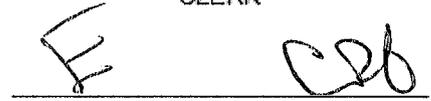


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**SUPREME COURT OF THE STATE OF WASHINGTON**

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

Appellants,

v.

STATE OF WASHINGTON, CHRISTINE O. GREGOIRE,  
Governor, PAULA HAMMOND, Secretary, Department of  
Transportation, CENTRAL PUGET SOUND REGIONAL TRANSIT  
AUTHORITY,

Respondents.

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**BRIEF OF RESPONDENT/CROSS-APPELLANT  
CENTRAL PUGET SOUND REGIONAL TRANSIT AUTHORITY**

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REGIONAL TRANSIT AUTHORITY  
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## I. INTRODUCTION

The 18<sup>th</sup> Amendment to the Washington Constitution has one concern: to restrict the use of specified motor vehicle taxes for highway purposes. The 18<sup>th</sup> Amendment is satisfied if a change in the use of a state highway to a non-highway purpose is accompanied by a full and fair reimbursement of the State's motor vehicle fund, so that no highway taxes are used for a non-highway purpose.

Pursuant to decisions by both voters and elected officials, Sound Transit and the Washington State Department of Transportation ("WSDOT") agreed to add two new vehicle lanes to Interstate 90 ("I-90"), and then to dedicate the center lanes of I-90 to light-rail, an admittedly non-highway purpose. When the Legislature expressed its intent that Sound Transit operate light rail on I-90, it also appropriated funding for an independent analysis to guide an appraisal of the center lanes. As a result of that appraisal process, Sound Transit agreed to pay the State the full current market value of its highway fund investment in the center lanes, taking into account the inflation of that investment to current dollars, and the current cost to rebuild the lanes in their present condition. In addition, as a condition of its right to lease the center lanes, Sound Transit agreed to pay the vast majority of the cost of construction of the two new replacement lanes. The agreement between WSDOT and Sound

Transit also mandates that the two new lanes must be open to vehicular traffic *before* the center lanes can be closed and leased to Sound Transit. I-90 will, therefore, remain an eight-lane highway, as it is today, and as it always has been. The compensation paid by Sound Transit to lease the lanes and to provide two new replacement lanes meets and exceeds the requirements of the 18<sup>th</sup> Amendment.

Appellants, dedicated opponents of Sound Transit's light rail expansion, would have this Court graft an additional requirement onto the 18<sup>th</sup> Amendment, which is that once constructed with motor vehicle funds a highway never may be used for a non-highway purpose. But the 18<sup>th</sup> Amendment does not govern or limit the Legislature's authority to devote state property, including highway property, to another use that, in its judgment, better serves the public interest. After the motor vehicle fund is paid fair market value for highway property, as it will be here, the 18<sup>th</sup> Amendment no longer applies because motor vehicle funds are no longer invested in the lanes. Accordingly, Appellants do not have a viable constitutional claim.

Appellants' statutory claims that WSDOT exceeded or abused its authority over state highways by entering into its agreement with Sound Transit are unsupported by evidence and legally without merit. The Legislature has long recognized and supported the premise that the I-90

center lanes ultimately be used for transit purposes, including rail transit. WSDOT's decision to lease the lanes to Sound Transit is consistent with the Legislature's general delegated authority allowing WSDOT to work with regional transit agencies for use of state highway facilities for public transit. WSDOT's leasing decision also is authorized by a statute in which the Legislature specifically delegated to WSDOT the authority to determine when state highways may be leased.

Pursuant to that specific statutory delegation of leasing authority, WSDOT here determined that, in light of the agreement by Sound Transit to construct two new replacement lanes, the center lanes of I-90 will no longer be needed *after* the new lanes are open to traffic. WSDOT's decision that the center lanes will not be presently needed after the new replacement lanes are in operation is well within WSDOT's expertise, discretion, and statutory leasing authority. This Court has recognized that WSDOT's discretionary determinations about the use of highways are entitled to special deference and can only be overturned for fraud or gross abuse of discretion. The record before this Court, containing years of study underlying WSDOT's conclusion, amply supports the determinations of WSDOT under any standard of review, let alone an abuse of discretion standard.

The trial court properly construed the 18<sup>th</sup> Amendment and applied the facts of record to WSDOT's statutory determinations in granting summary judgment to WSDOT and Sound Transit and in dismissing Appellants' claims. The trial court should be affirmed.

**II. ASSIGNMENTS OF ERROR AND ISSUES PERTAINING TO ASSIGNMENTS OF ERROR**

**A. Restatement of Appellants' Issues.**

The trial court did not err by granting Sound Transit's motion for summary judgment and by denying Appellants' motion. The issues pertaining to Appellants' Assignment of Error are more properly stated as follows:

1. Whether the trial court correctly granted summary judgment to Sound Transit because the 18<sup>th</sup> Amendment does not prohibit the lease of highway lanes for a non-highway purpose if the motor vehicle fund is fully repaid, so that no motor vehicle taxes are used to support a non-highway purpose (Appellants' Assignment of Error No. 1);
2. Whether the trial court correctly granted summary judgment to Sound Transit because WSDOT's decision to lease the I-90 center lanes to Sound Transit is authorized by properly delegated legislative authority (Appellants' Assignment of Error No. 1);
3. Whether, in granting Sound Transit's motion for summary judgment, the trial court correctly determined that it would not substitute

its judgment for WSDOT's discretion in deciding that the two center lanes would no longer be presently needed after two new replacement lanes were constructed and in operation, thereby allowing WSDOT to lease the I-90 center lanes for light rail use (Appellants' Assignment of Error No. 1); and

4. Whether Appellants' request for attorney fees should be denied because they have not prevailed and have not created a common fund (Appellants' Assignment of Error No. 1)?

**B. Sound Transit's Assignment of Error**

1. The trial court erred by denying Sound Transit's Motion to Strike.

**C. Sound Transit's Issue Pertaining to Its Assignment of Error**

1. Did the trial court err by declining to strike Appellants' declarations and exhibits that were not authenticated, contained inadmissible hearsay, or were offered after the hearing on summary judgment (Sound Transit's Assignment of Error No. 1).

**III. COUNTER STATEMENT OF THE CASE**

**A. The Center Lanes of I-90 Were Designed for and Permanently Dedicated to Transit Use.**

In 1957, the Washington Department of Highways (predecessor to WSDOT) began engineering and design studies on an improved interstate highway segment between Bellevue and Seattle. *See Seattle Bldg. &*

*Constr. Trades Council v. City of Seattle*, 94 Wn.2d 740, 742, 620 P.2d 82 (1980). In 1975, after nearly twenty years of study, debate, and litigation, regarding the design and operation of the Bellevue-Seattle segment, the Legislature passed a law “designed to terminate the debate.” *Id.* at 744. The Legislature proclaimed that “further protracted delay in establishing the transportation system (I-90) is contrary to the interest of the people of this state and can no longer be tolerated as acceptable public administration.” *Id.* (quoting RCW 47.20.645). In response, the State, King County, and Seattle, Mercer Island, Bellevue, and the Municipality of Metropolitan Seattle negotiated a “Memorandum Agreement” to govern I-90’s design and operation. *Id.* at 745; CP 2343-56.

In the Memorandum Agreement, the jurisdictions agreed to support construction of a “facility which will accommodate *no more than eight motor vehicle lanes*,” with “*two lanes designed for and permanently committed to transit use*.” CP 2346-47 (emphasis added). The Memorandum Agreement further established specific criteria to govern any modification of I-90’s mode of operation:

The subsequent mode of operation of the facility shall be based upon existing needs as determined by the [Highway] Commission in consultation with the affected jurisdictions, pursuant to paragraph 14 of this agreement. That

determination will consider efficient transit flow, equitable access for Mercer Island and Bellevue traffic, and traffic-related impacts on Seattle.<sup>1</sup>

CP 2348. The Memorandum Agreement also provided that I-90 “shall be designed and constructed so that conversion of all or part of the transit roadway to *fixed guideway is possible*.” CP 2348 (emphasis added).<sup>2</sup>

After the state and local jurisdictions signed the Memorandum Agreement, the Legislature amended RCW 47.52.180 to facilitate adoption of the Memorandum Agreement as the legally binding plan for

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<sup>1</sup> Paragraph 14 of the Memorandum Agreement limits future actions in contravention of the Memorandum Agreement as follows:

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

CP 2355-2356 (emphasis added).

<sup>2</sup> Since at least the 1970s, the term “fixed guideway” has been understood to mean fixed rail or other high-occupancy public transportation that exclusively uses a separate right-of-way. Pub. L. 95-599, § 308(b), Nov. 6, 1978 (“the term ‘fixed guideway’ means any public transportation facility which utilizes and occupies a separate right-of-way for the exclusive use of public transportation service including, but not limited to, fixed rail, automated guideway transit, and exclusive facilities for buses and other high occupancy vehicles”); *see also* RCW 81.104.015(3) (“‘Rail fixed guideway system’ means a light, heavy, or rapid rail system, monorail, inclined plane, funicular, trolley, or other fixed rail guideway component of a high capacity transportation system that is not regulated by the Federal Railroad Administration, or its successor.”).

the construction and operation of the Seattle-Bellevue section of I-90. *See Seattle Bldg.*, 94 Wn.2d at 745 (citing Laws of 1977, ch. 77, § 3). In response to this legislative enactment, the Washington Transportation Commission (successor to the Highway Commission), passed resolutions adopting the Memorandum Agreement as part of the approved plan for I-90. CP 2358-64. Thus, “[t]he decision of the board, as well as the Memorandum Agreement, approved the design of the highway as a limited access facility with provision for mass transit.” *Seattle Bldg.*, 94 Wn.2d at 748.

In 1978, U.S. Secretary of Transportation Brock Adams issued a Decision on I-90 (“Decision Document”) approving federal funding to construct the proposed I-90 segment. CP 2366-71. The Decision Document noted that the State proposed “to build a unique interstate facility which includes both highway and transit elements, funded with 90 percent federal funds.” CP 2366. Secretary Adams conditioned his approval of federal funding on the commitment in the Memorandum Agreement that “*public transportation shall permanently have first priority in the use of the center lanes*” of I-90. CP 2371 (emphasis added).

Construction of the I-90 tunnel, road, and bridge structures between Seattle and Bellevue was operationally complete in 1993. The U.S. Department of Transportation paid \$1.035 billion (85.49 percent),

and the State paid \$175.7 million (14.51 percent) of the construction costs.

CP 108 (Agreed Facts, ¶ 8);<sup>3</sup> *see also* CP 1735-1737.

**B. Stakeholders Approve Changes to I-90 Transit/HOV Lanes from One-Way to Two-Way Operation.**

1. One-Way Operation of the I-90 Transit/HOV Lanes Proves Inadequate to Serve Changing Traffic Patterns.

Following its completion, the section of I-90 between Seattle and Bellevue operated with three general-purpose lanes in each direction, and a reversible two-lane center roadway restricted to buses, carpools, and Mercer Island single-occupant traffic. CP 1408-09. The center roadway operated as a one-way highway westbound to Seattle in the morning and a one-way highway eastbound in the afternoon. CP 1408. These patterns remain in place today, even though the center lanes were designed as reversible to serve the commute patterns of the 1970s, when peak direction traffic was 85 percent westbound in the morning and eastbound in the evening. CP 1961. Since the 1970s, travel patterns have changed and east and westbound traffic is almost evenly split throughout the day. *Id.* This change made the reversible design of the center lanes obsolete for today's

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<sup>3</sup> Although Appellants did not agree to Paragraph 8 of the Agreed Facts in *Freeman v. Gregoire*, 171 Wn.2d 316, 256 P.3d 264 (2011) ("*Freeman I*"), CP 106, they have introduced no contrary evidence to the cost data that WSDOT has introduced in the record, CP 1734-37.

travel patterns, as the lanes serve only half the transit and high-occupancy vehicle (“HOV”) rush-hour traffic. *Id.*

2. Sound Transit Is Created to Develop and Operate High-Capacity Transit Systems.

In 1992, the Legislature authorized the creation of regional transit authorities to develop and operate high-capacity transit systems. RCW 81.112.030. Under this statute, the King, Pierce, and Snohomish County Councils voted to create the Central Puget Sound Regional Transit Authority (“Sound Transit”). CP 2390. In the 1996 general election, voters in the Sound Transit district approved funding for *Sound Move*, a ten-year regional transit system plan that included a project to convert the I-90 center lanes from one-way lanes operating westbound in the morning and eastbound in the evening, to two-way lanes operating in both directions for transit and carpools at all times. *See* CP 2378-88.

3. Stakeholders Agree to Add Lanes to the I-90 Outer Roadway to Improve Transit/HOV Operations.

In 1998, the I-90 Steering Committee was created to guide development of the I-90 two-way transit and HOV lanes project approved by Sound Transit voters. CP 2390. The Committee was convened because WSDOT had agreed not to make major changes to the design or operation of I-90 without seeking consensus of the parties to the 1976 Memorandum Agreement. CP 3130. Thus, the Committee’s members

included the signatories to the 1976 Memorandum Agreement, along with Sound Transit, the Federal Highway Administration, and the Federal Transit Administration. CP 2390. From 1998 to 2004, Sound Transit and WSDOT evaluated five alternative highway designs to improve two-way transit and HOV operations between Seattle and Bellevue. CP 2400.

In 2003, the Committee identified high-capacity transit in the I-90 center roadway as the proposed ultimate highway configuration. CP 2391. The Committee also selected Alternative R-8A (“R-8A”) as the *first step* toward achieving that ultimate configuration of high-capacity transit in the center roadway. CP 2391. R-8A proposed new HOV lanes on the I-90 outer roadway as part of the approved design. CP 2391.

In August 2004, the Committee members amended the 1976 Memorandum Agreement governing I-90. CP 2449-51. The 2004 Amendment reflects the Committee’s decision that “the ultimate configuration for I-90 between Bellevue, Mercer Island, and Seattle should be defined as High Capacity Transit in the center roadway and HOV lanes in the outer roadways.” CP 2449. The 2004 Amendment defines high-capacity transit as “a transit system operating in dedicated right-of-ways such as *light rail*, monorail, or substantially equivalent system.” CP 2449 (emphasis added). The parties to the 2004 Amendment resolved that “[c]onstruction of R-8A should occur as soon as possible *as a*

*first step to the ultimate configuration*” and “[u]pon completion of R-8A, [the parties would] move as quickly as possible to construct High Capacity Transit in the center lanes.” CP 2450 (emphasis added).

After the Steering Committee approved the R-8A design, the Sound Transit governing board amended the *Sound Move* transit plan to include R-8A as part of its broader plan to implement high-capacity transit in the center lanes of I-90. CP 2393; CP 1964.

Federal approval followed. In September 2004, one month after Sound Transit approved construction of R-8A, the Federal Highway Administration issued a Record of Decision (“ROD”) selecting R-8A as the project to provide two new transit/HOV lanes on I-90’s outer roadway. CP 1419-47. The ROD explicitly acknowledged the reasonable foreseeability of “future improvements to I-90 which may include the future placement of high capacity transit (HCT) in the center roadway.” CP 1423. A key reason R-8A was selected was that it “would accommodate the ultimate configuration of I-90 (High Capacity Transit in the center lanes). Alternative R-8A adds HOV lanes on the outer roadways which would provide for reliable transit and HOV operations with the ultimate roadway configuration.” CP 1432. Thus, the ROD for R-8A recognized the likely dedication of the I-90 center lanes to high-

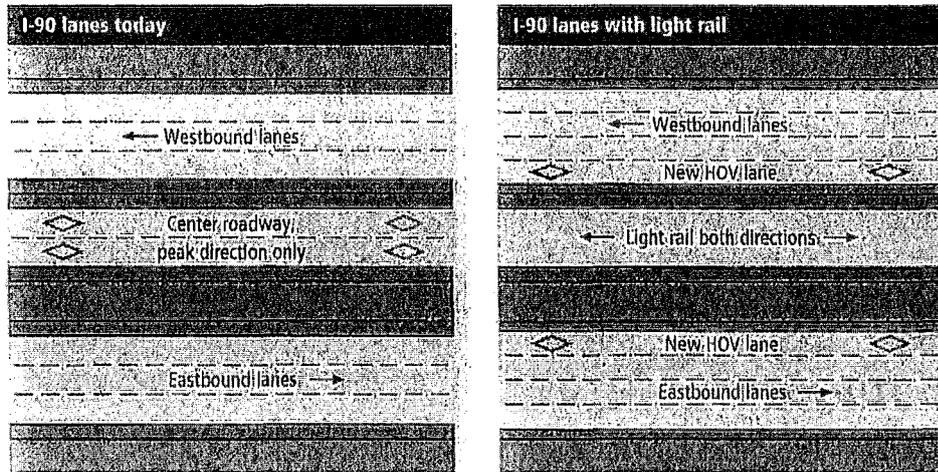
capacity transit, in keeping with the Memorandum Agreement and 2004 Amendment.<sup>4</sup> CP 2347-2348; CP 2450.

**C. Voters Approve the East Link Light Rail Project Across Lake Washington in the I-90 Center Lanes.**

In 2008, Sound Transit district voters approved funding for the *Sound Transit 2 Regional Transit Plan* (“ST 2”), which includes a new light-rail line connecting Seattle to Mercer Island, Bellevue, and Overlake/Redmond (“East Link”) using the I-90 center lanes to cross Lake Washington. *See* CP 2458-59. Sound Transit mailed an eight-page guide to every registered voter describing the projects in ST 2. CP 2340. The guide identified East Link as a “14.5 mile light-rail extension east from downtown Seattle *across Interstate 90* to Mercer Island, Bellevue and Redmond’s Overlake Transit Center.” CP 2546 (emphasis added). The official ST 2 plan documents describing the proposal to voters included a diagram showing light rail in the center lanes, with the transit/HOV traffic moved to the new outer lanes as contemplated by R-8A:

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<sup>4</sup> *See also* CP 1432-33 (stating that R-8A was selected in part because it was consistent with the 1976 Memorandum Agreement).



CP 2459.

**D. The Legislature Establishes a Process to Value the Use of the Center Lanes for Light Rail.**

In the session immediately after voters approved taxes to fund East Link, the Legislature appropriated \$300,000 “for an independent analysis of methodologies to value the reversible lanes on I-90 to be used for high capacity transit pursuant to [the *ST 2* plan] approved by voters in November 2008.” CP 2554 (ESSB 5352, Laws of 2009, ch. 470, § 204(3)). The Legislature also expressed its support for both light rail in the center lanes and new HOV lanes in the outer roadway:

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.

*See Freeman I*, 171 Wn.2d at 322 (quoting Laws of 2009, ch. 470, § 306(17)); CP 2561.

Following the Legislature's directive, the Joint Legislative Transportation Committee retained consultants to develop an appraisal methodology for the valuation of the center lanes. CP 1631. Both WSDOT and Sound Transit then issued valuation instructions, based on that methodology, to an independent appraiser. *Id.*; CP 1964. Following established appraisal standards, the Sound Transit appraisal valued a permanent easement on the I-90 center transit lanes at \$31.6 million. CP 1631. The appraisal valued the state's 14.51 percent investment of motor vehicle funds in the overall existing center lane improvements between Bellevue and Seattle at \$69.2 million. CP 1687. WSDOT directed a separate appraisal that, following established appraisal standards, valued an unencumbered fee interest in the land under the center lanes at \$70.1 million and valued a 20-year lease of the center lanes at \$49.4 million. CP 1631, 1765.

**E. Studies and Analysis Confirm that Two New HOV Lanes in the Outer Roadway (R-8A) with Light Rail in the Center Lanes Would Improve Congestion Overall.**

As plans to implement R-8A with light rail in the I-90 center lanes progressed, Sound Transit conducted significant environmental review and conceptual engineering. CP 1964. The final environmental impact statement (“EIS”) for East Link was completed in July 2011.<sup>5</sup> CP 1408, 2203. The EIS contains a comprehensive analysis of the traffic impacts of converting the reversible one-way center lanes to light rail transit, and moving bus and HOV traffic to the new two-way HOV lanes created by R-8A. CP 2203-2204; CP 2208-2332. Earlier traffic studies, including the I-90 Two-Way Transit and HOV Operations Project EIS and the I-90 Center Roadway Study cited by Appellants, did not evaluate conditions with HOV lanes on the outer roadway and light rail in the center lanes. CP 2797-2800.

The EIS compares three highway configurations: (1) light rail in the center lanes, and two new HOV lanes added to the outer roadway (“East Link Option”); (2) the center lanes retained as one way reversible HOV lanes, and two additional HOV lanes added to the outer roadway only between Bellevue and Mercer Island; and (3) the center lanes retained as

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<sup>5</sup> The complete East Link EIS is available at <http://projects.soundtransit.org/Projects-Home/East-Link-Project/East-Link-EIS.xml>. See pages 1-9 and 1-10 for a list of the many studies evaluating transportation options for I-90 between 1960 and 2003.

one way reversible HOV lanes, and two additional HOV lanes added to the outer roadway between Bellevue and Seattle. CP 2801.

The EIS concludes that under the East Link Option (*i.e.*, light rail in the center lanes), general-purpose vehicle traffic in peak periods will improve or remain similar. CP 2801; *see also* CP 2204, CP 2248 (Table 3-19), CP 2249, and CP 2251 (Table 3-20). At the same time, the highway will move more people with East Link and peak period “person throughput” will increase between 10 and 30 percent. CP 2801; CP 2205. By 2030, I-90, with East Link, is forecast to increase vehicle throughput (move more cars) in the morning and afternoon peak hours when compared to the only other possible alternative in which the center lanes remain open to traffic and no new HOV lanes are constructed on the outer roadway between *Mercer Island and Seattle*. CP 2801, CP 2251 (EIS Table 3-20).<sup>6</sup>

The EIS also concludes that freight traffic will improve significantly with East Link and R-8A in all directions at all times, except a predicted one minute longer travel time Eastbound during the AM Peak. CP 2804, CP 2328 (Table 3-33). Freight traffic currently is limited in its

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<sup>6</sup> A comparison of the impact of these two alternatives on traffic and person throughput is critical because, for the reasons discussed in section III(F), *infra*, HOV lanes will not be added between Bellevue and Mercer Island (the longest section of the highway) if light rail cannot operate in the center lanes. CP 3131-32.

ability to use the center roadway due to limited access, weight restrictions, and occupancy requirements. CP 2804. Accordingly, the EIS concluded that impacts to freight travel over I-90 would be limited and that freight travel times likely would improve overall. See CP 2803-04.

One key reason that East Link will improve overall mobility across I-90 is that due to the one-way operation and limited ingress and egress points of the current center lanes, the lanes carry only about 2,000 vehicles per hour, the equivalent of about one freeway lane (rather than two). CP 2802-03.<sup>7</sup> “The center reversible roadway will continue to be underutilized in the future because of constraints in accessing these lanes, which prevents the center roadway from realizing its full capacity.” East Link EIS, *supra*, n.5, at 1-6.

Accordingly, use of the center lanes for bi-directional light rail with bi-directional replacement HOV lanes on the outer roadway “would be a more efficient use of the center roadway space than the current reversible one-directional vehicle operations” and better accommodate the current and projected use of I-90. CP 2248; *see also* CP 2802.

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<sup>7</sup> In both the morning and evening peak traffic hours, “the center roadway accommodates less than 15% of the total vehicles on I-90 due to its limited access. Access is provided by ramps from the outer mainline roadway and the 5<sup>th</sup> Avenue South and South Dearborn Street intersection, neither of which provides enough capacity to effectively use the two lanes across Lake Washington in the reversible center roadway.” CP 2242.

**F. Sound Transit and WSDOT Agree on Conditional Funding for R-8A and Full Compensation for Lease of the Center Lanes.**

Although Appellants throughout their brief refer to the potential for ten lanes of automobile traffic on I-90, in fact no such alternative exists. Because the voter-approved funding required to complete the R-8A HOV lanes is part of the funding for the project to operate light rail in the center lanes, Sound Transit's agreement to provide funding for the completion of R-8A is conditioned on WSDOT's agreement that the center lanes be used for light rail after the new lanes on the outer roadway are complete and open to traffic.

This agreement is consistent with the history of I-90 and the dedication of the center lanes for transit use. The 1976 Memorandum agreement provided that I-90 would be limited to "no more than eight motor vehicle lanes." CP 2346. The parties to that agreement, including WSDOT, never have agreed to change the operation of I-90 to ten vehicle lanes. CP 2346-47, CP 3131.

This agreement also is a practical necessity. WSDOT concluded years ago that it did not have sufficient funding in its current or projected future budgets to fund construction of R-8A. CP 3131. As a result, when Sound Transit and WSDOT executed the final agreement by which Sound Transit will lease the center lanes ("Umbrella Agreement"), Sound Transit

agreed not only to reimburse the current value of the state's motor vehicle funds invested in the I-90 center lanes, but also to pay for the construction of R-8A to replace those lanes. CP 1965.

To facilitate the completion of R-8A, Sound Transit agreed to advance the vast majority of the cost to construct the new two-way HOV replacement lanes, as well as other improvements, for a total estimated payment of \$165.7 million.<sup>8</sup> CP 1965. This amount will then be credited against the amounts owed WSDOT for the light rail use of the center lanes. CP 1965.

The amounts that Sound Transit will ultimately pay for the use of the center lanes will be calculated as follows: (a) an amount equal to the current value of the state's share (\$69.2 million) of the cost to construct the center lanes in today's dollars (reimbursing the state for that amount of motor vehicle funds used for that construction inflated to today's construction costs); *plus* (b) the 45-year rental value of the lanes that will be used for light rail, with the final value to be established one year before light rail construction begins on I-90. CP 1965. The rental value for the

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<sup>8</sup> By mid-2011, Sound Transit had paid \$44.2 million to fund construction of HOV lanes, entrance and exit ramps, and overpasses between Bellevue and Mercer Island. CP 1964. The westbound HOV lane opened in 2008, and the eastbound lane opened in early 2012. CP 1964. If the light-rail project proceeds, Sound Transit will next fund construction of the new HOV replacement lanes on the outer roadway between Mercer Island and Seattle. *See* CP 1964.

45-year lease period will be based on the \$70.1 million land value contained in the independent appraisal prepared for WSDOT, updated to the then current land value one year before light-rail construction commences. CP 1965. If the cost to add the new transit/HOV lanes exceeds the amounts owed to lease the center lanes, Sound Transit will also make up the difference. CP 1965.

Based on years of study and expert analysis,<sup>9</sup> WSDOT determined that *after* the replacement lanes are completed and in operation, the I-90 center lanes will no longer be needed and may be leased for light rail use. CP 1010-11. Accordingly, the Umbrella Agreement provides that the center lanes will not be closed to traffic until after the replacement HOV lanes are complete and open to traffic, and after Sound Transit has repaid the value of the motor vehicle fund investment in the lanes. CP 1965.

Importantly, however, if the center lanes cannot be used for light rail, Sound Transit *will not fund the construction of R-8A*, and will receive credit for any funds advanced to date. CP 3131-32. In other words, if the

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<sup>9</sup> Studies and analysis relied upon by WSDOT included the I-90 Two-Way Transit and HOV Operations FEIS and ROD, the I-90 Two-Way Transit and HOV Access Point Decision Report, the WSDOT I-90 Center Roadway Study, the East Link FEIS and ROD, the East Link/I-90 Interchange Justification Report, the I-90 Bellevue to North Bend Corridor Study, the WSDOT Highway System Plan 2007-2026, and the legislative history reflected in 2009 Engrossed Senate Substitute Bill 5352. CP 1010.

center lanes cannot be used for light rail, there will be no funding to complete R-8A, and the two outer lanes will not be added.

**G. Appellants Bring Successive Challenges to the Plan to Use the I-90 Center Lanes for Light Rail.**

In 2009, many of the same Appellants in this case filed an original action in this Court seeking to enjoin the expenditure of motor vehicle funds to value the I-90 center lanes. *See Freeman I*, 171 Wn.2d at 323-24. The Court rejected the 18<sup>th</sup> Amendment challenge to the Legislature's decision to appropriate motor vehicle funds to value the lanes. *Id.* at 331. The *Freeman I* petitioners also sought to prevent WSDOT from leasing the I-90 center lanes to Sound Transit, but this Court dismissed that claim as beyond the scope of original jurisdiction. *Id.* at 334.

Following dismissal of *Freeman I*, Appellants filed the present case in Kittitas County Superior Court, seeking declaratory and injunctive relief and seeking constitutional and statutory writs of mandamus and prohibition to prevent WSDOT from leasing the I-90 center lanes to Sound Transit for light rail use. CP 19-28.

At the same time, Tim Eyman, supported by a business affiliated with Appellant Kemper Freeman, proposed a statewide ballot initiative, Measure No. 1125 ("I-1125"), which included a section prohibiting the transfer or use of highway lanes constructed with gas taxes for non-

highway purposes.<sup>10</sup> As this case remained pending, more than 53 percent of voters statewide rejected I-1125.<sup>11</sup>

All parties to this case filed cross-motions for summary judgment relying principally on the Agreed Facts filed in *Freeman I*, and the traffic analysis from the East Link EIS. CP 66-79, 982-91, 1598-1609. The trial court granted summary judgment in favor of Sound Transit and WSDOT. CP 3177-80. Specifically, the trial court determined that the 18<sup>th</sup> Amendment was not violated because Sound Transit and the State have agreed to appropriate compensation so that no motor vehicle funds are used for a non-highway purpose. CP 3191. The trial court further determined that the 18<sup>th</sup> Amendment did not otherwise limit WSDOT's discretion to lease highway lanes, and that Appellants had failed to present evidence that WSDOT's actions amounted to fraud or bad faith, such that the Court should substitute its judgment for WSDOT's valid discretionary decision. *Id.* Accordingly, the trial court dismissed Appellants' claims with prejudice and entered judgment in favor of Sound Transit and

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<sup>10</sup> The full text of I-1125 is available at <http://www.sos.wa.gov/elections/initiatives/text/i1125.pdf>. Section 3 of I-1125 purported to prohibit light-rail on I-90. Washington State Public Disclosure Commission filings indicate that Kemper Holdings, LLC, an affiliated business of Appellant Kemper Freeman contributed \$1,093,000 dollars to support Initiative 1125. The PDC report is available at <http://www.pdc.wa.gov/MvcQuerySystem/CommitteeData/contributions?param=Vk9URVdNIDIwNw====&year=2011&type=initiative>.

<sup>11</sup> Certified election results are available at <http://vote.wa.gov/results/20111108/Initiative-Measure-1125-Concerning-state-expenditures-on-transportation.html>.

WSDOT. CP 3176-94. Appellants subsequently sought direct review from this Court. CP 3195-3217.

#### **IV. SUMMARY OF ARGUMENT**

The 18<sup>th</sup> Amendment governs the expenditure of motor vehicle funds; it does not otherwise restrict the Legislature's authority over the location or operation of specific highway lanes, and it does not limit the Legislature's authority to determine how long those lanes remain in highway service. The Legislature has delegated the authority to make decisions regarding the management, location, and use of specific highway lanes to the sound discretion of WSDOT. When WSDOT determines that the highway system would function more efficiently with a different lane configuration (such as relocating HOV lanes from the center of a highway to its outer edge), the 18<sup>th</sup> Amendment does not override that exercise of discretion and require that highway lanes permanently remain open to automobile traffic in the same location. Instead, the lanes may be relocated or closed and used for a non-highway purpose, including for light rail, so long as the State's motor vehicle fund investment is repaid, as it will be here.

Absent a constitutional violation, WSDOT's discretionary decision to lease highway lanes for light-rail use should not be disturbed unless it is arbitrary and capricious or amounts to fraud or bad faith. This is

particularly true where, as here, the Legislature specifically has authorized WSDOT to lease the I-90 center lanes for light rail, and multiple statutes confirm WSDOT's discretionary authority to do so. While Appellants may disagree with WSDOT's decision, they are not entitled to a trial on the merits of a transportation policy determination made over the course of several decades, with the validation of federal, state, and local jurisdictions, and the voting public.

Accordingly, the trial court properly ruled that Sound Transit and WSDOT were entitled to judgment as a matter of law that WSDOT may lease the I-90 center lanes to Sound Transit for light rail use pursuant to the terms of the Umbrella Agreement. Sound Transit respectfully requests that the Court affirm the trial court's summary judgment order in favor of Sound Transit and WSDOT.

## V. AUTHORITY & ARGUMENT

### A. Standard of Review

The trial court's grant of summary judgment to WSDOT and Sound Transit is reviewed *de novo*. *Elcon Const., Inc. v. E. Washington Univ.*, 174 Wn.2d 157, 164, 273 P.3d 965 (2012).<sup>12</sup> Summary judgment is

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<sup>12</sup> Similarly, the dismissal of Appellants' claims for statutory writs of mandamus and prohibition are reviewed *de novo*. *Dress v. Wash. State Dep't of Corr.*, 168 Wn. App. 319, 335, 279 P.3d 875 (2012). It appears Appellants have abandoned these claims on

proper when there are no disputed material facts and the moving party is entitled to judgment as a matter of law. CR 56.

The trial court ruled that Sound Transit and WSDOT satisfied the 18<sup>th</sup> Amendment as a matter of law, and that WSDOT had legal authority to lease the center lanes of I-90 to Sound Transit. CP 3191-93.

Appellants' challenge to these legal determinations is subject to *de novo* review. *Elcon Const., Inc.*, 174 Wn.2d at 164. A decision that lies within the authorized discretion of WSDOT "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). Appellants contend an issue of fact precluded summary judgment on WSDOT's exercise of its discretion. Importantly, the standard of review that governs Appellants' challenge to WSDOT's discretionary decision is not whether there is an issue of fact regarding the prudence of WSDOT's decision, but whether Appellants raised an issue of fact that WSDOT's decision was so arbitrary and capricious as to constitute fraud or a gross abuse of discretion. *See, e.g., Pierce County Sheriff v. Civil Serv. Comm'n of Pierce County*, 98 Wn.2d

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appeal. *See* Appellants' Br. at 42-44 (arguing only that WSDOT's decision to lease the I-90 center lanes is subject to a declaratory judgment action). Regardless, the record does not support Appellants' claims for a statutory writ because WSDOT's decision to lease highway lanes is discretionary and squarely within its jurisdiction. *See Freeman I*, 171 Wn.2d at 323-28.

690, 695, 658 P.2d 648 (1983) (scope of court review under arbitrary and capricious standard is “very narrow” and “one who seeks to demonstrate that action is arbitrary and capricious must carry a heavy burden”); *see also Marquez v. Univ. of Wash.*, 32 Wn. App. 302, 308-09, 648 P.2d 94 (1982) (summary judgment dismissal proper where the record does not establish or raise an inference of arbitrary or capricious action).

**B. Lease of the I-90 Center Lanes for Light Rail Does Not “Divert” Motor Vehicle Funds or Violate the 18<sup>th</sup> Amendment.**

1. The 18<sup>th</sup> Amendment Governs Use of Motor Vehicle Funds, Not Operation of Highway Lanes.

The 18<sup>th</sup> Amendment, by its plain language, governs the use of motor vehicle *funds*, not the future use of highway *property* purchased with those funds. The 18<sup>th</sup> Amendment provides only that certain fees and taxes will be applied to a fund to be disbursed for highway purposes:

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

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

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

There is created in the state treasury a permanent fund to be known as the motor vehicle fund to the credit of which shall

be deposited all moneys directed by law to be deposited therein. This fund shall be for the use of the state, and through state agencies, for the use of counties, cities, and towns for proper road, street, and highway purposes, including the purposes of RCW 47.30.030.

The 18<sup>th</sup> Amendment and RCW 46.68.070 both restrict the use of motor vehicle funds and specify that those funds must be used for roads and highways. Neither the 18<sup>th</sup> Amendment nor RCW 46.48.070 restricts how a highway constructed with those funds may be used after the motor vehicle fund is repaid the value of the highway so that no highway funds remain invested in the road.

This Court has instructed that the 18<sup>th</sup> Amendment “should be read according to the natural and most obvious import of its framers, without resorting to subtle and forced construction for the purpose of limiting or extending its operation.” *State ex rel. Heavey v. Murphy*, 138 Wn.2d 800, 811, 982 P.2d 611 (1999) (internal citation and quotation marks omitted); *see also State ex rel. O’Connell v. Slavin*, 75 Wn.2d 554, 559, 452 P.2d 943 (1969) (“the words of [the 18<sup>th</sup> Amendment] are unambiguous, and in their commonly received sense lead to a reasonable conclusion, that the people in framing this provision intended to insure *that certain fees and taxes paid by them ...* should be used to provide roads, streets and highways on which they could drive.” (emphasis added)). Because this Court has concluded that the 18<sup>th</sup> Amendment is unambiguous, its

meaning should also not be altered in the guise of construing secondary evidence. *See Roe v. TeleTech Customer Care Mgmt. (Colorado) LLC*, 171 Wn.2d 736, 746, 257 P.3d 586 (2011) (citing *Amalgamated Transit Union Local 587 v. State*, 142 Wn.2d 183, 205, 11 P.3d 762 (2001)).<sup>13</sup>

All of the authority relied on by Appellants supports the proposition that the 18<sup>th</sup> Amendment restricts only the diversion of motor vehicle *funds*, not the future use of highway property after full repayment of the highway fund. *See, e.g., O'Connell*, 75 Wn.2d at 558; *Wash. State Highway Comm'n v. Pac. Nw. Bell Tel. Co.*, 59 Wn.2d 216, 223, 367 P.2d 605 (1961) (“expenditure, if paid from the *motor vehicle fund*, is repugnant to amendment 18 of the constitution”) (emphasis in original); *Auto. Club of Wash. v. City of Seattle*, 55 Wn.2d 161, 171, 346 P.2d 695 (1959) (motor vehicle fund could not be used to pay tort judgment).

Despite this clear authority, Appellants argue that the “policy” of the 18<sup>th</sup> Amendment requires that highway property leased for non-highway purposes must “objectively not [be] needed for highway

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<sup>13</sup> Contrary to Appellants’ suggestion, the voter’s pamphlet also supports the plain language of the 18<sup>th</sup> Amendment, which is limited to the disposition of motor vehicle funds. The concise statement in the 1944 Voters Pamphlet characterized the proposed amendment as “limiting exclusively to highway purposes the use of motor vehicle license fees, excise taxes on motor fuels and other revenue intended for highway purposes only.” 1944 Voters Pamphlet at 45 (emphasis added), available at [http://wsldocs.sos.wa.gov/library/docs/OSOS/voterspamphlet/voterspamphlet\\_1944\\_2006\\_002278.pdf](http://wsldocs.sos.wa.gov/library/docs/OSOS/voterspamphlet/voterspamphlet_1944_2006_002278.pdf).

purposes.” Appellants’ Br. at 28. Not only do Appellants cite no case authority for this proposition, they improperly seek to transform oversight of highways from a legislative to a judicial function. Nothing in the 18<sup>th</sup> Amendment or in the case law suggests that the 18<sup>th</sup> Amendment was intended to transfer the ultimate authority to manage the operation of the highway system from the Legislature to the courts.

As the trial court determined, “[t]he plain language of Article 2, Section 40, as well as the case law interpreting its language, confirms that the constitutional limitation only applies to the expenditure of motor vehicle funds for highway purposes, not to the use or management of the highways.” CP 3172. This Court should reject Appellants’ unsupported and forced construction of the 18<sup>th</sup> Amendment’s language improperly made “for the purpose of . . . extending its operation.” *O’Connell*, 75 Wn.2d at 558.

Appellants’ sole source for attempting to add a new restrictive clause (“not needed for highway purposes”) to the 18<sup>th</sup> Amendment is a statute passed by the Legislature *after* the 18<sup>th</sup> Amendment. Appellants’ Br. at 31 (citing Laws of 1949, ch. 162, § 1). That statute, now codified at RCW 47.12.120, makes no reference to the 18<sup>th</sup> Amendment and has nothing to do with the deposit or expenditure of motor vehicle funds. Instead, the statute is one of many legislative delegations of discretionary

authority to WSDOT. *See* Section V(C), *infra*. Under no theory of law can the terms of this later-enacted statute change the meaning of the 18<sup>th</sup> Amendment. *Wash. State Highway Comm'n*, 59 Wn.2d at 222 (“[t]he constitution does not grant to the legislature the power or authority to define, by legislative enactment, the meaning and scope of a constitutional provision. Nor does the Eighteenth Amendment, which refers directly to this subject, grant such authority to the legislature.”).

Accordingly, the only issue raised by the 18<sup>th</sup> Amendment is whether highway *funds* are being used for non-highway purposes. As explained below, where, as here, the motor vehicle fund is repaid as part of the change in use of a highway, there is no 18<sup>th</sup> Amendment violation.

2. Lease of Highway Lanes for Appropriate Compensation Does Not Violate the 18<sup>th</sup> Amendment.

As in *Freeman I*, Appellants rely on a straw argument by asserting that Sound Transit and WSDOT concede that light rail is not a highway purpose under the 18<sup>th</sup> Amendment. *See* Appellants’ Br. at 22. Sound Transit agrees that light rail is not a highway purpose and that motor vehicle funds cannot be used to fund light rail. Because the center lanes were partially funded by motor vehicle funds, Sound Transit has agreed to reimburse the current value of the motor vehicle funds invested in the roadway.

A Washington Attorney General Opinion validates this exact approach. It addressed the following question:

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

AGLO 1975 No. 62, at \*1.<sup>14</sup> The Attorney General concluded that when highway land is purchased with motor vehicle funds, it may be leased or sold for non-highway purposes, and the purchaser “will be required to provide such monetary or other consideration as is necessary, under the particular factual circumstances involved, to avoid an unlawful diversion of motor vehicle funds.” AGLO 1975 No. 62, at \*3. Such consideration may take various forms and “need not necessarily be monetary or be precisely equivalent to the fair market rental or sale value of the subject lands.” *Id.* Thus, as long as necessary consideration is provided, highways paid for with motor vehicle funds may be transferred for non-highway purposes.

Appellants quarrel with the Attorney General’s conclusion in AGLO 1975 No. 62 that highway land may be leased or sold for non-highway purposes, consistent with the 18<sup>th</sup> Amendment, because the

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<sup>14</sup> See CP 2583-2594 for copies of the Washington and out-of-state attorney general opinions cited by Sound Transit.

opinion does not address when highway property is “no longer needed.” Appellants’ Br. at 32-33. But as set forth in Section V(B)(1), *supra*, the 18<sup>th</sup> Amendment does not require a determination that highway property is “no longer needed.” Absent reading the “no longer needed” proviso into the 18<sup>th</sup> Amendment, Appellants do not otherwise dispute the actual conclusion of the Attorney General’s opinion, that the 18<sup>th</sup> Amendment is not violated when highway property is transferred for appropriate compensation, nor do they cite any contrary authority.

Other states with analogous constitutional provisions to Washington’s 18<sup>th</sup> Amendment also have not placed substantive restrictions on the lease or transfer of property purchased with funds earmarked for highway purposes, so long as appropriate compensation is paid. For example, in Arizona Opinion of the Attorney General No. I79-319, the Department of Transportation asked whether transfer of a building constructed with motor vehicle funds to the Department of Public Safety required that the fund be reimbursed. The opinion concluded that because the building was purchased with funds earmarked for highway uses only, the highway users’ fund must be reimbursed for the fair market value of the building. Ariz. Op. Att’y Gen. No. I79-319, at \*\*1-2 (Dec. 31, 1979); *see also* Penn. Op. Att’y Gen. No. 40, at 103 (June 1, 1973) (department of transportation can lease airplane for highway purposes and

allow its employees to use the airplane for non-highway purposes, assuming the fair market rental value of the non-highway use is returned).

Ignoring the plain language of 18<sup>th</sup> Amendment and the authority confirming that highway property may be transferred for appropriate compensation, Appellants contend that the 18<sup>th</sup> Amendment bars such a transfer as an “indirect” diversion of funds. *See* Appellants Br. at 27 (theorizing that the 18<sup>th</sup> Amendment prevents WSDOT from constructing a highway facility and subsequently “turn[ing] the facility over to an entity for a non-highway purpose for ‘consideration.’”). But Appellants cite no authority for this proposition. *See id.* The 18<sup>th</sup> Amendment does not prohibit closure of a highway so that the property can be devoted to other public uses such as airports, schools, and hospitals after the State pays appropriate compensation to the motor vehicle fund.

Regardless, no motor vehicle funds will be diverted, directly or indirectly, under the agreement between Sound Transit and WSDOT. Sound Transit has agreed to reimburse the current value of the motor vehicle funds invested in the center roadway *and* to fund the construction of replacement highway lanes. CP 1965. This ensures that motor vehicle funds are not diverted, and that eight vehicle lanes remain in service on the I-90 corridor between Bellevue and Seattle.

In sum, the trial court correctly concluded that the 18<sup>th</sup> Amendment permits WSDOT to lease or transfer property purchased with motor vehicle funds if the funds are repaid such that no vehicle funds are directly or indirectly diverted to support light rail. *See Freeman I*, 171 Wn.2d at 334 (“...the statutory provisions authorizing transfers of highway land do not generally violate article II, section 40.”). Any constitutional concerns under the 18<sup>th</sup> Amendment are resolved by the payment of appropriate compensation for property purchased with motor vehicle funds.

3. Appellants Presented No Evidence to Dispute the Appraisal Process Used to Determine Compensation for Leasing the Center Lanes.

The compensation to be paid by Sound Transit to lease the I-90 center lanes was determined through a process by which the Legislature required “an independent analysis of methodologies to value the reversible lanes on I-90 to be used for high capacity transit pursuant to [the *ST 2* plan] approved by voters in November 2008.” CP 2554 (ESSB 5352, Laws of 2009, ch. 470, § 204(3)). Sound Transit and WSDOT ultimately agreed, in the Umbrella Agreement, on the compensation to be paid based on the highest appraised value of the center lanes. CP 1631, 1974-75.

The appraisal used to establish this value applied accepted appraisal principles (*e.g.*, Replacement Cost and Across-the-Fence) and methodologies. CP 1631, CP 1643-47. The appraisal also considered

whether the people carrying capacity of the I-90 center lanes would be reduced by the new configuration (it is not). CP 1657-1658; CP 2204-2205. The appraisal valued the state's interest in I-90 as if it were owned in fee simple, when in fact, in many locations, the state owns only less valuable tunnel easements. CP 1771. As between the Sound Transit and WSDOT appraisals, the higher value resulting from the WSDOT appraisal was applied to determine the compensation. *See* CP 1965; CP 1972-1975.

Thus, Sound Transit will pay the full value of the State's interest based on assumptions favorable to the State utilizing accepted standard appraisal methodology. The Umbrella Agreement obligates Sound Transit to reimburse fully the motor vehicle fund for the current fair market value of the state's share (\$69.2 million) of the cost to construct the two center lanes at issue. CP 1965; CP 1975. Sound Transit also will prepay the 45-year rental value of the lanes, which will be based on the land value calculated within one year prior to the commencement of construction. CP 1965; CP 1974. Had the land value been determined in 2009, it would have been \$70.1 million. CP 1965; *see also* CP 1631; CP 1765. As part of this process, Sound Transit also will advance the cost to complete the two replacement HOV lanes on the outer roadway, as well as entrance and

exit ramps and overpasses, at an estimated cost of \$165.7 million. CP 1965.<sup>15</sup>

Appellants assert, without reference to the record or any authority, that the appraisal did not consider the maintenance costs or full replacement costs of the lanes. Appellants' Br. at 21-22.<sup>16</sup> In fact, the appraisal specifically included an inflation multiplier in its methodology, so the price that Sound Transit will pay is the amount it would cost in today's dollars to construct the bridge in its current condition and then buy the State's 14.51 percent investment in the lanes. CP 1682-1688. In other words, the appraisal identified the *current cost of a fee simple interest in the facility*.

Moreover, Appellants cannot challenge in this Court the trial court's finding that the compensation paid to lease the lanes satisfies the 18th Amendment, because Appellants offered *no evidence* at the trial court refuting the legislatively-authorized appraisal or its findings. The fact that the appraised value constitutes full and fair reimbursement of the motor vehicle fund was not disputed by any competent evidence on summary

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<sup>15</sup> Again, this amount will then be credited against the amounts owed WSDOT for the light rail use of the center lanes. CP 1965.

<sup>16</sup> Appellants cite to CP 278-80 (Appellants' Br. at 22) for the proposition that "millions of MVF dollars were spent" on the upkeep of I-90, but that cite, to a section of the center lanes appraisal, contains no reference to maintenance costs.

judgment, and is undisputed in the record on appeal. The trial court's conclusion that the compensation to be paid satisfies the 18<sup>th</sup> Amendment should be affirmed.

**C. The Legislature Has Delegated the Authority to Manage and Determine the Use of Highway Lanes to WSDOT.**

Because the 18<sup>th</sup> Amendment does not prohibit the lease or transfer of highway property to a non-highway use, so long as any motor vehicle funds are fully repaid, the Legislature has plenary authority to establish when and how such leases or transfers can occur. *State ex rel. York v. Bd. of Comm'rs of Walla Walla Cnty.*, 28 Wn.2d 891, 898, 184 P.2d 577 (1947) ("The essential principle to be kept in mind is that the legislature, within constitutional limitations, has absolute control over the highways of the state, both rural and urban.").

In a series of statutes, the Legislature has demonstrated its intent to authorize WSDOT to agree to use highway property for transit purposes such as light rail. For example, in RCW 47.52.090, the Legislature authorized WSDOT to enter agreements with local governments to use highways for urban public transportation systems.<sup>17</sup> The Umbrella

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<sup>17</sup> This statute authorizes WSDOT and a municipal corporation "owning or operating an urban public transportation system," such as Sound Transit, to enter into agreements that "provide for the *exclusive or nonexclusive use of a portion of [a limited access] facility* by streetcars, trains, or other vehicles forming a part of an urban public

Agreement between Sound Transit and WSDOT identifies RCW 47.52.090 as authority for that agreement. CP 1970. Similarly, the Legislature authorized WSDOT to join with any public agency, county, city, or town for the purpose of establishing an urban public transportation system in conjunction with a new or existing highway. *See* RCW 47.04.081, RCW 47.04.080.

Against this backdrop, the Legislature has also taken a series of steps demonstrating its specific intent to facilitate the use of the I-90 center lanes for transit and, most recently, light rail.

1. The Legislature Has Authorized WSDOT to Lease the I-90 Center Lanes for Light Rail.

The 1976 Memorandum Agreement required that the segment of I-90 between Seattle and Bellevue be designed to permit conversion of all or part of center lanes to fixed guideway. CP 2348. The Agreement also expressly authorized WSDOT to determine the future operation of the segment “based on existing needs *as determined by the Commission* [now WSDOT] in consultation with the affected jurisdictions.” CP 248 (emphasis added).

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transportation system and for the erection, construction, and maintenance of structures and facilities of such a system.” RCW 47.52.090 (emphasis added).

This Court specifically has acknowledged that the Legislature imbued the 1976 Memorandum Agreement with the force of law. *Seattle Building*, 94 Wn.2d at 748 (noting that the Legislature amended RCW 47.52.180, with the 1976 Memorandum Agreement in mind, so as to authorize future amendments such as the 2004 Amendment); *see also* RCW 47.20.645, .647.

In 2009, the Legislature specifically reaffirmed its approval of both the process and the result of WSDOT's decision to lease the I-90 center roadway when it passed ESSB 5352. CP 2552-66. This statute stated that "[t]he legislature is committed to the timely completion of R8A *which supports the construction of sound transit's east link.*" CP 2561 (ESSB 5352, Laws of 2009, ch. 470, § 306(17) (emphasis added)). The Legislature funded a valuation process and directed WSDOT "to complete the process of negotiations with sound transit...no later than December 1, 2009." CP 2561.

The Legislature would not have appropriated \$300,000 to determine the compensation Sound Transit should pay to use the I-90 center lanes for light rail unless it believed that WSDOT was otherwise authorized to permit the lanes to be used by Sound Transit for light rail. *See* CP 2561; *see also Freeman I*, 171 Wn.2d at 327 (citing four statutes authorizing the sale or lease of highway property).

Given the Legislature's general and specific intent to facilitate the completion of East Link, Appellants' suggestion that the lease of the center lanes is prohibited by the general leasing statute, RCW 47.12.120, should be rejected.

2. RCW 47.12.120 Authorizes WSDOT, in Its Discretion, to Lease the I-90 Center Lanes.

RCW 47.12.120 is a general statute that governs the lease of certain WSDOT property. RCW 47.12.120 provides that "[t]he department may rent or lease any lands, improvements, or air space above or below any lands that are held for highway purposes but are not presently needed." It further provides that "[t]he rental or lease . . . [m]ust be upon such terms and conditions as the department may determine." RCW 47.12.120(1). WSDOT has determined that after the replacement HOV lanes are completed the I-90 center lanes are no longer presently needed and may be leased for light rail use. CP 1970.

Because the Legislature did not include an objective standard in the statute or otherwise provide for a public hearing, fact-finding commission, or other formal procedure to determine whether property is not presently needed for a highway purpose under RCW 47.12.120, the determination is necessarily and properly delegated to WSDOT, the agency with the necessary expertise to make an inherently discretionary

decision. *Freeman I*, 171 Wn.2d at 327-328 (appropriation does not mandate how WSDOT exercises future “discretionary” decision to negotiate agreement to permit light rail in the center lanes); *see also Household Fin. Co. v. State*, 40 Wn.2d 451, 460, 244 P.2d 260 (1952) (Supervisor of Banking exercises discretion to determine whether business will promote public convenience); *ASARCO, Inc. v. Puget Sound Air Pollution Control Agency*, 51 Wn. App. 49, 56, 751 P.2d 1229 (1988) (Puget Sound Air Pollution Control Agency exercises discretion to set air quality standard to define unlawful air pollution), *aff’d* 112 Wn.2d 314, 771 P.2d 335 (1989).

This Court has held that discretionary administrative determinations about state highways are subject to a particularly deferential standard of review. Where, such as in RCW 47.12.120, the Legislature does not provide a formal procedure to make determinations relating to highways, the agency’s determination “is not reviewable except for fraud or gross abuse of discretion.” *Agee*, 58 Wn.2d at 839.

This particularly deferential standard of review applies rather than the typical standards under the Administrative Procedure Act (“APA”), chapter 34.05 RCW, because any decision by WSDOT to sell, lease, or contract regarding the use of highway property is expressly excluded from APA review. RCW 34.05.010(3)(c) (for the purposes of the APA, an

“[a]gency action does not include an agency decision regarding . . . any sale, lease, contract, or other proprietary decision in the management of public lands or real property interests.”); *see also City of Tacoma v. Welcker*, 65 Wn.2d 677, 684, 399 P.2d 330 (1965) (in the condemnation context, a determination of necessity by a government entity “will, by the courts, be deemed conclusive, in the absence of proof of actual fraud or such arbitrary and capricious conduct as would amount to constructive fraud.”).

Appellants contend that WSDOT’s decision is not entitled to discretion because “as a matter of law, the 18<sup>th</sup> Amendment requires no less.” Appellants’ Br. at 30. But this is merely a circular argument based on Appellants’ assertion that the 18<sup>th</sup> Amendment contains a “not presently needed” restriction on the lease of highway facilities. For the reasons elaborated above, this is a statutory rather than a constitutional issue.

On the face of the statute, however, the Legislature demonstrated its intent to vest WSDOT with the discretion to decide whether property can be leased. RCW 47.12.120(1) provides that any rental or lease “[m]ust be upon such terms and conditions as the department may determine.” The “department,” WSDOT, is the state agency charged to use its expertise in making decisions delegated by the Legislature (such as

whether a highway is not presently needed). RCW 47.01.011. The Legislature has declared “that placing all elements of transportation in a single department is fully consistent with and shall in no way impair the use of moneys in the motor vehicle fund exclusively for highway purposes.” *Id.*

Under its enabling statutes, WSDOT “shall exercise all the powers and perform all the duties necessary, convenient, or incidental to the planning, locating, designing, constructing, improving, repairing, operating, and maintaining state highways.” RCW 47.01.260(1). “[T]he decision of whether to transfer or lease lands is inherently a function of the administration of highway property.” *Freeman*, 171 Wn.2d at 331.

Appellants argue that the trial court should have conducted a trial *de novo* of WSDOT’s discretionary decision. This Court previously has rejected that argument as an unconstitutional attempt to vest the judiciary with powers delegated to the legislative and executive branches. *Household Finance Co.*, 40 Wn.2d at 456-57 (unconstitutional to hold trial *de novo* to determine if issuance of business license to loan company is in the public interest). Like the agency action in *Household Finance*, the administration of Washington’s highways is a legislative function (delegated to WSDOT) and not subject to *de novo* review. *See York*, 28 Wn.2d at 898; Tegland & Ende, 14 Wash. Practice, Civil Procedure § 3:15

(2009-10) (“The superior courts are constitutional courts, and may not be given administrative functions.”)

*Sperline v. Rosellini*, 64 Wn.2d 605, 392 P.2d 1009 (1964), which Appellants cite, does not support the conclusion that WSDOT lacks discretion or that a court may conduct a *de novo* trial of WSDOT’s decision. In *Sperline*, the Legislature passed a law authorizing the transfer of all or a portion of a specific highway asset if the Washington state highway commission (WSDOT’s predecessor) concluded that the lands were not required for highway purposes. *Id.* at 605-606. This Court restrained the sale because “the only evidence before the court is that the lands are presently required for highway purposes.” *Id.* at 606. The highway commission argued that even though the sole witness was its own engineer, who testified that the land was not surplus, the land could still be sold because the Legislature had already declared its surplus. *Id.* This Court rejected that premise and held that, in the absence of a declaration by WSDOT that these specific lands were no longer required for highway purposes, the lands could not be transferred consistent with the underlying statutory requirements. *Id.*

*Sperline* does not address the level of deference afforded to the highway commission’s determinations, because in that case the commission made no determination. *Sperline* stands only for the

proposition that WSDOT must make required statutory findings to invoke its authority under the statute. Here, WSDOT expressly found that “upon the completion of the R8A Project and the completion of all the necessary obligations and actions identified in this Agreement and the exhibits attached hereto, the Center Roadway will no longer be presently needed for highway purposes.” CP 1970.

3. The Decision to Lease the I-90 Center Lanes for Light Rail Was Not a Result of Fraud or a Gross Abuse of Discretion.

Contrary to Appellants’ argument that WSDOT made this finding without following proper procedures, this determination was based on years of study and analysis.<sup>18</sup> This record demonstrates that: (1) the two replacement transit/HOV lanes will significantly reduce congestion by adding lane capacity in both directions, in contrast to the current one-direction operation of the center roadway; (2) because of access limitations, the two center lanes have the capacity of only one lane, carry only a small fraction of the overall traffic, and do not impact freight traffic (given the weight limit and HOV requirement, fewer than 100 trucks use the center lanes daily);<sup>19</sup> (3) with light-rail in the center lanes, vehicle

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<sup>18</sup> See n. 9, *supra*, and CP 1010-11, for an inclusive list of studies and analysis that WSDOT considered.

<sup>19</sup> In 2008, the I-90 bridge carried 143,100 vehicles per day. The two center roadway lanes carried only 9,300 vehicles per day, substantially less than ten percent of the total I-

travel times will remain the same or improve, and the capacity to move people across I-90 will increase from 10 to 30 percent with East Link compared to a configuration that retains the reversible center roadway; and (4) with light-rail in the center lanes, freight traffic travel times would remain similar or improve. CP 2801-05; CP 2408-11; CP 2204-05; CP 1961-62.

Appellants argue that this analysis supports the conclusion that the center lanes will not be needed at a future time, and prophesize that “highways could be leased for non-highway purposes at the whim of WSDOT, so long as WSDOT could allege that sometime in the future they would no longer be needed.” Appellants’ Br. at 29. Nothing of the sort has occurred in this case, however, and the Umbrella Agreement directly addresses this concern by prohibiting the transfer of possession and control of the lanes until the replacement HOV lanes are complete and are operational:

If the superior court judgment referenced in paragraph 4.1 [in the present case] is entered in favor of defendant State and intervenor Sound Transit before R8A is completed, the TCAL and the ASL will be signed at the time of entry of judgment, but *WSDOT shall not transfer possession or*

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90 traffic. In 2010, the I-90 bridge carried 139,800 vehicles per day, and the two center roadway lanes carried 11,700 vehicles per day, again demonstrating that one-fourth of the lanes carry less than ten percent of the total traffic. These numbers and relationships have been relatively consistent for at least a decade. CP 1962.

*control of the Center Roadway to Sound Transit until R8A is completed, the new improvements are open to vehicular traffic, and to the extent not already satisfied, all necessary actions and obligations identified in this Agreement and the Exhibits D-1 and D-2 are completed for the relevant lease.*

CP 1971 (emphasis added).

Thus, the Umbrella Agreement provides that WSDOT retains full possession and control of the center lanes until replacement lanes are open, and that Sound Transit may only use the center lanes after that point. This assurance is essential because if the center lanes cannot be used for light rail, Sound Transit will not contribute the estimated \$121.5 million necessary for the completion of the R-8A improvements. CP 3132. Under Appellants' contrary theory, even a conditional leasing agreement could not be entered until after any predicate construction was complete. This theory ignores the lengthy process inherent in study, design, funding, and environmental review for major public works projects.

Along the same lines, Appellants' companion theory that R-8A could be completed without light rail in the center lanes, thereby creating a ten lane highway, is completely specious. CP 3131-32 (Sound Transit funding for R-8A dependent on use of center lanes for light rail); *see also* CP 2346-2347 (1976 Memorandum Agreement provided that I-90 would have "no more than eight motor vehicle lanes," with "two lanes designed

*for and permanently committed to transit use.”*). Absent the use of the center lanes for light rail, there is no funding to complete R-8A.

Regardless, Appellants failed to present any evidence to the trial court sufficient to create a disputed issue of material fact regarding WSDOT’s determination that the center lanes will no longer be needed after the completion of two new HOV lanes, let alone to establish fraud or a gross abuse of discretion in making its decision.<sup>20</sup> Because Appellants have neither alleged nor presented evidence from which a court could infer that WSDOT’s decision was willful, unreasoning, and failed to consider the facts and circumstances underlying its decision, the trial court properly granted summary judgment dismissing the claims challenging the decision. *See, e.g., Stewart v. State, Dep’t of Soc. & Health Servs.*, 162 Wn. App. 266, 273, 252 P.3d 920 (2011); *Alpha Kappa Lambda Fraternity v. Wash. State Univ.*, 152 Wn. App. 401, 421-422, 216 P.3d 451 (2009) (decision not arbitrary or capricious where there is room for more than one opinion, where decision is based on honest and due consideration).

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<sup>20</sup> Much of the evidence presented by Appellants in the trial court was also inadmissible and the subject of Sound Transit’s Motion to Strike. *See* Section V(E), *infra*. For example, Appellants rely on a memorandum from the Washington Policy Center, which lacks foundation and constitutes improper opinion testimony. *See* Appellants Br. at 41 (citing CP 670-75).

Appellants' assertions that the I-90 center lanes are needed for highway purposes even after completion of R-8A merely reflect their policy preferences, not the results of decades of study regarding the ultimate configuration of I-90. Notably, Appellants do not dispute the testimony of record that the July 2011 East Link EIS is a more accurate analysis and contains more current data than the 2006 Center Roadway Study, which by its own terms did not consider light rail in the center lanes and acknowledged that a different analytical approach and level of effort would be needed to better analyze throughput with transit. *See* CP 1496; *see also* CP 2796-2801, CP 2613-14, CP 2205-06; CP 2334-2338; CP 1405-1411.

While relying heavily on misleading citations to the R-8A ROD issued by the Federal Highway Administration in 2004 (which did not address light rail in the center lanes), Appellants also do not dispute the Record of Decision issued by that same federal agency in 2011 (which did address light rail in the center lanes):

**Interstate 90**

The East Link Project would convert the I-90 center roadway lanes for exclusive light rail use; modify access to the I-90 center roadway; and modify existing ramps for light rail access to and from I-90. These modifications are fully described in the Final EIS and the Final I-90 Interchange Justification Report.

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- When compared to the No Build Alternative, the light rail project has the capacity to carry from 9,000 to 12,000 people per hour in each direction, which would more than double the person-carrying capacity of I-90. The ability to carry this many people is equivalent to about seven to ten freeway lanes of vehicle traffic.
- The project would increase total person throughput across I-90 during peak traffic periods by approximately 15 to 30 percent in 2030. In general, traffic congestion on I-90 would be shorter in duration and extent as people shift to use light rail.  
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- Freight truck access to and from I-90 outer roadways would be unchanged because none of the general purpose ramps to and from I-90 would be modified with the project.
- Regarding freight mobility, the average truck travel time in the afternoon peak period in 2030 would improve with an approximately 5-minute travel time savings. Average truck travel time in the morning peak period would be comparable with the no-build condition, with a potential 1-minute travel through savings

CP 1562-1563.

In summary, RCW 47.12.120 specifically delegates to WSDOT the authority to decide whether highway lanes are “presently needed.”

WSDOT decided that the center lanes of I-90 will no longer be needed after completion of the R8-A project, which provides two replacement lanes that improve traffic congestion. In every scenario, studies show that I-90 will better meet the traffic demand with light-rail in the center lanes and new HOV lanes on the outer roadway than with the center lanes open to vehicular traffic. *See* CP 2254. WSDOT’s decision is amply supported

by traffic analysis demonstrating that the lanes will not be needed after the replacement lanes are completed and open to traffic. Sound Transit will not take possession of the center lanes until the replacement lanes are open. WSDOT's determination is not a result of fraud, is not a gross abuse of discretion, and it not arbitrary or capricious. The trial court properly determined that RCW 47.12.120 is satisfied, and its ruling should be affirmed.

**D. Appellants Are Not Entitled to an Award of Attorney Fees.**

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

Appellants did not prevail below and should not prevail here. Moreover, Appellants' challenge to Sound Transit's lease of the I-90 center lanes, even if successful, will not create or preserve a common fund. In each of the cases cited by Appellants in support of their claim to fees, the plaintiffs created or preserved a monetary fund from which the fee award could be drawn. Appellants misleadingly cite *Weiss v. Bruno*, 83 Wn.2d 911, 523 P.2d 915 (1974), for the proposition that there "need not be an identifiable existing fund *under control or in the registry of the court.*" Appellants' Br. at 45 (emphasis added). The *Weiss* court awarded attorney fees to petitioners, however, precisely because they had prevailed in restraining the "expenditure of public funds," *Weiss*, 83 Wn.2d at 914 (emphasis added)).

Here, Appellants challenge transit use of highway lanes constructed decades ago and only in part with motor vehicle funds, not the *expenditure of motor vehicle funds*. Thus, even if their challenge is successful, Appellants will not have prevailed in preventing the expenditure of any motor vehicle funds and will not have created or preserved a common fund. *See, e.g., Interlake Sporting Ass'n, Inc. v. Wash. State Boundary Review Bd. for King Cnty.*, 158 Wn.2d 545, 561, 146 P.3d 904 (2006) (denying attorney fees in successful challenge to property annexation even though benefit was conferred on property

owners, because “no common fund [was] created from which attorney fees may be drawn”). Appellants’ request for attorney fees should be denied.

**E. The Trial Court Erroneously Denied Sound Transit’s Motion to Strike.**

While the trial court correctly granted Sound Transit’s Motion for Summary Judgment, it erred in denying Sound Transit’s motion to strike certain evidence offered by Appellants in support of their motion and in opposition to Sound Transit’s motion. For reasons elaborated above, none of the evidence below calls into question the grant of summary judgment or creates an issue of disputed material fact. Nonetheless, because none of the items cited below were admissible on summary judgment, Sound Transit has filed a cross-appeal on this discrete issue.<sup>21</sup>

In relevant part, Sound Transit moved to strike the following items offered at the trial court:

1. Appendix to Appellants’ Motion for Summary Judgment, CP 98-100;
2. A memorandum from the Washington Policy Center, CP 670-675;

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<sup>21</sup> Appellate courts review *de novo* a trial court’s ruling on a motion to strike evidence made in conjunction with a summary judgment motion. *Rice v. Offshore Sys., Inc.*, 167 Wn. App. 77, 85, 272 P.3d 865 (2012).

3. Declaration of William Eager in Opposition to Sound Transit's Motion ("Eager Declaration"), CP 2738-2752<sup>22</sup>;
4. Declaration of Jim Horn in Opposition to Sound Transit's Motion ("Horn Declaration"), CP 2670-2692;
5. Exhibits 3 and 4 to the Declaration of Susan Machler in Opposition to Sound Transit's Motion, CP 2719-30.

The trial court erred by declining to strike these materials because only admissible evidence may be considered in ruling on summary judgment motions. *Allen v. Asbestos Corp., Ltd.*, 138 Wn. App. 564, 570, 157 P.3d 406 (2007). Documents submitted in support of summary judgment that are neither sworn to nor authenticated are inadmissible. CR 56; *Spokane Research & Defense Fund v. Spokane Cnty.*, 139 Wn. App. 450, 459, 160 P.3d 1096 (2007) (city failed to supply supporting affidavit on which to base the admission of a letter). Accordingly, the Appendix to Appellants' Motion for Summary Judgment is inadmissible because it was not authenticated or submitted by any witness with knowledge.

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<sup>22</sup> Appellants filed a Supplemental Declaration of William Eager on March 1, 2012, nearly two weeks after the summary judgment hearing. See CP 3161-3163. Four days later, and before Sound Transit had an opportunity to move to strike this untimely and inadmissible declaration, the Court issued its order granting summary judgment to Sound Transit and WSDOT. See CP 3165-3175. This declaration should not be considered because it was not part of the record on summary judgment: CR 56(c) provides that affidavits in support of a motion for summary judgment must be filed 28 days before the hearing, affidavits in response 11 days before the hearing, and affidavits in reply 5 days before the hearing.

*Burmeister v. State Farm Ins. Co.*, 92 Wn. App. 359, 364–67, 966 P.2d 921 (1998) (only a person with personal knowledge that a document is what it claims to be may authenticate the document); ER 901.

Appellants attempted to use this unauthenticated evidence, as well as the Washington Policy Center memorandum and Eager, Horn, and Supplemental Eager Declarations, as a substitute for proper expert testimony in support of their Motion.<sup>23</sup> Expert testimony that lacks an adequate evidentiary foundation, or that is speculative or conclusory, is inadmissible. *Miller v. Likins*, 109 Wn. App. 140, 148, 34 P.3d 835 (2001); see *Theonnes v. Hazen*, 37 Wn. App. 644, 648, 681 P.2d 1284 (1984) (an expert opinion must be based on facts and an opinion that is simply a conclusion or based on an assumption is not evidence which will take a case to the fact finder). The materials offered by Appellants, including the Eager and Horn declarations, failed to set out any evidentiary foundation for their opinions and are entirely conclusory. See CP 2780-2782; CP 3121-3123. Thus, to the extent the trial court considered this inadmissible evidence, it was error to do so. See *Allen*, 138 Wn. App. at 570.

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<sup>23</sup> By contrast, Sound Transit submitted detailed declarations from Joan Earl, Bates McKee, Bob Harvey, Craig Grandstrom, Andrea Tull, and Don Billen that, where necessary, set forth the proper foundation for their testimony.

Accordingly, Sound Transit respectfully requests that the Court reverse the trial court's decision on Sound Transit's motion to strike and exclude unauthenticated and inadmissible evidence submitted by Appellants from the record.

## VI. CONCLUSION

The 18<sup>th</sup> Amendment governs only the use of motor vehicle funds and does not prohibit Sound Transit from leasing the I-90 center lanes for light-rail use upon payment of compensation to fully reimburse the motor vehicle fund so that highway funds are not directly or indirectly diverted to a non-highway purpose. Sound Transit will pay compensation in excess of the value of the motor vehicle fund investment in the center lanes. Sound Transit also will pay an amount necessary to provide the two lanes that will replace the center lanes. The new lanes will be open to traffic before the center lanes are closed to traffic and converted to light rail use. As a result, the motor vehicle fund will be fully reimbursed the current value of the State's actual monetary investment in the center lanes, and highway users will obtain new lanes with greater utility than the center lanes. This record amply supports WSDOT's exercise of discretion in leasing the I-90 center lanes to Sound Transit. Appellants' "evidence" falls far short of establishing an abuse of discretion or even a dispute of material fact as to whether WSDOT's exercise of discretion was the result

of fraud or a gross abuse of discretion. While this Court should reverse the trial court's denial of Sound Transit's motion to strike, it should affirm the trial court's entry of summary judgment in favor of Sound Transit and WSDOT and deny Appellants' request for attorney fees.

RESPECTFULLY SUBMITTED this 3rd day of October, 2012.

CENTRAL PUGET SOUND  
REGIONAL TRANSIT AUTHORITY

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