August 27, 2025

***via electronic mail to**: Angie.Adams@atg.wa.gov*

Honorable Nicholas W. Brown
Office of the Attorney General
State of Washington
1125 Washington St. SE
PO Box 40100
Olympia, WA 98504

Re: Constitutional Deficiencies in Language and Potential Operation of S.H.B. 1774

Dear Attorney General Brown,

We represent individual taxpayer Washington State Senator Curtis King. On behalf of Senator King, we request that your office investigate and institute legal proceedings to invalidate Substitute House Bill 1774 Ch. 298 Laws of 2025 ("Act"), entitled "an act relating to modifying allowable terms for the lease of unused highway land; amending RCW 47.12.20; and creating a new section." The Act is void because it violates several provisions of the Washington and U.S. Constitutions, including, in relevant part:

- Wash. Const., Art. I, §16: *State Takings Clause* ("Private property shall not be taken for private use, except for private ways of necessity, and for drains, flumes, or ditches on or across the lands of others for agricultural, domestic, or sanitary purposes. No private property shall be taken or damaged for public or private use without just compensation having been first made . . .").
- Wash. Const., Art. VIII, §5: *State Gift of Public Funds Clause* ("The credit of the state shall not, in any manner be given or loaned to, or in aid of, any individual, association, company or corporation.") and §7: *Local Gift of Public Funds Clause* ("No county, city, town or other municipal corporation shall hereafter give any money, or property, or loan its money, or credit to or in aid of any individual, association, company or corporation, except for the necessary support of the poor and infirm . . .").
- Wash. Const., Art. II, §40: *Highway Purposes Clause* ("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. . . .").

- U.S. Const., Art. IV, §3: *Federal Property Clause* ("The Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . .").

State Takings Clause. The Act allows the Washington Department of Transportation ("WSDOT") to repurpose highway-designated lands to effectuate one or more specified "community purposes" which bear little to no resemblance to the sorts of "public uses" that Washington courts *have* recognized as legitimate exercises of the state's police powers. Specifically, the Act's "community purpose" of "public housing" which, although arguably useful to the public, is not a "public use" in the recognized state-constitutional sense. *See HTK Mgmt., L.L.C. v. Seattle Popular Monorail Auth.*, 155 Wash.2d 612, 630, 121 P.3d 1166 (2005).

Washington courts caution against equating public welfare benefits to "public use," particularly when the benefit is conferred on a specific private group. In *Manufactured Housing Communities of Washington v. State*, 142 Wash.2d 347, 13 P.3d 183 (2000), for example, the Washington Supreme Court struck a statute that had granted mobile-home-park tenants a right-of-first-refusal to purchase the parkland and protect their homes. In so doing, the Court reasoned that a "beneficial use is not necessarily a public use" and that preserving housing, while beneficial, did not transform a tenants' private right into a public use. *Id.* at 360 (quoting *In re Petition of Seattle*, 96 Wash.2d 616, 627, 638 P.2d 549 (1981)).

While "a private enterprise may be selected to effectuate" a public use, *in re Port of Seattle (Seattle-Tacoma)*, 80 Wash.2d 392, 495 P.2d 327 (1972), public-private ventures elicit heightened judicial scrutiny. *Manufac. Hous.*, 142 Wash.2d at 358 ("Whenever an attempt is made to take private property for a use alleged to be public, the question whether the contemplated use be really public shall be a judicial question, and determined as such, without regard to any legislative assertion that the use is public."). Thus in choosing private tenants, WSDOT will encounter a minefield of both *ex ante* and *ex post* inquiries into whether Act-authorized transfers of interests in public lands are indeed for "public use" with "private enterprise" only "incidental to the main public purpose," *Port of Seattle (Seattle-Tacoma)*, 80 Wash.2d at 396, or are, in reality, grants to private parties for nonpublic uses. *See Hogue v. Port of Seattle*, 54 Wash.2d 799, 341 P.2d 171 (1959) ("Unless the state or its subdivision can prove to the satisfaction of a court that it seeks to acquire the property for a 'really public' use (and also pays just compensation for it), the owner may not be deprived of it without his consent.").

State and Local Gift of Public Funds Clauses. In *Japan Line, Ltd. v. McCaffree*, 88 Wash.2d 93, 558 P.2d 211 (1977), the Washington Supreme Court noted that "[t]he manifest purpose of these provisions is to prevent state funds from being used to benefit private interests where the public interest is not primarily served." *Id. at 98*. To distinguish between private and public interests, Washington courts first ask whether the transfer is in furtherance of a "fundamental purpose" of government (*i.e.*, the private recipient is performing a core state function), in which case the transfer is "not a gift at all." *City of Tacoma v. Taxpayers of City of Tacoma*, 108 Wash.2d 679,

701, 743 P.2d 679 (1987). If a Court finds there is no fundamental governmental purpose, it next asks if the government executed the transfer with a "donative intent*." See, e.g., CLEAN v. State*, 139 Wash.2d 782, 798–99, 928 P.2d 1054 (1996), *non*-dispositive evidence against which includes consideration (e.g., payment of rent).

Here, again, the Act presents WSDOT with a minefield of constitutional traps. As explained, while "public housing" might *benefit* the public, it is not a core governmental function. It has never been within the ambit of the traditional means of ensuring public health, safety, morals, or general welfare, and does not resemble those that are. The distribution of "entitlements" for example, are a core governmental function because the act "provide[s] to the public, or a segment of the public, as cash or services, in carrying out a program to further an overriding public purpose or satisfy a moral obligation." *City of Tacoma*, 108 Wn.2d at 702 (citing *Seattle v. State,* 100 Wn.2d 232, 241, 668 P.2d 1266 (1983)).

Therefore, the extent—if any—to which such a transfer serves a public interest or benefit is irrelevant to the question of whether the government has gifted public property to private entities. The Act includes no language limiting authorized transfers to uses in furtherance of core governmental functions. With respect to "donative intent," the Act also fails to formulate what qualifies as a fair-market rent, referring only to soft factors "comprised of . . . [t]he performance of activities that fulfill the community purposes" or "[m]aintenance and security of the premises." RCW 47.12.120(6)(g)(ii)(A), (B).

Notably absent is any reference to fair-market rent, though the Act hedges that WSDOT "may require additional monetary or nonmonetary consideration . . . to the extent it determines that" performance, maintenance, and security "are insufficient consideration for use of the property and that additional consideration is necessary." *Id.* WSDOT appears doomed either to overcharge for fear of upsetting this nebulous "formula" or, more likely, fail to explain to the satisfaction of any injured parties how the rents "charged"—even that comprised solely of in-kind payment—indeed meet the Clauses' straightforward "consideration" requirement. The Act thus exposes WSDOT to serious and substantial litigation claiming that specific Act-authorized transfers to private entities are for non-fundamental (or any) governmental purposes and/or involve consideration that betrays a donative intent.

Highway Purposes Clause. In *State ex rel. O'Connell v. Slavin*, 75 Wn.2d 554, 452 P.2d 943 (1969), the Washington Supreme Court noted that Article II, § 40's listed purposes "pertain to highways, roads and streets . . . adapted and *dedicated to use by operators of motor vehicles*," and none pertain to other modes of transportation like rail or transit. *Id.* at 558–59. If even "public transportation system[s]" do not count as "highway purposes," neither, of course, does it extend to Act-defined "community purposes." *See id.* ("The mere fact that these vehicles 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.").

Washington caselaw on this is well-established and counsels strongly against misappropriating for non-highway uses lands designated exclusively for "highway purposes," which are read extremely

narrowly. *Id.* at 557. Unless a use falls within the specific categories enumerated in the constitutional text, that project cannot be financed by the special fund reserved for same. *See, e.g.*, *Wash. St. Highway Comm'n v. Pac. Nw. Bell Tele. Co.*, 59 Wn.2d 216, 367 P.2d 605 (1961) (ruling that a statute directing the state to reimburse utilities companies' for the cost of relocating their highway projects was not an "exclusively highway" purpose); *Automobile Club of Wash. v. City of Seattle*, 55 Wn.2d 161, 346 P.2d 695 (1959) (prohibiting the state's payment of a personal-injury judgment resulting from negligent operation of a bridge within the state's highway system).

None of the Act's "community purposes" are exclusively "highway purposes," nor are they proximately or even remotely ancillary thereto. Neither "public housing," "parks," "public plaza," nor "salmon habitat restoration"—to name but a few—fit the bill. RCW 47.12.120(6)(g)(i)(A)–(G). WSDOT's transfer of highway-designated lands for any such uses therefore violates the Highway Purposes Clause and are likely to be invalidated if and when challenged.

Federal Property Clause. This Clause gives Congress plenary power over federal property, and federal statutes comprehensively govern the disposition of same. *See, e.g.*, 40 U.S.C. §541 *et seq.*; *Kleppe v. New Mexico*, 426 U.S. 529, 540–43 (1976) (Congress's power over federal lands is "complete" and when Congress legislates under the Property Clause, federal law overrides conflicting state laws under the Supremacy Clause). The Act purports to override conditions that have been placed on state land purchased with federal assistance. *See, e.g., Lankford v. Sherman*, 451 F.3d 496, 510 (8th Cir.2006) (noting that in "a system of cooperative federalism ... once the state voluntarily accepts the conditions imposed by Congress, the Supremacy Clause obliges it to comply with federal requirements").

Federal highway law imposes specific requirements on state disposition of land acquired or improved with federal-aid highway funds. Under 23 U.S.C. § 156, a state "shall charge, at a minimum, fair market value" for the sale or lease of any real property acquired with federal highway assistance, except in certain circumstances. *Id.* The statute authorizes the U.S. Secretary of Transportation to grant exceptions to the fair-market requirement "for a social, environmental, or economic purpose." 23 U.S.C. § 156(b).

In the event WSDOT seeks to charge below-market lease of lands subject to the federal rules, it would have to undergo a comprehensive Federal Highway Administration ("FHWA") approval process, to which the Act makes absolutely no reference. Failure on this front might be two-fold: Either WSDOT submits all relevant transfers for *ex ante* FHWA approval—a process with mixed results at best—or otherwise ignores the federal mandate (as the Act itself does) and risks invalidating many if not most of Act-authorized transfers.

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Taxpayers throughout Washington, including Sen. King, will be harmed by this unconstitutional piece of legislation. On his behalf, we ask that your office commence proceedings to invalidate S.H.B. 1774 immediately.

Sincerely,

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