Technical Memorandum No. 8.3: Potential Use of Tolling Revenues

Date: August 1, 2004 **To: Geoff Larkin, Larkin Group** **Cc: Mary Joe Porter, Underhill Co.** **From: Steven M. Siegel, Siegel Consulting** **Re: Review Draft TM No. 8.3**	**ATA No. 23483W1** **WOC No. 1-Amend. No. 1** **Task No. 8.3** **Product: TM 8.3** **Status: Consulting Team Review**

Executive Summary

All state and federal statutes and state constitutional provisions applicable to tolling the bridges permit the proceeds from such tolling to be used to (a) repay bonds for the toll bridge, and (b) pay for operations and maintenance of the toll bridge. This Technical Memorandum addresses whether toll proceeds in excess of these expenditures (hereinafter "Net Proceeds") can be used for other transportation purposes, and if so, for what purposes and under what conditions.

- **Use of Toll Revenues Permitted by Federal Statutes:** The uses of toll revenues permitted by federal statutes depends on the authority under which the tolls are imposed:
  - 23 USC 129 allows states to generate Net Proceeds for as long as the state desires and to use the Net Proceeds for any federally eligible transporation project, provided that first priority be given to bond repayment and operations of the toll bridge.
  - The Interstate Reconstruction and Rehabilitation Pilot Program limits the use of toll revenues to pay (a) debt service on the pilot project, (b) operations, maintenance, and improvement of the pilot project; and (c) reasonable rate of return for private financing of project; leaving no possibility for Net Proceeds.
  - Under the Value Pricing Pilot Program, any toll revenues in excess of pilot project implementation expenses (i.e. Net Proceeds) may be used for any federally eligible transporation project.

- **State Constitutional Restrictions on the Use of Toll Revenues**
  - Judicial validations or Attorney General Opinions are required to clarify the parameters of allowed uses of toll revenues.
  - Article IX, Section 3a of the Oregon Constitution is narrowly construed and limits the use of toll revenues to "*exclusively for the construction, reconstruction, improvement, repair, maintenance, operation and use of public highways, roads, streets and roadside rest areas in this state.*"
  - Article II, section 40 of the Washington Constitution dedicates certain motor vehicle-related taxes and fees to highway purposes, but not all. Whether the use of toll revenues is restricted depends on whether the framers of the constitutional amendment considered the proceeds of toll revenues "intended" for highway purposes. Preliminary research has not found any indication that they did, but more research is needed. If toll revenues were not intended for highway purposes, there would be no constitutional restriction on their use. If toll revenues are intended for highway purposes, their general use for transit would be prohibited; however the Washington Constitution allows for certain transit-related expenditures that would be disallowed by the Oregon Constitution. The use of

revenues from tolls imposed by local and regional governments (as opposed to the state) is not limited by the Washington Constitution.

- **Statutory Restrictions on the Use of Toll Revenues**

  - The limitations or requirements on the use of toll revenues depends on the authority under which the tolls are imposed.

- **Oregon Statutes**

  - Revenues from tolls issued under the general provisions of ORS 381 must first be applied to the "*necessary operating and other appropriate or proper charges*" of the bridge. Net Proceeds, after payment of required charges, be "divided equally between Oregon and Washington." Thus, there is no requirement that toll revenues be only used for constructing and operating the toll facility.

  - Revenues from ORS 383 can be used to (a) finance preliminary studies and reports for any tollway, (b) acquire land to be owned by the state for tollways, (c) finance the construction, renovation, operation, improvement, maintenance or repair of any tollway project; and (c) make grants or loans to a unit of government for tollway projects.

  - Revenues from tolls issued under Chapter 790 Oregon Laws 2003 ("Innovative Partnership Act") can be used for any constitutionally permitted use that conforms to the 'agreement' entered into under the Act.

- **Washington Statutes**

  - Toll projects in Washington require individual legislative authorization; the use of toll revenues described in these specific project authorizations can override or elaborate on the general tolling authorities.

  - Revenues from tolls imposed under RCW 47.56 must be deposited in segregated trust funds for the project and first used to repay the bonds issued for the construction of the bridge. Tolls must be retained for the project until all costs of constructing and financing the project have been paid. The costs of maintenance and operation of the bridge can be paid from the special trust fund established for the project.

  - RCW 47.58 allows a toll bridge project to be linked with reconstruction of an existing bridge within two miles of the bridge project, and finance the costs of both bridges through an integrated fund. Otherwise, the requirements of RCW 47.56 apply.

  - RCW 47.52, "limited access facilities" (which include bridges), allows that lanes on a limited access highway can be wholly or partially dedicated to public transportation

  - RCW 47.08 establishes legislative intent that it is a 'highway purpose' to use motor vehicle funds, to pay the full proportionate highway, street or road share of the costs of design, right of way acquisition, construction and maintenance of any highway, street or road to be used jointly with an urban public transportation system.

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1. Background

All state and federal statutes and state constitutional provisions applicable to tolling the bridges permit the proceeds from such tolling to be used to (a) repay bonds used to construct the auto-related elements of the toll bridge, and (b) pay for operations and maintenance of the toll bridge. The issue addressed in this Technical Memorandum is whether toll proceeds in excess of these expenditures (called "Net Proceeds" in the remainder of this Technical Memorandum) are available for other transportation purposes, and if so, for what purposes and under what conditions.

The provisions governing the use of Net Proceeds are governed by three frameworks:

- The specific federal statutory authority under which the subject tolling is authorized. [1]
- The state constitutional provisions governing the use of highway taxes and fees.
- The specific state statutory authority under which the subject tolling is authorized.[2]

This memorandum assesses individually each of these governing frameworks, and how they interact with each other.

2. The Use of Toll Revenues Permitted by Federal Statutes

There are three federal laws that can be used to allow tolling of the I-5 and I-205 Bridges:

- 23 USC 129(a)(1)
- The Interstate Reconstruction and Rehabilitation Pilot Program
- The Value Pricing Pilot Program

Each program has it own, unique provisions governing the allowed use of toll proceeds, which are described in the subsections that follow.

2.1 Use of Toll Revenues Authorized under 23 USC 129(a)(1)

As discussed in Technical Memorandum 8.1, 23 USC 129(a)(1)(C) allows federal aid to be used for reconstruction or replacement of a free Interstate or non-Interstate bridges and tunnels and conversion of the free bridge or tunnel to a toll facility following the

[1] These federal statutory authorities were addressed in Technical Memorandum 8.1 details the federal statutory authorities, those provisions governing the use of toll proceeds are reintroduced in this Technical Memorandum.

[2] The Oregon statutory authorities were addressed in Technical Memorandum 8.6.1; those governing use are reintroduced herein. A future Technical Memorandum will detail the Washington statutory authorities, those governing the use of toll proceeds are addressed herein

reconstruction or replacement. [3] This is the only provision under 23 USC 129 that may be applicable to the I-5 and I-205 Bridges.

Prior to tolling a facility under this statute, a Section 129(a)(3) toll agreement must be executed.[4] No model toll agreement has been developed, but the agreement must include five items:

(a) The Section 129(a)(1) category that permits tolling;

(b) A description of the toll facility covered by the agreement;

(c) A commitment that all revenues will be used for debt service, operations and maintenance, a reasonable return on private investment, and establishment of necessary reserve funds;

(d) If excess toll revenues are to be collected, a provision of how any excess toll revenues will be used; and [5]

(e) A stipulation regarding FHWA's access to records.

Thus, while the agreement must place first priority on debt service, reasonable return on private investment, and operation and maintenance, at the option of the state, the agreement could also allow Net Proceeds of the toll revenues to be used for any purpose authorized under Title 23. Further, a Section 129 toll agreement allows the state to determine whether a toll facility is to become free when debt is retired, or at some future

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[3] 23 USC 129(a)(1): Authorization for federal participation. – Notwithstanding section 301 of this title and subject to the provisions of this section, the Secretary shall permit Federal participation in –

(A) initial construction of a toll highway, bridge, or tunnel (other than a highway, bridge, or tunnel on the Interstate System) or approach thereto;

(B) reconstructing, resurfacing, restoring, and rehabilitating a toll highway, bridge, or tunnel …or approach thereto;

(C) reconstruction or replacement of a toll-free bridge or tunnel and conversion of the bridge or tunnel to a toll facility;

(D) reconstruction of a toll-free Federal-aid highway (other than a highway on the Interstate System) and conversion of the highway to a toll facility; and

(E) preliminary studies….

[4] *Guidance on Section 313(a) of the NHS Act; Toll Facilities under Section 129(a) of Title 23***,** dated May 10, 1996

[5] 23 USC 129(a)(3) states "Limitations on use of revenues. Before the Secretary may permit Federal participation under this subsection in construction of a highway, bridge, or tunnel located in a State, the public authority (including the State transportation department) having jurisdiction over the highway, bridge, or tunnel must enter into an agreement with the Secretary which provides that all toll revenues received from operation of the toll facility will be used first for debt service, for reasonable return on investment of any private person financing the project, and for the costs necessary for the proper operation and maintenance of the toll facility, including reconstruction, resurfacing, restoration, and rehabilitation. If the State certifies annually that the tolled facility is being adequately maintained, the State may use any toll revenues in excess of amounts required under the preceding sentence for any purpose for which Federal funds may be obligated by a State under this title."

point in time or whether tolls are to continue indefinitely. And, toll rates are set by the state. Taken together, 23 USC 129 allows states to generate Net Proceeds for as long as the state desires and to use the Net Proceeds for any federally eligible transporation project.

2.2 Use of Toll Revenues Authorized under the Interstate Reconstruction and Rehabilitation Pilot Program

The Interstate Reconstruction and Rehabilitation Pilot Program allows a state to convert an existing free Interstate highway, bridge, or tunnel to a toll facility in conjunction with reconstruction or rehabilitation of the highway that cannot otherwise be improved without the collection of tolls.[6, 7]

The purpose of the program is to provide for the reconstruction or rehabilitation of Interstate highway corridors where work cannot be financially advanced without tolling the facility. An analysis is needed to demonstrate that the facility could not be maintained or improved to meet current or future needs within the limits of the state's apportionments and allocations. No new Federal funding is available for projects approved under this program; any project sponsor wishing to supplement toll revenues with Federal funds must use regular Federal-aid highway funding. By law, Interstate Maintenance funds cannot be used on any road approved under this pilot project. [8]

Prior to initiating tolling, the State must execute an agreement with the FHWA specifying that toll revenues received from operation of the facility will be used in accordance with the requirements set forth in Section 1216(b)(5) of TEA-21, which limits the use of toll revenues **only** for: [9]

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[6] § 1216(b) of TEA-21.

[7] Proposals for SAFETEA reauthorize the program and simplify the eligibility requirements. The new program would require states to show that tolling is the most efficient and economical way to finance the project. The TEA-21 program required that states prove that tolling was the only way to finance the interstate reconstruction or rehabilitation project. The new program would also require that the state agency collect tolls electronically and that the agency include a program to permit low-income drivers to pay a reduced toll amount. The administration has objected to the "low income" provisions.

[8] A *Federal Register* notice published on February 10, 1999 (Vol. 64, No. 27) provides detailed guidance on the pilot program.

[9] Section 1216(b)(5) Before the Secretary may permit a State to participate in the pilot program, the State must enter into an agreement with the Secretary that provides that—

(A) **all toll revenues** received from operation of the toll facility **will be used only for**—

(i) debt service;

(ii) reasonable return on investment of any private person financing the project; and

(iii) any costs necessary for the improvement of and the proper operation and maintenance of the toll facility, including reconstruction, resurfacing, restoration, and rehabilitation of the toll facility; and

(B) regular audits will be conducted to ensure compliance with subparagraph (A) and the results of such audits will be transmitted to the Secretary.

- Debt service on the rehabilitation or reconstruction of the pilot project
- Operations, maintenance, and improvement of the pilot project; and
- Reasonable rate of return for private financing of project.

The earliest that tolls may be imposed on a pilot project is the date of award of a contract for the physical construction to reconstruct or rehabilitate a significant portion of the proposed toll facility. Toll collection must occur for at least 10 years. There is no maximum time limit concerning the duration of toll collection; however, tolls that are collected can only be used for the purposes set forth in Section 1216(b)(5) of TEA-21. Thus, there is no possibility for having Net Proceeds available for transportation projects, other than the pilot project.

2.3 Use of Toll Revenues Authorized under the Variable Pricing Pilot Program

TEA-21 expanded the congestion pricing pilot program created under ISTEA, allowing FHWA to make up to 15 agreements to establish, maintain, and monitor local "value pricing" programs.[10, 11] The authorization includes a limited amount of funds are available to help cover costs associated with pre-implementation activities for up to three years prior to a given project's implementation.[12]

Value pricing is not synonymous with tolling, for it can involve other kinds of charges that are similarly designed to influence drivers' behavior. Still, tolls continue to represent a pre-eminent tool in the value pricing arsenal. The key is for toll rates to vary with the level of congestion on the tolled roadway. It is permissible for any value pricing project selected under this program to levy tolls on the Interstate system, notwithstanding the general prohibition on tolls on the Interstate system.

Any revenues generated by a pilot project must be applied first to pay for pilot project implementation costs. These include such items as:

- Costs associated with implementation of a value pricing project, including necessary salaries and expenses or other administrative and operational costs, such as installation of equipment necessary for operation of a pilot project (e.g., AVI technology, video equipment for traffic monitoring, other instrumentation), enforcement costs, costs of monitoring and evaluating project operations, and costs of continuing public relations activities during the period of implementation.

[10] P.L. 105-178, § 1216(a)

[11] Proposals for SAFETEA/TEA-LU reauthorize and rename the pilot program. The maximum number of congestion pricing pilot projects is proposed to be raised to 25. The limit of 25 projects includes all projects previously approved under this section prior to the enactment of SAFETEA/TEA-LU that collect tolls. It would also require that any congestion pricing toll programs include a program for low-income drivers to pay a reduced toll.

[12] A *Federal Register* notice published on May 7, 2001 (Vol. 66, No. 88) solicited applications for the Value Pricing Pilot Program and provides the particulars on the application process

- Costs of providing transportation alternatives, such as new or expanded transit service provided as an integral part of the value pricing project.

Any project revenues in excess of pilot project implementation expenses (i.e. Net Proceeds) may be used for any programs eligible under title 23, U.S. Code. Uses of revenue are encouraged that support the goals of the value pricing program, particularly uses designed to provide benefits to those traveling in the corridor where the project is being implemented.

3. Oregon Constitutional Restrictions on the Use of Toll Revenues

3.1 Overview

Subsection (1) of Article IX, Section 3a of the Oregon Constitution provides the overriding law governing the use of taxes or excises on or connected with motor vehicles.[13] Paragraph (a) of Subsection (1) addresses taxes on motor vehicle fuels, which is not directly pertinent to this analysis of tolls. Paragraph (1)(b) of Article IX, Section 3a of the Oregon Constitution provides that revenues from a "*tax or excise on the ownership, operation or use of motor vehicles*" apart from certain enumerated exceptions "*shall be used exclusively for the construction, reconstruction, improvement, repair, maintenance, operation and use of public highways, roads, streets and roadside rest areas in this state.*" Thus, the threshold issue for this analysis is whether a "toll" is a "*tax or excise on the ownership, operation, or use of motor vehicles*." If tolls are such a tax or excise, the limitations of Article IX, Section 3a apply to the use of the resulting revenues. Then the issue becomes: what are the limits imposed by Article IX, Section 3a?

3.2 History of Article IX, Section 3a

The history of Article IX, Section 3 is critical to interpreting its coverage and limitations. The original constitutional limitation on the use of revenues from taxes or excises on motor vehicles dates back to 1942, when SJR No. 11 (1941) was approved by the electorate (Article IX, section 3 was subsequently replaced by the present Section 3a). Prior to 1942, Oregon's use of revenues from gasoline taxes and other vehicle fees was governed by statute. The state had imposed a one-cent-per-gallon "license tax" on motor vehicle fuel and the proceeds of which were dedicated to highway purposes. But the proponents of SJR No.11 thought greater assurances were needed. The statement

[13] (1) Except as provided in subsection (2) of this section, revenue from the following shall be used exclusively for the construction, reconstruction, improvement, repair, maintenance, operation and use of public highways, roads, streets and roadside rest areas in this state:

(a) Any tax levied on, with respect to, or measured by the storage, withdrawal, use, sale, distribution, importation or receipt of motor vehicle fuel or any other product used for the propulsion of motor vehicles; and

(b) Any tax or excise levied on the ownership, operation or use of motor vehicles.

submitted for the Voters Pamphlet by the joint legislative subcommittee that drafted SJR No. 11 explains their objectives: [14]

> "*provide that the state keep faith with the users of its highways who gladly pay and have paid these taxes because of their unquestioning reliance and full expectation that the proceeds would be applied to the highway purposes to which they now are dedicated. [The amendment] make[s] certain that the present policy of this state to use highway user funds for highway purposes will be continued*."

In *State ex rel Sprague v. Straub*, [15] the Oregon Supreme Court commented on the intent of the voters with respect to the enactment of this constitutional amendment:

> "*Article IX, Section 3 of the constitution…restricted the use of this form of revenue to highway purposes. It is apparent that the intent of the people when they adopted the amendment was to guarantee that none of the 'proceeds' of the taxes and fees listed in the amendment would be diverted to any other purpose."*

In the 1970s, Oregon's state highway system had fallen into disrepair. Nonetheless Oregon voters rejected a one cent increase in gasoline taxes in 1976 and a two cent increase in gasoline taxes in 1978. The 1979 legislature was aware of a poll indicating that a majority of Oregonians would support a gas tax increase if the monies were used only for highway maintenance and construction and responded by passing Senate Joint Resolution 7 (SJR 7), which proposed an amendment to Article IX, section 3.

Article IX, Section 3a, was adopted by the people May 20, 1980. It amended *former* Article IX, section 3, further restricting permissible uses of motor vehicle revenues to highway purposes.[16] The new Section 3a, which is in effect today, eliminated the use of

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[14] The 1942 Voters' Pamphlet statements advocating that provision also stated:

- *"This principle that highway taxes should be applied solely to highway uses is not new. It was the very basis of the argument for the adoption of the first gasoline tax ever passed, namely our own enacted in 1919. In fact, it was never seriously questioned before the early nineteen thirties when some states, instead of putting their houses in order and meeting their financial emergencies by levying the necessary taxes on all taxpayers, found it easier to raid the highway funds or raise the gasoline tax or the registration fee or both, and divert the proceeds to other purposes, such as in one state, for oyster propagation*!
- *"And all of us see quite clearly that our highways and roads need additions and improvements; that we need safer roads, divided highways, freeways in congested areas, grade separations, more and wider bridges if we are to relieve congestion and reduce the appalling and growing number of accidents.*
- "*So pronounced is the sentiment against diversion of highway funds that the people of many states * * * have prohibited it by constitutional amendments. Such amendments effectuate a basic democratic principle, that of direct control by the people, insofar as is reasonable, of the expenditure of tax monies.*"

[15] *State ex rel Sprague v. Straub*, 240 Or 272, 279, 400 P2d 229, 401 P2d 29 (1965)

[16] The Voters' Pamphlet contained a Joint Legislative Committee argument in favor of the ballot measure, which included such statements as:

motor vehicle and gasoline taxes for the funding of police, parks, scenic and historic places and permitted the use of such funds for only highways, roads, streets, and roadside rest areas.

In reviewing the current Article IX, Section 3a, the Oregon Supreme Court concluded in *Rogers v. Lane County* that the drafters "clearly intended a narrow application of this new constitutional provision to the specific purposes stated." [17] The Court in *Rogers* also concluded "*In short, this constitutional amendment made it clear and unambiguous that the people of Oregon wanted monies derived from taxes and fees on motor vehicles and motor vehicle fuels to be used only for highway purposes."* [18]

In the past two decades, Oregon voters have been asked three times to Section 3a, to allow revenues from motor vehicle fuel and/or registration taxes to be used for public transportation. The voters responded by rejecting Measure 2 in May 1974, Measure 4 in May 1976, and Measure 1 in May 1990. These defeats were not lost on the Oregon Supreme Court. In finding unconstitutional the use of highway funds for transit improvements in *Automobile Club of Oregon v State*, the Court noted these defeated measures and said "*We will not do by reconstructive interpretation what the drafters did not do and what the electorate has declined to do.*" [19]

3.3 Are Tolls a "Tax or Excise" under Article IX, Section 3a?

While there have been many cases regarding what constitutes a tax, excise, or assessment, the court's decision in *Automobile Club of Oregon v. State*, provides the most comprehensive guidance on how the Oregon Supreme Court might classify bridge tolls. In *Automobile Club*, the Court addressed the constitutionality of two legislative enactments:

- *"Measure No. 1 will protect the Highway Fund; it will constitutionally dedicate the Highway Fund to streets, roads, and highways only.*
- *"Under present law the Highway Fund can be used to pay for state police, parks, and other 'highway-related programs.' This has been done and the result has been to rob our highways of needed maintenance.*
- *"These so-called 'highway-related programs' will still be funded but will be financed from the State General Fund---not from gasoline taxes, weight-mile taxes, and vehicle registration fees.*
- *"Ballot Measure No. 1 says that the Highway Fund 'shall be used exclusively for the construction, reconstruction, improvement, repair, and maintenance, operation and use of public highways, roads, streets, and roadside rest areas in this state.'"*
- *"It's time to stop the raid on the Highway Fund";*
- *"[This measure] will constitutionally dedicate the Highway Fund to streets, roads, and highways only"; "*
- *Under present law the Highway Fund can be used to pay for state police, parks, and other 'highway-related programs'[;] … [this has] rob[bed] our highways of needed maintenance";*
- *"[Under this measure] [t]hese so-called 'highway-related programs' will … not [be financed] from gasoline taxes … and vehicle registration fees."*

[17] *Rogers v. Lane County*, 307 Or. 534, 545 771 P,2d 254, 259 (1989)

[18] *Id*. at 541

[19] 314 OR 479, 840 P.2d 674 (1992)

- An underground storage tank assessment, which levied a fee for depositing motor vehicle fuel into underground storage tanks for later resale. The resulting revenues were to be used to fund grants and loans to retail gasoline stations to help bring underground storage tanks into compliance with federal environmental regulations.

- An emission fee, which assessed a $1 to $2 annual "emission fee" payable along with registration of certain motor vehicles. The resulting revenues were to be used to fund projects aimed at improving air quality, particularly public transportation.

In analyzing the constitutionality of these uses, the Court interpreted the term "tax" as being "*any contribution imposed by government upon individuals, for the use and service of the state, whether in the name of* ***toll****, tribute, tallage, gabel, impost, duty, custom, excise, subsidy, aid, supply or other name.*" [20] The court interpreted the term "excise," as being a "*tax imposed on the performance of an act, the engaging in an occupation, or the enjoyment of a privilege.*" [21] A tax on use or operation of motor vehicles is an "excise," because it taxes the enjoyment of a privilege.

The State argued that the underground storage tank assessment align burdens and benefits closely enough to support a "special assessment" label, rather than be classified as a "tax or excise." An assessment is a "*government fee imposed on owners of property to finance improvements or services directly benefiting that property*." Assessments are exempt from constitutional limitations requiring that taxes be uniformly imposed so long as the financial burden and the private benefit are closely related. [22] The Court's decisions on assessments have evolved to suggest that, in certain circumstances, an assessment is not a tax at all. [23] If the Court were to view a toll as an "assessment" in the context of Article IX, Section 3a, there would be no constitutional limitation on the

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[20] 314 Or. at 492, emphasis added.

[21] Black's Law Dictionary 563 (6th ed 1991); The court also referenced *Pacific First Federal v. Dept. of Rev.*, 308 Or 332, 779 P2d 1033 (1989) (corporate excise tax is a privilege tax exacted for the privilege of earning a net income in this state); *Eugene Theatre v. Eugene*, 194 Or 603, 629, 243 P2d 1060 (1952) (a municipal occupation tax is an excise).

[22] *King v. Portland*, 38 Or 402, 63 P 2 (1900), *aff'd*, 814 US 61, 22 S Ct 290, 46 L Ed 431 (1902). In *King v. Portland*, 38 Or 402, 418, 63 P 2 (1900), the court distinguished taxes from assessments for street improvements, stating that taxes are for the benefit of the general public, but assessments are for local improvements and "*are made and sustained upon the assumption that a prescribed portion of the community is to be especially benefited, in the enhancement of the value of the property peculiarly situated as regards the proposed expenditure of the funds to be raised by the assessment…Such an assessment is not in conflict with the provision of our state constitution requiring that 'all taxation shall be equal and uniform'[.]"*

[23] Compare *Sproul v. State Tax Com.*, 234 Or 579, 383 P2d 754 (1963) (fire protection assessments on forest lands exempt from uniformity limitations because not an exercise of state's "taxing power"), with *Dennehy v. Dept. of Rev.*, 305 Or 595, 604 n 3, 756 P2d 13 (1988) (disapproving distinction for these purposes between state's "taxing power" and "police power" and focusing, instead, on "whether a law imposes a 'tax' within the meaning of constitutional rules governing taxation").

use of the toll revenues because tolls would not be a "tax or excise" and Article IX, Section 31 would be inapplicable.

However, the holding in *Automobile Club of Oregon v. State* appears to shut this possibility. Referencing the history of Article IX, Section 3a, the Court held that the underground storage tank assessment is a "tax" under Article IX, Section 3a(1)(a). In doing so, the Court explained "*no matter what label the legislature may attach to a tax on motor vehicle fuel, whether it be "fee," "excise," "tithe," "assessment," or some other term, the revenues derived therefrom must be dedicated to the listed purposes*." The Court further noted "*The people of Oregon have directed that all government revenues from motor vehicle fuel taxes be expended for specified highway purposes; we must honor that direction.*" [24]

The Court also held in *Automobile Club of Oregon* that that the emission fee is a "tax or excise" on the operation or use of motor vehicles that invokes Article IX, Section 3a(1)(b). The Court explained its conclusion with the following statements:

- "*The emission fee is to be collected at the time certain vehicles are registered or when registration is renewed.. Although payment of the fee is not a condition of registration, a civil penalty may be assessed for non-payment of the emission fee. Only vehicles registered under …(passenger cars) are assessed the fee. Graduation of the fee, with older vehicles assessed more than newer ones, does not persuade us that the fee is a "special assessment" unrelated to registration."*
- *"We reach the same conclusion by accepting the state's characterization of the emission fee as a charge for polluting the airshed, because polluting the airshed is an inescapable incident of the operation or use of motor vehicles, and a state-imposed "fee" or "charge" for operating or using a vehicle is a tax or excise on its operation or use for purposes of Article IX, subsection 3a(1)(b)."*

There may be an argument that a toll is an excise or a regulatory fee on the use of the bridge, rather than the use of a motor vehicle, and, as such, not covered by Article IX, Section 3a. This is the basis for permitting parking meter funds to be used for general fund or transit purposes.[25] Given the decisions in *Automobile Club of Oregon* and *Rogers*, the court would give great scrutiny to such an argument.

Thus, based on the history of Article IX, Section 3a and the Court's reasoning and holdings in *Automobile Club of Oregon* and *Rogers*, it appears highly likely that a "toll" levied by the State of Oregon on users of the I-5 or I-205 bridge would constitute an "tax or excise" that is subject to the limitations of Article IX, Section 3a. We now turn attention to what the limitations are.

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[24] The Court also cited *Northwest Natural Gas Co. v. Frank*, 293 Or 374, 648 P2d 1284 (1982), which interpreted Article VIII, section 2, committing taxes measured by the sale of natural gas and oil to the Common School Fund, and Article IX, section 3b, limiting the permissible amount of such taxes, as supporting their conclusion in Automobile Club. ("*This court decided in Northwest Natural Gas Co. v. Frank, that a fee imposed by government may be a "tax" in certain constitutional contexts despite the fact that the fee is called an "assessment" and that it burdens those benefited*.)

[25] 28 Or. Op. Atty. Gen. 20

3.4 Allowed Uses of Toll Revenues under Article IX, Section 3a [26]

As a tax or excise on the operations or use motor vehicles, the use of toll revenues is limited by subsections (1) and (2) of Article IX, Section 3a, which states in relevant part:

> *(1) Except as provided in subsection (2) of this section, revenue from* [tolls] *shall be used exclusively for the construction, reconstruction, improvement, repair, maintenance, operation and **use** of public highways, roads, streets and roadside rest areas in this state* [27]

There has been little difficulty construing the meaning of "construction, reconstruction, repair, maintenance, operation … of public highway, roads, streets and roadside rest areas." The same cannot be said of the terms "improvement" and "use" in subsection 1. Their meaning has been the subject of Attorney General Opinions and Oregon Supreme Court cases.

A 1969 Oregon Attorney General Opinion [28] addressed if the word 'use' allows expenditures of motor vehicle taxes for acquisition and maintenance of public transit equipment which would be used on streets and highways. The question specifically asked if such expenditures would be allowed because they would achieve more efficient use by the public of streets and highways and reduce pressure for capital investments in highways in urban areas. The Attorney General opined that construing the word "use" to include transit expenditures was not warranted because transit was not within the scope of the purposes intended by the people at the time the amendment to Article IX, Section 3 was adopted. In doing so, the Attorney General offered the following instructional analysis:

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[26] This memorandum does not address subsection (3) of Article IX, Section 3a; which may have some affect on the toll rate structure itself, but not the use of toll revenues. This will be addressed in a subsequent memorandum. Subsection (3) states: "*Revenues described in subsection (1) of this section that are generated by taxes or excises imposed by the state shall be generated in a manner that ensures that the share of revenues paid for the use of light vehicles, including cars, and the share of revenues paid for the use of heavy vehicles, including trucks, is fair and proportionate to the costs incurred for the highway system because of each class of vehicle. The Legislative Assembly shall provide for a biennial review and, if necessary, adjustment, of revenue sources to ensure fairness and proportionality.*"

[27] Subsection (2), describes certain exceptions that are not critical to this analysis, as follows: *Revenues described in subsection (1) of this section: (a) May also be used for the cost of administration and any refunds or credits authorized by law.(b) May also be used for the retirement of bonds for which such revenues have been pledged.(c) If from levies under paragraph (b) of subsection (1) of this section on campers, mobile homes, motor homes, travel trailers, snowmobiles, or like vehicles, may also be used for the acquisition, development, maintenance or care of parks or recreation areas. (d) If from levies under paragraph (b) of subsection (1) of this section on vehicles used or held out for use for commercial purposes, may also be used for enforcement of commercial vehicle weight, size, load, conformation and equipment regulation.*

[28] 34 Or. Op. Atty. Gen. 509

"The effect of the amendment of Article IX, § 3, by addition of the second sentence of that section, in November 1942, was to guarantee that the proceeds of the taxes on gasoline and motor vehicles would not be diverted to any other purposes than those described in the amendment... We have been unable to find any Oregon case giving any indication of the scope or meaning of the word "use" in Article IX, § 3… We are warranted, therefore, in looking to the Official Voters' Pamphlet arguments for indications as to the intended meaning of the word in Article IX, § 3… The argument in favor of the amendment is enlightening, however, and the portions we deem pertinent to the question at hand are as follows:

"The purpose of the amendment is to reassert and to write into the constitution of this state, the principle underlying the gasoline tax and the other taxes on motor vehicle users which is, that the revenues received from these taxes and imposed ONLY on such users should be devoted solely to highway purposes as broadly conceived and defined in our present laws. Put differently, the amendment raises this question for the people of Oregon to answer: 'Shall the Constitution be amended to guarantee that the gasoline, diesel fuel, ton mile and other taxes paid only by motor vehicle users be used for highways, roads and streets, and for the other closely related purposes now provided by law?'

*"There is nothing novel or revolutionary in such a proposal. * * * It does provide that the state keep faith with the users of its highways who gladly pay and have paid these taxes because of their unquestioning reliance and full expectation that the proceeds would be applied to the highway purposes to which they now are dedicated. It does make certain that the present policy of this state to use highway user funds for highway purposes will be continued.*

"The farmer realizes that by diversion of funds to non-highway purposes his own access to markets may be impaired or his transportation costs raised, or both. The same is true of the lumberman. The businessman, as he watches the periodic increases in the federal gasoline tax, uses different language to describe what he sees, but he too realizes, as he has not before, that these highway taxes and particularly the gasoline tax, are so lucrative and so easily collected, that once the benefit theory is abandoned and the revenues from these special taxes used for any governmental purpose, expediency becomes the criterion, AND NEITHER ABILITY TO PAY NOR BENEFITS RECEIVED COUNT ANY LONGER. And all of us see quite clearly that our highways and roads need additions and improvements; that we need safer roads, divided highways, freeways in congested areas, grade separations, more and wider bridges if we are to relieve congestion and reduce the appalling and growing number of accidents.

"Oregon's highway funds must be protected, PARTICULARLY DURING OUR PRESENT EMERGENCY, to insure (1) maintenance of existing roads so that we can save tires and equipment; (2) building and widening highways for strategic military purposes; (3) conducting a necessary modernization and improvement program after the war is over." (Emphasis supplied)

"VOTE YES ON THIS MEASURE."

…a rule of construction that has appeared in cases dealing with similar antidiversion amendments, namely, the rule that such a constitutional provision should be interpreted, as to the nature of the expenditures it authorizes, in the light of statutes existing at the time of its adoption... The Oregon Supreme Court itself has given some indication that Article IX, § 3, should be interpreted in the light of statutes existing at the time of its adoption, by its statement in State Highway Commission v. Rawson et al., supra (210 Or. at 612):

> *"* * * The policy of this state to keep highway funds separate and to devote them exclusively to the purposes authorized by law was fortified by the adoption in 1942 of a constitutional amendment * * *."*

Following the rule of the above cases and the purpose brought out in the Voters' Pamphlet argument, it would appear that Article IX, § 3, cannot be construed to include expenditures for public transit facilities because in 1942, when the amendment was adopted, no statute allowed expenditure of highway fund moneys for such a purpose.

In your second question, however, you suggest that acquisition and maintenance of the public transit equipment would achieve more efficient use of the highways and reduce the pressure for capital investments in highways in urban areas. In other words, operation of public transit facilities would benefit the highway system by reducing the volume of traffic on existing highways and reducing the need for more highways.

It is generally held by the courts that highway fund expenditures should further or benefit the highway system...As noted previously herein, one of the purposes stressed in the Voters' Pamphlet argument was the idea that the "benefit" from expenditure of gas and motor vehicle tax moneys should go to those who pay such taxes. In light of the holdings of the two cases just cited, we may assume that the "benefit" envisioned by the authors of the Voters' Pamphlet argument was to be a benefit to the highways, streets and roads of the State of Oregon."

In *Rogers v. Lane County*, the Oregon Supreme Court found that the construction of an airport parking lot and covered walkway from the parking lot to the airport was not sufficiently highway-related, under Article IX, Section 3a, to be paid with Highway Funds.[29] In doing so, the Supreme Court affirmed the conclusions of the Court of Appeals, which held that the trial court erred in relying on a use-benefit test to determine if an expenditure has a sufficient highway purpose to pass muster under Article IX, Section 3a.. The Court of Appeals explained its reasoning by quoting an Attorney General Opinion: [30, 31]

[29] *Rogers v. Lane County*, 307 Or. 534, 771 P.2d 254 (1989)

[30] *Rogers*, 91 Or App at 582

[31] 41 Op Att'y Gen 545, 547 (Or 1981)

> *"'[B]enefit alone is not sufficient. Art IX, Sec 3a does not authorize expenditures for anything as broad as benefits to highway users, but limits them "exclusively for the construction, reconstruction, improvement, repair, maintenance, operation and use of public highways, roads, streets and roadside rest areas ….*
> *"'In short, expenditures must be for the highway itself. In 35 Op Atty Gen 198 (1970), it was concluded that indirect benefits to highway users, such as mass transit facilities which reduce highway congestion, were not included.".*

In a 3-2 decision, the majority created what has become the "Rogers test" for determining permissible uses of highway revenues:

> *" Because the language of Article IX, Section 3a, must be narrowly construed,* ***expenditures of motor vehicle and fuel taxes*** *within the meaning of "improvement, … operation and use"* ***must be limited exclusively to expenditures on highways, roads, streets and roadside rest areas themselves and for other projects or purposes within or adjacent to a highway, road, street or roadside rest area right-of-way that primarily and directly facilitate motorized vehicle travel****. …The expenditure does not fall within these definitions, because the proposed expenditure is an expenditure for the construction of an airport parking lot and covered walkway, rather than an expenditure for a highway, road, street or roadside rest area itself. Further, it is an expenditure primarily for the operational convenience of an airport, rather than for* ***a project or purpose within or adjacent to a highway, road, street or roadside rest area right-of-way that primarily and directly facilitates motorized vehicle travel****."*

The Oregon Supreme Court reinforced the Rogers test in *Automobile Club of Oregon v. State of Oregon*. In *Automobile Club of Oregon*, the state contended that the use of the underground storage assessment was permissible under Article IX, Section 3a, because it funded the "improvement[,] … operation and use of public highways." This broader standard (i.e., whether a project "improves the operation and use of a highway, road, street, or roadside rest area.") was proposed by the dissent in *Rogers v. Lane County.* [32] The Court, in finding the use of the underground storage assessment unconstitutional, firmly rejected the broader standard:

> *We construe Article IX, Section 3a, narrowly. .. The [underground tank] fund clearly does not provide for construction, improvement, repair, maintenance, or use of highways. Neither does it fall within the meaning that this court has attached to "operation and use" of a highway, viz., it does not* ***"primarily and directly facilitate motorized vehicle traffic."*** *See Rogers v. Lane County, supra, 307 Or at 545 (stating the test)****.*** *The fund facilitates motorized vehicle traffic only tangentially; its primary beneficiaries are not users of highways but owners of gasoline stations.*

In concluding the emission fee was unconstitutional, the court found:

[32] 307 Or 534, 553, 771 P2d 254 (1989): (Linde, J., dissenting.)

*"The uses established for the Public Transportation Development Fund are many. The state … urge that at least some of them are permissible purposes under Article IX, Section 3a. For instance, they urge that transportation demand management projects supported by the fund are for the "improvement, * * * operation and use" of highways, as this court construed that phrase in Rogers v. Lane County, supra. They appear to concede that other projects funded by the emission fee (e.g., research into alternative fuels and acquisition of buses) are impermissible unless this court adopts a broader test, such as the one proposed by the dissent in Rogers, viz., "improves the operation and use of a highway, road, street, or roadside rest area." 307 Or at 553.* ***As noted earlier in this opinion, we decline to adopt a new test. Under the existing test, we conclude that the majority of public transportation projects to be funded by the emission fee are impermissible…*** *"*

While the Court's decision, by the use of the phrase "*the 'majority' of public transportation projects are …impermissible,*" seems to leave room for certain public transportation uses of Highway Funds it is clear that the court very tightly construes such uses. Thus, if this language opens the door to certain transit uses, it is very small opening.

4. Use of Toll Revenues Permitted by Oregon Statutes

The Oregon statutes authorizing tolling cannot provide any greater flexibility regarding the use of such revenues than permitted by the Oregon constitution, but it can, and in some cases does, further limit the use of such revenues. As detailed in Technical Memorandum 8.6.1, there are three legislative enactments which allow ODOT to toll the I-5 and I-205 bridges:

- ORS 381
- ORS 383
- Chapter 790 Oregon Laws 2003 ("Innovative Partnership Act")

Each of these has its own method of governing the use of toll proceeds.

4.1 ORS 381: Interstate Bridges

ORS 381, enacted in 1953, gave ODOT the authority to toll the original bridge span between Portland and Vancouver as a way to finance the construction of the second span. ORS 381 provides two distinct grants of tolling authority with regard to 'Interstate Bridges': [33]

- ORS 381.005 to 381.075 provides general authority regarding the tolling of Columbia River bridges.

[33] This memorandum only focuses on authority granted to the state under ORS 381, and does not address the authority granted to other units of government by the statute.

- ORS 381.086 to 381.094 provides specific authority for the 'existing' I-5 bridge (The 'existing' I-5 bridge at the time of the statute was enacted in 1953 was the original, single-span bridge between Portland and Vancouver. The legislation was specifically aimed at providing for the construction of the second span).

If ODOT tolls a Columbia River Bridge under ORS 381.005 to 381.075, ORS 381.070(2) requires that the revenues from the tolls first be applied to the "*necessary operating and other appropriate or proper charges*" of the bridge...[34] ORS 381.070(2) also provides that the Net Proceeds, after payment of required charges, be "divided equally between Oregon and Washington."[35] Thus, there is no requirement that toll revenues be only used for constructing and operating the toll facility.

ORS 381.086 to 381.094 provides specific authorities for tolling the 'existing' I-5 bridge. These provisions seemingly refer only to the single span existing between Portland and Vancouver in 1953. This appears to suggest that the provisions of ORS 381.086 to ORS 381.094 are historical remnants that are inapplicable to the current situation. Nonetheless, it remains on the books and needs to be considered.

Under 381.086, the existing I-5 bridge may be operated by ODOT "*as a toll bridge for the purpose of creating revenue to be used as set forth in ORS 381.092*." ODOT is provided authority to toll a broad range of bridge users and impose franchise fees for use of the bridge. [36] The use of the revenues from these sources is limited to bridge and approach construction, operation and maintenance. [37] The duration of tolls imposed by ODOT on the existing I-5 bridge under ORS 381 is limited to the term of the construction bonds for the new bridge. [38] Thus, not only does this part of ORS 381 appear outdated, it is far more restrictive than the authority granted earlier in the Chapter.

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[34] 381.070(2) If any such *[i.e. Columbia River]* bridge is operated as a toll bridge, the revenues derived as a result of the tolls and charges collected shall, after deducting necessary operating and other appropriate or proper charges, be divided equally between the State of Oregon and the State of Washington.

[35] Because the relationship between tolling authorities under ORS 381 and the tolling authorities provided elsewhere in Oregon statute is ambiguous, it is not clear whether this requirement for dividing excess revenues would apply to tolling done under ORS 383 or the Innovative Partnership Act

[36] 381.088 Tolls and franchise fees. The Department of Transportation may impose and collect tolls and franchise fees for the use of said bridge by all vehicles, pedestrians, public utilities and telecommunications utilities, including power, light, telephone and telegraph wires, and water, gas and oil pipes.

[37] 381.092 Uses of tolls and fees collected. The revenues derived from the imposition and collection of tolls and franchise fees for the use of said bridge shall be used for the purpose of paying the cost and incidental expenses of construction of a new bridge, including approaches thereto, across the Columbia River adjacent to said existing interstate bridge, including payment of principal, interest and financing costs of bonds issued for the purpose of obtaining funds for the construction of said new bridge, and the cost of maintaining and operating both of said bridges while said bridges are operated as toll bridges

[38] 381.094 Operation of bridge as free bridge. The said existing interstate bridge shall be operated as a free bridge whenever all bonds and interest thereon issued for the purpose of obtaining funds to be used for construction of a new bridge adjacent to said existing interstate bridge have been paid.

4.2 ORS 383: Toll Roads and Toll Bridges

Like ORS 381, ORS 383 contains two distinct sets of authority:

- ORS 383.001 to ORS 383.027, which is headed "Toll Roads" in the statute, grants broad tolling authority for "tollways" and "tollway projects." While headed as "Toll Roads," these authorities can also apply to "toll bridges."

- ORS 383.310 to ORS 383.380, which is headed "Toll Bridges" in the statute, includes procedural requirements that have no practical affect on State projects (but would affect toll projects by other units of governments or private entities). These sections do not grant the state any additional authority to toll or use toll revenues.

If a facility is a tollway, ORS 383.005(2) provides ODOT (directly or through other entities) clear authority to impose and collect tolls on tollway projects. [39] The proceeds of these toll collections can be used: [40]

- To finance preliminary studies and reports for <u>any</u> tollway project;
- To acquire land to be owned by the state for tollways …;
- To finance the construction, renovation, operation, improvement, maintenance or repair of <u>any</u> tollway project;
- To make grants or loans to a unit of government for tollway <u>projects</u>…

The use of the terms "any tollway project," "tollways" and "projects" (i.e. plurals) in ORS 383.009 authorizes ODOT to use Net Proceeds in the State Tollway Account for projects other than the facility from which the tolls were collected, provided the project receiving such Net Proceeds is a "tollway project." A tollway project is "*any capital project involving … a tollway, <u>related facilities</u> or any portion thereof*." The inclusion of "related facilities" does not provide much flexibility regarding the use of toll proceeds. [41]

Thus, there are only two basic criteria for a bridge or highway to be a tollway: (a) it must be constructed, operated, <u>or</u> maintained with toll revenues, and (b) the toll revenues must result from a qualified <u>agreement</u> under ORS 383. A bi-state agreement to construct and toll a bridge would make such a bridge a "tollway" and its construction a "tollway project." But would the needed improvements to I-5 and interchanges along I-5 in the vicinity of a tolled Interstate Bridge also be classified as a tollway project?

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[39] ORS 383.005 (2) The department may operate tollway projects and impose and collect tolls on any tollway project the department operates. Any private entity or unit of government that operates a tollway project pursuant to an agreement with the department may impose and collect tolls on the tollway project.

[40] ORS 383.009

[41] ORS 383.003(3) "Related facility" means any real or personal property that:(a) Will be used to operate, maintain, renovate or facilitate the use of the tollway; (b) Will provide goods or services to the users of the tollway; or(c) Can be developed efficiently when tollways are developed and will generate revenue that may be used to reduce tolls or will be deposited in the State Tollway Account.

Note that a "tollway" is *"…a land vehicle transportation route … wholly or partially funded with toll revenues resulting from an agreement under ORS 383.005"*. Thus, it is possible that an agreement between Oregon and Washington to construct a toll bridge and highway and interchange improvements along I-5 in the vicinity of the bridge, all paid by the proceeds of tolling the bridge, would constitute a "tollway" because (a) it is the subject of a qualified agreement and (b) all of the facility improvements in the agreement are to be paid with toll proceeds. As part of a tollway project, the improvements to and along I-5 would be eligible to be paid with toll revenues from the bridge. This interpretation is not without doubt, an Attorney General's Opinion or judicial validation should be sought prior to pursuing this approach.

ORS 381.070(2) may apply to tollway projects authorized under ORS 383. If so, ORS 381 would require that the Net Proceeds after operations (and other appropriate and proper charges) be divided equally between Oregon and Washington. This issue needs clarification, as discussed in Technical Memorandum 8.6.1. Assuming that it does, the half of Net Proceeds apportioned to Oregon would have to be deposited in the State Tollway Account and used only for other tollways. Thus, the use of Net Proceeds allowed by ORS 383 is more restrictive than that allowed under the first part of ORS 381.

4.3 Use of Toll Revenues under Chapter 790 of Oregon Laws 2003; the Innovative Partnership Act of 2003 (IPA)

As with the tollway statutes under ORS 383, the tolling authority under IPA emanates from an "agreement" under Section 4 of the Act. An "agreement" is a "*written agreement, including but not limited to a contract, for a transportation project that is entered into under section 4 of this 2003 Act*." [42] A "transportation project" is "*any proposed or existing undertaking that facilitates any mode of transportation in this state*." [43]

The IPA authorizes ODOT to: "Enter into any agreement or any configuration of agreements relating to transportation projects with any private entity or unit of government [44]... The subject of agreements entered into under this section may include, but need not be limited to, planning, acquisition, financing, development, design, construction, reconstruction, replacement, improvement, maintenance, management, repair, leasing and operation of transportation projects." [45]

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[42] 790 Oregon Laws 2003, Section 2(1).

[43] 790 Oregon Laws 2003, Section 2(3).

[44] Under 790 Oregon Laws 2003, Section 2(4) a "unit of government" means "any department or agency of the federal government, any state or any agency, office or department of a state …or intergovernmental entity …"

[45] 790 Oregon Laws 2003, Section 4(1).

Subsequent to entering a qualified agreement, revenues received by ODOT from the funding mechanism established in the agreement (i.e. tolling) are required to be deposited in the "State Transportation Enterprise Fund." [46] Separate accounts are established in the Fund for each project undertaken pursuant to a qualified agreement. Funds in an account may be spent in accordance with the terms of the qualified agreement. Thus, the agreement could provide for improvements to I-5, I-205, transportation projects in the corridor, metropolitan area, or one or both states – providing great flexibility.

While agreements and projects undertaken under IPA are exempt from the provisions of ORS 383, it is possible that the provisions of ORS 381.005 to ORS 381.080 may overlay those of the IPA. [47] If so, this would require agreements executed and projects undertaken pursuant to the IPA to:

- Divide net revenues equally between Oregon and Washington;
- Reimburse the state highway trust fund for any expenditures made from the fund on behalf of the tolled bridge; and
- Other procedural requirements.

5. Washington Constitutional Restrictions on the Use of Toll Revenues

Much like Oregon, in the early 1940's the State of Washington sought to limit the expenditure of proceeds of auto-related taxes or fees to highway purposes. Article II, section 40 of the Washington Constitution was adopted in 1944 as Amendment 18 to the Washington State Constitution. The intent of this amendment is revealed in the following proponent's statement in the 1943 Voter's Pamphlet:

> *Between 1933 and 1943 in this state, in excess of $10,000,000 of your gas tax money was diverted away from street and highway improvement and maintenance for other uses. Several hundred miles of good, paved, safe highway would have*

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[46] SECTION 6. (1) The State Transportation Enterprise Fund is established separate and distinct from the General Fund. Interest earned by the State Transportation Enterprise Fund shall be credited to the fund.
(2) The following moneys shall be deposited into the State Transportation Enterprise Fund:…
(b) Revenues received from any transportation project developed under the program established under section 3 of this 2003 Act; and ….
(3) Moneys in the State Transportation Enterprise Fund are continuously appropriated to the Department of Transportation for the purpose of carrying out the provisions of sections 1 to 13 of this 2003 Act and implementing all or portions of any transportation project developed under the program established under section 3 of this 2003 Act.
(4) Moneys in the State Transportation Enterprise Fund that are transferred from the State Highway Fund or from any one of the sources that comprise the State Highway Fund as specified in ORS 366.505 and that are revenue under Section 3a, Article IX of the Oregon Constitution, may be used only for purposes authorized by Section 3a, Article IX of the Oregon Constitution.
(5) The department shall establish a separate account in the State Transportation Enterprise Fund for each transportation project that is undertaken under the program established under section 3 of this 2003 Act. …
(6) **Moneys in an account established under subsection (5) of this section shall be used as provided in any agreement applicable to the transportation project for which the account is established**

[47] This assumes the remainder of ORS 381, relating to the construction of the second span of the I-5 Bridge, is no longer applicable.

been built to save money in motor vehicle operation had this special motor tax money been used as it was intended. These were highways and streets we paid for, but didn't get! Now you can stop further diversion.

In pertinent part, Article II, Section 40 provides:

> *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:*
> . . . .
> *Provided, That this section shall not be construed to include revenue from general or special taxes or excises not levied primarily for highway purposes, or apply to vehicle operator's license fees or any excise tax imposed on motor vehicles or the use thereof in lieu of a property tax thereon, or fees for certificates of ownership of motor vehicles.* [48]

Put simply, Article II, Section 40 states that certain enumerated auto-related revenues must be used only for "highway purposes." Thus, there are two primary questions for this analysis: (a) what are "highway purposes" and (b) which revenues have restricted uses, in particular, are revenues from tolls subject to use restrictions?

5.1 What Constitutes a "Highway Purpose"?

There has been a long-line of legal thought on the term "*highway purpose*." The following paragraphs summarize an Attorney General Opinion and a Washington Supreme Court cast that are particularly pertinent in this Technical Memorandum.

In a 1958 Attorney General Opinion, the Attorney General opined that the use of motor vehicle funds as the state's participating money in the purchase of additional rights of way to accommodate a rapid rail transit system within the highway right of way would constitute a diversion of motor vehicle funds under the 18th Amendment to the

[48] The omitted list of "highway purposes" includes:
(a) The necessary operating, engineering and legal expenses connected with the administration of public highways, county roads and city streets;
(b) The construction, reconstruction, maintenance, repair, and betterment of public highways, county roads, bridges and city streets; including the cost and expense of (1) acquisition of rights-of-way, (2) installing, maintaining and operating traffic signs and signal lights, (3) policing by the state of public highways, (4) operation of movable span bridges, (5) operation of ferries which are a part of any public highway, county road, or city street;
(c) The payment or refunding of any obligation of the State of Washington, or any political subdivision thereof, for which any of the revenues described in section 1 may have been legally pledged prior to the effective date of this act;
(d) Refunds authorized by law for taxes paid on motor vehicle fuels;
(e) The cost of collection of any revenues described in this section:

Washington constitution. [49] In doing so, the Attorney General analyzed the term "highway purpose" as follows:

> *" Since the passage of Amendment 18 to the Washington Constitution in November, 1944, there has been only one judicial construction of this amendment by our court. In State ex rel. Bugge vs. Martin 38 Wn. (2d) 834, at 839, 840, the supreme court stated that:*
>
> *"Amendment 18 was designed to insure that the motor vehicle fund would be used exclusively for highway purposes. In order to remove any doubt as to whether the words 'highway purposes' would be regarded as broad enough to cover the various items and objectives which the framers of the amendment desired to include therein, the amendment, after providing the fund was to be used exclusively for highway purposes, then provided that 'such highway purposes shall be construed to include the following: . . .' Subdivisions (a) to (e) set forth what may be deemed an expansion of that which might* otherwise be considered as *being embraced within the term 'highway purposes,' when such words are given their ordinary meaning.*
>
> *"The content of the subdivisions does not limit the scope of the term 'highway purposes,' but enlarges and extends it. . . ."*
>
> *Thus the court concluded that the phrase "highway purposes" was not necessarily restricted to those objectives specifically enumerated in subdivisions (a) to (c). However, the court did make clear that the proposed use to which motor vehicle funds may be expended must be exclusively in connection with a highway. In the Martin case, supra, the court authorized expenditure of motor vehicle funds in order to retire bonds upon the Agate Pass Bridge. This appears to be a very broad interpretation of the phrase "highway purposes," but proper in view of the fact that the Agate Pass Bridge was being acquired as part of the highway system.*
>
> *In the situation at hand the purchase of the extra right of way would not serve any highway purpose, since such right of way would be exclusively for the rapid rail transit system. Therefore, it is the opinion of this office that expenditure of motor vehicle funds for the purchase of additional right of way in order for a rapid rail transit system to be built upon the median strip would constitute an expenditure of motor vehicle funds in violation of Amendment 18 of the Washington state constitution."*

In *State ex rel. O'Connell v. Slavin,* [50] the Court addressed the constitutionality of using an appropriation from the Motor Vehicle Fund for the preparation of a comprehensive transit plans. In declaring unconstitutional such use of highway funds, the court stated:

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[49] AGO 1957-58 No.104
[50] 75 Wn.2d 554, 558, 452 P.2d 943 (1969)

"The appellant accepts the definition of highway adopted by this court in State ex rel. Oregon-Wash. R.R. &Nav. Co. v. Walla Walla Cy., 5 Wn.2d 95, 104 P.2d 764 (1940), which was taken from 25 Am. Jur. Highways § 2 (1940): "A highway is a way open to the public at large, for travel or transportation, without distinction, discrimination, or restriction, except such as is, incident to regulations calculated to secure to the general public the largest practical benefit therefrom and enjoyment thereof. Its prime essentials are the right of common enjoyment on the one hand and the duty of public maintenance on the other. It is the right of travel by all the world, and not the exercise of the right, which constitutes a way a public highway, and the actual amount of travel upon it is not material. If it is, open to all who desire to use it, it is a public highway although it may accommodate only a limited portion of the public or even a single family or although it accommodates some individuals more than others."

What is a public transportation system? It is not a "way" at all, but is a number of buses, trains, or other carriers each holding a number of passengers, which may travel upon the highways or may travel upon rails or water, or through the air, and which are owned and operated, either publicly or privately, for the transportation of the public. The mere fact that these vehicles may travel over the highways, or that, as the appellant points out, may relieve the highways of vehicular traffic, does not make their construction, ownership, operation, or planning a highway purpose, within the meaning of the constitutional provision.

If the fact that vehicles affording public transportation make use of highways and the fact that persons who use these vehicles may be refraining from driving their own vehicles and thereby saving wear and tear and congestion on the highways were sufficient to bring the ownership and operation of such vehicles within the definition of "highway purpose," then private bus companies would be justified in claiming subsidies out of the highway funds. This we believe the appellant would be quick to concede was not the intent of the framers of the amendment. We are convinced that it was no more the intent of the framers to provide subsidies for the planning, constructing, owning or operating of public transportation systems, however beneficial such a use of the funds might be to the state and its citizens."

Thus, AGO 1957-58 No.104 and *Slavin* stand for the proposition that transit is not a "highway purpose." Thus, revenue from a restricted source under Article II, Section 40, may not be used for transit purposes.

5.2 Are Toll Revenues Subject to Use Restrictions?

There is no case law directly on the classification of toll revenues for purposes of Article II, Section 40 analysis. However, guidance can be drawn using the methodology of the Court in *State ex rel. Heavey v. Murphy*. [51]

[51] 138 Wn.2d 800, 982 P.2d 611 (1999)

In *Heavey*, the Washington Supreme Court was asked to determine if it was constitutionally permitted to use motor vehicle excise tax revenues for highway purposes, even though Article II, Section 40 did not require such funds be used for highway purposes (i.e. does Section 40 mean you do not have to use MVET for highway purposes, or does it mean you cannot use MVET funds for highway purposes).[52] To reach its conclusions, the Court discussed how Article II, Section 40 operates, in particular, the relationship of the proviso (i.e., the paragraph starting with "provided") to the enacting clause (i.e., the first paragraph).

According to the Court, "*the language from the enacting clause requires only the deposit of certain revenue into the motor vehicle fund and limits their expenditure*." The revenues whose expenditures are limited by the enacting clause include only the following:

- License fees for motor vehicles;
- Excise taxes on the sale, distribution or use of motor vehicle fuel; and
- All other state revenue intended to be used for highway purposes

Pursuant to the enacting clause, revenues from these sources (but not the exceptions listed in the proviso), must be "*…placed in a special fund"* (which has been interpreted to be the Motor Vehicle Fund) and "*…used exclusively for highway purposes*."

The proviso is a limitation on the enacting clause of Article II, Section 40. As explained by the Court: "*[T]he proviso was not intended to enlarge the enactment to which it is appended so as to operate as a substantive enactment itself. Rather, it is a restraint or limitation upon, and not an addition to, that which precedes it. The proviso simply placed exceptions outside of the preceding enacting clause…"* [53] The Court summarized its conclusion about the proviso, stating: "*In sum, the language from the enacting clause requires only the deposit of certain revenue into the motor vehicle fund and limits their expenditure. If, as a result of the proviso, this language does not "apply to" or "include" MVET revenue, the logical import of such an exception is that the deposit of MVET revenue into the motor vehicle fund is simply not required and its expenditure not limited by the terms of the enacting clause*." [54]

The exceptions (i.e. revenues whose uses are expressly not limited by the enacting clause) in the proviso include only the following:

- Revenue from general or special taxes or excises not levied primarily for highway purposes;
- Vehicle operator's license fees;

[52] The Court held that while Article II, Section 40 did not require motor vehicle excise taxes to be used for highway purposes, it did not prohibit their use of such purposes.

[53] *Heavey*, 138 Wn.2d at 812

[54] *Id*. at 812-13

- Any excise tax imposed on motor vehicles or the use thereof in lieu of a property tax thereon; and
- Fees for certificates of ownership of motor vehicles.

The key question for this Technical Memorandum is whether or not the revenues from a bridge toll are restricted by Article II, Section 40? First, we know there are only three types of revenues that are restricted by the enacting clause, and two of them clearly do not encompass tolls (i.e., "license fees for motor vehicles" and "excise taxes on the sale, distribution, or use of motor vehicle fuel"). Thus, the only possibility that the use of "tolls" is limited by Article II, Section 40 is if toll revenue constitutes "other state revenue intended to be used for highway purposes."

But before addressing this question, one must determine if "tolls" are exempted from the limitations of Article II, Section 40 by its proviso. Here we know three exceptions clearly do not encompass tolls (i.e., "vehicle operator's license fees," "fees for certificates of ownership," and "excise tax imposed on motor vehicles …in lieu of a property tax.") Thus, the only possible exception relating to tolls, if one is needed, is if it is "revenue from general or special taxes or excises not levied primarily for highway purposes."

Taking the applicable provisions of the enacting clause and proviso together, this means:

- If toll revenues are <u>not</u> "other state revenue intended for to be used for highway purposes," there is no need to consider the proviso and there are no restrictions on the use of toll revenues.

- If tolls revenues <u>are</u> "revenue from general or special taxes or excises not levied primarily for highway purposes," there is no need to consider the enacting clause and there are no restrictions on the use of toll revenues.

- If toll revenues (a) are revenues *intended* for highway purposes, and (b) are *primarily intended* [55] for highway purposes, they are subject to uses restrictions by Article II. Section 40 (i.e., they could <u>not</u> be used for transit).

The precepts advanced by the Court in *Heavey* help determine what is meant by "*intended*" or "*primarily intended*" under Article II, Section 40. The *Heavey* court stated that Article II, Section 40 "*should be read according to the natural and most obvious import of its framers, without resorting to subtle and forced construction for the purpose of limiting or extending its operation.*" [56] It is clear that the "framers" expressly considered gas taxes, and motor vehicle excise taxes existing at the time, but I have not uncovered any evidence that the "framers" focused attention on toll revenues. This

[55] This analysis assumes that tolls would be classified as an "excise" under Washington law, as they would under Oregon law, as discussed earlier in this Technical Memorandum.

[56] *Heavey*, 138 Wn.2d at 811 (quoting *State ex rel. O'Connell v. Slavin*, 75 Wn.2d 554, 558, 452 P.2d 943 (1969)).

conclusion is preliminary; additional research is required to more definitively inventory the "framers" intentions.

Assuming there was no clear intention by the framers to make Article II, Section 40 applicable to tolls, the "intended use" of toll revenues is best determined by the legislative authority on which such tolls are levied. For example, if the statutes enabling the subject tolling expressly state that the revenues are to be used for highway purposes, or if it directs the proceeds of the tolls to be placed in the Motor Vehicle Fund, the toll revenues are likely to be deemed "intended" for highway purposes. Conversely, if the tolling authority expressly permits tolls to be used, for example, for a multi-modal improvement, then it is likely that the toll revenues would not be deemed "intended" for highway purposes.

This preliminary conclusion is not free of doubt; and research will continue on this issue. And there are contrary opinions. As part of a response to questions regarding the allocation of funds remaining in the Lake Washington Toll Bridge trust fund at the time all bonds were repaid, a 1951 Attorney General Opinion stated: [57]

> "*Our conclusion that these funds may be properly allocated to the Motor Vehicle Fund is reinforced by the provisions of Constitutional Amendment 18 which protects highway and motor vehicle revenues from encroachment. We doubt that it would be lawful for this money actually derived from highway users to be used for any other than highway purposes*."

Before taking any actions that assumes the constitutionality of using toll revenues for transit purposes, a judicial validation or Attorney General clarification should be sought.

5.3 Revenues from Tolls Imposed by Local and Regional Entities Can be Used for Any Purpose

While this Technical Memorandum focuses on the use of toll revenues imposed by the State of Washington (i.e., WSDOT), it must be noted that **Article II, Section 40 does not apply to revenues collected from tolls imposed by other levels of government**. A 1974 Attorney General Opinion explains: [58]

> *"…it is our opinion, in any event, that Article II, § 40 (Amendment 18) only relates to taxes collected by the state of Washington and does not reach those imposed and collected by local units of government. Specifically, by its own express terms it relates to "All fees collected by the State of Washington"; "all excise taxes collected by the State of Washington"; "all other state revenue intended to be used for highway purposes." Then, it goes on to require these revenues to be "paid into the state treasury"; not the treasury of a county, city or town as is the case with respect to locally levied and collected taxes.*

[57] 1951-53 AGO No. 190, note this AG Opinion was issued prior to *Heavey*.
[58] AGLO 1974 No. 6

Accordingly, we do not believe that this constitutional provision would render invalid a state statute enabling counties and cities to impose and collect a license fee on motor vehicles and/or a tax on motor vehicle fuel and to use the revenue collected therefrom for purposes other than "highway purposes," as used and defined therein, and, for this reason, we answer your question [May the legislature constitutionally authorize counties and cities to impose and collect a license fee on motor vehicles and/or a tax on motor vehicle fuel and to use the revenue collected therefrom for purposes other than "highway purposes"?] in the affirmative."

6. Use of Toll Revenues Permitted by Washington Statutes

As with Oregon, the Washington statutes authorizing tolling cannot provide any greater flexibility regarding the use of such revenues than permitted by the Washington constitution, but it can, and in some cases does, further limit the use of such revenues. As will be detailed in a future Technical Memorandum, there are three statutes that could be applicable to tolling the I-5 and I-205 bridges:

- RCW 47.56
- RCW 57.58
- RCW 47.46

Each of these has its own method of governing the use of toll proceeds

6.1 Tolling Authorized under RCW 47.56

As with ORS 381, RCW 47.56 contains to distinct sets of authorities:

- The general tolling authority under RCW 47.56.010 – 47.56.257
- The project specific authorizations granted under RCW 47.56.310 – 47.56.345 (relating to the I-5 Bridge; there are other sections relating to other bridges that are not applicable to this analysis)

6.1.1 General Tolling Authority under RCW 47.56.010 – 47.56.257

The Transportation Commission is empowered to fix toll rates for toll bridges built under RCW 47.56; provided that the toll rates yield annual revenue "*equal to operating and maintenance expenses … and all redemption payments and interest charges of the bonds*" for the subject bridge. [59] The use of the term "equal to" appears to imply an intention not to create Net Proceeds.

[59] RCW 47.56.240 Toll bridges -- Fixing of toll rates authorized -- Lien of bonds on revenue**.** The commission is hereby empowered to fix the rates of toll and other charges for all toll bridges built under the terms of this chapter. Toll charges so fixed may be changed from time to time as conditions warrant. The commission, in establishing toll charges, shall give due consideration to the cost of operating and

All revenues received from tolls authorized under RCW 47.56 must be deposited in segregated trust funds for the bridge or bridges producing the tolls.[60] Monies from these separate accounts are first used to repay the bonds issued for the construction of the subject bridge[61] and to defray certain expenses of WSDOT relating to issuing the bonds. Tolls must be retained on a subject facility until all costs of constructing and financing the project, and Motor Vehicle Funds advanced to the project have been fully paid. [62] For recently or newly constructed facilities, the costs of maintenance and operation of the bridge can be paid from the special trust fund established for the subject bridge, except that bridges constructed under RCW 47.46 are not eligible to receive funds for operations and maintenance.

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maintaining such toll bridge or toll bridges including the cost of insurance, and to the amount required annually to meet the redemption of bonds and interest payments on them. The tolls and charges shall be at all times fixed at rates to yield annual revenue equal to annual operating and maintenance expenses including insurance costs and all redemption payments and interest charges of the bonds issued for any particular toll bridge or toll bridges as the bonds become due**.** The bond redemption and interest payments constitute a first direct and exclusive charge and lien on all such tolls and other revenues and interest thereon. Sinking funds created therefrom received from the use and operation of the toll bridge or toll bridges, and such tolls and revenues together with the interest earned thereon shall constitute a trust fund for the security and payment of such bonds and shall not be used or pledged for any other purpose as long as any of these bonds are outstanding and unpaid.

[60] RCW 47.56.160 Toll bridges -- Toll revenue fund. All tolls or other revenues received from the operation of any toll bridge or toll bridges constructed with the proceeds of bonds issued and sold hereunder shall be paid over by the department to the state treasurer. The treasurer shall deposit them forthwith as demand deposits in a depositary or depositaries authorized by law to receive deposits of state funds. The deposit shall be made to the credit of a special trust fund designated as the toll revenue fund of the particular toll bridge or toll bridges producing the tolls or revenue, which fund shall be a trust fund and shall at all times be kept segregated and set apart from all other funds.

[61] RCW 47.56.170 Toll bridges -- Transfer of funds for bond payments -- Surplus funds**.** From the money deposited in each separate construction fund under RCW 47.56.160, the state treasurer shall transfer to the place or places of payment named in the bonds such sums as may be required to pay the interest as it becomes due on all bonds sold and outstanding for the construction of a particular toll bridge or toll bridges during the period of actual construction and during the period of six months immediately thereafter. The state treasurer shall thereafter transfer from each separate toll revenue fund to the place or places of payment named in the bonds such sums as may be required to pay the interest on the bonds and redeem the principal thereof as the interest payments and bond redemption become due for all bonds issued and sold for the construction of the particular toll bridge or toll bridges producing the tolls or revenues so deposited in the toll revenue fund..

[62] RCW 47.56.245 Toll charges retained until costs paid**.** The department shall retain toll charges on all existing and future facilities until all costs of investigation, financing, acquisition of property, and construction advanced from the motor vehicle fund, and obligations incurred under RCW 47.56.250 and chapter 16, Laws of 1945 have been fully paid.

(1) Except as provided in subsection (2) of this section, with respect to every facility completed after March 19, 1953, costs of maintenance and operation shall be paid periodically out of the revenues of the facility in which such costs were incurred.

(2) Where a state toll facility is constructed under chapter 47.46 RCW adjacent to or within two miles of an existing bridge that was constructed under this chapter, revenue from the toll facility may not be used to pay for costs of maintenance on the existing bridge.

Provided that "*it is in the public interest and not inconsistent with the use and operations*" of the toll bridge, WSDOT may grant franchises to certain public or private entities to use any portion of the property of any toll bridge, including approaches, for the construction of structures and facilities that are part of any urban public transportation system. [63] Any funds collected for such franchises of any leases or licenses issued to governmental entities to use a portion of a toll bridge [64] must be deposited in the special trust fund for the subject bridge and spent for the purposes described above. [65]

6.1.2 Project Specific Authorization under RCW 47.56.310 – 47.56.345

Consistent with State of Washington practice, specific authorization was granted in 1953 by RCW 47.56.310 to construct the second bridge span between Portland and Vancouver. This section provides, in relevant part:

> *"The Washington toll bridge authority is hereby authorized in conjunction with the Oregon state highway commission, to erect an additional bridge … including approaches thereto, across the Columbia river adjacent to the existing interstate bridge between Vancouver, Washington, and Portland, Oregon, and to reconstruct and improve the said existing interstate bridge and its approaches …"*

By its terms this authority appears only related to the second span constructed in 1960, and is just an historical remnant at this time; that is, it does not provide the authority to implement any of the project/tolling options contemplated in the Trade Partnership

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[63] RCW 47.56.256 Franchises for utility, railway, urban public transportation purposes. If the department deems it not inconsistent with the use and operation of any department facility, the department may grant franchises to persons, associations, private or municipal corporations, the United States government, or any agency thereof, to use any portion of the property of any toll bridge, toll road, toll tunnel, or the Washington state ferry system, including approaches thereto, for the construction and maintenance of water pipes, flumes, gas pipes, telephone, telegraph, and electric light and power lines and conduits, trams or railways, any structures or facilities that are part of an urban public transportation system owned or operated by a municipal corporation, agency, or department of the state of Washington other than the department of transportation, and any other such facilities in the manner of granting franchises on state highways.

[64] RCW 47.56.253 Permits, leases, licenses to governmental entities to use property of toll facility or ferry system. If the department deems it in the public interest and not inconsistent with the use and operation of the toll facility involved, the department may on application therefor issue a permit, lease, or license to the state, or to any city, county, port district, or other political subdivision or municipal corporation of the state to use any portion of the property of any toll bridge, toll road, toll tunnel, or Washington state ferry system upon such terms and conditions as the department may prescribe

[65] RCW 47.56.257 Deposit of moneys received under RCW 47.56.253 through 47.56.256**.** Any moneys received pursuant to the provisions of RCW 47.56.253 through 47.56.256 shall be deposited into the separate and proper trust fund with the state treasurer established for the respective toll facility.

Strategic Plan. While no longer applicable, it is noteworthy that the project authorization allowed WSDOT to:

> "*…collect tolls from the users of both bridges constituting said toll facility for the purpose of providing revenue at least sufficient to pay the cost and incidental expenses of construction of the new bridge including approaches thereto in both states, the reconstruction and improvement of the existing interstate bridge including approaches thereto in both states, the cost of maintaining, operating and repairing both of said bridges while the same are operated as said toll facility, and for the payment of the principal of and interest on its revenue bonds…*" [66]

WSDOT was authorized to enter into agreements with ODOT to construct and operate the bridges.[67] WSDOT was required to include in such agreement a provision that requiring that "*toll charges shall be removed after all costs of construction of the new bridge and approaches thereto and the reconstruction and improvement of the existing bridge and approaches thereto,…, shall have been paid, and all of said revenue bonds, and interest thereon, issued …shall have been fully paid and redeemed*."

This provision was reinforced by RCW 47.56.340, which required the bridges to be toll-free whenever the construction costs and financing costs have been fully repaid. [68] These authorities are similar to the outdated Oregon tolling statutes regarding this 1960 bridge span under ORS 381, but are considerably less flexible with regard to the use of the revenues and the time period during which tolls may be collected than the other tolling authorities provided under Oregon law.

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[66] RCW 47.56.320 Additional Columbia river bridge -- Tolls**.** The Washington toll bridge authority is authorized to enter into an agreement with the Oregon state highway commission that the new bridge, **including approaches**, provided for herein shall be merged and consolidated with the existing interstate bridge, including its approaches, located between Vancouver, Washington and Portland, Oregon so that both bridges shall be and become a single toll facility. The Washington toll bridge authority is hereby authorized to operate and to assume the full control of said toll facility and each portion thereof, whether within or without the borders of the state of Washington, with full power to impose and collect tolls from the users of both bridges constituting said toll facility for the purpose of providing revenue at least sufficient to pay the cost and incidental expenses of construction of the new bridge including approaches thereto in both states, the reconstruction and improvement of the existing interstate bridge including approaches thereto in both states, the cost of maintaining, operating and repairing both of said bridges while the same are operated as said toll facility, and for the payment of the principal of and interest on its revenue bonds authorized by, and for the purposes set forth in, RCW 47.56.310 through 47.56.345

[67] RCW 47.56.330

[68] RCW 47.56.340 Additional Columbia river bridge -- When toll free**.** Both the bridges herein provided for shall be operated as toll-free bridges whenever the costs of construction of the new bridge and approaches thereto and the reconstruction and improvement of the existing bridge and approaches thereto, including all incidental costs shall have been paid, and when all of said revenue bonds and interest thereon issued and sold pursuant to the authority of RCW 47.56.310 through 47.56.345 shall have been fully paid and redeemed.

The term in "including approaches" in RCW 47.56.320 merits discussion. All toll authorization statutes address approaches, some in a general sense, such as in RCW 47.56.320, and some more specifically. There have been several court cases and Attorney General Opinions addressing the types and extent of highway projects that fall inside and outside this term.

In State ex rel. Washington Toll Bridge Authority v. Yelle[69] construing the term "approaches thereto," the court held that the legislature had granted the authority broad discretion in determining the nature and extent of the approaches for any given toll bridge, subject to review only for abuse. The Yelle case involved approaches for the first Lake Washington Bridge, described by the court as follows:

> "*The so-called approach contemplates a one-fourth mile long twin-bore tunnel and the construction of an arterial highway for a distance something in excess of six thousand lineal feet on the west side of Lake Washington leading up to the bridge, most of it being very remote from the bridge. The so-called approaches on the eastern side of the lake cover a distance in excess of sixteen thousand lineal feet, about three miles.*"

The court decided that such approaches did not constitute an abuse of discretion in the circumstances, and pointed out that:

> *"…It is not only proper, but also very necessary, to extend the arterial bridge approaches to encourage the flow of traffic to and over the bridge…"*

Thus, the court accepted a very broad interpretation of "approaches thereto."

However, a broad interpretation is not always possible. In a 1955 Attorney General Opinion,[70] the Attorney General was asked about certain modifications to the approaches to the second Lake Washington Bridge, The problem arose because studies concluded that it would not be financially feasible to construct a project which included as an initial component a new throughway from the bridge to the main business district of Seattle, although the estimated toll revenue would support a bond issue sufficient to cover construction of a bridge project with a connection to the proposed Tacoma-Seattle-Everett toll road. The Attorney General analyzed the issue as follows:

> *Thus, under* [statutes using the term "approaches thereto"], *the authority could and no doubt would have constructed connections between the bridge and arterials leading to the business district of Seattle to insure a traffic flow sufficient to finance the project. However, the legislature chose to be more specific in this case. RCW 47.56.300 (1953 Supp.), provides in relevant part that: "The approaches referred to in section 1 of this act shall include all thoroughfares, tunnels, overpasses and underpasses necessary for the orderly and satisfactory flow of traffic between the additional Lake Washington bridge and the main business district of Seattle. * * *"*

[69] 197 Wash. 110
[70] AGO 55-57 No. 127

We must assume that the legislature was aware of the powers and discretion which the authority would have regarding approaches under RCW 47.56.280 (1953 Supp.) standing alone, by virtue of the Yelle decision. Graffell v. Honeysuckle, 30 Wn. (2d) 390. We have no doubt the legislature realized that the approaches in any event would have to afford reasonable access for traffic from the city in order to make the project financially feasible. RCW 47.56.300 (1953 Supp.) was not necessary to insure such approaches. Unless the language of that section as underscored above is meaningless (and we may not assume that it is; Guinness v. State, 40 Wn. (2d) 677) it prescribes something more than a connection with arterials leading into the city. That language in fact seems clearly to require a comprehensive system of approaches from the business district of the city to the bridge.

The west end of the proposed approach at Tenth Avenue North and Roanoke Street falls short of the business district by any test. If a connection were to be made with the proposed toll road at that point, and the toll road treated as a part of the approach, another objection would arise. The approaches are to be financed through tolls on the bridge, and RCW 47.56.300 (1953 Supp.) plainly contemplates that one may travel across the lake to the business district along the approaches by paying the bridge toll. We are advised, however, that an approach via the toll road would involve payment of toll charges thereon in addition to the bridge toll. We believe that such an arrangement would be contrary to the legislative purpose. We conclude that an approach to intersect the proposed toll road at Tenth Avenue North and Roanoke would not satisfy the terms of RCW (1953 Supp.) 47.56.300.

Thus, the extent to which toll bridge revenues may be used for related highway projects (such as improvements along I-5 in the vicinity of the bridge) depends on the precise language included in the toll authorization statute for that particular project.

6.2 Tolling Authorized under RCW 47.58

RCW 47.58 provides an alternative tolling authority to that granted by RCW 47.56 and RCW 47.46. [71] It specifically addresses one circumstance – when a new bridge is constructed within two miles of an existing bridge. In such circumstance, if the legislature specifically authorizes the construction of a toll bridge and reconstruction of the existing bridge, as may be the case with regard to some of the I-5 alternatives, the toll program of the two bridges may be integrated. [72] The Transportation Commission must

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[71] RCW 47.58.900 Chapter provides additional method. This chapter shall be deemed to provide an additional and alternative method for the doing of the things authorized thereby, and shall be regarded as supplemental and additional to powers conferred by other laws, and shall not be regarded as in derogation of any powers existing on June 8, 1955.

[72] RCW 47.58.010 Improvement of existing bridge and construction of new bridge as single project -- Agreement -- Tolls. Whenever the legislature specifically authorizes, as a single project, the construction of an additional toll bridge, including approaches, and the reconstruction of an existing adjacent bridge, including approaches, and the imposition of tolls on both bridges, the department is authorized to enter into appropriate agreements whereunder the existing bridge or its approaches will be reconstructed and

set tolls at a rate sufficient to repay the construction bonds, operating and maintenance costs and repay any motor vehicle funds advanced to the project.[73] Except as otherwise specifically authorized in RCW 57.58, the use of tolls imposed under this section must follow the provisions of RCW 47.56, discussed above. Tolling under RCW 47.58 still requires specific legislative authorization, and it is the language in the legislative authorization that will dictate the use of the funds.

6.3 Tolling Authority under RCW 47.46

In 1993, the Washington State Legislature approved the Public-Private Initiatives Act (PPI) to test the feasibility of using private financing for major public infrastructure projects. The new law, codified as RCW 47.46, allowed Washington State Department of Transportation (WSDOT) to enter into agreements with private entities to develop transportation projects and to recover some or all of the costs through tolls or other user fees.

Subsequent legislative changes to the program resulted in projects being stopped or had the effect of substantially changing the private sector's role in the projects. Tolls and the use of private financing using tolls as the revenue source generated the most controversy, and ultimately the Tacoma Narrows Bridge was the only project constructed under PPI. While tolls may be used to repay construction bonds, the project was actually through public financing backed by the gas tax. The existing law does not allow for further projects without legislative approval.

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improved and an additional bridge, including approaches and connecting highways will be constructed as a part of the same project to be located adjacent to or within two miles of the existing bridge and will be financed through the issuance of revenue bonds of the same series. The department has the right to impose tolls for traffic over the existing bridge as well as the additional bridge for the purpose of paying the cost of operation and maintenance of the bridge or bridges and the interest on and creating a sinking fund for retirement of revenue bonds issued for account of such project, all in the manner permitted and provided by this chapter.

[73] RCW 47.58.030 Construction, operation of bridges -- Collection of tolls -- Schedule of charges. The secretary shall have full charge of the construction of all such improvements and reconstruction work and the construction of any additional bridge, including approaches and connecting highways, that may be authorized under this chapter and the operation of such bridge or bridges, as well as the collection of tolls and other charges for services and facilities thereby afforded. The schedule of charges for the services and facilities shall be fixed and revised from time to time by the commission so that the tolls and revenues collected will yield annual revenue and income sufficient, after payment or allowance for all operating, maintenance, and repair expenses, to pay the interest on all revenue bonds outstanding under the provisions of this chapter for account of the project and to create a sinking fund for the retirement of the revenue bonds at or prior to maturity. The charges shall be continued until all such bonds and interest thereon and unpaid advancements, if any, have been paid.

6.4 Other Statutes affecting Use of Toll Revenues: RCW 47.52

RCW 47.52 addresses "limited access facilities," which by definition include bridges. [74] RCW 47.52.025 grants specific additional authority for WSDOT, and others, that lanes on a limited access highway can be wholly or partially dedicated to public transportation.[75] WSDOT and local governments are granted special authority to enter into agreements providing for such dedicated lanes on limited access highways. [76]

A 1971 Attorney General Opinion addressed the issue of whether a lane on a toll bridge could be dedicated for transit purposes; it concluded that: [77]

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[74] RCW 47.52.010"Limited access facility" defined. For the purposes of this chapter, a "limited access facility" is defined as a highway or street especially designed or designated for through traffic, and over, from, or to which owners or occupants of abutting land, or other persons, have no right or easement, or only a limited right or easement of access, light, air, or view by reason of the fact that their property abuts upon such limited access facility, or for any other reason to accomplish the purpose of a limited access facility. Such highways or streets may be parkways, from which vehicles forming part of an urban public transportation system, trucks, buses, or other commercial vehicles may be excluded; or they may be freeways open to use by all customary forms of street and highway traffic, including vehicles forming a part of an urban public transportation system.
RCW 47.04.010(11) defines "highway" as "every way, lane, road, street, boulevard, and every way or place in the state of Washington open as a matter of right to public vehicular travel both inside and outside the limits of incorporated cities and towns."
AGO_1963-64_No_025 found that a privately owned road or bridge that is open to public use is a highway.

[75] RCW 47.52.025 Additional powers -- Controlling use of limited access facilities -- High-occupancy vehicle lanes**.** Highway authorities of the state, counties, and incorporated cities and towns, in addition to the specific powers granted in this chapter, shall also have, and may exercise, relative to limited access facilities, any and all additional authority, now or hereafter vested in them relative to highways or streets within their respective jurisdictions, and may regulate, restrict, or prohibit the use of such limited access facilities by various classes of vehicles or traffic. **Such highway authorities may reserve any limited access facility or portions thereof, including designated lanes or ramps for the exclusive or preferential use of public transportation** vehicles, privately owned buses, or private motor vehicles carrying not less than a specified number of passengers when such limitation will increase the efficient utilization of the highway facility or will aid in the conservation of energy resources. Regulations authorizing such exclusive or preferential use of a highway facility may be declared to be effective at all time or at specified times of day or on specified days.

[76] RCW 47.52.090 Cooperative agreements -- Urban public transportation systems -- Title to highway -- Traffic regulations -- Underground utilities and overcrossings -- Passenger transportation -- Storm sewers -- City street crossings. **The highway authorities of the state**, counties, incorporated cities and towns**, and municipal corporations owning or operating an urban public transportation system are authorized to enter into agreements with each other, or with the federal government, respecting the financing, planning, establishment, improvement, construction, maintenance, use, regulation, or vacation of limited access facilities in their respective jurisdictions to facilitate the purposes of this chapter. Any such agreement may provide for the exclusive or nonexclusive use of a portion of the facility by street cars, trains, or other vehicles forming a part of an urban public transportation system and for the erection, construction, and maintenance of structures and facilities of such a system** including facilities for the receipt and discharge of passengers…"

[77] AGO_1971_No_036

"…both the statutes authorizing the construction and operation of the Evergreen Point Toll Bridge and the bond resolution would permit the highway commission to reserve one lane of the bridge for exclusive bus transit use. However, additional legislation will be required to authorize the commission to give preferential use of lanes to cars carrying a specified minimum number of passengers.

After finding that the statute authorizing the imposition of the toll (RCW 47.56.281 - 47.56.286) did not prohibit lanes to be dedicated to transit purposes, the AG turned its attention to RCW 47.52, concluding the following

"The Evergreen Point Toll Bridge is a part of state Route 520 (RCW 47.17.720) and has been established as a limited access facility pursuant to the provisions of chapter 47.52 RCW. RCW 47.52.025 authorizes the highway authorities of the state, counties, and cities to regulate, restrict, and prohibit the use of limited access facilities by the various classes of vehicles or traffic. This statute contains general authority for the state highway commission to establish classes of vehicles and traffic and then restrict any part of a limited access facility for exclusive use by one or more of the classes of vehicles or traffic established. Transit buses are clearly an identifiable class of vehicles. Such a classification is reasonable and within the power of the highway commission to make under RCW 47.52.025. See, also, RCW 47.52.070 authorizing agreements for use of limited access facilities by an urban public transportation system.

We note also that RCW 47.56.256 authorizes the highway commission to grant franchises to persons or public agencies to use any portion of a toll bridge for maintenance of various utility lines for "any structures or facilities which are part of the urban transportation system" in the manner of granting franchises on state highways. It would appear that the principal purpose of this statute is to permit the erection of transit facilities such as stations on toll bridge authority property pursuant to a franchise and does not specifically relate to the allocation of highway lanes for exclusive transit use.

Reservation of a bridge lane for cars carrying a specified minimum number of passengers as in the case of car pools presents a more difficult question. RCW 47.52.025 speaks of restricting or prohibiting use of limited access facilities "by various classes of vehicles or traffic." A class of vehicles by the usually understood meaning of the term relates to type of vehicle such as passenger cars, trucks or buses. It cannot fairly be said that the number of passengers in an automobile at a particular time would distinguish that automobile as a "class of vehicle" or for that matter a class of traffic. In context, the word "traffic" used in the statute …means simply the movement of vehicles upon the highway … Thus, traffic could properly be classified by the commission as "slow moving" or "under 35 miles per hour" for example. Again, in the context of the statute, the number of passengers in an automobile would not represent a class of traffic."

6.5 Other Statutes affecting Use of Toll Revenues: RCW 47.08

RCW 47.08 establishes a legislative policy to seek for coordinated development and financing of joint highway and 'urban public transportation' projects.[78, 79] The statute establishes legislative intent that it is a 'highway purpose' to use motor vehicle funds, to pay the full proportionate highway, street or road share of the costs of design, right of way acquisition, construction and maintenance of any highway, street or road to be used jointly with an urban public transportation system. While a judicial determination of the constitutionality of a use of motor vehicle funds is not bound by such a legislative intent, it provides some judicial weight. It also authorizes WSDOT to employ a kind of proportionate-benefits test to determine the amount of fund WSDOT should contribute to such multi-modal projects.[80]

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[78] RCW 47.04.083 Urban public transportation systems -- Declaration of public policy -- Use of motor vehicle, city street, or county road funds. **The separate and uncoordinated development of public highways and urban public transportation systems is wasteful of this state's natural and financial resources. It is the public policy of this state to encourage wherever feasible the joint planning, construction and maintenance of public highways and urban public transportation systems** serving common geographical areas as joint use facilities. To this end **the legislature declares it to be a highway purpose to use motor vehicle funds**, city and town street funds or county road funds **to pay the full proportionate highway, street or road share of the costs of design, right of way acquisition, construction and maintenance of any highway, street or road to be used jointly with an urban public transportation system**.

[79] RCW 47.04.082 Urban public transportation systems -- Defined**.** As used in this act the term "urban public transportation system" shall mean a system for the public transportation of persons or property by buses, street cars, trains, electric trolley coaches, other public transit vehicles, or any combination thereof operating in or through predominantly urban areas and owned and operated by the state, any city or county or any municipal corporation of the state, including all structures, facilities, vehicles and other property rights and interest forming a part of such a system.

[80] RCW 47.08.070 Cooperation in public works projects, urban public transportation systems. **When it appears to the department that any state highway will be benefited or improved by the construction of any public works project, including any urban public transportation system**, within the state of Washington by any of the departments of the state of Washington, by the federal government, or by any agency, instrumentality, or municipal corporation of either the state of Washington or the United States, the department is authorized to enter into cooperative agreements with any such state department, with the United States, or with any agency, instrumentality, or municipal corporation of either the state of Washington or the United States, wherein the state of Washington, acting through **the department, will participate in the cost of the public works project in such amount as may be determined by the department to be the value of the benefits or improvements to the particular state highway derived from the construction of the public works project.** Under any such agreement the department may contribute to the cost of the public works project by making direct payment to the particular state department, federal government, or to any agency, instrumentality, or municipal corporation of either the state or the United States, or any combination thereof, which may be involved in the project, from any funds appropriated to the department and available for highway purposes, or by doing a portion of the project either by day labor or by contract, or in any other manner as may be deemed advisable and necessary by the department