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November 4, 2013

Carlton Christensen, Mayor's Office
Director of Regional Development
2001 South State Street, Suite N-2100
Salt Lake City, Utah 84190

RE: Use of Corridor Preservation Funds for Bus Rapid Transit and
Dedicated Bicycle Lanes

Dear Mr. Christensen:

You have asked whether the Local Transportation Corridor Preservation Fund (the "Preservation Fund") may be used on a corridor involving Bus Rapid Transit ("BRT") or dedicated bicycle lanes.

BACKGROUND

Utah Code § 72-2-117.5(2) creates the Local Transportation Corridor Preservation Fund. One of the funding sources is a local option highway construction and transportation corridor fee allowed to be imposed by a county legislative body pursuant to Utah Code § 41-1a-1222(1)(a)(i). Salt Lake County has adopted a \$10 fee for annual registration of all motor vehicles in Salt Lake County (the "Motor Vehicle Fee").¹

To use the funds, a highway authority within a county applies for use of the funds to a Council of governments ("COG"), comprised of the county governing body and the mayors of each municipality in the county.² The COG is then tasked with prioritizing the applications and making endorsements of the applications.³ Ultimately, the Utah Department of Transportation ("UDOT") authorizes the expenditure once it has determined that the expenditure is authorized by Utah Code § 72-2-117.5 and it has been endorsed by the COG.

¹ *Salt Lake County Ordinance 3.70.10.*

² Utah Code § 72-2-117.5(1)(a).

³ Utah Code § 72-2-117.5(7).

Recently, the question has arisen in a subcommittee of COG as to whether the Preservation Fund could be used for a corridor for a Bus Rapid Transit (“BRT”) lane. BRT lanes are dedicated lanes for UDOT buses and allow buses to operate in a separate lane from regular traffic. BRT lanes can be restricted to buses only or some portions may also be used by regular vehicular traffic. A second question also arose as to whether the Preservation Fund could be used for bicycle lanes.

DISCUSSION

There are two potential limitations on how the portion of the \$10 Motor Vehicle Fee that is used to partially⁴ fund the Preservation Fund may be used: Article XIII, § 5 of the Utah Constitution and Utah Code § 72-2-117.5. Each will be discussed in turn.

I. THE UTAH CONSTITUTION ARTICLE XIII, § 5 AUTHORIZES USE OF THE MOTOR VEHICLE FEE FOR THE CONSTRUCTION, MAINTENANCE, AND REPAIR OF STATE AND LOCAL ROADS, WHICH WOULD INCLUDE STATE AND LOCAL ROADS THAT CONTAIN BRT AND DEDICATED BICYCLE LANES.

Article XIII, § 5(6) of the Utah Constitution states that:

Proceeds from fees, taxes, and other charges related to the operation of motor vehicles on public highways and proceeds from an excise tax on liquid motor fuel used to propel those motor vehicles shall be used for:

- (a) statutory refunds and adjustments and costs of collection and administration;
- (b) the construction, maintenance, and repair of State and local roads, including payment for property taken for or damaged by rights-of-way and for associated administrative costs;
- (c) driver education;
- (d) enforcement of state motor vehicle and traffic laws; and
- (e) the payment of the principal of an interest on any obligation of the State or a city or county, issued for any of the purposes set forth in Subsection (6)(b) and to which any of the fees, taxes, or other charges described in this Subsection (6) have been pledged, including any paid to the State or a city or county, as provided by statute.

Because the \$10 fee established by Salt Lake County is an annual registration fee on all motor vehicles, the fee must be used for one of the enumerated reasons in Article XIII, § 5(6). The most relevant provision that potentially authorizes use of the Motor Vehicle Fee is

⁴ Other potential sources of funding for the Preservation Fund include appropriations made to the fund by the Legislature, contributions from other public and private sources, money collected from rents and sales of real property acquired with the Preservation Fund money, proceeds from certain bonds, and a portion of the sales and use tax. Utah Code § 72-2-117.5(3).

subsection (6)(b), which allows it to be used for “the construction, maintenance, and repair of State and local roads”

In interpreting a state constitutional provision, “the cardinal rule . . . is to begin with the plain language of the provision in question.”⁵ “In interpreting the state constitution, we look primarily to the language of the constitution itself . . . as it would be understood by persons of ordinary intelligence and experience.”⁶ If the language is clear and unambiguous, that ends the inquiry.⁷

Although the constitution does not define “road,” under subsection(6), the common meaning is “a hard flat surface for vehicles, people, and animals to travel on.”⁸ *See also Cohen v. City of Hartford*, 710 A.2d 746, 752 (Conn. 1998) (citing Webster’s Third New International Dictionary and defining road as “an open way or public passage for vehicles, persons, and animals”). Because BRT lanes are built for buses and buses need roads to travel on, the plain meaning of “roads” would include BRT lanes. A dedicated bicycle lane that is part of a road for vehicles would also fall under the common meaning of “roads.” *See Borromeo v. Shea*, 156 P.3d 946, 949-50 (Ct. App. Wash. 2007) (finding that under the statutory definition of “roadway,” a bicycle lane adjacent to regular traffic lanes was part of the “roadway.”)

Despite the fact that BRT lanes and bicycle lanes in a road falls within the plain language of Article XIII, § 5(6)(b), one might argue that because the fee is imposed directly on motor vehicles, the provision should be narrowly read so that only portions of the road used by vehicles paying the Motor Vehicle Fee should qualify for funding.⁹ Under that reading, since buses and bicycles do not pay the Motor Vehicle Fee, the Motor Vehicle Fee could not be used for BRT lanes or bicycle lanes.

Although there is no Utah caselaw interpreting § 5(6)(b), other jurisdictions have interpreted similar provisions broadly. For example, in *State v. O’Brien*, the Washington Supreme Court addressed whether Washington’s constitution allowed motor vehicle fees that had to be “used exclusively for highway purposes” to be used for park and ride facilities.¹⁰ Although the Washington constitution did not enumerate park and ride facilities as a highway purpose,¹¹ the court held that:

5 *University of Utah v. Shurtleff*, 2006 UT 51, ¶ 30, 144 P.3d 1109.

6 *Proulx v. Salt Lake City Recorder*, 2013 UT 2, ¶ 8, 297 P.3d 573.

7 *Grand County v. Emery County*, 2002 UT 57, ¶ 29, 52 P.3d 1148.

8 *Miriam-Webster*, definition of “road,” <http://merriam-webster.com/dictionary/corridor> (accessed October 31, 2013)

9 *See Oregon Telecommunications Association v. Oregon Department of Transportation*, 144 P.3d 935, 941 (Or. 2006) (rejecting an argument that highway funds must be used exclusively for “the promotion of vehicular travel.”); *State ex rel. O’Connell v. Slavin*, 452 P.2d 943, 947 (Wash. 1969) (holding that a public transportation system that would save wear and tear and congestion on the highways was not for “highway purposes” under the state constitution).

10 523 P.2d 190, 192 (Wash. 1974).

11 The Washington constitution stated that “[s]uch highway purposes shall be construed to include the following: (a) The necessary operating, engineering and legal expenses connected with the administration of public highways,

. . . the proposed ‘park and ride’ facilities heretofore referred to are an integral part of the highway system and are directly related to a more efficient and safer operation of the system; and that the expenditure of funds for the accomplishment of these objectives comes within the mandate of the amendment limiting the expenditure of such funds exclusively for highway purposes.¹²

Other jurisdictions have also interpreted similar provisions broadly. *See Idaho Branch, Inc. v. Nampa Highway District No. 1*, 846 P.2d 239, 243 (Idaho 1993) (broadly interpreting a highway fund provision and holding that highway funds could be used to purchase gravel crushing equipment); *Oregon Telecommunications Association v. Oregon Department of Transportation*, 144 P.3d 935, 941 (Or. 2006) (refusing to read a highway fund provision as applying only to “the promotion of vehicular travel,” and holding that funds could be used to relocate utilities since it “enhanced the ability of the public to travel on the affected highways.”). Although some jurisdictions have interpreted highway fund provisions more narrowly,¹³ it does not require an overly broad reading to accept that “state and local roads” includes roads that have BRT lanes and bicycle lanes.¹⁴

Moreover, in a different context, the Utah Supreme Court interpreted highway purposes broadly. In *Utah Dept. of Transp. v. Fuller*, the Utah Supreme Court addressed whether UDOT had condemnation authority to acquire real property for a sewage lagoon.¹⁵ The eminent domain statute authorized UDOT to acquire real property through condemnation for “highway purposes,” which included “the construction and maintenance of roadside rest areas.”¹⁶ Although the statute did not enumerate a sewage lagoon as a “highway purpose,” the Court pointed out that the statute stated that the term “highway purposes” was not limited exclusively to those enumerated.¹⁷ The Court also reasoned that rest areas offering drinking water and toilet facilities would require

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 . . .” *Id.* at 192-193.

¹² *Id.* at 193.

¹³ *See Rogers v. Lane County*, 771 P.2d 254, 255, 260 (Or. 1989) (holding that constitutional provision that highway fund monies must be used “exclusively for the construction, reconstruction, improvement, repair, maintenance, operation and use of public highways, roads, streets, and roadside rest areas” prohibited use of funds for an airport parking lot or covered walkway from the parking lot to the airport terminal.)

¹⁴ However, “roads” may not be broad enough to include a right-of-way for a rail line to be built. *See New Hampshire Motor Transport Association v. State of New Hampshire*, 846 A.2d 553, 555, 559 (N.H. 2004) (holding that funds used for a rail project violated state constitutional provision requiring vehicle fund fees to be used “exclusively for construction, reconstruction, and maintenance of public highways . . .”)

¹⁵ 603 P.2d 814, 815-16 (Utah 1979).

¹⁶ *Id.* at 816.

¹⁷ *Id.*

waste disposal provisions and therefore the “power to construct and maintain a sewage lagoon may be implied in the statutory grant of power.”¹⁸ Although the Court in *Fuller* dealt with a different statute in the area of condemnation, the case provides support that at least in the condemnation area, the Court is willing to read a statute relating to highway purposes broadly.

Although there is an argument that the Utah Supreme Court might strictly read the constitutional provision and limit it to only roads that motor vehicles who pay the Motor Vehicle Fee use directly, the more likely outcome is that the Utah Supreme Court would interpret “roads” under its plain meaning that would include any road regardless of what vehicles use the road. Under that plain language interpretation, the Motor Vehicle Fee may be used for the construction,¹⁹ maintenance, and repair of state and local roads, which would include roads that have BRT lanes and dedicated bicycle lanes.

II. UTAH CODE § 72-2-117.5 AUTHORIZES USE OF THE PRESERVATION FUND FOR THE ACQUISITION AND PRESERVATION OF HIGHWAY CORRIDORS, WHICH WOULD INCLUDE CORRIDORS THAT CONTAIN BRT LANES AND DEDICATED BICYCLE LANES AS LONG AS THE CORRIDORS ARE CLASSIFIED AS A STATE HIGHWAY, A PRINCIPAL ARTERIAL HIGHWAY, A MINOR ARTERIAL HIGHWAY, OR A MINOR COLLECTOR ROAD.

In addition to complying with Article XIII, § 5 of the Utah Constitution, expenditure of the Preservation Fund must also be authorized by Utah Code § 72-2-117.5. Just as the Utah Constitution should be interpreted by its plain language, the same plain language analysis applies to state statutes.²⁰ Utah Code § 72-2-117.5(6)(a)(i) states that the Preservation Fund shall be used “to preserve highway corridors, promote long-term statewide transportation planning, save on acquisition costs, and promote the best interests of the state in a manner which minimizes impact on prime agricultural land.” Not only does the statute allow the Preservation Fund to be used for the preservation of highway corridors, but the statute also authorizes “the expenditure of fund money to allow a highway authority to acquire real property or any interests in real property for state, county, and municipal highway corridors subject to: (i) money available in the fund to each county under Subsections 4(c) and (d); and (ii) the provisions of this section.”²¹

The plain language of the statute allows the funds to be used to acquire or preserve highway corridors. The statute defines “Highway” broadly as “any public road, street, alley, lane, court, place, viaduct, tunnel, culvert, bridge, or structure laid out or erected for public use,

18 *Id.*

19 In at least one jurisdiction, a court held that a statute authorizing funds to be used for the construction and maintenance of roads also implicitly authorized the purchase of right-of-ways to build those roads. *Rice v. Marcum*, 172 S.W.2d 75 (Ct. App. Ky. 1943).

20 See *Boyle v. Christensen*, 2011 UT 20, ¶ 27, 251 P.3d 810 (“When interpreting a statute, we look first to its plain language and ‘presume that the legislature used each word advisedly and read each term according to its ordinary and accepted meaning If the plain meaning of the statute can be discerned from its language, no other interpretive tools are needed.’”) (quoting *State v. Harker*, 2010 UT 56, ¶ 12).

21 Utah Code § 72-2-117.5(5)(a).

or dedicated or abandoned to the public, or made public in an action for the partition of real property, including the entire area within the right-of-way.”²² Corridor is not defined,²³ but a corridor generally refers to “a long narrow piece of land.”²⁴ Using these terms together, a highway corridor is essentially any path or structure laid out for public use. Under the plain meaning of “Highway Corridor,” as long as the BRT lane or dedicated bicycle lane is on a road or street and it is for public use, it would qualify under this language as part of a highway corridor. Although “public use” is not defined, a BRT lane used for public transportation and a bicycle lane open to the public presumably qualifies as “public use.”

However, two other statutory limitations must be considered. First, Utah Code § 72-2-117.5(6)(a)(ii) further limits the use of the Preservation Fund for highway corridors in counties of the first and second classes to right-of-ways that are a state highway, a principal arterial highway, a minor arterial highway, or a minor collector road. Accordingly, for the Preservation Fund to be used for a BRT lane or dedicated bicycle lane, the BRT lane or bicycle lane must be located on one of these types²⁵ of highways.²⁶

The second limitation relates to recreational trails. Utah Code § 72-2-117.5(6)(a)(iii) prohibits the Preservation Fund to be used “for a highway corridor²⁷ that is primarily a recreational trail” A recreational trail is defined as a “multi-use path used for: (a) muscle-powered activities, including (i) bicycling; (ii) cross-country skiing, (iii) walking; (iv) jogging; and (v) horseback riding; and (b) uses compatible with uses described in Subsection (4)(a).”²⁸ Pursuant to this statute, the Preservation Fund may be used for a dedicated bicycle lane as long as that is not the primary purpose of the highway corridor where the bicycle lane is located.

22 Utah Code § 72-1-102(7).

23 Utah Code § 72-5-401(1) defines “Corridor” as “the path or proposed path of a transportation facility that exists or that may exist in the future. A corridor may include the land occupied or to be occupied by a transportation facility, and any other land that may be needed for expanding a transportation facility or for controlling access to it.”

This definition does not directly apply to the Local Transportation Corridor Preservation Fund Act since they are in different statutory parts.

24 *Miriam-Webster*, definition of “corridor,” <http://merriam-webster.com/dictionary/corridor> (accessed October 31, 2013); see also *Steckley v. Department of Local Government Finance*, 779 N.E.2d 1270, (Tax Ct Ind. 2002) (citing Webster’s Third New International Dictionary and defining “corridor” as “a . . . narrow passageway or route.”).

25 Principal arterial highways, minor arterial highways, and minor collector roads are ultimately defined and classified by the Federal Highway Administration Functional Classification Guidelines. It is my understanding from Linda Hull at UDOT that UDOT works with the local Metropolitan Planning Organization to classify the roads within the area and the proposed classifications are ultimately approved by the Federal Highway Administration. If the BRT lane or bicycle lane is not located on one of these classified roads or on a state highway, it would not qualify for funding from the Preservation Fund.

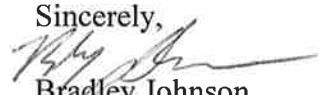
26 It is my understanding that there has been an internal practice within the Public Works Subcommittee of COG that to be eligible for use of the funds, a corridor had to be located on the Long Range Regional Highway Plan, which is created by the Wasatch Front Regional Council. While such limitation may be an internal policy restriction, I could not find any such restriction in any Salt Lake County ordinance or state law. While there may be policy reasons to make such restrictions, there is nothing in state law or Salt Lake County ordinance that requires it.

27 Although Utah Code § 72-2-117.5(6)(a)(iii) is a limiting statute, it supports that “highway corridor” is to be read broadly since the statute implicitly recognizes that a recreational trail falls under the definition of a highway corridor.

28 Utah Code § 79-5-102(4).

Accordingly, for the reasons discussed above, the Preservation Fund may be used for BRT lanes provided the BRT lanes are located on a highway corridor that is classified as a state highway, a principal arterial highway, a minor arterial highway, or a minor collector road. Similarly, the Preservation Fund may be used for dedicated bicycle lanes provided the same standards are met and the highway corridor is not primarily a recreation trail.²⁹

Should you have any questions, please do not hesitate to contact me.

Sincerely,

Bradley Johnson
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²⁹ However, despite these conclusions, Utah Code § 72-2-117.5(5)(a) gives UDOT the ultimate authority to determine whether the expenditure is authorized by the statute. Accordingly, if UDOT disagrees with this opinion, UDOT could ultimately decide not to authorize use of the funds for BRT lanes and dedicated bicycle lanes.