



## Washington State Senate

October 23, 2017

Senator Curtis King  
Chair, Senate Transportation Committee

Senator Mark Miloscia  
Chair, Senate State Government Committee

Representative Judy Clibborn  
Chair, House Transportation Committee

Representative Zack Hudgins  
Chair, House State Government, Elections,  
& Information Technology Committee

Dear Senators and Representatives,

The Senate Law and Justice Committee has concluded an investigation regarding the legislation and authorization for Sound Transit 3 (ST3), a 2016 general-election ballot proposition from Sound Transit (a regional transit authority) concerning the expansion of mass transit in King, Pierce and Snohomish counties. A letter sent to the committee on May 11, 2017 by Senators Dino Rossi and Steve O'Ban prompted the investigation. The letter requested that the committee consider three issues:

1. Whether the ST3 authorization legislation was unconstitutionally drafted in violation of Article 11, Section 37 of the Washington State Constitution, which prohibits amending provisions of law by reference;
2. Whether Sound Transit, in 2015, misled legislators as to the amount it sought in the authorization; and
3. Whether Sound Transit improperly participated in and misled voters in the promotion of ST3.

The investigation consisted of the review of documents produced by Sound Transit and other agencies pursuant to three public records requests. Staff had the opportunity to examine over 7,000 pages of documents. Following review of those documents and at the direction of committee members, nine Sound Transit witnesses were identified and interviewed over the course of three days. The interviews were conducted by a panel of non-partisan Senate Law and Justice and caucus staff. A court reporter was present and transcripts were created at the request of Sound Transit of each witness interview.

As a part of the investigation, the Senate Law and Justice Committee met in two separate work sessions solely devoted to the Sound Transit Investigation, on September 26 in Kent and on October 5 in Everett. Over the course of a total of five hours of testimony and questions, fifteen witnesses testified and members reviewed a notebook with 77 exhibits, including constitutional and statutory provisions, nine transcripts of witness statements, newspaper articles, court cases, emails, press releases, talking points, and other relevant documentation.

The following is an executive summary of some of the testimony and documents from the investigation. It is intended to answer the three questions posed above, as well as provide key findings and a list of recommendations for potential legislation or other action.

### EXECUTIVE SUMMARY

*I. Whether the authorizing legislation was unconstitutionally drafted.* The first issue considered by the committee was whether the ST3 authorization provisions in SB 5987 (2015) violated Article II, Section 37, which provides:

SECTION 37 REVISION OR AMENDMENT. No act shall ever be revised or amended by mere reference to its title, but the act revised or the section amended shall be set forth at full length.

The statute at issue was RCW 81.104.160(1) which provides in pertinent part:

*Notwithstanding any other provision of this subsection or chapter 82.44 RCW, a motor vehicle excise tax imposed by a regional transit authority before or after July 15, 2015, must comply with chapter 82.44 RCW as it existed on January 1, 1996, until December 31st of the year in which the regional transit authority repays bond debt to which a motor vehicle excise tax was pledged before July 15, 2015.*

The ST3 authorization provisions referenced a repealed statute without setting forth the provision amended in full. The purpose of the constitutional requirement to set forth in full the provisions that are amended is to avoid misleading legislators and the public. The committee heard from the state code reviser, who testified about the general requirements that have been established to avoid drafting errors. The committee also heard from David DeWolf, Professor Emeritus at Gonzaga University School of Law. He gave extended testimony and legal analysis of this issue (a copy of which is attached to this letter). Tim Eyman and Sound Transit attorney Desmond Brown also provided testimony.

#### KEY FINDINGS:

- *The 2015 statute is unconstitutionally drafted. The reference to the schedule as it existed in 1996 prior to repeal is improper and constitutionally defective.*
- *In indirectly resurrecting a schedule used prior to its repeal in 2006, the 2015 law had the effect of dramatically increasing the Motor Vehicle Excise Tax as was demonstrated by the chart Prof. DeWolf provided with his testimony.*

(RCW 81.104.160) 1996 Schedule		(RCW 82.44.035) 2015 Schedule		% increase	
YEARS OF SERVICE	%AGE	YEARS OF SERVICE	%AGE	0.85	
1	100	1	100	85	18
2	95	2	81	68.85	38
3	89	3	72	61.2	45
4	83	4	63	53.55	55
5	74	5	55	46.75	58
6	65	6	47	39.95	63
7	57	7	41	34.85	64
8	48	8	36	30.6	57
9	40	9	32	27.2	47
10	31	10	27	22.95	35

- *Once it is determined that a statute meets the factors identified by prior court decisions as representing a violation of the constitution, there is no need to prove actual confusion of voters or legislators.*

#### RECOMMENDATIONS:

- I. No recommendation for legislative action on this item. The appropriate remedy can only be achieved in the courts, which may include a determination of the validity of ST3-related bonds.

*II. Whether Sound Transit misled legislators as to the amount of authorization.* The second issue considered by the committee is whether the Legislature was misled about Sound Transit's 2015 request for \$15 billion in authorization in light of its 2016 request, via Proposition No. 1, of \$54 billion in authority. RCW 42.17A.635 prohibits lobbying by state agencies. Agencies are generally restricted to providing information, communicating, and advocating the official position of the agency to public officials and employees of other agencies. The committee heard from nine witnesses including four Sound Transit employees.

#### KEY FINDINGS:

- *Sound Transit provided money to outside organizations and then coordinated testimony by those organizations before the Legislature. The records reviewed for the committee include a list of "dues" paid to non-profit organizations, including \$35,000 a year to Transportation Choices Coalition {TCC}. {Exhibit 49}*

- *Although Sound Transit's witnesses claimed that these dues were for policy work and efforts to increase ridership, the internal memoranda accompanying the justification for the dues to TCC indicates the organization was paid for "support for ST efforts to secure grants, additional revenue, and other funding." [emphasis added] (Exhibit L) In 2015 the only significant measure to increase Sound Transit's revenue was to obtain authorization for ST3. TCC, which never registered as a lobbyist for Sound Transit, publicly took credit in multiple media reports for its role in achieving legislative authorization.*
- *In an email that included Futurewise, TCC, and the Snohomish Economic Alliance, Sound Transit's lobbyist referenced a "coordination meeting" conducted in Olympia to prepare for testimony at hearings (Exhibit 51). All of these groups were receiving thousands of dollars in "dues" from Sound Transit while they were testifying before legislators. A number of emails sent and received by Sound Transit's lobbyist and government affairs director demonstrates extensive coordination of testimony and messaging.*
- *All of this coordination, in such close proximity to the payment of "dues," ran counter to the letter and the spirit of the statutory prohibition on lobbying described above. Somewhat ironically, Sound Transit's own employees testified that they understood they were restricted to providing information to legislators. Sound Transit's own lobbyist noted in one email that they "[c]annot ask others to advocate." (Exhibit 31)*
- *The message that Sound Transit and these outside organizations repeated from November 2014 through July 2015 was that Sound Transit needed "the full authority for \$15 billion." {Exhibit 31} In press releases, talking points, communications one-pagers, draft letters to legislators, and internal emails, the \$15 billion figure was used again and again. When pressed, Sound Transit's government relations director and spokesman were unable to point to a single piece of paper from Sound Transit during this period that clearly and unambiguously indicated that Sound Transit might seek more than \$15 billion.*
- *It is understandable that numerous legislators feel misled. Sen. Steve O'Ban has described Sound Transit's emphasis on \$15 billion in taxing authority as a "bait and switch." Rep. Judy Clibborn, chair of the House Transportation Committee, has said that if Sound Transit had said "'[w]e're going to bond this and we're going to ask for \$54 billion,' it would have not gone anywhere . . . Nobody was going to do that. . . Everybody was having this \$15 billion in front of them." Sen. Bob Hasegawa similarly accused Sound Transit of "false advertising."*

#### RECOMMENDATIONS:

1. In order to increase accountability, consider legislation that makes Sound Transit's board directly elected.

2. Because Sound Transit misled legislators and the public on the size of the authorization as well as the cost of ST3, consider legislation that gives taxpayers substantial and meaningful tax relief.
3. Consider legislation that clearly prohibits non-profit organizations that receive public funding from lobbying the Legislature.
4. Clarify restrictions on when a state or local government can "coordinate" with other entities on legislation designed to give additional tax authority so that tax dollars are not spent to pursue more tax dollars.
5. Refer the relationship between Sound Transit and TCC to the Public Disclosure Commission (PDC) or other appropriate authority to investigate whether they engaged in lobbying activity in violation of state law.

### **III. Whether Sound Transit improperly participated or misled voters in the promotion of ST3.**

The final issue the committee considered was whether Sound Transit improperly participated in promoting the Proposition 1 initiative and misled voters about the \$4 billion ballot measure. RCW 42.17A.55 prohibits a state agency from using facilities or employees to directly or indirectly support a public initiative.

#### **KEY FINDINGS:**

- *Sound Transit prepared a survey question that the PDC deemed was illegally in support of the ballot measure. Sound Transit withdrew the question.*
- *Sound Transit responded to a public-records request by disclosing email addresses of its 173,000 One Regional Card for All {ORCA} cardholders; those email addresses were used by Transportation Choices/Mass Transit Now in the campaign in support of Proposition No. 1. There is evidence from both testimony in witness statements and before the committee that Sound Transit employees knew that the requestor was affiliated with Transportation Choices and involved in the campaign. The credibility of these employees is compromised because they all admitted to either donating money to the campaign, participating in events, or volunteering at a phone bank.*
- *Sound Transit's so-called investigation that purported to clear itself was flawed in three ways:*
  1. *The legal firm hired to do the investigation, MFR Law Group {MFR} had a long-standing relationship with Sound Transit's legal office and had likely done thousands of dollars' worth of prior investigations, and most importantly, employed the wrong legal standard.*
  2. *MFR was instructed by Sound Transit's legal office to hurry the investigation.*

3. *MFR allowed Sound Transit's legal office to review a draft of the report and incorporated at least one suggested change, thereby compromising the independence of the investigation.*

- *No employees of Sound Transit were disciplined in any manner as a result of the internal investigation despite its finding that the email addresses were improperly disclosed.*
- *In public statements, Sound Transit has relied heavily on the PDC's decision in the weeks prior to the passage of Proposition 1 not to fine Sound Transit for campaign violations. However, the PDC's determination was based upon the internal investigation that was flawed for the reasons outlined above. Moreover, the internal report did not absolve Sound Transit of wrongdoing but acknowledged that its actions were improper. Finally, the PDC's determination that Sound Transit acted unintentionally is legally dubious since it effectively inferred an intent requirement into violations of the state's Public Records Act and campaign law. This is a new standard not extended to legislators, candidates for public office or previous ballot measures.*
- *While finding Sound Transit improperly disclosed the personal emails, MFR concluded, nonetheless, without legal support that ST was exculpated because the records custodian did not know the TCC/Mass Transit Now campaign had requested them. First, the knowledge of management level employees that the campaign requested the emails is legally imputed to Sound Transit. Second, intent is not even required under RCW 42.46.330 and RCW 42.17A.635. No one, not even its investigator, argues Sound Transit lawfully disclosed the emails. That it arguably did not intend to do so, even though its key employees clearly did, is irrelevant.*
- *Sound Transit significantly increased its advertising budget in the years leading up to ST3, in part by spending almost a million dollars on a single ribbon-cutting for a new facility in 2016. Sound Transit's explanation that the bulk of those dollars were for "crowd control" is not credible.*
- *Sound Transit misled voters in the "Mass Transit Guide," mailed to each registered voter in the Sound Transit taxing district prior to the ST3 vote, by failing to identify that the valuation schedule for the calculation of the new Motor Vehicle Excise Tax {M VET} tax associated with ST3 was based on M SRP (Manufacturer's Suggested Retail Price) from a tax schedule repealed in 2006.*
- *Sound Transit misled voters regarding use of the tax calculator it supplied online. Because it depended on the previous year's RTA (Regional Transit Authority) tax and made reference to "motor vehicle value," voters were easily misled or confused as to how much they might pay.*

- *The executive director of Transportation Choices testified that her non-profit was reimbursed by the campaign for the leave incurred by that organization's advocacy director while working on the campaign. Given that Transportation Choices was receiving funds from Sound Transit, and apparently from the political campaign as well, it may be worth further investigation as to whether this was legal.*
- *In addition to ORCA email accounts, testimony was received that a Rideshare Online account was also given to the campaign. Further investigation should reveal how this occurred.*

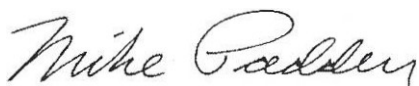
#### RECOMMENDATIONS:

1. Consider legislation that limits the political activities of employees of any local or state agency in a campaign that directly benefits that agency.
2. Consider legislation that freezes or limits advertising budgets of state or local agencies concerning ballot initiatives that could increase revenue to the agency, so as to avoid indirect use of public funds to support a ballot initiative.
3. Refer the issue of whether Transportation Choices violated restrictions on political activities by non-profits. One issue that could be investigated further is whether TCC should have allowed the ST3 campaign to reimburse TCC for the time spent on leave by its campaign manager. It should also be considered whether Sound Transit's funding of TCC in light of this arrangement served to circumvent the restrictions on indirect use of public funds to support a ballot initiative. This question could be referred to an appropriate authority such as the Attorney General, State Auditor, the PDC or King County prosecutor's office.
4. Refer the issue of whether Rideshare Online emails were improperly disclosed to the Transportation Choices/Mass Transit Now campaign to an appropriate authority such as the Attorney General, State Auditor, the PDC or King County prosecutor's office.

#### CONCLUSION

We entrust this executive summary for each of you and your respective committees' review. Thank you in advance for your consideration of these very serious matters.

Sincerely,



Sen. Mike Padden  
Chair, Senate Law & Justice Committee



Sen. Steve O'Ban  
Vice-Chair, Senate Law & Justice Committee