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Evaluation of Public-Private Partnership Opportunities identified in the study proviso



Prepared for:

Washington State Joint Transportation Committee





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1.0 Introduction

This memo reviews the potential for P3 opportunities identified in the legislative budget proviso that directed this study (see call-out box below). The viability of utilizing P3 under the new legislation as a mechanism to deliver two project types is assessed. Specifically:

- Culvert replacements on state highways as a component of the required fish passage barrier removal projects.
- The construction/replacement of, or commercial retail options within, Washington's state ferry terminals, including development of adjacent real estate.

The memo provides an overview of existing conditions for both projects, followed by an assessment of viability using various P3 procurement options for culvert replacements and state ferry terminals.

Budget proviso language from Sec. 204, paragraph 2, of the 2023-25 transportation budget (HB 1125).

(a) \$400,000 of the motor vehicle account—state appropriation is for the joint transportation committee, in collaboration with the department of transportation, to convene a work group to study and recommend a new statutory framework for the department's public-private partnership program. The committee may contract with a third party Consultant for work group support and drafting the new statutory framework.

(b)(i) The work group must consist of, but is not limited to, the following members: (A) The secretary of transportation or their designee; (B) Joint transportation committee executive committee members or their designees; (C) The state treasurer or the state treasurer's designee; (D) A representative of a national nonprofit organization specializing in public-private partnership program development; (E) A representative of the construction trades; and (F) A representative from an organization representing general contractors.

(ii) The work group must also consult with the Washington state transportation commission and the department of commerce.

(c)(i) The work group must review the 2012 joint transportation committee's "Evaluation of Public-Private Partnerships" study, consisting of an evaluation of the recommendations for replacing chapter 47.29 RCW and development of a process for implementing public-private partnerships that serve the defined public interest, including, but not limited to: (A) Protecting the state's ability to retain public ownership of assets constructed or managed under a public-private partnership contract; (B) Allowing for the most transparency during the negotiation of terms of a public-private partnership agreement; and (C) Addressing the state's ability to oversee the private entity's management of the asset.

(ii)(A) The work group must identify any barriers to the implementation of funding models that best protect the public interest, including statutory and constitutional barriers. **(B) The work group may also evaluate public-private partnership opportunities for required fish passage and culvert work on state highways, for the construction of, replacement of, or commercial retail options within Washington state ferries' terminals, and for other projects as determined by the work group.**

(iii) The work group must update the 2012 recommendations and devise an implementation plan for the state.

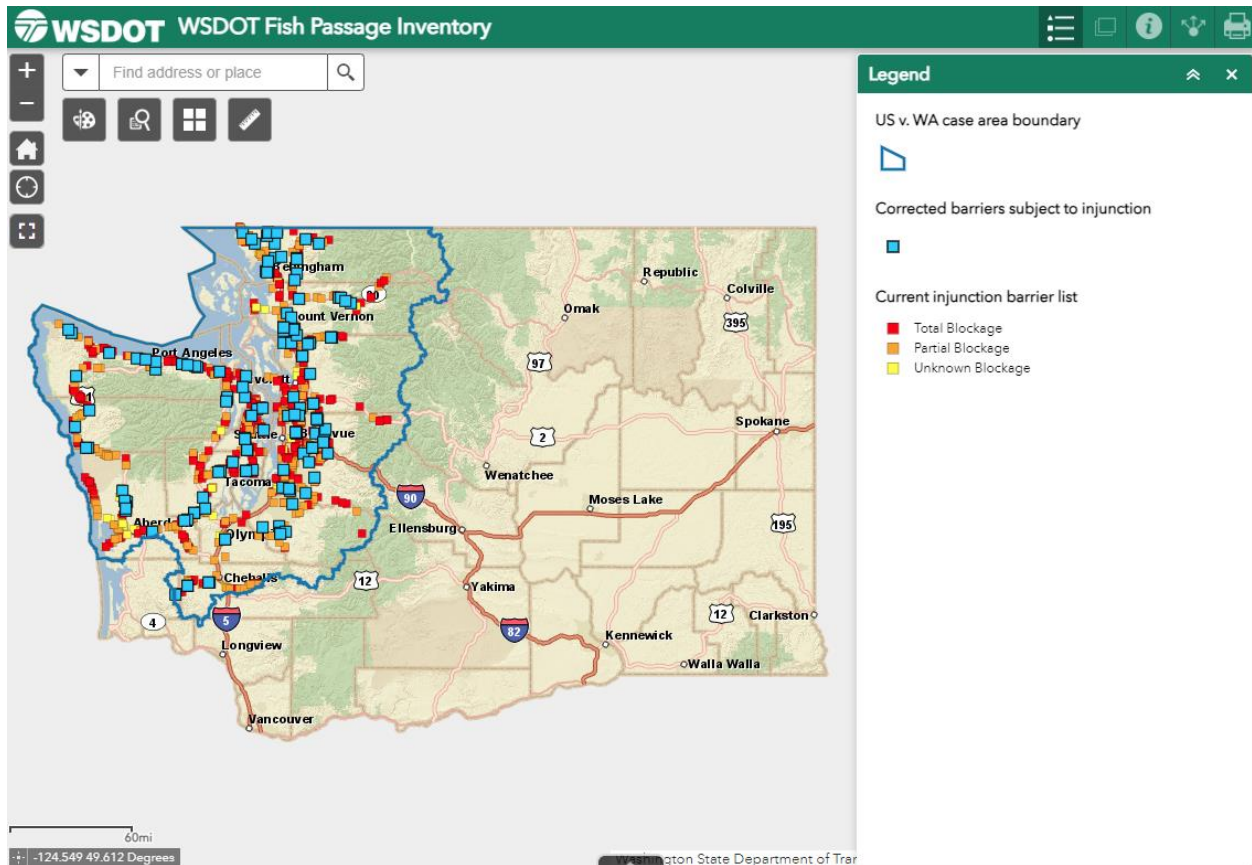
(d) The work group must submit a preliminary report, including any recommendations or draft legislation, to the office of the governor and the transportation committees of the legislature by December 15, 2023. The work group must submit a final report with draft legislation to the office of the governor and the transportation committees of the legislature by July 1, 2024.

2.0 Overview of Current Conditions of Select Opportunities

2.1 Fish Passage Barrier Removal on State Highways

Federal injunction

In 2013, the U.S. District Court for the Western District of Washington ordered the State to increase its efforts towards correcting salmon barriers.¹ The injunction area includes over 900 culverts, out of over 2,000 state-owned culverts impeding fish passage across the state.² In a December 2023 update to the Washington State Legislature, WSDOT reported that 45% of blocked habitat in the injunction area has been restored. Approximately 300 projects are currently underway, which will restore access to 80% of blocked habitat. To reach the injunction requirement of restoring 90% of blocked habitat by 2030, WSDOT plans to have approximately 100 additional projects under contract by 2025.³



Source: [WSDOT, 2024](#).

¹ United States v. Washington, No. C70-9213 (W.D. Wash. Mar. 29, 2013).

² WSDOT Fish Passage Inventory. Washington State Department of Transportation, 2024. Accessed February 16, 2024. <https://wsdot.maps.arcgis.com/apps/webappviewer/index.html?id=c2850f30118480fbb576f1ccfda7f47>

³ Statewide Culvert Remediation Plan Update, December 2023. Washington State Department of Transportation, 2023. Accessed February 16, 2024. <https://wsdot.wa.gov/sites/default/files/2023-12/Statewide-Culvert-Remediation-Plan-Update-December2023.pdf>

Figure 2-1 Washington State Fish Passage Injunction Area Inventory

Due to site conditions, each fish passage project is unique in design and construction. It is estimated to cost \$3.8 billion to open 80% of blocked habitat and an additional \$4 billion to reach 90%.⁴ Estimated costs for remaining projects are relatively higher than current projects in part due to proximity to urban areas, which may require excavation of existing roads and relocating utilities.

Current project delivery roles

On a typical fish passage project, WSDOT assesses site conditions, designs the culvert replacement structure, and solicits bids for construction.⁵ Recent contracting opportunities also include design-build work that involves the private sector completing design and construction through a single contract. Funding and maintenance are the State's responsibility.

1. *Assessment:* Biologists and engineers examine the upstream and downstream conditions of a site with guidance from the Washington Department of Fish and Wildlife (WDFW), tribal partners, and other local stakeholders.
2. *Design:* Includes documenting the environmental impacts of the proposed project, obtaining permits and permissions from stakeholders, and drafting construction contracts. Multiple fish passage barrier removal projects may be bundled together if there are design and construction efficiencies.
3. *Construction:* Ranges from a few months to several years.

Examples of private sector involvement in current project delivery

In March 2021, WSDOT awarded Kiewit a design-build contract for a bundle of 29 fish barriers. Design work began in April 2021, construction began in Spring 2023, and the project is estimated to be completed in Fall 2026.⁶

WSDOT is currently undergoing a two-stage procurement process to determine a shortlist of qualified firms then select a contractor for a project comprising eight fish barriers. Four firms submitted in the Statement of Qualifications stage. WSDOT notified shortlisted submitters and issued the project Request for Proposals (RFP) in March 2024, with proposals due in August 2024 and the "best value" proposer announced in September 2024. Work is estimated to be completed by December 2028.⁷

⁴ WSDOT Fish Passage Program Update, House Transportation Committee Meeting. Washington State Department of Transportation, 2023. Accessed February 16, 2024. <https://app.leg.wa.gov/committeeschedules/Home/Documents/31464>

⁵ Designing Fish Passage Projects. Washington State Department of Transportation, 2019. Accessed February 16, 2024. <https://www.youtube.com/watch?v=u7HT6oMqAco>

⁶ US 101 – SR 109 Grays Harbor, Jefferson and Clallam Counties – Remove Fish Barriers. Washington State Department of Transportation, 2020. Accessed February 16, 2024. <https://wsdot.wa.gov/construction-planning/search-projects/us-101-sr-109-grays-harbor-jefferson-and-clallam-counties-remove-fish-barriers>

⁷ SR 16, Goodnough Creeks & McCormick Creeks – Remove Fish Barrier. Washington State Department of Transportation, 2023. Accessed April 5, 2024. <https://wsdot.wa.gov/business-wsdot/contracting-opportunities/sr-16-goodnough-creeks-mccormick-creeks-remove-fish-barrier>

2.2 Ferry Terminal Redevelopment

Overview

Washington State Ferries owns and operates 20 ferry terminals. New terminals have opened recently at Seattle's Colman Dock and Mukilteo, and WSF's 2040 Long Range Plan includes a new terminal facility at Anacortes, though no funding has been allocated.

The 2018 transportation budget (ESSB 5096, Section 214) included a proviso for WSDOT's Innovative Partnerships Office to explore a potential P3 for the Anacortes terminal site. WSDOT partnered with the Port and City of Anacortes to conduct community engagement to understand preferences and needs for an improved or new terminal. The community survey received 1,397 responses. Findings of note included:

- 56% feel it is important that WSDOT improve the Anacortes terminal.
- 69% selected improved restaurant/café/grocery as the top choice. The next most frequent responses were 36% selecting "vehicle charging, bikes, e-bikes, scooters," and 32% selected "arts, culture, museum, interpretive, visitors center."
- Other responses focused on a need to fix ferries, concerns about traffic, and overdevelopment of the 35-acre site.
- The survey asked "What, if any, concerns do you have about a joint development project or other public-private partnerships at this site?" and received a range of responses. It is unclear whether respondents had a common understanding of what was meant by public-private partnership.

The agency also issued an RFI to solicit developer interest in the 35-acre ferry terminal site. The RFI was distributed through Washington’s Electronic Bidding System (WEBS), and through some direct outreach in the retail and development community and on the project website. The RFI noted that “The project must generate revenue for an improved terminal facility – currently more than fifty years old, undersized and in deteriorating condition – and provide improved amenities for ferry passengers and the nearby communities.” At that time, the Anacortes-Sidney, BC route was still operational, and 2019 ridership for the terminal was estimated to be 2 million travelers. The RFI explained that WSDOT is leasing the terminal property from the Port of Anacortes under a 25-year lease and that WSDOT owns a nearby parking lot which is operated under a Memorandum of Agreement between WSDOT and the City of Anacortes. See Figure 2-2 for more details.

Source: WSDOT, 2020⁸

Two responses were received; however, they were not responsive and were instead firms offering to support any future projects. As noted in the lessons learned, WSDOT did not identify a specific project in

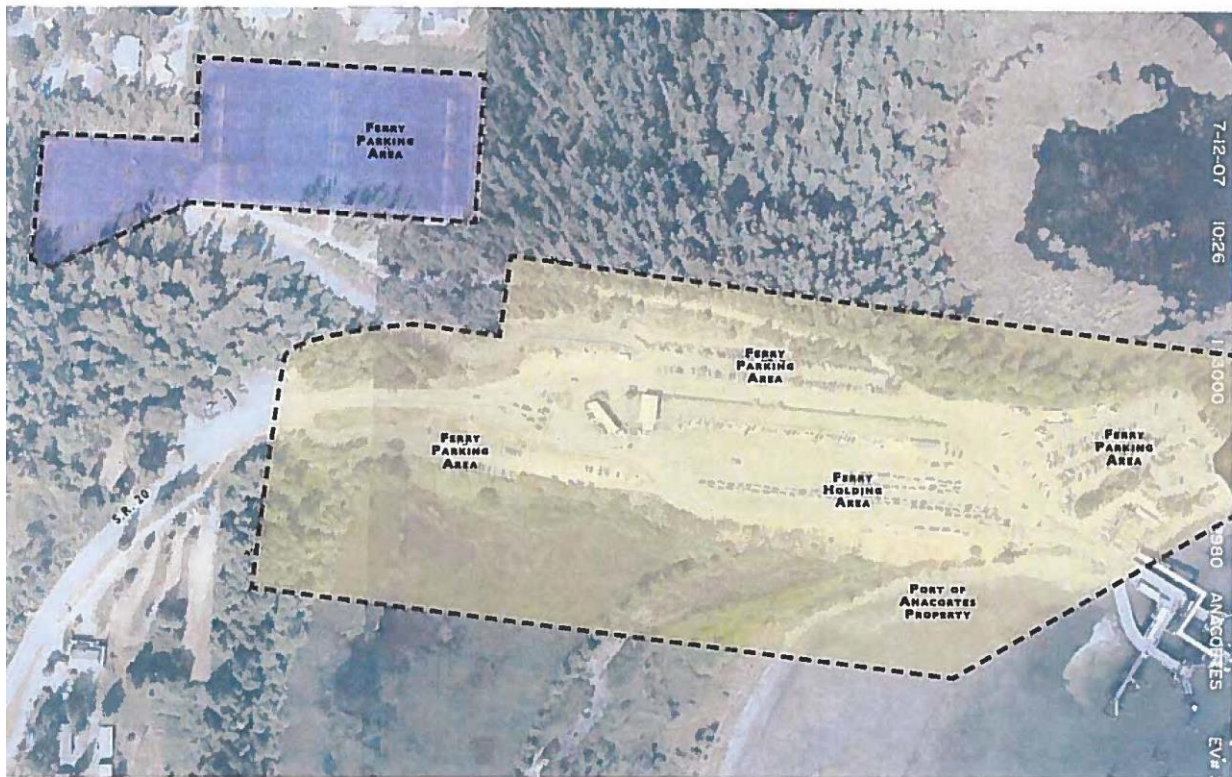


Figure 2-2 Anacortes Ferry Terminal Ownership



⁸ WSDOT, 2020. Innovative Partnership Opportunities at Anacortes Ferry Terminal, Legislative Report.

the RFI, and no advance permitting or environmental work had been done to get the site ready for development. This is not an approach that should be repeated.

Factors that may have also contributed to the lack of developer response, but are speculative, include the terminal site's location is 3.7 miles from the center of downtown Anacortes, surrounded by a low-density, single-family residential neighborhood. It is also possible that the prospect of working with three public partners proved daunting, absent any agreement among the three public agencies on shared vision, goals, and commitment to a public-private partnership.

3.0 Feasibility Assessment of P3 Procurement Options

This section evaluates the fish passage barrier removal and ferry terminals projects, to explore the feasibility of utilizing P3 project delivery options. This evaluation is a high-level assessment that investigates the legal feasibility, benefits, risks or downsides of applying a range of possible P3 approaches. Each evaluation concludes with a process that can be applied to each of these specific project types to make a final decision about delivery approach.

3.1 Fish Passage Barrier Removal

This subsection analyzes and describes the potential application of a P3 procurement model for the successful execution of fish passage barrier removals. High-level benefits and risks are discussed for this project type, although a specific project would include critical decision points that are informed by more specific benefits and risks analysis.

3.1.1 Legal Permissibility

RCW 47.20.780 and .785 allow WSDOT to procure and enter into contracts using design-build methodologies. However, this statute has been interpreted to require WSDOT to award the project to the lowest bidder, regardless of other project delivery and funding considerations. Some potential limitations of the existing model include the following:

- The only ability for WSDOT to make a “best value” selection under current Washington law (where factors such as accelerated project delivery, innovation, lifecycle costs, etc.) is RCW 39.10, the state’s Alternative Public Works Contracting procedures. This statute was originally created to allow the state’s capital construction projects (higher education facilities, state office buildings, etc.) to use progressive design-build procedures, including awarding projects based on overall best value to the state.
- The process prescribed in RCW 39.10 is overseen by the Capital Projects Advisory Review Board (CPARB). Although WSDOT has occasionally relied on the process detailed in 39.10 for authority to procure projects based on best value, that statute (and the Board approving those projects) were not designed nor intended to govern state transportation projects.
- Even if WSDOT continues to rely upon the CPARB process and authority under RCW 39.10 to award projects based on best overall value, that statute does not grant WSDOT the authority to incorporate private (or quasi-private) financing mechanisms into the project.

The work group-proposed P3 legislation framework in Section 3 would provide an additional legal authority for WSDOT to procure and contract transportation projects based on best overall value. Unlike RCW 39.10, under the new/proposed legislation, transportation projects would not be subject to the CPARB process; instead, a different process is prescribed in the draft P3 legislation framework which more closely mirrors WSDOT’s approval processes for other transportation infrastructure projects.

- *It is doubtful that private financing or other innovative financing techniques (such as availability payments) could be used under current law.* The work group proposed P3 legislation framework specifically allows for availability payments as well as other forms of private financing. While private financing by itself may not be viable for fish passage barrier removal projects, an availability payment arrangement could potentially be useful.
- One opportunity that could be beneficial would be the incorporation of long-term maintenance contracts (DBOM), which is not generally permissible under existing design-build statutes or RCW 47.29, the current transportation innovative partnership program.⁹ The ability to consider ongoing maintenance and operations costs as part of a long-term contract would dovetail with bundling of projects.

3.1.2 Potential Benefits

One approach to fish passage barrier removal procurement that could bring value through P3 delivery involves not only the bundling of projects but including the long-term maintenance and operations to reduce lifecycle costs. However, a bundled scenario assumes that similarities exist among the remaining various fish passage barrier projects that would allow for a shared design and more efficient construction approach. The remaining fish passage barriers may be too distinct from one other to allow for bundling of design and would need to be evaluated as a next step.

Further, incorporating long-term maintenance contracts into a DBOM and bundled project may provide additional benefits to the state to shift that responsibility to the private sector. The opportunity to bundle the remaining fish passage barrier removal projects and incorporate long-term maintenance could be a first step in the assessment of P3 options. Should bundling not be viable, pursuing DBOM on a case-by-case basis may still provide benefits.

3.1.3 Potential Risks

The potential risks and downsides associated with DBOM for a fish passage barrier removal project are primarily around the time needed to initiate this new procurement model that would include long-term maintenance contracts and ensure compliance with the injunction timeline. Attempting to optimize life cycle costs may require a longer time horizon than is available to align on the process, identify the correct private partner, and determine the contractual details. Additionally, it is unknown at this time whether bundling of projects and design of the remaining culverts is possible given the unique nature of the fish passage barrier removals and the environmental clearance and permitting requirements. The possibility of bundling would need to be evaluated as the first step toward delivering these projects under a DBOM model.

3.1.4 Decision Process

WSDOT has delivered a select number of fish passage barrier removals using progressive design build. The next step in assessing potential P3 delivery options is to determine whether the remaining projects could also be able to be delivered in a similar manner, including bundling. Potential for incorporating long-term maintenance would need to be evaluated to understand the possible benefits, including

⁹ Maintenance and operations can currently be incorporated under existing statute for projects contracted under chapter 39.10 RCW and requires CPARB approval

public dollars saved, within the time frame of required replacement. In normal circumstances, the determination to pursue a bundled DBOM contract would be based on best value. In this case, the decision would also need to consider whether DBOM would result in completion beyond the injunction deadline and therefore run the risk of incurring penalties or other consequences.

3.2 Ferry Terminals

This section focuses on how the work group-proposed legislation framework may allow additional options for joint development at Washington’s ferry terminals. Other options such as commercial leases, long-term leases, or outright selling of the land were considered but not assessed further in this section as they are already allowable under current statute. Like joint development, they are not P3s but rather are conventional commercial arrangements with a private actor. However, joint development can benefit from some of the provisions of the work group-proposed legislation framework.

Joint development represents an opportunity to bring additional revenue by engaging a private developer to utilize excess land adjacent to (or airspace above) ferry terminal facilities such as Colman Dock. Examples are surplus property, co-location with the terminal, inside the terminal (concessions), and airspace. The state has an opportunity in select ferry terminal locations to engage in joint development. Joint development is defined under the Federal Transit Administration (FTA)¹⁰ as:

A public transportation project that integrally relates to, and often co-locates with commercial, residential, mixed-used, or other non-transit development. Joint development may include partnerships for public or private development associated with any mode of transit system that is being improved through new construction, renovation, or extension. Joint development may also include intermodal facilities, intercity bus and rail facilities, transit malls, or historic transportation facilities.

Joint Development involves the development of a transportation project and adjacent complementary private real estate development where a private developer either implements the real estate improvement directly or gives money to a public sector sponsor to offset the costs. Joint development may involve public participation in market-oriented developments as a means to subsidize the cost of public transportation. There are generally two forms of joint development:

- *Revenue-sharing arrangements: where the public sector infrastructure provider receives a share of the revenue from complementary real estate development; and*
- *Cost-sharing arrangements: where the private sector contributes directly to the provision or maintenance of the transportation infrastructure.*

¹⁰ Federal Transit Administration Circular: Guidance on Joint Development, revised January 25, 2024, <https://www.transit.dot.gov/sites/fta.dot.gov/files/2024-01/Joint-Development-Circular-C-7050-1C.pdf>

3.2.1 Legal Permissibility

Under current law, joint development is allowable. WSDOT does have some latitude to enter into contracts with private entities that would allow the private sector to participate in the development (or redevelopment) of ferry terminals (or WSDOT-controlled land more generally).

- WSDOT also has authority under current state law to enter into either ground or airspace leases that would allow a private partner to use or develop property for commercial purposes. However, several conditions must be met. First, the land or airspace must be owned by the state, and not have been acquired with federal funds. If the land/airspace was originally acquired with federal funds, then federal law and regulations may control the permissible uses of the land/airspace. Second, the state must receive fair value for use of the land or airspace. Third, in the past some have argued that WSDOT's land/airspace can only be developed for allowable transportation purposes (or even more narrowly, for highway-related purposes), although this interpretation has not been tested in court. A fourth constraint is that any proceeds derived by WSDOT for use of the state's land/airspace must be returned to the state's motor vehicle fund (if the land was originally acquired with motor vehicle fund proceeds) or to other state depository accounts that are restrictive in nature.
- There is no overlap between joint development and the proposed P3 legislation framework. In other words, the proposed legislation does not affect the state's ability to pursue joint development.
- The work group-proposed P3 legislation framework could potentially help a future joint development project at a ferry terminal in at least two ways: first, if WSDOT wishes to use a progressive design build or a best-value selection methodology, the proposed legislation would be more accommodative and not involve review and approval by CPARB. Second, if the joint development project would benefit from some form of alternative or innovative (private) financing technique, the work group-proposed legislation framework would allow for that, subject to review and approval by the State Finance Committee.

3.2.2 Potential Benefits

The benefits related to potential joint development include providing the ability for the State to improve public infrastructure by leveraging real estate it owns to generate additional revenue from leases with private parties. Depending on whether there is a concession agreement along with joint development, this could result in an effective net lower cost to the state to operate ferry terminals.

3.2.3 Potential Risks

Beyond the typical risks associated with joint development, there are unique challenges related to joint development of ferry terminals that should be considered. Primarily, it is currently unclear where joint development may be attractive to a private sector partner given the assumed potential locations and market opportunities or limited traffic at ferry terminals that need improvements (e.g., the Anacortes terminal, as described below, attracted little interest from the private sector, likely due to low traffic and limited revenue opportunities).

3.2.4 Decision Process

One of the initial steps for pursuing joint development at ferry terminals would be to engage developers to understand the precise market appetite for joint development at specific locations. For example, WSDOT could conduct a Request for Information (RFI) or market sounding activities such as interviews and industry forums. Should the assessment reveal little interest, then joint development is likely not suitable for Washington's ferry terminals. If, however, there is market interest in select locations, WSDOT could initiate a formal solicitation or entertain unsolicited proposals to advance consideration of joint development as a progressive design-build and/or private-financed project.

3.2.5 Considerations for Port of Anacortes

As mentioned previously, WSDOT considered a P3 for the Port of Anacortes and issued an RFI in pursuit of that effort. Based on the RFI responses, WSDOT offered several recommendations for consideration, including revising the current P3 statutes (underway with this project), working with city and state economic development organizations to better define what the development opportunity might be, as well as exploring creation of a Public Development Authority as a vehicle for the P3.

Because the State leases the land from the Port of Anacortes, any P3 focused on a new terminal would need to involve the Port and possibly the City, as WSDOT would have a more limited land contribution.

A project that focused only on terminal redevelopment could generate revenue through food (coffee, snacks, and possibly a café or restaurant) and gift items, as well as parking. Ingress/egress to the terminal, walking distance from Anacortes, and limited parking makes it unlikely that people not waiting for a ferry would come to eat or shop there.