

NO. 83349-4

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**SUPREME COURT OF THE STATE OF WASHINGTON**

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KEMPER FREEMAN, JIM HORN, STEVE STIVALA, KEN COLLINS,  
MICHAEL DUNMIRE, SARAH RINDLAUB, AL DEATLEY, JIM  
COLES, BRIAN BOEHM, and EASTSIDE TRANSPORTATION  
ASSOCIATION, a Washington nonprofit corporation,

Petitioners,

v.

CHRISTINE O. GREGOIRE, a state officer in her capacity as Governor  
of the State of Washington, and PAULA J. HAMMOND, a state officer in  
her capacity as Secretary of the Washington State Department of  
Transportation,

Respondents.

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**RESPONDENTS' MEMORANDUM IN SUPPORT OF DISMISSAL**

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Respondents Christine O. Gregoire, Governor of the State of Washington, and Paula J. Hammond, Secretary of the Washington State Department of Transportation (WSDOT), submit this Memorandum in response to the Court's letter dated July 20, 2009, to address whether the Court should retain, transfer, or dismiss the Petition in this matter. For the reasons set forth below, Respondents respectfully submit that the Petition should be dismissed.

#### **I. NATURE OF THE CASE**

Petitioners bring this action based on two subsections of the State Transportation Budget for the 2009-11 biennium, Engrossed Substitute Senate Bill ("E.S.S.B.") 5352, Section 204(3) and Section 306(17). Petitioners assert that these provisions, quoted in full at pages 10-11 below, "set[] a date certain by which the sale or lease [of portions of Interstate 90] to Sound Transit is to be accomplished." Pet. ¶2.25. Petitioners allege that, "[u]nless restrained, the Governor or Washington State Department of Transportation will undoubtedly exercise their purported authority under ESSB 5352 to sell or lease I-90 to Sound Transit by December 1, 2009 in violation of the Washington Constitution Art. II, § 40." Pet. ¶3.3. Petitioners seek a "writ of prohibition prohibiting [Respondents] from taking any action pursuant to ESSB 5352 with respect to the sale or lease of any portion of I-90 to Sound Transit for the purpose

of a rail transit system because (1) such action is unconstitutional under the Washington State Constitution Article. II, § 40.” Pet. ¶3.1.

## **II. STATEMENT OF THE CASE**

### **A. Factual Background**

#### **1. Sound Transit’s Proposed Use of Interstate 90 for East Link Light Rail**

For several years, WSDOT and Sound Transit have been discussing Sound Transit’s interest in using the center lanes of Interstate 90 for light rail. Sound Transit’s interest in the use of Interstate 90 resulted in Sound Transit’s proposed East Link Light Rail Transit Project (“East Link Project”). As identified by Sound Transit, the purpose of the East Link Project is to connect the initial segment of light rail in downtown Seattle and extend the system east to Mercer Island, Bellevue, and Redmond, via the center lanes of Interstate 90.

On November 4, 2008, voters approved Sound Transit’s Mass Transit Expansion proposal, including the East Link Project. The draft environmental impact statement (“DEIS”) for the proposed East Link Project was issued by Sound Transit, the Federal Transit Authority, and WSDOT on December 12, 2008. The public comment period ended on February 25, 2009, and the final environmental impact statement (“FEIS”) is anticipated to be published in 2010.

Following the voters' approval of Sound Transit's Mass Transit Expansion proposal, WSDOT's Director of Environmental Services issued a letter to Sound Transit on November 21, 2008. (See Exhibit A attached to the Declaration of Dylan Counts.) The letter confirmed that:

WSDOT agrees with the East Link Project's purpose and need for the East Link Light Rail line to use the existing I-90 floating bridge to cross Lake Washington.

The letter identifies three issues to be resolved between WSDOT and Sound Transit before the signing of the FEIS for the proposed light rail project:

- 1) Reaching agreement on the value of the use of the I-90 center roadway by Sound Transit for the East Link Project;
- 2) Reaching agreement on the configuration of the I-90 Bellevue Way Interchange; and
- 3) Reaching agreement on many alignment and design issues related to the East Link Project and I-90 Two-Way Transit project.

There were also seven issues identified in the letter that need to be resolved before construction could begin on the proposed light rail project:

- 1) Ensuring full funding is in place for the I-90 Two Way Transit & high occupancy vehicles ("HOV") Operations projects;
- 2) Sound Transit's compliance with recommendations of the I-90 Homer Hadley Floating Bridge Independent Review Team;
- 3) Completion of an operations and maintenance agreement for the I-90 Homer Hadley Floating Bridge;
- 4) Reaching agreement on the schedules of the East Link Project and the I-90 Two-Way Transit & HOV Operations projects;
- 5) Reaching agreement on which project will build each of the Mercer Island outer roadway HOV lane direct access ramps;

- 6) Sound Transit receiving approval from WSDOT and the Federal Highway Administration on the Intersection Justification Report; and
- 7) Determining the enforcement method that will be used to allow Mercer Island traffic to use the I-90 HOV lanes.

## **2. WSDOT Improvements to Interstate 90**

The I-90 Two-Way Transit and HOV Operations Project identified in WSDOT's letter of November 21, 2008, is an expansion of the Interstate 90 corridor between Seattle and Bellevue. WSDOT, Sound Transit, and the Federal Highway Administration carried out the environmental review of the proposed expansion in 2003-04. The agencies agreed on a "preferred alternative" that was designated "R-8A" in the FEIS. This alternative includes (1) the addition of HOV lanes to the Interstate 90 outer lanes (westbound and eastbound) between Seattle and Bellevue; (2) new Interstate 90 HOV on-and-off ramps on Mercer Island; and (3) improvements to Interstate 90 HOV access at Bellevue Way.

Because funding has not been approved for the entire I-90 Two-Way Transit and HOV Operations Project, WSDOT is building the project in three separate stages. Stage 1 was opened to traffic in October 2008. Sound Transit contributed \$25.8 million to this stage. This stage of the project included:

- 1) An additional HOV lane to the westbound Interstate 90 mainline from Bellevue Way to 80th Avenue SE on Mercer Island;

- 2) A new left side off-ramp for HOVs at 80th Avenue SE on Mercer Island; and
- 3) Reconfigured the existing Bellevue Way HOV on-ramp.

Stage 2 of the Interstate 90 project is currently at a 90% level of design. Sound Transit is contributing \$2.15 million toward the design work. The features of this stage include:

- 1) A new HOV lane to the eastbound Interstate 90 mainline from 80th Avenue SE on Mercer Island to Bellevue Way;
- 2) Modifications to the existing reversible ramp at 80th Avenue SE to connect as a full-time on-ramp to the new eastbound HOV lane; and
- 3) Reconfiguration of the existing eastbound lane to the Bellevue Way/I-405 HOV connection to allow 24/7 access from the new eastbound HOV lane.

This stage is expected to be advertised for bids in December 2009, dependent on WSDOT's securing construction funding in the amount of \$22 million. The 2009 Legislature did not appropriate money to WSDOT for this construction. If the project secures funding and goes forward in December 2009, these lanes are expected to be open to traffic by late 2011.

WSDOT has not started the final design of Stage 3. The design work is tentatively scheduled to begin at the end of 2009 and be complete by December 2011. The total project cost of Stage 3 is estimated at \$113.7 million. WSDOT currently has \$10.6 million for design funding. The features of this stage would include:

- 1) A new HOV lane in the eastbound and westbound outer roadways of Interstate 90 between 80th Avenue SE on Mercer Island and Rainier Avenue in Seattle;
- 2) Direct access improvements on Mercer Island via an eastbound left-side exit from the new HOV lane; and
- 3) An upgrade of the fire/life safety infrastructure in the Interstate 90 tunnels on Mercer Island and in Seattle (improved detection, ventilation, lighting, etc).

**3. Legislation Regarding Valuation of the Center Lanes of Interstate 90 for Light Rail**

In the 2009 regular legislative session, the State's transportation budget included provisions to assist WSDOT and Sound Transit in resolving the question of valuation of the Interstate 90 center lanes. E.S.S.B. 5352, Section 204(3), provided an appropriation to the Joint Transportation Committee to oversee an independent analysis of methodologies to value the reversible lanes on Interstate 90 for high capacity transit. The independent analysis is to be conducted by Sound Transit and WSDOT, and the two agencies are to provide periodic reports to the Joint Transportation Committee, the Sound Transit Board of Directors, and the Governor. The two agencies are to report final recommendations by November 1, 2009.

E.S.S.B. 5352, Section 306(17), further provides that upon completion of the independent analysis identified in Section 204(3), WSDOT is directed to complete the process of negotiations with Sound

Transit. Section 306(17) also provides that an agreement as to valuation is to be completed no later than December 1, 2009.

WSDOT and Sound Transit have been working with selected consultants to analyze the methodologies to value the reversible lanes on Interstate 90, to prepare appropriate appraisal instructions, and to engage appraisers for the purpose of deriving value(s) for Sound Transit's proposed use of Interstate 90 for light rail. WSDOT intends to complete the process of valuation by the date specified in E.S.S.B. 5352, Section 306(17).

**B. Procedural Background**

Petitioners filed this action on July 15, 2009. By letter of July 20, 2009, from the Supreme Court Clerk, Respondents were directed to answer the Petition, to address whether this action should be retained, transferred or dismissed. This matter is presently before the Court for determination of that question.

**III. SUMMARY OF ARGUMENT**

The Court should dismiss the Petition for two reasons. First, the provisions of the Transportation Budget on which Petitioners rely, E.S.S.B. 5352, Section 204(3) and Section 306(17), do not authorize, let alone impose a duty on the Governor or the Secretary to enter into an

agreement to sell or lease any portion of Interstate 90 to Sound Transit by December 1, 2009.

Mandamus will not lie in the absence of a clear duty. *Gerberding v. Munro*, 134 Wn.2d 188, 195, 949 P.2d 1366 (1998). Neither provision of the Transportation Budget that Petitioners challenge mentions or refers to a sale or lease agreement at all. Fairly read, the provisions direct only an agreement as to the *value* of portions of the Interstate 90 corridor. There is no basis for the Petition, seeking to prohibit the Governor or Secretary from selling or leasing any portion of Interstate 90 to Sound Transit pursuant to E.S.S.B. 5352, Section 204(3) and Section 306(17), when these provisions simply do not provide authority, let alone impose a duty on the Respondents to do so.

Second, Petitioners' action is nonjusticiable on two grounds. First, the action brought by Petitioners does not involve parties with opposing interests. Petitioners allege that Respondents do not have authority to enter into a sale or lease agreement by virtue of Section 204(3) or Section 306(17) of E.S.S.B. 5352. Respondents do not contend otherwise.

Second, the validity of any sale or lease of a portion of Interstate 90 for Sound Transit's proposed light rail transit project that may be executed in the future will depend on all of the terms and conditions of the transaction, and all of the facts and circumstances then

surrounding the light rail project. Those terms, facts, and circumstances can only be assessed at the time such a transaction is to be undertaken. Any challenge at this point would be speculative and premature, and for this additional reason, nonjusticiable.

The Petition should be dismissed.

#### IV. ARGUMENT

##### A. The Petition Does Not State A Claim In Mandamus, And Accordingly Is Not Within The Original Jurisdiction Of The Court

The original jurisdiction of this Court is limited and where it exists, it is discretionary and non-exclusive. *Staples v. Benton Cy. ex rel. Bd. of Comm'rs*, 151 Wn.2d 460, 464, 89 P.3d 706 (2004). The Court's original jurisdiction is not properly invoked in this case.

Petitioners denominate the writ that they seek as a writ of prohibition. However, mandamus is the appropriate remedy where a petition seeks to prohibit the performance of a mandatory duty. *Washington State Labor Coun. v. Reed*, 149 Wn.2d 48, 55, 65 P.3d 1203 (2003); *City of Tacoma v. O'Brien*, 85 Wn.2d 266, 268, 534 P.2d 114 (1975). A pleading of the nature filed by Petitioners thus actually is a petition seeking to invoke the Court's original jurisdiction in mandamus to prohibit the performance of a duty required by law.

In this case, the most fundamental prerequisite to mandamus is not present. The writ of mandamus exists “to compel the performance of an act which the law especially enjoins as a duty resulting from an office” or, as in this case, to prohibit the performance of such a duty. *Washington State Coun. of Cy. & City Employees v. Hahn*, 151 Wn.2d 163, 166-67, 86 P.3d 774 (2004) (quoting RCW 7.16.160). Mandamus is available only where the duty is clear. *Gerberding v. Munro*, 134 Wn.2d 188, 195, 949 P.2d 1366 (1998), citing *Walker v. Munro*, 124 Wn.2d 402, 407-08, 879 P.2d 920 (1994).

Petitioners assert that the following two subsections of the State Transportation Budget require the Governor and the Secretary to enter into a sale or lease agreement with Sound Transit with respect to portions of Interstate 90, and seek a writ prohibiting Respondents from doing so under these provisions.<sup>1</sup>

Section 204(3): \$300,000 of the motor vehicle account--state appropriation is for an independent analysis of methodologies to value the reversible lanes on Interstate 90 to be used for high capacity transit pursuant to sound transit proposition 1 approved by voters in November 2008. The independent analysis shall be conducted by sound transit and the department of transportation, using consultant resources deemed appropriate by the secretary of the department, the chief executive officer of sound transit, and the cochairs of the joint transportation committee. It shall be conducted in consultation with the federal transit and federal highway administrations and account for applicable federal laws,

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<sup>1</sup> The complete sections of Sections 204 and 306 of Engrossed Substitute Senate Bill 5352 are attached as Exhibit A to the Declaration of Bryce E. Brown.

regulations, and practices. It shall also account for the 1976 Interstate 90 memorandum of agreement and subsequent 2004 amendment and the 1978 federal secretary of transportation's environmental decision on Interstate 90. The department and sound transit must provide periodic reports to the joint transportation committee, the sound transit board of directors, and the governor, and report final recommendations by November 1, 2009.

Section 306(17): The legislature is committed to the timely completion of R8A which supports the construction of sound transit's east link. Following the completion of the independent analysis of the methodologies to value the reversible lanes on Interstate 90 which may be used for high capacity transit as directed in section 204 of this act, the department shall complete the process of negotiations with sound transit. Such agreement shall be completed no later than December 1, 2009.

Petitioners' request for a writ of mandamus has no basis in the language of the provisions upon which Petitioners' rely for the Governor's and Secretary's alleged duty. Neither provision so much as mentions the word "sale" or "lease," nor otherwise refers to such an agreement, and neither authorizes nor directs a sale or lease agreement. Both the language and context of the provisions cited by Petitioners make it evident that they only address establishing a value for the center roadway of the Interstate 90 corridor as part of a proposed East Link Project.<sup>2</sup>

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<sup>2</sup> Even as to valuing I-90, the subject actually addressed by E.S.S.B. 5352, Section 306(17), the provision does not impose a mandatory duty on WSDOT to reach an agreement. It directs WSDOT to complete the process of negotiations with Sound Transit with respect to valuation. It then provides that "[s]uch agreement shall be completed no later than December 1, 2009." This does not impose a mandatory duty on WSDOT to reach an agreement on value by December 1, 2009. Such a strained reading effectively would transfer to Sound Transit the authority to establish the value of the I-90 corridor, as under such a reading WSDOT would have to accept Sound Transit's

Petitioners' action thus does not sound in mandamus, is not within the original jurisdiction of this Court, and should be dismissed.

**B. Petitioners' Request Does Not Present A Justiciable Controversy**

Even if Petitioners' action otherwise invoked jurisdiction in mandamus (and for the reasons expressed above it does not) this Court also requires that a justiciable controversy be presented before entertaining a petition for mandamus, that is predicated as is the present Petition, on a request that the Court declare a law invalid. See, e.g., *Walker v. Munro*, 124 Wn.2d at 427. (“This original action is improperly before this court on application for a writ of mandamus and further, is not justiciable at this time.”).<sup>3</sup>

A justiciable controversy requires: “(1) . . . an actual, present and existing dispute, or the mature seeds of one, as distinguished from a

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negotiating position on December 1, 2009. It seems apparent that in this provision, the legislature is exhorting WSDOT to move the valuation negotiation process along, and is expressing its desire that an agreement be reached by December 1, 2009, but it hardly is imposing a mandatory duty on WSDOT to reach such an agreement. In addition, neither budget proviso mentions the Governor at all.

<sup>3</sup> It additionally is important to note that “[t]his court’s original jurisdiction is governed by the constitution and, by the plain language of the constitution, does not include original jurisdiction in a declaratory judgment action.” *Walker*, 124 Wn.2d at 411. “The only grounds on which this court could render declaratory relief [in an original action] is if such a declaration necessarily underlies a writ of mandate.” *Hahn*, 151 Wn.2d at 170, citing *Walker*, 124 Wn.2d 411 (brackets in original). As explained above, in this case the “duty” that Petitioners allege does not exist, and thus, there is no basis for a writ of mandamus. That being so, the Court is without original jurisdiction to issue a declaratory judgment. *Hahn*, 151 Wn.2d at 171. See also, *Walker*, 124 Wn.2d at 422 (rejecting consideration of a declaratory judgment claim “being brought in on the shirttail of a mandamus action, which is improperly before us in the first place.”).

