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**BEFORE THE HEARING EXAMINER  
FOR THE CITY OF MERCER ISLAND**

In the Matter of the Appeal of  
**CENTRAL PUGET SOUND TRANSIT  
AUTHORITY,**  
  
**Petitioner,**  
  
v.  
**CITY OF MERCER ISLAND,**  
  
**Respondent.**

No. APL21-001

**DECLARATION OF PATRICK J.  
SCHNEIDER IN SUPPORT OF SOUND  
TRANSIT’S RESPONSE TO CITY’S  
PARTIAL MOTION TO DISMISS FOR  
LACK OF JURISDICTION**

Patrick J. Schneider declares as follows:

1. I am one of the attorneys representing Central Puget Sound Transit Authority. I am a resident of the State of Washington, over the age of eighteen years, and competent to be a witness herein.

2. Attached as Exhibit A are copies of the City’s motion to Judge Ramseyer, Sound Transit’s Response, the City’s Reply, and the Judge’s Order.

I hereby certify and declare under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct to the best of my knowledge.

EXECUTED at Seattle, Washington, this 26<sup>th</sup> day of February, 2021.



Patrick J. Schneider, WSBA #11957

**DECLARATION OF PATRICK J. SCHNEIDER - 1**

**FOSTER GARVEY PC  
1111 THIRD AVENUE, SUITE 3000  
SEATTLE, WASHINGTON 98101-3292  
PHONE (206) 447-4400 FAX (206) 447-9700**

# Exhibit A

The Honorable Judith H. Ramseyer  
Noted for: February 19, 2021  
Time: 2:45 P.M

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
FOR THE COUNTY OF KING

The Central Puget Sound Regional Transit Authority, a regional transit authority organized under Chapter 81.112 RCW,

Petitioner/Plaintiff,

v.

City of Mercer Island, a Code City,

Respondent/Defendant,

and

Peter and Ana Woo, a married couple, and Andrew Snethen, a natural person, and Carol Hancock, a natural person,

Additional Parties pursuant to RCW 36.70C.040.

No. 21-2-00474-8 SEA

CITY OF MERCER ISLAND'S  
MOTION TO DISMISS

I. INTRODUCTION

On January 11, 2021, Petitioner the Central Puget Sound Regional Transit Authority (“Sound Transit”) filed a Land Use Petition; Complaint For Writ of Mandamus, Declaratory Judgment and Injunction; and Complaint for Damages under Chapter 64.40 RCW (“Complaint”). Respondent City of Mercer Island (“City”), requests that Sound Transit’s Land Use Petition Act (“LUPA”) appeal in the Complaint be dismissed in its entirety because

1 Sound Transit failed to exhaust its administrative remedies, the case or controversy is not yet  
2 ripe for judicial adjudication, and right-of-way permits are expressly exempt from review  
3 under LUPA. The City also requests that the Court bifurcate and stay Sound Transit's  
4 damage claims in the Complaint until the administrative appeal process and any subsequent  
5 LUPA appeals are complete.

## 6 II. STATEMENT OF FACTS

7 The facts provided herein are only those relevant to this Motion. On December 22,  
8 2020, the City issued a Right-of-way ("ROW") Use Permit No. 2010-186 with Conditions of  
9 Approval in response to Sound Transit's application for same (the "ROW  
10 Permit Decision"). Exhibit A attached to Sound Transit's Complaint is the ROW  
11 Permit Decision comprised of both the Notification of Decision dated December 22, 2020  
12 (Complaint Ex. A pages 1-2) and the Conditions of Permit Approval (Complaint Ex.  
13 A remainder). The ROW Permit Decision's Conditions of Approval are also applicable  
14 to four permits ancillary to ROW Permit No. 2010-186 (clear and grade permits, a tree  
15 removal permit, and a stormwater permit). Complaint, Ex. B.

17 Sound Transit claims the City issued "seven individual permits for the Project." *Id.* at  
18 11, ¶ 40. Sound Transit identifies seven permits in paragraph 4 of the LUPA Petition that the  
19 City allegedly issued:

- 21 1) ROW Permit No. 2010-186,
- 22 2) Clearing and grade Permit No. 2012-153,
- 23 3) Clearing and Grade Permit No. 2012-154,
- 24 4) Stormwater Permit No. 2012-119,
- 25 5) Tree Removal Permit No. 2012-096,
- 26

- 6) Building permit, and
- 7) Fire Protection Permit.<sup>1</sup>

Paragraph 41 of the LUPA Petition further claims that the City did not issue or withdrew the issuance of the following permits:

- 8) Building permit for stormwater vault and retaining walls over four feet, and
- 9) Multiple tree permits.

### III. EVIDENCE RELIED UPON

The City of Mercer Island relies on the pleadings on file, and the Declarations of Patrick Yamashita and Kim Adams Pratt in Support of the City of Mercer Island’s Motion to Dismiss, filed herewith.

### IV. ISSUES PRESENTED

- A. Should Sound Transit’s LUPA Petition be dismissed for lack of standing because Sound Transit failed to exhaust its administrative remedies? Yes.
- B. Should Sound Transit’s LUPA Petition be dismissed because Sound Transit’s claims are not yet ripe? Yes.
- C. Should Sound Transit’s LUPA Petition be dismissed because Sound Transit has appealed a ROW Use Permit not subject to LUPA review? Yes.
- D. Should Sound Transit’s damage claims be bifurcated and stayed pending exhaustion of administrative remedies and a determination on any subsequent LUPA claims? Yes.

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<sup>1</sup> The City does not issue “Fire Protection Permits,” as this is not a permit type authorized by the Mercer Island City Code, discussed further *infra* at Section V.B.

V. ARGUMENT

LUPA is the exclusive means of obtaining judicial review of land use decisions. *Community Treasures v. San Juan County*, 192 Wn.2d 47, 51, 427 P.3d 647 (2018) (citing RCW 36.70C.030(1)). “A land use decision means a final determination by a local jurisdiction’s body or officer with the highest level of authority to make the determination, including those with authority to hear appeals . . . .” RCW 36.70C.020(2).

A. Sound Transit does not have standing to file this LUPA petition because it has not exhausted its administrative remedies.

LUPA expressly provides that to have standing to file a land use petition, a petitioner must have exhausted their administrative remedies:

Standing to bring a land use petition under this chapter is limited to the following persons:

...  
(2) Another person aggrieved or adversely affected by the land use decision, or who would be aggrieved or adversely affected by a reversal or modification of the land use decision. A person is aggrieved or adversely affected within the meaning of this section only when all of the following conditions are present:

...  
(d) The petitioner has exhausted his or her administrative remedies to the extent required by law.

RCW 36.70C.060(2)(d), *Community Treasures*, 192 Wn.2d at 51.

As expressly stated in the statute, a petitioner must first exhaust administrative remedies, not simultaneously pursue its administrative remedies with a LUPA appeal. This strict administrative exhaustion requirement furthers the LUPA purposes of:

“(1) discouraging the frequent and deliberate flouting of administrative processes; (2) protecting agency autonomy by allowing an agency the first opportunity to apply its expertise, exercise its discretion, and correct its errors; (3) aiding judicial review by promoting the development of facts during the administrative proceeding; and (4) promoting judicial economy by reducing duplication, and perhaps even obviating judicial involvement.”

1 *Klineburger v. King County Department of Development and Environmental Services*, 189  
2 Wn.App 153, 169, 356 P.3d 223 (2015), quoting *IGI Res., Inc. v. City of Pasco*, 180 Wn.App.  
3 638, 642, 325 P.3d 275 (2014) (internal quotation marks omitted) (quoting *King County v.*  
4 *Wash. State Boundary Review Bd.*, 122 Wn.2d 648, 669, 860 P.2d 1024 (1993)). There are  
5 no equitable exceptions to LUPA’s requirement of exhaustion of administrative remedies.  
6 *Durland v. San Juan County*, 182 Wn.2d 55, 66-67, 340 P.3d 191 (2014).

7         Sound Transit asserts that some of the permits allegedly issued by the City are  
8 administratively appealable and some are not.<sup>2</sup> Complaint at 3. Sound Transit acknowledges  
9 that it has filed a “separate administrative appeal to the Hearing Examiner,” and that this  
10 “judicial appeal challenges those decisions not appealable to the City Hearing Examiner.” *Id.*  
11 Sound Transit does not, however, state which permits it is appealing in its LUPA Petition  
12 versus its administrative appeal with the City Hearing Examiner because Sound Transit  
13 claims it is not able to discern “which permits and approvals the Hearing examiner has  
14 jurisdiction over.” *Id.* at 6, ¶ 6.

15  
16         This City disagrees with Sound Transit’s assertion that the permits listed as 6) through  
17 9) in Section II. *supra* were issued, denied, or withdrawn by the City. Assuming arguendo  
18 that the City issued a final decision on all nine of the alleged permits, the Mercer Island City  
19 Code (“MICC”) provides an administrative appeal for each of the nine alleged permits  
20 (except for those that do not exist, discussed *infra* in Section B as the “Fictional Permits”).  
21 The following chart (“Permit Chart”) includes the permit title included in the LUPA Petition,  
22 the MICC authority for the permit, and the administrative appeal provision within the MICC  
23  
24

25  
26 <sup>2</sup> The City uses the term “allegedly” because as discussed *infra*, many of the permits that Sound Transit may be  
alleging that the City issued do not exist in the Mercer Island City Code.

for same.

<b>Permit</b>	<b>MICC permit authority</b>	<b>MICC administrative appeal</b>
1. ROW Use Permit No. 2010-186	MICC 19.09.060(A) Permits.  1. It is unlawful for anyone to excavate, alter, ... or place any structure upon any public right-of-way without first obtaining a right-of-way permit from the city ...	MICC 19.15.030 Table A. Land Use Review Type & Table B. Review Processing Procedures  Right-of-way permit: Type I Land Use Review Type, Appeal Authority: Hearing Examiner
2. Clear and Grade Permit No. 2012-153	MICC 17.14.010, Section 105.1.2 Grading permit required.  No person shall do any grading without first obtaining a grading permit from the building official.	MICC 17.14.020(A) Appeals to Hearing Examiner.  Appeals of orders, decisions and determinations of building or fire code official issued pursuant to MICC Title 15 or this Title that do not constitute enforcement actions shall be heard and decided by the city of Mercer Island hearing examiner ...
3. Clear and Grade Permit No. 2012-154	See 2. above	See 2. above
4. Stormwater Permit No. 2012-119	MICC 15.09.080(B).  Prior to the commencement of any construction on a project or "land disturbing activity," the applicant shall obtain a storm water permit from the city.	MICC 15.09.090 Appeal Process.  Any person aggrieved by the decision of the city manager or his/her designee in the administering this chapter may appeal the decision to the hearing examiner.
5. Tree Removal Permit No. 2012-096	MICC 19.10.020(B). Permit required.  A permit approval is required prior to removing any tree, except for trees that are exempt pursuant to MICC 19.10.030.	MICC 19.10.150 Appeals.  Any person ... aggrieved by any action or decision of city staff made pursuant to any section of this chapter may appeal such action or decision in accordance with the appeal process set forth in Chapter 19.15 MICC.





1 2 3 4 5	6. Building Permit	MICC 17.14.010, Section 105.1 Required.  Any owner or authorized agent who intends to construct ... a building or structure ... shall first make application to the building official and obtain the required permit.	See 2. above
6	7. Fire Protection Permit	Not a recognized permit under the MICC	N/A
7 8	8. Building permit - stormwater vault and retaining walls over four feet	See 6. above	See 6. above
9 10	9. Multiple Tree Permits	See 5. above	See 5. above

11 Attached to this Motion as Exhibit A is the full text of the MICC sections cited in the Permit  
12 Chart.

13  
14 Under LUPA, Sound Transit must exhaust its administrative remedies before it files  
15 a LUPA Petition. MICC 19.09.060(A), *Permits*, expressly requires ROW use permits before  
16 any work is performed in the public right-of-way. Motion Ex. A at 2. MICC 19.15.030  
17 includes two tables: Table A provides the *Land Use Review Type* and Table B provides the  
18 *Review Process Procedures*. Motion Ex. A at 3-6. Tables A-B specifically list a ROW use  
19 permit as a Type I permit appealable to the Hearing Examiner. *Id.*

20 Chapter 17.14 MICC is the *Construction Administration Code*, and MICC 17.14.010,  
21 §105.1.2 is the requirement for clear and grade permits:

22  
23 105.1.2 Grading permit required. No person shall do any grading without first  
24 obtaining a grading permit from the building official.

1 Any appeal of the building official’s decision regarding Clear and Grade Permit No. 2012-  
2 153 and No. 2012-154 is administratively appealable to the City’s Hearing Examiner  
3 pursuant to MICC 17.14.020(A), *Appeals to Hearing Examiner*. Motion Ex. A at 2.

4 Chapter 15.09 MICC, *Storm Water Management Program*, includes MICC  
5 15.09.080, *Administration*, which provides in part:

6 B. Prior to the commencement of any construction on a project or “land  
7 disturbing activity,” the applicant shall obtain a storm water permit from the  
8 city.

9 The corresponding administrative appeal is in MICC 15.09.090, *Appeals Process*, which  
10 provides for an appeal to the City’s Hearing examiner of Stormwater Permit No. 2012-119.  
11 Motion Ex. A at 1.

12 Chapter 19.10 is titled *Trees* and includes MICC 19.10.020, *Applicability and permit*  
13 *required*, which provides that “[a] permit approval is required prior to removing any tree.”  
14 Motion Ex. A at 2. Administrative appeals to the City’s Hearing Examiner are provided for  
15 in MICC 19.10.150, *Appeals*, by reference to the same MICC 19.15.030 Tables A-B listing  
16 ROW use permits. In the Tables, “Tree removal permit” is identified as a Type I permit and  
17 subject to an administrative appeal to the Hearing Examiner. Motion Ex. A at 2.  
18

19 The permits listed as 6) and 8) are both building permits. Any person intending to  
20 construct a building or structure must obtain a building permit from the City’s building  
21 official. MICC 17.14.010, §105.1.2. Motion Ex. A at 1. Any appeal of the building official’s  
22 decision is administratively appealable to the City’s Hearing Examiner per MICC  
23 17.14.020A. Motion Ex. A at 2.

24 The permit listed as 7) is described as a Fire Protection Permit. As explained in the  
25 Declaration of Patrick Yamashita, the City’s Deputy Public Works Director and City  
26

1 Engineer, the MICC does not authorize the City to issue Fire Protection Permits. Declaration  
2 of Patrick Yamashita in Support of City’s Motion to Dismiss (“Yamashita Decl.) at 4, ¶ 11.  
3 If Sound Transit were to assert that this is a permit issued pursuant to the International Fire  
4 Code adopted by the City, the administrative appeal provision would then be MICC  
5 17.14.020(A), *Appeals to Hearing Examiner*, which provides that decisions by the fire code  
6 official are appealable to the Hearing Examiner. Motion Ex. A at 2.

7           Sound Transit categorizes the permit listed as 9) above as “multiple tree permits.”  
8 These tree permits would be appealable to the City Hearing Examiner by the same MICC  
9 provisions as Tree Removal Permit No. 2012-096 described above.  
10

11           Accordingly, all of the alleged permits appealed by Sound Transit, with the exception  
12 of the Fire Protection Permit, are appealable to the City Hearing Examiner pursuant to the  
13 plain language of the MICC.<sup>3</sup> Sound Transit has appealed the ROW Use Permit to the  
14 Hearing Examiner, and that appeal is currently in progress, with a hearing scheduled for  
15 March 2021. Declaration of Kim Adams Pratt at 1. Accordingly, Sound Transit’s LUPA  
16 appeal should be dismissed because Sound Transit has yet to exhaust its administrative  
17 remedies. Pursuant to RCW 36.70C.060, Sound Transit lacks standing to bring this LUPA  
18 appeal.  
19

20       B.    Sound Transit’s LUPA petition is not yet ripe for judicial review.

21           1. *The City’s final decision maker has not yet ruled on Sound Transit’s administrative*  
22 *appeal.*

23  
24  
25 \_\_\_\_\_  
26 <sup>3</sup> Administrative appeals under the MICC are limited to review of the MICC and compliance with same. The City acknowledges that administrative appeals do not encompass the interpretation or enforcement of contract terms existing outside of the MICC.

1 Because Sound Transit did not utilize available administrative remedies (and to the  
2 extent it has, such remedies are in progress), Sound Transit’s claims are unripe for judicial  
3 review. Division I of the Washington Court of Appeals has stated that “a claim is ripe for  
4 judicial determination if the issues raised are primarily legal and do not require further  
5 factual development, and the challenged action is final.”<sup>4</sup> LUPA incorporates the ripeness  
6 doctrine into the definition of “land use decision.” RCW 36.70C.020(2) provides “‘land use  
7 decision’ means a final determination by a local jurisdiction’s body or officer with the highest  
8 level of authority to make the determination, *including those with authority to hear*  
9 *appeals...*” (emphasis supplied). For example, in a LUPA context, a challenge to potential  
10 park impact fees, not actually imposed, was not ripe for judicial review.<sup>5</sup> In an unpublished  
11 opinion, Division I of the Washington Court of Appeals similarly found that a challenge to  
12 an unexecuted latecomer agreement with as yet uncalculated assessments was not ripe for  
13 judicial review.<sup>6</sup>

15 Sound Transit’s LUPA Petition does not appeal the final determination made by the  
16 City’s officer with the highest level of authority to make the determination - the City’s  
17 Hearings Examiner. The Hearing Examiner will not make any decisions until after the  
18 administrative hearing scheduled for March.

19  
20 *2. Sound Transit may not appeal, in LUPA or otherwise, permits that do not exist in*  
21 *the MICC.*

22  
23  
24 <sup>4</sup> *Grandmaster Sheng-Yen Lu v. King Cty.*, 110 Wn. App. 92, 106, 38 P.3d 1040 (2002), quoting *Neighbors and*  
25 *Friends of Viretta Park v. Miller*, 87 Wn. App. 361, 383, 940 P.2d 286 (1987), review denied, 135 Wn.2d 1009,  
960 P.2d 937 (1998).

26 <sup>5</sup> *Isla Verde Int’l Holdings, Inc. v. City of Camas*, 146 Wn.2d 740, 770, 49 P.3d 867 (2002), abrogated on other  
grounds by *Yim v. The City of Seattle*, 451 P.3d 694 (2019).

<sup>6</sup> *Vern F. Sims Family Ltd. P’ship I v. City of Burlington*, 73608-6-I (2016).



1 Sound Transit may argue that the seven permits it references in its LUPA Petition at  
2 page 11, paragraph 40, are listed in the Notice of Decision review discipline chart: 1)  
3 Building, 2) Right of Way, 3) Engineering, 4) Landscape, Trees, Irrigation; 5) Street  
4 Engineering; 6) Tree; and 7) Fire Protection. However, as explained in the Declaration of  
5 Patrick Yamashita, this is not a list of permits the City granted to Sound Transit. Rather these  
6 are a list of the review disciplines at the City and the status of their analysis within the ROW  
7 Use Permit application. Yamashita Decl. at 2, ¶¶ 5-6. “Review disciplines are the groups or  
8 individual City staff members who review the permit application for conformance with  
9 applicable codes, standards, and regulations.” *Id.* ¶ 5. There are explanatory bullets  
10 explaining that “APPROVED” does not mean a permit was granted to Sound Transit. Instead,  
11 “APPROVED: indicates there are no corrections from that review discipline.” *Id.* at 3, ¶ 6.  
12

13 Mr. Yamashita explains that the Notice of Decision shows the results of the City’s  
14 “Third Review” round, meaning the third time the review disciplines had reviewed the permit  
15 application documents. Two prior rounds of review results are attached to Mr. Yamashita’s  
16 declaration. *Id.*, ¶ 7. The results of the First Round show that all of the review disciplines  
17 were “WCI (Waiting for Customer Information): the comments from that review discipline  
18 are included with the ePlan drawing file noted above.” *Id.* at Attachment 1. In the Second  
19 Round, only two review disciplines were marked WCI and in the Third Round, no additional  
20 information was needed and the City issued the Notification of Decision. *Id.* at Attachment 2  
21 and Complaint Ex. A at 1, respectively.  
22

23 The list of review disciplines also does not correspond to permits authorized by the  
24 MICC. Yamashita Decl. at 2, ¶7. Yes, “Building” permits, “Right of Way” permits, and  
25 “Tree” permits do coincidentally correspond to the names of permits in the MICC, but not the  
26

1 remainder of the list. As Mr. Yamashita explains, the MICC does not include or require  
2 “Engineering” permits; “Landscaping, Trees, Irrigation” permits; “Street Engineering”  
3 permits or “Fire Protection” permits (collectively, the “Fictional Permits”). *Id.* at 4, ¶¶ 7 –  
4 11. Needless to say, the Notification of Decision did not include decisions made by the City  
5 on the Fictional Permits.

6 If Sound Transit asserts that the City issued decisions on the Fictional Permits, as in  
7 *Isla Verde Int’l Holdings* and in *Vern F. Sims Family Ltd. P’ship I*, Sound Transit’s complaint  
8 relates to an action the City has not taken. As in those cases, this Court should hold that Sound  
9 Transit’s LUPA claims are not ripe for review in this proceeding.

10  
11 C. LUPA does not apply to ROW Use Permit No. 2010-186 because ROW use permits  
12 are not reviewable under LUPA.

13 Sound Transit’s appeal of ROW Use Permit No. 2010-186, as it applies to public  
14 ROW, is not subject to review under LUPA because the statute expressly excludes right-of-  
15 way use permits from LUPA review.

16 LUPA governs the judicial review of “land use decisions.” RCW 36.70C.010, et. seq.  
17 There are three categories of “land use decisions” subject to review under LUPA:

18 (2) “Land use decision” means a final determination by a local  
19 jurisdiction's body or officer with the highest level of authority to make the  
20 determination, including those with authority to hear appeals, on:

21 (a) An application for a project permit or other governmental approval  
22 required by law before real property may be improved, developed, modified,  
23 sold, transferred, or used, but ***excluding applications for permits or approvals***  
***to use, vacate, or transfer streets, parks, and similar types of public***  
***property***; excluding applications for legislative approvals such as area-wide  
24 rezones and annexations; and excluding applications for business licenses;

25 (b) An interpretative or declaratory decision regarding the application  
26 to a specific property of zoning or other ordinances or rules regulating the  
improvement, development, modification, maintenance, or use of real  
property; and

(c) The enforcement by a local jurisdiction of ordinances regulating  
the improvement, development, modification, maintenance, or use of real

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property. However, when a local jurisdiction is required by law to enforce the ordinances in a court of limited jurisdiction, a petition may not be brought under this chapter.

RCW 36.70C.020(2)(emphasis supplied).

Subsection (2)(a) specifically excludes applications to use public property, including public streets. Sound Transit is applying to use public property—specifically, 77<sup>th</sup> Avenue SE and North Mercer Way, which are both City owned streets. Complaint at 9, ¶ 25. Under the plain language of LUPA, ROW Use Permit No. 2010-186, as an application to use City owned right-of-way, is not reviewable under LUPA.

The Court of Appeals, Division One, explained that the exemption in RCW 36.70C.020(2)(a) “evinces a legislative intent to treat the decisions a city makes as an owner of public property more deferentially than decisions a city makes as a regulator of private property.” *Wescot Corp. v. City of Des Moines*, 120 Wn.App. 764, 769, 86 P.3d 230 (2004). In 2020, the same Court expanded its reading of subsection (2)(a) and found that even cities’ water availability certification processes are not subject to LUPA review. Such water availability certification required “an application for approval to use public property—the water distribution infrastructure and the water to be purchased [were] publicly owned” and therefore, such decision was not reviewable under LUPA. *Pioneer Square Hotel Co. v. The City of Seattle*, 461 P.3d 370, 373-74 (2020). RCW 36.70C.020(2) “[s]ubsection (a) exists to recognize and give effect to the distinction between when a government acts as a regulator of private land and when a government acts as a property owner.” *Id.*

ROW Use Permit No. 2010-186 is just such an example of the City acting as an owner of public property. MICC 19.09.060(A) requires a right-of-way use permit of anyone wishing

1 to “excavate, alter, tunnel under, obstruct, or place any structure upon any public right-of-  
2 way.” Therefore, this Court should dismiss the ROW Use Permit No. 2010-186 LUPA  
3 claims as they relate to work in the public right-of way.

4 D. Sound Transit’s damage claims should be bifurcated and stayed pending exhaustion  
5 of administrative remedies and a determination on any subsequent LUPA claims.

6 At this time, the City is not asking for dispositive relief regarding the remaining  
7 causes of action in the Complaint. The City requests that the Court bifurcate Sound Transit’s  
8 damage claim and stay such claim pending exhaustion of Sound Transit’s administrative  
9 remedies and any subsequent LUPA proceeding. Pursuant to RCW 36.70C.030(1)(c), “[i]f  
10 one or more claims for damages or compensation are set forth in the same complaint with a  
11 land use petition brought under this chapter, the claims are not subject to the procedures and  
12 standards, including deadlines, provided in this chapter for review of the petition.” LUPA  
13 mandates expedited review but does not govern Sound Transit’s remaining claims.

14 Sound Transit’s damage claims are expressly not subject to LUPA and the expedited  
15 schedule associated with LUPA proceedings.<sup>7</sup> These claims arise outside of the purview of  
16 LUPA and will be reviewed separately under different procedural and legal standards.<sup>8</sup> The  
17 Washington Court of Appeals, Division I, explained in *Shaw v. City of Des Moines* that the  
18 computer-generated case schedule set in LUPA proceedings is not intended to apply to the  
19 trial of damage claims that may accompany land use petitions because such schedule makes  
20 no provision for trial of accompanying damages claims.<sup>9</sup> The *Shaw* court noted “by way of  
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23  
24 <sup>7</sup> RCW 36.70C.030(1)(c).

25 <sup>8</sup> See *Asche v. Bloomquist*, 132 Wn. App. 784, 800, 133 P.3d 475, 483 (2006), as amended (Apr. 4, 2006) (“And  
26 Washington recognizes that a plaintiff may elect to bring a land use petition to challenge a land use decision  
and a claim for damages. [internal citation omitted] When that occurs, the court will consider the claims  
separately.”).

<sup>9</sup> 109 Wn. App. 896, 901–02 (2002).



1 example, the case schedule for a land use appeal does not contain a discovery cut-off date;  
2 neither does it contain a deadline for the joint status report that is required 120 days before  
3 civil trials under King County local rules.”<sup>10</sup> The *Shaw* court concluded “[t]his makes perfect  
4 sense when one considers that a land use appeal is just that; it is an appeal, not a trial.”<sup>11</sup>

5 Sound Transit, like the plaintiff in *Shaw*, claims damages in its Complaint.<sup>12</sup>  
6 However, as in *Shaw*, the current case schedule makes no provision for trial of Petitioner’s  
7 accompanying Writ, Declaratory Judgment, and damages claims. Therefore, pursuant to the  
8 LUPA statute and the discussion in *Shaw*, the Court should set a separate trial schedule for  
9 Petitioner’s damage claims.

10  
11 Further, the Court should issue a stay of Sound Transit’s damage claims. In LUPA  
12 cases where damages are also claimed, the LUPA proceeding may be dispositive of any  
13 joined damage claims. “If the petitioner loses the LUPA appeal, the damages case is moot  
14 and the matter is over. However, if the plaintiff prevails at the LUPA hearing, the remaining  
15 compensation claim must be allowed to proceed to trial.”<sup>13</sup>

16  
17 Judicial economy is not served by having both the administrative appeals and damage  
18 claim proceed at the same time. After resolving the administrative appeals, and any  
19 subsequent LUPA claims, the Court can then resolve the damage claims if Petitioner prevails.  
20 The Court should stay the damage claim until after resolution of the administrative appeals  
21 and any subsequent LUPA petitions on same.

## 22 VI. CONCLUSION

23  
24 <sup>10</sup> *Id.* at 902.

25 <sup>11</sup> *Id.*

26 <sup>12</sup> Complaint at 14.

<sup>13</sup> *Shaw* at 901-902. See also *Mercer Island Citizens for Fair Process v. Tent City 4*, 156 Wn. App. 393, 405, 232 P.3d 1163, 1169 (2010) (“claims for damages based on a LUPA claim must be dismissed if the LUPA claim fails.”).

1 This LUPA Petition should be dismissed in its entirety because Sound Transit has  
2 filed it prior to exhausting its administrative remedies, its claims on the Fictional Permits are  
3 not final decisions ripe for judicial review, and LUPA excludes from its review ROW Use  
4 Permit No. 2010-186. The City also respectfully requests the Court stay the damage claims  
5 until resolution of the administrative appeals and any subsequent LUPA proceeding.

6  
7 DATED this 5<sup>th</sup> day of February, 2021.

8 MADRONA LAW GROUP, PLLC

9 By: /s/ Kim Adams Pratt  
10 Kim Adams Pratt, WSBA No. 19798  
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**CITY OF MERCER ISLAND**  
**OFFICE OF THE CITY ATTORNEY**

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*Attorneys for the City of Mercer Island*

We certify that this Motion contains 4197 words, in compliance with Local Civil Rules.

**DECLARATION OF SERVICE**

I, Adrienne Whitmore, declare and state:

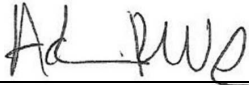
1. I am a citizen of the State of Washington, over the age of eighteen years, not a party to this action, and competent to be a witness herein.

2. On the 5th day of February, 2021, I served a true copy of the foregoing City of Mercer Island’s Motion to Dismiss, with exhibit; along with Note for Motion; Declaration of Kim Adams Pratt in Support of Motion to Dismiss, with attachments; Declaration of Patrick Yamashita in Support of Motion to Dismiss, with attachments; and Proposed Order Granting City of Mercer Island’s Motion to Dismiss 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: <a href="mailto:stephen.sheehy@soundtransit.org">stephen.sheehy@soundtransit.org</a> <input checked="" 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: <a href="mailto:pat.schneider@foster.com">pat.schneider@foster.com</a> <a href="mailto:steve.gillespie@foster.com">steve.gillespie@foster.com</a> <a href="mailto:michelle.rusk@foster.com">michelle.rusk@foster.com</a> <input checked="" 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 5<sup>th</sup> day of February, 2021, at Renton, Washington.

  
 \_\_\_\_\_  
 Adrienne Whitmore

**EXHIBIT A**

EXCERPTS MERCER ISLAND CITY CODE

<https://mercerisland.municipal.codes/MICC>

**MICC 15.09.080 Administration**

A. The city manager or his/her designee shall have the authority to develop and implement administrative procedures to administer and enforce this chapter and the program. The city manager or his/her designee shall approve, conditionally approve or deny an application for activities regulated by this chapter.

B. Prior to the commencement of any construction on a project or “land disturbing activity,” the applicant shall obtain a storm water permit from the city. A bond may be required by the city engineer in an amount sufficient to cover cost of construction of the system in accordance with approved plans and anticipated city inspection. Upon completion of the work inspection and approval of the storm water facilities by the city, 70 percent of the bond shall be released. At the one-year inspection, the remaining 30 percent shall be released. A two-year bond may be required for vegetated storm water facilities.

...

**MICC 15.09.090 Appeal Process.**

Any person aggrieved by the decision of the city manager or his/her designee in administering this chapter may appeal the decision to the hearing examiner. Appeals shall follow the process described in MICC 19.15.130.

**MICC 17.14.010 Adoption**

...

**SECTION 105 PERMITS**

105.1 Required. Any owner or authorized agent who intends to construct, enlarge, alter, repair, move, demolish, or change the occupancy of a building or structure, or to erect, install, enlarge, alter, repair, remove, convert or replace any electrical, gas, mechanical or plumbing system, the installation of which is regulated by the construction codes and the Construction Administrative Code, or to cause any such work to be done, shall first make application to the building official and obtain the required permit.

...

105.1.2 Grading permit required. No person shall do any grading without first obtaining a grading permit from the building official.

**MICC 17.14.020 Appeals**

A. Appeals to Hearing Examiner.

1. Appeals of orders, decisions and determinations of the building or fire code official issued pursuant to MICC Title 15 or this title that do not constitute enforcement actions shall be heard and decided by the city of Mercer Island hearing examiner pursuant to this section and Chapter 3.40 MICC.
2. To the extent the codes adopted by reference in this title refer to a “board of appeals” or a “building board of appeals,” those references shall be deemed to refer to the city of Mercer Island hearing examiner.

**MICC 19.09.060 Right-of-Way use.**

A. Permits.

1. It is unlawful for anyone to excavate, alter, tunnel under, obstruct, or place any structure upon any public right-of-way without first obtaining a right-of-way permit from the city, or to fail to comply with any conditions attached to such right-of-way permit.

...

**MICC 19.10.020. Applicability and permit required.**

A. *Applicability.* The provisions of this chapter shall apply to all property and public rights-of-way in the city.

B. *Permit Required.* A permit approval is required prior to removing any tree, except for trees that are exempt pursuant to MICC 19.10.030.

...

**MICC 19.10.150. Appeals.**

Any person or persons aggrieved by any action or decision of city staff made pursuant to any section of this chapter may appeal such action or decision in accordance with the appeal procedure set forth in Chapter 19.15 MICC.

MICC 19.15.030

...

**Table A. Land Use Review Type**

Type I	Type II	Type III	Type IV
<ul style="list-style-type: none"> <li>• Home business</li> <li>• Seasonal development limitation waiver</li> <li>• Nonmajor single-family dwelling building permits</li> <li>• <b>Tree removal permit</b></li> <li>• <b>Right-of-way permit</b></li> <li>• Special needs group housing safety determination</li> <li>• Tenant improvement/change of use</li> <li>• Shoreline exemption<sup>1</sup></li> <li>• Critical area review 1</li> <li>• Final short plat</li> <li>• Temporary commerce on public property</li> <li>• site development permits</li> <li>• Transportation concurrency certificate</li> </ul>	<ul style="list-style-type: none"> <li>• Modified wireless communication facilities (6409 per 47 CFR 1.40001)</li> <li>• Lot line revision</li> <li>• Setback deviations</li> <li>• Final plat<sup>2,3</sup></li> <li>• Code official design review</li> <li>• Accessory dwelling unit</li> <li>• Parking modification<sup>7</sup> (reviewed by city Engineer)</li> </ul>	<ul style="list-style-type: none"> <li>• New and modified wireless (non-6409) eligible facility</li> <li>• SEPA threshold determination</li> <li>• Critical area review 2</li> <li>• Public agency exception</li> <li>• Temporary encampment<sup>4</sup></li> <li>• Short plat alteration and vacations</li> <li>• Preliminary short plat</li> <li>• Development Code interpretations</li> </ul>	<ul style="list-style-type: none"> <li>• Preliminary long plat approval</li> <li>• Conditional use permit</li> <li>• Variance</li> <li>• Critical areas reasonable use exception</li> <li>• Long plat alteration and vacations</li> <li>• Parking modifications<sup>7</sup> (reviewed by design commission)</li> <li>• Variance from Short plat acreage Limitations</li> <li>• Wireless communication facility height variance</li> <li>• Planned unit development</li> </ul>

**Table A. Land Use Review Type**

Type I	Type II	Type III	Type IV
		<ul style="list-style-type: none"> <li>• Major single-family dwelling building permit<sup>5</sup></li> <li>• Shoreline Substantial Development permit<sup>1</sup></li> <li>• Shoreline revision (substantial development)<sup>1</sup></li> </ul>	<ul style="list-style-type: none"> <li>• Design commission design review</li> <li>• Permanent commerce on public property</li> <li>• Shoreline conditional use permit (SCUP)<sup>6</sup></li> <li>• Shoreline variance<sup>6</sup></li> <li>• Shoreline revision (variance and SCUP)</li> </ul>

1 Appeal will be heard by the Shorelines Hearings Board.

2 Decision is made by city council after discussion at a public meeting.

3 A notice of decision will be issued for a final long plat.

4 A public meeting is required.

5 Major single-family dwelling building permits are subject only to the notice of application process. A notice of decision will be provided to parties of record.

6 Hearing examiner will forward a recommendation to the Washington State Department of Ecology for Ecology's decision.

7 Parking modifications are issued pursuant to the provisions of MICC 19.11.130.



**Table B. Review Processing Procedures**

	<b>Type I</b>	<b>Type II</b>	<b>Type III</b>	<b>Type IV</b>
	No Notice of Application No Notice of Decision Code Official	Public Notification No Notice of Application No Notice of Decision Code Official	Notice of Application Notice of Decision Code Official	Notice of Application Public Hearing Notice of Decision Hearing Examiner/Design Commission
Preapplication meeting required	No	No	Yes	Yes
Letter of completion (within 28 days)	No	No	Yes	Yes
Public Notification	No	Yes	No	No
Notice of Application (mailing and posting)	No	No	Yes	Yes
Public Comment Period	None	None	30 days	30 days
Public Hearing (open record pre-decision)	No	No	No	Yes

**Table B. Review Processing Procedures**

	<b>Type I</b>	<b>Type II</b>	<b>Type III</b>	<b>Type IV</b>
Notice of Decision	Code Official	Code Official	Code Official	Hearing Examiner <sup>2</sup> or Design Commission
Notice of Decision	No	No	Yes	Yes
<b>Appeal Authority</b>	<b>Hearing Examiner<sup>1</sup></b>	Hearing Examiner or Design Commission (code official design review)	Hearing Examiner	Superior Court or Shoreline Hearings Board (shoreline permits)

1 Appeals of final short plat approvals shall be to superior court. Appeals of shoreline exemptions shall be to the shoreline hearings board.

2 The hearing examiner will provide a recommendation to Ecology for decisions on shoreline conditional use permits and shoreline variances.

(emphasis added)

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SUPERIOR COURT OF WASHINGTON IN AND FOR KING COUNTY

The Central Puget Sound Regional Transit Authority, a regional transit authority organized under Chapter 81.112 RCW,

Petitioner/Plaintiff,

v.

The City of Mercer Island, a Code City,

Respondent/Defendant,

and

Peter and Ana Woo, a married couple, and Andrew Snethen, a natural person, and Carol Hancock, a natural person,

Additional Parties pursuant to RCW 36.70C.040.

No. 21-2-00474-8 SEA

SOUND TRANSIT’S RESPONSE TO CITY OF MERCER ISLAND’S MOTION TO DISMISS

**I. INTRODUCTION**

Sound Transit opposes dismissal of its LUPA petition because the petition raises important issues that are properly before this Court at this time: (1) the City’s decision *not* to approve a building permit for work on two residential lots even though the City’s building code requires a building permit for this work; and (2) the City’s related decision to regulate construction on these residential lots by means of a right-of-way (“ROW”) permit, even though

SOUND TRANSIT’S RESPONSE TO CITY OF MERCER ISLAND’S MOTION TO DISMISS - 1

FOSTER GARVEY PC  
1111 THIRD AVENUE, SUITE 3000  
SEATTLE, WASHINGTON 98101-3292  
PHONE (206) 447-4400 FAX (206) 447-9700

1 the City's code does not authorize regulation of non-right-of-way by means of a ROW permit.  
2 These conditions are not based on any authority in the City codes over which the Hearing  
3 Examiner has jurisdiction, and they are ultra vires acts that knowingly violate state statutes that  
4 protect regional transportation systems and essential public facilities from local efforts to thwart  
5 regional interests.

6 The City code does not delegate to the City's Hearing Examiner (who is not an attorney)  
7 the jurisdiction to decide such intentional violations of state law, to review a decision *not* to issue  
8 a building permit, or to review a decision to disregard the City's code rather than apply the code.  
9 The Hearing Examiner lacks jurisdiction over these decisions, they meet LUPA's definition of  
10 "land use decision," RCW 36.70C.020(2), and are amenable to immediate judicial appeal.

11 As explained below in the Conclusion, Sound Transit will continue with its  
12 administrative appeal before the Hearing Examiner, but the City's motion to dismiss the LUPA  
13 petition should be denied for the reasons explained below.

## 14 **II. STATEMENT OF FACTS**

15 Sound Transit is finishing construction of the regional East Link Light Rail System,  
16 which is an "essential public facility" as defined in the Growth Management Act, Chapter  
17 36.70A RCW, and bus/rail integration is an essential element of this regional system. King  
18 County Metro buses from east King County that now travel into downtown Seattle will instead  
19 drop-off and pick-up passengers at light rail stations, including the Mercer Island Station, and  
20 then return to east King County, thereby providing more reliable transit service into Seattle and  
21 creating more bus capacity to serve the region. These background facts are described in the  
22 Introduction and Concise Statement of the Facts to Sound Transit's LUPA petition, and these  
23 facts are verified in the Declaration of Jemae Hoffman submitted in support of this Response.

24 In order for bus/rail integration to happen on Mercer Island, there must be bus stops and  
25 bus layover areas near the Light Rail Station. Since 2018, King County Metro has explained its  
26 minimal operational requirements to the City: these requirements, and the City's knowledge of

1 them, are summarized in the Declaration of Jemae Hoffman. In the decision at issue in this  
2 appeal, the City is refusing to approve construction of the bus layover area on the north side of  
3 North Mercer Way that the City knows Metro requires for its operations, and is thereby  
4 attempting to stop bus/rail integration from happening on Mercer Island.

5 Sound Transit's construction of the infrastructure needed to meet Metro's operational  
6 needs and thereby enable bus/rail integration is referred to as the Mercer Island Transit  
7 Interchange ("MITI") Project. Sound Transit worked with the City for a year to prepare and  
8 submit the applications that are needed to build this MITI Project, as described in the Declaration  
9 of Matthew Below. Construction of the MITI Project requires construction on two residential  
10 lots abutting the north side of North Mercer Way as well as within existing City right-of-way: the  
11 required construction on these residential lots includes a portion of the new traffic roundabout,  
12 new sidewalks, retaining walls, and a stormwater vault.

13 City staff acknowledged for the better part of a year that Sound Transit would need a  
14 building permit for the retaining walls and stormwater vault on the residential lots, and would  
15 need a ROW permit for work within the existing right-of-way. Sound Transit applied for these  
16 permits as directed by the City, but when the City issued its decision the City: (1) imposed  
17 conditions on the ROW permit that prohibit construction of the bus layover area required for  
18 Metro's operational needs (2) refused to issue the building permit that its code requires; (3)  
19 imposed conditions on the ROW permit that purport to regulate construction on the residential  
20 lots outside the right-of-way; and (4) imposed a condition on the ROW permit that requires  
21 Sound Transit to convey these two residential lots to the City, on terms acceptable to the City,  
22 before Sound Transit can begin construction, which is scheduled to happen in April or May of  
23 this year.

24 The Hearing Examiner has scheduled the hearing on Sound Transit's administrative  
25 appeal to begin on March 16 and to conclude on or before March 24. The City code at MICC  
26 3.40.100 requires him to issue his decision within 14 days of the conclusion of the hearing, or by

1 April 7. His decision then will be subject to a LUPA appeal within 21-days, and if an appeal is  
2 filed, the case schedule issued by the Court will likely schedule the hearing on the appeal  
3 between five and six months later (as happened in this LUPA appeal), which will be late  
4 September or October.

### 5 **III. STATEMENT OF ISSUES**

6 Should this Court retain jurisdiction over Sound Transit's LUPA petition (in addition to  
7 Sound Transit's other causes of action) because the LUPA petition challenges the City's  
8 decisions that are not appealable to the Hearing Examiner both because local law does not grant  
9 jurisdiction over the decisions and because the decisions are ultra vires to begin with, and  
10 therefore are final land use decisions subject to LUPA review at this time?

### 11 **IV. EVIDENCE RELIED UPON**

12 This Response relies upon the Declaration of Jemae Hoffman and the Declaration of  
13 Matthew Below.

### 14 **V. LEGAL AUTHORITY AND ARGUMENT**

#### 15 **A. The Hearing Examiner can only exercise authority that is delegated to him**

16 As an administrative tribunal created by City code, *see* Ch. 3.40 MICC, the Hearing  
17 Examiner can exercise only the authority delegated to him. *See, e.g., Woodinville Water Dist. v.*  
18 *King County*, 105 Wn. App. 897, 906, 21 P.3d 309 (2001) ("As employees of an administrative  
19 agency created by the King County Council, hearing examiners have only the authority delegated  
20 to them by the Council."). It is reversible error for a hearing examiner to decide an issue that is  
21 not plainly within his delegated authority. *See, e.g., Chaussee v. Snohomish County Council*, 38  
22 Wn. App. 630, 636, 689 P.2d 1084 (1984) (holding hearing examiner's authority was limited to  
23 determining whether the Snohomish County Code applied to portions of plaintiff's property and  
24 examiner had no discretion to exempt a landowner from the Code based on equitable arguments).

25 The Mercer Island Hearing Examiner has quasi-judicial appellate jurisdiction over certain  
26 enumerated decisions of City staff. These include, for example, the final decision to approve

1 with conditions a ROW permit or a building permit. However, nothing in the MICC grants the  
2 Hearing Examiner jurisdiction over a staff decision *not to* grant a building permit—a decision, to  
3 be clear, that was not a rejection on the merits of the application, but a decision not to issue a  
4 building permit that the applicant was entitled to. Similarly, the MICC does not give the Hearing  
5 Examiner jurisdiction over a staff attempt to regulate private property through a ROW permit.  
6 The lack of express jurisdiction is understandable, since the Code also does not authorize staff to  
7 make such decisions; as discussed below, these decisions are *ultra vires* and of no effect.

8 **B. The City decisions described in this Response are *ultra vires* decisions over which  
9 the Hearing Examiner does not have jurisdiction**

10 In Condition XIII.A, City staff purports to exercise land use regulatory authority over  
11 transit uses within the right-of-way, but the exercise of non-existent authority, particularly in a  
12 way that violates state law, is *ultra vires* and of no effect. *See, e.g., Failor's Pharmacy v. Dep't*  
13 *of Soc. & Health Servs.*, 125 Wn.2d 488, 499, 886 P.2d 147 (1994) (“A contract in conflict with  
14 statutory requirements is illegal and unenforceable as a matter of law.”); *Miller v. City of*  
15 *Bainbridge Island*, 111 Wn. App. 152, 165, 43 P.3d 1250 (2002) (“Acts done without legal  
16 authorization or in direct violation of existing statutes are *ultra vires*.”). Particularly as applied  
17 to the City’s decision to issue a ROW permit for property that is outside of the right of way, *see*  
18 MICC 19.09.060(1) (limiting scope of section to property within the right-of-way), and to the  
19 City’s decision not to issue a building permit for elements of the MITI Project that plainly  
20 require such permits, the decision has no effect, *Cf. Noel v. Cole*, 98 Wn.2d 375, 379-81, 655  
21 P.2d 245 (1982) (finding contract for sale of timber was *ultra vires* because state did not first  
22 prepare an environmental impact statement), and the Hearing Examiner cannot exercise  
23 jurisdiction over it.

24 Under City Code, a ROW permit is available only for projects within the right-of-way.  
25 MICC 19.09.060.A.1 (“It is unlawful for anyone to excavate, alter, tunnel under, obstruct, or  
26 place any structure upon any public right-of-way without first obtaining a right-of-way permit

1 from the city, or to fail to comply with any conditions attached to such right-of-way permit.”).  
2 Yet, in the Conditions, City staff purported to use an ROW permit to regulate a project *outside of*  
3 the right-of-way. That was not Sound Transit’s decision; City staff unilaterally decided which  
4 permits to issue for the MITI Project. Using a ROW permit to regulate private property was an  
5 ultra vires act.

6 Similarly, as the City repeatedly acknowledged, *see* Declaration of Matthew Below, the  
7 MITI Project requires building permits for at least two retaining walls over 4’ in height, and for a  
8 stormwater vault, all on private property. Yet the City declined to issue the building permits, and  
9 acted outside any authority conveyed by the code by attempting to coerce Sound Transit into  
10 conveying the property to the City to *become* right-of-way in the future. “A building or use  
11 permit must issue as a matter of right upon compliance with the ordinance,” *Mission Springs Inc.*  
12 *v. City of Spokane*, 134 Wn.2d 947, 960-61, 954 P.2d 250 (1998), so refusing to issue a building  
13 permit to which the applicant is entitled because of an illegal condition on another permit is  
14 another ultra vires act.

15 In Condition XIII.A, staff asserts that the City can prohibit transit uses because they are  
16 not authorized through a ROW permit, citing an entire chapter of the Mercer Island City Code  
17 (“MICC”) as authority. Not only does the condition find no support in the text of Chapter 19.09  
18 MICC (“Property Development”), but state law is plain: local rights-of-way are part of the state  
19 highway system, and local government exercises only that control over the right-of-way that the  
20 state legislature delegates to it. *See, e.g., State v. Howell*, 85 Wash. 281, 289, 147 P. 1162, 1165  
21 (1915) (“The highways of the state include the streets in the cities of the state. The streets are  
22 therefore subject to the paramount and primary control of the Legislature.”). Here, the  
23 legislature has enacted two material constraints on that local control that completely supplant the  
24 City’s ability to exercise land use regulatory authority over transit uses.

25 First, state law grants regional transit providers such as Sound Transit and King County  
26 Metro the authority to construct transit facilities within city rights-of-way:



1 A metropolitan municipal corporation shall have power to construct or maintain  
2 metropolitan facilities in, along, on, under, over, or through public streets,  
3 bridges, viaducts, and other public rights-of-way without first obtaining a  
4 franchise from the county or city having jurisdiction over the same: PROVIDED,  
That such facilities shall be constructed and maintained in accordance with the  
ordinances and resolutions of such city or county relating to construction,  
installation and maintenance of similar facilities in such public properties.

5 RCW 35.58.330. Under the statutory proviso, the local government may regulate how projects  
6 are constructed, which is why Sound Transit applied for construction permits from the City, but  
7 the decision of whether and where to locate regional transit facilities belongs to the regional  
8 transit operators: both to King County Metro, which is a “metropolitan municipal corporation,”  
9 and to Sound Transit, which is a “regional transit authority.” RCW 81.12.100. The obvious  
10 purpose of these statutes is to ensure that a single local jurisdiction cannot block construction of  
11 regionally agreed-upon infrastructure.

12 In keeping with the statutory preemption, Chapter 19.09 MICC does not purport to  
13 regulate transit uses in the right-of-way. Nevertheless, the Conditions cites to that entire chapter  
14 to support the assertion that “use of the City’s ROW as a bus bay for layovers and passenger  
15 drop-off purposes are not uses authorized under a ROW permit.” Conditions XIII.A. The only  
16 section of that chapter relevant to work in the right-of-way is MICC 19.09.060 (“Right-of-way  
17 use”), and, consistent with the statutes quoted above, that section permits the City Engineer to  
18 impose conditions on a ROW permit “to ensure the public health, safety and welfare,” but  
19 nothing in that section, or any other, purports to authorize staff to prohibit transit uses in the right  
20 of way.

21 Second, the Growth Management Act (“GMA”) prohibits local government from  
22 precluding the siting of “Essential Public Facilities,” or “EPFs”: difficult-to-site facilities that  
23 deliver essential public services. *See* RCW 36.70A.200. High-capacity transit facilities are  
24 EPFs as defined by the State Legislature at RCW 36.70A.200(1)(a) (listing “regional transit  
25 authority facilities as defined in RCW 81.112.020” as an example of an EPF). The GMA  
26 expressly prohibits local governments from adopting comprehensive plans and development

1 regulations that preclude the siting of EPFs, and the Growth Management Hearings Board and  
2 courts agree that the GMA’s prohibition must inform project decisions or local governments  
3 would be able to thwart the legislature’s protection for EPFs. *See, e.g., Central Puget Sound*  
4 *Regional Transit Authority v. City of Tukwila*, CPSGMHB No. 99-3-0003, Final Decision and  
5 Order, 1999 WL 33100213 at \*4 (1999) (“[A]fter the regional decision is made, **the city then has**  
6 **a duty to accommodate the essential public facility**, and the exercise of its land use powers may  
7 only impose reasonable conditions and mitigations that will not effectively preclude the essential  
8 public facility by rendering it impracticable.” (emphasis added)); *accord Washington State Dep’t*  
9 *of Corr. v. City of Kennewick*, 86 Wn. App. 521, 533–34, 937 P.2d 1119 (1997), *as amended on*  
10 *denial of reconsideration* (June 26, 1997) (drawing an inference based on the GMA’s prohibition  
11 on preclusion of EPF that unsubstantiated neighborhood fears about the impacts of an EPF are  
12 not relevant to a permitting decision for an EPF).

13         The GMA’s EPF protections extend to proposals to expand an existing EPF, and also to  
14 “necessary support activities.” *City of Des Moines v. Puget Sound Regional Council*, 98 Wn.  
15 App. 23, 108 Wn. App. 836, 844-47, 988 P.2d 27 (1999) (“The legislative purpose of RCW  
16 36.70A.200(2) would be defeated if local governments could prevent the construction or  
17 operation of an EPF. Thus, if an activity is indeed “necessary” to construction of an EPF, a local  
18 plan may not stop it from occurring.).

19         A government act is ultra vires when it violates law and the policy underlying the law.  
20 *See S. Tacoma Way, LLC v. State*, 169 Wn.2d 118, 126, 233 P.3d 871, 875 (2010). The City’s  
21 attempt to prohibit regional transit uses in the right-of-way is unsupported by the City’s own  
22 code and directly contradicts state law, as well as the policies of (a) allowing regional transit  
23 authorities to control how they provide mass transit and (b) preventing local government from  
24 elevating their own interests above the regional need for essential public facilities. This decision,  
25 like the decision to use a ROW permit to regulate private property and the decision not to issue  
26 building permits to which Sound Transit is entitled, is ultra vires and has no effect. Sound

1 Transit cannot be held to an administrative remedy that involves an appeal of an ultra vires  
2 decision, and this Court should accept jurisdiction over these issues.

3 **C. Sound Transit’s LUPA petition is not precluded by the exception in LUPA for**  
4 **“permits or approvals to use, vacate, or transfer streets.”**

5 The City asserts that Sound Transit’s appeal of the ROW permit is precluded by RCW  
6 36.70C.020(2)(a) which excludes from the definition of “land use decision” city decisions on  
7 “applications for permits or approvals to use, vacate, or transfer streets, parks, and similar types  
8 of public property.” As explained above, Sound Transit is a regional transit authority, and East  
9 Link is an essential public facility, and Sound Transit does not need, and did not ask for, City  
10 permission to use City right-of-way: Sound Transit applied for construction permits, not use  
11 permits, and the City was required to issue such construction permits because they comply with  
12 the applicable code provisions, which the City has refused to do in its ultra vires effort to stop  
13 regional transit use of its street. The exclusion does not apply, and even if it otherwise did, the  
14 City is attempting to use its ROW permit to regulate development of residential lots, and the  
15 exclusion does not apply for that reason as well.

16 **VI. CONCLUSION**

17 The Declaration of Patrick Yamashita explains, finally, that the City did not intend to  
18 issue permits for the six “approvals” that are listed in the chart on his email conveying the City’s  
19 decision and attaching the conditions of approval:

20 Building:	Approved
21 Right of Way:	Approved
22 Engineering:	Approved
23 Landscaping, Trees, Irrigation:	Approved
Street Engineering:	Approved
Tree:	Approved
Fire Protection:	Approved

24 Mr. Yamashita submitted a declaration in support of the City’s motion that states that  
25 these approvals are not, in fact, approvals of permits, but of “review disciplines,” and that the  
26

1 City has only approved a ROW permit and four “ancillary” permits: two “clear and grade”  
2 permits, a tree removal permit and a stormwater permit.

3 In light of Mr. Yamashita’s declaration, Sound Transit will continue with its appeal of  
4 these permits before the Hearing Examiner, in order to exhaust its administrative remedies. But  
5 Mr. Yamashita’s declaration does not acknowledge that the City has refused to issue a building  
6 permit, and that refusal is properly before this Court, as is the City’s ROW permit to the extent  
7 discussed above. For these reasons, Sound Transit asks this Court to deny the City’s motion to  
8 dismiss the LUPA petition.

9 DATED this 12<sup>th</sup> day of February, 2021.

10 *I certify that this memorandum contains 3,026 words, in compliance with the Local*  
11 *Civil Rules.*

13 CENTRAL PUGET SOUND REGIONAL  
14 TRANSIT AUTHORITY, a regional transit  
authority, d/b/a SOUND TRANSIT

FOSTER GARVEY PC

15 /s/Stephen G. Sheehy  
16 Stephen G. Sheehy, WSBA #13304  
17 Managing Legal Counsel  
18 Union Station  
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*Attorneys for Petitioner/Plaintiff*

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DECLARATION OF SERVICE

The undersigned certifies that I am a citizen of the United States of America and a resident of the State of Washington, I am over the age of twenty-one years, I am not a party to this action, and I am competent to be a witness herein.

The undersigned declares that on February 12, 2021, I caused to be served the foregoing document on the following parties in the manner referenced below:

- SOUND TRANSIT’S RESPONSE TO CITY OF MERCER ISLAND’S MOTION TO DISMISS

Kim Adams Pratt, WSBA No. 19798  
Eileen M. Keiffer, WSBA No. 51598  
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- via first class mail, postage prepaid
- via e-mail
- via ECF (if opted in)

*Attorneys for the City of Mercer Island*

///

///

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

3 DATED this 12<sup>th</sup> day of February, 2021, at Seattle, Washington.

4 *s/Nikea Smedley*

5 Nikea Smedley, Legal Practice Assistant

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The Honorable Judith H. Ramseyer  
Noted for: February 19, 2021  
Time: 2:45 P.M

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
FOR THE COUNTY OF KING

The Central Puget Sound Regional Transit Authority, a regional transit authority organized under Chapter 81.112 RCW,

Petitioner/Plaintiff,

v.

City of Mercer Island, a Code City,

Respondent/Defendant,

and

Peter and Ana Woo, a married couple, and Andrew Snethen, a natural person, and Carol Hancock, a natural person,

Additional Parties pursuant to RCW 36.70C.040.

No. 21-2-00474-8 SEA

CITY OF MERCER ISLAND’S  
REPLY TO SOUND TRANSIT’S  
RESPONSE TO CITY’S MOTION  
TO DISMISS AND MOTION TO  
STRIKE DECLARATION OF  
JEMAE HOFFMAN

I. INTRODUCTION

Sound Transit attempts to argue the merits of its position to distract from the fact that it lacks standing, has brought unripe claims, and has brought claims not subject to LUPA review. Sound Transit’s LUPA Petition should be dismissed.

II. EVIDENCE RELIED UPON

The City relies on the Supplemental Declarations of Patrick Yamashita and Kim

1 Adams Pratt in support of the City’s Reply to Sound Transit’s Response to the City’s Motion  
2 to Dismiss.

3 III. ARGUMENT

4 Sound Transit’s Response to the City’s Motion (“Response”) narrowed its position to  
5 two permits that Sound Transit claims do not have administrative appeal provisions: 1) failure  
6 to approve a building permit on two residential lots, and 2) decision to regulate by right-of-  
7 way (“ROW”) permit construction on two residential lots Sound Transit had agreed to deed  
8 to the City as ROW. Response at 1-2. Sound Transit is incorrect on both counts.

9  
10 A. The Building Official’s decision not to grant a building permit and the ROW Use  
Permit are both appealable to the Hearing Examiner.

11 The Mercer Island City Code (“MICC) gives the Hearing Examiner authority over  
12 the decision not to issue a building permit. MICC 17.14.020(A) provides:

13  
14 **Appeals of orders, decisions and determinations** of building or fire code  
15 official issued pursuant to MICC Title 15 or this Title that do not constitute  
16 enforcement actions shall be heard and decided by the city of Mercer Island  
17 hearing examiner . . . “

18 (Emphasis added). This section includes appeals of the building official’s decision not to  
19 issue a building permit. The MICC places no limit on the Hearing Examiner’s jurisdiction  
20 to hear appeals of decisions and determinations of the City’s building official.

21 Similarly, the City Engineer’s conditioning of a ROW permit is a Type I permit  
22 decision appealable to the Hearing Examiner. MICC 19.15.030, Table A and B. There is a  
23 clear administrative appellate procedure for both issues.

24 Indeed, Sound Transit’s counsel admitted that the City’s Hearing Examiner has  
25 jurisdiction over both these issues in an email to the City’s counsel dated February 3, 2021:  
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The December 22 email from Patrick Yamashita lists the following approvals, and we interpret the City’s code to give the Hearing Examiner jurisdiction over the ones highlighted in yellow; the “tree” approval is highlighted in blue because we’re not certain about it. The approvals that are not highlighted are the ones that we believe are subject to the LUPA appeal:

- Building
- Right of Way
- Engineering
- Landscaping, Trees, Irrigation
- Street Engineering
- Tree
- Fire Protection

Declaration of Kim Adams Pratt at Exhibit A. It is disingenuous for Sound Transit to now allege that the Hearing Examiner lacks jurisdiction over these issues to avoid exhausting administrative remedies.

B. LUPA does not exempt allegedly ultra vires decisions from its definition of “final decision.”

The City’s Motion is based on LUPA’s requirement that an appellant exhaust its administrative remedies to have standing. RCW 36.70C.060(2)(d). Here, the only relevant inquiry is whether the MICC provides an administrative appeal for the issues appealed. Sound Transit wants the Court to skip the issue of standing and first decide the merits to find the City’s decisions ultra vires. Response at 5. This tactic clearly attempts to circumvent LUPA’s standing requirement.

Sound Transit’s insistence on arguing the merits in this procedural motion requires the City to provide accurate information to prevent the Court from being misinformed. Patrick Yamashita, Deputy City Public Works Director and City Engineer, explains that the City issued ROW Permit No. 2010-186 with the condition that the two residential lots be conveyed to the City as ROW because Sound Transit *chose* to convey the residential lots as ROW.



1 Sound Transit made this choice to avoid the MICC requirement for a Conditional Use Permit  
2 when a public stormwater vault is constructed on residentially zoned real property. MICC  
3 19.2.010(C)(1); Supplemental Declaration of Patrick Yamashita in Support of Motion to  
4 Dismiss (Supp. Decl. Yamashita) at 2-3, ¶¶ 4-7. In review comments submitted to the City,  
5 Sound Transit asserted: “Sound Transit[’s] plan is to dedicate the property to [City of Mercer  
6 Island] as ROW.” *Id.* As ROW, construction of the stormwater vault and retaining walls is  
7 allowed without a Conditional Use Permit. *Id.* at 3, ¶ 8. Work in the ROW is also exempt  
8 from obtaining a building permit and is instead subject to review under the ROW use permit.  
9 *Id.* at 3-4, ¶ 9. Sound Transit intentionally chose its path to deed the residential lots to the  
10 City as ROW.  
11

12 Sound Transit’s appeal of the ROW permit and/or a building permit are appealable to  
13 the Hearing Examiner. Sound Transit’s ultra vires argument has no validity under LUPA.  
14 Sound Transit argues that an ultra vires decision is “final” and therefore appealable directly  
15 to Court. Response at 4-5. This argument conflicts with LUPA’s plain language: “[a] land  
16 use decision means a final determination by a local jurisdiction’s body or officer with the  
17 highest level of authority to make the determination, including those with authority to hear  
18 appeals . . . .” RCW 36.70C.020(2). LUPA’s definition of final decision cannot be ignored  
19 in this proceeding.  
20

21 Sound Transit persists with its ultra vires argument by piling on irrelevant, to this  
22 motion, assertions of statutory rights as a regional transit authority and protection of Essential  
23 Public Facilities under the Growth Management Act. Response at 7. Sound Transit asserts  
24 that “this Court should accept jurisdiction over these issues.” Response at 9. Sound Transit  
25 misses the point. Sound Transit does not have standing under LUPA until all administrative  
26

1 remedies are exhausted. Sound Transit cannot do an end run around the City's required  
2 administrative appeals by alleging the decisions are ultra vires.

3 C. The LUPA exemption applies to the ROW Use Permit by LUPA's plain language.

4 Sound Transit incorrectly alleges LUPA's exclusion of applications to use  
5 streets/public property does not apply. Response at 9. Sound Transit asserts that it "does not  
6 need, and did not ask for, City permission to use City right-of-way." *Id.* at 9. However, Sound  
7 Transit applied for a ROW Use permit to make vast changes to the City's ROW including  
8 constructing a roundabout. Petition, Ex. A.

9  
10 Sound Transit argues that the LUPA exclusion does not apply to residential lots. First,  
11 Sound Transit made the decision to deed residential property to the City as ROW.  
12 Supplemental Yamashita Decl. at 2-3, ¶¶ 4-7. Second, the ROW permit applies to more than  
13 the improvements slated for the lots zoned residential. It applies to work Sound Transit seeks  
14 to perform within existing ROW. Petition, Ex. A. at 11. The plain exemption in RCW  
15 36.70C.020(2)(a) applies; the ROW Use Permit is specifically excluded from LUPA review.

16  
17 D. The enforcement of contract terms between parties is likewise not reviewable  
under LUPA.

18 Sound Transit argues that the City cannot issue Condition XIII.A. (new curb cut for  
19 bus layovers), which implements the 2017 Settlement Agreement between the City and  
20 Sound Transit. Response at 7-9. Implementation of the Settlement Agreement, however, is  
21 not appealable under LUPA because LUPA does not include the enforcement of contract  
22 terms. RCW 36.70C.020(2).

23  
24 In *City of Union Gap v. Printing Press Properties, L.L.C.*, Union Gap and Printing  
25 Press entered into a development agreement before the City of Yakima granted a permit to  
26

1 Printing Press. 2 Wn.App.2d 201, 221, 409.P3d 239 (2018). The Court held that Union Gap  
2 was not challenging the issuance of a permit by Yakima. Instead, insofar as Union Gap sought  
3 to enforce its contract rights against Printing Press, its suit rose independently of the permits,  
4 and therefore LUPA’s statute of limitations did not bar Union Gap’s suit. *Id.* at 220.

5 As in *Union Gap*, LUPA does not control enforcement or implementation of the  
6 Settlement Agreement terms. Condition XIII.A explicitly references implementation of the  
7 2017 Settlement Agreement. The City is enforcing negotiated contract rights and Sound  
8 Transit cannot contravene “the intent of LUPA by using the act as an excuse to shirk its  
9 contractual obligations.” *Id.* at 222.

10  
11 Settlement Agreement interpretation is also inappropriate in this venue. By taking the  
12 position that the City cannot rely upon the Settlement Agreement, Sound Transit is asking  
13 this Court to interpret that agreement. However, the parties are currently litigating the  
14 meaning and application of the Settlement Agreement including the curb cut issue in a  
15 declaratory judgment action filed by the City under King County Cause No. 20-2-15730-9  
16 SEA. To avoid potentially conflicting judicial decisions on the same controversy, this Court  
17 should reject Sound Transit’s attempts to insert Settlement Agreement issues into this  
18 proceeding.

19  
20 E. The Court Should Strike the Declaration of Jemae Hoffman.

21 The Court should strike the Declaration of Jemae Hoffman in Support of Sound  
22 Transit’s Response (“Hoffman Declaration.”) pursuant to Washington Rules of Evidence  
23 (ER) 401, 403, and 802. Under ER 401, only relevant evidence is admissible. The Hoffman  
24 Declaration is irrelevant to this procedural motion. The Declaration does not make the  
25 existence of any fact of consequence to this procedural motion more probable or less probable  
26

1 than it would be without the Declaration. In fact, Sound Transit does not once cite to the  
2 Declaration in its argument. Instead, the Declaration contains legal arguments interpreting  
3 the Settlement Agreement. For example, the Settlement Agreement requires the City and  
4 Sound Transit to collaborate. It is currently Sound Transit's legal position that this  
5 collaborative process concluded with a single study. Case No. 20-2-15730-9 SEA Dkt. Sub  
6 No. 8 at ¶¶ 33-34 (describing obligation to collaborate under Section 4.1 of the Settlement  
7 Agreement). The Hoffman Declaration parrots that legal argument. Hoffman Decl. ¶ 5.  
8 Likewise, whether the City may reasonably withhold approval of Metro's requested changes  
9 is a question before the Shaffer Court. *Id.* ¶ 6.

11 ER 403 allows courts to exclude otherwise relevant evidence if its probative value is  
12 substantially outweighed by the danger of unfair prejudice, confusion of the issues or if  
13 admission of the evidence would be a waste of time. Even were the Declaration relevant, it  
14 is presented to further Sound Transit's attempt to litigate interpretation of the Settlement  
15 Agreement under LUPA. As discussed supra, this Court should not impinge upon the  
16 jurisdiction of the Shaffer Court in King County Cause No. 20-2-15730-9 SEA.

18 The Declaration contains inadmissible hearsay at paragraphs 3-5 and Exhibit A.  
19 Sound Transit offers no hearsay exceptions that would establish that these portions of the  
20 Declaration are admissible.

21 Therefore, under ER 401, 403, and 802 this Court should strike the Hoffman  
22 Declaration.

## 23 VI. CONCLUSION

24 The Court should dismiss Sound Transit's LUPA Petition for the reasons set forth  
25  
26

1 above and in the City's Motion to Dismiss. The Court should also strike the declaration of  
2 Jemae Hoffman.

3 DATED this 17<sup>th</sup> day of February, 2021.

4 MADRONA LAW GROUP, PLLC

5  
6 By: /s/ Kim Adams Pratt  
7 Kim Adams Pratt, WSBA No. 19798  
8 Eileen M. Keiffer, WSBA No. 51598  
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17 **OFFICE OF THE CITY ATTORNEY**

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*Attorneys for the City of Mercer Island*

We certify that this Reply contains 1750  
words, in compliance with Local Civil Rules.

**DECLARATION OF SERVICE**

I, Tori Harris, declare and state:

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

2. On the 17th day of February, 2021, I served a true copy of the foregoing City of Mercer Island’s Reply to Sound Transits Response to Motion to Dismiss 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: <a href="mailto:stephen.sheehy@soundtransit.org">stephen.sheehy@soundtransit.org</a> <input checked="" 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: <a href="mailto:pat.schneider@foster.com">pat.schneider@foster.com</a> <a href="mailto:steve.gillespie@foster.com">steve.gillespie@foster.com</a> <a href="mailto:michelle.rusk@foster.com">michelle.rusk@foster.com</a> <input checked="" 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 17th day of February, 2021, at Seattle, Washington.

Tori Harris

The Honorable Judith H. Ramseyer  
Noted for: February 19, 2021  
Time: 2:45 P.M.

IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON  
FOR THE COUNTY OF KING

The Central Puget Sound Regional Transit  
Authority, a regional transit authority organized  
under Chapter 81.112 RCW,

Petitioner/Plaintiff,

v.

City of Mercer Island, a Code City,

Respondent/Defendant,

and

Peter and Ana Woo, a married couple, and  
Andrew Snethen, a natural person, and Carol  
Hancock, a natural person,

Additional Parties pursuant to  
RCW 36.70C.040.

No. 21-2-00474-8 SEA

~~PROPOSED~~ ORDER GRANTING  
CITY OF MERCER ISLAND'S  
MOTION TO DISMISS

**[CLERK'S ACTION REQUIRED]**

Respondent The City of Mercer Island ("City") has moved the Court to dismiss the LUPA Petition of Petitioner Center Puget Sound Regional Transit Authority ("Sound Transit") because Petitioner lacks standing for failure to exhaust administrative remedies, the claims are not yet ripe for judicial review, and claims related to use of City right-of-way are excluded from review under LUPA. The City has also requested that the Court issue a

~~PROPOSED~~ ORDER GRANTING CITY OF MERCER  
ISLAND'S MOTION TO DISMISS - 1



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1 separate case schedule for Petitioner's damage claims and stay such damage claims until  
2 resolution of the administrative appeal proceedings and any subsequent LUPA appeals.

3 The Court has reviewed the file and record in this matter and considered the  
4 arguments of counsel *at a hearing on this date.* The Court finds that Petitioner lacks standing for failure to exhaust  
5 administrative remedies, the LUPA Petition is not ripe for judicial adjudication, and that  
6 LUPA excludes review of permit decisions or approvals relating to use of public right-of-  
7 way.

8 NOW, THEREFORE, IT IS HEREBY ORDERED:

9  
10 1. The City of Mercer Island's Motion to Dismiss Petitioner's LUPA Petition is hereby  
11 granted without prejudice.

12 2. A general civil case schedule shall be issued for Petitioner's Complaint for Damages  
13 Under Chapter 64.40 RCW.

14 3. Petitioner's Complaint for Damages Under Chapter 64.40 RCW *and Petition for writ of Mandamus*  
15 *and Declaratory Judgment* shall be stayed *#*  
16 pending resolution of administrative appeals and any subsequent LUPA appeals. *#* The parties  
17 shall provide the Court with a joint status report *by April 30, 2021.* every six months from the date of this Order.

18 DONE IN OPEN COURT this 19 day of February 2021.

19  
20 *Judith H. Ramsey*  
The Honorable Judith H. Ramsey

21  
22 Presented by:

23 MADRONA LAW GROUP, PLLC

24  
25 By: /s/ Kim Adams Pratt  
Kim Adams Pratt, WSBA No. 19798  
26 Eileen M. Keiffer, WSBA No. 51598

*\* A party may seek relief from stay by agreed order or motion practice.*



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**CITY OF MERCER ISLAND  
OFFICE OF THE CITY ATTORNEY**

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

WILLIAMS, KASTNER & GIBBS, PLLC

By: /s/ Adams Rosenberg  
Adam Rosenberg, WSBA No. 39256

*Attorneys for the City of Mercer Island*

1 **DECLARATION OF SERVICE**

2 I, Nikea Smedley, under penalty of perjury under the laws of the State of Washington,  
3 declare as follows:

4 On the date indicated below, I caused **DECLARATION OF PATRICK J.**  
5 **SCHNEIDER IN SUPPORT OF SOUND TRANSIT’S RESPONSE TO CITY’S PARTIAL**  
6 **MOTION TO DISMISS FOR LACK OF JURISDICTION** to be filed with the Hearing  
7 Examiner for the City of Mercer Island and served on the persons listed below in the manner  
8 indicated:  
9

10 City of Mercer Island Hearing Examiner [ ] Via Facsimile  
11 John Galt [ ] Via Legal Messenger  
12 9611 SE 36<sup>th</sup> Street [X] Via E-mail  
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25 OFFICE OF THE CITY ATTORNEY [ ] Via Facsimile  
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Via Facsimile  
 Via Legal Messenger  
 Via E-mail  
 Via US Mail, postage prepaid

8 *Attorneys for Plaintiff City of Mercer Island,*  
9 *Washington*

10 DATED this 26<sup>th</sup> day of February, 2021 at Seattle, Washington.

11 *s/Nikea Smedley*

12 \_\_\_\_\_  
13 Nikea Smedley, Legal Practice Assistant