

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

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

DECLARATION OF KIM ADAMS
PRATT IN SUPPORT OF CITY'S
PARTIAL MOTION TO DISMISS

KIM ADAMS PRATT, declares:

1. I am over the age of eighteen years, competent to testify herein, and make this declaration on personal knowledge of the facts stated.

2. A true and correct copy of the Complaint for Declaratory Judgment and Breach of Contract is attached to this declaration as Exhibit A.

3. A true and correct copy of the Sound Transit's Answer, Affirmative Defenses, and Counterclaim is attached to this declaration as Exhibit B.

4. A true and correct copy of the City's Reply to Defendant's Counterclaims is attached to this declaration as Exhibit C.

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

3
4 DATED this 16th day of February, 2021, at Renton, Washington.

5
6 /s/ Kim Adams Pratt
7 Kim Adams Pratt
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

DECLARATION OF SERVICE

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

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 16th day of February, 2021, I served a true copy of the foregoing Declaration of Kim Adams Pratt in Support of City’s Partial Motion to Dismiss for Lack of Jurisdiction 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 16th day of February, 2021, at Seattle, Washington.



Tori Harris

Hon. Catherine Shaffer

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

CITY OF MERCER ISLAND,
WASHINGTON, a municipal corporation,

Plaintiff,

v.

CENTRAL PUGET SOUND REGIONAL
TRANSIT AUTHORITY, dba SOUND
TRANSIT,

Defendant.

No. 20-2-15730-9 SEA

COMPLAINT FOR
DECLARATORY JUDGMENT AND
BREACH OF CONTRACT

Plaintiff City of Mercer Island, Washington (the “City”), alleges the following claims against Defendant Central Puget Sound Regional Transit Authority dba Sound Transit (“Sound Transit”), arising out of a 2017 Settlement Agreement (“Settlement Agreement”) between the parties.

I. INTRODUCTION

1. For years, the City has worked cooperatively with Sound Transit to implement the terms of the Settlement Agreement the parties reached to resolve issues around the expansion of light rail and revisions to bus routes on Mercer Island. The Settlement Agreement included compromises on the part of both parties as well as benefits to both parties. One of the key terms that the City sought and received in the signed Settlement Agreement was that there be no bus layovers, pick-ups, or drop-offs on the north side of North Mercer Way. The City agreed that Sound Transit buses operated

1 by King County Metro (“Metro”) could use the south side of that street. Another key term
2 the City negotiated for and received was to limit bus layovers to no more than 15 minutes
3 and only during the afternoon peak hours. The City specifically negotiated for and
4 received those terms to control (as much as it could) potential adverse impacts on traffic
5 and safety connected to Mercer Island’s only means of off-island access, and to protect (as
6 much as it could) the character of the street. These protections were, and still are, of great
7 importance to the City; the north side of North Mercer Way is the primary connection
8 point between Island Crest Way, the principal arterial providing access to the rest of
9 Mercer Island, and I-90 westbound to Seattle. Metro reviewed the Settlement Agreement
10 before it was signed in 2017—and supported it.

11 2. Pursuant to the terms of that Settlement Agreement, the City has expedited
12 its review of Sound Transit’s permit applications. It has worked diligently to ensure that
13 the Mercer Island light rail station proceeds apace and to ensure that the parties faithfully
14 follow the terms of the Settlement Agreement. The City has acted in good faith
15 throughout the process, following the spirit and letter of the Settlement Agreement with
16 Sound Transit. The City relied on Sound Transit and Metro’s promises of good faith
17 when it entered into the Settlement Agreement; that reliance was misplaced.

18 3. Sound Transit has not lived up to its side of the bargain. For more than one
19 year Sound Transit has demanded several radical changes to the Settlement Agreement,
20 and has refused to compromise on these demands. Sound Transit has demanded unlimited
21 layovers. Sound Transit has demanded the use of both sides of North Mercer Way. And
22 Sound Transit’s approach has been to simply stonewall the City, refusing to offer any
23 concessions or to even mediate the issue. This approach simply ignores the terms of the
24 Settlement Agreement between the parties—which demands the parties always act in good
25 faith and use their best efforts to compromise. Sound Transit has ignored all of that. The
26 City has been left with no choice but to file this action seeking a declaration that the

1 Settlement Agreement means what it says—the City may reasonably reject the material
2 changes that Sound Transit has demanded and Sound Transit may not force the City to do
3 what the Settlement Agreement does not contemplate.

4 **II. PARTIES**

5 4. Plaintiff City is a non-charter optional municipal code city incorporated
6 under the laws of the State of Washington. The City’s principal place of business is
7 located in Mercer Island, King County, Washington.

8 5. Sound Transit is a regional transit authority organized under the laws of the
9 state of Washington.

10 **III. JURISDICTION AND VENUE**

11 6. This Court has jurisdiction over this action under RCW 2.08.010, RCW
12 7.24.010, and RCW 7.24.020.

13 7. The City has standing to seek a declaratory judgment because an actual
14 justiciable controversy exists between the City and Sound Transit regarding the rights and
15 obligations of the parties pursuant to a contract.

16 8. This Court has personal jurisdiction over the parties because they have
17 transacted business in King County, Washington, and because Sound Transit’s acts and
18 omissions giving rise to this action occurred, and continue to occur, in King County,
19 Washington.

20 9. Venue is appropriate under RCW 4.12.020 because many of the
21 transactions, witnesses, and events giving rise to this claim took place and are located in
22 King County, Washington, and under the parties’ Settlement Agreement.

23 **IV. FACTS**

24 **A. Genesis of the Settlement Agreement**

25 10. In 1976, the City, the City of Bellevue, the City of Seattle, Metro, and the
26 Washington State Highway Commission entered into an agreement regarding the

1 reconstruction of I-90. The 1976 agreement provided for the construction of the center
2 lane on I-90, and for Mercer Island commuters to use those lanes. This agreement was
3 reached in specific recognition that I-90 is the only way on and off the island for the
4 residents of Mercer Island.

5 11. In 2004, the 1976 agreement was amended, with Sound Transit added as a
6 party. In relevant part, the 2004 amendment provided for the center lane to be converted
7 for use only as high capacity transit, eliminating the allowance that was previously agreed
8 to allow Mercer Island residents to access I-90 through the center lane. Construction
9 began on the center lane in June 2017 and Mercer Island commuters were no longer able
10 to use the center lanes to access their homes or leave the island to reach Seattle.

11 12. Various disputes between the parties and the Washington State Department
12 of Transportation (“WSDOT”) ensued, with several lawsuits eventually being filed. The
13 City sought to ameliorate the negative impacts on the Mercer Island community’s
14 mobility and access caused by the changes to I-90.

15 13. The City and Sound Transit ultimately resolved their differences through
16 entry into the Settlement Agreement.¹

17 **B. The Settlement Agreement Required the City and Sound Transit to**
18 **Cooperate and Act in Good Faith**

19 14. The Settlement Agreement recognized that the City and Sound Transit had
20 a shared interest in ensuring that the City, the Eastside, and the greater Puget Sound region
21 each had access to convenient and high quality public transportation. This was reflected
22 in the East Link Project (the “Project”). The Project (defined as the part of the East Link
23 Project occurring within the City’s boundaries) included the construction of light rail
24 stations running from downtown Seattle to Mercer Island and then on to Bellevue, along
25 I-90. It also covered changes to bus routes on Mercer Island.

26 _____
¹ A copy of the Settlement Agreement is attached hereto as **Exhibit A**.

1 15. Due to the clear impact of the Project upon Mercer Island, the Settlement
2 Agreement recognized that each party had a joint interest in ensuring that appropriate
3 design and mitigation measures were implemented as a part of the Project and that the
4 Project itself would be a high-quality investment for the City, taxpayers, and Sound
5 Transit.

6 16. A key hallmark of the Settlement Agreement is cooperation. It provides
7 that both parties

8 understand and agree that the process described in this Agreement depends
9 upon timely and open communication and cooperation between the Parties.
10 In this regard, the Parties should communicate issues, changes, or problems
11 that arise with any aspect of the performance of terms of this Agreement as
12 early as possible in the process, and should not wait for explicit due dates
or deadlines. Each Party agrees to work cooperatively and in good faith
toward resolution of any such issues in a manner that ensures adequate
time for each Party to work through issues.

13 Settlement Agreement, § 2.1

14 17. That same section also requires the parties to “provide the necessary
15 resources and to work in good faith to diligently and timely develop” any further
16 agreements that may be necessary to implement the Settlement Agreement. *Id.* § 2.3.

17 18. The collaborative structure of the Settlement Agreement is also reflected in
18 its dispute resolution process, with the City and Sound Transit “agree[ing] that
19 cooperation and communication are essential to resolving issues efficiently. The Parties
20 agree to exercise their best efforts to resolve any disputes that may arise through this
21 dispute resolution process.” *Id.* § 17.2.

22 19. To encourage a good faith compromise of any dispute, the Settlement
23 Agreement implements a three-stage dispute resolution process. The “Level One” stage
24 provided that designated representatives of the City and Sound Transit would meet and
25 discuss any issues. If such good faith negotiations were not successful, then the dispute
26 would be referred to the next level.

1 20. The second level provided that the respective senior design and
2 development officers would meet to further discuss and ideally resolve the dispute. If
3 such a meeting was not successful, then the dispute could be escalated to “Level Three,”
4 in which Sound Transit’s CEO and Mercer Island’s City Manager would meet directly and
5 attempt to resolve the issue in good faith.

6 21. If these meetings could not resolve a dispute, then the parties would be free
7 to either “file suit, seek any available legal remedy, or agree to alternative dispute
8 resolution methods such as mediation.” *Id.* § 17.5. The parties likewise agreed that any
9 such disputes regarding the provisions of the Settlement Agreement would be resolved in
10 King County Superior Court. *Id.* § 27.2.

11 **C. The City Negotiates Essential Protections Designed to Ensure That the**
12 **Project Is a High Quality Investment for the Mercer Island Community**

13 22. As part of the Settlement Agreement, the City and Sound Transit agreed
14 that, as preferred by the City, the integration of bus and light rail would follow the 77th
15 Avenue SE Configuration² (the “Configuration”). Sound Transit had favored a
16 configuration on 80th Avenue SE. The Settlement Agreement further modified the
17 Configuration in recognition of the City’s concerns regarding the transformation of 77th
18 Avenue SE (one of Mercer Island’s most heavily used core streets, connecting commuter
19 traffic from Island Crest Way, the Island’s primary arterial, to Seattle), including potential
20 short-term and long-term impacts to, among other things, traffic and safety. The parties
21 recognized that “[t]o the extent that King County Metro buses are necessary to coordinate
22 service, the Parties agree that the 77th Avenue SE Configuration cannot be implemented
23 without King County Metro’s agreement. The Parties will work collaboratively with King
24 County Metro to obtain its concurrence where necessary and document such concurrence
25 as appropriate.” Settlement Agreement, § 4.1.

26 ² The 77th Avenue SE Configuration was one of two configurations identified in the 2017
SEPA Addendum, which was attached as Exhibit A to the Settlement Agreement.

1 23. Sound Transit and the City agreed on a number of modifications to the
2 Configuration. As relevant here, the parties agreed that “all bus drop-off/pick-up and
3 layover areas (other than those for local Mercer Island buses) will be located on the south
4 side of North Mercer Way.” *Id.* § 4.2(a).

5 24. Due to the involvement of Metro, the City agreed that it would not
6 unreasonably withhold its approval to changes in one or more of the below provisions
7 based on Metro’s operational concerns:

8 (a) In order to reduce impacts on traffic flow on North Mercer Way, all
9 pick-up/drop-off of passengers will be on the south side of North Mercer
10 Way.

11 (b) Other than in an emergency or due to equipment malfunction, bus
12 layovers are limited to no more than fifteen (15) minutes and then only
13 during the afternoon peak period (3:30pm - 7:00pm). Except as to buses
14 running entirely on electrical (battery) power, there will be no idling of
15 buses other than during actual pick-up and drop-off of passengers or while
16 waiting in traffic.

17 Settlement Agreement § 4.3.

18 25. These terms were of material importance to the City. The City agreed to
19 them in reliance upon a letter from Metro (the “Metro Letter”) sent to the city five days
20 before the Settlement Agreement was executed.³

21 26. The Metro Letter stated that “Metro supports the City’s preference as
22 identified in the agreement with Sound Transit for the 77th configuration over the 80th
23 configuration and will work with the City and Sound Transit to implement this design
24 with the modifications described in Section 4.2 of the Settlement Agreement between the
25 City and Sound Transit.”
26

³ The Metro Letter is attached hereto as **Exhibit B**.

1 **D. Sound Transit Breaches the Settlement Agreement**

2 27. Instead, years later Metro reversed course, sending a letter to Sound Transit
3 in May of 2019 (the “Metro Demand Letter”) that demanded the Configuration be revised
4 to provide for unlimited layovers (rather than 15 minute layovers) and that layovers, pick-
5 ups, and drop-offs be allowed on not only the south side of North Mercer Way, but the
6 north side as well.

7 28. The Configuration, which Metro had supported *before* the City entered into
8 the Settlement Agreement, was all of a sudden now “[u]nworkable.”

9 29. In October 2019, the City respectfully disagreed with this position, and
10 expressed surprise that Metro had so completely reversed course from its position in 2017.
11 The City notified Sound Transit that the requested change to unlimited layovers was
12 unreasonable, but indicated it was open to negotiating reasonable layover durations
13 greater than the 15 minutes set forth in the Settlement Agreement.

14 30. The City further explained its concern to Sound Transit that use of the
15 north side of North Mercer Way for layovers, pick-ups, and drop-offs would adversely
16 impact public safety; pedestrian, bicycle, and vehicular traffic; the built environment; and
17 landscape. The City further noted that the Metro Demand Letter relied upon a long-range
18 planning document and not an actual operational plan to support its claim that the changes
19 were necessary for “operational” reasons. The City concluded by noting that while it was
20 withholding its approval, it was “willing to consider other reasonable alternatives to, and
21 additional studies of, [Metro’s] demands. The City looks forward to a constructive
22 dialogue with Sound Transit and [Metro] on these issues in the hope that a reasonable
23 position can be agreed upon.”

24 31. In response, Sound Transit refused to even offer a compromise. It instead
25 made clear that it would push through the remaining work to finalize the Project as
26 quickly as it could.

1 39. Accordingly, a sufficient controversy exists between the parties regarding
2 these issues. This dispute is of sufficient immediacy to warrant the issuance of a
3 declaratory judgment.

4 40. Pursuant to RCW 7.24 *et seq.*, the City seeks the following declarations:

5 a. A declaration that the Settlement Agreement is a valid contract
6 between the parties.

7 b. A declaration that under the Settlement Agreement Sound Transit
8 cannot require unlimited layovers, or pick-ups and drop-offs on both sides of North
9 Mercer Way.

10 c. A declaration that under the Settlement Agreement that the City's
11 refusal of the proposed changes are reasonable.

12 **VI. PLAINTIFF'S CAUSE OF ACTION**
13 **BREACH OF CONTRACT**

14 41. The City realleges the preceding paragraphs and incorporates them by
15 reference.

16 42. The Settlement Agreement is a valid contract between the City and Sound
17 Transit.

18 43. Sound Transit breached the Settlement Agreement by demanding revisions
19 and concessions of the City related to bus integration that were not allowed under the
20 Settlement Agreement. Sound Transit did not act in good faith in its performance under
21 the Settlement Agreement. The City has not received the full benefit of Sound Transit's
22 performance.

23 44. The City has performed in good faith and has reasonably withheld its
24 consent to certain demands made by Sound Transit, as authorized under the Settlement
25 Agreement.

26 45. The City has suffered damages from Sound Transit's breach in an amount
to be determined at trial.

VII. PRAYER FOR RELIEF

Plaintiff requests the following relief:

- A. A declaration that the Settlement Agreement is a valid contract between the parties;
- B. A declaration that under the Settlement Agreement Sound Transit cannot require unlimited layovers, or pick-ups and drop-offs on both sides of North Mercer Way;
- C. A declaration that under the Settlement Agreement that the City’s refusal of the proposed changes are reasonable;
- D. An award and/or indemnification of reasonable attorneys’ fees and costs to the extent permitted by law and the Settlement Agreement;
- E. Damages to be determined at trial; and
- F. For such other and further relief as the Court deems just and equitable.

DATED this 26th day of October, 2020.

McNAUL EBEL NAWROT & HELGREN PLLC

By: s/Malaika M. Eaton
Malaika M. Eaton, WSBA No. 32837

By: s/Charles Wittmann-Todd
Charles Wittmann-Todd, WSBA No. 54229

600 University Street, Suite 2700
Seattle, Washington 98101
(206) 467-1816
meaton@mcnaul.com
cwittmantodd@mcnaul.com

and

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

OFFICE OF THE CITY ATTORNEY
CITY OF MERCER ISLAND

By: s/Bio Park
Bio Park, WSBA No. 36994

City Attorney
9611 S.E. 36th Street
Mercer Island, Washington 98040
bio.park@mercerisland.gov

Attorneys for Plaintiff City of Mercer Island,
Washington

Exhibit A

**SETTLEMENT AGREEMENT
BETWEEN THE CITY OF MERCER ISLAND AND THE
CENTRAL PUGET SOUND REGIONAL TRANSIT AUTHORITY (SOUND TRANSIT)
FOR THE EAST LINK PROJECT**

This SETTLEMENT AGREEMENT (“Agreement”), is entered into between the CITY OF MERCER ISLAND, a Washington municipal corporation (“City”), and the CENTRAL PUGET SOUND REGIONAL TRANSIT AUTHORITY, a regional transit authority (“Sound Transit”), collectively the “Parties” and each a “Party.” For and in consideration of the mutual covenants contained herein, the Parties do hereby agree as follows regarding the Project, as that term is defined below.

RECITALS

WHEREAS, the City is a non-charter optional municipal code city incorporated under the laws of the State of Washington, with authority to enact laws and enter into agreements to promote the health, safety, and welfare of its citizens and for other lawful purposes;

WHEREAS, the City’s only means for vehicles to enter or exit is via Interstate 90 (“I-90”);

WHEREAS, Sound Transit is a regional transit authority created pursuant to chapters 81.104 and 81.112 RCW, with all powers necessary to implement a high-capacity transit system within its boundaries in King, Pierce, and Snohomish Counties;

WHEREAS, on November 4, 2008, Central Puget Sound area voters approved the Sound Transit 2 plan, a package of transit improvements and expansions including: increased bus service, increased commuter rail service, an expansion of link light rail, and improved access to transportation facilities;

WHEREAS, the East Link Project (“the Project”) includes an expansion of light rail from downtown Seattle to Mercer Island, downtown Bellevue, and the Overlake Transit Center with stations serving Mercer Island, South Bellevue, downtown Bellevue, Bel-Red, and Overlake area; Sound Transit is implementing the East Link Project pursuant to its statutory authority described above and the voter approved Sound Transit 2 plan;

WHEREAS, segments of the Project will be constructed and operated within the City, with associated impacts and benefits for residents, businesses, and visitors to the City;

WHEREAS, in December 1976, the City, King County, the City of Seattle, the City of Bellevue, Metro and the State Highway Commission entered into a Memorandum Agreement regarding, among other matters, the lane configuration of a reconstructed I-90 (“1976 Agreement”);

WHEREAS, the 1976 Agreement provided for the construction of a 2-lane Center Roadway (“Center Roadway”) on I-90 for transit use, high occupancy vehicles (“HOV”), and also

for traffic that had Mercer Island as its origin or destination, including single occupancy vehicles (“SOV”);

WHEREAS, in 2004, an amendment to the 1976 Agreement was entered into with Sound Transit added as a party (the “2004 Amendment”), providing for the eventual conversion of the Center Roadway exclusively for High Capacity Transit and the construction of an additional lane in each outside roadway (“New R&A Lanes”);

WHEREAS, in July 2011, Sound Transit, WSDOT, and the Federal Transit Administration issued the East Link Project Final Environmental Impact Statement (“2011 FEIS”), and Sound Transit and WSDOT issued Addenda to the 2011 FEIS under the State Environmental Policy Act (“SEPA”) in December 2016 (“2016 SEPA Addendum”) and in April 2017 (“2017 SEPA Addendum”), which included detailed analysis of potential environmental impacts and identified potential mitigation measures for the Project on Mercer Island;

WHEREAS, Sound Transit and WSDOT closed the Center Roadway and opened two-way HOV lanes on June 3, 2017, to begin construction of that part of the Project that is within Mercer Island;

WHEREAS, the Parties have a joint interest in serving Mercer Island, the Eastside and the Puget Sound region with high quality, convenient public transit, and the Project is intended to provide a reliable, high frequency transportation option for Mercer Island residents and regional commuters, and to benefit the Eastside and Mercer Island residents and workers by linking to multiple destinations in the region;

WHEREAS, the Parties have a joint interest in ensuring that the Project incorporates design and mitigation measures appropriate to its impacts and represents a high-quality investment for taxpayers, the City, and Sound Transit; and

WHEREAS, since February 2017 the Parties engaged in extensive litigation and administrative appeal proceedings against each other and following lengthy negotiations, the City Council approved an outline of settlement terms on May 31, 2017, and the Sound Transit Board authorized the Chief Executive Officer to negotiate a settlement agreement on June 22, 2017, as provided in Motion No. M2017-96;

NOW THEREFORE, in consideration of the mutual promises and covenants contained herein, the Parties hereby agree to the following terms and conditions:

SECTION 1 DEFINITIONS

In addition to those terms defined above and elsewhere in this Agreement, the following terms shall have the meanings given herein where capitalized; words not defined herein shall have their ordinary and common meaning. When not inconsistent with the context, words used in the present tense include the future, words in the plural number include the singular number, words in the singular number include the plural number, and the use of any gender shall be applicable to all genders whenever the context requires. The words “shall” and “will” are mandatory and the word “may” is permissive. References to governmental entities (whether persons or entities) refer to those entities or their successors in authority. If specific provisions of law referred to herein are

renumbered, then the reference shall be read to refer to the renumbered provision. References to laws, ordinances, or regulations shall be interpreted broadly to cover government actions, however nominated, and include laws, ordinances, and regulations now in force or hereinafter enacted or amended.

1.1 Aubrey Davis Park. “Aubrey Davis Park” refers to the City park that runs along and above I-90.

1.2 Mercer Island Station. “Mercer Island Station” means the East Link station being built on Mercer Island as part of the Project.

1.3 Greta Hackett Gallery. “Greta Hackett Gallery” refers to the City’s outdoor sculpture gallery commonly known as the Greta Hackett Outdoor Sculpture Gallery located between Sunset Highway and I-90, including the northwest corner of 80th Avenue SE and SE 27th Street.

1.4 Last Mile Solutions. “Last Mile Solutions” refers to various measures enabling a person to travel all or part of the way between their home and the Mercer Island Station other than in their own passenger vehicle or a means to enable a passenger vehicle to utilize shared parking in a parking area or facility other than a regular park and ride lot, including, without limitation, ride sharing, carpools, van service, satellite park and ride facilities, shuttles, apps and other technology enhancements.

1.5 Project. “Project” means that part of the East Link work that is described in the 2011 FEIS and the 2016 and 2017 SEPA Addenda that is occurring within the boundaries of the City.

1.6 Third Party. “Third Party” means any person other than a Party or an employee or agent of a Party.

1.7 Work Days. “Work Days” means Monday through Friday, except legal holidays.

SECTION 2 COOPERATION AND GOOD FAITH EFFORTS

2.1 The Parties understand and agree that the process described in this Agreement depends upon timely and open communication and cooperation between the Parties. In this regard, the Parties should communicate issues, changes, or problems that arise with any aspect of the performance of terms of this Agreement as early as possible in the process, and should not wait for explicit due dates or deadlines. Each Party agrees to work cooperatively and in good faith toward resolution of any such issues in a manner that ensures adequate time for each Party to work through issues.

2.2 The Parties contemplate that additional agreements, subsequent to execution of this Agreement, may be necessary to fully implement this Agreement. The Parties agree to work cooperatively to negotiate in good faith to develop the final form and contents of such agreements as needed. In the coming years, it is likely that various challenges and opportunities will develop.

Many of those issues and opportunities have already been discussed, but more time is needed to determine how they should be resolved. Accordingly, the Parties desire to acknowledge that these events may occur and commit to address them at the time.

2.3 The Parties acknowledge that this Agreement contemplates the execution and delivery of a number of future documents, instruments and permits, the final form and contents of which are not presently determined. 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.

2.4 The Parties may apply for grants to supplement either Party's funds as contemplated by this Agreement. Upon request, each Party will, as appropriate, provide letters of support for, and otherwise cooperate fully in, grant applications made by another Party.

SECTION 3 TEMPORARY CONSTRUCTION PARKING

By January 1, 2018, Sound Transit shall lease from Third Parties parking stalls for transit commuters during the construction period for the South Bellevue park-and-ride garage with a goal of securing one hundred (100) stalls which are either within 1/3rd mile of the North Mercer Way bus stop or will be served by local transit or shuttle service. The City acknowledges that Sound Transit will lease parking stalls at rates and on terms consistent with terms and conditions included in parking leases in the cities of Bellevue, Renton and Redmond. Such parking leases shall, to the extent possible, be in effect until the South Bellevue Park and Ride garage is operational. Stalls that cannot be leased for the entire construction period shall be replaced if feasible. The total amount for all expenditures shall not exceed two hundred forty thousand dollars (\$240,000), including any transit/shuttle service. In the event that the total actual cost of the leases in the aggregate is less than \$240,000, the difference shall be added to the Traffic Safety Enhancements fund.

SECTION 4 BUS/RAIL INTEGRATION

4.1 The 2017 SEPA Addendum identifies two configurations for transit integration for when East Link is operational: (i) the 77th Avenue SE Configuration; and (ii) the 80th Avenue SE Configuration. Pursuant to and as modified by this Agreement, the Parties agree to implement the 77th Avenue SE Configuration. To the extent that King County Metro buses are necessary to coordinate service, the Parties agree that the 77th Avenue SE Configuration cannot be implemented without King County Metro's agreement. The Parties will work collaboratively with King County Metro to obtain its concurrence where necessary and document such concurrence as appropriate.

4.2 The Parties have agreed on the following modifications to the 77th Avenue SE Configuration as otherwise described in the 2017 SEPA Addendum:

- (a) There will be no bus drop-off/pick-up or layover area on 80th Avenue SE. Accordingly, all bus drop-off/pick-up and layover areas (other than those for local Mercer Island buses) will be located on the south side of North Mercer Way.
- (b) Routing of buses will keep circulation of all but local (on-island only) buses off SE 27th Street, except in emergency or unexpected situations (e.g., to circumvent a traffic accident), consistent with the Parties' intent to limit the routes of non-local buses to North Mercer Way and 77th Ave. SE. Prior to East Link becoming operational, Sound Transit shall complete construction of a traffic roundabout at the intersection of North Mercer Way and 77th Avenue SE, using a design

substantially similar to one of the designs depicted in the 2017 SEPA Addendum Exhibit 2-4 attached as **Exhibit A**.

- (c) Buses will not be scheduled in a manner that could be expected to result in bus volumes on North Mercer Way, both during peak periods and on a daily basis, that exceed current volumes, excluding for these purposes both current and future Mercer Island-only (local) buses. The current bus volumes at the time of execution of this Agreement are as follows: AM Peak 34, PM Peak 34, and Daily 346.

4.3 The Parties have further agreed on the following additional modifications to the 77th Avenue SE Configuration; provided that, the City will not unreasonably withhold its approval to changes in one or more of the below provisions based on Metro operational concerns:

- (a) In order to reduce impacts on traffic flow on North Mercer Way, all pick-up/drop-off of passengers will be on the south side of North Mercer Way.
- (b) Other than in an emergency or due to equipment malfunction, bus layovers are limited to no more than fifteen (15) minutes and then only during the afternoon peak period (3:30pm – 7:00pm). Except as to buses running entirely on electrical (battery) power, there will be no idling of buses other than during actual pick-up and drop-off of passengers or while waiting in traffic.

4.4 Sound Transit is solely responsible for all costs required to implement and operate the systems and facilities required for the 77th Avenue SE Configuration as generally described in the 2017 SEPA Addendum, including, without limitation, design and engineering, permitting, property acquisition, signage, landscaping, street improvements, lighting, traffic improvements, paving, other construction costs, and any other costs incurred with respect thereto. All work will be performed in good faith, in close consultation with the City, and in a manner that reduces construction impacts on pedestrians, bicyclists and motorists, as practical.

SECTION 5 TRAFFIC/SAFETY ENHANCEMENTS

5.1 Sound Transit shall complete all traffic mitigation work identified in the 2011 FEIS (updated in the 2017 Addendum) and the 2017 SEPA Addendum and is solely responsible for all costs incurred to complete such work.

5.2 Upon payment of the regular permit fees imposed by the City and submittal of the normally required documentation incident to obtaining the permits, the City will expedite the issuance of all required permits to enable the work described in Section 14 (Permits) to proceed as provided in that Section. Sound Transit agrees to expedite the work to the extent feasible if doing so would help reduce traffic congestion and/or improve bicycle circulation on Mercer Island.

5.3 In addition to the traffic mitigation work described above, Sound Transit shall provide the City with reimbursable contributions for the actual reasonable costs to fund traffic safety enhancements related to the effects of the Center Roadway closure and HOV-only use of the R-8A HOV lanes, as reasonably determined by the City, in an amount not to exceed five million one hundred thousand dollars (\$5,100,000), except as this amount may be adjusted as provided in the Temporary Construction Parking and Long-term Parking sections of this Agreement. Such

traffic/safety enhancements may include, without limitation, temporary and permanent improvements to intersections, traffic signals, traffic signal coordination, roundabouts, new signage, new or improved crosswalks, road widening or restriping, and traffic calming. If the total traffic/safety enhancements identified by the City cost less than the total contribution authorized herein, the remaining funds, if any, may be applied to Last Mile Solutions or Aubrey Davis Park improvements.

5.4 Sound Transit will assist the City-led effort to mutually study and identify traffic safety enhancements and intersection improvements, subject to the total reimbursement contribution described in this Section. The City shall be responsible for all of the requirements related to design, environmental review, permitting, construction, operation and maintenance of the any and all traffic/safety enhancements developed under this Section of the Agreement.

SECTION 6 LONG-TERM PARKING

6.1 Upon completion of the new, expanded South Bellevue Park-and-Ride, Sound Transit will terminate the short-term commuter lot leases referenced in the Temporary Construction Parking section of this Agreement.

6.2 The City will identify one or more City-led transit-oriented development projects and/or structured parking facilities for long-term regional transit commuter parking. The City or its designee shall be entirely responsible for all development and operational matters associated with such long-term regional transit commuter parking including, without limitation, environmental review, property acquisition/control, construction, design, permitting, entitlements, operation and maintenance. The City will fund at least fifty-one percent (51%) of the actual reasonable construction costs per stall, as described in Section 12, Total Authorized Expenditure. It is anticipated that the City may manage and operate these parking stalls to provide parking for local commuters during certain hours of the day.

6.3 Sound Transit shall provide reimbursable contributions to the City for development of such regional transit commuter parking stalls up to forty-nine percent (49%) of the actual reasonable construction costs per stall, as described in Section 12, Total Authorized Expenditure, for up to a maximum of two hundred (200) parking stalls.

6.4 Without regard to the actual reasonable construction cost per parking stall, if Sound Transit's forty-nine percent (49%) maximum contribution per stall exceeds four million four hundred and ten thousand dollars (\$4,410,000), the excess must be deducted from the total authorized amount allocated to fund the Traffic/Safety Enhancements related to the Center Roadway closure and R-8A HOV restriction. This means that notwithstanding the amount Sound Transit provides to fund long-term parking stalls, the maximum total funding provided for all purposes under this Agreement, including inflation, shall not exceed ten million fifty thousand dollars (\$10,050,000).

6.5 At any time, the City may notify Sound Transit that it will not be seeking any further payments under this Section 6; in the event of such notice, if Sound Transit's forty-nine percent (49%) maximum contribution per parking stall is less than four million four hundred and ten thousand dollars (\$4,410,000), the remaining funds may be used to fund Traffic/Safety

Enhancements related to the effects of the Center Roadway closure and HOV-only use of the R-8A HOV lanes.

SECTION 7 AUBREY DAVIS PARK

7.1 Sound Transit shall provide a reimbursable contribution not to exceed fifty thousand dollars (\$50,000) to the City, for actual reasonable costs incurred in preparing the Aubrey Davis Park Master Plan (“Park Master Plan”). To the extent that the total amount authorized herein is not expended on preparing the Park Master Plan, the remaining amounts may be provided to the City to implement elements of the Park Master Plan. In addition, Sound Transit will assign appropriate staff to assist the City in preparing the Park Master Plan.

7.2 In the proximity of 77th and 80th Avenue SE, Sound Transit will provide safe access to the Mercer Island Station, which will include the re-routing of the I-90 bicycle route in the same proximity to avoid conflicts with the Mercer Island Park-and-Ride on North Mercer Way. Sound Transit’s costs incurred pursuant to this subsection shall not count against Sound Transit’s other funding contributions described in this Agreement.

SECTION 8 LAST MILE SOLUTIONS PILOT PROJECT WITH KING COUNTY METRO

The Parties agree to work collaboratively with King County Metro to develop and launch a pilot project to improve last mile access for City residents that would potentially have regional applicability. Once the Last Mile Solutions pilot project has been designed and planned to the point where it is ready for actual implementation on a pilot basis, Sound Transit shall provide funding in an amount not to exceed two hundred twenty-six thousand nine hundred dollars (\$226,900), except as this amount may be adjusted as provided in the Traffic/Safety Enhancements section of this Agreement.

SECTION 9 EMERGENCY TRAINING FOR I-90 RESPONSE

In order to enable the City to participate in discussions and planning as to East Link safety measures that may be relevant to East Link operations on Mercer Island, Sound Transit agrees to include City personnel in its existing multi-city/multi-agency Fire Life Safety Committee. In addition, Sound Transit agrees to contract with the City of Seattle to provide training for City police and fire personnel who may be needed to respond to an East Link safety issue. In addition to providing training, Sound Transit will reimburse the City a total not to exceed twenty-three thousand one-hundred dollars (\$23,100) in wage costs actually incurred by the City for its personnel while attending the training.

SECTION 10 ADDITIONAL SOUND TRANSIT STAFFING THROUGH CONSTRUCTION

Until such time as the East Link Project becomes operational, Sound Transit will assign a member of its community outreach staff to spend on average at least fifteen (15) hours per week at City-provided work space to work with City staff to develop and implement community outreach and communication measures. Sound Transit staff will serve as a single point of contact for Mercer Island residents, businesses and City staff to answer questions and provide information related to

the Project. These efforts are a City-targeted subset of the larger outreach commitments identified in the 2011 FEIS, the 2016 and 2017 SEPA Addenda, the November 17, 2011 East Link Light Rail Transit Project Record of Decision issued by the FHWA, and the November 16, 2011 East Link Record of Decision issued by the Federal Transit Administration, as well as Sound Transit's external engagement strategy, and the East Link construction outreach plan.

SECTION 11 APPLICABLE FEDERAL REQUIREMENTS

11.1 As provided in Sound Transit Board Motion No. M2017-96, Sound Transit's financial obligations to the City pursuant to this Agreement are funded subject to a financial assistance contract between Sound Transit and the United States Department of Transportation ("USDOT") and the Federal Transit Administration ("FTA").

11.2 The City agrees to comply with the federal funding requirements described in the FTA's Master Agreement and Circular C4220.1F by including the applicable requirements described in **Exhibit B**, incorporated by reference herein, into its contracts with third-party contractors and their subcontractors for services or work funded under the following sections of the Agreement: 5.0 Traffic/Safety Enhancements, 6.0 Long-Term Parking, and 7.0 Aubrey Davis Park.

11.3 The Parties will work cooperatively to determine which federal requirements are applicable to which contracts before the City initiates its procurement process for each contract.

11.4 In addition, both Parties recognize that the FTA may request further changes to this Agreement to comply with its funding requirements and agree to consider any such requests in good faith.

SECTION 12 TOTAL AUTHORIZED EXPENDITURE

12.1 Sound Transit's total financial expenditures authorized pursuant to this Agreement shall not exceed ten million fifty thousand dollars (\$10,050,000) and shall expire on December 31, 2025. Any invoices received by Sound Transit from the City after December 31, 2025 shall not be paid.

12.2 The City shall be responsible for ensuring that any necessary environmental review is accomplished and compliance is demonstrated before Sound Transit's payment of any invoice for reimbursable contributions described herein becomes due.

12.3 The following types of expenditures by the City shall be eligible costs for reimbursement from Sound Transit:

- (a) The direct salary rate and direct overhead including benefits of City staff calculated in the same manner that the City routinely allocates staff and other overhead costs to City capital projects.
- (b) Incidental expenses needed to complete the City tasks described in this Agreement, such as, for example, supplies, meeting expenses, mileage and travel from City offices to Sound Transit meeting locations.

(c) All actual reasonable direct and indirect construction costs such as, for example, property acquisition, architects, engineers, appraisals, permitting, insurance, recording fees, financing, bonding and other construction-related costs commonly referred to as soft costs.

(d) Costs related to implement the Last Mile Solutions.

12.4 The City shall submit invoices and supporting documentation for Sound Transit's reimbursement contribution payments. The invoices must include the appropriate purchase order number, which will be provided by Sound Transit after execution of this Agreement, a cover memo as described in **Exhibit C**, and supporting documentation detailing the work completed and associated costs.

12.5 The City shall submit its invoices with the required documentation via email or mail to AccountsPayable@SoundTransit.org, or Sound Transit, Accounts Payable, 401 S. Jackson St., Seattle, WA 98104-2826. Invoices are payable thirty (30) days upon Sound Transit's receipt of the invoice and acceptable documentation.

12.6 If Sound Transit determines that an invoice lacks sufficient documentation to support payment, Sound Transit will notify the City of its determination and request that the City provide additional documentation. Sound Transit may withhold payment for contested portions of the invoice until supporting documentation for the contested portions are provided; however, such approval shall not be unreasonably withheld.

12.7 During the period of construction of any City-led projects contemplated in this Agreement and for which Sound Transit provides funding and for a period not less than three (3) years, or that period established by the State Archivist, from the date of final payment to the City, records and accounts pertaining to subjects of this Agreement and accounting are to be kept available for inspection and audit by representatives of Sound Transit, the State of Washington, and the federal government. Copies of the records shall be furnished to Sound Transit upon request and shall be maintained in accordance with a work order accounting procedure prescribed by the Division of Municipal Corporations of the State Auditor's Office.

SECTION 13 SEPA COMPLIANCE

13.1 Sound Transit and WSDOT are the "co-lead agencies" for purposes of the Project's compliance with the State Environmental Policy Act, RCW Chapter 43.21C ("SEPA") and have issued the following documents in that capacity (collectively, the "Project Environmental Documents"):

- (a) East Link Project Draft Environmental Impact Statement ("DEIS"), dated December 12, 2008;
- (c) East Link Project Supplemental Draft Environmental Impact Statement ("SDEIS"), dated November 12, 2010;
- (d) 2011 FEIS, dated July 2011;

- (e) 2013 SEPA Addendum, dated March 2013;
- (f) 2016 SEPA Addendum, dated December 2016; and
- (g) 2017 SEPA Addendum, dated April 2017.

13.2 The City agrees that the Project has been subject to procedural and substantive SEPA compliance through issuance of the Project Environmental Documents and that no further actions are required by Sound Transit and WSDOT to satisfy their documentation requirements under SEPA. The Parties agree that pursuant to WAC 197-11-600 (adopted by reference in Mercer Island City Code (“MICC”) Section 19.07.120(D) as supplemented by MICC 19.07.120), the Project Environmental Documents will be used by the City, unchanged for its review and decisions on permit applications related to the Project, unless otherwise indicated pursuant to WAC 197-11-600(3) or MICC 19.07.120(H). The City further agrees that it will not exercise any rights it may have under SEPA to conduct its own environmental review as to the Project.

SECTION 14 PERMITS

14.1 Upon Sound Transit’s payment of all applicable fees and providing all documentation required by applicable law, the City agrees to expeditiously screen and process applications for all City permits required for the Project by Sound Transit and its contractors.

14.2 The City agrees that the Project is permitted by Title 19 of the MICC (the “City Land Use Code”) and that no additional land use permits, or other City discretionary permits of any kind, are required for the Project.

14.3 The Parties agree that this Agreement provides all reasonable and appropriate mitigation for the Project, and the City agrees that there is no basis in fact or law for the City to exercise its regulatory authority to impose additional mitigation on the Project. The City will exercise its regulatory authority only to require compliance with specific regulations that apply to the Project, e.g., the City will require that a building permit complies with the building code and that an electrical permit complies with the electrical code.

14.4 The City agrees to issue a final decision on the building permit for the Mercer Island Station no later than 5-days following satisfactory resolution of the City code review comments. As to all other City permits needed for the Project, upon receipt of any permit application, the City agrees to immediately screen and place the application at the top of the City’s review queue and to notify Sound Transit and its contractors within three business days whether an application is complete. If the City notifies Sound Transit and its contractors that an application is incomplete, the City will include with its notice an explanation of the specific additional information that is needed to make the application complete. The City will similarly respond within three business days of submittal of any requested additional information. Once an application is complete, the City will issue a decision on the permit within ten calendar days.

14.5 The City shall not take any further action to rescind, revoke, condition, amend or suspend the Shoreline Permit issued by the City for the Project. In the event that Sound Transit proposes substantive changes to the design, terms, or conditions of the Project from what is approved in the

Project's Shoreline Permit, the City shall promptly and reasonably process an application for a permit revision in accordance with WAC 173-27-100.

14.6 The City shall not hinder Sound Transit's attempts to secure, obtain, and maintain, at Sound Transit's sole cost and expense, any permits, licenses, or approvals of other governmental agencies or authorities, or of any necessary Third Parties, for the use of any structures or facilities required by the Project. Nothing in this Section is intended to prevent the City's participation in the review procedures of such other governmental agencies or authorities to the fullest extent provided by law, including commenting on impacts and mitigation.

14.7 The Parties agree that this Section 14 constitutes a reasonable and informed exercise of the City's regulatory authority.

14.8 If the City has reason to believe that the Project is not in compliance with the terms or conditions of any issued permit, the City will provide written notice to Sound Transit of the reasons for the City's belief, and the Parties will resolve the matter using the Dispute Resolution provisions of Section 17 instead of by means of the City's usual code enforcement procedures, unless an unsafe condition arises during Project construction, in which case the City's building official is authorized to take appropriate action including but not limited to issuance of a stop work order.

SECTION 15 DISPOSITION OF LITIGATION

15.1 Within thirty (30) days after execution of this Agreement or as soon thereafter as is feasible, the City and Sound Transit will take the following actions:

- (a) The City will dismiss King County Superior Court Case No. 17-2-03884-9 with prejudice;
- (b) The City will strike the motions for discretionary review pending before the Washington State Supreme Court that it filed in King County Superior Court Case No. 17-2-05191-8 and Case No. 17-2-05193-4;
- (c) Sound Transit and the City will ask the King County Superior Court to enter agreed orders that continue in effect all orders and rulings granting preliminary injunctive relief and to stay the proceedings in Case No. 17-2-05191-8 and Case No. 17-2-05193-4 until either all required permits for the Project have been issued by the City (estimated June of 2023) or the Parties seek enforcement of the orders granting preliminary injunctions or permanent injunctive relief. The Parties will request that the Court enter a stipulated Final Judgment dismissing both cases after all required permits for the Project to be completed have been issued by the City;
- (d) Sound Transit will voluntarily dismiss the Growth Board Proceedings with prejudice;
- (e) The City will cancel Development Code Interpretation DCI #17-01;
- (f) Sound Transit will withdraw its appeal pending before the City's Planning Commission;

- (g) The City will enact amendments to the 2017 City Ordinances to the extent necessary to make them consistent with the provisions of this Agreement; and
- (h) The City will not commence any further proceedings, new litigation, or new regulatory actions impacting the Project.

15.2 Each Party shall cooperate as necessary and shall bear its own attorneys' fees and costs to complete the actions provided for in this Section 15.

SECTION 16 ADDITIONAL COMMITMENTS

16.1 Sound Transit and the City will coordinate with King County Department of Natural Resources regarding construction work on the Project and the King County (North Mercer Way) Sewer Line Projects on North Mercer Way to minimize Work Day road closures that would cause a material and adverse impact on motorists.

16.2 If the construction of the Project requires work in or impacting any part of the Greta Hackett Outdoor Sculpture Gallery, Sound Transit shall be responsible for the proper and safe removal, storage and reinstallation of any sculptures that need to be moved and shall pay all associated costs.

SECTION 17 DISPUTE RESOLUTION

17.1 The Parties agree that no Party shall take or join any action in any judicial or administrative forum to challenge actions of the other Party associated or arising in connection with this Agreement or the Project, except as set forth in this Agreement.

17.2 Any disputes or questions of interpretation of this Agreement that may arise between the Parties shall be governed under the dispute resolution provisions in this Section. The Parties agree that cooperation and communication are essential to resolving issues efficiently. The Parties agree to exercise their best efforts to resolve any disputes that may arise through this dispute resolution process.

17.3 The Parties agree to use their best efforts to prevent and resolve potential sources of conflict at the lowest level.

17.4 The Parties agree to use their best efforts to resolve disputes arising out of or related to this Agreement using good faith negotiations by engaging in the following dispute escalation process should any such disputes arise:

- (a) Level One: The Designated Representatives of the Parties in dispute shall meet to discuss and attempt to resolve the dispute in good faith and in a timely manner. If they cannot resolve the dispute within fourteen (14) calendar days after referral of that dispute to Level One, any Party to the dispute may refer the dispute to Level Two.
- (b) Level Two: Sound Transit's Executive Director of Design, Engineering and Construction Management or Designee, the City's Development Services Director or Designee, as applicable, shall meet to discuss and attempt to resolve the dispute,

in good faith and in a timely manner. If they cannot resolve the dispute within fourteen (14) business days after referral of that dispute to Level Two, any Party to the dispute may refer the dispute to Level Three.

- (c) Level Three: Sound Transit's Chief Executive Officer or Designee, the City Manager or Designee, as applicable, shall meet to discuss and attempt to resolve the dispute in good faith and in a timely manner.

17.5 Except as otherwise specified in this Agreement, in the event the dispute is not resolved at Level Three within fourteen (14) calendar days after referral of that dispute to Level Three, the Parties to the dispute are free to file suit, seek any available legal remedy, or agree to alternative dispute resolution methods such as mediation, subject to the governing law, venue, and default Sections of this Agreement. At all times prior to resolution of the dispute, the Parties shall continue to perform any undisputed obligations and make any undisputed required payments under this Agreement in the same manner and under the same terms as existed prior to the dispute. Notwithstanding anything in this Agreement to the contrary, no Party has an obligation to agree to refer the dispute to mediation or other form of dispute resolution following completion of Level Three of the process described herein. Such agreement may be withheld for any or no reason.

SECTION 18 INSURANCE

18.1 The City is part of an insurance pool, the Washington Cities Insurance Authority ("WCIA"), and shall maintain, throughout the term of this Agreement and for six (6) years after its termination, appropriate coverage in amounts and types sufficient to satisfy its liabilities. When commercial insurance is utilized, the City shall secure and maintain in effect insurance adequate to protect Sound Transit against claims or lawsuits that may arise as a result of the design, construction, operation, maintenance, repair, removal, occupancy, or use of the facilities to be designed and constructed by the City pursuant to this Agreement, including, without limitation: (i) commercial general liability insurance; (ii) workers' compensation insurance (to the extent required by law); (iii) employer's liability insurance; (iv) auto liability coverage for any auto; (v) environmental liability insurance; and, (vii) during construction, builder's risk.

18.2 The City shall file with Sound Transit's Risk Manager on an annual basis a letter evidencing its WCIA member status, which shall be deemed sufficient coverage by Sound Transit. When commercial insurance is utilized, the City shall provide Sound Transit's Risk Manager with Certificates of Insurance reflecting evidence of the required insurance, naming Sound Transit as an additional insured where appropriate, to evidence continued coverage during the term of this Agreement and for six years after its termination.

18.3 If the City fails to maintain the required insurance, Sound Transit may withhold from the City any payments that may become due hereunder until such time as the required insurance is obtained.

18.4 On City projects impacting the Project, the City shall require any contractors or subcontractors to maintain insurance as required by the City in its standard contracts, and to name Sound Transit as an additional insured on their required insurance. The City shall also either require any professional services consultants, subconsultants, contractors or subcontractors

working on City projects impacting the Project to carry appropriate levels of Professional Liability insurance coverage during the course of design, engineering, and construction or the City may itself acquire such insurance or self-insure the work.

18.5 With respect to any liability imposed against the City arising out of the Emergency Training for I-90 Response as provided for in Section 9 of this Agreement, Sound Transit shall indemnify and hold harmless the City against claims for negligent training and/or injuries to persons, including death, or damage to property which may arise from or in connection with such training for the duration of this Agreement and for six (6) years after its termination.

SECTION 19 INDEMNIFICATION

19.1 To the greatest extent allowed by law, the City agrees to defend, release, indemnify and hold harmless Sound Transit its successors and assigns, and its officers, officials, directors, contractors, and employees from and against any and all claims, suits, actions, causes of actions, losses, costs, penalties, response costs, and damages of whatsoever kind or nature arising out of, in connection with, or incident to the acts, actions or omissions of the City, its employees, consultants, designers contractors or construction managers or agents in any way connected or related to the City's performance or failure to perform the work required or allowed to be performed by the City under this Agreement; provided, however, the City's indemnification in this Section expressly excludes the Bus/Rail Integration work (Section 4) and all SEPA-mandated traffic mitigation work (Section 5.1) that Sound Transit is solely required to perform; provided further, however, that should a court of competent jurisdiction determine that this Agreement is subject to RCW 4.24.115, then, in the event of liability for damages arising out of bodily injury to persons or damages to property caused by or resulting from the concurrent negligence of the City, its employees, consultants, designers, contractors, construction managers or agents and Sound Transit, the indemnification applies only to the extent of the negligence of the City, its employees, consultants, designers, contractors, construction managers or agents.

THE CITY SPECIFICALLY ASSUMES POTENTIAL LIABILITY FOR ACTIONS BROUGHT BY THE CITY'S OWN EMPLOYEES OR FORMER EMPLOYEES AGAINST SOUND TRANSIT, AND FOR THAT PURPOSE THE CITY SPECIFICALLY WAIVES ALL IMMUNITY AND LIMITATIONS ON LIABILITY UNDER THE WORKERS COMPENSATION ACT, RCW TITLE 51, OR ANY INDUSTRIAL INSURANCE ACT, DISABILITY BENEFIT ACT OR OTHER EMPLOYEE BENEFIT ACT OF ANY JURISDICTION THAT WOULD OTHERWISE BE APPLICABLE IN THE CASE OF SUCH CLAIM. THIS INDEMNITY OBLIGATION SHALL NOT BE LIMITED BY ANY LIMITATION ON THE AMOUNT OR TYPE OF DAMAGES, COMPENSATION OR BENEFITS PAYABLE BY OR FOR CONTRACTOR OR A SUBCONTRACTOR UNDER WORKERS' COMPENSATION, DISABILITY BENEFIT OR OTHER EMPLOYEE BENEFITS LAWS. THE CITY RECOGNIZES THAT THIS WAIVER WAS SPECIFICALLY ENTERED INTO AND WAS THE SUBJECT OF MUTUAL NEGOTIATION. PROVIDED, HOWEVER, THE CITY'S WAIVER OF IMMUNITY UNDER THE PROVISIONS OF THIS PARAGRAPH EXTENDS ONLY TO CLAIMS AGAINST SOUND TRANSIT, AND DOES NOT INCLUDE, OR EXTEND TO, ANY CLAIMS BY THE CITY'S EMPLOYEE DIRECTLY AGAINST THE CITY.

19.2 The City further agrees to assume the defense of Sound Transit with legal counsel acceptable to Sound Transit, whose acceptance shall not be unreasonably withheld, in all legal or claim proceedings arising out of, in connection with, or incidental to the performance of this Agreement or the work by or for the City and expressly excluding the work identified in Section 19.1 that Sound Transit is solely required to perform. The City shall pay all defense expenses, including attorneys' fees, expert fees, and costs (collectively "defense costs") incurred directly or indirectly on account of such litigation or claims, and the City shall satisfy any judgment rendered in connection therewith. In the event that any lien is placed upon any of Sound Transit's property as a result of such suits or legal proceedings, the City agrees to immediately cause the same to be dissolved and discharged by giving bond or otherwise. The City may settle any suit, claim, action, loss, cost, penalty, or damages, subject to Sound Transit's approval, which approval shall not be unreasonably withheld, if such settlement completely and forever extinguishes any and all liability of Sound Transit. In the event of litigation between the Parties to enforce the rights under this Section, reasonable attorney fees shall be allowed to the prevailing party.

19.3 The City further agrees that any review, approval or acceptance by Sound Transit and/or others hereunder shall not relieve the City of any of its obligations to defend, indemnify and hold harmless Sound Transit as required in this Section, nor shall such review, approval or acceptance relieve the City of the obligation to ensure the work by the City under this Agreement be performed in accordance with all governing statutes, regulations and codes and to generally accepted professional standards applicable to the types of services and work performed by the City and/or its contractors, agents, etc. or in any way diminish its liability for the performance of such obligations or its obligations to provide the indemnities hereunder.

19.4 The foregoing indemnities and duties to defend shall survive the termination of this Agreement and final payment hereunder, and are in addition to any other rights or remedies that Sound Transit may have by law or under this Agreement. In the event of any claim or demand made Sound Transit, Sound Transit may, in its sole discretion, reserve, retain or apply any monies due to the City under this Agreement for the purpose of resolving such claims; provided, however, that Sound Transit may release such funds if the City provides Sound Transit with adequate assurance of the protection of Sound Transit's interests.

19.5 The City shall comply, and require its contractors, agents, etc. to comply, with all Sound Transit resolutions, motions and federal, state, and local laws, regulations, and ordinances applicable to the work and services to be performed by the City under this Agreement.

19.6 Insurance Coverage, or the lack of same, shall not relieve the City of its responsibility for liability or damages to Sound Transit under this Agreement.

SECTION 20 DEFAULT

20.1 No Party shall be in default under this Agreement unless it has failed to perform under this Agreement for a period of thirty (30) calendar days after written notice of default from another Party. Each notice of default shall specify the nature of the alleged default and the manner in which the default may be cured satisfactorily. If the nature of the alleged default is such that it cannot be reasonably cured within the 30-day period, then commencement of the cure within such

time period and the diligent prosecution to completion of the cure shall be deemed a cure; provided, however, that in no event shall a cure take longer than ninety (90) days to complete without mutual written consent to an extension for a definite period. Any dispute regarding the existence of a default or appropriate cure shall be handled through dispute resolution consistent with Section 17.

20.2 The Parties shall not be liable or deemed in breach or default of this Agreement if and to the extent its performance under the Agreement is prevented by reason of force majeure. The term "force majeure" means an occurrence that is beyond the control of the Parties and could not have been avoided by exercising due care. Force majeure shall include but not be limited to acts of God, terrorism, war, riots, strikes, fire, floods, earthquakes, or other similar occurrences.

SECTION 21 REMEDIES; ENFORCEMENT

21.1 The Parties reserve the right to exercise any and all of the following remedies, singly or in combination, and consistent with the dispute resolution, governing law, venue, and default Sections of this Agreement, in the event another Party violates any provision of this Agreement:

- (a) Commencing an action at law for monetary damages;
- (b) Commencing an action for equitable or other relief;
- (c) Seeking specific performance of any provision that reasonably lends itself to such remedy; and
- (d) The prevailing Party (or substantially prevailing Party if no one Party prevails entirely) shall be entitled to reasonable attorney fees and costs.

21.2 Remedies are cumulative; the exercise of one shall not foreclose the exercise of others.

21.3 A Party shall not be relieved of any of its obligations to comply promptly with any provision of this Agreement by reason of any failure by another Party to enforce prompt compliance, and such failure to enforce shall not constitute a waiver of rights or acquiescence in the other Party's conduct.

SECTION 22 TERM; TERMINATION

This Agreement shall be effective as of the date the last Party signs and shall remain in effect until terminated by mutual written agreement of the Parties.

SECTION 23 COVENANTS AND WARRANTIES

By execution of this Agreement, each Party covenants and warrants as follows:

- (a) That it has the full right and authority to enter into and perform this Agreement, and that by entering into and performing this Agreement, it is not knowingly in violation of any law, regulation or agreement by which it is bound or to which it is bound or to which it is subject; and

- (b) That its execution, delivery, and performance of this Agreement has been duly authorized by all requisite corporate action, that the signatories for it are authorized to sign this Agreement, and that, upon approval by it, the joinder or consent of any other Party, including a court or trustee or referee, is not necessary to make valid and effective the execution, delivery and performance of this Agreement.

SECTION 24 ASSIGNMENT

24.1 This Agreement shall be binding upon and inure solely to the benefit of the Parties hereto and their respective successors or assignees. No assignment hereof or sublease shall be valid for any purpose without the prior written consent of every other Party. The above requirement for consent shall not apply to (i) any disposition of all or substantially all of the assets of a Party, (ii) any governmental entity merger, consolidation, or reorganization, whether voluntary or involuntary, or (iii) a sublease or assignment of this Agreement (in whole or in part) to a governmental entity; provided, however, that no unconsented assignment shall relieve a Party of its obligations and liabilities under this Agreement.

24.2 Any Party hereto may assign any monetary receivables due them under this Agreement; provided, however, such assignment shall not relieve the assignor of any of its rights or obligations under this Agreement.

24.3 Neither this Agreement nor any term or provision hereof, or any inclusion by reference, shall be construed as being for the benefit of any Third Party not a signatory hereto.

SECTION 25 DESIGNATED REPRESENTATIVES

25.1 To promote effective intergovernmental cooperation and efficiencies, each Party shall designate a representative ("Designated Representative") who shall be responsible for coordinating communications between the Parties and shall act as the point of contact for each Party. The Designated Representatives shall communicate regularly to discuss the status of the tasks to be performed, identify upcoming Project decisions and any information or input necessary to inform those decisions, and to resolve any issues or disputes related to the Project, consistent with Section 17.

25.2 Communication of issues, changes, or problems that may arise with any aspect of the Project should occur in good faith and as early as possible in the process, and not wait for specific due dates or deadlines. The Designated Representatives shall use reasonable best efforts to provide up-to-date and best available information to the other Party promptly after such information is obtained or developed.

25.3 Each Designated Representative is also responsible for coordinating the input and work of its agency, consultants, and staff as it relates to the objectives of this Agreement. The Parties reserve the right to change Designated Representatives, by written notice to the other Parties during the term of this Agreement. Each Party's initial Designated Representative is identified in the attached **Exhibit D**.

SECTION 26 NOTICE

26.1 Unless otherwise provided herein, all notices and communications concerning this Agreement shall be in writing and addressed to the applicable Designated Representative(s).

26.2 Unless otherwise provided herein, all notices shall be either: (i) delivered in person, (ii) deposited postage prepaid in the certified mails of the United States, return receipt requested, (iii) delivered by a nationally recognized overnight or same-day courier service that obtains receipts, or (iv) delivered electronically to the other Party's Designated Representative as listed in the attached **Exhibit D**.

SECTION 27 GENERAL PROVISIONS

27.1 The Parties shall not unreasonably withhold or delay requests for information, approvals or consents provided for in this Agreement; provided, however, that approvals or consents required to be given by vote of the Sound Transit Board or the Mercer Island City Council are recognized to be legislative actions. The Parties agree to take further actions and execute further documents, either jointly or within their respective powers and authority, to implement the intent of this Agreement; provided, however, that where such actions or documents required must be first approved by vote of the Sound Transit Board or the Mercer Island City Council, such actions are recognized to be legislative actions. The Parties agree to work cooperatively with each other to achieve the mutually agreeable goals as set forth in this Agreement.

27.2 This Agreement shall be interpreted, construed and enforced in accordance with the laws of the State of Washington. Venue for any action under this Agreement shall be King County, Washington.

27.3 If any term of this Agreement is to any extent invalid, illegal, or incapable of being enforced, such term shall be excluded to the extent of such invalidity, illegality, or unenforceability; all other terms hereof shall remain in full force and effect.

27.4 Time is of the essence in every provision of this Agreement. Unless otherwise set forth in this Agreement, the reference to "days" shall mean calendar days. If any time for action occurs on a weekend or legal holiday, then the time period shall be extended automatically to the next business day.

27.5 This Agreement is made and entered into for the sole protection and benefit of the Parties hereto and their successors and assigns. No other person shall have any right of action based upon any provision of this Agreement.

27.6 No joint venture or partnership is formed as a result of this Agreement. No employees, agents or subcontractors of one Party shall be deemed, or represent themselves to be, employees of any other Party.

27.7 This Agreement has been reviewed and revised by legal counsel for all Parties and no presumption or rule that ambiguity shall be construed against the Party drafting the document shall apply to the interpretation or enforcement of this Agreement. The Parties intend this Agreement to be interpreted to the full extent authorized by applicable law.

27.8 Each Party shall be responsible for its own costs, including legal fees, incurred in negotiating or finalizing this Agreement, unless otherwise agreed in writing by the Parties.

27.9 This Agreement, including its exhibits, may be amended only by a written instrument executed by all of the Parties hereto.

27.10 This Agreement constitutes the entire agreement of the Parties with respect to the subject matters of this Agreement, and supersedes any and all prior negotiations (oral and written), understandings and agreements with respect hereto.

27.11 Section headings are intended as information only, and shall not be construed with the substance of the section they caption.

27.12 This Agreement may be executed in several counterparts, each of which shall be deemed an original, and all counterparts together shall constitute but one and the same instrument.

IN WITNESS WHEREOF, each of the Parties has executed this Agreement by having its authorized representative affix his/her name in the appropriate space below:

**CENTRAL PUGET SOUND REGIONAL
TRANSIT AUTHORITY (SOUND
TRANSIT)**

CITY OF MERCER ISLAND

By: 
Peter M. Rogoff, Chief Executive Officer

By: 
Julie Underwood, City Manager

Date: Nov 2, 2017

Date: October 18, 2017

Authorized by Motion No. M2017-96

Authorized by Resolution No. 1533

Approved as to Form:

Approved as to Form:


Stephen G. Sheehy, Senior Legal Counsel

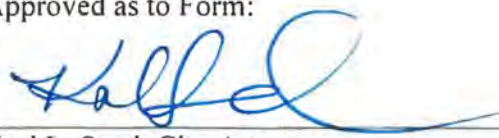

Kari L. Sand, City Attorney

Exhibit List

Exhibit A – 2017 SEPA Addendum Exhibit 2-4

Exhibit B – Federal Requirements

Exhibit C – Sound Transit Invoice Form

Exhibit D – Designated Representatives

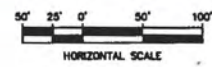
EXHIBIT A

2017 SEPA ADDENDUM EXHIBIT 2-4

EXHIBIT A



- LEGEND**
- BUS DROP-OFF AREA
 - BUS LAYOVER AREA
 - BUS PICK UP
 - MERCER ISLAND EAST LINK STATION
 - MERCER ISLAND ROUTES
 - TRANSIT CENTER ROUTES
 - EAST LINK FEIS PROPOSED MITIGATION
 - EXISTING SIGNAL CONTROL
 - EXISTING STOP CONTROL



MERCER ISLAND BUS TRANSIT INTEGRATION
Exhibit 2-4 - 77th Avenue SE Configuration

Mercer Island Settlement Agreement

EXHIBIT B

FEDERAL REQUIREMENTS

Federally Required and Other Model Contract Clauses

1. Fly America Requirements
2. Buy America Requirements
3. Cargo Preference Requirements
4. Energy Conservation Requirements
5. Clean Water Requirements
6. Pre-Award and Post-Delivery Audit Requirements
7. Lobbying
8. Access to Records and Reports
9. Federal Changes
10. Clean Air
11. Recycled Products
12. No Government Obligation to Third Parties
13. Program Fraud and False or Fraudulent Statements and Related Acts
14. Termination
15. Government-wide Debarment and Suspension (Nonprocurement)
16. Privacy Act
17. Civil Rights Requirements
18. Breaches and Dispute Resolution
19. Disadvantaged Business Enterprises (DBE)
20. Incorporation of Federal Transit Administration (FTA) Terms
21. Safe Operation of Motor Vehicles
22. Bonding Requirements

1. FLY AMERICA REQUIREMENTS [49 U.S.C. § 40118, 41 CFR Part 301-10]**Applicability to Contracts**

The Fly America requirements apply to the transportation of persons or property, by air, between a place in the U.S. and a place outside the U.S., or between places outside the U.S., when the Federal Trade Administration (“FTA”) will participate in the costs of such air transportation. Transportation on a foreign air carrier is permissible when provided by a foreign air carrier under a code share agreement when the ticket identifies the U.S. air carrier’s designator code and flight number. Transportation by a foreign air carrier is also permissible if there is a bilateral or multilateral air transportation agreement to which the U.S. Government and a foreign government are parties and which the Federal Department of Transportation (“FDOT”) has determined meets the requirements of the Fly America Act.

Flow Down Requirements

The Fly America requirements flow down from FTA recipients and subrecipients to first-tier contractors, who are responsible for ensuring that lower-tier contractors and subcontractors are in compliance.

Model Clause/Language

The relevant statutes and regulations do not mandate any specified clause or language. FTA proposes the following language.

Fly America Requirements

The Contractor agrees to comply with 49 U.S.C. 40118 (the “Fly America” Act) in accordance with the General Services Administration’s regulations at 41 CFR Part 301-10, which provide that recipients and subrecipients of Federal funds and their contractors are required to use U.S. Flag air carriers for U.S Government-financed international air travel and transportation of their personal effects or property, to the extent such service is available, unless travel by foreign air carrier is a matter of necessity, as defined by the Fly America Act. The Contractor shall submit, if a foreign air carrier was used, an appropriate certification or memorandum adequately explaining why service by a U.S. flag air carrier was not available or why it was necessary to use a foreign air carrier and shall, in any event, provide a certificate of compliance with the Fly America requirements. The Contractor agrees to include the requirements of this section in all subcontracts that may involve international air transportation.

2. BUY AMERICA REQUIREMENTS [49 U.S.C. 5323(j), 49 CFR Part 661]**Applicability to Contracts**

The Buy America requirements apply to the following types of contracts: Construction Contracts and Acquisition of Goods or Rolling Stock valued at more than one hundred thousand dollars (\$100,000).

Flow Down

The Buy America requirements flow down from FTA recipients and subrecipients to first-tier contractors, who are responsible for ensuring that lower-tier contractors and subcontractors are in compliance. The one hundred thousand dollars (\$100,000) threshold applies only to the grantee contract, subcontracts under that amount are subject to Buy America.

Mandatory Clause/Language

The Buy America regulation, at 49 CFR 661.13, requires notification of the Buy America requirements in FTA-funded contracts, but does not specify the language to be used. The following language has been developed by FTA.

Buy America - The contractor agrees to comply with 49 U.S.C. 5323(j) and 49 C.F.R. Part 661, which provide that Federal funds may not be obligated unless steel, iron, and manufactured products used in FTA-funded projects are produced in the United States, unless a waiver has been granted by FTA or the product is subject to a general waiver. General waivers are listed in 49 C.F.R. 661.7, and include final assembly in the United States for fifteen (15) passenger vans and fifteen (15) passenger wagons produced by Chrysler Corporation, and microcomputer equipment and software. Separate requirements for rolling stock are set out at 49 U.S.C. 5323(j)(2)(C) and 49 C.F.R. 661.11. Rolling stock must be assembled in the United States and have a sixty percent (60%) percent domestic content.

A bidder or offeror must submit to the FTA recipient the appropriate Buy America certification (below) with all bids or offers on FTA-funded contracts, except those subject to a general waiver. Bids or offers that are not accompanied by a completed Buy America certification must be rejected as nonresponsive. This requirement does not apply to lower tier subcontractors.

Certification requirement for procurement of steel, iron, or manufactured products.*Certificate of Compliance with 49 U.S.C. 5323(j)(1)*

The bidder or offeror hereby certifies that it will meet the requirements of 49 U.S.C. 5323(j)(1) and the applicable regulations in 49 C.F.R. Part 661.5.

Date _____

Signature _____

Company Name _____

Title _____

Certificate of Non-Compliance with 49 U.S.C. 5323(j)(1)

The bidder or offeror hereby certifies that it cannot comply with the requirements of 49 U.S.C. 5323(j)(1) and 49 C.F.R. 661.5, but it may qualify for an exception pursuant to 49 U.S.C.

5323(j)(2)(A), 5323(j)(2)(B), or 5323(j)(2)(D), and 49 C.F.R. 661.7.

Date _____

Signature _____

Company Name _____

Title _____

Certification requirement for procurement of buses, other rolling stock and associated equipment.

Certificate of Compliance with 49 U.S.C. 5323(j)(2)(C).

The bidder or offeror hereby certifies that it will comply with the requirements of 49 U.S.C. 5323(j)(2)(C) and the regulations at 49 C.F.R. Part 661.11.

Date _____

Signature _____

Company Name _____

Title _____

Certificate of Non-Compliance with 49 U.S.C. 5323(j)(2)(C)

The bidder or offeror hereby certifies that it cannot comply with the requirements of 49 U.S.C. 5323(j)(2)(C) and 49 C.F.R. 661.11, but may qualify for an exception pursuant to 49 U.S.C. 5323(j)(2)(A), 5323(j)(2)(B), or 5323(j)(2)(D), and 49 CFR 661.7.

Date _____

Signature _____

Company Name _____

Title _____

3. CARGO PREFERENCE REQUIREMENTS [46 U.S.C. 1241, 46 CFR Part 381]

Applicability to Contracts

The Cargo Preference requirements apply to all contracts involving equipment, materials, or commodities which may be transported by ocean vessels.

Flow Down

The Cargo Preference requirements apply to all subcontracts when the subcontract may be involved with the transport of equipment, material, or commodities by ocean vessel.

Model Clause/Language

The MARAD regulations at 46 CFR 381.7 contain suggested contract clauses. The following language is proffered by FTA.

Cargo Preference - Use of United States-Flag Vessels - The contractor agrees: a) to use privately owned United States-Flag commercial vessels to ship at least fifty percent (50%) of the gross tonnage (computed separately for dry bulk carriers, dry cargo liners, and tankers) involved, whenever shipping any equipment, material, or commodities pursuant to the underlying contract to the extent such vessels are available at fair and reasonable rates for United States-Flag commercial vessels; b). to furnish within twenty (20) working days following the date of loading for shipments originating within the United States or within thirty (30) working days following the date of leading for shipments originating outside the United States, a legible copy of a rated, "on-board" commercial ocean bill-of-lading in English for each shipment of cargo described in the preceding paragraph to the Division of National Cargo, Office of Market Development, Maritime Administration, Washington, DC 20590 and to the FTA recipient (through the contractor in the case of a subcontractor's bill-of-lading.) and c) to include these requirements in all subcontracts issued pursuant to this contract when the subcontract may involve the transport of equipment, material, or commodities by ocean vessel.

4. ENERGY CONSERVATION REQUIREMENTS [42 U.S.C. 6321 *et seq.*, 49 CFR Part 18]

Applicability to Contracts

The Energy Conservation requirements are applicable to all contracts.

Flow Down

The Energy Conservation requirements extend to all third-party contractors and their contracts at every tier and subrecipients and their subagreements at every tier.

Model Clause/Language

No specific clause is recommended in the regulations because the Energy Conservation requirements are so dependent on the state energy conservation plan. The following language has been developed by FTA:

Energy Conservation - The contractor agrees to comply with mandatory standards and policies

relating to energy efficiency which are contained in the state energy conservation plan issued in compliance with the Energy Policy and Conservation Act.

5. CLEAN WATER REQUIREMENTS [33 U.S.C. 1251]

Applicability to Contracts

The Clean Water requirements apply to each contract and subcontract which exceeds one hundred thousand dollars (\$100,000).

Flow Down

The Clean Water requirements flow down to FTA recipients and subrecipients at every tier.

Model Clause/Language

While no mandatory clause is contained in the Federal Water Pollution Control Act, as amended, the following language developed by FTA contains all the mandatory requirements:

Clean Water - (1) The Contractor agrees to comply with all applicable standards, orders or regulations issued pursuant to the Federal Water Pollution Control Act, as amended, 33 U.S.C. 1251 *et seq.* The Contractor agrees to report each violation to the Purchaser and understands and agrees that the Purchaser will, in turn, report each violation as required to assure notification to FTA and the appropriate EPA Regional Office.

(2) The Contractor also agrees to include these requirements in each subcontract exceeding one hundred thousand dollars (\$100,000) financed in whole or in part with Federal assistance provided by FTA.

6. PRE-AWARD AND POST-DELIVERY AUDITS REQUIREMENTS [49 U.S.C. 5323 49 CFR Part 663]

Applicability to Contracts

These requirements apply only to the acquisition of Rolling Stock/Turnkey.

Flow Down

These requirements should not flow down, except to the Turnkey contractor as stated in Master Agreement.

Model Clause/Language

Clause and language therein are merely suggested. 49 C.F.R. Part 663 does not contain specific language to be included in third-party contracts but does contain requirements applicable to subrecipients and third-party contractors.

- Buy America certification is mandated under FTA regulation, "Pre-Award and Post-Delivery Audits of Rolling Stock Purchases," 49 C.F.R. 663.13.

-- Specific language for the Buy America certification is mandated by FTA regulation,

"Buy America Requirements--Surface Transportation Assistance Act of 1982, as amended,"

49 C.F.R. 661.12, but has been modified to include FTA's Buy America requirements codified at 49 U.S.C. A 5323(j).

Pre-Award and Post-Delivery Audit Requirements - The Contractor agrees to comply with 49 U.S.C. § 5323(l) and FTA's implementing regulation at 49 C.F.R. Part 663 and to submit the following certifications:

(1) Buy America Requirements: The Contractor shall complete and submit a declaration certifying either compliance or noncompliance with Buy America. If the Bidder/Offeror certifies compliance with Buy America, it shall submit documentation which lists a) component and subcomponent parts of the rolling stock to be purchased identified by manufacturer of the parts, their country of origin and costs; and b) the location of the final assembly point for the rolling stock, including a description of the activities that will take place at the final assembly point and the cost of final assembly.

(2) Solicitation Specification Requirements: The Contractor shall submit evidence that it will be capable of meeting the bid specifications.

(3) Federal Motor Vehicle Safety Standards (FMVSS): The Contractor shall submit 1) manufacturer's FMVSS self-certification sticker information that the vehicle complies with relevant FMVSS, or 2) manufacturer's certified statement that the contracted buses will not be subject to FMVSS regulations.

BUY AMERICA CERTIFICATE OF COMPLIANCE WITH FTA REQUIREMENTS FOR BUSES, OTHER ROLLING STOCK, OR ASSOCIATED EQUIPMENT

(To be submitted with a bid or offer exceeding the small purchase threshold for Federal assistance programs, currently set at \$100,000.)

Certificate of Compliance

The bidder hereby certifies that it will comply with the requirements of 49 U.S.C. Section 5323(j)(2)(C), Section 165(b)(3) of the Surface Transportation Assistance Act of 1982, as amended, and the regulations of 49 C.F.R. 661.11:

Date: _____

Signature: _____

Company Name: _____

Title: _____

Certificate of Non-Compliance

The bidder hereby certifies that it cannot comply with the requirements of 49 U.S.C. Section 5323(j)(2)(C) and Section 165(b)(3) of the Surface Transportation Assistance Act of 1982, as amended, but may qualify for an exception to the requirements consistent with 49 U.S.C. Sections 5323(j)(2)(B) or (j)(2)(D), Sections 165(b)(2) or (b)(4) of the Surface Transportation Assistance Act, as amended, and regulations in 49 C.F.R. 661.7.

Date: _____

Signature: _____

Company Name: _____

Title: _____

7. LOBBYING [31 U.S.C. 1352, 49 CFR Part 19, 20]

Applicability to Contracts

The Lobbying requirements apply to Construction/Architectural and Engineering/Acquisition of Rolling Stock/Professional Service Contract/Operational Service Contract/Turnkey contracts.

Flow Down

The Lobbying requirements mandate the maximum flow down, pursuant to Byrd Anti-Lobbying Amendment, 31 U.S.C. § 1352(b)(5) and 49 C.F.R. Part 19, Appendix A, Section 7.

Mandatory Clause/Language

Clause and specific language therein are mandated by 49 CFR Part 19, Appendix A.

Modifications have been made to the Clause pursuant to Section 10 of the Lobbying Disclosure Act of 1995, P.L. 104-65 [to be codified at 2 U.S.C. § 1601, *et seq.*]:

- Lobbying Certification and Disclosure of Lobbying Activities for third party contractors are mandated by 31 U.S.C. 1352(b)(5), as amended by Section 10 of the Lobbying Disclosure Act of 1995, and DOT implementing regulation, "New Restrictions on Lobbying," at 49 CFR § 20.110(d)

- Language in Lobbying Certification is mandated by 49 CFR Part 19, Appendix A, Section 7, which provides that contractors file the certification required by 49 CFR Part 20, Appendix A.

Modifications have been made to the Lobbying Certification pursuant to Section 10 of the Lobbying Disclosure Act of 1995:

- Use of "Disclosure of Lobbying Activities," Standard Form--LLL set forth in Appendix B of 49 CFR Part 20, as amended by "Government wide Guidance For New Restrictions on Lobbying," 61 Fed. Reg. 1413 (1/19/96) is mandated by 49 CFR Part 20, Appendix A.

Byrd Anti-Lobbying Amendment, 31 U.S.C. 1352, as amended by the Lobbying Disclosure Act of 1995, P.L. 104-65 [to be codified at 2 U.S.C. § 1601, *et seq.*] - Contractors who apply or bid for an award of \$100,000 or more shall file the certification required by 49 CFR part 20, "New Restrictions on Lobbying." Each tier certifies to the tier above that it will not and has not used Federal appropriated funds to pay any person or organization for influencing or attempting to influence an officer or employee of any agency, a member of Congress, officer or employee of Congress, or an employee of a member of Congress in connection with obtaining any Federal contract, grant or any other award covered by 31 U.S.C. 1352. Each tier shall also disclose the name of any registrant under the Lobbying Disclosure Act of 1995 who has made lobbying contacts on its behalf with non-Federal funds with respect to that Federal contract, grant or award covered by 31 U.S.C. 1352. Such disclosures are forwarded from tier to tier up to the recipient.

APPENDIX A, 49 CFR PART 20--CERTIFICATION REGARDING LOBBYING

Certification for Contracts, Grants, Loans, and Cooperative Agreements

(To be submitted with each bid or offer exceeding one hundred thousand dollars (\$100,000).)

The undersigned [Contractor] certifies, to the best of his or her knowledge and belief, that:

- (1) No Federal appropriated funds have been paid or will be paid, by or on behalf of the undersigned, to any person for influencing or attempting to influence an officer or employee of an agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with the awarding of any Federal contract, the making of any Federal grant, the making of any Federal loan, the entering into of any cooperative agreement, and the extension, continuation, renewal, amendment, or modification of any Federal contract, grant, loan, or cooperative agreement.
- (2) If any funds other than Federal appropriated funds have been paid or will be paid to any person for making lobbying contacts to an officer or employee of any agency, a Member of Congress, an officer or employee of Congress, or an employee of a Member of Congress in connection with this Federal contract, grant, loan, or cooperative agreement, the undersigned shall complete and submit Standard Form--LLL, "Disclosure Form to Report Lobbying," in accordance with its instructions [as amended by "Government wide Guidance for New Restrictions on Lobbying," 61 Fed. Reg. 1413 (1/19/96). Note: Language in paragraph (2) herein has been modified in accordance with Section 10 of the Lobbying Disclosure Act of 1995 (P.L. 104-65, to be codified at 2 U.S.C. 1601, *et seq.*)]
- (3) The undersigned shall require that the language of this certification be included in the award documents for all subawards at all tiers (including subcontracts, subgrants, and contracts under grants, loans, and cooperative agreements) and that all subrecipients shall certify and disclose accordingly.

This certification is a material representation of fact upon which reliance was placed when this transaction was made or entered into. Submission of this certification is a prerequisite for making or entering into this transaction imposed by 31, U.S.C. § 1352 (as amended by the Lobbying Disclosure Act of 1995). Any person who fails to file the required certification shall be subject to a civil penalty of not less than \$10,000 and not more than \$100,000 for each such failure.

[Note: Pursuant to 31 U.S.C. § 1352(c)(1)-(2)(A), any person who makes a prohibited expenditure or fails to file or amend a required certification or disclosure form shall be subject to a civil penalty of not less than ten thousand dollars (\$10,000) and not more than one hundred thousand dollars (\$100,000) for each such expenditure or failure.]

The Contractor, _____, certifies or affirms the truthfulness and accuracy of each statement of its certification and disclosure, if any. In addition, the Contractor understands and agrees that the provisions of 31 U.S.C. A 3801, *et seq.*, apply to this certification and disclosure, if any.

_____ Signature of Contractor's Authorized Official

_____ Name and Title of Contractor's Authorized Official

_____ Date

8. ACCESS TO RECORDS AND REPORTS [49 U.S.C. 5325, 18 CFR 18.36 (i), 49 CFR 633.17]

Applicability to Contracts

Reference Chart "Requirements for Access to Records and Reports by Type of Contracts"

Flow Down

FTA does not require the inclusion of these requirements in subcontracts.

Model Clause/Language

The specified language is not mandated by the statutes or regulations referenced, but the language provided paraphrases the statutory or regulatory language.

Access to Records - The following access to records requirements apply to this Contract:

1. Where the Purchaser is not a State but a local government and is the FTA Recipient or a subgrantee of the FTA Recipient in accordance with 49 C.F.R. 18.36(i), the Contractor agrees to provide the Purchaser, the FTA Administrator, the Comptroller General of the United States or any of their authorized representatives access to any books, documents, papers and records of the Contractor which are directly pertinent to this contract for the purposes of making audits,

examinations, excerpts and transcriptions. Contractor also agrees, pursuant to 49 C.F.R. 633.17 to provide the FTA Administrator or his authorized representatives including any PMO Contractor access to Contractor's records and construction sites pertaining to a major capital project, defined at 49 U.S.C. 5302(a)1, which is receiving federal financial assistance through the programs described at 49 U.S.C. 5307, 5309 or 5311.

2. Where the Purchaser is a State and is the FTA Recipient or a subgrantee of the FTA Recipient in accordance with 49 C.F.R. 633.17, Contractor agrees to provide the Purchaser, the FTA Administrator or his authorized representatives, including any PMO Contractor, access to the Contractor's records and construction sites pertaining to a major capital project, defined at 49 U.S.C. 5302(a)1, which is receiving federal financial assistance through the programs described at 49 U.S.C. 5307, 5309 or 5311. By definition, a major capital project excludes contracts of less than the simplified acquisition threshold currently set at one hundred thousand dollars (\$100,000).

3. Where the Purchaser enters into a negotiated contract for other than a small purchase or under the simplified acquisition threshold and is an institution of higher education, a hospital or other non-profit organization and is the FTA Recipient or a subgrantee of the FTA Recipient in accordance with 49 C.F.R. 19.48, Contractor agrees to provide the Purchaser, FTA Administrator, the Comptroller General of the United States or any of their duly authorized representatives with access to any books, documents, papers and record of the Contractor which are directly pertinent to this contract for the purposes of making audits, examinations, excerpts and transcriptions.

4. Where any Purchaser which is the FTA Recipient or a subgrantee of the FTA Recipient in accordance with 49 U.S.C. 5325(a) enters into a contract for a capital project or improvement (defined at 49 U.S.C. 5302(a)1) through other than competitive bidding, the Contractor shall make available records related to the contract to the Purchaser, the Secretary of Transportation and the Comptroller General or any authorized officer or employee of any of them for the purposes of conducting an audit and inspection.

5. The Contractor agrees to permit any of the foregoing parties to reproduce by any means whatsoever or to copy excerpts and transcriptions as reasonably needed.

6. The Contractor agrees to maintain all books, records, accounts and reports required under this contract for a period of not less than three (3) years after the date of termination or expiration of this contract, except in the event of litigation or settlement of claims arising from the performance of this contract, in which case Contractor agrees to maintain same until the Purchaser, the FTA Administrator, the Comptroller General, or any of their duly authorized representatives, have disposed of all such litigation, appeals, claims or exceptions related thereto. Reference 49 CFR 18.39(i)(11).

7. FTA does not require the inclusion of these requirements in subcontracts.

Requirements for Access to Records and Reports by Types of Contract

Contract Characteristics	Operational Service Contract	Turnkey	Construction	Architectural Engineering	Acquisition of Rolling Stock	Professional Services
<u>I State Grantees</u>						
a. Contracts below SAT (\$100,000)	None	Those imposed on state pass thru to Contractor	None	None	None	None
b. Contracts above \$100,000/Capital Projects	None unless ¹ non-competitive award		Yes, if non-competitive award or if funded thru ³ 5307/5309/5311	None unless non-competitive award	None unless non-competitive award	None unless non-competitive award
<u>II Non State Grantees</u>						
a. Contracts below SAT (\$100,000)	Yes ¹	Those imposed on non-state Grantee pass thru to Contractor	Yes	Yes	Yes	Yes
b. Contracts above \$100,000/Capital Projects	Yes ¹		Yes	Yes	Yes	Yes

Sources of Authority:

¹ 49 USC 5325 (a)

² 49 CFR 633.17

³ 18 CFR 18.36 (i)

9. FEDERAL CHANGES [49 CFR Part 18]

Applicability to Contracts

The Federal Changes requirement applies to all contracts.

Flow Down

The Federal Changes requirement flows down appropriately to each applicable changed requirement.

Model Clause/Language

No specific language is mandated. The following language has been developed by FTA.

Federal Changes - Contractor shall at all times comply with all applicable FTA regulations, policies, procedures, and directives, including without limitation, those listed directly or by

reference in the Master Agreement between Purchaser and FTA, as they may be amended or promulgated from time to time during the term of this contract. Contractor's failure to so comply shall constitute a material breach of this contract.

10. CLEAN AIR [42 U.S.C. 7401 *et seq.*, 40 CFR 15.61, 49 CFR Part 18]

Applicability to Contracts

The Clean Air requirements apply to all contracts exceeding one hundred thousand dollars (\$100,000), including indefinite quantities where the amount is expected to exceed one hundred thousand dollars (\$100,000) in any year.

Flow Down

The Clean Air requirements flow down to all subcontracts which exceed one hundred thousand dollars (\$100,000).

Model Clauses/Language

No specific language is required. FTA has proposed the following language.

Clean Air - (1) The Contractor agrees to comply with all applicable standards, orders or regulations issued pursuant to the Clean Air Act, as amended, 42 U.S.C. § 7401 *et seq.* The Contractor agrees to report each violation to the Purchaser and understands and agrees that the Purchaser will, in turn, report each violation as required to assure notification to FTA and the appropriate EPA Regional Office.

(2) The Contractor also agrees to include these requirements in each subcontract exceeding one hundred thousand dollars (\$100,000) financed in whole or in part with Federal assistance provided by FTA.

11. RECYCLED PRODUCTS [42 U.S.C. 6962, 40 CFR Part 247, Executive Order 12873]

Applicability to Contracts

The Recycled Products requirements apply to all contracts for items designated by the EPA, when the purchaser or contractor procures ten thousand dollars (\$10,000) or more of one of these items during the fiscal year, or has procured ten thousand dollars (\$10,000) or more of such items in the previous fiscal year, using Federal funds. New requirements for "recovered materials" will become effective May 1, 1996. These new regulations apply to all procurement actions involving items designated by the EPA, where the procuring agency purchases ten thousand dollars (\$10,000) or more of one of these items in a fiscal year, or when the cost of such items purchased during the previous fiscal year was ten thousand dollars (\$10,000).

Flow Down

These requirements flow down to all to all contractor and subcontractor tiers.

Model Clause/Language

No specific clause is mandated, but FTA has developed the following language.

Recovered Materials - The contractor agrees to comply with all the requirements of Section 6002 of the Resource Conservation and Recovery Act (RCRA), as amended (42 U.S.C. 6962), including but not limited to the regulatory provisions of 40 CFR Part 247, and Executive Order 12873, as they apply to the procurement of the items designated in Subpart B of 40 CFR Part 247.

12. NO GOVERNMENT OBLIGATION TO THIRD PARTIES**Applicability to Contracts**

Applicable to all contracts.

Flow Down

Not required by statute or regulation for either primary contractors or subcontractors, this concept should flow down to all levels to clarify, to all parties to the contract, that the Federal Government does not have contractual liability to third parties, absent specific written consent.

Model Clause/Language

While no specific language is required, FTA has developed the following language.

No Obligation by the Federal Government.

(1) The Purchaser and Contractor acknowledge and agree that, notwithstanding any concurrence by the Federal Government in or approval of the solicitation or award of the underlying contract, absent the express written consent by the Federal Government, the Federal Government is not a party to this contract and shall not be subject to any obligations or liabilities to the Purchaser, Contractor, or any other party (whether or not a party to that contract) pertaining to any matter resulting from the underlying contract.

(2) The Contractor agrees to include the above clause in each subcontract financed in whole or in part with Federal assistance provided by FTA. It is further agreed that the clause shall not be modified, except to identify the subcontractor who will be subject to its provisions.

13. PROGRAM FRAUD AND FALSE OR FRAUDULENT STATEMENTS AND RELATED ACTS [31 U.S.C. 3801 *et seq.*, 49 CFR Part 31 18 U.S.C. 1001, 49 U.S.C. 5307]**Applicability to Contracts**

These requirements are applicable to all contracts.

Flow Down

These requirements flow down to contractors and subcontractors who make, present, or submit

covered claims and statements.

Model Clause/Language

These requirements have no specified language, so FTA proffers the following language.

Program Fraud and False or Fraudulent Statements or Related Acts.

(1) The Contractor acknowledges that the provisions of the Program Fraud Civil Remedies Act of 1986, as amended, 31 U.S.C. § 3801 *et seq.* and U.S. DOT regulations, "Program Fraud Civil Remedies," 49 C.F.R. Part 31, apply to its actions pertaining to this Project. Upon execution of the underlying contract, the Contractor certifies or affirms the truthfulness and accuracy of any statement it has made, it makes, it may make, or causes to be made, pertaining to the underlying contract or the FTA assisted project for which this contract work is being performed. In addition to other penalties that may be applicable, the Contractor further acknowledges that if it makes, or causes to be made, a false, fictitious, or fraudulent claim, statement, submission, or certification, the Federal Government reserves the right to impose the penalties of the Program Fraud Civil Remedies Act of 1986 on the Contractor to the extent the Federal Government deems appropriate.

(2) The Contractor also acknowledges that if it makes, or causes to be made, a false, fictitious, or fraudulent claim, statement, submission, or certification to the Federal Government under a contract connected with a project that is financed in whole or in part with Federal assistance originally awarded by FTA under the authority of 49 U.S.C. § 5307, the Government reserves the right to impose the penalties of 18 U.S.C. § 1001 and 49 U.S.C. § 5307(n)(1) on the Contractor, to the extent the Federal Government deems appropriate.

(3) The Contractor agrees to include the above two clauses in each subcontract financed in whole or in part with Federal assistance provided by FTA. It is further agreed that the clauses shall not be modified, except to identify the subcontractor who will be subject to the provisions.

14. TERMINATION [49 U.S.C. Part 18, FTA Circular 4220.1E]

Applicability to Contracts

All contracts (with the exception of contracts with nonprofit organizations and institutions of higher education,) in excess of ten thousand dollars (\$10,000) shall contain suitable provisions for termination by the grantee including the manner by which it will be effected and the basis for settlement. (For contracts with nonprofit organizations and institutions of higher education the threshold is one hundred thousand dollars (\$100,000).) In addition, such contracts shall describe conditions under which the contract may be terminated for default as well as conditions where the contract may be terminated because of circumstances beyond the control of the contractor.

Flow Down

The termination requirements flow down to all contracts in excess of ten thousand dollars (\$10,000), with the exception of contracts with nonprofit organizations and institutions of higher

learning.

Model Clause/Language

FTA does not prescribe the form or content of such clauses. The following are suggestions of clauses to be used in different types of contracts:

a. Termination for Convenience (General Provision) The (Recipient) may terminate this contract, in whole or in part, at any time by written notice to the Contractor when it is in the Government's best interest. The Contractor shall be paid its costs, including contract close-out costs, and profit on work performed up to the time of termination. The Contractor shall promptly submit its termination claim to (Recipient) to be paid the Contractor. If the Contractor has any property in its possession belonging to the (Recipient), the Contractor will account for the same, and dispose of it in the manner the (Recipient) directs.

b. Termination for Default [Breach or Cause] (General Provision) If the Contractor does not deliver supplies in accordance with the contract delivery schedule, or, if the contract is for services, the Contractor fails to perform in the manner called for in the contract, or if the Contractor fails to comply with any other provisions of the contract, the (Recipient) may terminate this contract for default. Termination shall be effected by serving a notice of termination on the contractor setting forth the manner in which the Contractor is in default. The contractor will only be paid the contract price for supplies delivered and accepted, or services performed in accordance with the manner of performance set forth in the contract.

If it is later determined by the (Recipient) that the Contractor had an excusable reason for not performing, such as a strike, fire, or flood, events which are not the fault of or are beyond the control of the Contractor, the (Recipient), after setting up a new delivery of performance schedule, may allow the Contractor to continue work, or treat the termination as a termination for convenience.

c. Opportunity to Cure (General Provision) The (Recipient) in its sole discretion may, in the case of a termination for breach or default, allow the Contractor [an appropriately short period of time] in which to cure the defect. In such case, the notice of termination will state the time period in which cure is permitted and other appropriate conditions

If Contractor fails to remedy to (Recipient)'s satisfaction the breach or default of any of the terms, covenants, or conditions of this Contract within ten (10) days after receipt by Contractor of written notice from (Recipient) setting forth the nature of said breach or default, (Recipient) shall have the right to terminate the Contract without any further obligation to Contractor. Any such termination for default shall not in any way operate to preclude (Recipient) from also pursuing all available remedies against Contractor and its sureties for said breach or default.

d. Waiver of Remedies for any Breach In the event that (Recipient) elects to waive its remedies for any breach by Contractor of any covenant, term or condition of this Contract, such waiver by (Recipient) shall not limit (Recipient)'s remedies for any succeeding breach of that or

of any other term, covenant, or condition of this Contract.

e. Termination for Convenience (Professional or Transit Service Contracts) The (Recipient), by written notice, may terminate this contract, in whole or in part, when it is in the Government's interest. If this contract is terminated, the Recipient shall be liable only for payment under the payment provisions of this contract for services rendered before the effective date of termination.

f. Termination for Default (Supplies and Service) If the Contractor fails to deliver supplies or to perform the services within the time specified in this contract or any extension or if the Contractor fails to comply with any other provisions of this contract, the (Recipient) may terminate this contract for default. The (Recipient) shall terminate by delivering to the Contractor a Notice of Termination specifying the nature of the default. The Contractor will only be paid the contract price for supplies delivered and accepted, or services performed in accordance with the manner or performance set forth in this contract.

If, after termination for failure to fulfill contract obligations, it is determined that the Contractor was not in default, the rights and obligations of the parties shall be the same as if the termination had been issued for the convenience of the Recipient.

g. Termination for Default (Transportation Services) If the Contractor fails to pick up the commodities or to perform the services, including delivery services, within the time specified in this contract or any extension or if the Contractor fails to comply with any other provisions of this contract, the (Recipient) may terminate this contract for default. The (Recipient) shall terminate by delivering to the Contractor a Notice of Termination specifying the nature of default. The Contractor will only be paid the contract price for services performed in accordance with the manner of performance set forth in this contract.

If this contract is terminated while the Contractor has possession of Recipient goods, the Contractor shall, upon direction of the (Recipient), protect and preserve the goods until surrendered to the Recipient or its agent. The Contractor and (Recipient) shall agree on payment for the preservation and protection of goods. Failure to agree on an amount will be resolved under the Dispute clause.

If, after termination for failure to fulfill contract obligations, it is determined that the Contractor was not in default, the rights and obligations of the parties shall be the same as if the termination had been issued for the convenience of the (Recipient).

h. Termination for Default (Construction) If the Contractor refuses or fails to prosecute the work or any separable part, with the diligence that will insure its completion within the time specified in this contract or any extension or fails to complete the work within this time, or if the Contractor fails to comply with any other provisions of this contract, the (Recipient) may terminate this contract for default. The (Recipient) shall terminate by delivering to the Contractor a Notice of Termination specifying the nature of the default. In this event, the

Recipient may take over the work and complete it by contract or otherwise, and may take possession of and use any materials, appliances, and plant on the work site necessary for completing the work. The Contractor and its sureties shall be liable for any damage to the Recipient resulting from the Contractor's refusal or failure to complete the work within specified time, whether or not the Contractor's right to proceed with the work is terminated. This liability includes any increased costs incurred by the Recipient in completing the work.

The Contractor's right to proceed shall not be terminated nor the Contractor charged with damages under this clause if the following conditions exist:

1. The delay in completing the work arises from unforeseeable causes beyond the control and without the fault or negligence of the Contractor. Examples of such causes include: acts of God, acts of the Recipient, acts of another Contractor in the performance of a contract with the Recipient, epidemics, quarantine restrictions, strikes, freight embargoes; and
2. The contractor, within ten (10) days from the beginning of any delay, notifies the (Recipient) in writing of the causes of delay. If in the judgment of the (Recipient), the delay is excusable, the time for completing the work shall be extended. The judgment of the (Recipient) shall be final and conclusive on the parties, but subject to appeal under the Disputes clauses.

If, after termination of the Contractor's right to proceed, it is determined that the Contractor was not in default, or that the delay was excusable, the rights and obligations of the parties will be the same as if the termination had been issued for the convenience of the Recipient.

i. Termination for Convenience or Default (Architect and Engineering) The (Recipient) may terminate this contract in whole or in part, for the Recipient's convenience or because of the failure of the Contractor to fulfill the contract obligations. The (Recipient) shall terminate by delivering to the Contractor a Notice of Termination specifying the nature, extent, and effective date of the termination. Upon receipt of the notice, the Contractor shall (1) immediately discontinue all services affected, unless the notice directs otherwise, and (2) deliver to the Contracting Officer all data, drawings, specifications, reports, estimates, summaries, and other information and materials accumulated in performing this contract, whether completed or in process.

If the termination is for the convenience of the Recipient, the Contracting Officer shall make an equitable adjustment in the contract price but shall allow no anticipated profit on unperformed services.

If the termination is for failure of the Contractor to fulfill the contract obligations, the Recipient may complete the work by contract or otherwise and the Contractor shall be liable for any additional cost incurred by the Recipient.

If, after termination for failure to fulfill contract obligations, it is determined that the Contractor was not in default, the rights and obligations of the parties shall be the same as if the termination

had been issued for the convenience of the Recipient.

j. Termination for Convenience of Default (Cost-Type Contracts) The (Recipient) may terminate this contract, or any portion of it, by serving a notice of termination on the Contractor. The notice shall state whether the termination is for convenience of the (Recipient) or for the default of the Contractor. If the termination is for default, the notice shall state the manner in which the contractor has failed to perform the requirements of the contract. The Contractor shall account for any property in its possession paid for from funds received from the (Recipient), or property supplied to the Contractor by the (Recipient). If the termination is for default, the (Recipient) may fix the fee, if the contract provides for a fee, to be paid the contractor in proportion to the value, if any, of work performed up to the time of termination. The Contractor shall promptly submit its termination claim to the (Recipient) and the parties shall negotiate the termination settlement to be paid the Contractor.

If the termination is for the convenience of the (Recipient), the Contractor shall be paid its contract close-out costs, and a fee, if the contract provided for payment of a fee, in proportion to the work performed up to the time of termination.

If, after serving a notice of termination for default, the (Recipient) determines that the Contractor has an excusable reason for not performing, such as strike, fire, flood, events which are not the fault of and are beyond the control of the contractor, the (Recipient), after setting up a new work schedule, may allow the Contractor to continue work, or treat the termination as a termination for convenience.

15. GOVERNMENT-WIDE DEBARMENT AND SUSPENSION (NONPROCUREMENT)

Background and Applicability

In conjunction with the Office of Management and Budget and other affected Federal agencies, DOT published an update to 49 CFR Part 29 on November 26, 2003. This government-wide regulation implements Executive Order 12549, *Debarment and Suspension*, Executive Order 12689, *Debarment and Suspension*, and 31 U.S.C. 6101 note (Section 2455, Public Law 103-355, 108 Stat. 3327).

The provisions of Part 29 apply to all grantee contracts and subcontracts at any level expected to equal or exceed twenty-five thousand dollars (\$25,000) as well as any contract or subcontract, at any level, for federally required auditing services. 49 CFR 29.220(b). This represents a change from prior practice in that the dollar threshold for application of these rules has been lowered from one hundred thousand dollars (\$100,000) to twenty-five thousand dollars (\$25,000). These are contracts and subcontracts referred to in the regulation as “covered transactions.”

Grantees, contractors, and subcontractors, at any level, that enter into covered transactions are required to verify that the entity (as well as its principals and affiliates) they propose to contract or subcontract with is not excluded or disqualified. They do this by (a) checking the Excluded

Parties List System, (b) collecting a certification from that person, or (c) adding a clause or condition to the contract or subcontract. This represents a change from prior practice in that certification is still acceptable but is no longer required. 49 CFR 29.300.

Grantees, contractors, and subcontractors who enter into covered transactions also must require the entities they contract with to comply with 49 CFR 29, subpart C and include this requirement in their own subsequent covered transactions (i.e., the requirement flows down to subcontracts at all levels).

Clause Language

The following clause language is suggested, not mandatory. It incorporates the optional method of verifying that contractors are not excluded or disqualified by certification.

Suspension and Debarment

This contract is a covered transaction for purposes of 49 CFR Part 29. As such, the contractor is required to verify that none of the contractor, its principals, as defined at 49 CFR 29.995, or affiliates, as defined at 49 CFR 29.905, are excluded or disqualified as defined at 49 CFR 29.940 and 29.945.

The contractor is required to comply with 49 CFR 29, Subpart C and must include the requirement to comply with 49 CFR 29, Subpart C in any lower tier covered transaction it enters into.

By signing and submitting its bid or proposal, the bidder or proposer certifies as follows:

The certification in this clause is a material representation of fact relied upon by **{insert agency name}**. If it is later determined that the bidder or proposer knowingly rendered an erroneous certification, in addition to remedies available to **{insert agency name}**, the Federal Government may pursue available remedies, including but not limited to suspension and/or debarment. The bidder or proposer agrees to comply with the requirements of 49 CFR 29, Subpart C while this offer is valid and throughout the period of any contract that may arise from this offer. The bidder or proposer further agrees to include a provision requiring such compliance in its lower tier covered transactions.

16. PRIVACY ACT [5 U.S.C. 552]

Applicability to Contracts

When a grantee maintains files on drug and alcohol enforcement activities for FTA, and those files are organized so that information could be retrieved by personal identifier, the Privacy Act requirements apply to all contracts.

Flow Down

The Federal Privacy Act requirements flow down to each third party contractor and their contracts at every tier.

Model Clause/Language

The text of the following clause has not been mandated by statute or specific regulation, but has been developed by FTA.

Contracts Involving Federal Privacy Act Requirements The following requirements apply to the Contractor and its employees that administer any system of records on behalf of the Federal Government under any contract:

(1) The Contractor agrees to comply with, and assures the compliance of its employees with, the information restrictions and other applicable requirements of the Privacy Act of 1974,

5 U.S.C. § 552a. Among other things, the Contractor agrees to obtain the express consent of the Federal Government before the Contractor or its employees operate a system of records on behalf of the Federal Government. The Contractor understands that the requirements of the Privacy Act, including the civil and criminal penalties for violation of that Act, apply to those individuals involved, and that failure to comply with the terms of the Privacy Act may result in termination of the underlying contract.

(2) The Contractor also agrees to include these requirements in each subcontract to administer any system of records on behalf of the Federal Government financed in whole or in part with Federal assistance provided by FTA.

17. CIVIL RIGHTS REQUIREMENTS [29 U.S.C. § 623, 42 U.S.C. § 2000, 42 U.S.C. § 6102, 42 U.S.C. § 12112, 42 U.S.C. § 12132, 49 U.S.C. § 5332, 29 CFR Part 1630, 41 CFR Parts 60 *et seq.*

Applicability to Contracts

The Civil Rights Requirements apply to all contracts.

Flow Down

The Civil Rights requirements flow down to all third party contractors and their contracts at every tier.

Model Clause/Language

The following clause was predicated on language contained at 49 CFR Part 19, Appendix A, but FTA has shortened the lengthy text.

Civil Rights - The following requirements apply to the underlying contract:

(1) **Nondiscrimination** - In accordance with Title VI of the Civil Rights Act, as amended, 42 U.S.C. § 2000d, section 303 of the Age Discrimination Act of 1975, as amended, 42 U.S.C. § 6102, section 202 of the Americans with Disabilities Act of 1990, 42 U.S.C. § 12132, and Federal transit law at 49 U.S.C. § 5332, the Contractor agrees that it will not discriminate against

any employee or applicant for employment because of race, color, creed, national origin, sex, age, or disability. In addition, the Contractor agrees to comply with applicable Federal implementing regulations and other implementing requirements FTA may issue.

(2) Equal Employment Opportunity - The following equal employment opportunity requirements apply to the underlying contract:

(a) Race, Color, Creed, National Origin, Sex - In accordance with Title VII of the Civil Rights Act, as amended, 42 U.S.C. § 2000e, and Federal transit laws at 49 U.S.C. § 5332, the Contractor agrees to comply with all applicable equal employment opportunity requirements of U.S. Department of Labor (U.S. DOL) regulations, "Office of Federal Contract Compliance Programs, Equal Employment Opportunity, Department of Labor," 41 C.F.R. Parts 60 *et seq.*, (which implement Executive Order No. 11246, "Equal Employment Opportunity," as amended by Executive Order No. 11375, "Amending Executive Order 11246 Relating to Equal Employment Opportunity," 42 U.S.C. § 2000e note), and with any applicable Federal statutes, executive orders, regulations, and Federal policies that may in the future affect construction activities undertaken in the course of the Project. The Contractor agrees to take affirmative action to ensure that applicants are employed, and that employees are treated during employment, without regard to their race, color, creed, national origin, sex, or age. Such action shall include, but not be limited to, the following: employment, upgrading, demotion or transfer, recruitment or recruitment advertising, layoff or termination; rates of pay or other forms of compensation; and selection for training, including apprenticeship. In addition, the Contractor agrees to comply with any implementing requirements FTA may issue.

(b) Age - In accordance with section 4 of the Age Discrimination in Employment Act of 1967, as amended, 29 U.S.C. § 623 and Federal transit law at 49 U.S.C. § 5332, the Contractor agrees to refrain from discrimination against present and prospective employees for reason of age. In addition, the Contractor agrees to comply with any implementing requirements FTA may issue.

(c) Disabilities - In accordance with section 102 of the Americans with Disabilities Act, as amended, 42 U.S.C. § 12112, the Contractor agrees that it will comply with the requirements of U.S. Equal Employment Opportunity Commission, "Regulations to Implement the Equal Employment Provisions of the Americans with Disabilities Act," 29 C.F.R. Part 1630, pertaining to employment of persons with disabilities. In addition, the Contractor agrees to comply with any implementing requirements FTA may issue.

(3) The Contractor also agrees to include these requirements in each subcontract financed in whole or in part with Federal assistance provided by FTA, modified only if necessary to identify the affected parties.

18. BREACHES AND DISPUTE RESOLUTION [49 CFR Part 18, FTA Circular 4220.1E]

Applicability to Contracts

All contracts in excess of one hundred thousand dollars (\$100,000) shall contain provisions or conditions which will allow for administrative, contractual, or legal remedies in instances where

contractors violate or breach contract terms, and provide for such sanctions and penalties as may be appropriate. This may include provisions for bonding, penalties for late or inadequate performance, retained earnings, liquidated damages, or other appropriate measures.

Flow Down

The Breaches and Dispute Resolutions requirements flow down to all tiers.

Model Clauses/Language

FTA does not prescribe the form or content of such provisions. What provisions are developed will depend on the circumstances and the type of contract. Recipients should consult legal counsel in developing appropriate clauses. The following clauses are examples of provisions from various FTA third party contracts.

Disputes - Disputes arising in the performance of this Contract which are not resolved by agreement of the parties shall be decided in writing by the authorized representative of (Recipient)'s [title of employee]. This decision shall be final and conclusive unless within ten (10) days from the date of receipt of its copy, the Contractor mails or otherwise furnishes a written appeal to the [title of employee]. In connection with any such appeal, the Contractor shall be afforded an opportunity to be heard and to offer evidence in support of its position. The decision of the [title of employee] shall be binding upon the Contractor and the Contractor shall abide by the decision.

Performance During Dispute - Unless otherwise directed by (Recipient), Contractor shall continue performance under this Contract while matters in dispute are being resolved.

Claims for Damages - Should either party to the Contract suffer injury or damage to person or property because of any act or omission of the party or of any of his employees, agents or others for whose acts he is legally liable, a claim for damages therefor shall be made in writing to such other party within a reasonable time after the first observance of such injury or damage.

Remedies - Unless this contract provides otherwise, all claims, counterclaims, disputes and other matters in question between the (Recipient) and the Contractor arising out of or relating to this agreement or its breach will be decided by arbitration if the parties mutually agree, or in a court of competent jurisdiction within the State in which the (Recipient) is located.

Rights and Remedies - The duties and obligations imposed by the Contract Documents and the rights and remedies available thereunder shall be in addition to and not a limitation of any duties, obligations, rights and remedies otherwise imposed or available by law. No action or failure to act by the (Recipient), (Architect) or Contractor shall constitute a waiver of any right or duty afforded any of them under the Contract, nor shall any such action or failure to act constitute an approval of or acquiescence in any breach thereunder, except as may be specifically agreed in writing.

19. DISADVANTAGED BUSINESS ENTERPRISES (“DBE”) [49 CFR Part 26]

Background and Applicability

The newest version on the Department of Transportation's Disadvantaged Business Enterprise ("DBE") program became effective July 16, 2003. The rule provides guidance to grantees on the use of overall and contract goals, requirement to include DBE provisions in subcontracts, evaluating DBE participation where specific contract goals have been set, reporting requirements, and replacement of DBE subcontractors. Additionally, the DBE program dictates payment terms and conditions (including limitations on retainage) applicable to all subcontractors regardless of whether they are DBE firms or not.

The DBE program applies to all DOT-assisted contracting activities. A formal clause such as that below must be included in all contracts above the micro-purchase level. The requirements of clause subsection b flow down to subcontracts.

A substantial change to the payment provisions in this newest version of Part 26 concerns retainage (*see* section 26.29). Grantee choices concerning retainage should be reflected in the language choices in clause subsection d.

Clause Language

The following clause language is suggested, not mandatory. It incorporates the payment terms and conditions applicable to all subcontractors based in Part 26 as well as those related only to DBE subcontractors. The suggested language allows for the options available to grantees concerning retainage, specific contract goals, and evaluation of DBE subcontracting participation when specific contract goals have been established.

Disadvantaged Business Enterprises

- a. This contract is subject to the requirements of Title 49, Code of Federal Regulations, Part 26, *Participation by Disadvantaged Business Enterprises in Department of Transportation Financial Assistance Programs*. The national goal for participation of Disadvantaged Business Enterprises (DBE) is 10%. The agency's overall goal for DBE participation is __%. A separate contract goal [of __% DBE participation has] [has not] been established for this procurement.
- b. The contractor shall not discriminate on the basis of race, color, national origin, or sex in the performance of this contract. The contractor shall carry out applicable requirements of 49 CFR Part 26 in the award and administration of this DOT-assisted contract. Failure by the contractor to carry out these requirements is a material breach of this contract, which may result in the termination of this contract or such other remedy as {insert agency name} deems appropriate. Each subcontract the contractor signs with a subcontractor must include the assurance in this paragraph (*see* 49 CFR 26.13(b)).
- c. {If a separate contract goal has been established, use the following} Bidders/offerors are required to document sufficient DBE participation to meet these goals or, alternatively, document adequate good faith efforts to do so, as provided for in 49 CFR 26.53. Award of this contract is conditioned on submission of the following [concurrent with and accompanying sealed bid] [concurrent with and accompanying an initial proposal] [prior to award]:

1. The names and addresses of DBE firms that will participate in this contract;
2. A description of the work each DBE will perform;
3. The dollar amount of the participation of each DBE firm participating;
4. Written documentation of the bidder/offeror's commitment to use a DBE subcontractor whose participation it submits to meet the contract goal;
5. Written confirmation from the DBE that it is participating in the contract as provided in the prime contractor's commitment; and
6. If the contract goal is not met, evidence of good faith efforts to do so.

[Bidders][Offerors] must present the information required above **[as a matter of responsiveness] [with initial proposals] [prior to contract award]** (*see* 49 CFR 26.53(3)).

[If no separate contract goal has been established, use the following] The successful bidder/offeror will be required to report its DBE participation obtained through race-neutral means throughout the period of performance.

d. The contractor is required to pay its subcontractors performing work related to this contract for satisfactory performance of that work no later than 30 days after the contractor's receipt of payment for that work from the {insert agency name}. In addition, **[the contractor may not hold retainage from its subcontractors.] [is required to return any retainage payments to those subcontractors within 30 days after the subcontractor's work related to this contract is satisfactorily completed.] [is required to return any retainage payments to those subcontractors within 30 days after incremental acceptance of the subcontractor's work by the {insert agency name} and contractor's receipt of the partial retainage payment related to the subcontractor's work.]**

e. The contractor must promptly notify {insert agency name}, whenever a DBE subcontractor performing work related to this contract is terminated or fails to complete its work, and must make good faith efforts to engage another DBE subcontractor to perform at least the same amount of work. The contractor may not terminate any DBE subcontractor and perform that work through its own forces or those of an affiliate without prior written consent of {insert agency name}.

20. INCORPORATION OF FEDERAL TRANSIT ADMINISTRATION ("FTA") TERMS [FTA Circular 4220.1E]

Applicability to Contracts

The incorporation of FTA terms applies to all contracts.

Flow Down

The incorporation of FTA terms has unlimited flow down.

Model Clause/Language

FTA has developed the following incorporation of terms language:

Incorporation of Federal Transit Administration Terms - The preceding provisions include, in part, certain Standard Terms and Conditions required by DOT, whether or not expressly set forth in the preceding contract provisions. All contractual provisions required by DOT, as set forth in FTA Circular 4220.1E, are hereby incorporated by reference. Anything to the contrary herein notwithstanding, all FTA mandated terms shall be deemed to control in the event of a conflict with other provisions contained in this Agreement. The Contractor shall not perform any act, fail to perform any act, or refuse to comply with any (name of grantee) requests which would cause (name of grantee) to be in violation of the FTA terms and conditions.

21. SAFE OPERATION OF MOTOR VEHICLES [23 U.S.C. part 402, Executive Order No. 13043, Executive Order No. 13513, U.S. DOT Order No. 3902.10]

Applicability to Contracts

The Safe Operation of Motor Vehicles requirements apply to all federally funded third party contracts. In compliance with Federal Executive Order No. 13043, "Increasing Seat Belt Use in the United States," April 16, 1997, 23 U.S.C. Section 402 note, FTA encourages each third party contractor to adopt and promote on-the-job seat belt use policies and programs for its employees and other personnel that operate company owned, rented, or personally operated vehicles, and to include this provision in each third party subcontract involving the project. Additionally, recipients are required by FTA to include a Distracted Driving clause that addresses distracted driving, including text messaging in each of its third party agreements supported with Federal assistance.

Flow Down Requirements

The Safe Operation of Motor Vehicles requirements flow down to all third party contractors at every tier.

Model Clause/Language

There is no required language for the Safe Operation of Motor Vehicles clause. Recipients can draw on the following language for inclusion in their federally funded procurements.

Safe Operation of Motor Vehicles

Seat Belt Use

The Contractor is encouraged to adopt and promote on-the-job seat belt use policies and programs for its employees and other personnel who operate company-owned vehicles, company-rented vehicles, or personally operated vehicles. The terms "company-owned" and "company-leased" refer to vehicles owned or leased either by the Contractor or AGENCY.

Distracted Driving

The Contractor agrees to adopt and enforce workplace safety policies to decrease crashes caused by distracted drivers, including policies to ban text messaging while using an electronic device supplied by an employer, and driving a vehicle the driver owns or rents, a vehicle Contractor owns, leases, or rents, or a privately-owned vehicle when on official business in connection with the work performed under this agreement.

22. BONDING REQUIREMENTS [2 C.F.R. § 200.325, 31 C.F.R. part 223]Applicability to Contracts

a. Bonds are required for all construction or facility improvement contracts and subcontracts exceeding the simplified acquisition threshold. FTA may accept the bonding policy and requirements of the recipient if FTA has determined that the Federal interest is adequately protected. If such a determination has not been made, the following minimum requirements apply:

b. A bid guarantee from each bidder equivalent to five percent of the bid price. The “bid guarantee” must consist of a firm commitment such as a bid bond, certified check, or other negotiable instrument accompanying a bid as assurance that the bidder will, upon acceptance of the bid, execute such contractual documents as may be required within the time specified.

c. A performance bond on the part of the contractor for one hundred percent (100%) of the contract price. A “performance bond” is one executed in connection with a contract to secure fulfillment of all the contractor's obligations under such contract.

A payment bond on the part of the contractor for one hundred percent (100%) of the contract price. A “payment bond” is one executed in connection with a contract to assure payment as required by law of all persons supplying labor and material in the execution of the work provided for in the contract.

Flow Down

These requirements extend to all third party contractors and their contracts at every tier and subrecipients and their subcontracts at every tier that exceed the simplified acquisition threshold.

Model Clauses/Language

There is no required language for bonding requirements.

EXHIBIT C

SOUND TRANSIT INVOICE FORM

Invoice No. _____ Dated: _____

TO: Sound Transit
Accounts Payable
401 S Jackson Street
Seattle, WA 98104

accountspayable@soundtransit.org

Attention: Accounts Payable and [Sound Transit's Designated Representative]

Re: _____

The City's authorized representative certifies that the amount of \$ _____ is due and payable to the City in accordance with the provisions of the Agreement, as supported by the attached invoice and supporting documentation.

[Identify the phase(s), and the amounts by phase, for which the amount due applies]

The City makes the following representations and warranties to Sound Transit in connection with the Invoice:

- All work performed to date has been, unless otherwise specifically stated by the City, performed in accordance with the terms and conditions of this Agreement.
- The amount specified above has been computed in accordance with, and is due and payable under, the terms and conditions of the Agreement, has not been the subject of any previous invoice (unless disputed or rejected for payment) and is not the subject of any pending invoice from the City.

Any liability of Sound Transit arising from these representations and warranties are governed by the terms and conditions of the Agreement.

City of Mercer Island

By: _____ Date: _____
[Name, Position]

EXHIBIT D

DESIGNATED REPRESENTATIVES

SOUND TRANSIT:

Eric Beckman
Deputy Executive Director
401 South Jackson
Seattle, WA 98104
(206) 398-5251
Eric.Beckman@soundtransit.org

CITY OF MERCER ISLAND:

Julie T. Underwood
City Manager (or designee)
9611 SE 36th Street
Mercer Island, WA 98040
(206) 275-7665
Julie.Underwood@mergergov.org

Exhibit B

**King County**

Department of Transportation

Metro Transit Division
General Manager's Office
201 S. Jackson Street
KSC-TR-0415
Seattle, WA 98104-3856

October 13, 2017

Dear Ms. Underwood,

Metro appreciates the opportunity to continue to engage with the City of Mercer Island as transit infrastructure and service decisions are being developed in relation to Sound Transit's East Link project. Metro values its partnerships with cities and other entities across King County and we fully understand that planning and building for the future transit needs of residents is an ongoing dialogue.

For the planned bus-rail intercept, Metro supports the City's preference as identified in the agreement with Sound Transit for the 77th configuration over the 80th configuration and will work with the City and Sound Transit to implement this design with the modifications described in Section 4.2 of the Settlement Agreement between the City and Sound Transit. As East Link-related work between Sound Transit and Mercer Island progresses, King County Metro would welcome an opportunity to work with both parties on the details of implementing reliable, efficient, and practical transit service at this location.

Metro is specifically interested in working with the City and Sound Transit to identify solutions for a transit operator comfort station, enhancements to the pedestrian environment to improve the functionality and appearance of this intercept location, traffic flow considerations, and additional technical components as have been or may be identified by the project teams.

We at Metro appreciate the opportunity to continue to work with the City of Mercer Island and Sound Transit as these core transit infrastructure and service decisions are being developed. Thank you for reaching out to King County Metro. We look forward to continuing the good work in which you and your team are involved.

Sincerely,

A handwritten signature in blue ink, appearing to read "Rob Gannon", written over a light blue horizontal line.

Rob Gannon
General Manager
King County Metro

The Honorable Catherine Shaffer

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

<p>CITY OF MERCER ISLAND, WASHINGTON, a municipal corporation,</p> <p style="text-align: right;">Plaintiff,</p> <p style="text-align: center;">v.</p> <p>CENTRAL PUGET SOUND REGIONAL TRANSIT AUTHORITY, dba, SOUND TRANSIT,</p> <p style="text-align: right;">Defendants.</p>
--

No. 20-2-15730-9 SEA

CENTRAL PUGET SOUND REGIONAL
TRANSIT AUTHORITY’S ANSWER,
AFFIRMATIVE DEFENSES, AND
COUNTERCLAIMS

I. INTRODUCTION

Defendant Central Puget Sound Regional Transit Authority (“Sound Transit”), by and through undersigned counsel, submits the following Answer, Affirmative Defenses, and Counterclaims in response to Plaintiff City of Mercer Island’s Complaint. Except as expressly admitted herein, Sound Transit denies each and every allegation contained in the Plaintiff’s Complaint and denies that Plaintiff is entitled to any relief.

The Presiding Civil Judge already has jurisdiction over the issues raised by the City’s Complaint and by Sound Transit’s Counterclaims set forth below. Plaintiff’s Complaint should be dismissed because of the priority of action rule, as well as for the other reasons stated below. Sound Transit will pursue its counterclaims in this action only if this Court does not first dismiss the City’s Complaint.

II. SOUND TRANSIT'S ANSWERS TO COMPLAINT

1
2 1. Answering paragraph 1 of Plaintiff's Complaint, this paragraph sets forth
3 characterizations of the case rather than limited averments as required by CR 10(b), and no
4 answer is required. To the extent an answer is deemed required, Sound Transit denies the same.

5 2. Answering paragraph 2 of Plaintiff's Complaint, this paragraph sets forth
6 characterizations of the case rather than limited averments as required by CR 10(b), and no
7 answer is required. To the extent an answer is deemed required, Sound Transit denies the same.

8 3. Answering paragraph 3 of Plaintiff's Complaint, this paragraph sets forth
9 characterizations of the case rather than limited averments as required by CR 10(b), and no
10 answer is required. To the extent an answer is deemed required, Sound Transit denies the same.

11 4. Answering paragraph 4 of Plaintiff's Complaint, Sound Transit admits the same.

12 5. Answering paragraph 5 of Plaintiff's Complaint, Sound Transit admits the same.

13 6. Answering paragraph 6 of Plaintiff's Complaint, Sound Transit admits the same.

14 7. Answering paragraph 7 of Plaintiff's Complaint, Sound Transit denies that that
15 Plaintiff has standing to seek a declaratory judgment in this action because jurisdiction over the
16 contract at issue already resides in the Presiding Judge of this Court under Cause No. 17-2-
17 05193-4 SEA and No. 17-2-05191-8 SEA.

18 8. Answering paragraph 8 of Plaintiff's Complaint, Sound Transit admits the same.

19 9. Answering paragraph 9 of Plaintiff's Complaint, Sound Transit admits that venue
20 in King County Superior Court is appropriate, but not in this department of the Court.

21 10. Answering paragraph 10 of Plaintiff's Complaint, Sound Transit admits that in
22 1976, the City of Mercer Island, City of Bellevue, City of Seattle, King County Metro ("Metro")
23 and the Washington State Highway Commission entered into an agreement concerning the
24 reconstruction of Interstate-90 ("I-90"). The 1976 Agreement speaks for itself. Sound Transit
25 denies any remaining factual allegations contained in this paragraph which require a response.
26

1 11. Answering paragraph 11 of Plaintiff’s Complaint, Sound Transit admits that in
2 2004 the 1976 agreement was amended to add Sound Transit as a party. The 2004 Amendment
3 speaks for itself.

4 12. Answering paragraph 12 of Plaintiff’s Complaint, Sound Transit admits that
5 Plaintiff filed a lawsuit against Sound Transit, that Sound Transit filed two lawsuits against
6 Plaintiff, and that the Washington State Department of Transportation (“WSDOT”) joined in one
7 of these lawsuits against Plaintiff. The lawsuits speak for themselves. Sound Transit denies any
8 remaining factual allegations contained in this paragraph which require a response.

9 13. Answering paragraph 13 of Plaintiff’s Complaint, Sound Transit admits that
10 Plaintiff and Sound Transit entered into a Settlement Agreement executed by Sound Transit on
11 November 2, 2017. The Settlement Agreement speaks for itself. Sound Transit denies any
12 remaining factual allegations contained in this paragraph which require a response, and
13 specifically denies that the Settlement Agreement resolved all “differences” between Plaintiff
14 and Sound Transit.

15 14. Answering paragraph 14 of Plaintiff’s Complaint, answering the first and second
16 sentences, the Settlement Agreement speaks for itself. Answering the third and fourth sentences,
17 Sound Transit admits the same.

18 15. Answering paragraph 15 of Plaintiff’s Complaint, the Settlement Agreement
19 speaks for itself. Sound Transit lacks knowledge to admit or deny the remainder of paragraph
20 15, and therefore denies the same.

21 16. Answering paragraph 16 of Plaintiff’s Complaint, the Settlement Agreement
22 speaks for itself and Sound Transit denies any mischaracterization of that document.

23 17. Answering paragraph 17 of Plaintiff’s Complaint, the Settlement Agreement
24 speaks for itself and Sound Transit denies any mischaracterization of that document.

25 18. Answering paragraph 18 of Plaintiff’s Complaint, the Settlement Agreement
26 speaks for itself and Sound Transit denies any mischaracterization of that document.

1 19. Answering paragraph 19 of Plaintiff’s Complaint, the Settlement Agreement
2 speaks for itself and Sound Transit denies any mischaracterization of that document.

3 20. Answering paragraph 20 of Plaintiff’s Complaint, the Settlement Agreement
4 speaks for itself and Sound Transit denies any mischaracterization of that document.

5 21. Answering paragraph 21 of Plaintiff’s Complaint, the Settlement Agreement
6 speaks for itself and Sound Transit denies any mischaracterization of that document.

7 22. Answering paragraph 22 of Plaintiff’s Complaint, the Settlement Agreement
8 speaks for itself and Sound Transit denies any mischaracterization of that document.

9 23. Answering paragraph 23 of Plaintiff’s Complaint, the Settlement Agreement
10 speaks for itself. By way of further answer, the quoted text from Section 4.2(a) of the Settlement
11 Agreement must be read in context with Section 4.1 of the Settlement Agreement, which states
12 “[t]o the extent that King County Metro buses are necessary to coordinate service, the Parties
13 agree that the 77th Ave. SE Configuration cannot be implemented without King County Metro’s
14 agreement. The Parties will work collaboratively with King County Metro to obtain its
15 concurrence where necessary and document such concurrence as appropriate.” Sound Transit
16 lacks knowledge to admit or deny the remainder of paragraph 23, and therefore denies the same.

17 24. Answering paragraph 24 of Plaintiff’s Complaint, the Settlement Statement
18 speaks for itself. To the extent the Plaintiff paraphrases the Settlement Agreement in paragraph
19 24, Section 4.3 expressly states: “the Parties have further agreed on the following additional
20 modifications to the 77th Avenue SE Configuration; provided that, the City will not unreasonably
21 withhold its approval to changes in one or more of the below provisions based on Metro
22 operational concerns: . . .” Sound Transit lacks knowledge to admit or deny the remainder of
23 paragraph 24, and therefore denies the same.

24 25. Answering paragraph 25 of Plaintiff’s Complaint, Sound Transit admits that
25 Metro sent the Plaintiff a letter. The letter speaks for itself. Sound Transit lacks knowledge to
26 admit or deny the remainder of paragraph 25, and therefore denies the same.

1 26. Answering paragraph 26 of Plaintiff’s Complaint, the Settlement Agreement and
2 Metro Letter speak for themselves. By way of further Answer, the Metro Letter did not express
3 agreement to the modifications to the 77th Ave. SE Configuration contained in § 4.3 of the
4 Settlement Agreement, which form the basis of this dispute. Sound Transit lacks knowledge to
5 admit or deny the remainder of paragraph 26, and therefore denies the same.

6 27. Answering paragraph 27 of Plaintiff’s Complaint, Sound Transit admits that
7 Metro sent the Plaintiff a letter in May of 2019. That letter speaks for itself. Sound Transit denies
8 any remaining factual allegations.

9 28. Answering paragraph 28 of Plaintiff’s Complaint, Sound Transit denies the same.

10 29. Answering paragraph 29 of Plaintiff’s Complaint, Sound Transit admits that
11 Plaintiff sent it a letter on October 16, 2019. That letter speaks for itself. Sound Transit denies
12 any remaining factual allegations.

13 30. Answering paragraph 30 of Plaintiff’s Complaint, the October 16, 2019 letter
14 speaks for itself. Sound Transit denies any remaining factual allegations.

15 31. Answering paragraph 31 of Plaintiff’s Complaint, Sound Transit denies the
16 allegations.

17 32. Answering paragraph 32 of Plaintiff’s Complaint, Sound Transit admits that
18 Plaintiff requested that the Parties begin the dispute resolution process, and further requested that
19 Sound Transit “agree to waiver of the three tiered process.” Sound Transit also admits that
20 Plaintiff requested that the Parties begin mediation. Sound Transit denies any remaining factual
21 allegations.

22 33. Answering paragraph 33 to Plaintiff’s Complaint, Sound Transit admits that it
23 proposed a meeting between Sound Transit’s CEO and the City Manager, that this meeting
24 happened, and that Sound Transit declined mediation. Sound Transit denies the remainder of
25 paragraph 33.

26

1 34. Answering paragraph 34 to Plaintiff’s Complaint, Sound Transit admits the Level
2 3 meeting between Sound Transit’s CEO and the City Manager did not resolve the dispute.
3 Sound Transit denies the remaining allegations.

4 35. Answering paragraph 35 of Plaintiff’s Complaint, Sound Transit admits it
5 declined to mediate and that it continued with the permitting process. Sound Transit denies the
6 remainder of paragraph 35.

7 36. Answering paragraph 36 of Plaintiff’s Complaint, Sound Transit admits it has
8 applied for a right-of-way use permit from Plaintiff. Sound Transit denies the remaining
9 allegations.

10 **SOUND TRANSIT’S ANSWERS TO PLAINTIFF’S CAUSE OF ACTION –**
11 **DECLARATORY JUDGMENT**

12 37. Sound Transit re-alleges and incorporates the preceding paragraphs by reference.

13 38. Answering paragraph 38 of Plaintiff’s Complaint, Sound Transit admits that it has
14 now proposed final plans and applied for permits that reflect Sound Transit’s position. Sound
15 Transit denies the remaining factual allegations.

16 39. Answering paragraph 39 of Plaintiff’s Complaint, Sound Transit denies the same.

17 40. Answering paragraph 40 of Plaintiff’s Complaint, Sound Transit admits that the
18 Settlement Agreement is a valid contract between the parties subject to rescission because of
19 Plaintiff’s material breaches. Sound Transit denies the remaining factual allegations and denies
20 that Plaintiff is entitled to any relief whatsoever.

21 **SOUND TRANSIT’S ANSWERS TO PLAINTIFF’S CAUSE OF ACTION –**
22 **BREACH OF CONTRACT**

23 41. Sound Transit re-alleges and incorporates the preceding paragraphs by reference.

24 42. Answering paragraph 42 of Plaintiff’s Complaint, Sound Transit admits the
25 Settlement Agreement is a valid contract between Plaintiff and Sound Transit, subject to
26 rescission because of Plaintiff’s material breaches.

 43. Answering paragraph 43 of Plaintiff’s Complaint, Sound Transit denies the same.

1 44. Answering paragraph 44 of Plaintiff’s Complaint, Sound Transit denies the same.

2 45. Answering paragraph 45 of Plaintiff’s Complaint, Sound Transit denies the same.

3 **SOUND TRANSIT’S ANSWER TO PLAINTIFF’S PRAYER FOR RELIEF**

4 Sound Transit denies that Plaintiff is entitled to any of the relief requested in the
5 Complaint, or any relief whatsoever. Sound Transit denies all allegations in the Complaint that
6 have not been specifically admitted in paragraphs 1 through 45.

7 **III. SOUND TRANSIT’S DEFENSES AND AFFIRMATIVE DEFENSES**

8 By way of further answer, Sound Transit raises the following defenses and affirmative
9 defenses:

10 A. Plaintiff’s Complaint fails to state a claim upon which relief may be granted.

11 B. Plaintiff’s action is barred by the doctrine of priority of action because another
12 Department of this Court already has jurisdiction over the Settlement Agreement.

13 C. Plaintiff’s material breaches of the Settlement Agreement preclude its recovery.

14 D. Sound Transit has fully performed under the Settlement Agreement.

15 E. Even if Sound Transit had breached the Settlement Agreement, Plaintiff cannot
16 bring this action because Plaintiff failed to send Sound Transit written notice of default as
17 required by Section 20 of the Settlement Agreement.

18 F. Plaintiff’s material breaches of the Settlement Agreement excuse further
19 performance by Sound Transit.

20 G. Plaintiff failed to mitigate damages, if any.

21 H. To the extent Plaintiff’s Complaint seeks equitable relief, Plaintiff’s unclean
22 hands bar such relief.

23 I. Sound Transit reserves the right to assert additional defenses in the event that
24 discovery or other analysis indicates that additional defenses are appropriate.

25 WHEREAS, Sound Transit prays for relief as follows:
26

1 1) That Plaintiff's Complaint be dismissed with prejudice without award of any
2 relief to Plaintiff.

3 2) That Sound Transit be excused from further performance under the Settlement
4 Agreement because of Plaintiff's material breaches.

5 2) For an award of Sound Transit's costs and reasonable attorneys' fees pursuant to
6 Section 21.1(d) of the Settlement Agreement; and

7 3) For such other and further relief as the Court may deem just and proper.

8 **IV. SOUND TRANSIT'S COUNTERCLAIMS**

9 In the event that this Court does not grant Sound Transit's motion to dismiss, Sound
10 Transit, for its counterclaims against the City, states as follows:

11 **A. PARTIES**

12 1. The City is a non-charter optional code city incorporated in King County,
13 Washington, that operates under the council-manager form of government authorized by Chapter
14 35A.13 RCW.

15 2. Sound Transit is a regional transit authority organized under the laws of the state
16 of Washington.

17 **B. JURISDICTION AND VENUE**

18 3. This Court has jurisdiction over this action pursuant to RCW 2.08.010, RCW
19 7.24.010, and RCW 7.24.020.

20 4. Sound Transit has standing to seek declaratory judgement because an actual
21 justiciable controversy exists between the City and Sound Transit regarding the rights and
22 obligations of the Parties pursuant to a contract.

23 5. This Court has jurisdiction over the Parties because they have transacted business
24 in King County, Washington, and because the acts giving rise to this action occurred, and
25 continue to occur, in King County, Washington.

1 6. Venue is appropriate in King County under RCW 4.12.020 because the
2 transactions, witnesses, and events giving rise to this claim took place and are located in King
3 County, Washington, and under the Parties' Settlement Agreement.

4 **C. FACTS**

5 7. In 1976, the City of Mercer Island, City of Bellevue, City of Seattle, King
6 County, King County Metro ("Metro") and the Washington State Highway Commission entered
7 into an agreement concerning the reconstruction of Interstate-90 ("I-90").

8 8. The 1976 agreement provided for construction of center lanes on I-90. The center
9 lanes were "designed for and permanently committed to transit use."

10 9. The 1976 agreement initially allowed Single Occupant Vehicles ("SOV") entering
11 from Mercer Island to utilize the center transit lanes.

12 10. In 2004, the parties to the 1976 agreement amended the agreement to include
13 Sound Transit as a party. In the 2004 amendment, the parties also expressly agreed "that the
14 ultimate configuration for I-90 between Bellevue, Mercer Island, and Seattle should be defined
15 as High Capacity Transit in the center roadway and HOV lanes in the outer roadways; and
16 further agree that High Capacity Transit for this purpose is defined as a transit system operating
17 in dedicated right-of-way such as light rail, monorail, or a substantially equivalent system."

18 11. To effectuate light rail in the center transit lanes (and closure of those lanes to
19 vehicular traffic), WSDOT added an HOV lane to each outer lane, thus creating three general
20 purpose lanes and one HOV lane in each direction.

21 12. Additionally, the direct access ramps from Island Crest Way to the center transit
22 lanes were redirected for direct access to the new HOV lanes.

23 13. However, the Federal Highway Administration, on August 5, 2016, notified
24 WSDOT that SOVs cannot, under federal law, use the new I-90 HOV lanes.

25 14. In approximately June 2017, WSDOT closed the center transit lanes to allow for
26 the construction of Sound Transit's East Link. The East Link Project extends light rail from the

1 City of Seattle to the cities of Mercer Island, Bellevue, and Redmond. Construction is currently
2 ongoing, and the first segment of East Link is currently scheduled to open to the public in 2023.

3 15. After the closure of the center transit lanes, Mercer Island SOVs have full access
4 to westbound I-90 from two access points, while HOV vehicles have direct access to the HOV
5 lanes from Island Crest Way.

6 16. In an effort to gain negotiating power to force Sound Transit and WSDOT to
7 concede to its demands to allow direct access for Mercer Island SOVs to the new HOV lanes, the
8 City took several actions that had the potential to cost Sound Transit (and by extension the
9 residents of Snohomish, Pierce, and King Counties) over \$100 million.

10 17. First, on February 16, 2017, the City filed a lawsuit against Sound Transit and
11 WSDOT in an attempt to preserve its special SOV privileges by asserting that Sound Transit and
12 WSDOT failed to “adequately study, assess, [or] mitigate the impact” that the closure of the
13 center HOV lanes would have on Mercer Island residents. KCSC Case No. 17-2-03884-9.

14 18. At the same time that it sued Sound Transit and WSDOT, the City passed two
15 development moratoria that imposed six-month delays on processing and approving all building
16 permits related to the City’s I-90 right of way or the siting of essential public facilities. These
17 moratoria were specifically aimed at delaying the construction of the East Link Project.

18 19. Additionally, the City revoked Sound Transit’s Shoreline Substantial
19 Development Permit (“SSDP”) that it had issued seven months earlier. In revoking the permit,
20 the City alleged unidentified significant impacts from the Federal Highway Administration’s
21 decision not to allow SOVs to access the new HOV lanes, a decision the City was aware of when
22 it issued the SSDP.

23 20. The City’s spokesman, Ross Freeman, admitted in a *Seattle Times* article that the
24 City’s intent was to gain “some negotiating room.”¹

25
26 ¹ <https://www.seattletimes.com/seattle-news/eastside/mercer-island-council-votes-to-sue-sound-transit-over-access-to-hov-lanes-this-summer/>

1 21. In response to the City’s moratoria and permit suspension, Sound Transit initiated
2 two superior court actions seeking injunctive relief and writs of mandamus and prohibition.

3 22. In the first action, Case No. 17-2-05193-4, Sound Transit sought injunctive relief
4 and writs to force the City to withdraw its letter suspending the Shoreline Permit or, in the
5 alternative, to prohibit the City from interfering with Sound Transit’s issued Shoreline Permit.

6 23. On March 13, 2017, then Superior Court Judge Andrus found adequate cause to
7 issue the requested writs. In response, on March 17, 2017, the City withdrew its suspension of
8 the SSDP. At the same time, the City moved to dismiss Sound Transit’s writ application because
9 there was no active controversy and “[i]t would be entirely inappropriate for the Court to
10 preemptively enjoin legitimate future actions with respect to the SSDP that the City might take
11 pursuant to its duties and authority under the Shoreline Management Act (SMA), the State
12 Environmental Policy Act (SEPA), and the Mercer Island City Code (MICC).” It asserted that if
13 the City took any future action related to the SSDP, review of such action would be subject to the
14 exclusive jurisdiction of the Shorelines Hearings Board.

15 24. Sound Transit disagreed that reinstatement of the SSDP mooted its action for
16 injunctive relief. The City’s extensive discussion regarding the future actions it might take in
17 regards to the SSDP, including potential revocation, indicated that an active controversy still
18 existed. Sound Transit further noted that the City could not deprive the Court of jurisdiction by
19 forcing any future disputes before the Shorelines Hearing Board, because the City’s threatened
20 process before the Board would be neither speedy nor adequate when delay would cost taxpayers
21 tens of millions of dollars. The Court agreed with Sound Transit and issued its preliminary
22 injunction on April 13, 2017.

23 25. In the second action, Case No. 17-2-05191-8, Sound Transit and WSDOT jointly
24 sought injunctive relief and writs of prohibition and mandamus because the City enacted two
25 ordinances that imposed a “six-month moratorium on the acceptance, processing, and/or
26 approval of applications” for permits for the East Link Project. The City declared emergencies

1 in both ordinances, thereby enacting the moratoria without notice or hearing, and making them
2 effective immediately. However, the “emergencies” declared in the ordinances were known to
3 the City months prior to the passing of the ordinances. After the parties briefed the issues raised
4 by Sound Transit’s and WSDOT’s applications for relief, the City adopted another ordinance
5 purporting to authorize light rail as a permitted use in the I-90 center roadway, which “allowed”
6 it to lift the moratoria. In doing so, the City again sought to moot Sound Transit’s applications
7 for relief from the Court, but the Court issued both a preliminary injunction and a writ of
8 prohibition preventing the City from applying its zoning criteria to East Link and from delaying
9 issuance of the building permit for the Mercer Island Station.

10 26. In response to the Court’s multiple decisions in favor of Sound Transit, Sound
11 Transit and the City negotiated the Settlement Agreement in which, in Section 15, the City
12 agreed to dismiss the lawsuit that it had filed against Sound Transit, and also agreed to join with
13 Sound Transit in asking the Court to stay further proceedings in the two lawsuits in which Sound
14 Transit had obtained injunctions and a writ of prohibition to prevent the City from interfering
15 with completion of the Project, so that the Court would retain jurisdiction over the Settlement
16 Agreement and Sound Transit’s requests for additional relief.

17 27. On November 30 and December 7, 2017, the Court issued the requested orders
18 staying proceedings and maintaining in effect the preliminary injunctions and writ of prohibition.
19 On December 20, 2017, the Court also issued an order that requires the City and Sound Transit
20 to submit joint status reports to the Court every 90 days.

21 28. After Judge Andrus was appointed to the Court of Appeals, on-going jurisdiction
22 over the two pending matters and the Settlement Agreement was transferred to the Presiding
23 Judge, and the next status reports are due December 14, 2020.

24 29. Sound Transit’s requests for relief in the two matters over which the Presiding
25 Judge retains jurisdiction include requests for relief that encompass the City’s new efforts to
26 interfere with completion of East Link. The Second Amended Verified Complaint in No. 17-2-

1 05191-8 SEA includes a request for “preliminary and permanent injunctions that require the City
2 to . . . Take no other action to interfere with East Link without prior written authorization from
3 this Court.” The Verified Complaint in No. 17-2-05193-4 includes a request for “preliminary
4 and permanent injunctions against enforcement of the suspension letter, and against any future
5 actions by the City to delay or increase the costs of the Project unless the City first receives
6 authorization from this Court.”

7 30. Section 4 of the Settlement Agreement is entitled Bus/Rail Integration. In this
8 Section the Parties agreed to construct the 77th Avenue SE Configuration as desired by the City *if*
9 King County Metro agreed:

10 To the extent that King County Metro buses are necessary to
11 coordinate service, the Parties agree that the 77th Avenue SE
12 Configuration cannot be implemented without King County
13 Metro’s agreement. The Parties will work collaboratively with
14 King County Metro to obtain its concurrence where necessary and
15 document such concurrence as appropriate.

16 31. Similarly, the Parties agreed that “the City will not unreasonably withhold its
17 approval to changes in one or more of the below provisions based on Metro operational
18 concerns.” The provisions subject to Metro’s operational concerns include the provision that
19 limits pick-up/drop-off of passengers to the south side of North Mercer Way and the provision
20 that limits bus layovers to the afternoon peak period and to no more than fifteen minutes.

21 32. The Settlement Agreement was executed on behalf of the City by City Manager
22 Julie Underwood on October 18, 2017, and on behalf of Sound Transit by Chief Executive
23 Officer Peter Rogoff on November 2, 2017.

24 33. As agreed in Section 4.1 of the Settlement Agreement, in 2018 and continuing
25 until May, 2019, the City and Sound Transit worked collaboratively with King County Metro
26 seeking to obtain its concurrence to the 77th Avenue SE Configuration desired by the City.
These collaborative meetings usually took place at the Mercer Island City Hall, and included
City Manager Julie Underwood and Kirsten Taylor, the City’s Senior Project Manager.

1 34. At the conclusion of this collaborative process, the City Manager agreed on behalf
2 of the City that Metro’s operational needs require pick-ups/drop-offs and layovers on the north
3 side of North Mercer Way, as well as layovers that will sometimes exceed 15 minutes and that
4 cannot be restricted by time of day.

5 35. City Manager Underwood and Senior Project Manager Kirsten Taylor presented a
6 memo to the City Council dated February 1, 2019 that:

- 7 • describes the collaborative study undertaken by the City, Sound Transit, and King County
8 Metro;
- 9 • describes the “joint list of goals and objectives” that the City agreed upon with Sound
10 Transit and King County Metro;
- 11 • describes the three “potential transit interchange configurations” that the agencies
12 studied; and
- 13 • recommends the agreed-upon “Optimal Service Configuration” that provides for pick-
14 ups/drop-offs and layovers on the north side of North Mercer Way, as well as layovers
15 that are not restricted in length or by time of day

16 36. In March, 2019 David Evans & Associates published the “Mercer Island Transit
17 Interchange Operational and Configuration Study” that described the collaborative process
18 undertaken by Sound Transit, King County Metro, and the City. This Study describes the
19 Optimal Service Configuration and explains why it was the agreed-upon recommendation of all
20 three agencies.

21 37. City Manager Underwood asked King County Metro to send its May 10, 2019
22 letter to Sound Transit to further explain its operations, to explain why Metro requires use of the
23 north side of North Mercer Way and unrestricted layovers, and to explain why Metro cannot
24 agree to the 77th Avenue Configuration as described in Section 4 of the Settlement Agreement.

25 38. City Manager Underwood also participated in many meetings with the City
26 Council and its members to explain Metro’s operational needs and the conclusions of the

1 collaborative process that the City undertook with Sound Transit and King County Metro.
2 Representatives from Sound Transit and King County Metro also participated along with City
3 Manager Underwood and Project Manager Taylor in many of these meetings with the Council
4 and its members.

5 39. Sound Transit complied with its obligation in Section 4 of the Settlement
6 Agreement to work collaboratively with King County Metro to obtain its concurrence. Metro
7 did not concur, and the City Manager agreed that Metro's lack of concurrence was reasonable
8 and necessary in order for bus/rail integration to happen on Mercer Island.

9 40. Neither City Manager Underwood nor the current City Manager nor the City
10 Council has identified an alternative configuration for bus/rail integration that is acceptable to
11 the City and that also meets Metro's operational needs, and the City's position in this lawsuit that
12 it can reasonably withhold its approval to changes that are needed to address Metro's operational
13 concerns is manifestly and egregiously unreasonable.

14 41. Since the conclusion of the collaborative process with the City and King County
15 Metro, Sound Transit has moved forward to implement the 77th Avenue SE Configuration in
16 conformity with Metro's operational needs, so that East Link can open on schedule.

17 42. Bus/rail integration on Mercer Island is an essential part of the regional East Link
18 Project that cannot happen unless Metro's operational needs are met. By refusing to
19 acknowledge the City Manager's prior agreement that Metro's operational needs require the
20 changes to the 77th Avenue SE Configuration that Sound Transit proposes to construct; and by
21 failing to propose an alternative that meets Metro's operational needs, the City is attempting to
22 stop bus/rail integration from happening on Mercer Island and intentionally violating its
23 commitments in the Settlement Agreement.

24 43. In consideration of the City's multiple commitments in the Settlement Agreement
25 not to further interfere with the completion of East Link, Sound Transit agreed to a number of
26 commitments including:

1 (1) “pay a reimbursable contribution not to exceed fifty thousand (\$50,000) to
2 the City, for actual reasonable costs incurred in preparing the Aubrey Davis Park
3 Master Plan”; Settlement Agreement § 7.1;

4 (2) “provide the City with reimbursable contributions for the actual
5 reasonable costs to fund traffic safety enhancements related to the effects of the
6 Center Roadway closure and HOV-only use of the R-8A HOV lanes, as
7 reasonably determined by the City, in an amount not to exceed five million one
8 hundred thousand dollars (\$5,100,000)”; Settlement Agreement § 5.3;

9 (3) reimburse the City for development of regional transit parking stalls up to
10 forty-nine percent (49%) of the actual reasonable construction costs (estimated to
11 be four million four hundred thousand dollars (\$4,410,00)). Settlement
12 Agreement, § 6;

13 (4) collaborate “with King County Metro to develop and launch a pilot project
14 to improve last mile access for City residents that would potentially have regional
15 applicability. Once the Last Mile Solutions pilot project has been designed and
16 planned to the point where it is ready for actual implementation on a pilot basis,
17 Sound Transit shall provide funding in an amount not to exceed two hundred
18 twenty-six thousand nine hundred dollars (\$226,900), except as this amount may
19 be adjusted as provided in the Traffic/Safety Enhancements section of this
20 Agreement.” Settlement Agreement, § 8.

21 44. The City’s breaches of the Settlement Agreement are material and constitute a
22 substantial failure of consideration to Sound Transit.

23 45. The City also is anticipatorily violating its commitments in Section 14 of the
24 Settlement Agreement to require only non-discretionary permits for East Link and to issue such
25 permits within ten days of receiving complete applications. Instead the City now is asserting that
26

1 it may require a Conditional Use Permit (“CUP”), which is a discretionary permit that requires
2 many months of process after an application is submitted.

3 46. In Section 15.1(h) of the Settlement Agreement the City agreed that “The City
4 will not commence any further proceedings, new litigation, or new regulatory actions impacting
5 the Project.” The instant lawsuit violates the City’s commitment in Section 15.1(h).

6 47. In Section 20 of the Settlement Agreement the City agreed that “No party shall be
7 in default under this Agreement unless it has failed to perform under this Agreement for a period
8 of thirty (30) calendar days after written notice of default from another party.” The City has not
9 issued a Notice of Default to Sound Transit and Sound Transit is not in default.

10 **D. SOUND TRANSIT’S FIRST CAUSE OF ACTION: DECLARATORY**
11 **JUDGMENT**

12 48. Sound Transit realleges the preceding paragraphs and incorporates them by
13 reference.

14 49. An actual, present, and existing dispute has arisen between the Parties regarding
15 the Parties’ obligations under the Settlement Agreement.

16 50. Sound Transit and the City of Mercer Island have genuine and opposing interests,
17 which are direct and substantial and not merely potential, theoretical, abstract or academic.

18 51. Sound Transit seeks a declaratory judgment that:

- 19 a. Sound Transit has not breached the Settlement Agreement and is not in
20 default;
- 21 b. the City is violating the Settlement Agreement by, *inter alia*, (1) filing the
22 instant litigation, (2) withholding its approval of refinements to the 77th
23 Ave. SE Configuration that are necessary to meet Metro’s operational
24 needs; (3) threatening to require Sound Transit to obtain a Conditional Use
25 Permit from the City; and (4) breaching the implied and contractual duties
26 of good faith, and

1 c. the City's breaches of the Settlement Agreement are material breaches that
2 relieve Sound Transit of further performance under the Settlement
3 Agreement.

4 52. Pursuant to the Uniform Declaratory Judgments Act, Chapter 7.24 RCW, Sound
5 Transit is entitled to any further necessary or proper relief based on such declaratory judgment or
6 decree.

7 53. Pursuant to RCW 7.24.100, Sound Transit is entitled to an award of costs that the
8 Court determines are equitable and just.

9 **E. SOUND TRANSIT'S SECOND CAUSE OF ACTION: BREACH OF CONTRACT**
10 **AND REQUEST FOR SPECIFIC PERFORMANCE**

11 54. Sound Transit realleges the preceding paragraphs and incorporates them by
12 reference.

13 55. The Settlement Agreement is a valid contract between the City and Sound Transit.

14 56. The Settlement Agreement provides that "The City will not commence any
15 further proceedings, new litigation, or new regulatory actions impacting the Project."

16 57. This lawsuit impacts the Project by seeking to prevent construction and operation
17 of an essential component of the Project: bus/rail integration at the Mercer Island Station.

18 58. The City is breaching the Settlement Agreement by refusing to acknowledge that
19 King County Metro has not agreed to the 77th Avenue SE Configuration described in the
20 Settlement Agreement.

21 59. The City is breaching the Settlement Agreement by refusing to acknowledge that
22 in 2019, at the conclusion of the collaborative process called for in § 4.1 of the Settlement
23 Agreement, its City Manager approved the refinements to the 77th Avenue SE Configuration that
24 Metro's operations require and that Sound Transit is implementing.

1 60. The City is breaching the Settlement Agreement by attempting today to
2 unreasonably withhold approval to the changes to the 77th Avenue SE Configuration that Metro’s
3 operations require in order for bus/rail integration to happen on Mercer Island.

4 61. The City is anticipatorily breaching the Settlement Agreement by threatening to
5 require a Conditional Use Permit for the Project.

6 62. The City’s breaches of the contract are individually and cumulatively material and
7 deprive Sound Transit of the benefit of its bargain.

8 63. Bus/rail integration on Mercer Island is an essential component of East Link,
9 which is an essential public facility under the Growth Management Act, and Sound Transit is
10 entitled to specific performance of the Settlement Agreement because damages are not an
11 adequate remedy for the City’s efforts to prevent construction and operation of an essential
12 public facility.

13 **F. SOUND TRANSIT’S THIRD CAUSE OF ACTION: BREACH OF THE**
14 **CONTRACTUAL AND IMPLIED DUTY OF GOOD FAITH AND FAIR**
15 **DEALING**

16 64. Sound Transit realleges the preceding paragraphs and incorporates them by
17 reference.

18 65. Every Washington contract imposes an implied duty of good faith and fair
19 dealing.

20 66. In the Settlement Agreement, the City agreed to “work cooperatively and in good
21 faith” with Sound Transit.

22 67. The City is breaching both its express and implied duties of good faith by the
23 actions described above.

24 68. Sound Transit has been damaged by the City’s breach of the duty of good faith
25 and fair dealing, but damages are not an adequate remedy for the City’s breaches and Sound
26 Transit is entitled to specific performance of the Settlement Agreement and an order requiring
the City to stop interfering with completion of the Project.

1 **G. RIGHT TO AMEND COUNTERCLAIM**

2 69. Sound Transit respectfully reserves the right to amend and supplement this
3 Counterclaim.

4 **H. PRAYER FOR COUNTERCLAIM RELIEF**

5 Defendant Sound Transit prays for:

- 6 A. A judicial declaration that the City has breached and is breaching the Settlement
7 Agreement and that its breaches are material and constitute a failure of
8 consideration;
- 9 B. A judicial declaration that Sound Transit has not breached the Settlement
10 Agreement and is not in default;
- 11 C. A judicial declaration that the City cannot require a Conditional Use Permit for
12 construction of any portion of the Project;
- 13 D. An order requiring the City to immediately and specifically perform its
14 obligations under the Settlement Agreement, including its obligations to timely
15 issue permits in compliance with Section 14.
- 16 E. In the event that the City does not immediately and completely cure its breaches
17 of the Settlement Agreement and comply with its obligation to timely issue
18 permits in compliance with Section 14, an order relieving Sound Transit of any
19 further obligation to perform under the Settlement Agreement;
- 20 F. An award of costs, attorneys' fees, and expenses incurred in litigating this action
21 pursuant to the terms of the Settlement Agreement; and
- 22 G. An award of any other relief that this Court deems just and equitable.
- 23
24
25
26

1 DATED this 16th day of November, 2020.

2
3 *s/ Stephen G. Sheehy*

4 Stephen G. Sheehy, WSBA #13304
5 Managing Legal Counsel
6 CENTRAL PUGET SOUND REGIONAL TRANSIT
7 AUTHORITY
8 401 S. Jackson St.
9 Seattle, WA 98104
10 Telephone: 206-398-5000
11 Email: stephen.sheehy@soundtransit.org

12 *s/Patrick J. Schneider*

13 Patrick J. Schneider, WSBA No. 11957
14 Rylan Weythman, WSBA No. 45352
15 Christopher A. Rogers, WSBA No. 49634
16 Michelle Rusk, WSBA No. 52826
17 FOSTER GARVEY PC
18 1111 Third Avenue, Suite 3000
19 Seattle, Washington 98101-3292
20 Telephone: (206) 447-4400
21 Facsimile: (206) 447-9700
22 Email: pat.schneider@foster.com
23 rylan.veythman@foster.com
24 christopher.rogers@foster.com
25 michelle.rusk@foster.com

26 *Attorneys for Central Puget Sound Regional Transit Authority,
dba, Sound Transit*

Hon. Catherine Shaffer

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

CITY OF MERCER ISLAND,
WASHINGTON, a municipal corporation,

Plaintiff,

v.

CENTRAL PUGET SOUND REGIONAL
TRANSIT AUTHORITY, dba SOUND
TRANSIT,

Defendant.

No. 20-2-15730-9 SEA

PLAINTIFF'S REPLY TO
DEFENDANT'S COUNTERCLAIMS**I. INTRODUCTION**

Plaintiff City of Mercer Island, Washington ("Plaintiff" or the "City") submits the following Reply to Defendant Central Puget Sound Regional Transit Authority, dba Sound Transit's ("Defendant" or "Sound Transit") Counterclaims (the "Counterclaims").

In its unenumerated "introductions," Sound Transit states that the Presiding Civil Judge has jurisdiction over the issues raised by the City's Complaint and by Sound Transit's Counterclaims, and makes reference to a "Motion to Dismiss," yet has filed no such motion and still proceeds to assert the jurisdiction of this Court. Because this issue has not been raised for resolution by the Court, no response is necessary.

II. THE CITY'S REPLY TO SOUND TRANSIT'S COUNTERCLAIMS**A. Parties**

1. The City admits the allegations in paragraph 1.

1 2. The City admits the allegations in paragraph 2.

2 **B. Jurisdiction and Venue**

3 3. Paragraph 3 sets forth legal conclusions to which no answer is required.

4 To the extent an answer is required, the City does not contest jurisdiction or venue in this
5 Court.

6 4. Paragraph 4 sets forth legal conclusions to which no answer is required.

7 To the extent an answer is required, the City admits that there is a dispute between the
8 City and Sound Transit regarding the rights and obligations of the Parties pursuant to the
9 Settlement Agreement.

10 5. Paragraph 5 sets forth legal conclusions to which no answer is required.

11 To the extent an answer is required, the City does not contest jurisdiction or venue in this
12 Court.

13 6. Paragraph 6 sets forth legal conclusions to which no answer is required.

14 To the extent an answer is required, the City does not contest jurisdiction or venue in this
15 Court.

16 **C. Facts**

17 7. The City admits the allegations in paragraph 7.

18 8. The 1976 agreement speaks for itself. The City admits that Sound Transit
19 has accurately quoted an excerpt from the 1976 agreement, but the City denies any
20 allegations inconsistent with the 1976 agreement as a whole.

21 9. The 1976 agreement speaks for itself.

22 10. The City admits that the 1976 agreement was amended in 2004. The 2004
23 amendment to the 1976 agreement speaks for itself. The City admits that Sound Transit
24 has accurately quoted an excerpt from the 2004 amendment to the 1976 agreement, but the
25 City denies any allegations inconsistent with the 2004 amendment as a whole.

1 11. The City admits that alterations were made to I-90, otherwise the City lacks
2 knowledge or information sufficient to form a belief as to the truth of the remaining
3 allegations set forth in paragraph 11 and therefore denies them.

4 12. The City admits that alterations were made to ingress and egress points on
5 Mercer Island, otherwise the City lacks knowledge or information sufficient to form a
6 belief as to the truth of the remaining allegations set forth in paragraph 12 and therefore
7 denies them.

8 13. The Federal Highway Administration's letter to the City and WSDOT
9 dated August 5, 2016 speaks for itself. The City denies any allegations inconsistent with
10 the language of that letter.

11 14. The City admits that the I-90 center lanes were closed and that construction
12 related to the East Link Project is ongoing, otherwise the City lacks knowledge or
13 information sufficient to form a belief as to the truth of the remaining allegations set forth
14 in paragraph 14 and therefore denies them.

15 15. The City admits that single-occupancy vehicles ("SOV") from Mercer
16 Island can access westbound I-90 from three points and that high-occupancy vehicles
17 ("HOV") have access to dedicated HOV lanes from Island Crest Way. Otherwise, the
18 City lacks knowledge or information sufficient to form a belief as to the truth of the
19 remaining allegations set forth in paragraph 15 and therefore denies them.

20 16. The City denies the allegations in paragraph 16.

21 17. The City admits that it filed a complaint against Sound Transit and the
22 Washington State Department of Transportation ("WSDOT") in King Co. Sup. Ct. No.
23 17-2-03884-9SEA based on Sound Transit's and WSDOT's failure to honor their
24 commitments made in earlier agreements concerning the accessibility to and from Mercer
25 Island for its residents, workers, businesses, and visitors. The pleadings in that lawsuit
26 speak for themselves and to the extent the allegations in paragraph 17 are unfair and

1 incomplete characterizations of the orders, pleadings, and filings in King Co. Sup. Ct.
2 No. 17-2-03884-9SEA, the City denies them.

3 18. The City admits that it exercised its zoning and permitting authorities,
4 including those granted to cities in the Growth Management Act, in passing the moratoria.
5 The moratoria speak for themselves. The City denies each and every remaining allegation
6 in paragraph 18.

7 19. The City admits that the Shoreline Substantial Development Permit was
8 revoked. The notice of revocation speaks for itself. The City denies each and every
9 remaining allegation in paragraph 19.

10 20. The Seattle Times article referenced in paragraph 20 speaks for itself. The
11 City admits that the Seattle Time article referenced in paragraph 20 stated that “Council
12 members said their concern was not only the loss of direct access to I-90, but the loss of
13 the access ramps from Island Crest Way, a four-lane arterial, which city leaders said
14 would result in congestion around the Town Center,” and that Ross Freeman was quoted
15 as saying “[t]his isn’t about trying to stop light rail.” The City admits that Sound Transit
16 has accurately quoted three words from the Seattle Times article, but the City denies the
17 allegations in paragraph 20 to the extent they are an incomplete and misleading
18 representation of the Seattle Times article as a whole. The City denies each and every
19 remaining allegation in paragraph 20.

20 21. The City admits that Sound Transit filed two lawsuits against the City. The
21 filings in those lawsuits speak for themselves.

22 22. The filings in King Co. Sup. Ct. No. 17-2-05193-4SEA speak for
23 themselves. The City denies each and every remaining allegation in paragraph 22.

24 23. The orders, pleadings, and filings in Case No. 17-2-05193-4SEA speak for
25 themselves. The City admits that Sound Transit has accurately quoted an excerpt from the
26

1 City's March 17, 2017 response filed in Case No. 17-2-05193-4SEA, but the City denies
2 any allegations inconsistent with the language of that filing as a whole.

3 24. The orders, pleadings, and filings in Case No. 17-2-05193-4SEA speak for
4 themselves. The City admits that on April 13, 2017, the Court in Case No. 17-2-05193-
5 4SEA issued a preliminary injunction "enjoining and prohibiting the City of Mercer Island
6 from rescinding the Shoreline Substantial Development Permit SHL 15-023 (SSDP) based
7 upon any alleged adverse environmental impacts or changes to the project outside of the
8 shoreline jurisdiction." To the extent the allegations in paragraph 24 are unfair and
9 incomplete characterizations of the orders, pleadings, and filings in Case No. 17-2-05193-
10 4SEA, the City denies them. To the extent the allegations in paragraph 24 are not in
11 reference to the orders, pleadings, and filings in Case No. 17-2-05193-4SEA, the City
12 lacks knowledge or information sufficient to form a belief as to the truth of the allegations
13 set forth in paragraph 24 and therefore denies them.

14 25. The orders, pleadings, and filings in King Co. Sup. Ct. No. 17-2-05191-
15 8SEA speak for themselves. The City's moratoria speak for themselves. The City admits
16 that Sound Transit has accurately quoted excerpts from the City's moratoria, but the City
17 denies the allegations in paragraph 25 to the extent they are incomplete representations of
18 the moratoria. The City admits that on April 21, 2017, the Court in Case No. 17-2-05191-
19 8SEA issued a preliminary injunction enjoining the City "from invoking any provision of
20 Title 19 of the Mercer Island City Code to prevent Sound Transit from placing any light
21 rail facilities, including the Mercer Island Station, in the I-90 right-of way" and from
22 "delaying the issuance of the Mercer Island Station building permit based on the alleged
23 inadequacy of the Sound Transit FEIS Addendum." To the extent the allegations in
24 paragraph 25 are unfair and incomplete characterizations of the orders, pleadings, and
25 filings in Case No. 17-2-05191-8SEA, the City denies them.

1 26. The City admits that it entered into the Settlement Agreement with Sound
2 Transit. The Settlement Agreement speaks for itself and the City denies any allegations
3 that are incomplete representations of or inconsistent with its terms. The orders in Case
4 Nos. 17-2-05191-8SEA and 17-2-05193-4SEA speak for themselves. The City denies that
5 the Court issued “injunctions and a writ of prohibition to prevent the City from interfering
6 with completion of the Project.” The City denies that “the Court would retain jurisdiction
7 over the Settlement Agreement and Sound Transit’s requests for additional relief.” The
8 City denies each and every remaining allegation in paragraph 26.

9 27. The orders, pleadings, and filings in Case Nos. 17-2-05193-4SEA and 17-
10 2-05191-8SEA speak for themselves. The City denies that “the Court issued the requested
11 orders” in Case Nos. 17-2-05193-4SEA and 17-2-05191-8SEA.

12 28. The orders, pleadings, and filings in Case Nos. 17-2-05193-4SEA and 17-
13 2-05191-8SEA speak for themselves. The City denies that jurisdiction over “the
14 Settlement Agreement was transferred to the Presiding Judge.”

15 29. The orders, pleadings, and filings in Case Nos. 17-2-05193-4SEA and 17-
16 2-05191-8SEA speak for themselves. The City denies that any other Court has
17 jurisdiction over its instant claims against Sound Transit. The City admits that Sound
18 Transit has accurately quoted from the complaints filed in Case Nos. 17-2-05193-4SEA
19 and 17-2-05191-8SEA. The City denies the allegations in paragraph 29 to the extent they
20 are incomplete representations of the complaints filed in Case Nos. 17-2-05193-4SEA and
21 17-2-05191-8SEA. The City admits that the events underlying Case No. 17-2-05193-
22 4SEA and the injunction issued in that case were related solely to the issuance and
23 suspension of the Shoreline Substantial Development Permit. The City admits that the
24 events underlying Case No. 17-2-05191-8SEA and the injunction issued in that case were
25 related solely to the use of the I-90 right of way, and Sound Transit’s allegations that the
26

1 City did not immediately issue a building permit for the Mercer Island Light Rail Station
2 because of Sound Transit's inadequate FEIS addendum.

3 30. The Settlement Agreement speaks for itself and the City denies any
4 allegations inconsistent with its terms. The City denies the allegations in paragraph 30 to
5 the extent they are an incomplete and misleading representation of Section 4 of the
6 Settlement Agreement. Sound Transit quotes only one part of one subsection (namely,
7 subsection 4.1) of Section 4, which provides, in its entirety:

8 **SECTION 4 BUS/RAIL INTEGRATION**

9 4.1 The 2017 SEPA Addendum identifies two configurations for
10 transit integration for when East Link is operational: (i) the 77th Avenue
11 SE Configuration; and (ii) the 80th Avenue SE Configuration. Pursuant to
12 and as modified by this Agreement, the Parties agree to implement the
13 77th Avenue SE Configuration. To the extent that King County Metro
14 buses are necessary to coordinate service, the Parties agree that the 77th
15 Avenue SE Configuration cannot be implemented without King County
16 Metro's agreement. The Parties will work collaboratively with King
17 County Metro to obtain its concurrence where necessary and document
18 such concurrence as appropriate.

19 4.2 The Parties have agreed on the following modifications to the 77th
20 Avenue SE Configuration as otherwise described in the 2017 SEPA
21 Addendum:

- 22 (a) There will be no bus drop-off/pick-up or layover area on
23 80th Avenue SE. Accordingly, all bus drop-off/pick-up
24 and layover areas (other than those for local Mercer Island
25 buses) will be located on the south side of North Mercer
26 Way.
- (b) Routing of buses will keep circulation of all but local (on-
island only) buses off SE 27th Street, except in emergency
or unexpected situations (e.g., to circumvent a traffic
accident), consistent with the Parties' intent to limit the
routes of non-local buses to North Mercer Way and 77th
Ave. SE. Prior to East Link becoming operational, Sound
Transit shall complete construction of a traffic roundabout
at the intersection of North Mercer Way and 77th Avenue
SE, using a design substantially similar to one of the
designs depicted in the 2017 SEPA Addendum Exhibit 2-4
attached as **Exhibit A**.
- (c) Buses will not be scheduled in a manner that could be
expected to result in bus volumes on North Mercer Way,
both during peak periods and on a daily basis that exceed
current volumes, excluding for these purposes both current
and future Mercer Island-only (local) buses. The current

1 bus volumes at the time of execution of this Agreement are
2 as follows: AM Peak 34, PM Peak 34, and Daily 346.

3 4.3 The Parties have further agreed on the following additional
4 modifications to the 77th Avenue SE Configuration; provided that, the
5 City will not unreasonably withhold its approval to changes in one or more
6 of the below provisions based on Metro operational concerns:

- 7 (a) In order to reduce impacts on traffic flow on North Mercer
8 Way, all pick-up/drop-off of passengers will be on the
9 south side of North Mercer Way.
- 10 (b) Other than in an emergency or due to equipment
11 malfunction, bus layovers are limited to no more than
12 fifteen (15) minutes and then only during the afternoon
13 peak period (3:30pm - 7:00pm). Except as to buses
14 running entirely on electrical (battery) power, there will be
15 no idling of buses other than during actual pick-up and
16 drop-off of passengers or while waiting in traffic.

17 4.4 Sound Transit is solely responsible for all costs required to
18 implement and operate the systems and facilities required for the 77th
19 Avenue SE Configuration as generally described in the 2017 SEPA
20 Addendum, including, without limitation, design and engineering,
21 permitting, property acquisition, signage, landscaping, street
22 improvements, lighting, traffic improvements, paving, other construction
23 costs, and any other costs incurred with respect thereto. All work will be
24 performed in good faith, in close consultation with the City, and in a
25 manner that reduces construction impacts on pedestrians, bicyclists and
26 motorists, as practical.

31. The Settlement Agreement speaks for itself and the City denies any
allegations inconsistent with its terms. The City denies the allegations in paragraph 31 to
the extent they are an incomplete and misleading representation of Section 4 of the
Settlement Agreement. Sound Transit quotes only one parts of one subsection (namely,
subsection 4.3) of Section 4, which is quoted in its entirety in response to paragraph 30.

32. The City admits that the Settlement Agreement was approved by the City
Council before it was executed by City Manager Julie Underwood and admits the
remaining allegations in paragraph 32.

33. The City admits it attempted to work collaboratively with Sound Transit
and Metro during this time frame and that certain collaborative meetings took place at

1 Mercer Island City Hall. The Settlement Agreement speaks for itself and the City denies
2 any allegations inconsistent with its terms.

3 34. The City admits that Metro and Sound Transit have demanded that the City
4 approve bus layovers of unlimited duration, bus layovers and pick-ups/drop-offs on both
5 sides of North Mercer Way, and that such layovers be unrestricted and permitted to occur
6 at all hours of the day or night. The City denies each and every allegation remaining in
7 paragraph 34.

8 35. The memo speaks for itself and the City denies any allegations in
9 paragraph 35 inconsistent with it.

10 36. The “Mercer Island Transit Interchange Operational and Configuration
11 Study” (“Study”) speaks for itself and the City denies any allegations that are inconsistent
12 with the Study. The City denies that the Study’s recommended configuration was “the
13 agreed-upon configuration of all three entities.” The City denies each and every
14 remaining allegation in paragraph 36.

15 37. The City lacks knowledge or information sufficient to form a belief as to
16 the truth of the allegations in paragraph 37 and therefore denies them.

17 38. The City admits that the Mercer Island City Council participated in
18 meetings with the City Manager and representatives from Sound Transit and Metro
19 regarding proposed deviations from the Settlement Agreement. The City denies each and
20 every remaining allegation in paragraph 38, including that the collaborative process
21 required by the Settlement Agreement concluded in any manner.

22 39. The City admits that Metro demanded changes to the 77th Avenue
23 Configuration in its May 10, 2019 letter and that document speaks for itself. The City
24 denies the remaining allegations in paragraph 39.

25 40. The City admits that it has proposed alternative dispute resolution in order
26 to find a mutually acceptable alternative to Sound Transit’s demands, and that Sound

1 Transit has rejected that proposal. The City further alleges that Sound Transit refused to
2 work cooperatively with the City to find other reasonable alternatives in violation of the
3 Settlement Agreement. The City denies each and every remaining allegation in paragraph
4 40.

5 41. The City denies that the collaborative process has concluded, and admits
6 that Sound Transit has barreled forward in violation of the Settlement Agreement
7 collaborative process and without the City's agreement to submit permit applications to
8 the City that are not in compliance with the Settlement Agreement, all while refusing to
9 work cooperatively with the City to reach a reasonable compromise. Otherwise the City
10 lacks knowledge or information sufficient to form a belief as to the truth of the remaining
11 allegations set forth in paragraph 41 and therefore denies them.

12 42. The City lacks knowledge or information sufficient to form a belief as to
13 the truth of the allegations set forth in paragraph 42 regarding the essential nature of the
14 "Bus/rail integration on Mercer Island" and therefore denies them. The City denies each
15 and every remaining allegation in paragraph 42. Further answering, the City has
16 repeatedly attempted to work with Sound Transit to find a reasonable compromise but
17 Sound Transit has refused to engage with the City, all in violation of the Settlement
18 Agreement.

19 43. The Settlement Agreement speaks for itself and the City denies any
20 allegations inconsistent with its terms. The City admits that Sound Transit has accurately
21 quoted limited excerpts from certain subparts of Sections 5, 7, and 8 of the Settlement
22 Agreement, with the exception that Section 7.1 of the Settlement Agreement states that
23 Sound Transit shall "provide" a reimbursable contribution, not "pay" a reimbursable
24 contribution. The city denies the allegations in paragraph 43 to the extent they are an
25 incomplete representation of Sections 5–8 of the Settlement Agreement and do not reflect
26 the agreements of the parties.

1 44. The City denies the allegations in paragraph 44.

2 45. Paragraph 45 sets forth legal conclusions to which no answer is required.

3 To the extent an answer is required, the City admits that Sound Transit has not provided
4 the required documentation necessary for it to receive the type of permit it seeks without
5 conditions being imposed. The City denies the remaining factual allegations in paragraph
6 45.

7 46. The Settlement Agreement speaks for itself and the City denies any
8 allegations inconsistent with its terms. The city denies the allegations in paragraph 46 to
9 the extent they are a misleading and unfair representation of the Settlement Agreement's
10 provisions relating to filing suit and are not even a fair representation of Section 15 of the
11 Settlement Agreement. The City denies that Section 15 prohibits this lawsuit. Answering
12 further, the City admits that the Settlement Agreement expressly permits this lawsuit.

13 47. The Settlement Agreement speaks for itself and the City denies any
14 allegations inconsistent with its terms. Paragraph 47 sets forth legal conclusions to which
15 no answer is required. To the extent an answer is required, the City denies each and every
16 remaining factual allegation in paragraph 47.

17 **D. Sound Transit's First Cause of Action: Declaratory Judgment**

18 48. The City restates its admissions, denials, and allegations set forth in
19 response to paragraphs 1 through 47 as if fully set forth herein.

20 49. Paragraph 49 sets forth a legal conclusion to which no answer is required.

21 50. Paragraph 50 sets forth a legal conclusion to which no answer is required.

22 51. The City denies the allegations in paragraph 51 and denies that Sound
23 Transit is entitled to the relief it requests.

24 52. The City denies the allegations in paragraph 52 and denies that Sound
25 Transit is entitled to the relief it requests.

26

1 53. The City denies the allegations in paragraph 53 and denies that Sound
2 Transit is entitled to the relief it requests.

3 **E. Sound Transit’s Second Cause of aCtion: Breach of Contract and Request for**
4 **Specific Performance**

5 54. The City restates its admissions, denials, and allegations set forth in
6 response to paragraphs 1 through 53 as if fully set forth herein.

7 55. The City admits that the Settlement Agreement is a valid contract between
8 the City and Sound Transit, and that the Settlement Agreement speaks for itself.

9 56. The Settlement Agreement speaks for itself and the City denies any
10 allegations inconsistent with its terms and specifically denies that the provision Sound
11 Transit misleadingly cites prohibits this lawsuit, which is specifically authorized by the
12 Settlement Agreement.

13 57. The City denies the allegations in paragraph 57.

14 58. The City denies the allegations in paragraph 58.

15 59. The City denies the allegations in paragraph 59.

16 60. The City denies the allegations in paragraph 60.

17 61. The City denies the allegations in paragraph 61.

18 62. The City denies the allegations in paragraph 62.

19 63. The City denies that Sound Transit is entitled to any relief. Paragraph 63
20 sets forth legal conclusions to which no answer is required. To the extent an answer is
21 required, the City lacks knowledge or information sufficient to form a belief as to the truth
22 of the allegations set forth in paragraph 63 and therefore denies them.

23 **F. Sound Transit’s Third Cause of Action: Breach of the Contractual and**
24 **Implied Duty of Good Faith and Fair Dealing**

25 64. The City restates its admissions, denials, and allegations set forth in
26 response to paragraphs 1 through 63 as if fully set forth herein.

 65. Paragraph 65 sets forth a legal conclusion to which no answer is required.

1 66. The Settlement Agreement speaks for itself and the City denies any
2 allegations inconsistent with its terms.

3 67. The City denies the allegations in paragraph 67.

4 68. The City denies the allegations in paragraph 68 and denies that Sound
5 Transit is entitled to the relief it requests.

6 **G. Defendant’s Right to Amend Counterclaim**

7 69. Paragraph 69 sets forth legal conclusions to which no answer is required.
8 To the extent an answer is required, the City lacks knowledge or information sufficient to
9 form a belief as to the truth of the allegations set forth in paragraph 69 and therefore
10 denies them.

11 **H. Defendant’s Prayer for Counterclaim Relief**

12 In response to Sound Transit’s prayer for relief, the City denies that Sound Transit
13 is entitled to any of the relief requested in its Counterclaims.

14 **AFFIRMATIVE AND OTHER DEFENSES**

15 By way of further answer to Sound Transit’s Counterclaims, and without waiving
16 any previous denials, the City asserts the following Defenses.

17 A. Sound Transit has failed to state a claim upon which relief can be granted.

18 B. The City acted in good faith.

19 C. Sound Transit’s injuries, if any, were sustained as a direct and proximate
20 result of Sound Transit’s own conduct.

21 D. Sound Transit has failed to mitigate its damages.

22 E. Sound Transit’s claims, in whole or in part, are barred by the doctrine of
23 estoppel.

24 F. Sound Transit’s claims, in whole or in part, are barred by the doctrine of
25 waiver.

26

1 G. Upon information and belief, Sound Transit may be responsible for all or a
2 portion of its damages, if any.

3 H. Sound Transit's damages, if any, were caused by individuals and entities
4 over which the City had no control.

5 I. Because Sound Transit has not complied with its obligations under the
6 Settlement Agreement to bring suit, it is barred from seeking judicial relief.

7 By stating any of the defenses set forth above, the City reserves the right to plead
8 additional defenses as may be warranted by ongoing discovery.

9 By stating any of the defenses set forth above, the City does not assume any
10 burden it does not have under the law.

11 By stating any of the defenses set forth above, the City reserves the right to amend
12 its answer to Sound Transit's Counterclaims and to assert additional defenses made
13 known to it through investigation and discovery. The City likewise reserves the right to
14 argue legal theories in addition to or in lieu of those specifically identified here as the
15 facts in this matter may warrant, including, without limitation, additional or further facts
16 hereafter learned through discovery or during the course of this action.

17 III. PRAYER FOR RELIEF

18 WHEREFORE, having answered Sound Transit's Counterclaims, the City requests
19 the following relief:

- 20 A. For dismissal of Sound Transit's Counterclaims, with prejudice;
21 B. For an award of the City reasonable attorneys' fees and costs incurred in
22 answering and responding to Sound Transit's Counterclaims; and

23 ///
24
25
26

C. For such other and further relief as the Court deems just and equitable.

DATED this 7th day of December, 2020.

McNAUL EBEL NAWROT & HELGREN PLLC

By: s/Malaika M. Eaton

Malaika M. Eaton, WSBA No. 32837
Charles Wittmann-Todd, WSBA No. 54229

600 University Street, Suite 2700
Seattle, Washington 98101
(206) 467-1816
meaton@mcnaul.com
cwittmantodd@mcnaul.com

and

OFFICE OF THE CITY ATTORNEY
CITY OF MERCER ISLAND

By: s/Bio Park
Bio Park, WSBA No. 36994

City Attorney
9611 S.E. 36th Street
Mercer Island, Washington 98040
bio.park@mercerisland.gov

Attorneys for Plaintiff City of Mercer Island,
Washington

CERTIFICATE OF SERVICE

I hereby certify that on December 7, 2020, I caused a true and correct copy of the foregoing document to be served by electronic email service to the following:

Stephen G. Sheehy, WSBA #13304
Managing Legal Counsel
Sound Transit
Union Station
401 South Jackson Street
Seattle, WA 98104-2826
stephen.sheehy@soundtransit.org

Patrick J. Schneider, WSBA #11957
Rylan Weythman, WSBA #45352
Christopher Rogers, WSBA #49634
Michelle Rusk, WSBA #52826
FOSTER GARVEY PC
1111 Third Avenue, Suite 3000
Seattle, Washington 98101-3292
pat.schneider@foster.com
rylan.veythman@foster.com
christopher.rogers@foster.com
michelle.rusk@foster.com

Attorneys for Defendant

DATED: December 7, 2020.

By: s/Malaika M. Eaton
Malaika M. Eaton, WSBA No. 32837