SUPERIOR COURT OF WASHINGTON FOR KITTITAS COUNTY

KEMPER FREEMAN, JIM HORN, STEVE STIVALA, KEN COLLINS, MICHAEL DUNMORE, SARAH RINLAUB, AL DEATLEY, JIM COLES, BRIAN BOEHM, MARK ANDERSON and EASTSIDE TRANSPORTATION ASSOCIATION, a Washington nonprofit corporation, Plaintiffs, v. STATE OF WASHINGTON, CHRISTINE O. GREGOIRE, Governor, PAULA HAMMOND, Secretary of Transportation, Defendants. and CENTRAL PUGET SOUND REGIONAL TRANSIT AUTHORITY, Intervenor.	No. 11 2 00195 7 MEMORANDUM DECISION

INTRODUCTION

The plaintiffs filed suit against the defendants seeking declaratory relief pursuant to Chapter 7.24 RCW, for a writ of prohibition, for a writ of mandamus, and for injunction. Essentially, the plaintiffs ask this court to determine that the defendant Washington State

Department of Transportation (DOT) may not lease, sell, transfer or otherwise allow Central Puget Sound Regional Transit Authority (Sound Transit) to occupy any portion of Interstate 90 for light rail, a non-highway purpose, and to otherwise prohibit the State from leasing or using Interstate 90 for light rail. The parties are agreed as to the facts and each side seeks summary judgment in its favor.[1]

FACTS

The parties are in agreement as to the facts as outlined in their pleadings and as previously agreed to in Freeman v. Gregoire, 171 Wn.2d 316 (2011). Those facts are essentially as follows:

Interstate 90 is a state highway route that, in the vicinity of Lake Washington in King County, extends from the City of Bellevue across Mercer Island towards Interstate 5 (I-5), traversing two bridges. The portion of I-90 in dispute consists of eight total lanes: three general purpose lanes in each direction and a two-lane reversible center roadway. The center roadway is currently restricted to high-occupancy vehicles (HOV). I-90 was built in part with motor vehicle fund expenditures.[2] This motor vehicle fund is also used to maintain I-90.

The initial proposal to build the section of I-90 between Bellevue and I-5 was besieged by design and configuration conflicts between state and local jurisdictions. On December 21, 1976, following public hearings, King County; the cities of Seattle, Mercer Island and Bellevue; the municipality of metropolitan Seattle; and the Washington State Highway Commission executed a Memorandum of Agreement (MOA) regarding I-90. The MOA established that two of I-90's lanes be "designed for and permanently committed to transit use."

On September 20, 1978, the United States Secretary of Transportation issued the "decision document" approving federal funding for the proposed I-90 roadway. This decision contained an express condition that "public transportation shall permanently have first priority in the use of the center lanes."

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[1] The State of Washington and Intervenor Sound Transit each move for summary judgment in favor of the defendants/intervenor and support each other's motions for summary judgment. The plaintiffs seek their own summary judgment and opposes the defendants' and the intervenor's motions.

[2] See Article 2, Section 40 Washington State Constitution.

From 1998 to 2004, Sound Transit and the DOT conducted a planning and environmental review process regarding transit and HOV operation on I-90 between Seattle and Bellevue. Sound Transit and DOT identified plan "R8A" as the preferred alternative. One design feature of R8A was the reconfiguration and addition of HOV lanes to the I-90 outer lanes. In August 2004 the signatories to the 1976 MOA amended their original agreement. The amended 2004 MOA states:

> "'[T]he ultimate configuration for I-90. . . should be defined as High Capacity Transit in the center roadway and HOV lanes in the outer roadways. . . .High Capacity Transit for this purpose is defined as a transit system operating in dedicated right-of-ways such as light rail, monorail, or a substantially equivalent system."

Shortly thereafter, the Federal Highway Administration (FHA) selected R8A as the preferred alternative. On November 6, 2008, Sound Transit submitted the Sound Transit 2 Regional Transit System Plan (ST2) for voter approval. Included in the ST2 plan was a proposal for light rail operations beginning in Seattle, traveling over Mercer Island, and proceeding into Bellevue (east link). The east link portion of ST2 provides funding for placing HOV lanes on the outer roadway of I-90. Unlike the existing, reversible HOV lanes located in the center of I-90, the new HOV lanes would be dedicated to one direction of travel, one eastbound and one westbound, at all times. The east link also provides that the two center lanes of I-90 be used by Sound Transit for light rail. The ST2 plan was approved by the voters.

In 2009 the legislature inserted in the 2009 transportation budget, ESSB 5352, $300,000 from the motor vehicle fund for an independent analysis of methodologies to value the reversible lanes on I-90 to be used for high capacity transit. Section 306(17) of Chapter 470, Laws of 2009 provided:

> "'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."

Independent appraisals of the I-90 center lanes were delivered to Sound Transit and DOT. In November 2009, $250,000 was paid for the work performed on the valuations. Following agreement on the valuation, Sound Transit and DOT engaged in negotiations that produced a "Term Sheet." The Term Sheet is subject to the delivery of a number of future agreements but essentially outlines that Sound Transit in exchange for a 40 year air space lease of the center

lanes of I-90, will pay DOT an amount equal to the current cost to construct the center lanes and the fair market rental value for the lanes as determined by the independent valuation funded by Section 204(3) of Chapter 470, Laws of 2009 (ESSB 5352). The funds DOT receives from Sound Transit, for both construction reimbursement and the value of the lease, will be placed back into the motor vehicle fund.

On December 1, 2009 the Federal Highway Administration confirmed that reimbursement of federal-aid highway funds expended in the construction of the center lanes of I-90 would not be required should the center lanes be used for light rail transit.

In October 2011 DOT and Sound Transit signed a final agreement by which DOT will lease the center lanes to Sound Transit. Sound Transit will pay DOT an amount equal to the current value of the State's share ($69.2 million) of the cost to construct the center lanes, and thereby reimburse the State for any gas or motor vehicle excise taxes used for that construction; plus pay a 45 year rental value of the lanes to be established one year before light rail construction on I-90 begins. The rental value for the 45 year lease period will be based on the $70.1 million land value contained in the independent appraisal prepared for DOT, updated to the then current land value for one year before the light rail construction begins. Sound Transit's estimated payment of $167.5 million to fund the construction of the new two way HOV lanes on the I-90 outer roadway will be credited against the amounts owed DOT for the light rail use of the center lanes. If the cost to add the new transit/HOV lanes exceeds the amounts owed to lease the center lanes for light rail transit, Sound Transit will pay the difference.

The final agreement between DOT and Sound Transit provides that the center lanes will not be closed to traffic until the new bus and HOV lanes are complete and open to traffic and after Sound Transit has repaid the value of the motor vehicle fund investment in the lanes.

The agreement between DOT and Sound Transit provides:

> "WSDOT's determination to lease highway property. WSDOT has determined that the center roadway will not be presently needed for highway purposes after the R8A 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 D1 and D2 attached hereto are completed for the relevant lease. This determination is based upon, including but not limited to the analyses contained in: 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, Section 204(3) and Section 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."[3]

In November 2011 a majority of Washington voters rejected Initiative Measure Number 1125 which would have prohibited state government from transferring or using gas tax funded or toll revenue funded lanes on state highways for non-highway purposes. On November 10, 2011 the Federal Transit Administration issued its record of decision finding the requirements of the National Environmental Policy Act had been satisfied for the construction and operation of the east link project. On November 17, 2011, FHA also issued a record of decision for the east link project. The FHA's record of decision included a statement from the FHA, the FTA, and Sound Transit that because "the 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. . . there will be no net loss of HOV lanes."

The parties specifically agree that light rail is not a highway purpose and that motor vehicles funds cannot be used to fund light rail.

ISSUES PRESENTED

1. Whether the 18th Amendment (Article 2, Section 40 of the Washington Constitution) bars the leasing of highway right-of-way purchased and/or construction, with motor vehicle funds as authorized by RCW 47.12.120, for non-highway use, such as light rail, when the land is not presently needed for highway purposes and when fair market rent is paid.

2. Whether DOT's discretionary decision, made under RCW 47.12.120, that I-90's center lanes presently will be no longer presently needed for a highway purpose and can be leased for light rail **after** two replacement I-90 HOV lanes are constructed, is so arbitrary and capricious that it amounts to fraud or bad faith, requiring this court to abrogate such decision, when the decision was made after 13 years of engineering, design and traffic studies.

3. Whether this court can substitute its judgment for DOT's and determine the appropriate lease terms and rent required for a highway property lease to be issued under DOT's discretionary property management authority.

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[3] See paragraph 3of the Umbrella Agreement. Dye declaration.

ANALYSIS

1. Law of Summary Judgment. The purpose of a summary judgment is to avoid a useless trial. However, a trial is required and summary judgment must be denied whenever there are genuine issues of material fact. CR 56(c); Jacobsen v. State, 89 Wn.2d 104 (1977). Material facts are those facts upon which the outcome of litigation depends, either in whole or in part. Harris v. Ski Park Farms, 120 Wn.2d 727, 729 (1993). In a summary judgment the burden is always on the moving party regardless of where the burden would lie in the trial of the matter. Peninsula Truck Lines, Inc. v. Tooker, 63 Wn.2d 724 (1961). In ruling on a motion for summary judgment the court must consider all of the evidence and all reasonable inferences from the evidence in favor of the non-moving party. CR 56(c); Ohler v. Tacoma General Hospital, 92 Wn.2d 507 (1979). Summary judgment should be granted only if there is no genuine issue of material fact or if reasonable minds can reach but one conclusion on that issue based on the evidence construed in a light most favorable to the non-moving party. White v. State, 131 Wn.2d 1, 9 (1997); Weatherbee v. Gustafson, 64 Wn.App. 128 (1992).

Although the moving party bears the initial burden of showing the absence of an issue of material fact, once this initial showing is met, the burden shifts to the non-moving party, who must set forth specific, admissible facts showing that there is a genuine issue of material fact for trial. Young v. Key Pharmaceuticals, 112 Wn.2d 216, 225-226 (1989). The moving party can satisfy its initial burden in either of two ways: (1) it can set forth its version of the facts, and allege there is no genuine issue as to those facts; or (2) it can simply point out to the court that no evidence exists to support the non-moving party's case. Howell v. Blood Bank, 117 Wn.2d 619, 624 (1991); Guile v. Ballard Community Hospital, 70 Wn.App. 18, 21 (1993).

2. Decision.

a. Whether the 18th Amendment (Article 2, Section 40 of the Washington Constitution) bars the leasing of highway right-of-way purchased and/or construction, with motor vehicle funds as authorized by RCW 47.12.120, for non-highway use, such as light rail, when the land is not presently needed for highway purposes and when fair market rent is paid?

Article 2, Section 40[4] restricts the expenditure of motor vehicle fund moneys. It provides in pertinent part:

> "All fees collected by the State of Washington as license fees for motor vehicles and all excise taxes collected by the State of Washington on the sale, distribution or use of motor vehicle fuel and all other state revenue intended to be used for highway purposes, shall be paid into the state treasury and placed in a special fund to be used exclusively for highway purposes. Such highway purposes shall be construed to include the following: (a) the necessary operating, engineering and legal expenses connected with the administrative of public highways, county roads and city streets. . . ."

The State Supreme Court in Freeman v. Gregoire, supra at 331, held that a valuation performed in anticipation of the eventual transfer or lease of highway land indirectly benefits public highways and serves as a valid highway purpose under Article 2, Section 40. Freeman upheld the appropriation of up to $300,000 to be expended pursuant to Section 204(3) of Chapter 470 of the Laws of 2009, relying on State Highway Commission v. O'Brien, 83 Wn.2d 878 (1974) and distinguishing State, ex rel. O'Connell v. Slavin, 75 Wn.2d 554 (1969).

The court in Freeman specifically did not broaden its inquiry to view the transaction according to any discretionary decisions that may occur after the valuations obtained. That inquiry is set forth in this litigation. The plaintiffs argue Article 2, Section 40 prohibits the State from entering into any agreement with Sound Transit for the use of the two center lanes of I-90 for light rail and since the center lanes were constructed, in part using motor vehicle fund moneys, any transfer of the lanes for light rail transit would essentially be an unlawful diversion of motor vehicle fund moneys in violation of Article 2, Section 40. The defendants and intervenor argue Article 2, Section 40 of the Washington Constitution does not prohibit the State from leasing highway right-of-way not presently needed for highway purposes as authorized by RCW 47.12.120. They argue the Constitution does not restrict how a highway purchased with motor vehicle funds may be used in the future nor does it restrict use of the property when it is removed from highway use when the value of the State's investment in the highway is repaid to the motor vehicle fund before the property is removed from highway use. The defendants and intervenor assert that the natural, obvious import of the framers of the Constitution is that motor vehicle taxes be used for highway purposes, not that highways built, in part with motor vehicle funds, be dedicated as highways forever.

[4] As amended by Amendment 18.

The court agrees Article 2, Section 40 restricts the use of motor vehicle excise taxes to the use for highway purposes but it does not restrict the State from eventually declaring the highway surplus and then using it for non-highway purposes, provided, however, that the motor vehicle funds used to construct the highway are in effect repaid to preclude any allegation that the State is circumventing the intent of Article 2, Section 40. Here, the parties agree that light rail is not a highway purpose. That fact does was not disputed in the original action before the State Supreme Court and is not in dispute now. Freeman, supra at 331. The State and Sound Transit agree that motor vehicle funds may not be expended on light rail so Sound Transit has agreed to reimburse the State for any motor vehicle funds expended for the construction of the center lanes of I-90.

Nor does Article 2, Section 40 of the Washington State Constitution limit or interfere with the State's authority to decide where the I-90 HOV lanes are located or how they are operated. The plain language of Article 2, Section 40, as well as the case law interpreting its language, confirms that the constitutional limitation only applies to the expenditure of motor vehicle funds for highway purposes, not to the use or management of the highways. When highway land is purchased with motor vehicle funds it may be leased or sold for non-highway purposes but the purchaser will be required to provide such monetary or other consideration as is necessary under the particular factual circumstances and law involved to avoid an unlawful diversion of motor vehicle funds. AGLO 1975 Number 62. 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.

b. Whether the State's decision, made under RCW 47.12.120, that I-90 center lanes will be no longer presently needed for a highway purpose and can be leased for light rail after two replacement I-90 HOV lanes are constructed is so arbitrary and capricious that it amounts to fraud or bad faith, requiring this court to abrogate such decision?

RCW 47.12.120 authorizes the State to rent or lease any lands, improvements or air space above or below any lands held for highway purposes are not presently needed. The Umbrella Agreement between the State and Sound Transit makes a specific finding by the State that it has determined that the center roadway of I-90 will not be presently needed for highway purposes

after the R8A 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 the agreement are completed for the safe and efficient operation of the highway. The State's determination that the center roadway of I-90 will not be presently needed for highway purposes after the completion of the conditions set forth in the Umbrella Agreement is based upon years of study and analysis set forth in the record including the I-90 two way transit and HOV operations FEIS and ROD; the I-90 two way transit and HOV access point decision report; the DOT 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 DOT Highway System Plan 2007-2026; and the legislative history reflected in Sections 204(3) and 306(17) of Chapter 470 Laws of 2009.

The State concedes the center lanes in question will be needed until a future date. The Umbrella Agreement directly addresses the present need by prohibiting the transfer of possession and control of the lanes until the R8A project is complete and its traffic improvements, including the new HOV lanes, are operational. Once the project is completed, the center lanes will no longer be needed for highway purposes as they are replaced by the two new lanes.

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 so arbitrary and capricious as to amount to bad faith or fraud. Deaconess Hospital v. Washington State Highway Commission, 66 Wn.2d 378 (1965). The State has broad discretion to decide whether the 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. While the State is not required to lease the land, it is within its discretion to do so as long as it first determines the highway land is not then presently needed for highway purposes. As a part of its overall analysis before leasing the unused right-of-way the State must make sure the lease will not cause undue risk or impair the use of the facility for highway purposes. Finally, while RCW 47.12.120 does not specifically require the payment of a fair market rent for non-highway use of highway land the State does require monetary and other considerations to avoid the unlawful diversion of motor vehicle funds. Here, again the State's decision to determine that the center lanes of I-90 in question, *after* certain conditions are met, will be no longer needed for highway purposes is based upon years of engineering studies, scrutiny by local governments and federal highway administration, public review of environmental documents,

approval of voter's funding Sound Transit work, the legislatively funded independent appraisal methodology and independent appraisals for the leasing of highway property. The decision of whether to transfer or lease lands is inherently a function of the administration of highway property. Freeman, supra at 331. Moreover, the court must defer to the State's expertise in managing the highway system and intervene only in the case of fraud or a gross abuse of discretion. State, ex. rel. Agagee v. Superior Court, 58 Wn.2d 838, 839 (1961). The plaintiffs have not demonstrated the State's actions amount to bad faith or fraud. The State's discretionary decision to declare that the center lanes of I-90 in question will be no longer presently needed for a highway purpose and can be leased for light rail after the two replacement I-90 HOV lanes are constructed and all other conditions of the Umbrella Agreement are met is not arbitrary and capricious requiring the court to abrogate the decision.

c. Whether this court can substitute its judgment for the State and determine the appropriate lease terms and rent required for a highway property lease to be issued under the State's discretionary property management authority?

Whether the State administered RCW 47.12.120 correctly by deciding that the center roadway will not be presently needed upon completion of the R8A project is an administrative decision that is not reviewable under the declaratory judgment action. Bainbridge Citizens United v. Washington State Department of Natural Resources, 147 Wn.App. 365, 374-75 (2008). Declaratory judgment actions are only proper to determine the facial validity of an enactment, as distinguished from its application or administration. Moreover, Chapter 34.05 RCW, the Administrative Procedures Act (APA) does not provide for a review of agency decisions regarding the "purchase, lease, or acquisition by any other means, including eminent domain, of real estate, as well as all activities necessarily related to those functions. . ." RCW 34.05.010(3). Therefore, the court respectfully declines to review the administrative decisions of the State regarding its determination the center lanes of I-90 in question will not be needed for highway purposes upon the completion of the R8A project and fulfillment of the Umbrella Agreement.

CONCLUSION

Based upon the foregoing, the court denies the plaintiffs' motion for summary judgment and grants the defendants' and intervenor's motions for summary judgment. Please prepare the appropriate orders and either note them for presentation or circulate them for signature.[5]

DATED: March 5, 2012.

JUDGE PRO TEM[6]

[5] Each side has moved to strike certain declarations and information filed by the other. The plaintiffs' motion is primarily based upon redundancy and irrelevancy. The intervenor's motion to strike is based primarily upon failure to authenticate. As the record contains over 3,500 pages of pleadings, and as the court has reviewed the record more with the intent on determining the legal issues as opposed to the collateral issues on some of the marginal information supplied, the court simply denies both motions to strike.

[6] At oral argument on February 17 the court received the assurance of the parties that it could proceed to hear the case even though the court is now retired (on October 1, 2011) and maintains an inactive status with the bar association. Article 4, Section 7 and RCW 2.08.180 authorize a retired judge to sit as a judge pro tem without the stipulation of the parties if the previously elected judge of the superior court retires leaving a pending case in which the judge has made discretionary rulings. The court made discretionary rulings in this case by denying the motion for an order changing venue (docket entry 54, signed August 15, 2011) and the fact the court is now inactive with the bar association provides no barrier to the court hearing the case as a pro tem. In re Marriage of Dalthorp, 23 Wn.App. 904 (1979).