to classify highway lands unneeded could easily have been included in RCW 47.12.120, but was not. Sound Transit Sound Transit/WSDOT cannot explain why this explicit language should be inserted into RCW 47.12.120 by this Court.

Another example of an explicit grant of the discretion to classify lands can be found in *Goodyear, supra*, in which the Legislature also explicitly granted the State Board of Forest Commissioners the right to determine which lands were “forest lands:”

For the purposes of this act any land shall be considered forest land which has enough timber, standing or down, or inflammable debris, *to constitute in the judgment of the state board of forest commissioners* a fire menace to life or property.

Goodyear, 30 Wn.2d at 840, quoting § 6, Rem. Rev. Stat. § 5809 (emphasis added). Likewise in *State ex rel. Agee v. Superior Court*, 58 Wn.2d 838, 365 P.2d 16 (1961), upon which Sound Transit/WSDOT rely, discretion to determine a different width for state highways was expressly granted to the director of highways:

That from and after the taking effect of this act, the width of one hundred feet is the necessary and proper right of way width for primary state highways *unless the director of*

highways, for good cause, may adopt and designate a different width.

Agee, 58 Wn.2d at 839, quoting Laws of 1937, chapter 53, § 30, p. 152; Rem. Rev. Stat. §§ 6400-30 (emphasis added).

Here, the Legislature did afford WSDOT some discretion, but not the scope of discretion it now claims. Deciding the “terms or conditions” of the lease is an expressly discretionary decision under the statute. RCW 47.12.120(1) (a lease “Must be upon such terms and conditions as the department may determine”). The statute also says WSDOT “may” rent or lease lands that are not presently needed, connoting discretion as to whether to rent or lease unneeded lands. RCW 47.12.120. This is logical; the Legislature would be unlikely to *require* the agency to rent or lease unneeded lands.

But the statute does *not* say WSDOT may rent or lease lands that it determines are not presently needed. RCW 47.12.120. If the Legislature intended to grant WSDOT discretion to decide whether highway lands were presently needed, it could have written the statute to read: “The department may rent or lease any lands...that are held for highway purposes but [*the department has determined*] are not presently needed.” This is how the Legislature drafted RCW 47.12.063 but not RCW

47.12.120. The leasing statute grants WSDOT *no* discretion to determine whether highway lands are presently needed.

Sound Transit/WSDOT also claim that *Sperline v. Rosellini*, 64 Wn.2d 605, 606, 392 P.2d 1009, 1010 (1964), a controlling case, is inapposite because “the only evidence before the [*Sperline*] Court was that the lands were presently required for highway purposes.” WSDOT br. at 35. What WSDOT fails to acknowledge is that the same is true here: WSDOT, Sound Transit and the taxpayers all agree that the two center lanes on I-90 are presently needed for highway purposes. CP 2664. Sound Transit/WSDOT merely claim that at some point in the future, the lanes will not be “presently needed.”

In addition to the factual similarity between this case and *Sperline*, Sound Transit/WSDOT also fail to acknowledge that in *Sperline*, this Court applied the facts directly to the statutory language “presently needed,” without any reference to agency discretion. There, as here, the statute afforded no such discretion, reserving the power to interpret the words “presently needed” with the Court, not the agency. *Sperline*, 64 Wn.2d at 606. *Sperline* makes clear that the courts, not WSDOT, must apply the statute to the facts to determine if a highway facility is “presently needed.”

Sound Transit cites *Agee* in support of its argument that this Court must defer to WSDOT's discretion regarding whether the center lanes are presently needed. Sound Transit br. at 26.¹² However, as explained *supra*, the statute at issue in *Agee* expressly granted the director discretion to make the determination at issue in the case. "That from and after the taking effect of this act, the width of one hundred feet is the necessary and proper right of way width for primary state highways *unless the director of highways, for good cause, may adopt and designate a different width.*" *Agee*, 58 Wn.2d at 839.

Thus, *Agee* stands only for the proposition that when the Legislature explicitly vests discretion to make a decision with an agency, that agency's determination is subject to judicial deference. *Id.* That is not the kind of statutory language this Court is applying here, thus *Agee* is inapposite.

WSDOT also cites *State ex rel. Lange v. Superior Court*, 61 Wn.2d 153, 157, 377 P.2d 425 (1963) in support of its claim that this Court must defer to its judgment regarding whether highway lands are presently needed. WSDOT br. at 40. While acknowledging that *Lange* is an

¹² Sound Transit's claim that the taxpayers want a "*de novo* trial" of WSDOT's decision is a red herring. Sound Transit br. at 45. It suggests that a previous trial or official adjudication occurred in this case prior to the taxpayers' suit being filed. No adjudication of these issues occurred at the agency level.

eminent domain case, and as such only helpful by analogy, WSDOT claims that in eminent domain cases, executive agencies have discretion to determine whether property is necessary for highway purposes. *Id.* at 41.

Lange actually stands for precisely the opposite proposition: that only the courts, applying the constitution, can determine the *necessity* of lands, while the statute only confers discretion on the agency to *select which lands* will be taken. *Lange*, 61 Wn.2d at 157. In fact, *Lange* is very helpful authority for the taxpayers, and supports their argument. In *Lange*, this Court interpreted RCW 47.12.010, the condemnation statute. That statute confers discretion on the highway commission to *select* lands for condemnation: “The selection of the lands or interests in land by the secretary of transportation shall, in the absence of bad faith, arbitrary, capricious, or fraudulent action, be conclusive upon the court and judge.” RCW 47.12.010. The statute confers this discretion to select lands “whenever it is necessary.” However, this Court concluded that the statute’s language granting selection discretion *did not extend* to the decision as to whether acquisition of such lands was “necessary:”

Although the issue of public use and necessity is, under our constitution, a judicial one, we have long adhered to the theory that *administrative selection* is conclusive, in the absence of bad faith, arbitrary, capricious or fraudulent action.

Id. at 157 (emphasis added).

In *Lange*, this Court reached the exact same conclusion the taxpayers urge: that the agency does not have discretion to determine whether lands are needed for highway purposes. Instead, a court must determine whether the land is needed without deference to the agency's conclusion. *Id. Lange* and basic principles of statutory construction dictate that this Court is not required to defer to WSDOT's judgment regarding the meaning of the words "presently needed."

RCW 47.12.120 does not explicitly grant discretion to WSDOT to make a determination, so the issue is one of statutory construction which is ultimately decided *de novo* by a court. *Campbell & Gwinn*, 146 Wn.2d at 9. The fundamental objective in statutory interpretation is to give effect to the legislature's intent. *Id.* at 9-10. If a statute's meaning is plain on its face, then courts must give effect to that plain meaning as an expression of legislative intent. *State ex rel. Citizens Against Tolls (CAT) v. Murphy*, 151 Wn.2d 226, 242, 88 P.3d 375 (2004).

(b) Sound Transit/WSDOT Admit That the Center Lanes Are Presently Needed, and Until They Are Not, Their Lease to Sound Transit Is Prohibited By Statute

Having established that this Court reviews *de novo* the language of RCW 47.12.120, the statutory application here becomes fairly straightforward. The words "presently" and "needed" are not ambiguous

or susceptible to interpretation. "Presently" means "at the present time, now." MERRIAM WEBSTER'S COLLEGIATE DICTIONARY 982 (11th ed. 2004). "Needed" means "to be needful or necessary." *Id.* at 829.

Sound Transit/WSDOT *admit* that the two center lanes of I-90 are necessary for highway purposes *now*. CP 2664. Under RCW 47.12.120, WSDOT only has authority to lease lands not presently needed for highway purposes. Unless and until the two center lanes of I-90 are not presently needed for highway purposes, WSDOT may not lease them to Sound Transit.

Also, the record clearly reflects that the center lanes are needed for highway purposes *now*. I-90 is a designated highway of statewide significance pursuant to RCW 47.05.021(3). Under that provision, as part of the interstate highway system, I-90 is "needed to connect major communities across Washington and support the state's economy." The Legislature deemed I-90 to be of importance to the *whole state of Washington*, not just commuters on Sound Transit. RCW 47.06.140. I-90 is a vital corridor for movement of people and freight. CP 107. In particular, I-90 is the only connection between Mercer Island and Bellevue and Seattle and during an average weekday carries approximately 142,500 vehicles per day, according to the WSDOT. *Id.*

In order to avoid the fatal flaw in their argument regarding whether the lanes are “presently needed” Sound Transit/WSDOT want to excise the words “presently needed” out of RCW 47.12.120 altogether. They argue that “replacing” the two center lanes with two HOV lanes on the outer decks, combined with increased “person throughput” on light rail, will render the center lanes unneeded *in the future*. WSDOT br. at 21; Sound Transit br. at 3.

Sound Transit/WSDOT’s circular logic, that once the center lanes have already been diverted to a non-highway use they will no longer be “presently needed,” impermissibly excises the word “presently” from RCW 47.12.120. If an agency can dispose of lands while they are needed by prospectively declaring that they will no longer be needed after they are gone, all meaning will be stripped from the statute and from the 18th Amendment that informs it.

Also, according to the evidence, the center lanes will still be “needed” regardless of Sound Transit’s attempt to “replace” them with single HOV lanes on the outer bridge decks. The notion that the restriping plan will render the center lanes unneeded contradicts the Record of Decision on R-8A, which found that traffic times would be improved after the addition of HOV lanes, *presuming* the preservation of the two center lanes. CP 2409. The problem with respect to I-90 is heavy traffic and

slow travel time. CP 2401. R-8A found that *10 lanes*, not 8, would improve traffic flow on I-90. CP 2408.

Sound Transit/WSDOT's assertion that 8 lanes are all that will be "needed" in the future is both contrary to logic and the record. There is already heavy traffic on the bridge. CP 2402. Vehicular traffic demand will increase in the future. *Id.* In the current configuration, peak hour traffic has five lanes available, including two lanes for HOV, bus, and Mercer Island traffic. CP 2672. After the transfer of the two center lanes to Sound Transit, each peak direction will have only four lanes available, with only one lane for HOV, bus, and Mercer Island traffic. CP 2687. Under R-8A's original configuration, with the two center lanes preserved for vehicular traffic, then there would have been six lanes available in each peak direction for vehicular traffic, to meet the growing capacity demand. CP 2408. Sound Transit/WSDOT cannot demonstrate that R-8A will render the center lanes unneeded, in fact, the adoption of R-8A proves how vitally needed the center lanes are and will continue to be.

Also, Sound Transit's highly flawed ridership forecasts seriously undermine their claims that the center lanes will not be needed because increased "person throughput" will alleviate congestion for those taxpayers who still need to drive on the remaining highway lanes. Sound Transit br. at 50. If, as the Auditor found, fewer people will be riding light

rail than Sound Transit predicts, then the rationale for the prediction that the center lanes will not be needed crumbles. Appendix A.

The Auditor's Report is perhaps the best evidence of the wisdom of the Legislature's decision to forbid the leasing of highway lands "presently" needed, and to refuse to grant WSDOT discretion to make that determination. It would be far too easy to fund an "analysis" predicting that highway property might not be needed in the future to rationalize the disposal of valuable highway property. In the case of I-90, the property at issue is irreplaceable, and the scrutiny should be equal to the stakes.

Sound Transit/WSDOT's claim that light rail will render the center lanes unneeded ignores both the word "presently" in and the word "needed" in RCW 47.12.120. If the center lanes will only be unneeded *after* light rail is installed, then they will be presently needed at the time WSDOT proposes to convey them to Sound Transit. WSDOT may not directly violate an existing statute, particularly a statute enacted specifically to fulfill a constitutional provision such as the 18th Amendment.

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

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

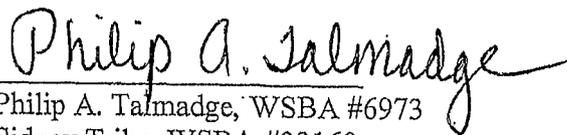
E. CONCLUSION

The taxpayers and citizens of this State were so concerned about building, improving, and protecting our vital system of highways that they amended their Constitution to protect them. The Legislature, acknowledging the Amendment, constrained WSDOT's power to sell or lease those lands to prevent the diversion of needed highways to non-highway purposes. The two center lanes of I-90 are vital highway facilities protected by the 18th Amendment. They are now and will always be needed, and cannot be diverted to light rail use by Sound Transit. This Court reverse the trial court's ruling, and remand this case for summary judgment in favor of the taxpayers, and for imposition of the appropriate remedy.

In the alternative, this Court should remand for a trial on the numerous disputed factual issues here.

DATED this 20th day of December, 2012.

Respectfully submitted,



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