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NO. 87267-8

SUPREME COURT OF THE STATE OF WASHINGTON

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

Appellants,

v.

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

Respondents.

**BRIEF OF RESPONDENTS STATE OF WASHINGTON,
GOVERNOR GREGOIRE AND SECRETARY HAMMOND**

ROBERT M. MCKENNA
Attorney General

BRYCE E. BROWN, WSBA #21230
Senior Assistant Attorney General
PO Box 40113 (7141 Cleanwater Drive SW)
Olympia, WA 98504-0113
(360) 753-4962

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I. INTRODUCTION

The Umbrella Agreement between the Washington State Department of Transportation (WSDOT) and Sound Transit provides that WSDOT will lease the Interstate 90 (I-90) center lanes of the I-90 bridge to Sound Transit for light rail, but only after Sound Transit has paid for and WSDOT has added one replacement HOV lane in each direction. The Agreement is the product of a nearly 13-year highway engineering, traffic and operations, and design process requiring local, state, and federal approval. The Appellants, led by Kemper Freeman (collectively, Freeman), have made two earlier attempts to thwart the decisions of local, state, and federal agencies and Puget Sound area voters to extend light rail across I-90. They failed to persuade the statewide electorate to pass Initiative 1125 in November 2011, and they failed in their original action before this court in *Freeman v. Gregoire (Freeman I)*, 171 Wn.2d 316, 256 P.3d 264 (2011). In this matter, Freeman also failed to persuade the Kittitas County Superior Court to prohibit the lease of the two center lanes of I-90 (the Center Roadway) for light rail purposes.

Freeman asserts that WSDOT has already transferred possession of the Center Roadway to Sound Transit. In fact, the agreement between WSDOT and Sound Transit requires Sound Transit to meet numerous terms and conditions, all of which are conditions precedent to WSDOT's

future obligation to transfer possession of the Center Roadway. The most important of these conditions precedent are Sound Transit's funding of the replacement HOV lanes and WSDOT's completion of that project. Until those conditions are satisfied, WSDOT cannot and will not transfer possession of the Center Roadway.

Moreover, the Umbrella Agreement does not improperly divert highway funds under the 18th Amendment of the Washington Constitution because once all of the required conditions precedent are met, the Center Roadway will not be needed for highway purposes at the time of the transfer and appropriate consideration will have been paid. Furthermore, the record demonstrates that the agreement is in compliance with applicable statutes and falls within WSDOT's discretionary authority to manage highway property, as recognized by this court in *Freeman I*.

II. COUNTER STATEMENT OF THE ISSUES

1. Will the lease of highway property to Sound Transit comply with the anti-diversionary purpose of the 18th Amendment if the land is not needed for highway purposes at the time of the transfer and if appropriate consideration has been paid?

2. Does WSDOT's highway property management and leasing authority include the discretion to decide when highway property is "not presently needed" for highway purposes?

3. WSDOT has made a discretionary decision that the I-90 Center Roadway will no longer be presently needed for a highway purpose and can be leased for light rail after two replacement I-90 HOV lanes are added, based on 13 years of engineering and traffic studies and coordination with local and federal agencies. Must the court uphold this decision because it was not so arbitrary and capricious that it amounted to bad faith or fraud?¹

III. COUNTER STATEMENT OF THE CASE

A. Construction of I-90 and Transit Use Policy Decisions

Since December 1976, WSDOT has been cooperatively working with several other state and local entities to improve transit and HOV operations on I-90 between Seattle and Bellevue. The Office of the Governor, the Washington Legislature, the Washington Transportation Commission, the Cities of Mercer Island, Bellevue, and Seattle, King County, and Sound Transit have been part of this effort. CP 1007.

In December 1976, WSDOT, Seattle, Mercer Island, Bellevue, King County, and the Municipality of Metropolitan Seattle executed a Memorandum Agreement (1976 Agreement) regarding construction of

¹ Freeman also seeks relief under the writ of mandamus, the writ of prohibition, and injunctive relief. CP 0027. Freeman did not brief any of these grounds for relief, and must be considered to have abandoned them. *State v. Sims*, 171 Wn.2d 436, 441, 256 P.3d 285 (2011) (appellant is considered to have waived issues not raised as assignments of error and not argued in brief).

I-90 across Lake Washington. CP 1006, 1012-25. The 1976 Agreement provided for no more than eight motor vehicle lanes. CP 1006, 1015. It also provided that two of the lanes would be designed for and permanently committed to transit use. CP 1007, 1016. The 1976 Agreement stated that the I-90 facility “shall be designed and constructed so that conversion of all or part of the transit roadway to fixed guideway is possible.” CP 1007, 1017.

Based in part on this 1976 Agreement, United States Secretary of Transportation, Brock Adams, approved federal funding to construct the currently disputed section of I-90. CP 1007, 1026-31. Federal approval and funding for the project were conditioned upon the State’s agreement that “public transportation shall permanently have first priority in the use of the center lanes” of the roadway. CP 1007, 1031.

B. Selection of I-90 Two-Way Transit and HOV Operations Project

From 1998 to 2004, WSDOT and Sound Transit conducted a planning and environmental review process examining two-way transit and HOV operations on I-90 between Seattle and Bellevue, referred to as the “Interstate 90 Two-Way Transit and HOV Operations Project.” CP 1406. In May 2004, WSDOT, Sound Transit, and the Federal Highway Administration issued a Final Environmental Impact Statement

(FEIS) for this project, stating:

The purpose of the proposed action is to improve regional mobility by providing reliable and safe two-way transit and high-occupancy vehicle (HOV) operations on Interstate 90 (I-90) between Bellevue and Seattle, while minimizing impacts to the environment and to other users and transportation modes.

CP 1413.

The FEIS examined a number of alternatives for accomplishing these improvements, and identified “R-8A” as the preferred alternative. CP 1406. This alternative includes (1) the addition of HOV lanes to the outer (westbound and eastbound) lanes of I-90 between Seattle and Bellevue; (2) the addition of new HOV on-and-off ramps on Mercer Island; and (3) improvements to HOV access at Bellevue Way. CP 1406.

In September 2004, the Federal Highway Administration’s Record of Decision designated R-8A (the HOV Project) as the selected alternative. CP 1406, 1419-69. This alternative was chosen because it “would accommodate the ultimate configuration of I-90 (High Capacity Transit in the center lanes).” CP 1407, 1432.

C. Analyzing the Installation of High Capacity Transit in the I-90 Center Lanes

With federal project approval in 2004, the signatories to the 1976 Agreement, along with Sound Transit, took the first step toward installing High Capacity Transit in the center lanes of I-90. In the

2004 Amendment to the 1976 Agreement, the parties agreed to the principle that upon completion of the HOV Project, they would “move as quickly as possible to construct High Capacity Transit in the center lanes.”

CP 1008, 1034. The parties defined “High Capacity Transit” as:

a transit system operating in dedicated right-of-way such as light rail, monorail, or a substantially equivalent system.

CP 1033. The parties also committed to the “earliest possible conversion of center roadway to two-way High Capacity Transit operation based on outcome of studies and funding approvals.” CP 1407, 1472.

In July 2005, WSDOT engineers began to assess how the conversion of the I-90 center lanes to exclusive use for High Capacity Transit might affect travel operations. CP 1407. Using its earlier environmental review of the HOV Project as a starting point, WSDOT conducted additional analyses in areas that included highway traffic and operations, structural integrity and capacity, and maintenance and preservation. CP 1008.

WSDOT’s 2006 Center Roadway Study analysis confirmed that I-90 could maintain its traffic functionality and not be impaired if two replacement HOV lanes were constructed as outside lanes and the two center lanes were subsequently used for High Capacity Transit purposes. CP 1407, 1474-99. Consequently, the conversion of the Center Roadway

to two-way High Capacity Transit and the addition of HOV lanes to the mainline were identified as the future mobility improvements for I-90 between Seattle and Bellevue in WSDOT's 2007 Highway System Plan.² CP 1407, 1500-01.

D. Sound Transit's East Link Project: Voter Approval, Legislative Action, and Valuation of the Center Lanes

In November 2008, Puget Sound voters approved the Sound Transit Mass Transit Expansion proposal (also known as ST2), which included the East Link project. CP 1008. East Link included the installation of light rail in the Center Roadway. Sound Transit and WSDOT acted as co-lead agencies (along with the Federal Transit Administration) to conduct an environmental review of the project under the National Environmental Policy Act. CP 1008.

After the voters approved Sound Transit's plans for I-90, the 2009 Washington State Legislature appropriated \$300,000 in motor vehicle funds to assist WSDOT and Sound Transit in resolving the question of how to value the Center Roadway. CP 1008-09. The legislature appropriated these funds "for an independent analysis of methodologies to value the reversible lanes on Interstate 90 to be used for high capacity transit pursuant to the sound transit proposition 1 approved

² This plan is required by both federal and state law. RCW 47.06.050(1); 23 U.S.C. § 135.

by voters in November 2008.” ESSB 5352, Laws of 2009, ch. 470, § 204(3). The legislature also included a *proviso* in the transportation budget stating:

The legislature is committed to the timely completion of R8A which supports the construction of sound transit’s east link. Following the completion of the independent analysis of the methodologies to value the reversible lanes on Interstate 90 which may be used for high capacity transit as directed in section 204 of this act, the department shall complete the process of negotiations with sound transit. Such agreement shall be completed no later than December 1, 2009.

Laws of 2009, ch. 470, § 306(17). CP 1009, 1036-51.

After the legislative appropriation, WSDOT and Sound Transit each made separate requests to a single independent appraisal firm. Sound Transit requested an appraisal to estimate the value of an easement that would permanently encumber the Center Roadway. WSDOT requested an appraisal to estimate the value of the fee title to the underlying land, including the cost of improvements, and also to derive a lease rate based upon the fee title value. CP 1009, 1052-1177 (Sound Transit); CP 1178-1373 (WSDOT). The appraiser valued the permanent easement at \$31,600,000. CP 1009, 1055. He valued the underlying fee interest in the land at \$70,100,000. CP 1009, 1199. Both appraisals concluded that WSDOT’s contributions to the construction costs of the Center Roadway amounted to \$69,200,000. CP 1009, 1100-06.

Following receipt of the appraisals, WSDOT and Sound Transit negotiated the value of the Center Roadway. The parties ultimately agreed to WSDOT's figure of \$70,100,000 for the land, plus an additional \$69,200,000 to reimburse the State's share of the motor vehicle funds used to construct the Center Roadway. CP 1009-10.³ In exchange for \$139,300,000, WSDOT agreed to lease the two center lanes to Sound Transit for 40 years upon completion of the HOV Project.⁴ Secretary Paula Hammond and Sound Transit Chief Executive Officer Joni Earl executed a Term Sheet on January 20, 2010, that identified the principal terms of the parties' arrangement, including the payment of consideration for Sound Transit's use of I-90. CP 1010, 1375-79.

E. Plaintiffs' Unsuccessful Original Action Before the Washington Supreme Court

In July 2009, Freeman filed a petition with this Court requesting a writ of mandamus barring WSDOT from entering into any agreement with Sound Transit pertaining to the use of I-90 for light rail purposes. *Freeman I*, 171 Wn.2d 316. The court reduced Freeman's challenges to two. They first addressed whether the Washington Legislature's \$300,000

³ The Federal Highway Administration sent a letter on December 1, 2009, confirming that it would not seek reimbursement of federal-aid highway funds expended in the construction of the center lanes of I-90 "should [the center lanes] be used for light rail transit." CP 1374.

⁴ The parties agreed that the valuation of the fair market rent component (\$70,100,000) would be based on an updated land value calculated within 1 year prior to the commencement of light rail construction. CP 1376.

appropriation to determine an appraised lease value of a portion of I-90 for potential light rail use violated the 18th Amendment. *See generally id.* at 324-331. Concluding that it did not, the court held that this appropriation properly fell within the 18th Amendment's explicit authorization to use motor vehicle funds for the "administration of public highways." *Id.* at 326.

The second issue addressed was whether a writ was appropriate to prohibit "any agreement" to transfer portions of I-90 for light rail use. *Id.* at 331-332. In refusing to issue such a writ, the court made three points. First, the petitioners failed "to identify a present constitutional violation remediable by writ." *Id.* at 332. Second, the court held that even assuming a possible constitutional violation, it would be premature to issue a writ of mandamus because no duty mandated the transfer of the Center Roadway for light rail use; although a Term Sheet had been signed, any transfer of the center lanes was conditioned upon the "execution and delivery of a number of future agreements and instruments." *Id.* at 333. Finally, the court noted that even if a mandatory duty to lease the I-90 right of way were before it, "DOT is statutorily authorized to sell, transfer or lease highway lands within certain statutory restrictions" and WSDOT's authority in this regard does "not generally violate article II, section 40 [the 18th Amendment]." *Id.* at 334. The court did not reach the

issue of whether the “potential lease specifically complies with the statutory restrictions” for leasing property. *Id.*

F. Federal Approval of the East Link Project and WSDOT’s Decision to Enter Into the Umbrella Agreement

The Final Environmental Impact Statement for the East Link project was published by Sound Transit, WSDOT, and the Federal Transit Administration on July 15, 2011.⁵ CP 1408. Leading up to this publication, WSDOT worked closely with the Federal Highway Administration on the East Link project because that federal agency must approve changes to I-90’s limited access. WSDOT requested that the Federal Highway Administration approve alterations to on-and-off ramps to accommodate the East Link project. On June 22, 2011, the Federal Highway Administration approved the East Link Interchange Justification Report “[b]ased on an engineering and operations review.” It further stated that “[i]f there are no major changes in the design of the proposal, final approval may be given upon the completion of the environmental process.” CP 1408, 1502. On December 12, 2011, the Federal Highway Administration issued another letter indicating that with the completion of the National Environmental Policy Act (NEPA) process, it approved the

⁵ While the 2004 Final Environmental Impact Statement addressed the “Interstate 90 Two-Way Transit and HOV Operations Project,” another Final Environmental Impact Statement was necessary for approval of Sound Transit’s East Link light rail project.

modified access to I-90 as described in the Interchange Justification Report. CP 1503.

WSDOT plainly understood that the parties to the 1976 Agreement and 2004 Amendment were interested in establishing the exclusive use of the Center Roadway for High Capacity Transit. CP 1007-08, 1409. Beginning with the environmental analysis in 1998 for the HOV Project though the East Link final environmental impact statement in 2011, WSDOT engineers conducted comprehensive analyses and review of various traffic studies, environmental reports, and highway system plans. CP. 1409. WSDOT focused primarily on current and projected travel volume patterns, highway access, vehicle weaving, location and duration of congestion, and safety. CP 1409. The traffic engineers' comprehensive review and analyses were based on several studies, and prior determinations, including:

- December 1976 Memorandum of Agreement signed by the State of Washington; the cities of Seattle, Mercer Island, and Bellevue; King County; and the Municipality of Metropolitan Seattle.
- The Final Environmental Impact Statement for the I-90 Two-Way Transit and HOV Operations Project, issued May 21, 2004.
- August 2004 Amendment to the 1976 Agreement.
- The Record of Decision for the I-90 Two-Way Transit and HOV Operations Project, approved September 28, 2004.
- I-90 Two-Way Transit and HOV Access Point Decision Report, Federal Highway Administration approval April 7, 2005, amended approval December 14, 2007.

- WSDOT I-90 Center Roadway Study, issued July 2006.
- WSDOT Highway System Plan, 2007-2026, issued December 2007.
- Legislative history reflected in the 2009 Engrossed Senate Substitute Bill 5352, § 204(3) and § 306(17).
- East Link – Final I-90 Interchange Justification Report, issued May 2011.
- East Link Final Environmental Impact Statement, issued July 15, 2011.
- I-90 Bellevue to North Bend Corridor Study, dated October 2011.

CP 1405-06. After comprehensive review of these historical materials and studies, WSDOT engineers were able to draw several conclusions:

- Growth in population and employment east of Lake Washington and employment and retail in Seattle have shifted travel patterns from predominantly inbound to Seattle in the morning and outbound in the evening *to a more dispersed pattern that is trending toward an even distribution, which is expected to continue into the future.*⁶
- The addition of outer roadway HOV lanes that are part of the I-90 HOV replacement lane project *would result in peak direction HOV travel times comparable to travel times in the center roadway and that HOV travel times in the reverse peak direction would be substantially improved compared to the existing configuration.*⁷
- Variable speed limits, enhanced illumination, profiled edge lines and durable striping, and enhanced incident response service will be implemented in advance of or in conjunction with the construction of outer roadway HOV lanes. *With these improvements, the addition of the outer*

⁶ CP 1409-10 (relying upon the Final Environmental Impact Statement for the I-90 Two-Way Transit and HOV Operations Project, issued May 21, 2004; WSDOT I-90 Center Roadway Study, issued July 2006; East Link Final Environmental Impact Statement, issued July 15, 2011) (emphasis added).

⁷ CP 1410 (relying upon the Final Environmental Impact Statement for the I-90 Two-Way Transit and HOV Operations Project, issued May 21, 2004; WSDOT I-90 Center Roadway Study, issued July 2006) (emphasis added).

*roadway HOV lanes and the use of the center roadway for light rail are not expected to significantly change the crash rate on I-90.*⁸

Based upon the historical materials, studies, and analyses, WSDOT decided to execute an agreement with Sound Transit with respect to Sound Transit's use of I-90 for light rail purposes. On November 3, 2011, WSDOT Secretary Paula Hammond and Sound Transit Chief Executive Officer Joni Earl signed the "Umbrella Agreement for the Use of the I-90 Center Roadway" (Umbrella Agreement). CP 1010-11, 1380-1403.⁹ This agreement generally provides for WSDOT's lease of the Center Roadway to Sound Transit for the construction and operation of the light rail system but only *after* the required actions and approvals have been completed. Primarily, Sound Transit must fund—and WSDOT must complete—the HOV Project before the Center Roadway will be available for Sound Transit's use.¹⁰ CP 1383-84.

G. Interstate 90 Lane Configuration Before and After Execution of the Umbrella Agreement, and the Completion of the HOV and Light Rail Projects

Before the completion of the HOV Project and the light rail project, I-90 has eight lanes for general purpose and HOV use. After

⁸ CP 1410 (relying upon the Final Environmental Impact Statement for the I-90 Two-Way Transit and HOV Operations Project, issued May 21, 2004; East Link Final Environmental Impact Statement, issued July 15, 2011) (emphasis added).

⁹ Umbrella Agreement attached as Appendix A.

¹⁰ The terms of the consideration are described on pp. 8-9 and note 4, *supra*. See also CP 1384-87 of Appendix A.

completion of these projects, I-90 will have eight lanes for general purpose and HOV use and two additional lanes for light rail use. CP 1408-09.

The current I-90 lane configuration consists of eight travel lanes – six of those are designated for general purpose use and the two center lanes are reversible and designated for HOV use. The two center HOV lanes are peak-direction lanes – the lanes operate westbound in the morning and eastbound in the afternoon. CP 1408. As a result, the eastbound traffic in the morning and the westbound traffic in the afternoon currently have only three available lanes.

As a result of the HOV Project, the addition of the two outer HOV lanes will convert the existing HOV traffic from peak-direction only (westbound in the morning and eastbound in the afternoon) into two dedicated HOV lanes: one westbound and one eastbound, each lane operating all day, seven days a week. CP 1007-08, 1408-09. This configuration is more consistent with current and future traffic patterns because as east King County's employment and population has increased, traffic volume on I-90 during peak periods has become more evenly distributed between westbound and eastbound traffic. CP 1409-10. Thus, when all conditions set forth in the Umbrella Agreement are met, the resulting highway configuration will be more consistent with actual current and future need, given what WSDOT knows about traffic patterns.

H. Washington Voters Reject I-1125

Around the same time the Umbrella Agreement was signed, during the November 2011 election, appellant Freeman funded statewide initiative I-1125 that would have “[p]rohibit[ed] state government from transferring or using gas-tax-funded or toll-revenue-funded lanes on state highways for non-highway purposes.” CP 1522-23. The effect of this initiative, had it been enacted, would have been to block the construction of light rail on I-90. A majority of Washington voters, including two-thirds of King County voters, rejected I-1125.¹¹

I. Freeman Does Not Appeal the Federal Agencies’ Actions Endorsing Light Rail on I-90

On November 10, 2011, the Federal Transit Administration issued its Record of Decision, finding that the requirements of the National Environmental Policy Act had been satisfied for the construction and operation of the East Link project. CP 1531-51. On November 17, 2011, the Federal Highway Administration also issued a Record of Decision for the East Link project. CP 1552-75. The Record of Decision included a statement from the Federal Highway Administration, the Federal Transit

¹¹ See 2011 statewide elections results for I-1125 at <http://vote.wa.gov/results/20111108/Initiative-Measure-1125-Concerning-state-expenditures-on-transportation.html>, and county-by-county results at http://vote.wa.gov/results/20111108/Initiative-Measure-1125-Concerning-state-expenditures-on-transportation_ByCounty.html (both sites last visited on September 4, 2012).

Administration, and Sound Transit that because “[t]he existing center roadway HOV lanes will not be converted to light rail until the I-90 Two-Way Transit project adding additional HOV lanes has been completed . . . [t]here will be no net loss of HOV lanes.” CP 1573.

The statute of limitations for challenging the federal Records of Decisions expired on June 24, 2012.¹² Although these decisions were challenged by other entities on other grounds, Freeman did not challenge the decisions, and there was no challenge filed by anyone regarding the use of the Center Roadway on I-90.¹³

J. Freeman’s Challenge in Kittitas County Superior Court

Rather than file a challenge regarding the use of the Center Roadway under the provisions of the National Environmental Policy Act, the appellants in this case, again led by Freeman, filed this challenge in Kittitas County Superior Court less than a month after this court issued its *Freeman I* decision. Freeman’s challenge in Kittitas County alleged that the 18th Amendment prohibits the State from entering into any agreement with Sound Transit for the use of the Center Roadway for light rail purposes. CP 0023. All parties moved for summary judgment. Freeman asserted in his motion that there were no genuine issues of material fact

¹² 76 Fed. Reg. 81,011 (Dec. 27, 2011).

¹³ *Building a Better Bellevue, et al. v. U.S. Dep’t of Transportation, et al.*, U.S.D.C. No. 2-12-CV-01019 (W.D. Wash.) (filed June 12, 2012).

that would preclude summary judgment based on his arguments. CP 3070. Freeman failed to raise genuine issues of material fact to dispute WSDOT's and Sound Transit's motions. CP 3165, 3176. The trial court granted summary judgment for WSDOT and Sound Transit and denied Freeman's motion. This appeal followed.

IV. SUMMARY OF ARGUMENT

WSDOT has not transferred the Center Roadway to Sound Transit and will not do so until the conditions precedent in the Umbrella Agreement are met. Nevertheless, the issues in this matter should be resolved by this court at this time. The Umbrella Agreement has been executed and the parties are implementing its provisions, including construction of the HOV Project and design of the light rail project. Furthermore, this court should finally put to rest Freeman's continuing challenges to WSDOT's authority under the 18th Amendment and its leasing statute.

WSDOT's leasing of property not presently needed for highway purposes is an administrative function permitted by the 18th Amendment. After 13 years of study, WSDOT reasonably determined that the Center Roadway may be leased for appropriate consideration to Sound Transit for light rail without diminishing highway functionality. The lease will be effective only *after* two HOV lanes and other improvements are added, at

Sound Transit's expense, to replace the current Center Roadway. I-90 will continue to have eight lanes dedicated to vehicle traffic, as it does today. I-90 will have improved traffic flow because the HOV lanes will be open in each direction all day, seven days a week, consistent with current and anticipated future need. Because the motor vehicle fund will be reimbursed by appropriate consideration, the anti-diversionary purpose of the 18th Amendment will be met. The trial court correctly concluded that WSDOT acted properly and within its statutory discretion, and the trial court's decision should be affirmed.

V. ARGUMENT

A. Standard of Review of an Order on Summary Judgment

The trial court granted summary judgment to WSDOT and to Sound Transit. Under CR 56, summary judgment is appropriate if there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. On appeal from a summary judgment order, an appellate court engages in the same inquiry as the trial court. *Cary v. Mason County*, 173 Wn.2d 697, 701, 272 P.3d 194 (2012). Issues pertaining to constitutional limitations and statutory authority are issues of law subject to *de novo* review. *Id.* at 702. However, the courts generally “accord substantial deference to the agency’s interpretation of law in matters involving the agency’s special knowledge and expertise.”

Overlake Hosp. Ass'n v. Dep't of Health, 170 Wn.2d 43, 50, 239 P.3d 1095 (2010).

According to RAP 9.12, in reviewing a grant of summary judgment, the court will review only those issues raised by the parties and considered by the trial court. *Ducote v. State, Dep't of Social and Health Services*, 167 Wn.2d 697, 701, 222 P.3d 785 (2009). In this case, Freeman, WSDOT, and Sound Transit all individually moved for summary judgment. At the summary judgment hearing, Freeman contended that there were no genuine issues of material fact with regard to his motion. CP 3070. He also failed to raise genuine issues of fact that would prevent summary judgment in WSDOT's and Sound Transit's favor. Freeman now appears to argue that there is a genuine issue of fact for trial. Appellants' Opening Br. at 42. The court should disregard this argument because of Freeman's failure to argue it to the trial court.

B. Analytical Framework

As an initial matter, it is important to establish the scope of judicial review available under various statutory and constitutional avenues. There are certain limitations to judicial review under the Administrative Procedure Act (APA) and the Uniform Declaratory Judgments Act (UDJA) that apply here. First, the APA's definition of "agency action" *excludes* the "sale, lease, contract, or other proprietary decision in the

management of public lands or real property interests.” RCW 34.05.010. Thus, WSDOT’s decisions related to highway property management are not reviewable under the APA.

Second, typically under the UDJA, actions are proper only to determine the validity or construction of an enactment, as distinguished from its application or administration. *See Bainbridge Citizens United v. Washington State Dep’t of Natural Res.*, 147 Wn. App. 365, 374-75, 198 P.3d 1033 (2008) (citing *City of Federal Way v. King County*, 62 Wn. App. 530, 535, 815 P.2d 790 (1991)). This court may issue a declaratory judgment on the interpretation of a statute, including whether RCW 47.12.120 gives WSDOT discretion to determine when property is not presently needed for a highway purpose. However, if the court affirms the trial court’s conclusion—that this statute does give WSDOT discretion—then the UDJA does not provide a basis for the court to determine the propriety of the exercise of that discretion.

Certainly, the courts may review WSDOT’s discretionary decisions under its inherent authority. “The superior court has inherent power provided in article IV, section 6 of the Washington State Constitution to review administrative decisions for illegal or manifestly arbitrary acts.” *Saldin Securities, Inc. v. Snohomish County*, 134 Wn.2d 288, 292, 949 P.2d 370 (1998). However, the court’s scope of review is

narrow, limited simply to the determination of whether the agency's action is arbitrary and capricious or contrary to law. *Williams v. Seattle Sch. Dist. No. 1*, 97 Wn.2d 215, 221, 643 P.2d 426 (1982).

An agency's decision is arbitrary and capricious if the decision is the result of willful and unreasoning disregard of the facts and circumstances. *Overlake Hosp.*, 170 Wn.2d at 50. "[W]here there is room for two opinions, an action taken after due consideration is not arbitrary and capricious even though a reviewing court may believe it to be erroneous." *Hillis v. State, Dep't of Ecology*, 131 Wn.2d 373, 383, 932 P.2d 139 (1997). A party challenging the validity of an agency action has the burden of proving invalidity. *Hardee v. State, Dep't of Social and Health Services*, 172 Wn.2d 1, 6, 256 P.3d 339 (2011).

This court has also specifically recognized that the type of highway, its location, and the engineering and design details are administrative decisions that will not be abrogated unless they have been arrived at without statutory authority or are so arbitrary and capricious as to amount to *bad faith* or *fraud*. *Deaconess Hosp. v. Washington State Highway Comm'n*, 66 Wn.2d 378, 405, 403 P.2d 54 (1965). In this area, the court should not substitute its judgment for that of elected legislative representatives and the Governor and her appointees. *Deaconess Hosp.*, 66 Wn.2d at 405; *see also Island County v. State*, 135 Wn.2d 141, 174,

955 P.2d 377 (1998) (Talmadge, J., concurring) (Judges “do not have a constitutional mandate to roam across the governmental landscape changing in our discretion decisions by other constitutional branches of government with which we disagree.”) Thus, while this court reviews questions of constitutional and statutory interpretation de novo, WSDOT’s decisions regarding highway configuration are subject only to very limited review.

C. WSDOT’s Umbrella Agreement With Sound Transit Is Consistent With the Requirements of the 18th Amendment

1. The Umbrella Agreement provides for reimbursement to the Motor Vehicle Fund, so there is no impermissible diversion of motor vehicle funds.

Freeman revives the *Freeman I* argument that article II, section 40 of the Washington State Constitution (the 18th Amendment) prohibits WSDOT from entering into “any agreement” to lease a portion of I-90 for rail purposes because such would be an impermissible diversion of motor vehicle funds protected by the constitutional provision. *Freeman I*, 171 Wn.2d at 324, 331-332; CP 0005, 3171-72; Appellants’ Opening Br. at 43.

The 18th Amendment provides in pertinent part:

All fees collected by the State of Washington as license fees for motor vehicles...shall be placed in a special fund to be used *exclusively for highway purposes*. Such highway purposes shall be construed to include the following:

(a) The necessary operating, engineering and legal expenses connected with the *administration of public highways*, county roads and city streets

(Emphasis added.)

In *Freeman I*, this court analyzed this constitutional provision in light of Freeman's challenge to the legislature's appropriation of \$300,000 to fund an appraisal methodology study of the Center Roadway. 171 Wn.2d at 323-25; CP 1008-09. There, WSDOT argued that through this appropriation, the legislature complied with the anti-diversionary policy of the 18th Amendment.¹⁴ The legislature had prescribed a valuation process whereby Sound Transit would fully reimburse the motor vehicle fund for Sound Transit's non-highway use of I-90.

In response to Freeman's challenge, this court agreed with WSDOT's argument that the appropriation simply established a valuation approach for the center lanes of I-90. The court further agreed with WSDOT that "any expenditure for a valuation would be consistent with subsection (a) of article II, section 40 because subsection (a) states that

¹⁴ WSDOT also complies with the anti-diversionary policy of the 18th Amendment. Although RCW 47.12.120, discussed in Section D *infra*, does not itself expressly require the payment of consideration for non-highway use of highway land, WSDOT requires monetary and other consideration to avoid the unlawful diversion of motor vehicle funds. AGLO 1975 No. 62 (July 17, 1975); CP 1576-79. This AGO opinion confirmed a 1952 opinion, AGO 1952 No. 376, which opined that when highway land is leased to a city or county (or regional transit authority, such as Sound Transit), the government agency is required to provide monetary or other consideration as dictated by the particular facts of the circumstances to avoid an unlawful diversion of motor vehicle funds. *See also* RCW 47.12.125; WAC 468-30-110(9).

expenditures for the ‘administration of public highways’ serve a constitutionally lawful highway purpose.” *Freeman I*, 171 Wn.2d at 326. The court reached the conclusion that the valuation of highway property performed in anticipation of the lease of such property “indirectly benefits” the public highways and is therefore lawful under the 18th Amendment. *Id.* at 331.¹⁵

Once the valuation approach prescribed by the appropriation bill was identified, an independent appraiser determined that WSDOT’s motor vehicle fund contribution to construct the I-90 center lanes amounted to \$69.2 million, which Sound Transit has agreed to pay. CP 1100-06, 1387. Further, Sound Transit has agreed to pay fair market rent based upon the fee value of the I-90 center lanes at the time of the lease, currently valued at \$70.1 million, even though the Sound Transit appraisal derived an easement value of \$31.6 million. CP 1111, 1386-87. The lease will be for 40 years and the approximate \$139,300,000 will be offset by the amount Sound Transit contributes to the cost of the HOV Project.¹⁶ CP 1385-86.

The trial court in this case reviewed the legislative appropriation

¹⁵ The *Freeman I* court relied on *State ex rel. Washington State Highway Comm’n v. O’Brien*, 83 Wn.2d 878, 523 P.2d 190 (1974) (payment from motor vehicle fund for preliminary engineering for park and ride facilities fell within the 18th Amendment’s constitutional ambit because the expenditure indirectly benefitted the safety, administration, and operation of the highway system). The *Freeman I* court distinguished *State ex rel. O’Connell v. Slavin*, 75 Wn.2d 554, 452 P.2d 943 (1969) (motor vehicle funds could not be used for transit planning). *Freeman I*, 171 Wn.2d at 328-30.

¹⁶ See note 4, *supra*.

language and the terms of the Umbrella Agreement, and held:

As long as the necessary reimbursement and consideration is provided, highways paid for with motor vehicle funds may be transferred for non-highway purposes. Here, Sound Transit and the State have agreed to appropriate compensation according to a legislatively prescribed process. Article 2, Section 40 has been satisfied and plaintiffs' constitutional attack therefore fails.

CP 3172. Freeman did not challenge the actual appraisal methodology that WSDOT and Sound Transit developed under legislative direction; he did not submit any expert declarations claiming the methodology was flawed or incorrect. Nor did Freeman submit evidence of a better methodology. Freeman has not cited to any evidence in the record showing the consideration WSDOT will receive under the Umbrella Agreement is inadequate. He simply offers a conclusory allegation that WSDOT has ignored the replacement and maintenance cost of two freeway lanes. *E.g., Grimwood v. Univ. of Puget Sound, Inc.*, 110 Wn.2d 355, 359-61, 753 P.2d 517 (1988) (Allegations or conclusory assertions do not raise genuine issues of material fact); Appellants' Opening Br. at 26. Freeman has failed to demonstrate a genuine issue that the motor vehicle fund has been inadequately reimbursed in violation of the 18th Amendment.

2. The legislature and the courts recognize the 18th Amendment does not completely restrict WSDOT's authority to manage the state highway system.

Freeman asserts in the Complaint for Declaratory Judgment that “[u]nder the 18th Amendment, facilities built with MVF (motor vehicle funds) resources must continue to be used for highway purposes.” CP 0023. Freeman’s position on summary judgment appeared to be that once highways are built with motor vehicle funds, the highway property may never be sold or leased. This court had already rejected that contention in *Freeman I*:

[W]e note that DOT is statutorily authorized to sell, transfer or lease highway lands within certain statutory restrictions . . . the statutory provisions authorizing transfers of highway land do not generally violate article II, section 40.

171 Wn.2d at 334.

In Freeman’s Opening Brief to this court, the assertion is modified:

[T]he 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 are needed as such*.

Appellants’ Opening Br. at 26 (emphasis added). WSDOT generally agrees with Freeman that state highways are intended to be used for highway purposes “so long as the roads and highways are needed as such.” However, the legislature has seen fit to grant WSDOT the broad

statutory authority to “exercise all the powers and perform all duties necessary, convenient, or incidental to the planning, locating, designing, constructing, improving, repairing, operating, and maintaining state highways.” RCW 47.01.260. The legislature has granted WSDOT the discretionary authority in the sections of chapter 47.12 RCW to acquire property for highway projects, manage highway property, and dispose of highway property. *See, e.g.*, RCW 47.12.063 (WSDOT may sell or exchange real property when the agency determines such property is no longer required for transportation purposes); RCW 47.12.120 (WSDOT may lease lands that are held for highway purposes but are not presently needed upon terms and conditions as the agency may determine); RCW 47.12.283 (WSDOT, in its discretion, may auction real property that is no longer required for highway purposes).

The legislature’s grants of discretionary authority under RCW 47.01.260 and chapter 47.12 RCW are consistent with the requirements of subsection (a) of the 18th Amendment to administer the public highway system.¹⁷ *See Freeman I*, 171 Wn.2d at 334. Finally, the

¹⁷ Within a year of adopting the 18th Amendment, the legislature authorized the director of highways to “negotiate for and issue” permits, leases, or licenses to cities or counties for the use of highway rights of way “upon such terms and conditions as [the director] may prescribe.” Laws of 1945, ch. 146, § 1 (*expanded and codified at* RCW 47.12.120 and .125). This reflects a contemporaneous understanding that the sale and leasing of highway property is entirely consistent with the principles of the 18th Amendment.

courts have long recognized that the type of highway, its location, and the engineering and design details are administrative decisions that will not be abrogated unless they lack statutory authority or are so arbitrary and capricious as to amount to *bad faith* or *fraud*. *Deaconess Hosp.*, 66 Wn.2d at 405.

The 18th Amendment does not mandate inflexibility in the management of highway property, barring WSDOT from using its engineering expertise to determine when highway property is not necessary for highway purposes. Here, WSDOT has exercised its sound engineering discretion based upon years of study to determine that the Center Roadway may be leased upon Sound Transit's compliance with the prerequisites of the Umbrella Agreement.

3. The discretionary decisions memorialized in the Umbrella Agreement are reasoned and are in concert with the 18th Amendment.

Freeman failed to persuade the *Freeman* I court that WSDOT was barred from entering into "any agreement" for the lease of a portion of I-90 for light rail. In denying the writ of mandamus, the court held that it did not have the authority to direct "the discretionary decisions of state officials in advance." 171 Wn.2d at 333. The request for a writ was deemed premature because the Term Sheet, dated January 20, 2010, did not mandate the transfer of the Center Roadway for light rail use. This

court held that although the Term Sheet had been signed, any transfer of the center lanes was conditioned upon the “execution and delivery of a number of future agreements and instruments.” *Id.* at 333.

Even though the duty to transfer the lanes was premature, this court recognized that WSDOT has “statutory authority to *discretionarily* manage highway property.” *Id.* at 333 (emphasis supplied). The court further held that:

Whether this potential lease specifically complies with these statutory provisions is not before us at this time and, in any event, *the statutory provisions authorizing transfers of highway land do not generally violate article II, section 40.*

Id. at 334 (emphasis added).

WSDOT and Sound Transit signed the Umbrella Agreement on November 3, 2011, following the issuance of the East Link Final Environmental Impact Statement and in reliance on the historical materials, studies, and analyses. CP 1010-11, 1380-1403 (Appendix A).¹⁸ This agreement formally memorialized WSDOT’s discretionary decision to lease the Center Roadway to Sound Transit for light rail purposes, subject to the satisfaction of certain conditions and approvals, including Sound Transit’s financial contributions to the HOV Project, WSDOT’s completion of the project, and the opening of the new improvements to

¹⁸ See *supra* pp. 12-14.

vehicular traffic. CP 1383.

Freeman has not provided the court with any evidence that the agreed-upon consideration, following a legislatively prescribed process, does not adequately reimburse the motor vehicle fund. Freeman has not provided any evidence that WSDOT's decisions to manage highway property, in accordance with chapter 47 RCW, were arbitrary and capricious. Freeman has not provided any evidence that the terms of the Umbrella Agreement—specifically the discretionary decision to lease upon the satisfaction of certain conditions—violates the 18th Amendment. The 18th Amendment provides no support for Freeman's assertions that WSDOT lacks authority to contract with Sound Transit for the use of I-90, nor does the constitution constrain WSDOT from disposing of highway property, subject to applicable statutory requirements. This court should therefore affirm the trial court's conclusion that there has been no violation of the 18th Amendment.

D. WSDOT Has Discretion Under RCW 47.12.120 to Lease Property Not Presently Needed for a Highway Purpose

- 1. Under RCW 47.12.120, WSDOT's discretion to manage highway property includes the ability to decide when highway property is "not presently needed" for a highway purpose and may be leased.**

WSDOT's leasing statute, RCW 47.12.120, provides in pertinent part:

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.

(Emphasis added.) Upon examination of this language, this court found in *Freeman I* that WSDOT has discretion to lease property under RCW 47.12.120:

DOT has specific statutory authority to transfer highway lands, and the decision of whether to transfer or lease lands is inherently a function of the administration of highway property.

Freeman I, 171 Wn.2d at 331.

Because petitioners broadly move this court to prevent the governor or DOT from “taking or authorizing any action” with respect to the transfer of the center lanes of I-90, petitioners are, in essence, asking this court to manage DOT’s potential discretionary decisions. However, the jurisdiction granted this court under article IV, section 4 does not authorize this court to assume general control or direction of official acts. DOT has statutory authority to discretionarily manage highway property.

Id. at 333 (citations omitted).

We note that DOT is statutorily authorized to sell, transfer or lease highway lands within certain statutory restrictions.

Id. at 334. Given the court’s recent recognition of WSDOT’s discretion to lease highway property, the only question that should presently be before the court is whether the terms of the Umbrella Agreement are consistent

with the requirements of RCW 47.12.120. Any continued argument that WSDOT lacks discretion to make the determinations required by RCW 47.12.120 is an improper collateral attack on the decision in *Freeman I*. E.g., *Christensen v. Grant County Hosp. Dist. No. 1*, 152 Wn.2d 299, 305-07, 96 P.3d 957 (2004).

WSDOT has broad discretion to decide whether highway property is not presently needed for highway purposes and whether a lease of that unused property would impair the highway facility for highway purposes. WSDOT must first determine if the highway land is not presently needed for highway purposes. As part of its overall engineering analysis, WSDOT must also make sure that the lease will not cause undue risk or impair the use of the facility for highway purposes. WAC 468-30-110(7).

The phrase in RCW 47.12.120(1), “upon such terms and conditions as the department may determine,” is broad enough to grant WSDOT the discretion to determine 1) standard lease terms, such as rental value and length of the lease period; 2) the conditions under which a property is not presently needed for a highway purpose; and 3) what conditions would be necessary to avoid negative impacts to the highway. In this case, the Umbrella Agreement, relying on the authority of RCW 47.12.120, requires that the stated conditions be fulfilled prior to any transfer of the Center Roadway property. WSDOT’s determination

of these conditions is permitted by RCW 47.12.120.

2. RCW 47.12.120 does not need to contain the word “discretionary” in order to create discretionary duties.

RCW 47.12.120 states that WSDOT *may* rent or lease highway property “upon terms and conditions as the department may determine” after a decision is made that the property is not presently needed for a highway purpose. The use of “may” connotes a discretionary action. However, Freeman ignores this language and the holdings in *Freeman I* and asserts that WSDOT’s decision as to whether property is “not presently needed” for highway purposes is non-discretionary. Appellants’ Opening Br. at 29. Specifically, Freeman argues, “RCW 47.12.120 does not grant WSDOT discretion to determine whether the center lanes are not presently needed for highway purposes.” *Id.* at 29. But this court should not extract or parse the words “not presently needed” from the discretionary framework of the leasing statute.

Freeman cites *Sperline v. Rosellini*, to argue that the “not presently needed” determination is non-discretionary. 64 Wn.2d 605, 392 P.2d 1009 (1964); Appellants’ Opening Br. at 38-39. Freeman begins by fairly describing the statute in question in that case, which authorized the State Highway Commission to transfer highway lands to the State Parks and Recreation Commission as long as the lands were “not required for

highway purposes.” But Freeman then omits the key fact that led to the *Sperline* court’s holding that the transfer violated the statute: the only witness who testified on behalf of the Highway Commission stated that there had been *no decision* that the property in question was “not required for highway purposes” prior to the Commission negotiating its transfer. As a result, “the only evidence before the court [was] that the lands [were] presently required for highway purposes.” *Sperline*, 64 Wn.2d at 606.

WSDOT does not dispute that property cannot be leased if the property is currently needed for highway purposes. But unlike *Sperline*, here there is substantial evidence in the record reflecting a WSDOT determination that the Center Roadway will not be presently needed at a future point in time after the satisfaction of conditions precedent, including Sound Transit’s payment of appropriate consideration and the completion of the HOV Project. *See* CP 1383 (Appendix A). That decision is discretionary and absent evidence of “fraud or gross abuse of discretion, which was not alleged or proved,” it is not subject to review. *State ex rel. Agee v. Superior Court*, 58 Wn.2d 838, 839, 365 P.2d 16 (1961); *Deaconess Hosp.*, 66 Wn.2d at 406.

Even if RCW 47.12.120 did *not* include express discretionary language, WSDOT would enjoy the discretion to lease property not presently needed for highway purposes, absent legislative directive to the

contrary. The decision in *State ex rel. Agee v. Superior Court* refutes Freeman's suggestion that WSDOT must have express statutory authority to act in a discretionary manner. 58 Wn.2d at 838. In *Agee*, the owners of property being condemned for a highway improvement project challenged the public use and necessity determination. They challenged WSDOT's decision to design a 60-foot-wide highway, as opposed to the 100 feet generally required by statute. The statute at issue provided that the director of highways could vary from the 100-foot width requirement *for good cause*, but did not say whether this decision was discretionary. In holding that the "good cause" determination was discretionary, the court found it persuasive that "the legislature did not provide for a public hearing, factfinding commission, or other procedure for the determination of 'good cause' for adopting a different width for a state highway." *Id.* at 839. Thus, the "good cause" determination was "within the authorized discretion of the director of highways, and it is not reviewable except for fraud or gross abuse of discretion, which was not alleged or proved." *Id.*

The *Agee* decision is in accord with the decision in *Peterson v. Dep't of Ecology*, 92 Wn.2d 306, 596 P.2d 285 (1979). In *Peterson*, the petitioner sought a writ of mandamus that would have required the Department of Ecology to issue him a permit to appropriate ground water. The water code authorizing Ecology to issue the permits requires that it

make four findings when evaluating a permit application: (1) what water, if any, is available; (2) to what beneficial uses the water is to be applied; (3) will the appropriation impair existing rights; and (4) will the appropriation detrimentally affect the public welfare. *Id.* at 314 (citing RCW 90.03.290). The court noted that these findings are within the discretion of Ecology. The trial court could issue a writ of mandamus requiring Ecology to make the findings, which it had a mandatory duty to do. However, it could not force it to arrive at a particular outcome because that decision is within its discretionary authority. *Id.* at 314-15.

Like the “good cause” determination in *Agee* and the water permit findings in *Peterson*, the determination as to whether highway property continues to be needed for highway purposes falls within WSDOT’s engineering discretionary authority. As in *Agee*, the legislature has outlined no process that WSDOT must follow, and it has specifically excluded such decisions from APA review. As in *Peterson*, the legislature has entrusted WSDOT to oversee the administration and management of a property right, including the leasing of that property “upon such terms and conditions as the department may determine.” RCW 47.12.120(1).

3. Freeman asks the court to apply an “objective” standard that is neither supported by case law nor defined.

Freeman contends that an “objective” standard be used to

determine whether highway property will be not presently needed for highway purposes. Appellants' Opening Br. at 30, 36. This is an argument not raised below, and the court should disregard it. *See* RAP 9.12 (requiring the court to consider only issues and evidence called to the attention of the trial court below). Even if the court were to consider this issue, Freeman cites to no case law mandating any particular standard. Nor does he cite to any evidence to demonstrate that WSDOT's determination was not an objective one. WSDOT's record includes numerous studies performed by experts employed and engaged by WSDOT.¹⁹ Thus, without evidence in the record to show that WSDOT was arbitrary and capricious, Freeman cannot support an argument that WSDOT's analysis and decision-making was not objective, even if that were the legal standard.

4. The legislature did not create a detailed public process to be followed when WSDOT leases property.

Freeman also contends that there should have been a public process component to the decision to lease the Center Roadway to Sound Transit. Appellants' Opening Br. at 37-38. The legislature has not prescribed any public process or procedure for WSDOT to follow when making leasing decisions. In other instances, such as the declaration that a

¹⁹ *See supra* pp. 12-14 for studies listed.

state highway will be a limited access highway, the legislature has set out requirements for public hearings, written orders, and the availability of appeals. *See* RCW 47.52.133-.195. The limited access statutes demonstrate that when the legislature intends a detailed public process to be followed, it enacts a statute defining the process. The legislature simply chose not to do so for WSDOT's property leasing decisions, which is clear from the fact that such decisions are specifically excluded from the application of the Administrative Procedure Act. *See* RCW 34.05.010.

Freeman makes the same argument with regard to the agencies' decision to amend the 1976 Memorandum Agreement to specify that light rail or a similar system would be the "high capacity transit" that would be utilized on the Center Roadway. Appellants' Opening Br. at 9. Again, there is no statute—and Freeman has not identified one—that requires WSDOT to undertake a formal hearing process in order to sign the 2004 Amendment. However, numerous local agencies are governed by boards or councils that would have had to enact an ordinance or resolution to approve the 2004 Amendment and would have had to do so at a public meeting in accordance with the Open Public Meetings Act, RCW 42.30.060. Therefore, there was ample opportunity for public input as to the type of high capacity transit that would be utilized on the Center

Roadway.²⁰

5. **The level of discretion allowed in RCW 47.12.120 is consistent with the level of discretion granted by other statutes in chapter 47.12 RCW.**

WSDOT's decisions regarding the acquisition and disposal of property are governed by chapter 47.12 RCW. RCW 47.12.010 authorizes WSDOT generally to acquire property that it determines to be necessary for a highway purpose. Later sections authorize WSDOT to acquire from other state agencies and political subdivisions, again when the acquisition is necessary for a highway purpose. RCW 47.12.023-.040. Other sections, including RCW 47.12.120, govern the disposal of highway property that is not needed for a highway use.²¹

The application of RCW 47.12.120 and the question of whether property is presently needed for highway purposes, or the determination of the circumstances under which it will no longer be needed, are decisions based on engineering expertise. *See State ex rel. Lange v. Superior Court*, 61 Wn.2d 153, 157, 377 P.2d 425 (1963). This court has already approved a similar level of WSDOT discretion to determine whether it needs to acquire property for a highway project. While this is not a case involving the acquisition of property under the State's power of eminent domain, the

²⁰ *See supra*, p. 17. Freeman did not appeal the Records of Decisions for East Link issued by the Federal Highway Administration or Federal Transit Administration in November 2011.

²¹ *See* RCW 47.12.063, .283.

eminent domain analysis does include a determination of whether certain property is “necessary” for a highway purpose. *Id.* at 156. An agency’s determination that condemning certain property is necessary is conclusive in the absence of fraud or arbitrary conduct amounting to constructive fraud. *State v. Brannan*, 85 Wn.2d 64, 68, 530 P.2d 322 (1975). A challenger bears the burden of showing actual or constructive fraud by the acquiring agency. *City of Tacoma v. Welcker*, 65 Wn.2d 677, 684, 399 P.2d 330 (1965). To show constructive fraud, the challenger must show arbitrary and capricious conduct, which is:

[W]illful and unreasoning action, without consideration and regard for facts or circumstances. Action, when exercised honestly, fairly, and upon due consideration is not arbitrary and capricious, even though there [may] be room for a difference of opinion upon the course to follow, or a belief by the reviewing authority that an erroneous conclusion has been reached.

Id. at 684-85 (citation omitted).

Statutes that address the same subject matter may be considered *in pari materia* and may be used to interpret an ambiguous statute or phrase. *State v. Houck*, 32 Wn.2d 681, 684, 203 P.2d 693 (1949). In construing a statute, all acts relating to the same subject matter or having the same purpose should be read together as constituting one law. *Id.* at 684-85. This rule assumes that “several statutes having to do with related subject matters were governed by one spirit or policy, and were intended to be

consistent and harmonious in their several parts and provisions.” *Id.* at 685.

WSDOT does not concede that RCW 47.12.120 is ambiguous; on the contrary, the term “may lease or rent” should be adequate to clearly state that WSDOT has discretion to make the decisions required by this section. The sections contained in chapter 47.12 RCW all pertain to WSDOT’s acquisition, management, and disposal of property that has been acquired for a highway purpose, and should be treated as being *in pari materia*. In other words, the arbitrary and capricious standard applied to WSDOT’s discretionary decision to determine the extent of property necessary when acquiring property for a project should equally apply to WSDOT’s discretionary decision that property is not presently needed for a highway purpose under RCW 47.12.120.

In sum, RCW 47.12.120 unambiguously gives WSDOT discretion to lease lands held for highway purposes, but not presently needed, upon such terms and conditions as WSDOT may determine. The Washington Supreme Court has acknowledged WSDOT’s discretion, and has held that WSDOT’s discretionary decisions are reviewed for fraud or gross abuse. Therefore, this court should review WSDOT’s decisions regarding the lease of the I-90 center lanes understanding that the legislature intended WSDOT to have significant discretion and judicial review is limited.

E. WSDOT Properly Exercised Its Discretion in Deciding That When the Replacement I-90 HOV Lanes Are Constructed and Open to Vehicular Traffic, the Center Lanes Will No Longer Be Needed for Highway Purposes

Urban transportation projects take years of planning, study, analysis, public input, and hundreds of millions of dollars to come to fruition. As part of the planning, engineering, and traffic reviews, WSDOT must determine what highway land is needed for the project. Highway plans may require additional right of way to be acquired and may also identify highway property that will not be presently needed for highway use once the project is complete. The *Deaconess* court left the highway route, design, and engineering details to WSDOT's discretion, unless they have been made so arbitrarily as to amount to bad faith or fraud. *Deaconess Hosp.*, 66 Wn.2d at 405; *see also* RCW 47.01.260.

WSDOT has undertaken significant efforts to meet the purpose and need of the HOV Project:

[T]o improve regional mobility by providing reliable and safe two-way transit and high-occupancy vehicle (HOV) operations on Interstate 90 (I-90) between Bellevue and Seattle, while minimizing impacts to the environment and to other users and transportation modes.

CP 1413.

WSDOT's discretionary decisions regarding I-90 have been reasonably based upon years of engineering studies, scrutiny by local

governments and two federal agencies, public review of environmental documents, approval of voters funding Sound Transit's work, approval of state-wide voters who voted against I-1125, legislatively-funded independent appraisal methodology studies, and independent appraisals to value the property.

Despite WSDOT's significant efforts to meet the purpose and need of the HOV Project, to follow the direction of federal, state, and local officials, and to adhere to the will of the voters, Freeman continues to challenge WSDOT's authority over the design and engineering details of I-90. In essence, Freeman is asking this court to substitute its judgment for that of WSDOT. Such a request is contrary to the long-standing principle that "[c]ourts ought not substitute their judgment for that of the administrative agency." *Deaconess*, 66 Wn.2d at 405-06 (citing *State ex rel. Dawes v. Washington State Highway Comm'n*, 63 Wn.2d 34, 385 P.2d 376 (1963)).

Freeman contends that without the lease of the Center Roadway to Sound Transit, there would be ten traffic lanes across I-90. Appellants' Opening Br. at 8, 34. However, Freeman completely ignores the rationale for selecting the R-8A alternative as reflected in the September 2004 Record of Decision for the HOV Project:

Alternative R-8A 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. The signatories to the 1976 Memorandum Agreement and Sound Transit executed the 2004 Amendment with the understanding that upon completion of the HOV Project, the parties would “move as quickly as possible to construct High Capacity Transit in the center lanes.” CP 1008, 1034. In the 2004 Amendment, “High Capacity Transit” was defined by the parties as:

[A] transit system operating in dedicated right-of-way such as light rail, monorail, or a substantially equivalent system.

CP 1033. There is absolutely no evidence in the record that the outer HOV lanes could be constructed in the absence of a plan for putting high capacity transit in the Center Roadway.²²

Freeman further contends that WSDOT’s 2006 Roadway Study “finds vehicular traffic congestion will be worse after the conversion of the center lanes to light rail.” Appellants’ Opening Br. at 34. The study actually found that:

The level of impacts and/or benefits of converting the center roadway will vary depending upon the destination and exit and entry points of the user. Conversion of the

²² Freeman also ignores the fact that the HOV Project may never come to fruition without Sound Transit’s contribution of approximately \$165 million for Stages 1-3 of the project. CP 1384, 1395 (Appendix A).

center roadway increases the travel time for trips across the East Channel Bridge. *Conversion of the center roadway decreases travel time between Mercer Island and downtown Seattle due to less weaving and congestion at the west end of the corridor under Exclusive operations.*

CP 1499 (emphasis added). Furthermore, Mark Bandy, Professional Engineer, who personally managed the roadway study, has explained:

- (1) the analysis in [the 2006] study was not as rigorous as that done for an environmental impact statement;
- (2) WSDOT acknowledged that subsequent analysis would be necessary; and
- (3) The subsequent and more rigorous analysis is reflected in the East Link Final Environmental Impact Statement, issued July 15, 2011.

CP 2614-15. With the benefit of later, more in-depth analysis, WSDOT's engineers concluded the addition of outer roadway HOV lanes would result in peak direction HOV travel times comparable to travel times in the Center Roadway and that HOV travel times in the reverse peak direction would be substantially improved. CP 1410.

Freeman has not alleged or shown bad faith or fraud in WSDOT's nearly 13-year highway engineering, traffic and operations, and design process. Freeman has not alleged that WSDOT's motives were not honest and intended to benefit the public. Freeman has not shown that WSDOT's discretionary decision is not reasonable or not supported by the facts and evidence. As the declarations of WSDOT Engineers Dye and Bandy show, WSDOT went through a long and detailed engineering and

environmental process that was open to the public and concurred in by the cities of Bellevue, Seattle, and Mercer Island. CP 1007-08, 1405-09. The Federal Highway Administration, which must approve changes to interstate highways, approved the I-90 limited access changes in support of the light rail use of I-90. CP 1408, 1502-03. The Federal Highway Administration also included in its Record of Decision for East Link that because “[t]he existing center roadway HOV lanes will not be converted to light rail until the I-90 Two-Way Transit project adding additional HOV lanes has been completed . . . [t]here will be no net loss of HOV lanes.” CP 1573. Finally, Sound Transit has obtained voter approval of and funding for the light rail project, and Freeman failed to undo these efforts with Initiative 1125.

Freeman may disagree with WSDOT’s discretionary decisions and may believe that future travel along I-90 may be impacted.²³ But Freeman’s unsupported beliefs or concerns do not require this court to reverse WSDOT’s discretionary decision to lease the Center Roadway for light rail purposes for appropriate consideration once the replacement HOV lanes are added and open to traffic. Where there is room for two opinions, agency action is not arbitrary and capricious when exercised

²³ In fact, WSDOT’s analyses show that there will be an improvement in traffic flow because each newly constructed HOV lane will be open all day, seven days per week, whereas the current center lanes are reversible and only available at peak traffic times. CP 1007-08, 1408-09.

honestly and upon due consideration of the facts and circumstances, although a challenger (or even the court) may believe that an erroneous conclusion has been reached. *City of Tacoma v. Welcker*, 65 Wn.2d 677, 684-85, 399 P.2d 330 (1965). The court should affirm the trial court and uphold WSDOT's decision to enter into the Umbrella Agreement and the discretionary terms contained therein.

F. Freeman is Not Entitled to Attorney Fees

Freeman argues the appellants are entitled to reasonable attorney fees under the common fund exception to the American rule. Appellants' Opening Br. at 44. Fees are awarded under this narrow exception only under very limited circumstances, where four strictly defined predicates are met:

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

Seattle School Dist. No. 1 of King County v. State, 90 Wn.2d 476, 544, 585 P.2d 71 (1978) (quoting *Weiss v. Bruno*, 83 Wn.2d 911, 914, 523 P.2d 915 (1974)).

In *Freeman I*, Freeman challenged the expenditure of public funds under § 204(3) of the 2009 transportation budget. 171 Wn.2d at 324. In this matter, Freeman is not challenging any expenditure of funds. Rather,

Freeman is challenging an administrative decision to allow the use of highway right of way for light rail purposes. Moreover, even if the use of highway right of way is analogized to the expenditure of funds, Freeman has not presented any evidence that the consideration to be paid is inadequate or that such decision was “patently unconstitutional.” *Id.* Finally, Freeman did not plead taxpayer status nor did he make a demand on the Office of the Attorney General to maintain a challenge against the State of Washington, and such a demand is a condition precedent to a taxpayer’s suit. *See Reiter v. Wallgren*, 28 Wn.2d 872, 877, 184 P.2d 571 (1947). The State has shown that Freeman’s claims have no substantive merit and that summary judgment was appropriate. Freeman accordingly is not entitled to attorney fees on a common fund or any other theory.

VI. CONCLUSION

The expansion of light rail in the Puget Sound region has been the result of decades of political process, including agreements among the State and local jurisdictions, as well as regional and statewide elections. The decisions whether to implement this regional transportation system should be the result of the democratic processes of the local and state governments that will be part of that transportation system, and not the result of judicial decree. Elected officials and the voters, informed by the professional engineering and planning analysis of experts who are

accountable to those officials, have decided to put light rail on I-90. As long as those officials and the agencies of the state and local governments have acted within their statutory authority and have not acted arbitrarily, the court must uphold their decisions. WSDOT has properly exercised its discretion under RCW 47.12.120 and has not done so in a manner that is arbitrary and capricious. Therefore, its decision to execute the Umbrella Agreement with Sound Transit must be upheld. The trial court's decisions granting summary judgment to the State and denying Freeman's motion for summary judgment should be affirmed.

RESPECTFULLY SUBMITTED on October 1, 2012.

ROBERT M. MCKENNA
Attorney General

By: 

BRYCE E. BROWN, WSBA #21230
Senior Assistant Attorney General
Attorney for the Washington State
Department of Transportation
PO Box 40113 (7141 Cleanwater Drive SW)
Olympia, WA 98504-0113
Telephone: (360) 753-4962

Appendix A

GCA 6523
IC# 1-17-09502

UMBRELLA AGREEMENT
by and between
Washington State Department of Transportation
and
Central Puget Sound Regional Transit Authority

For the Use of the I-90 Center Roadway

This UMBRELLA AGREEMENT (hereinafter the "Agreement") is made by and between the STATE of WASHINGTON, by and through the WASHINGTON STATE DEPARTMENT OF TRANSPORTATION (WSDOT or STATE), and the CENTRAL PUGET SOUND REGIONAL TRANSIT AUTHORITY (SOUND TRANSIT), a Regional Transit Authority, (each a "Party" and together the "Parties").

RECITALS

WHEREAS, SOUND TRANSIT is a regional transit authority established pursuant to Chapter 81.112 RCW that operates a high capacity regional transportation system throughout the Puget Sound Region, and it is authorized to plan for and provide public transportation services including, but not limited to, light rail pursuant to Chapter 81.104 RCW; and

WHEREAS, SOUND TRANSIT currently operates light rail transit services in downtown Tacoma and between downtown Seattle and the SeaTac Airport. SOUND TRANSIT is also working to extend light rail services to the East side of Lake Washington pursuant to the voter-approved Sound Transit 2 plan; and

WHEREAS, SOUND TRANSIT has all powers necessary to implement a high capacity transportation system pursuant to RCW 81.112.070 and the specific power to lease property interests in, on, over, or across property that is necessary for such transit facilities, pursuant to RCW 81.112.080; and

WHEREAS, the STATE owns or has possessory interests in the property and improvements between Seattle and Bellevue, Washington, commonly known as the I-90 Interstate system, which includes the two center lanes known as the I-90 Center Roadway, the access and exit ramps, and other improvements that are depicted in **Exhibit A** attached hereto and incorporated into this Agreement by reference. (The improvements constructed by WSDOT as part of the Center Roadway will be referred to as "CRP Improvements" and the property and CRP Improvements together will be called the "Center Roadway"); and

WHEREAS, the Final Environmental Impact Statement (FEIS) issued by SOUND TRANSIT, the STATE, and the Federal Highway Administration (FHWA) dated May 21, 2004 ("I-90 Two-Way Transit and HOV Operations Project") evaluated various alternatives to improve regional

mobility by providing reliable and safe two-way transit and HOV operations on I-90 between Bellevue and Seattle; and

WHEREAS, following issuance of the FEIS for the I-90 Two-Way Transit and HOV Operations Project, the SOUND TRANSIT Board selected R8A as the alternative to be built (Resolution No. R2004-09), and FHWA issued a Record of Decision ("ROD") for R8A. The R8A project includes reconfiguring the I-90 traffic lanes to construct two HOV lanes in the outer roadway, and it provides various access and other improvements as described in **Exhibit B** attached and incorporated by reference; and

WHEREAS, the Parties are constructing the R8A Project in stages, and SOUND TRANSIT has contributed funds for the construction of Stages 1 and 2 in partial payment of the rent to lease the Center Roadway for the construction and operation of light rail. Each Party will contribute additional funds to the design and construction of Stages 2 and 3 of the R8A Project and complete the R8A project under task orders issued under GCA 3361, the Umbrella Agreement for the Construction Administration of Sound Transit Projects Within Washington State Department of Transportation Right-of-Way dated September 13, 2002; and

WHEREAS, SOUND TRANSIT will provide an estimated \$165.7 million in total funding for the construction of the R8A Project (based on the 2010 Cost Estimate Valuation Process), which amount includes all funds previously provided for Stages 1 and 2 and the funding proposed under this Agreement. SOUND TRANSIT's funding commitment under this Agreement is based on the R8A Project scope as it existed in June 2010; and

WHEREAS, under this Agreement the STATE will provide \$44.4 million in funding for the R8A Project, which includes an estimated \$10.5 million for the construction of dowel bar retrofits as described in this Agreement; and

WHEREAS, the use of the I-90 Center Roadway for light rail is consistent with the 1978 Decision of the U.S. Department of Transportation, which provided that "public transportation shall permanently have first priority in the use of the center lanes," and with the 1976 Memorandum of Agreement, and the 2004 Amendment to the Memorandum of Agreement executed by the STATE, SOUND TRANSIT, the cities of Bellevue, Mercer Island, and Seattle, and King County; and

WHEREAS, SOUND TRANSIT, WSDOT, and the Federal Transit Administration (FTA) have completed the environmental review of the East Link Light Rail Project ("East Link Project"), which includes the conversion and use of the I-90 Center Roadway for light rail. A Draft EIS was issued in December 2008 and a Supplemental Draft EIS was issued in November 2010. The FTA published the FEIS in July 2011. The Parties expect that FTA will issue the ROD in 2011; and

WHEREAS, all of the alternatives evaluated in the East Link Project environmental documents include use of the I-90 Center Roadway for light rail, and this use is identified as the preferred alternative in the FEIS; and

WHEREAS, after consideration of the FEIS, the SOUND TRANSIT Board decided to proceed with the East Link Project on July 28, 2011, by adopting Board Resolution 2011-10, selecting the route for the East Link Project. The selected route will use the Center Roadway to cross Lake Washington; and

WHEREAS, the Parties entered into the Restated Land Bank Agreement dated December 1, 2003, which provides for the issuance of 40-year airspace leases by the STATE to SOUND TRANSIT for STATE property that is not presently needed for a highway purpose; and for the use of land bank credits by SOUND TRANSIT to purchase interests in STATE owned property; and

WHEREAS, WSDOT has all the necessary power under RCW 47.12.120 to issue airspace leases to SOUND TRANSIT subject to FHWA approval per 23 CFR 710.405; and

WHEREAS, in addition to, and independent of, RCW 47.12.120, RCW 47.52.090 (Cooperative agreements—Urban public transportation systems), authorizes “highway authorities of the state... and municipal corporations owning or operating an urban public transportation system... to enter into agreements with each other, or with the federal government, respecting the financing, planning, establishment, improvement, construction, maintenance, use, regulation, or vacation of limited access facilities in their respective jurisdictions to facilitate the purposes of this chapter. Any such agreement may provide for the exclusive or nonexclusive use of a portion of the facility by streetcars, trains, or other vehicles forming a part of an urban public transportation system and for the erection, construction, and maintenance of structures and facilities of such a system including facilities for the receipt and discharge of passengers”; and

WHEREAS, upon the completion of the R&A 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; and

WHEREAS, in consideration for the SOUND TRANSIT funding for the R&A Project, WSDOT agrees to lease the Center Roadway to Sound Transit on the terms set forth in this Agreement and attached airspace leases.

NOW, THEREFORE, in consideration of the foregoing Recitals, the mutual covenants contained herein, and other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged, the Parties agree as follows:

1. Purpose of Agreement. This Agreement provides for WSDOT’s completion of the R&A Project, and for WSDOT’s lease of the I-90 Center Roadway to Sound Transit for the construction and operation of the light-rail system. This Agreement sets forth the Parties’ agreement with respect to their funding obligations for the completion of the R&A Project, the lease terms for the use of the Center Roadway including all property and improvements necessary for the construction of the East Link Project from Seattle across Lake Washington to Bellevue Way, including the access and exit ramps, and other property required for the construction, testing, and maintenance of the light-rail system under the temporary construction airspace lease, and the property and improvements required for the operation and maintenance of the light rail system under the 40-year airspace lease (the temporary construction airspace lease

and the 40 year airspace lease are referred to collectively as the "CRP Leases"). This Agreement also provides for the award of land bank credits, and establishes the administrative procedure to be followed by the Parties in the signing and delivery of the CRP Leases.

2. Completion of the R&A Project. WSDOT agrees to use its best efforts to complete the R&A Project by December 31, 2014, or as soon thereafter as reasonably feasible, and thereby permit conversion of the Center Roadway to light rail use. Sound Transit agrees to timely pay its funding obligations under the Agreement to permit WSDOT to complete the R&A Project.

3. WSDOT's Determination to Lease Highway Property. WSDOT has determined that the Center Roadway will not be presently needed for highway purposes after the R&A Project 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 **Exhibits D-1 and D-2** attached hereto are completed for the relevant lease. This determination is based upon, including but not limited to analyses contained in the: I-90 Two-Way Transit and HOV Operations FEIS and ROD; I-90 Two-Way Transit and HOV Access Point Decision Report; WSDOT I-90 Center Roadway Study; East Link FEIS and ROD; East Link/I-90 Interchange Justification Report; I-90 Bellevue to North Bend Corridor Study; the WSDOT Highway System Plan 2007-2026, and the legislative history reflected in the 2009 Engrossed Senate Substitute Bill 5352, § 204(3) and § 306(17). This determination is consistent with the policy decisions reflected in the 1976 Memorandum of Agreement and the 2004 Amendment to the 1976 Agreement.

4. Execution of the CRP Leases.

4.1 Time of Delivery. Upon the earlier of: (1) the entry of a final judgment by the Kittitas County Superior Court or other superior court having jurisdiction in the pending litigation entitled *Freeman et. al. v. WSDOT et. al.*, Kittitas County Superior Ct., Cause No. 11-2-00195-7, or (2) the completion of the R&A Project and all the necessary obligations and actions identified in this Agreement and the exhibits attached hereto for the relevant lease, Sound Transit shall within ten (10) business days, sign and deliver two originals of the two CRP Leases (attached hereto and incorporated by reference as **Exhibits E and F**) to WSDOT. WSDOT shall sign both originals and return one original of each lease to Sound Transit within ten (10) business days of receipt. Without regard to whether a plaintiff in the Freeman matter has filed an appeal or such an appeal is pending, the Parties shall sign and deliver both originals of the CRP Leases unless prohibited by the court.

4.2 Commencement of Lease Terms. The attached CRP Leases include the Temporary Construction Airspace Lease ("TCAL") for the access and exit ramps and other Center Roadway property required for the construction of the East Link Project and the 40 year Airspace Lease ("ASL") for the operation and maintenance of the light-rail system over the Center Roadway. If the superior court judgment referenced in paragraph 4.1 is entered in favor of defendant State and intervenor Sound Transit before R&A is completed, the TCAL and the ASL will be signed at the time of entry of judgment, but WSDOT shall not transfer possession or control of the Center Roadway to Sound Transit until R&A 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.

4.3 Federal Highway Administration Approval of Leases. The Parties understand and acknowledge that the Federal Highway Administration (FHWA) must approve the TCAL and ASL, in accordance with the applicable federal laws and regulations. If FHWA requires amendments to the leases, the Parties agree to cooperate with each other to incorporate such amendments. As provided in Exhibit D-1 and D-2, other FHWA approvals include:

- Breaks-in-access, including those determined necessary during the design process as well as those requested during construction
- Operations and Maintenance Agreement
- Interchange Justification Report
- Record of Decision
- Approval of bridge expansion joint design

Sound Transit shall provide construction status reports to FHWA on quarterly basis.

5. Funding for the R8A Project.

5.1 R8A Funding. The Parties shall each provide additional funding for the completion of the R8A Project as follows:

5.1.1 SOUND TRANSIT's Funding Obligation. SOUND TRANSIT shall provide the funding for the construction of Stage 2 and Stage 3 of the R8A Project as the project is described and depicted in **Exhibit B**, attached and incorporated into this Agreement by reference. SOUND TRANSIT is not obligated to fund improvements not described in **Exhibit B** unless **Exhibit B** is amended by the mutual agreement of the Parties. SOUND TRANSIT's funding for the R8A Project shall be provided through construction task orders under Agreement GCA 3361, incorporated herein by this reference. Under these construction task orders, the STATE shall complete the construction of the R8A Stage 2 and Stage 3 improvements.

The total estimated amount of SOUND TRANSIT's funding contribution towards the R8A Project as defined in **Exhibit B** is \$165.7 million, which includes SOUND TRANSIT's previous contributions to Stages 1 and 2 and its subsequent contributions under this Section 5. SOUND TRANSIT's total funding for the R8A Project shall be listed in **Exhibit C**, which will be updated from time to time to reflect SOUND TRANSIT's actual funding contributions to the R8A Project.

5.1.2 STATE's Funding Obligation. The STATE shall provide \$44.4 million in funding for the R8A Project, which includes \$10.5 million for the construction of dowel bar retrofits and \$4.8 million in federal funding for the completion of the R8A Project. The STATE shall also be responsible for the cost of any betterments or work for highway purposes beyond the scope of improvements for R8A described in **Exhibit B** to this Agreement.

5.1.3 Construction Task Orders. The STATE shall construct Stage 2 and Stage 3 of the R8A Project under construction task orders issued under GCA 3361, and these construction task orders shall be funded by the SOUND TRANSIT contributions under this Agreement. The Parties may execute task orders for each phase of Stage 3.

6. Consideration for Use of Center Roadway and Land Bank Credits.

6.1 Consideration. The funding that SOUND TRANSIT provides for the R8A Project highway improvements, as identified in Section 5 above and in Exhibit C, is consideration for the CRP Lease(s) issued under this Agreement, and such funding shall be offset against the rent or reimbursement amounts due under Section 8.

6.2 Reconciliation. Within ten (10) business days after the appraisal update is completed as provided by Section 8.3, the Parties shall offset the total amount of the eligible R8A funding provided by SOUND TRANSIT under Section 6.1 against the amount due for the CRP Leases under Section 8 of this Agreement. "Eligible R8A funding" means the funding provided by Sound Transit for highway purpose improvements related to the R8A Project. An additional reconciliation shall be performed by the Parties following the Completion Date (as defined in WSDOT Standard Specifications for Road, Bridge, and Municipal Construction – 2010 edition) of the R8A Project.

6.3 Land Bank Credits Under the Restated Land Bank Agreement.

6.3.1 If SOUND TRANSIT's funding for the R8A Project is not sufficient to offset the rental and reimbursement amounts, then SOUND TRANSIT may use additional land bank credits previously awarded under the Restated Land Bank Agreement.

6.3.2 In addition to the adjustments made under Section 6.2, 6.3.3 and 6.3.4, the following land bank credit adjustments will be made, if appropriate:

- a) If the actual period of use for the TCAL is less than the period assumed in the appraisal, the rent will be adjusted, and SOUND TRANSIT shall receive land bank credits for the excess payment of rent.
- b) If the ASL premises are modified in size after completion and approval of the light rail design, the rent will be adjusted and the appropriate debit/credit to the land bank will be made.

6.3.3 The STATE shall award land bank credits to SOUND TRANSIT in the amount of \$18.4 million, which is the amount of the STATE's funding obligation for Stage 2 and Stage 3 of R8A that SOUND TRANSIT has agreed to assume.

6.3.4 If SOUND TRANSIT's funding contribution to the R8A project is in excess of the rental and reimbursement amounts due under Section 8 herein, SOUND TRANSIT shall receive land bank credits, and such credits may be used for other leases or property transactions as provided for under the Restated Land Bank Agreement. This Section 6.3.4 shall survive termination of this Agreement by any Party for any reason.

7. Temporary Construction Area Airspace Lease and 40-Year Airspace Lease.

7.1 Actions, Reviews and Approvals. The CRP Lease terms shall commence upon the completion of all the necessary obligations and actions identified in this Agreement and those activities relevant to each lease in Exhibits D-1 and D-2. Specifically, the STATE shall not transfer possession or control of the Center Roadway pursuant to the TCAL until R8A is

completed, the new improvements are open to vehicular traffic, and all necessary actions and obligations identified in this Agreement and **Exhibit D-1** are completed. The lease term of the ASL shall commence on the date that all necessary actions and obligations identified in this Agreement and **Exhibit D-2** are completed.

7.2 Temporary Construction Area Airspace Lease. The Parties agree to the terms of the TCAL, attached hereto as **Exhibit E**, subject to FHWA review and approval. The Parties shall sign and deliver the TCAL lease of the Center Roadway in the manner and at the time specified in Section 4. The premises of the TCAL generally includes the Center Roadway, access and exit ramps, and adjacent property required for the construction and testing of the light rail system, and this area will be represented by the exhibits attached to the TCAL.

7.3 Extension of TCAL. SOUND TRANSIT shall have the option to extend the TCAL to allow for the completion of final construction activities (such as signal installation and landscaping). If the ASL term begins during an extended term of the TCAL, the premises area of the TCAL will be amended to exclude the ASL premises area. The additional rent due for the extension of the TCAL will be calculated as provided in Section 8.4(1).

7.4 40-Year Airspace Lease. The Parties agree to the terms of the ASL, attached hereto as **Exhibit F**, subject to FHWA review and approval. The Parties shall sign and deliver the 40-year ASL of the Center Roadway in the manner and at the time specified in Section 4. The Parties may by mutual agreement modify the legal description and depiction of the lease premises in the ASL upon the completion and approval of the light rail design.

7.5 Renewal of ASL. As provided in the ASL, SOUND TRANSIT shall have the option to extend the ASL for an additional thirty-five (35) year term upon the mutual written agreement of the Parties, and the extension of the ASL shall be subject to the provisions of Section 8.6 in this Agreement.

8. Rent and Reimbursement Amounts.

8.1 Waiver of Federal Share of Center Roadway Improvement Costs. No reimbursement for the federal share of the costs of the CRP shall be required by the STATE per 23 CFR 710.405(c), and pursuant to the letter from the U.S. Department of Transportation dated December 1, 2009, attached herein as **Exhibit G** and incorporated herein by this reference.

8.2 Calculation of Rent for CRP Lease(s). The fair market rent for the CRP Lease(s) shall be calculated based on an update of the land value in the appraisal report issued by Bates McKee dated October 15, 2009 (Appraisal of I-90 for Light Rail Based on "WSDOT's Appraisal Instructions- Interstate 90, of which in 2009 the land value was appraised at \$70.1 million), hereinafter "McKee Appraisal."

8.3 Appraisal Update Completion Date. The fair market rent of both the TCAL and ASL will be updated based on updated land value calculated within one (1) year prior to the commencement of light rail construction on the Center Roadway. If the updated fair market rent is greater than the fair market rent under Section 8.2, SOUND TRANSIT shall pay the difference by first offsetting its R8A funding against the difference pursuant to Section 6.1, and then using

land bank credits to pay the difference pursuant to Section 6.3.1, if necessary. The appraiser shall be provided the CRP Leases and the legal descriptions to be issued under this Agreement. The appraiser shall be provided the Appraisal Instructions attached hereto as **Exhibit H** and incorporated herein by this reference.

8.4 Rent and Reimbursement Amounts. As consideration for the CRP leases, SOUND TRANSIT shall provide to WSDOT a rent and reimbursement amount that is the sum of (1) and (2) as follows:

- (1) Rent of Land. The fair market rent for the TCAL and the 40-year ASL as determined by the updated McKee Appraisal.
- (2) Reimbursement of STATE Share of CRP Improvement Costs. Reimbursement of the amount of \$69.2 million to the STATE for its fourteen and two-tenths (14.2) percent share of the cost of the CRP Improvements. This shall be a one-time reimbursement for the STATE's share of the CRP Improvements to allow the STATE to fully recover its investment in the CRP Improvements.

8.5 Notwithstanding SOUND TRANSIT's consideration identified in Section 8.4, SOUND TRANSIT shall provide funding for the R&A project as identified in Section 5 herein (unless SOUND TRANSIT terminates this Agreement under Section 15); and SOUND TRANSIT will receive land bank credits, if appropriate, as provided in Section 6.3.4 herein.

8.6 Payment for the 35-Year Extension Term of the ASL. The ASL provides for an additional term beyond the initial 40-year term upon the mutual agreement of the Parties; provided that in the event the Parties agree to extend the ASL for an additional 35-year term, the rental value of the 35-year term shall be based solely on the land value. SOUND TRANSIT shall not be obligated to make any other reimbursement to the STATE for the construction costs of the CRP Improvements, since the STATE will receive full reimbursement for its share of the costs of the CRP Improvements under section 8.4(2) and the federal share has been waived as described in section 8.1 of this Agreement. The rent payment may be monetary or through the use of land bank credits pursuant to the Restated Land Bank Agreement, or a combination of the foregoing, as mutually agreed to in writing by the Parties.

9. Amendment of Restated Land Bank Agreement. Contemporaneously with the execution of this Agreement, the Parties shall execute an amendment to the Restated Land Bank Agreement to extend the term of the Restated Land Bank Agreement by forty (40) years to expire in 2080. The form of the amendment is attached hereto as **Exhibit I** and incorporated herein by reference.

10. Operations and Maintenance Agreements. The Parties must execute an operations and maintenance agreement for the construction period and an operations and maintenance agreement for the operations period before the commencement date of each CRP Lease. The Parties will prepare and enter into operations and maintenance agreements for the anticipated matters and issues described in **Exhibit J**, attached hereto and incorporated herein by this reference. The Parties will agree to reasonable operation and maintenance requirements that are necessary to provide for the safe and efficient operation of the light rail system and of the I-90

highway system over which the light rail system operates. Because the TCAL may be executed and delivered to SOUND TRANSIT before the Parties execute the operations and maintenance agreement for the construction period, the lease will include a clause stating that that lease term cannot begin until the operations and maintenance agreement is signed.

11. Other Agreements. In addition to the agreements specifically mentioned in this Agreement, the Parties will execute other agreements necessary for the completion of the R8A Project and the SOUND TRANSIT East Link light-rail system. For example, during the construction of the light rail system, the STATE's inspections will be conducted under inspection task orders issued under Agreement GCA 3361. The agreements referenced in this section are administrative actions to facilitate implementation of this Agreement.

12. Completion of Review and Instruments. The Parties shall promptly complete the necessary review steps and approvals, the construction task orders, operations and maintenance agreements, the amendment to the Restated Land Bank Agreement, and any other documents and agreements necessary to implement the terms of this Agreement. The Parties agree to provide the necessary staff resources and work in good faith to develop the final form and contents of such agreements and instruments and to deliver the executed agreements and instruments in a timely manner, however, the STATE's inability to commit such resources or perform work in accordance with SOUND TRANSIT project schedules due to conditions beyond the STATE's reasonable control will not constitute a breach of this Agreement by the STATE and will not subject the STATE to any liability. The Parties will also execute any documents necessary to protect the rights of the Parties granted by this Agreement including a memorandum of this Agreement. Future actions, reviews, and approvals referenced in this section and identified in Exhibits D-1 and D-2 are administrative actions to facilitate implementation of this Agreement.

13. Modifications. This Agreement contains all the agreements and conditions made between the Parties hereto. No modification or amendment of this Agreement may be made except by written agreement or as otherwise may be provided in this Agreement.

14. Interpretation. This Agreement shall be construed in accordance with the laws of the State of Washington.

15. Court Rulings. If the STATE is prohibited from leasing the Center Roadway to SOUND TRANSIT by a court of law before construction of Stage 3 of R8A begins, SOUND TRANSIT (1) will be given land bank credits for all of its investments in R8A, except those investments for non-highway purposes and (2) may elect to terminate the Agreement without further obligation to fund R8A. If Initiative 1125 is enacted, the Parties will continue to implement this Agreement in compliance with the initiative but will not otherwise delay or halt timely performance of their obligations under this Agreement unless a court of law rules that the Initiative prohibits performance of those obligations. If the executed CRP Lease(s) delivered to SOUND TRANSIT are later determined to be unenforceable by a court of law, the STATE shall award land bank credits to SOUND TRANSIT for all of its investments in the R8A Project, except those investments for non-highway purposes, and SOUND TRANSIT shall pay for the cost of restoring the premises to its original condition, excepting reasonable wear and tear, or to such a condition as otherwise mutually agreed to in writing by the Parties. The CRP Lease(s) described

in this Agreement will conform to all applicable laws, regulations, and rulings from courts of competent jurisdiction.

16. Audits; Inspection. The Parties, the State Auditor, and/or the applicable federal agencies shall have the right to examine, during normal business hours and as often as they deem necessary, all of each Party's records with respect to all matters covered by this Agreement. Such representatives shall be permitted to audit, examine and make excerpts or transcripts from such records, and to make audits of all invoices, materials, payrolls and other matters covered by or related to this Agreement.

17. Retention of Records. All reports and accounting records pertaining to this Agreement shall be retained by each Party as required by applicable state retention schedules, but no less than six (6) years from the commencement of the ASL, except in the event of litigation or settlement of claims arising from the performance of this Agreement, in which case each Party agrees to maintain same until all such litigation, appeals, claims or exceptions are finally resolved.

18. Captions. The captions and section headings contained in this Agreement are for convenience of reference only and in no way limit, describe, extend or define the scope or intent of this Agreement nor the intent of any of the provisions hereof. As used in this Agreement, the masculine shall include the feminine and neuter, the feminine shall include the masculine and neuter, the neuter shall include the masculine and feminine, the singular shall include the plural and the plural shall include the singular, as the context may require.

19. Waivers. Any Party hereto, by notice and only by notice as provided in section 25 of this Agreement, may, but shall be under no obligation to, waive any of its rights or a condition to its obligations hereunder, or any duty, obligation or covenant of the other party hereto. No waiver shall affect or alter this Agreement and each and every covenant, agreement, term and condition of this Agreement shall continue in full force and effect with respect to any other than existing or subsequent breach thereof.

20. Fair Construction. The provisions of this Agreement shall be construed as a whole according to its common meaning, not strictly for or against any Party and consistent with the provisions contained herein in order to achieve the objectives and purposes of this Agreement. Each Party hereto and its counsel has reviewed and revised this Agreement and agrees that the normal rules of construction to the effect that any ambiguities are to be resolved against the drafting Party shall not apply in the interpretation of this Agreement.

21. No Partnership or Joint Venture. Although the Parties have common interests under this Agreement, it is not intended by this Agreement to, and nothing contained in this Agreement shall create any partnership, joint venture or other arrangement between the STATE and SOUND TRANSIT. No term or provision of this Agreement is intended to be, or shall be, for the benefit of any third party including any person, firm, organization or corporation not a party hereto, and no such other person, firm, organization, or corporation shall have any right or cause of action as hereunder.

22. Severability. Except as expressly stated herein, in case any one or more of the provisions contained in this Agreement shall for any reason be held to be invalid, illegal or unenforceable in any respect, such invalidity, illegality or unenforceability shall not affect any other provision hereof, and this Agreement shall be construed as if such invalid, illegal or unenforceable provision had never been contained herein.

23. Dispute Resolution. SOUND TRANSIT and the STATE shall meet and confer to resolve disputes that arise under this Agreement as requested by either Party.

23.1 The following individuals are the Designated Representatives for the purpose of resolving disputes that arise under this Agreement:

SOUND TRANSIT:

Manager, Real Estate Division
Central Puget Sound Regional Transit
Authority
401 S. Jackson St.
Seattle, WA 98104

STATE:

Program Administrator, Real Estate
Services
310 Maple Park Avenue SE
PO Box 47338
Olympia, WA 98504-7338

23.2 In the event the Designated Representatives are unable to resolve the dispute, the following individuals, or their designee, shall confer and resolve the dispute.

SOUND TRANSIT:

Chief Executive Officer
Central Puget Sound Regional Transit
Authority
401 S. Jackson St.
Seattle, WA 98104

STATE:

Secretary of Transportation
310 Maple Park Avenue SE
PO Box 47316
Olympia, WA 98504-7316

23.3. No Party shall have the right to seek relief in a court of law until and unless the Dispute Resolution process has been exhausted.

24. Venue. The Parties agree that the venue of any action or suit concerning this Agreement shall be in the Thurston County Superior Court, and all actions or suits thereon shall be brought therein, unless the Parties mutually agree otherwise, in writing.

25. Notices. Except as otherwise designated in this Agreement, wherever in this Agreement written notices are to be given or made, they will be delivered or sent by certified mail addressed to the Parties at the address listed below unless a different address shall be previously designated in writing and delivered to the other Party. Notice shall be deemed effective three (3) days after the date of mailing. The Parties agree to accept certified mail at the address provided for herein.

SOUND TRANSIT:

CENTRAL PUGET SOUND REGIONAL
TRANSIT AUTHORITY
Attn: Roger Hansen,
Manager Real Estate Services
401 S. Jackson St.
Seattle, WA 98104

Copy to:

CENTRAL PUGET SOUND REGIONAL
TRANSIT AUTHORITY
Attn: Betty Ngan, Legal Counsel
401 S. Jackson St.
Seattle, WA 98104

STATE:

WASHINGTON STATE
DEPARTMENT OF TRANSPORTATION
Attn: Property Management Program Manager,
Real Estate Services
P.O. Box 47338
Olympia, WA 98504-7338

Copy to:

OFFICE OF THE ATTORNEY GENERAL
STATE OF WASHINGTON
PO Box 40113
Olympia, Washington 98504-40113

26. Authorized Signature. The undersigned representatives of Sound Transit and WSDOT acknowledge that they are authorized to execute this Agreement and bind their respective agencies to the obligations set forth herein.

IN WITNESS WHEREOF, the Parties hereto have executed this Agreement as of the Party's date signed last below.

CENTRAL PUGET SOUND REGIONAL
TRANSIT AUTHORITY

WASHINGTON STATE
DEPARTMENT OF TRANSPORTATION

By: Joan M. Earl
Joan M. Earl
Chief Executive

By: Paula Hammond
Paula Hammond
Secretary of Transportation

Date: 11-3-11

Date: 11/3/11

APPROVED AS TO FORM

APPROVED AS TO FORM

By: Betty Ngan
Betty Ngan
Senior Legal Counsel

By: Bryce Brown
Bryce E. Brown Jr.
Senior Assistant Attorney General

Exhibits

Exhibit A	Depiction of I-90 Right of Way and Center Roadway Airspace Lease Area
Exhibit B	R8A Project Description
Exhibit C	R8A Project Elements and Sound Transit's Funding Contributions to R8A
Exhibit D-1	Actions, Reviews and Approvals for Completion Before Commencement of Temporary Construction Airspace Lease
Exhibit D-2	Actions, Reviews and Approvals for Completion Before Commencement of 40-Year Airspace Lease
Exhibit E	Temporary Construction Airspace Lease, Legal Description, and Plan Set
Exhibit F	40-Year Airspace Lease, Legal Description
Exhibit G	USDOT Letter dated Dec. 1, 2009
Exhibit H	Appraisal Instructions
Exhibit I	Amendment to Restated Land Bank Agreement
Exhibit J	Subjects for O&M Agreements

EXHIBIT A

Depiction of I-90 Right of Way and Center Roadway Airspace Lease Area

EXHIBIT B

R8A Project Description

The I-90 Two-Way Transit and HOV Operations Project will implement improvements to I-90 to improve the reliability of transit service and for other HOV users in the I-90 corridor between Seattle and Bellevue. These improvements, referred to as Alternative R-8A in the EIS prepared for the R8A Project, will create HOV lanes in the I-90 outer roadways between I-5 at a point approximately at Rainier Avenue in the city of Seattle and I-405 and Bellevue Way in the city of Bellevue, Washington; and transit and HOV direct access modifications at 77th and 80th Avenues on Mercer Island, and at Bellevue Way. The HOV lanes will pass through the Mount Baker Ridge Tunnel and Lid in the city of Seattle, as well as the First Hill Lid on Mercer Island. Upgrades that will be made to these tunnels include the ventilation and fire detection and suppression systems, tunnel control systems, tunnel ITS systems, tunnel electrical and power systems, along with enhanced signing and illumination. The R8A Project also includes a number of mitigation measures to minimize impacts associated with the operation of R8A. These include speed management, enhanced delineation and signing, enhanced illumination, and enhanced incident management program. Where lanes are shifted relative to the existing concrete panels, dowel bar retrofit will be implemented.

The R8A Project has been implemented in phases or stages. Current phasing of the R8A Project is as follows:

- Stage 1 – Westbound HOV, Bellevue Way to 80th Avenue SE
- Stage 2 – Eastbound HOV, 80th Avenue SE to Bellevue Way
- Stage 3 – Eastbound and Westbound HOV, I-5 to 80th Avenue SE

The overall R8A Project limits extend from I-90 opposite approximate Mileposts 2.72 to opposite approximate Milepost 10.34.

[Insert graphic in final version]

EXHIBIT C

R8A Project Elements and SOUND TRANSIT's Funding for R8A¹

R8A Project Elements	Sound Transit Funding Provided (\$ Million)
Stage 1	\$24.8
Stage 2	\$31.7
Stage 3	\$109.2
Bellevue Way Ramp (E-N) ⁽¹⁾	\$9.5
ST administrative costs ⁽²⁾	\$9.8
Stage 3 CEVP Deficit ⁽³⁾	\$29.9

- 1) ST is providing \$9.5 to WSDOT to rebuild a Bellevue Way Ramp (E-N) as part of R8A construction.
- 2) ST set aside additional \$9.8 funds for admin costs and contingency
- 3) Current estimate shows a shortage of \$29.2 M that WSDOT expects Sound Transit is expected to fund

All estimates based upon 2010 Mitigated CEVP costs

¹ Should include \$18.4 million, which is the amount of the STATE's funding obligation for Stage 2 and Stage 3 of R8A which ST has agreed to assume.

Exhibit D-1

Reviews, approvals and documents necessary prior to commencement of TCAL. All actions to be completed by approximately December 31, 2014.)

Action	Completion Date
East Link FEIS is published	July 15, 2011
Sound Transit Board's final decision on the East Link project	July 28, 2011
Record of Decision is issued by FTA	4th Quarter 2011
FHWA issues preliminary East Link Interchange Justification Report determination	June 22, 2011
WSDOT works with FHWA to issue NEPA Determination and final approval of IJR through a Record of Decision	4th Quarter 2011
Sound Transit provides funding to the State for construction of stage 2 and 3 of R&A	Ongoing
Appraisal Update	One (1) year prior to commencement of light rail construction
Access break request documentation reviewed and approved by WSDOT and FHWA.	1 st Quarter 2014
Red-green markups of WSDOT ROW Plans reviewed and approved by WSDOT and FHWA.	1 st Quarter 2014
Review and approval of final legal descriptions and depictions for the TCAL by WSDOT.	1 st Quarter 2014
Project Design Approval completed reviewed and approved by WSDOT and FHWA. (Project Design Approval will consist of final approval for ROW plans and documentation, geotechnical and structural design including walls, bridges, track bridge design and plinth attachment approvals, tunnel and lid designs, IRT issue resolution, environmental mitigation plans, utility relocation and design, traffic control plans, and construction phasing and coordination.)	3 rd Quarter 2014
FHWA approval of TCAL and ASL	3 rd Quarter 2014
The O&M Agreement for the construction period is approved by FHWA and executed by WSDOT and ST.	3 rd Quarter 2014
R&A project is completed and open to vehicular traffic	December 31, 2014

Exhibit D-2

Reviews, approvals and documents necessary prior to commencement of ASL. (All actions to be completed by approximately early 2020.)

Action	Completion Date
Update legal description and depiction, if needed, to reflect operating ASL premises. It is expected that the operating premises will have less square footage than the TCAL premises.	1 st Quarter 2020
Update and approve access break documentation, if needed.	1 st Quarter 2020
Update and approve red-green plan markups, if needed.	1 st Quarter 2020
The O&M Agreement for the operations period is approved by FHWA and executed by WSDOT and ST.	1 st Quarter 2020
Start of light rail revenue service	1 st Quarter 2020

EXHIBIT E

Temporary Construction Airspace Lease

Legal Description, And Plan Set

EXHIBIT F

40 Year Operating Airspace Lease
Legal Description

EXHIBIT G

USDOT Letter Dated December 1, 2009

EXHIBIT H

APPRAISAL INSTRUCTIONS INTERSTATE 90

- 1) The appraisal report must be a self contained complete appraisal of the described Center Roadway Property ("CRP").
- 2) The appraisal report must comply with the Uniform Standards of Professional Appraisal Practice and Chapter 4 of the WSDOT (STATE) Right of Way Manual.
- 3) STATE must be listed as an intended user of the appraisal report.
- 4) The appraiser is to estimate the underlying land value as owned if fee title. The appraiser shall also come up with the lease rate (market rent) based on the across the fence valuation method. The appraiser shall also convert this figure to a present value lump sum payment for a rental period of 45 years.
- 5) Any allocation between interests in the subject CRP due to the current funding allocations or consideration of existing transportation improvements shall be handled separate from this appraisal under the I-90 Umbrella Agreement.
- 6) The intended use of the appraisal is to establish a value for the fee title to the underlying land to allow SOUND TRANSIT's proposed use of CRP for the light rail system.
- 7) Across the Fence Valuation is the preferred method of establishing the value of the underlying fee title to the land. (Following the Tukwila model).
- 8) Those portions of this corridor located above bedlands of Lake Washington are outside the scope of this assignment.

EXHIBIT I

Form of Amended Restated Land Bank Agreement

EXHIBIT J

Anticipated Subjects for Operations and Maintenance Agreements

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