

**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 61<sup>st</sup> 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.<sup>1</sup> 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

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<sup>1</sup> 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).

