

FINAL REPORT

**AN ANALYSIS OF METHODOLOGIES
TO VALUE THE REVERSIBLE
(CENTER) LANES ON INTERSTATE 90
TO BE USED FOR HIGH CAPACITY
TRANSIT PURSUANT TO SOUND
TRANSIT PROPOSITION I APPROVED
BY VOTERS IN NOVEMBER 2008**

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1. INTRODUCTION

The history of the development and use of the Interstate 90 (I-90) corridor between I-5 and Bellevue Way is marked by controversy, litigation and political compromise. Years of litigation and studies resulted in federal approval of the project in September 1978 and the lifting of injunctions on construction in August 1979. The second span of the I-90 bridge (the Homer M. Hadley Memorial Bridge) opened on June 4, 1989.

The configuration of the corridor was the result of intense negotiations among the state and local governments over a number of years prior to the project's approval and construction. The agreement of the state and the local governments is set forth in a Memorandum Agreement (generally referred to as the Memorandum of Agreement ("MOA")) dated December 21, 1976, among King County, the Cities of Seattle, Mercer Island and Bellevue, the Municipality of Metropolitan Seattle, and the Washington State Highway Commission. The MOA provided in part:

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.

The MOA committed the parties to a configuration frequently referred to as 3-2T-3 in which "two lanes are designed for and permanently committed to transit use." There would not have been an expanded I-90, but for the 2-center transit lanes.

The MOA was central to the approval of the project by Brock Adams, United States Secretary of Transportation. In the September 20, 1978 Record of Decision (ROD) for the I-90 project, he specifically required,

as provided in the MOA, public transportation shall permanently have first priority in the use of the center lanes.

The MOA was amended in August 2004 to provide for high-capacity transit in the I-90 center lanes. High-capacity transit ("HCT") was defined in that amendment as "a transit system operating in dedicated right-of-way such as light rail, monorail or a substantially equivalent system". The 2004 amendment also called for implementation of the "R-8A" alternative for the I-90 corridor. The R-8A configuration provides for conversion of the three outer lanes of travel (eastbound and westbound) to four lanes, with one lane in each direction committed to bus and high occupancy vehicles. Upon completion of that development, the governments agreed to "move as quickly as possible to construct high capacity transit in the [I-90] center lanes." The parties to the 2004 amendment to the MOA remained the

same, with the Central Puget Regional Transit Authority (Sound Transit) substituting for the former Municipality of Metropolitan Seattle.

On November 12, 2008, voters approved expansion of Sound Transit, including the East Link Light Rail Project (ST2). Even before the vote, there had been ongoing planning for the East Link Project, including discussions between Sound Transit and the Washington State Department of Transportation (“WSDOT”) for use of the center lanes of I-90 for the East Link Project. Apparently sufficient issues arose between Sound Transit and WSDOT regarding a valuation of such use that the 61st Legislature enacted, as part of the State transportation budget, particular measures to assist in resolving the question of valuation of the I-90 center lanes. Chapter 470, Section 304(3), Laws of 2009. This “Analysis of Methodologies to Value the Reversible Lanes on Interstate 90 to be Used for High Capacity Transit Pursuant to Sound Transit Proposition I Approved by Voters in November 2008” (“Report”) is prepared pursuant to that legislative direction. In this Report, WSDOT and Sound Transit are collectively referred to as the “Agencies.” The term WSDOT is intended to incorporate its predecessor agencies (e.g., State Highway Commission).

One intended element of analysis for the Report was consideration of the position of the United States Department of Transportation’s Federal Highway Administration and Federal Transit Administration. The Federal agencies were not available for consideration on the schedule contemplated by the Legislature. As a result, the Report was initially delivered in draft form on July 20, 2009 without such consultation. Following receipt of relevant correspondence from the Federal Highway Administration on behalf of the Secretary of Transportation, the Report was completed and is now issued in Final form.

2. SCOPE OF WORK AND REPORT FORMAT

The legislature’s Joint Transportation Committee (JTC), working with WSDOT and Sound Transit, developed a scope of work for the selected consultants. The scope of work provides for two phases, and tasks within each phase. Phase I of that scope is to research and prepare analysis of agreements, commitments and valuation methodologies and prepare recommended appraisal instructions. Phase II of the work is to perform the approved valuation. Following issuance of the draft Report, at the direction of the Agencies the valuation report was prepared and delivered to the Agencies on November 16, 2009. Subsequently, a review appraisal report was also delivered to the Agencies. In addition to the Phase II valuation based on the recommended appraisal instructions contained in this

Report, the Agencies directed a further valuation analysis not discussed in this Report.

In this Report we provide a brief summary in Section 3. Certain relevant agreements and other documents are reviewed in Section 4. Federal and state laws, regulations and practices are addressed in Section 5. Our report on interviews with certain persons knowledgeable about elements of the analysis is in Section 6. Section 7 discusses valuation methodologies, including benefits and limitations on those methodologies. Section 8 contains draft appraisal instructions.

Appendix A is the Legislature's direction for this Report. Appendix B is a list of interviews and contacts. Appendix C is a list of materials that were considered. Appendix D is December 1, 2009 correspondence from the Federal Highway Administration. Other documents referenced in this Report have been provided to the Agencies.

3. SUMMARY OF ANALYSIS

The I-90 center lanes were constructed with transit as the first priority, with highway use available for a lengthy but indeterminate time. That highway use has continued for over twenty years, and will continue for some additional period of time until implementation of the R-8A configuration and construction of East Link light rail. We have considered the position of each of the agencies. Sound Transit urges that it should have no responsibility to pay for use of the center lanes for rail. WSDOT asserts that the state funded portion of the I-90 corridor may only be transferred upon payment of just compensation. It is our conclusion that consideration from Sound Transit to WSDOT for HCT use of the center lanes is required.

The I-90 corridor was constructed between approximately 1980 and 2000. Substantial funds were paid by the federal government from federal highway funds. The remainder was paid by the State of Washington.

In 1940, the voters adopted Amendment 18 to the state Constitution. That constitutional provision at Article 2, Section 40 ("Amendment 18"), created a special fund for all motor vehicle license fees and motor vehicle fuel excise taxes "to be used exclusively for highway purposes." WSDOT has represented, and we have assumed for the purposes of this Report, that Amendment 18-restricted funds were used for the State's share of match for receipt of federal highway funds.

Exclusive use of the center lanes of I-90 is to be transferred from WSDOT to Sound Transit. Sound Transit believes that federal funds should not be required to be reimbursed. WSDOT has confirmed it will not, in the absence of a directive from the Federal Agencies otherwise, claim that there should be reimbursement for federal dollars. The Federal Highway Administration by letter dated December 1, 2009 confirmed it would not require reimbursement.

An appraisal analysis that evaluates the State's contribution to the I-90 corridor is appropriate. As a result, we focus in this Report on the State's contribution to the I-90 corridor. Further, because we are addressing the center lanes, only 25% of that contribution is appropriate for consideration (two of the existing eight lanes). In this respect, there are no "damages" to the remainder of the corridor segment from the conversion of the center lanes to light rail. The agencies have already agreed to the R-8A program as a preliminary step to conversion of the center lanes to light rail. That program will create substitute lanes in the outer traveled

roadway, in each direction. In the “before” and “after” condition, the corridor will have eight lanes available to vehicles and bus transit as it does now.

This Report does not provide for a conclusion of value, but the methodology for reaching that conclusion.

This Report does not address property outside of the I-90 center lanes (e.g. property for passenger terminals and traction power substations). We are also aware that the I-90 corridor includes Lake Washington crossings authorized by the Department of Natural Resources (February 3, 1972). The right-of-way is noted on DNR records as a “limited access facility.” We are unaware of a charge to WSDOT by DNR for this continuing use.

4. AGREEMENTS AND DOCUMENTS

4.1 I-90 Memorandum of Agreement (December 21, 1976, MOA)

To “resolve the disputes which have surrounded the plans to construct an improved Interstate 90 (I-90) facility between Interstate 405 (I-405) and Interstate 5 (I-5),” the cities of Seattle, Mercer Island and Bellevue, the municipality of Metropolitan Seattle (“Metro”), King County and the Washington State Highway Commission entered into a Memorandum Agreement on December 21, 1976. The MOA is clearly a political compromise between those interested in a limited I-90 corridor and those seeking a larger highway segment. The MOA “represents substantial accommodations by the parties of positions held heretofore.” MOA at Section 14.

Based upon our investigation, and a close reading of the MOA, we believe it clear that the references in the MOA to future use of the I-90 center lanes for “transit” was for future fixed guide way or rail transit. The MOA uses the phrase “transit” in the context of bus and other, non-rail, transit differently in the context of the agreement. For example, Section 1(d) of the MOA states that the I-90 facility is to “provide priority by-pass access for **local transit** to the general purpose motor vehicle lanes.” Obviously, here local transit meant bus or similar transit activities. Similarly, in Section 1(e) the center lanes are referred to as “transit lanes” and initially “in the direction of minor flow, the transit lane shall be restricted to buses.” This reference preceded the determination to provide for reversible lanes in the I-90 corridor.

The I-90 facility was agreed to “contain provision for two lanes designed for and permanently committed to transit use.” MOA at Section 1(b). And, “the I-90 facility shall be designed and constructed so that conversion of all or part of the transit roadway to fixed guide way is possible.” MOA at Section 2. But, highway and transit uses were recognized as interim uses for an indeterminate period (continuing now in excess of 20 years). We find nothing in the MOA, our interviews or research that demonstrates interim highway use to be in any way inconsistent.

There is no discussion in the MOA regarding payment from a transit agency to the State Highway Commission (or successor agency) for use of that center roadway for transit. Because the center roadway was dedicated to transit, the issue appears not to have arisen in the discussions. See, in this regard, Report Section 6 regarding interviews with the drafters of the MOA. We have considered

WSDOT's position that "transit" use meant "highway transit use." And, we have considered Sound Transit's position that "transit" use does not permit further charges for use of the I-90 center lanes for conversion to light rail. Neither position finds support in the MOA.

4.2 I-90 Record of Decision (September 20, 1978, ROD).

Aubrey Davis, who was then at the Department of Transportation, advised that FHWA had recommended to Secretary Adams that the I-90 project not be approved. Concerns had been expressed about the lack of general purpose vehicle lanes and the cost of the project. Secretary Adams relied heavily on the agreements set forth in the MOA in approving the project. Specifically, "as provided in the MOA, public transportation shall permanently have first priority in the use of the center lanes."

The Secretary's decision on I-90 (or Record of Decision (ROD)) was issued promptly upon the release of the final Environmental Impact Statement (EIS) for the project. He considered that EIS, the Puget Sound Council of Governments Alternatives Analysis regarding the I-90 corridor, as well as other alternatives and materials. The ROD specifically references the final configuration for I-90 as "six general traffic lanes – three eastbound, three westbound – and a two-lane center roadway reserved for transit vehicles, carpools and Mercer Island general traffic." ROD at 1. The ROD also recognized that Mercer Island traffic would be controlled to maintain bus and carpool through-put. ROD at 6. However, the Secretary's decision selected the 3-2T-3 option, and not options for mass transit (which were not readily available at the time although evaluated in the EIS). Further, the ROD does not discuss issues relating to process or compensation for conversion of the center lanes from multiple uses to fixed rail use at some point in the future.

Not long after issuance of the ROD, Paul C. Gregson, Division Administrator, wrote to the Washington State Secretary of Transportation on October 4, 1978. That correspondence states specifically that "public transportation shall permanently have first priority in the use of the center lanes." USDOT sought a commitment from WSDOT to those conditions. Similarly, the USDOT by memorandum of January 25, 1980 to the Regional Federal Highway Administrator in Portland, Oregon, noted that the State may proceed to begin preliminary engineering for the entire mainline of I-90 but that "PS&E development on any section should not be to the extent so as to preclude any of the alternatives that are under consideration to provide transit access to Bellevue or Downtown Seattle."

The memo also noted that “the financing arrangements should not only be for those portions considered to be eligible for Interstate funding, but also for the portion that must be funded with other than Interstate funds.” The memo also states that the scheme must provide for “priority transit access” into the central business districts of Seattle and Bellevue “but need not be an elaborate plan. Provision of the HOV or bus only lanes in arterial streets with or without signal pre-emption may be adequate.”

On June 5, 1984, WSDOT prepared an intra-departmental memorandum for the project, listing commitments from the I-90 Final Environmental Impact/Section 4(f) Statement. The memo notes

“Other commitments made by the department were incorporated by reference to the “Findings and Order of the Board of Review, Interstate 90, Junction Interstate 5 to West Shore Mercer Island,” the “I-90 Memorandum Agreement” and an ACHP/FHWA/OAHP Memorandum of Agreement. These documents concisely present those commitments and have been included as an appendix.”

One of the documents titled “Measures to Mitigate Adverse Impacts” states “the preferential use of the center roadway for transit and carpools to improve transit patronage and reduce automobile traffic demand in the corridor.” See also May 27, 1977 memorandum from Federal Highway Administration to the Advisory Council on historic preservation to same effect.

4.3 Amendment to MOA (August 2004).

The MOA was amended in 2004 to address three principal points: adding Sound Transit as the regional transit authority with responsibility for “high capacity transit;” approving the R-8A redesign for the I-90 corridor; and, upon completion of R-8A, moving as quickly as possible to construct high capacity transit lanes.” In approving the 2004 Amendment, the State Highway Commission recognized the current understandings of the parties regarding the future configuration of I-90 and reaffirmed “the commitment [of the State] to conversion of the center roadway for use by high capacity transit, specifically:

- High capacity transit operating in the center roadway is the ultimate preferred configuration for I-90;
- Construction of high capacity transit operating in the center roadway should occur as soon as possible; and

- Implementation of high capacity transit should proceed as quickly as possible, depending on the outcome of required studies and on the securing of necessary funding.”

Washington State Transportation Commission Resolution No. 667 (September 16, 2004). Again, however, neither the 2004 Amendment nor the State Transportation Commission’s approval of that Amendment address issues of cost or consideration for use of those center lanes by Sound Transit. Neither Sound Transit nor WSDOT have identified writings that otherwise specifically address this issue.

4.4 Land Bank Agreement

Sound Transit and WSDOT have entered into a series of agreements relating to the acquisition by Sound Transit of WSDOT property for Sound Transit use. Currently there is a Restated Land Bank Agreement between the Agencies (December 1, 2003, “Land Bank Agreement”). The Land Bank Agreement is discussed in greater detail in Section 6 of this Report. The Agencies have advised us that the Land Bank Agreement is not directly applicable to the transfer of the I-90 center lanes.

Here, we note only that the Land Bank Agreement recognizes that there is WSDOT property “that is not presently needed for highway purposes and which will be used by Sound Transit for non-highway purpose” and WSDOT property “that is no longer needed for highway purposes.” Land Bank Agreement at Sections 2.2 and 2.3. We understand WSDOT has not yet determined how it views the I-90 center lanes in relation to either of these categories. For purposes of this Report, we have determined that the I-90 center lanes have been permanently committed to transit use since 1978; available to both highway and transit use since that time; that WSDOT is bound by the 1976 MOA and 2004 Amendment; and, that the implementation of R-8A and the development of light rail across the corridor will result in the I-90 center lanes either being no longer needed for highway purposes, or not presently needed for highway purposes.

We also note that in the Land Bank Agreement the Agencies agreed that “the net effect” of federal requirements permits WSDOT to allow Sound Transit use of both property not presently needed for highway purposes and property not needed for highway uses only if WSDOT “receives fair market value compensation” in return for non-highway uses. Land Bank Agreement at Recital F.

4.5 Other

We have considered certain other reports and documents, some of which are summarized in this section. A more complete list of materials considered is attached at Appendix B.

4.5.1 PSCOG I-90 Highway/Transit Alternatives Phase II Report (December 10, 1975, "1975 Report")

This 1975 Report was prepared by the Puget Sound Council of Governments ("PSCOG") to provide information on a wide range of alternative means "of providing for the travel demand in the I-90 corridor across Lake Washington."

"The I-90 project has been a matter of design studies and controversy for over 15 years. In recent years there has been a similar concern, nationwide, over the completion of planned urban commuter highways such as I-90. The 1973 Federal Aid Highway Act responded to these concerns by authorizing local governments to withdraw such highway segments from the Interstate System and use the equivalent federal-aid funds for the substitute transit project, which, in their judgment, better served the region's needs."

1975 Report at 1. The 1975 Report presented data on a wide range of alternatives for serving cross-lake travel including "guide way transit systems, bus transit improvements, and combinations of bus/highway improvements for I-90.

The PSCOG Study was commissioned by the State Highway Commission. That Phase II report provided a more detailed technical evaluation of specific transit alternatives which dealt with transportation service improvements in the cross-lake corridor. Material developed by the PSCOG report was intended for incorporation into the final EIS for I-90. The alternatives that were evaluated were:

- Horseshoe fixed guideway
- Eastgate/Seattle Center fixed guideway
- Modified bus guideways
- No build
- Low capital alternative
- Implement adopted 1990 Bus Transit Plan

In the Phase I Report, one of the alternatives studied by PSCOG was implementation of a previously adopted 1990 Bus-Transit Plan (except for an

exclusive bus way which would have been part of the deleted I-90 Highway Project).

“It was not recognized at that time [of the Phase I Report] that Interstate transfer projects provided for under Section 103(e)(2) of Federal Highway Act also permitted the construction of busways as interstate highway projects without any auto lanes involved.

It was reported in Phase I that mass transit substitution funds would not be used to fund any of the exclusive bus lanes and busways for the adopted 1990 Plan. For these reasons, the modified bus guideway concept was advanced as a means of adopting the mass transit orientation of the substitution provisions of Section 103(e)(4) to apply to the needs of this region for funding of exclusive busways.”

1975 Report at 21. At that same page 21 under the heading “Cross-Lake Transit Facilities” the following appears.

“In all cases, the adopted 1990 Bus Transit Plan assumes . . . that 2 lanes would be added to I-90 for the exclusive use of buses and/or buses and carpools under various different operating schemes.”

It does not appear that the “1990 Bus Transit Plan” was directly integrated into the I-90 decision. Note, PSCOG made no recommendations in its 1975 Report concerning a final solution of cross-lake travel questions.

4.5.2 I-90 EIS (September 22, 1978)

On September 22, 1978, the State Department of Highways and FHWA issued its Final Environmental Impact Statement for the SR 90, Junction SR 5 to Vicinity Junction SR 405. The EIS included a Section 4(f) Statement setting forth the basis for the determination that there were no feasible and prudent alternatives to the use of the land in the I-90 corridor and that the highway proposal includes all possible planning to minimize harm to the subject area resulting from the I-90 project.

The EIS is a multi-volume document. Key references include:

The existing highway offers no special provisions or incentives for mass transit...the proposed facility is responsive to this need for a better public transportation corridor between Seattle and the east side of Lake

Washington. It will include a two-lane center roadway for preferential use by transit. While these lanes are initially intended for operation of buses, carpools and limited general traffic from Mercer Island, they could be readily modified to accommodate a wide range of public transportation options, including fixed guideway or group rapid transit vehicles and light or heavy rail facilities.

The EIS considered rail transit alternatives, including rail transit, heavy rail, light rail and group rapid transit. EIS at 477-488. The rail transit alternate described in the EIS is “very similar to the alternative evaluated by PSCOG as the “Eastgate/Seattle Center fixed guideway” alternative. See PSCOG, “I-90 Highway/Transit Alternatives: Phase II (Draft),” pages 6 and 12-14, cited at EIS page 478, footnote 1. The EIS states that “continued use of the existing roadway under the rail transit alternate would effectively preclude the inclusion of some of the most important amenities of the proposed plan and the 3-2T-3 alternate.” EIS at page 478. It is clear that none of the rail transit alternates was selected. The 3-2T-3 plan included two center lanes: “designed for bus transit use, but which did not preclude eventual use by carpools or conversion to fixed guideway transit.” EIS at page 81.

The 1976 MOA was integrated into the EIS.

The Agreement specifies that there shall be two lanes designed to accommodate either a two-way or a reversible method of operation at no less than 45 miles per hour average speed, with the first priority given to transit, the second to carpools and the third to general Mercer Island traffic.

EIS at 17.

Note with respect to capital costs of the proposed facility, the FEIS states that “in the State of Washington . . . the 90/10 percent formula will actually result in the federal government paying 90.64 percent of the costs and the State paying 9.36 percent of the costs. EIS at 20.

4.5.3 I-405 Corridor Program

On June 20, 2002 a final Environmental Impact Statement was issued on the I-405 Corridor Program. The EIS was followed by a Record of Decision issued by FHWA and FTA on October 9, 2002. The I-405 corridor generally covers an area extending between the interchanges with I-5 at Tukwila and Lynnwood. As

reflected in the 2002 ROD, FTA, FHWA, WSDOT, Sound Transit and the King County Department of Transportation concurred that the selected alternative met the purpose and need for the program. The selected alternative included Bus Rapid Transit (BRT), and distinguished BRT from fixed-guide way “high capacity transit systems.” Throughout the ROD for the I-405 corridor, BRT was used distinctly from HCT.

4.5.4 I-90 Two-Way Transit and HOV Operations Project

The I-90 Two-Way Transit and HOV Operations Project evaluated two-way transit and high occupancy vehicle operations on I-90 between Bellevue and Seattle. The final Environmental Impact Statement was issued for that project on May 21, 2004 by Sound Transit, FHWA and WSDOT. The preferred alternative evaluated in the EIS was the R-8A configuration for I-90.

The EIS stated,

Alternative R-8A would be the most adaptable alternative in terms of compatibility for conversion of the I-90 center roadway to light rail use. Alternative R-8A would reduce both the construction impacts and long-term impacts of light rail operations on I-90. Alternative R-8A would prepare the corridor for future light rail in the I-90 center roadway by providing HOV lanes and associated HOV direct access ramps on Mercer Island for both directions of travel in the outer roadway, providing a two-way link in the Core HOV lane system for the Puget Sound region. Modifications to the HMH [Homer M. Hadley] floating bridge would not preclude converting the center roadway to light rail transit in the future.

EIS at S-20.

The R-8A preferred alternative adds HOV lanes on the outer roadways. It narrows outer roadway lanes and shoulders to add a transit and carpool lane in each direction; and, maintains current center roadway reversible operation.

The EIS notes that while this particular project for transit and HOV operations “is not a light rail or High Capacity Transit (HCT) project; it is intended to improve regional express bus transit and HOV operations.” EIS at S-19. “Light rail is discussed in this FEIS only as to whether any of the alternatives either preclude future light rail on I-90 or would facilitate future

light rail.” *Id.* The 2004 EIS recognizes that separate environmental analysis would be required for HCT.

The Record of Decision for that project was issued on September 28, 2004. And, as previously discussed, the 1976 MOA had been earlier amended in August 2004 to provide for the same R-8A Program. As stated in the September 2004 ROD, alternative R-8A was chosen because:

- Alternative R-8A meets the purpose of the project, which is to improve reasonable mobility by providing reliable and safe two-way transit and HOV operations on I-90 between Bellevue and Seattle, while minimizing impacts to the environment and to other users and transportation modes.
- Alternative R-8A would accommodate the ultimate configuration of I-90 (High Capacity Transit “HCT” 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.

2004 ROD at 10.

4.5.5 Sound Transit East Link Project

The draft Environmental Impact Statement for the Sound Transit East Link Project was issued by Sound Transit, FTA and WSDOT on December 12, 2008. The public comment period has closed, and the final Environmental Impact Statement is in preparation. We understand from the Agencies that they are close to resolution of mitigation for the conversion of the I-90 center lanes from highway and transit operations to an exclusive rail corridor.

The purpose of the East Link Project is to expand the Sound Transit Link Light Rail System from Seattle to Mercer Island, Bellevue and Redmond, via I-90 and routes north. In 2006, Sound Transit prepared its East Corridor High Capacity Transit Mode Analysis History. The Sound Transit Board later determined that light rail is the preferred high capacity transit technology for the I-90/East Corridor connecting the east side. DEIS at 1-9. A history of previous studies and planning for regional high capacity transit, including light rail, is summarized in the draft EIS.

The draft EIS also addressed I-90 floating bridge design considerations. Specific concerns identified were suitability of expansion joints on the transition span

between the approach bridges and the floating bridge; additional weight of rail and trains; stray electrical currents; seismic upgrades; and installation and maintenance issues. The DEIS reported that the Joint Transportation Committee had commissioned an Independent Review Team (IRT) to evaluate such matters and the IRT concluded that all issues identified as potentially affecting feasibility of light rail on the I-90 center roadway can be addressed.

On July 23, 2008, Sound Transit Chief Executive Officer, Joni Earl, wrote to WSDOT Secretary Paula Hammond. That letter states the following question and answer:

Do the planning and financial cost and funding plans within the ST-2 Plan for East Link assume that Sound Transit has responsibility for the cost and risk to construct and maintain electric light rail on the I-90 bridge? The short answer is yes.

We understand that specifics of this commitment remain under discussions between Sound Transit and WSDOT, including the allocation of costs and credits for implementation of the R8-A Plan and related highway improvements.

5. FEDERAL AND STATE LAWS, REGULATIONS AND PRACTICES

5.1 Federal Highway and Mass Transit Laws and Regulations

Several federal statutes and regulations may affect the disposition of real property acquired with federal highway or mass transit funds. These laws are identified below and discussed in the context of the I-90 center lanes. The general trend of these laws, and the limited case law interpreting them, is that there appears to be no clear federal repayment requirement from Sound Transit to WSDOT for the I-90 center lanes. Moreover, certain statutes indicate that WSDOT should agree to the provision of any available area for the development of public mass transit facilities. Certain federal administrative regulations cloud the issue and may require an examination of future highway needs relative to the use of a facility to provide mass transit. In either case though, we would not conclude that a payment of fair market value, the amount required when federal law mandates payment, would be required.

23 U.S.C. § 104(k) is a Federal Highway Administration statute generally allowing FHWA funds (often referred to as Title 23 funds) to be transferred to Federal Transit Administration projects (Title 49, Chapter 53 funds) and vice versa. The current version of this law was adopted in 2005 as part of the SAFETEA-LU transportation enactment (Pub.L. 109-59, 2005), which amended 1999's TEA-21 (Pub.L. 105-178). However, neither version of 23 U.S.C. § 104(k) contains a retroactive application clause, raising the question of whether this statute could be used to justify a cost-free transfer of an existing structure developed with FHWA funds.¹ No court has construed this statute to date.

Under FHWA statute **23 U.S.C. § 111**, state agreements with FHWA regarding the interstate system must include a clause barring the State from adding additional access points or exits to the highway. These agreements “may” authorize states to allow the use of airspace above and below the highway if it “will not impair full use and safety of the highway, as will not require or permit vehicular access to such space directly from such established grade line of the highway, or otherwise interfere in any way with the free flow of traffic on the Interstate System.” 23

¹ Statutes do not apply retroactively unless there is a clear legislative intent to do so: “We have frequently noted, and just recently reaffirmed, that there is a presumption against retroactive legislation [that] is deeply rooted in our jurisprudence. The principle that the legal effect of conduct should ordinarily be assessed under the law that existed when the conduct took place has timeless and universal appeal. Accordingly, we apply this time-honored presumption unless Congress has clearly manifested its intent to the contrary.” *Hughes Aircraft Co. v. U.S. ex rel. Schumer*, 520 U.S. 939, 946, 117 S.Ct. 1871, 1876 (1997) (internal citations omitted).

U.S.C. § 111(a). This statute existed in substantially its current form at the time of the 1976 I-90 MOA and other planning documents related to the I-90 express lanes. Pub.L. 87-61, 75 Stat. 122 (1961).

Although the statute uses the word “may,” the Comptroller General interpreted 1961 amendments to the statute (allowing non-impairing uses of airspace) to be a non-discretionary requirement of state/FHWA agreements rather than simply permissive. 41 Comp. Gen. 653, 1962 WL 1698 (1962). Under this interpretation, WSDOT has authority to allow uses of I-90 airspace that will not “impair the full use and safety of the highway.”

The only court case interpreting the air rights clause of 23 U.S.C. § 111 addresses the crossing of an interstate 10 times in a 40-year period by heavy mining equipment. *Citizens Organized to Defend Environment, Inc. v. Volpe*, 353 F.Supp. 520 (D. Ohio 1972).

23 U.S.C. § 120(a) defines the federal share of interstate projects as 90 percent of the total cost of the project. The federal share may rise to as high as 95 percent based on the percentage of a state’s land set aside for certain public and Indian land. States may determine a lower federal share than set by formula at their discretion. This statute has never been construed by a court.

23 U.S.C. § 142(f) is an FHWA statute that directs that the Secretary of Transportation shall authorize a state to make any sufficient land or air space in public highway rights-of-way available for rail systems and highway/nonhighway public mass transit facilities, either with or without a charge, so long as such accommodation will not affect automobile safety. This statute is implemented by 23 C.F.R. §810 *et seq.* (discussed below) but has not been interpreted by any court.

23 C.F.R. §810.200 states that “the purpose of this subpart is to implement 23 U.S.C. 142(f), which permits the Federal Highway Administrator to authorize a State to make available to a publicly-owned mass transit authority existing highway rights-of-way for rail or other non-highway public mass transit facilities.”

23 C.F.R. §810.204 states that “a publicly-owned mass transit authority desiring to utilize land existing within the publicly acquired right-of-way of any Federal-aid highway for a rail or other nonhighway public mass transit facility may submit an application therefor to the State highway agency.” **23 C.F.R. §810.206** allows WSDOT to request the Federal Highway Administrator to authorize it to “make available to the publicly-owned mass transit authority the land needed for the proposed facility. A request shall be accompanied by evidence that utilization of

the land for the proposed purposes will not impair future highway improvements or the safety of highway users.”

23 C.F.R. §810.210 requires a written agreement following approval of the mass-transit authority request. The written agreement conditions the use of highway right-of-way to require WSDOT approval of significant design revisions, bars transfer of the available land to a third party without WSDOT approval, and provides for a use termination and reversion to WSDOT after failure to use the land in a reasonable time.

Finally, **23 C.F.R. §810.212** directs that “*use and occupancy of the lands made available by the State to the publicly-owned transit authority shall be without charge. Costs incidental to making the lands available for mass transit shall be borne by the publicly-owned mass transit authority.*” (Emphasis supplied).

Interpreting 23 U.S.C. §142(f) and its enacting regulations is complicated by the fact that the FHWA never updated the implementing regulations after Congress last amended 23 U.S.C. §142(f). *See* Pub.L. 102-240 § 1027(d), 105 Stat. 1966 (1991); 50 FR 33915-02, 33917 (1985) (announcing FHWA amendments to 23 C.F.R. § 810).

Specifically, Pub.L. 102-240 § 1027(d) struck this paragraph:

(g) In any case where sufficient land exists within the publicly acquired rights-of-way of any Federal-aid highway to accommodate needed rail or nonhighway public mass transit facilities and where this can be accomplished without impairing automotive safety or future highway improvements, the Administrator may authorize a State to make such lands and rights-of-way available without charge to a publicly owned mass transit authority for such purposes wherever he may deem that the public interest will be served thereby.

and replaced it with this:

f) AVAILABILITY OF RIGHTS-OF-WAY. In any case where sufficient land or air space exists within the publicly acquired rights-of-way of any highway, constructed in whole or in part with Federal-aid highway funds, to accommodate needed passenger, commuter, or high speed rail, magnetic levitation systems, and highway and nonhighway public mass transit facilities, the Secretary shall authorize a State to make such lands, air space, and rights-of-way available with

or without charge to a publicly or privately owned authority or company or any other person for such purposes if such accommodation will not adversely affect automotive safety.”

Congress clearly struck the requirement for FHWA to consider future highway improvements and the public interest, while also changing the permissive “may authorize” to “shall authorize.” This would appear to reflect a legislative intent that transit is always in the public interest and installing public mass transit is more desirable than weighing future highway improvements against more immediate transit use. Moreover, where there is sufficient land or air space for public mass transit, FHWA now must authorize states to make such space available. Congress also expanded the range of transit authorities to whom such lands may be made available to both public and private and also allowed that such conveyance may be with or without charge.

A reasonable reading invoking both the statute and the regulations is that FHWA must authorize WSDOT to convey to a publicly owned authority sufficient land/airspace to accommodate needed public mass transit facilities - - without charge. *See* 23 U.S.C. §142(f); 23 C.F.R. §810.212. *See also* 23 C.F.R. § 710.403 (regulating real estate management of federally-aided facilities). *But see* 23 C.F.R. §710.405(c) (1999) (“[A State Transportation Department] may make lands and rights-of-way available without charge to a publicly owned mass transit authority for public transit purposes whenever the public interest will be served, and where this can be accomplished without impairing automotive safety or future highway improvements.”); 64 FR 71284-01 (1999) (discussing 23 C.F.R. § 710.405: “The final rule in § 710.405 continues to specify procedures the States will be required to follow in use of airspace on the Interstate facilities which have received funding under Title 23 U.S.C. in any way. However, these airspace requirements will no longer be mandated for non-Interstate highways.”)

No court has interpreted 23 C.F.R. §810.200, *et seq.*

23 C.F.R. Part 710 – Subpart D (§§710.401 - .409) is the subpart of Department of Transportation regulations that govern the acquiring agency’s responsibilities related to the control of real property for highway projects using federal aid (in any project phase).

23 C.F.R. §710.401 requires that changes in access control, use, or occupancy on interstates requires FHWA approval. The State’s ROW operations manual shall specify procedures for rental, leasing, maintenance, and disposal of land acquired with Title 23 funds.

23 C.F.R. §710.403 requires that all real property in federally-aided facilities be devoted exclusively to the facility unless alternative use is permitted by federal regulation or FHWA. Alternative uses must be consistent with the operation, maintenance, and safety of the facility. Current fair market value or rent shall be charged for use or disposal of real property. Fair market value (“FMV”) is defined by state statute and/or state common law. Certain uses may be excepted from the FMV requirement with FHWA approval, including public transportation under 23 U.S.C. 142(f), social/environmental/economic purposes in the overall public interest, and nonproprietary governmental uses. The federal share of net income from the sale or lease of property shall be used for Title 23 eligible projects.

23 C.F.R. §710.405 purports to govern air rights management. *Cf.* 23 U.S.C. § 142(f); 23 C.F.R. §810.212. States must assure that any airspace use is in the public interest, does not impair the highway, or interfere with free and safe flow of traffic. The state, with prior FHWA approval, may grant use of airspace when it is not presently or in the foreseeable future required for operations and maintenance of highway facility. **Neither FHWA approval nor a charge is required for State to make land and right-of-way available for “publicly owned mass transit authority for public transit purposes whenever the public interest will be served, and where this can be accomplished without impairing automotive safety or future highway improvements.”**

23 C.F.R. §710.407 governs leasing of federally funded facilities. Leases must ensure safety and integrity of the federally funded facility; changes to facility shall be without cost to federal funds; and, uses shall conform to current FHWA design and safety criteria.

23 C.F.R. §710.409 governs disposals of federally funded facilities. The regulation requires other government agencies be given the opportunity to acquire disposed property for parks/recreation/etc. States can transfer property to other government agencies **at less than FMV** for continued public uses approved by FHWA while retaining a reversion right for failure to maintain public use.

23 U.S.C. § 156 is an FHWA statute directing states to charge, at a minimum, fair market value, for the sale, use, or lease of real property acquired with federal Highway Trust Funds. Transportation projects eligible for assistance under Title 23 U.S.C. are excepted from this requirement. Transit projects can be built with Title 23 highway funds if they are otherwise eligible for Title 49, Chapter 53 U.S.C. funds. The project must be in the same corridor as the national highway, the project will improve level of service on the highway, and the transit project is more cost-effective than highway improvements. 23 U.S.C. § 103(b)(6)(C). 23

U.S.C. § 156 section also **does not require fair market value for right-of-way** occupancy under 23 U.S.C. § 142, discussed *supra*. In addition, the Secretary of Transportation may grant exceptions to the fair market value requirement for “social, environmental, or economic” purposes. Income gained by a state under this section is required to be used by the state for projects eligible for funding under Title 23 U.S.C.

49 C.F.R. §18.31 is the Common Rule for Grants that governs the disposition of real property acquired with federal grant money, providing in pertinent part “(b) Use. Except as otherwise provided by Federal statutes, real property will be used for the originally authorized purposes as long as needed for that purposes, and the grantee or subgrantee shall not dispose of or encumber its title or other interests.”

If real property is no longer needed for the originally authorized purpose, 49 C.F.R. §18.31 provides methods of disposition and generally requires repayment of the federal Highway Trust (Title 23 U.S.C.) Fund. However, repayment is not required for highways withdrawn from the Interstate System pursuant to 23 U.S.C. §§ 103(e) (5), (6), or (7).

There are no court cases construing a situation like the I-90 center lanes as to whether transit or a particular form of transit is or is not an originally authorized purpose under 49 C.F.R. §18.31. One federal district court, however, has determined that the lease of federal property to third parties is not an unauthorized disposition of property under 49 C.F.R. §18.31:

The Department of Transportation promulgated regulations designed to establish "uniform administrative rules for federal grants ... to state, local and Indian tribal governments." 49 C.F.R. § 18.31 et seq. These regulations address both the use and the disposition of real property acquired under federal grants. *Pursuant to these regulations, grantees are encouraged to rent real property acquired with federal grant funds in order to earn income and defray program costs. 49 C.F.R. § 18.25(a). However, real property obtained with federal funds must be used for its originally authorized purpose and the grantee or subgrantee may not dispose of or encumber its title. 49 C.F.R. § 18.31(b). If the grantee violates these regulations and disposes of real property obtained with federal funds, he must compensate the awarding agency. 49 C.F.R. § 18.31(c).*

In this case, MARTA created a joint development plan in which it leases federal property to third party investors and retains lease proceeds as program income. This activity is authorized under federal statutes and regulations. See 49 U.S.C. § 5302(a)(1)(G) (authorizing the FTA to provide funding for a mass transportation improvement that incorporates private investment); 49 C.F.R. § 18.25 (noting that grantees are “encouraged” to lease federal property to defray program costs).

Furthermore, MARTA continues to use the property for its “originally authorized purpose” and has not disposed of the property. 49 C.F.R. § 18.31(b). MARTA’s joint development plan enhances economic development, encourages transit use, and provides additional funding to the mass transit system. While third party investors are permitted to rent property at the Lindbergh station, this property continues to be used for its originally authorized “transit” purpose. Because MARTA’s joint development plan is authorized and “encouraged” under federal statutes and regulations, Plaintiff has failed to assert a violation of these regulations. Therefore, Defendant's Motion to Dismiss is GRANTED and Plaintiff's claim is dismissed with prejudice.

Woodham v. Federal Transit Admin., 125 F.Supp.2d 1106, 1111 (N.D.Ga. 2000) (emphasis supplied). Given the commitment to transit use of the I-90 center lanes in the 1976 MOA and 1978 ROD, it would be difficult to argue that any form of transit is not an originally authorized purpose for compliance with 49 C.F.R. § 18.31. Under *Woodham*, we conclude that an airspace lease between Sound Transit and WSDOT for the I-90 center lanes would be consistent with the requirements of 49 C.F.R. §18.31.

September 13, 2002 Comptroller General (General Counsel) Opinion Letter to Senator McCain re 23 U.S.C. §156 (B290744), 2002 WL 31073439

In this Letter, the Comptroller General opines that FHWA’s interpretation of 23 U.S.C. § 156 and the Common Rule for Grants, 49 C.F.R. §18.31, is exactly backward. FHWA interpreted 23 U.S.C. § 156 to allow states to consider the

proceeds of excess property dispositions as non-federal funds. The Comptroller General, agreeing with the Department of Transportation Inspector General, asserts that the proceeds of excess property dispositions do not lose their character as federal funds. Rather, 23 U.S.C. §156 was merely intended to streamline the process for a state to reapply disposition proceeds to other Title 23 projects.

49 C.F.R. §18.25(g)(7) implements the DOT common rule for air spaces, requiring that states charge fair market value for the sale, lease, or use of right-of-way airspace for **non-transportation** purposes and that such income shall be used for projects eligible under Title 23 U.S.C.

49 U.S.C. §5334(h) is an FTA statute governing the disposition of assets acquired under Chapter 53 but no longer needed for the purpose for which the asset was acquired. The Secretary of Transportation may authorize the recipient to transfer the asset to a local governmental authority for a public purpose, ending any obligation to the Federal Government:

(h) Transfer of assets no longer needed.--(1) If a recipient of assistance under this chapter decides an asset acquired under this chapter at least in part with that assistance is no longer needed for the purpose for which it was acquired, the Secretary of Transportation may authorize the recipient to transfer the asset to a local governmental authority to be used for a public purpose with no further obligation to the Government. The Secretary may also authorize a transfer for a public purpose other than public transportation only if the following four requirements are met:

(A) the asset will remain in public use for at least 5 years after the date the asset is transferred;

(B) there is no purpose eligible for assistance under this chapter for which the asset should be used;

(C) the overall benefit of allowing the transfer is greater than the interest of the Government in liquidation and return of the financial interest of the Government in the asset, after considering fair market value and other factors; and

(D) through an appropriate screening or survey process, that there is no interest in acquiring the asset for Government use if the asset is a facility or land.

Grant Management. FHWA Order 4410.1 (Feb. 28, 1994) sets out FHWA's Grant and Cooperative Agreement Policies and Procedures, but the Order does not apply to state funding received under the Federal-aid highway program (Title 23 funds). FHWA Order 4410.1 at ¶6. Generally, only the administrative requirements of 49 CFR Part 18 (common rule) and OMB Circular A-110 apply to grant management for Federal-aid highway programs. *Id.* OMB Circular A-110, however, does not apply to state or local governments, which are directed to follow OMB Circular A-102, 62 FR 45934 (1997). OMB Circular A-102 contains minimal direction regarding real property disposition except that federal agencies are encouraged to support privatization of federally-financed infrastructure consistent with Executive Order 12803, 57 FR 19063 (1992). Similarly, FTA Grant Management Requirements do not provide substantive guidance for the issues addressed in this Report. Those Requirements do provide some greater detail on the mechanisms for property disposition, but not on issues of valuation methodology. See FTA Circular 5010.1D, Grant Management Requirements (November 1, 2008). Subsequent to the publication of this Report in draft, the FHWA (for the Secretary of Transportation) wrote, in pertinent part, that

[The draft Report is] correct that the Federal Highway Administration would not require reimbursement of the Federal-aid highway funds expended in the construction of those center lanes should they be used for light rail transit.

See Appendix D.

5.2 State Property Disposition

This Report does not discuss the process or manner of transfer of the use of I-90 center lanes from WSDOT to Sound Transit. We note the statutory authority of WSDOT to dispose of or lease interests in real property to Sound Transit (a regional transit authority). RCW 47.12.063(2)(d) specifically authorizes WSDOT to transfer property to a regional transit authority, such as Sound Transit, when property

“is no longer required for transportation purposes and that it is in the public interest to do so, [WSDOT] may sell the property or exchange

it in full or part consideration for land or improvements or for construction of improvements at fair market value...

Similarly, WSDOT may “transfer and convey” any unused state-owned real property” when “consistent with the public interest.” RCW 47.12.080. That statute calls for an agreement and “a deed of conveyance, easement or other instrument.”

In *AGLO 1951–1953 No. 376* (August 13, 1952), the Attorney General found under former RCW 47.12.070 that it was

[N]ot the intent of the legislature to authorize the [state highway] commission to give away the subject lands without something in the way of consideration being returned to the motor vehicle fund. It would seem at the outset that if unused lands were given to a city or county for no monetary consideration it would constitute an unlawful diversion of motor vehicle funds, as such land is purchased from a definite fund provided by the motor vehicle users. However, if the establishment of the subject park will be of benefit to the motor vehicle users in much the same way as roadside improvements, which may be constructed by the commission from motor vehicle funds pursuant to section 88, chapter 53, Laws of 1937, RCW 47.10.010, then in that event there would be consideration of an indirect nature returning to the motor vehicle users.

AGLO 1951–1953 at 2-3. An informal opinion of the Attorney General’s Office is not controlling and is of generally limited application. This AGLO does not appear to have been withdrawn, and is likely to have limited applicability.

Additional statutory authority allows WSDOT to lease land, improvements, or airspace held for highway purposes, including limited access highways not presently needed for highway purposes.² RCW 47.12.120 In interpreting this statute, the Attorney General informally concluded that in leasing land (or selling surplus land under what is now RCW 47.12.063) acquired with motor vehicle fund moneys, WSDOT is not required to obtain consideration from a leasing/acquiring governmental body that will continue to use the land for highway purposes. *AGLO 1975 No. 62* (July 17, 1975). Consideration (monetary or otherwise) is required if

² Some have opined that there is a general misconception of the term “highway.” It does not mean a certain kind of high capacity roadway. A highway is “every way, lane, road, street, boulevard, and every way or place in the state of Washington open as a matter of right to public vehicular travel” RCW 47.04.010(11).

the land or airspace acquired with motor vehicle fund moneys will be put to a nonhighway use. *Id.*

We are also mindful of Washington Const. art. II, § 40 (1940, “Amendment 18”) that requires that “license fees for motor vehicles and all excise taxes . . . on the sale, distribution or use of motor vehicle fuel” shall be used “exclusively for highway purposes.” The attorney general opined in 1957 that expenditure of motor vehicle funds for the purchase of additional right-of-way “in order for a rapid rail transit system to be built upon the median strip would constitute an expenditure of motor vehicle funds in violation of Amendment 18” *AGO 57-58 No. 104* (July 29, 1957).

The Supreme Court confirmed the strict construction of Article 18 in 1969. *State ex rel. O’Connell v. Slavin*, 75 Wn.2d 554, 452 P.2d 943 (1969). There, the court considered an appropriation by the legislature for public transportation planning. In finding the appropriation to be invalid under Amendment 18, the Court both reviewed the definitions of “highways” and “public transportation systems.” In response to an argument that the use of State highway funds (“Amendment 18–restricted funds”) for transit planning served highway purposes, the Court stated, in part, as follows:

It may be conceded that, as the appellant argues, taking traffic off the highway benefits the highway in one sense but it is doubtful that that is the sense in which the framers were interested in obtaining benefits for the highway. It is obvious that it was the desire to secure the building and maintenance of highways so that they could be used; and we can take judicial notice of the fact that automobile drivers generally want more and better highways, leading to more places, rather than fewer, however nearsighted such an attitude may be. Also, it should be observed that the appellant’s argument is in more than one way self-defeating. If taking drivers of private vehicles off the roads relieves congestion and reduces wear and tear, carrying these same persons in buses may add to the congestion and increase the wear and tear, perhaps not so much as it alleviates these problems, but it is certainly not a benefit to the highways.

Id. at 560.

Also, taking money from the motor vehicle fund and spending it on public transportation does not benefit the highway system, however

much it may benefit the people as a whole or alleviate transportation problems.

Id. at 561-2.

WSDOT has advised that the records maintained by WSDOT cannot distinguish the source of funds for its approximate 10% contribution to the cost of the I-90 corridor over the approximate 20 year period between 1980 and 2000. We have not been charged with auditing those records. We rely on the representations of WSDOT that Article 18-restricted funds were used for the entirety of the I-90 corridor, including the center lanes. If this is in fact the case, then the expenditures for those center lanes may have violated Amendment 18. Alternatively, and notwithstanding the provisions of the MOA and ROD regarding two lanes designed for and permanently committed to transit use, WSDOT concluded that transit uses did not preclude highway uses and Article 18 funds were appropriate for use on the project. This Report makes no judgment in that regard. Rather, it addresses the legislature's direction to provide an analysis of valuation methods for those two center transit lanes. What is without challenge is that since constructed, the two I-90 center lanes have in fact been consistently used for highway purposes.

We have also not considered whether the State's investment of Article 18-restricted dollars for the segment of I-90 that was dedicated permanently to transit use, and consistently used for highway and transit related purposes, may have already been fully realized by use of the center roadways for non-exclusive transit use for nearly 20 years. Were this a private sector investment, an accounting analysis may demonstrate that the relatively small State investment for the center lanes (in relation to the total investment of both federal and state dollars for the entire project) may have been fully returned over the 20-plus year use of those center lanes by highway vehicle, including single occupancy vehicle, travel. However, it is not typical to use a rate of return to value public highway facilities. The Report does consider toll facilities in Section 7.

We note in this regard that the Agencies' Land Bank Agreement provides for a 20-year term of use for the full consideration paid by Sound Transit to WSDOT for highway right-of-way. With respect to those transactions, the Agencies have agreed that a 20-year term constitutes full consideration for the investment (airspace lease agreement).

6. INTERVIEWS

6.1 Federal

As part of our charge, we were to interview FTA and FHWA regional administrators or their designees. We initially addressed federal issues in the draft Report without prior input from the Federal Agencies, based upon our evaluation of other transactions and available information. As previously described, the Federal Highway Administration, responding for the Secretary of Transportation, on December 1, 2009 confirmed that there is no requirement for reimbursement of Federal funds upon conversion of the I-90 center lanes to light rail.

6.2 Local

We conducted numerous interviews of individuals identified both by Sound Transit and WSDOT, as well as individuals who directed us to other sources. Many of those interviews were conducted to better understand the context of 1976 MOA and the 2004 Amendment to that Agreement.

Of all those involved in the development of the 1976 MOA, principal responsibility for the final product rested with Ben Werner and Aubrey Davis, representing Mercer Island; Paul Kraabel representing the City of Seattle; and, Gary Zimmerman, representing the City of Bellevue. Mr. Zimmerman has specific recollection of writing the pertinent provisions of the Memorandum of Agreement (later, Memorandum Agreement) while sitting in the offices of the Executive Director of the Puget Sound Council of Government. The recollections and impressions of the participants in the process leading to the December 1976 MOA, while not consistent in all respects, can be summarized as follows.

There was no specific or general recollection that the issue of a transit agency payment for use of the I-90 center lanes was discussed or material to the consideration and adoption of the MOA. It was understood that but for the commitment to the 2-center transit lanes, there would not be an expanded I-90. There was uniform belief that the transit agency ultimately building out rail transit would be responsible for conversion of the center lanes for use by rail (whatever system was ultimately developed). Trains were the principal consideration on the minds of the participants, including those from Bellevue and Mercer Island. This was in recognition that, but for the future rail use of the center lanes, the City of Seattle would not agree to the I-90 project.

Some interviewees expressed the position that Sound Transit should not have to pay additionally for the right to use the I-90 center lanes. Some believed it appropriate that the State be reimbursed under the 18th Amendment for its actual contributions to the construction of the I-90 corridor; provided, that the amounts paid by Sound Transit for implementation of the R-8A Program (as well as other credits that may be available, similar to the Agencies' Land Bank Agreement) should be offset against the amount fixed for reimbursement of State highway fund expenditures.

In summary, our interviews with those most directly involved in the preparation of the 1976 MOA lead to a conclusion that there were no material discussions relating to a transit agency's payment for use of the I-90 center lanes for rail; and, no material discussions relating to reimbursement of State highway fund dollars expended on I-90 construction. Further, when reference was made in the MOA to "transit", the primary consideration on the minds of the drafters was ultimately rail transit. This is consistent with the specific provisions of the MOA that "the I-90 facility shall be designed and constructed so that conversion of all or part of the transit roadway to fix guide way is possible." MOA at Section 2. The temporal nature of that condition was founded on the prior failures of ballot measures for rapid (rail) transit, and the strong influence of the Seattle community for maintaining the opportunity for that rail transit alternative should, at some point, voters approve funding.

7. ANALYSIS OF APPRAISAL METHODOLOGY

7.1 General

We note the Legislature's direction for the employment of "consultant resources" deemed appropriate by the Secretary of WSDOT, Sound Transit's Chief Executive Officer, and the House and Senate Transportation Committee chairs. Such direction did not require the use of accountants, auditors or consulting engineers.

We recognize that in any appraisal work, other disciplines may be consulted by the appraiser to assist in resolving the valuation problem (e.g., land use planners, architects and engineers). But fundamentally, arriving at an opinion of value requires the exercise of judgment and not mathematic certainty.

7.2 Limited-Market and Special-Purpose Properties

The Appraisal of Real Estate (The Appraisal Institute, 12th Ed., 2001) is a recognized treatise on appraisal practices. In the following, we quote extensively from that section of text applicable to "limited-market" and "special-purpose" properties. There should be little doubt that the I-90 center lanes fit within such characterization. See A. Rahn, "Across the Fence Methodology for Valuation of Corridors: What Is It and How Is It Used," *The Appraisal Journal* (July 1, 2001) ("*Rahn I*"). The Agencies agree, and other stakeholders concur, that the I-90 center lanes shall soon only be available for HCT use, and that Sound Transit is the only "market" for that use.

When appraising a type of property that is not commonly exchanged or rented, it may be difficult to determine whether an opinion of market value can be reasonably supported. Such limited-market properties can cause special problems for appraisers. A limited-market property is a property that has relatively few potential buyers at a particular time, sometimes because of unique design features or changing market conditions. Large manufacturing plants, railroad sidings, and research and development properties are examples of limited-market properties that typically appeal to relatively few potential purchasers.

Many limited-market properties include structures with unique designs, special construction materials, or layouts that restrict their utility to the use for which they were originally built. These

properties usually have limited conversion potential and, consequently, are often called *special-purpose* or *special-design properties*. Examples of such properties include houses of worship, museums, schools, public buildings, and clubhouses.

. . . The distinction between market properties and limited-market properties is subject to the availability of relevant market data. If a market exists for a limited-market property, the appraiser must search diligently for whatever evidence of market value is available.

If a property's current use is so specialized that there is no demonstrable market for it but the use is viable and likely to continue, the appraiser may render an opinion of use value if the assignment reasonably permits a type of value other than market value. Such an estimate should not be confused with an opinion of market value. If no market can be demonstrated or if data is not available, the appraiser cannot develop an opinion of market value and should state so in the appraisal report. It is sometimes necessary to render an opinion of market value in these situations for legal purposes, however. In these cases, the appraiser must comply with the legal requirement, relying on personal judgment and whatever direct market evidence is available. Note that the type of value developed is not dictated by the property type, the size or viability of the market, or the ease with which that value can be developed; rather, the intended use of the appraisal determines the type of value to be developed. If the client needs a market value opinion, the appraiser must develop an opinion of market value, not use value.

The Appraisal of Real Estate at 25-26. See also definition of "Special-Purpose Property" as "[a] limited-market property with a unique physical design, special construction materials, or a layout that restricts its utility to the use for which it was built." *The Dictionary of Real Estate Appraisal* 342 (Appraisal Institute, 3rd Ed., 1993).

We understand the federal and state references to "fair market value." But there appears to be no true "market" upon which to determine value. There is only one seller (WSDOT) and only one buyer (Sound Transit), for conversion (as long anticipated) of a special-purpose property from transit (and highway) use to exclusive transit use. As discussed below, other appraisers have approached similar corridor valuation analysis with other than "fair market" value opinions.

And highway and transit agencies, including the Agencies, have accepted that approach. We address that approach in the next section.

7.3 Segmented Corridor Appraisals

7.3.1 WSDOT – Sound Transit Property Transactions

WSDOT is a state agency created pursuant to RCW 47.01.031. The statutory responsibilities of WSDOT include ownership, development, lease, maintenance and operation of the state highway system. In furtherance of its responsibility, WSDOT has acquired title to highway rights of way and other property using both federal and state funds.

Sound Transit is a regional transit authority of the state of Washington, authorized by public vote and Chapter 81.112 RCW. Sound Transit's responsibilities include the provision of high-capacity transportation systems, in coordination with other public transportation services provided by other public agencies throughout the Puget Sound region. Its Central Link (light rail) system from downtown Seattle to Tukwila opened July 18, 2009. Further phases for Sound Transit, including the East Link light rail segment, were approved by the voters of Pierce, King and Snohomish counties on November 12, 2008. Sound Transit has been in the planning for that East Link segment. A draft environmental impact statement was published on December 12, 2008. The comment period is closed and the final EIS is in preparation. The route for the East Link light rail from Seattle will use the I-90 corridor, including the I-90 floating and east channel bridges.

WSDOT and Sound Transit have a history of determining value and providing for transfer of certain rights in WSDOT property for use by Sound Transit for its facilities, including Link light rail. The current relationship is set forth in the Land Bank Agreement. The stated purpose of the Land Bank Agreement is to provide a framework for the WSDOT conveyance of property to Sound Transit; and to make portions of other WSDOT property available for non-highway use by Sound Transit in consideration of Sound Transit's funding of highway-purpose improvements.

Under the Land Bank Agreement, numerous transactions have been closed between WSDOT and Sound Transit. We have considered certain of those transactions. For example, we have considered the Airspace Lease Agreement for the link "Tukwila Freeway Route" (September 23, 2004, "Tukwila Agreement"). Consistent with the Land Bank Agreement, an appraisal of the Link corridor was performed. The fair market value for that corridor was determined to be

