

**BEFORE THE HEARING EXAMINER for the  
CITY of MERCER ISLAND**

**INTERLOCUTORY ORDER on MOTION**

FILE NUMBER: APL21-001

APPELLANT: Central Puget Sound Transit Authority  
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and

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APPLICANT: Same as Appellant

TYPE OF CASE: Appeal from conditions imposed on Permit 2010-186

**WHEREAS**, the City of Mercer Island Hearing Examiner (“Examiner”) has before him the appeal filed on January 5, 2021, by Central Puget Sound Transit Authority (“Sound Transit”) from seven of the conditions imposed by the City of Mercer Island (“City”) on Right-of-Way Use Permit 2010-186 (the “Permit”), issued on December 22, 2020. Sound Transit identifies its seven appeal issues by the condition numbers used in the Permit: Permit Conditions IV.A, IV.E, VII.H, VII.I, XIII.A, XIII.B, and XIII.C; and

**WHEREAS**, on February 16, 2021, the City filed a Partial Motion to Dismiss for Lack of Jurisdiction (the “City’s Motion”) asking the Examiner to dismiss Sound Transit’s appeal of Permit Conditions XIII.A and XIII.C for lack of jurisdiction; and

**WHEREAS**, pursuant to Hearing Examiner Rule of Procedure (“RoP”) 204(b) the Examiner invited Sound Transit to submit a response within 10 days. Sound Transit filed a timely response on February 26, 2021; and

**WHEREAS**, on March 1, 2021, the City filed a request to submit a reply to Sound Transit’s response.<sup>1</sup> Specifically, the City proposed to submit a transcript of a colloquy between the City and the judge during the litigation referred to in the second and third recitals, below. The Examiner finds and concludes that a reply is unnecessary and, by issuance of this Order, denies the City’s request to submit a reply; and

**WHEREAS**, Sound Transit and the City entered into a settlement agreement (the “Settlement Agreement”) in 2017 regarding the project which is the subject of the Permit; and

**WHEREAS**, the City’s Motion asserts that Sound Transit’s appeal of Permit Conditions XIII.A and XIII.C constitute “an unlawful collateral attack on the Settlement Agreement” and that a decision by the Examiner regarding those permit conditions would conflict with then on-going LUPA and related litigation in King County Superior Court between Sound Transit and the City; (City’s Motion, p. 6) and

**WHEREAS**, on February 19, 2021, the LUPA litigation in King County Superior Court was dismissed without prejudice and the related litigation was stayed. The City’s objection regarding conflicting jurisdiction is no longer a concern; and

**WHEREAS**, Permit Conditions XIII.A and XIII.C refer to the Settlement Agreement as a basis for the content of those conditions. Sound Transit, the City, and the Examiner all acknowledge that the Examiner lacks authority to resolve disagreements regarding the content and applicability of the Settlement Agreement. Therefore, consideration of the Settlement Agreement is beyond the scope of the Examiner’s jurisdiction; and

**WHEREAS**, Sound Transit’s appeal challenges Permit Condition XIII.A on three grounds: lack of authority in code, improper reliance on the Settlement Agreement, and equity. Sound Transit’s appeal challenges Permit Condition XIII.C solely on lack of authority in code. Therefore, the appeal of Permit Conditions XIII.A and XIII.C is based at least in part on arguments wholly separate and distinct from any consideration of the Settlement Agreement; and

**WHEREAS**, the question before the Examiner in this appeal is whether the challenged Permit Conditions are properly based upon and supported by adopted City code, not whether they are supported by or in conflict with the Settlement Agreement. The Examiner can meet his obligation without resorting to interpretation or consideration of the Settlement Agreement. Any concerns about the relationship between the Settlement Agreement and the Permit Conditions would have to be raised in another forum; and

**WHEREAS**, the City is required to base its land use decisions upon duly adopted laws and ordinances, and may not consider equitable defenses. [*Chaussee v. Snohomish County*, 38 Wn. App. 630,

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<sup>1</sup> The RoP do not expressly contemplate submission of replies in motion practice. [RoP 204] However, especially where a motion practice calendar is set during a prehearing conference, the Examiner typically allows submittal of replies.

638, 689 P.2d 1084 (1984)] Therefore, consideration of equitable issues is beyond the scope of the Examiner's jurisdiction; and

**WHEREAS**, the Examiner is authorized to dismiss an appeal for "lack of jurisdiction". [MICC 3.40.050] If the Examiner can dismiss an appeal in its entirety for lack of jurisdiction, the Examiner can dismiss one or more portions of an appeal for lack of jurisdiction.

**NOW, THEREFORE**, the Hearing Examiner issues the following:

### **ORDER**

The Examiner herewith **DISMISSES** (for lack of jurisdiction) any argument that Permit Conditions XIII.A and XIII.C are justified by or in conflict with the Settlement Agreement or that equity should be a consideration. The Examiner will not consider the applicability of the Settlement Agreement as a basis or foundation for the conditions, nor will the Examiner consider equity. The question before the Examiner is whether City Code provides appropriate support for the conditions. Testimony, evidence, and/or argument regarding the content and applicability of the Settlement Agreement or equity will not be allowed.

**ORDER** issued March 2, 2021.

*/s/ John E. Galt*

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JOHN E. GALT  
Hearing Examiner