



CITY ATTORNEY'S OFFICE
CITY OF MERCER ISLAND, WASHINGTON

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November 5, 2020

Patrick J. Schneider
Foster Garvey PC
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Seattle, WA 98101-3296
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Dear Mr. Schneider,

I write in response to your letter dated October 20, 2020. Thank you for responding to issues that the City has consistently raised with Sound Transit as part of the cooperative efforts of the City to facilitate the permit process. Your letter, however, makes a number of assertions that do not accurately reflect the interactions between the City and Sound Transit, the Settlement Agreement's terms, and other important issues. I address certain of those issues below.

First, it is my understanding that not until September 22, 2020, did Sound Transit staff state their opinion that the lots and improvements related to the right of way ("ROW") be conveyed after construction was completed. As you know, the City has, for months, alerted Sound Transit of the need to convey the property as ROW before a ROW permit could be issued. This issue was raised in the City staff's comments on Sound Transit's 60% submittal and 90% submittal. Sound Transit's responsive comments at both 60% and 90% failed to address this critical timing issue and certainly made no mention of Sound Transit's position that the City must issue a ROW permit authorizing work when the property at issue is not ROW. Instead, Sound Transit's response to the 60% comment was that it planned to dedicate the ROW, not that it planned to do so only after construction was completed. Indeed, when Sound Transit first floated its "solution" in September 2020, City staff reiterated the need for the conveyance of the two lots before permits could be issued; otherwise restrictions would be placed on the permitted work until the conveyance. At the same meeting, City staff provided information regarding the City's process for accepting such a conveyance. The October 13, 2020 preapplication meeting was the first time that Sound Transit notified the City that Sound Transit will not convey the two lots needed for the ROW improvements until after construction is complete. Indeed, it appears that Sound Transit does not yet actually own the parcels included in its ROW permit application. Given Sound Transit's prior representations, it appears that Sound Transit has simply failed to actually obtain ownership of the property in time.

Second, Sound Transit has not "made clear" (as you claim) that it will comply with a permit condition to convey the property, improvements, and facilities to the City. Since no later than the City's May 2020 comments on Sound Transit's 60% submittal, the City has repeatedly asked who will own and maintain

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the ROW property, improvements, and facilities. Sound Transit's responses have not offered or demanded a permit condition until your October 20, 2020 letter, which preceded by a few days Sound Transit's permit application submission. It is my understanding that prior to your letter, Sound Transit employees had represented to City staff that Sound Transit would provide examples of conveyance documents that could be used for the two parcels intended to become ROW. City staff has requested these documents from, and been promised these documents by, Sound Transit on at least three separate occasions.

Throughout this process the City has been transparent regarding its concerns about the ROW conveyance and the need to establish how Sound Transit will cover the costs attendant to implementing and operating the related facilities. Sound Transit has chosen to wait until now, the eleventh hour, to respond to these concerns. That is certainly Sound Transit's prerogative, but it is not conducive to both parties identifying practical and efficient solutions to any issues.

As to your new claim that a conditional use permit somehow violates the Settlement Agreement, we do not believe your interpretation is correct, but more importantly, you misunderstand the City's position, which is much more fundamental. Sound Transit is seeking a ROW permit. It should go without saying that the City can only grant a ROW permit if, in reality, it has ROW. Without a conveyance, the City has no ROW; a conveyance in this situation is, therefore, a standard requirement before the permit may be obtained. I am not aware of any situation in which the City has issued a ROW permit for property that is not ROW. Rather, part of the standard documentation required for a ROW permit to be granted is that either the property is already a ROW or is being conveyed to the City as a ROW prior to construction. Conveying the property after construction is complete would not resolve this fundamental issue. It is Sound Transit's responsibility to provide the necessary required documentation and take the steps needed, as the City has been communicating to Sound Transit for months. In September 2020, City staff explained to Sound Transit this process and these requirements for granting a ROW permit. If Sound Transit believes that there are ways of resolving this problem, I ask that you please provide them for the City's review.

Also, I fail to see why Sound Transit is refusing to discuss the terms of Sound Transit's reimbursement to the City of the costs of operating the facilities. As you correctly note, the Settlement Agreement is clear that the "Parties agree to provide the necessary resources and to work in good faith to diligently and timely develop the final form and contents of such documents, instruments and permits." The negotiations of this reimbursement agreement should begin now, and not after construction has finished. I do not see why the fact that Sound Transit will be responsible for the improvements currently will have any bearing on finalizing what we anticipate will be a simple agreement. Nor do I understand how a complete refusal to begin these negotiations constitutes good faith. However, in the spirit of compromise, the City can prepare the initial draft of the document if that will expedite the process.

Regarding the involvement of the City Council, I agree with you that it is not the responsibility of the City Council to issue or enforce permits (and the City has never claimed otherwise). But Sound Transit's

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disagreement regarding the involvement of the City Council is (again) misplaced. The City Council has statutory authority over real property. This includes, naturally, the acquisition of real property, or in other words, accepting the conveyance of the land from Sound Transit that is intended to be ROW. We anticipate that this process can be completed promptly as soon as Sound Transit provides the City with the appropriate documentation and an agreement is reached on reimbursement. In fact, City staff has informed Sound Transit of the pertinent dates for council meetings, specifically to ensure that Sound Transit could plan accordingly.

Sincerely,

/s/ Bio Park

Bio Park
City Attorney

cc: Jessi Bon, City Manager
Patrick Yamashita, City Engineer