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BEFORE THE HEARING EXAMINER OF THE CITY OF MERCER ISLAND

In Re The Appeal of:

CENTRAL PUGET SOUND TRANSIT
AUTHORITY,

Petitioner,

v.

CITY OF MERCER ISLAND,

Respondent.

No. APL21-001

CITY’S STAFF REPORT
PURSUANT TO ROP 224(g)

I. INTRODUCTION

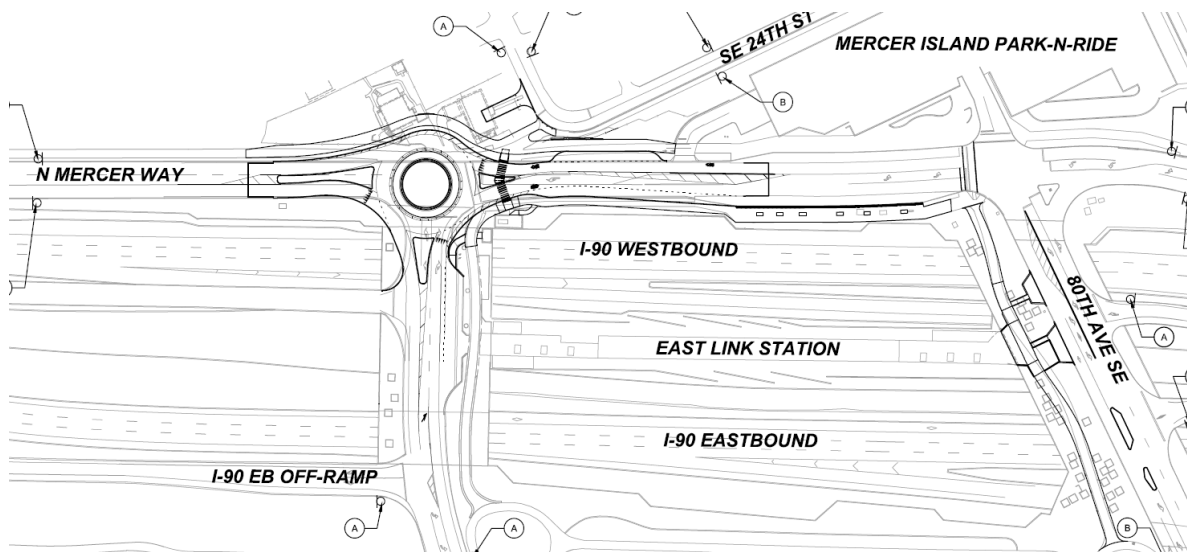
The City files this Staff Report Pursuant to Rules of Procedure (RoP) 224(g) and respectfully requests that the Hearing Examiner uphold the appealed permit decision. Each condition included in the decision and the denial of a curb cut for new bus layovers is based on provision in the Mercer Island City Code (MICC) and City staff’s professional review of the final plan set submitted by Sound Transit. ¹

II. STATEMENT OF FACTS

¹ Per the Hearing Examiner’s March 2, 2021, Interlocutory Order on Motion (“Order on Motion”), the City has not included in this Staff Report facts or discussion regarding Settlement Agreement terms or Sound Transit’s request for equitable relief.



1 On March 2, 2021, the City submitted exhibits for the appeal hearing. The following are
2 the facts found in those exhibits and facts that will be testified to at the appeal hearing. Sound
3 Transit's Mercer Island Transit Integration Project is a bus/light rail transit interchange where
4 bus riders will transfer to and from rail service (the "Project"). Construction will include a
5 roundabout to replace a signaled intersection at 77th Ave SE and North Mercer Way
6 ("NMW"); new curbs, gutters, and sidewalks; drainage; illumination; retaining walls;
7 signage; irrigation; and landscaping. Ex. 4 at 2. A general depiction of the Project area is
8 provided below from Exhibit 3 at page 60:
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19 Prior to submitting its Project permit applications in October 2020, Sound Transit
20 asked the City to review and provide comments to plan sets that were less than 100%
21 complete. The City received a plan set at 60% design on April 22, 2020 and returned
22 comments to Sound Transit regarding same on May 5, 2020. Ex. 8. Sound Transit responded
23 to the City's 60% comments July 9, 2020. Ex. 7 at 21. A plan set at 90% design was provided
24 to the City on September 3, 2020 and the City returned comments to Sound Transit September
25 17, 2020. Sound Transit responded to the City's 90% comments October 12 and October 20,
26

1 2020. Ex. 9 and 10. Sound Transit submitted its Project permit applications to the City on
2 October 23, 2020. Ex. 4.

3 The City reviewed the permit applications for completeness and informed Sound
4 Transit by emails dated October 28, 2020 and November 11, 2020 that the applications were
5 incomplete. Ex. 5 at 1 – 7. On November 25, 2020, Sound Transit was informed that the
6 applications would be deemed “complete and accepted for review under [ROW use] permit
7 application number 2010-186 once payment of the plan check fee is received and processed.”
8 Ex. 5 at 8. Payment was received and the application deemed complete on November 30,
9 2020. Ex. 6.

10
11 The City then proceeded to review Sound Transit’s plans for conformance with
12 applicable codes, standards, and regulations. Three rounds of review were done by seven
13 review disciplines at the City: Building; Right of Way; Engineering, Landscaping, Trees,
14 Irrigation; Street Engineering; Tree; and Fire Protection. Ex. 6. The City’s review comments
15 regarding necessary plan corrections were provided to Sound Transit on December 4, 2020
16 and December 17, 2020. Ex. 6. Both review comment emails provided Sound Transit with a
17 table listing whether a review discipline was “WCI” (waiting for customer information), had
18 “Approved” (no correction items from that review discipline), or was “NA” (not applicable).

19 The table in Exhibit 6 at page 2 is provided below:
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Building:	WCI
Right of Way:	APPROVED
Engineering:	WCI
Landscaping, Trees, Irrigation:	APPROVED
Street Engineering	APPROVED
Tree:	APPROVED
Fire Protection:	APPROVED

- WCI (Waiting for Customer Information): the comments from that review discipline are included within the ePlan drawing file noted above.
- APPROVED: indicates there are no correction items for that review discipline.
- NA (Not applicable): Review discipline is not scheduled to review this project.

On December 22, 2020, the City issued its decision on the permits that were processed under RCW use permit number 2010-186 (the “Decision”). Ex. 1. The permit was approved with conditions except the Decision denied the “proposed construction and use of a new curb cut on the north side of NMW with signage providing “No Parking (Bus Only).” Ex. 1 at 11. The “ancillary permits” or permits processed within right-of-way (ROW) use permit no. 2010-186 were Stormwater Permit no. 2012-119, Clear & Grade Permit no. 2012-153, Clear & Grade Permit no. 2012-154, and Tree Removal Permit no. 2012-096 (included ROW and Residence #1 and #2). Ex. 13.

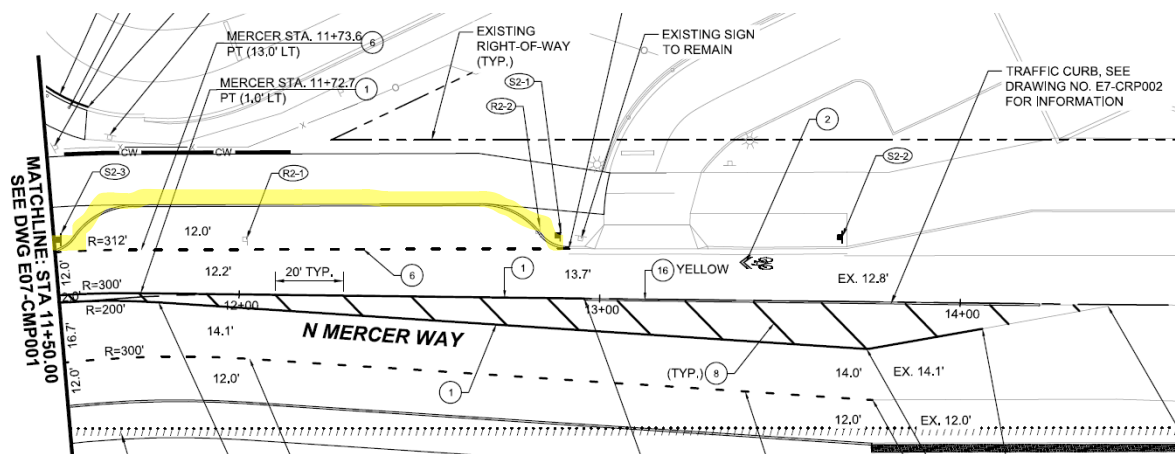
A. Traffic control plan and asphalt restoration.

Sound Transit’s January 5, 2020, Appeal of Conditions of Permit Approval for Permit No. 2010-186 (the “Appeal”) includes an appeal of Conditions A and E in Decision Paragraph IV, regarding traffic control. Ex. 2 at 4. The Appeal asserts that these two conditions are inconsistent. *Id.* Sound Transit requests, however, that the Hearing Examiner allow work hours (Monday-Friday, 7:00AM to 5:00PM, Saturday 9:00AM to 4:00PM) that were not included in the Traffic Control Plan submitted by Sound Transit in Exhibit 3 on pages 59 through 68. There is no inconsistency in the Conditions based on the material submitted to the City.

1 The Appeal also includes an appeal of Conditions H and I in Decision Paragraph VII,
2 related to final asphalt restoration. Ex. 2 at 4-5. Sound Transit appeals the inclusion of a
3 requirement that the restoration be done “within 30 days of excavation.” Ex. 1 at 6. The
4 Conditions, however, also include an allowance for extensions to be granted. The Conditions
5 combine flexibility for the applicant with necessary control by the City Engineer. Ex. 1 at 6.

6 B. Curb cut for new North Mercer Way bus bay.

7 Sound Transit also includes an appeal of Condition XIII.A. in the Decision regarding
8 the denial of construction and use of a new curb cut on the north side of NMW. The proposed
9 curb cut, the north edge of which is highlighted² below in yellow, is in Exhibit 3 at 45:
10



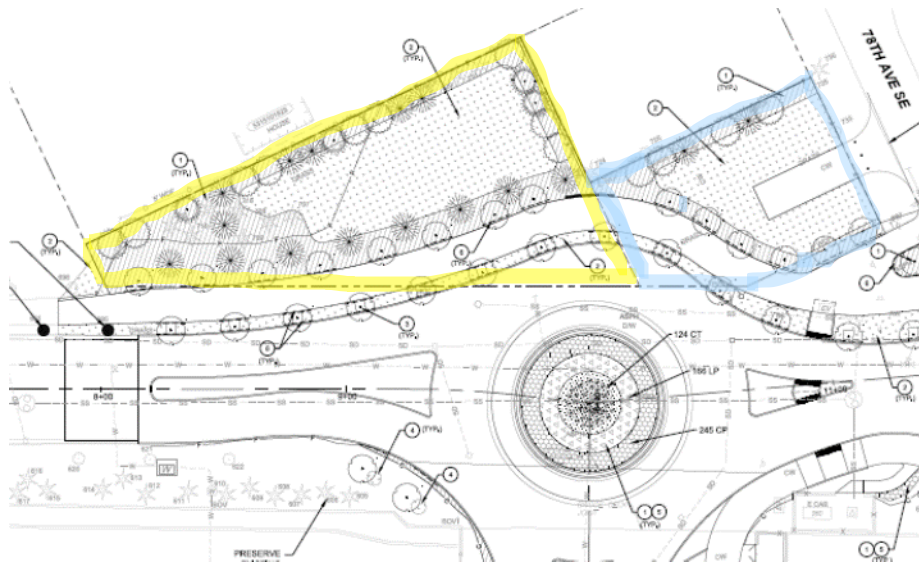
19 On October 20, 2020, Sound Transit informed the City it intended to use this curb cut
20 area as “a bus bay for layovers and supplemental passenger drop-offs.” Ex. 10 at 4. This
21 information was provided in response to the City’s May 5, 2020 and September 18, 2020
22 comments on the 60% and 90% plan sets asking Sound Transit to “[p]lease clarify the
23 intended use of this pull out area.” Ex. 10 at 11, Ex. 8 at 7, Ex. 9 at 7. The Condition explains
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² Highlights are provided for Ex. 3 at 45 and Ex. 3 at 95 for illustrative purposes only.

1 that the proposed use (bus bay/pick-up/drop off) is not authorized by a ROW use permit in
2 Chapter 19.09 MICC. The ROW issue is further discussed immediately below.

3 C. Conveyance of real property as ROW.

4 Sound Transit appeals Condition XIII.B. that requires conveyance of residentially
5 zoned lots to the City as ROW. This Condition was included to negate a code provision that
6 would otherwise require a CUP. The Project's stormwater vault and its appurtenances will
7 collect stormwater from public streets and are proposed for construction on two residentially
8 zoned lots, King County tax parcels 5315101-838 and 5315101-837 (the "Tax lots). Ex. 8 at
9 7, Ex. 24. The City's 60% and 90% comments called out the provision in MICC that requires
10 Conditional Use Permits for construction of "public facilities" on lots zoned single family
11 residential. Ex. 8 at 7; Ex. 9 at 2, 6, and 7. The Tax Lots are depicted below as shown in
12 Exhibit 3 at 95 and highlighted in yellow (531510-1838/Snethen) and blue (531510-
13 1837/Woo).
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25 The relevant portions of section 19.02.010, Single-family, and section 19.16.010,
26 Definitions, provide as follows:

1 19.02.010 Single-Family. A use not permitted by this section is prohibited. . .

2 . . .

3 C. Conditional Uses. The following uses are permitted when authorized by
4 the issuance of a conditional use permit when the applicable conditions set
5 forth in this section and in MICC 19.15.040 have been met:

6 1. Government services, public facilities, utilities, and museum and art
7 exhibitions, subject to the following conditions:

8 . . .

9 19.16.010 Public Facility: A building, structure, or complex used by the
10 general public. Examples include but are not limited to assembly halls,
11 schools, libraries, theaters and meeting places.

12 19.16.010 Structure: That which is built or constructed, an edifice or building
13 of any kind, or any piece of work artificially built up or composed of parts
14 joined together in some definite manner.

15 The above restriction on development of residential lots may be cancelled out by
16 conveyance of the Tax Lots to the City as ROW because upon conveyance, the Tax Lots will
17 no longer carry the zoning designation of Single-family residential and MICC 19.02.010(c)
18 will no longer apply. In its July 2020 response to City comments regarding this code
19 restriction, Sound Transit explained it planned to dedicate the Tax Lots to the City as ROW.
20 Ex. 8 at 7. Condition XIII.B. requires that the Tax Lots be conveyed prior to any construction
21 activity on the Tax Lots. Ex. 1 at 11. However, approved work within the existing ROW and
22 on 80th Avenue SE may proceed prior to the ROW conveyance. *Id.* At the time Sound Transit
23 filed the Appeal, it did not own the Tax Lots. However, as of February 8, 2021, Sound Transit
24 has obtained title to both Tax Lot 531510-1838 formerly owned by Snethen and Tax Lot
25 531510-1837 formerly owned by Woo. Ex. 19 – 21. Sound Transit has not to date dedicated
26 the lots to the City.

27 D. Operations and maintenance agreement.

28 Condition XIII.C. regarding an operations and maintenance agreement between the
29 City and Sound Transit references as its authority the terms of a 2017 Settlement Agreement
30 and therefore, under the terms of the Order on

1 Motion, cannot be a subject of the appeal hearing. And, accordingly will not be addressed
2 further.

3 III. DISCUSSION OF CONDITIONS APPEALED

4 A. Condition XIII.A. denied construction of a new North Mercer Way bus bay because
5 Sound Transit has not obtained the City's permission for use of such bus bay in the
6 City owned ROW.

7 In Condition XIII.A., the City denied the construction and use of a curb cut on the
8 north side of North Mercer Way with signage providing "No Parking (Bus only)." Ex. 3 at
9 45 and 49. Sound Transit alleges that its exclusive use of City owned (ROW) for this new
10 bus layover is not subject to permitting by the City. Sound Transit asserts it has use rights
11 superior to the City as owner and regulator of the ROW. Ex. 2 at 6. Sound Transit is legally
12 incorrect; its position is an attempt to circumvent the City's permitting process and the City's
13 rights as owner of the ROW.

14 Sound Transit cites to RCW 35.58.330 and RCW 81.112.100 for the purported
15 proposition that cities cannot limit regional transportation uses. Ex. 2 at 6. First, Sound
16 Transit overstates RCW 35.58.330, which only prohibits cities from requiring a
17 franchise of metropolitan municipal corporations. Mercer Island is not requiring Sound
18 Transit to procure a franchise agreement.

19 More crucially, Sound Transit's argument is contrary to Sound Transit's own
20 enabling legislation, which *requires* City permission for Sound Transit's use of City
21 ROW. RCW 81.112.080(2) explicitly provides that "[p]ublic transportation facilities and
22 properties which are owned by any city, county, county transportation authority, public
23 transportation benefit area, or metropolitan municipal corporation may be acquired or used
24 by an authority only with the consent of the agency owning such facilities." Emphasis added.

25 The definition of such facilities includes "any lands, interests in land, air rights over land, and
26

1 improvements thereto . . . and other components necessary to support the system.” RCW
2 81.112.020(3). Without permission from the City, RCW 81.112.080(2) prevents Sound
3 Transit from using the City’s ROW for the new North Mercer Way bus layover.

4 Condition XIII.A. explains that the uses proposed by Sound Transit are not
5 authorizations that fall under the parameters of a ROW use permit. An application under
6 MICC 19.09.060 is how an applicant seeks approval to construct in the ROW to “excavate,
7 alter, tunnel under, obstruct, or place” in the ROW. MICC 19.09.060(1). Sound Transit
8 recognizes this function of MICC 19.09.060, but asserts that Sound Transit can construct
9 improvements for any use so long as the construction itself complies with City standards. Ex.
10 2 at 6. This is incorrect.

12 The MICC provides a separate avenue by which new uses of the ROW must be
13 consented to by the City. MICC 19.06.060, Encroachment into public right-of-way, provides
14 that the City’s consent must be obtained for a “use” of the ROW. MICC 19.06.060(A) - (C).
15 It distinguishes between the construction of the desired improvement and the ongoing use of
16 same; it reaffirms that the City’s consent to use does not surrender its property rights as
17 owner. MICC 19.06.060(G) and (E).

19 Negotiation and execution of an agreement under MICC 19.06.060 is but one way for
20 the City and Sound Transit to document the consent Sound Transit is required to obtain under
21 RCW 81.112.080(2). It is absolutely, however, the City’s position that its consent is required
22 for Sound Transit to use City ROW for a bus bay, and such consent must be obtained in
23 addition to getting a permit for the construction of the related improvements. Without that
24 permission, RCW 81.112.080(2) prevents Sound Transit from using the City’s ROW for a
25 new North Mercer Way bus bay.
26

1 B. Sound Transit’s Essential Public Facilities (“EPF”) claims are unfounded.

2 Sound Transit incorrectly alleges that the City cannot deny the use of the bus layover
3 in Sound Transit’s preferred location because Sound Transit is constructing an EPF. Ex. 2 at
4 6. EPFs are “public facilities.... [t]hat are typically difficult to site, such as airports, state
5 education facilities and state or regional transportation facilities..., regional transit authority
6 facilities....” RCW 36.70A.200(1). *Also* MICC 19.16.010. A city’s comprehensive plan and
7 development regulations may not **preclude** the siting of an EPF. RCW 36.70A.200(5). The
8 Growth Management Hearings Board defines “preclude” to mean to “render impossible or
9 impracticable;” “impracticable” means “incapable of being performed or accomplished by
10 the means employed or at command.” *City of Des Moines v. Puget Sound Regional Council*,
11 108 Wn. App. 836, 847, 988 P.2d 27 (1999).
12

13 State law does not provide that applicants wishing to site EPFs may site their facilities
14 wherever they wish, without regard to municipal code. *Id.* Indeed, EPF applicants must
15 comply with cities’ “reasonable permitting and mitigation requirements.” Further, cities
16 may even enact ordinances that make operation or expansion of an EPF difficult, so long as
17 the ordinance does not render impossible or impracticable their current or contemplated
18 operations. *City of Airway Heights v. Eastern Wa. Growth Management Hearings Board*, 193
19 Wn.App.282, 313, 376 P.3d 1112 (2016)(upholding zoning ordinances allowing
20 incompatible development adjacent to EPF).
21

22 The MICC specifically includes a process for identifying, siting and regulating EPFs
23 in MICC 19.06.100. Prior to Sound Transit’s claims in the Appeal that the City is prohibiting
24 an EPF, Sound Transit did not raise the EPF issue during permitting or avail itself of the EPF
25 process in the City’s code.
26

1 Regardless, the result of the curb cut denial is that Sound Transit may not use
2 its **preferred** location with unlimited durations for bus layovers. The denial does not result
3 in the impossibility of the entire Project or even the impossibility of bus layovers — it simply
4 means that Sound Transit may not use its choice of site for unrestricted bus layover, pick/up
5 and drop/off as described by Sound Transit.

6 The City also notes that Sound Transit characterizes the bus layover as an “essential
7 element” of an essential public facility. Ex. 2 at 6. Sound Transit cites no caselaw or statute
8 providing that this is a term of art in relation to essential public facilities. Sound Transit’s
9 characterization is thus not grounded in law. It is also not grounded in fact. The City’s
10 decision does not preclude the construction of the Project. As stated above, it only provides
11 that Sound Transit must utilize a different option than Sound Transit’s first *preference* for
12 construction of the bus layover. Rejection of an applicant’s preferred option does not
13 preclude the siting of an EPF.
14

15 For the reasons stated above, the Hearing Examiner should uphold Condition XIII.A.

16 C. Conveyance of the residential lots as ROW allows Sound Transit’s Project to proceed
17 without a CUP and state statute authorizes the City Council, solely, to accept
18 conveyances of real property.

19 Condition XIII.B. requires the conveyance of real property to the City as ROW
20 because otherwise Sound Transit’s work proposed on residential lots is prohibited by the
21 MICC. The work on the two Tax Lots includes a stormwater vault and necessary piping for
22 same. Ex. 3 at 33. The MICC precludes construction of “public facilities” on lots zoned single
23 family residential unless a Conditional Use Permit is granted. MICC 19.02.010(C)(1).
24

25 The Appeal objects to the conveyance on the basis that that it requires Sound Transit
26 to convey property it does not yet own. Ex. 2 at 8. Fortunately, Sound Transit has now

1 acquired ownership of the two residential lots, one through purchase and one through
2 condemnation. Ex. 19 – 21.

3 Sound Transit also objects to the requirement that the City Council accept the
4 conveyance of real property from Sound Transit. The provision in Condition XIII.B.,
5 however, comports with the state law requirement that the City Council accept real property
6 dedications. RCW 35A.11.020 establishes that the Mercer Island City Council has authority
7 to accept property conveyances. (The legislative bodies for code cities have the powers
8 of “acquisition, sale, ownership, ... of public ways, real property of all kinds, waterways,
9 structures, or any other improvement or use of real or personal property...”) *See also* RCW
10 35A.13.230, establishing that a City Council in a Council-Manager form of government
11 “shall have the powers and authority granted to legislative bodies of cities governed by this
12 title as more particularly described in Chapter 35A.11 RCW, except insofar as such power
13 and authority is vested in the city manager.”

14
15 The MICC establishes the duties of the City Manager and does not include the power
16 to acquire real property. MICC 3.02.010 provides that the powers and duties of the City
17 Manager are coextensive with those found in RCW 35A.13.080, City manager - Powers and
18 duties, and other laws of the state and ordinances. In contrast to the power to accept and
19 dispose of real property given to the City Council by RCW 35A.11.020, the power to accept
20 real property conveyances is not specifically delegated to the City Manager by RCW
21 35A.13.080. There is also no ordinance in Mercer Island delegating the City Council’s power
22 to accept real property conveyances to the City Manager. Therefore, based on the statute and
23 MICC, only the Mercer Island City Council can accept real property dedications.
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1 The City requests that the Hearing Examiner uphold the condition requiring City
2 Council acceptance of the ROW dedications as consistent with state law and the MICC.

3 D. Conditions regarding a traffic control plan and asphalt restoration were imposed by
4 the City Engineer under this authority in MICC 19.06.060.

5 Testimony provided at the appeal hearing will explain the rationale and need for
6 Conditions IV.A. and E. and Condition VII.H. and I. regarding the terms of a traffic control
7 plan and timing of asphalt reconstruction. These conditions are authorized by MICC
8 19.06.060(A)(3) which generally requires conditions to ensure the public health, safety, and
9 welfare. More specifically, MICC 19.06.060(C) and (E) address the requirements for routing
10 and protecting traffic and MICC 19.06.060(Q) and (T) address the requirement to restore
11 ROW surfaces and that said work must be done as soon as practicable.

12 The City requests the Hearing Examiner uphold the conditions concerning traffic
13 control plans and restoration of asphalt.

14
15 IV. CONCLUSION

16 The City followed the constraints and requirements of the MICC and state law when
17 issuing the challenged ROW Use Permit No. 2010-186. The City respectfully requests that
18 the Hearing Examiner uphold the Decision.

19 DATED this 8th day of March, 2021.

20
21 MADRONA LAW GROUP, PLLC

22
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CITY OF MERCER ISLAND
OFFICE OF THE CITY ATTORNEY

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DECLARATION OF SERVICE

I, Tori Harris, declare and state:

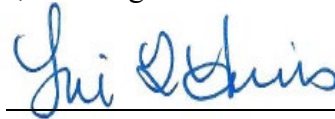
1. I am a citizen of the State of Washington, over the age of eighteen years, not a party to this action, and competent to be a witness herein.

2. On the 8th day of March, 2021, I served a true copy of the foregoing City's Staff Report on Appeal on the following counsel of record using the method of service indicated below:

Stephen G. Sheehy, WSBA No. 13304 Sound Transit / Legal Department 401 South Jackson Street Seattle, WA 98104-2826 Co-Counsel for Petitioner	<input type="checkbox"/> First Class, U.S. Mail, Postage Prepaid <input type="checkbox"/> Legal Messenger <input type="checkbox"/> Overnight Delivery <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> E-Mail: stephen.sheehy@soundtransit.org <input type="checkbox"/> EService pursuant to LGR
Patrick J. Schneider, WSBA No. 11957 Steven J. Gillespie, WSBA No. 39538 Michelle Rusk, WSBA No. 52826 Foster Garvey PLLC 1111 Third Avenue, Suite 3000 Seattle, WA 98101 Co-Counsel for Petitioner	<input type="checkbox"/> First Class, U.S. Mail, Postage Prepaid <input type="checkbox"/> Legal Messenger <input type="checkbox"/> Overnight Delivery <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> E-Mail: pat.schneider@foster.com steve.gillespie@foster.com michelle.rusk@foster.com <input type="checkbox"/> EService pursuant to LGR

I declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED this 8th day of March, 2021, at Seattle, Washington.



Tori Harris