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BEFORE THE HEARING EXAMINER OF THE CITY OF MERCER ISLAND

In Re The Appeal of:

CENTRAL PUGET SOUND TRANSIT
AUTHORITY,

Petitioner,

v.

CITY OF MERCER ISLAND,

Respondent.

No. APL21-001

CITY’S MOTION TO EXCLUDE
WITNESS TESTIMONY AND
EXHIBITS AND CITY’S REQUEST
FOR EXPEDITED RULING

I. RELIEF REQUESTED

The City of Mercer Island (“City”) respectfully requests that the Hearing Examiner exclude certain hearing exhibits, argument, and witness testimony identified in Sound Transit’s Exhibit List, Prehearing Brief, and Witness List because they relate to the Settlement Agreement between the parties or equitable issues. These submissions deliberately violate the Hearing Examiner’s Interlocutory Order on Motion dated March 2, 2021, (“Order on Motion”), which provided that “[t]estimony, evidence, and/or argument regarding the content and applicability of the Settlement or equity will not be allowed.”

1 The City requests an expedited ruling on this Motion because the City complied with
2 the Order on Motion and limited its hearing preparation, exhibits, and Staff Report only to
3 material authorized by the Order on Motion. For this reason, the City requests the Hearing
4 Examiner rule by Monday, March 15th to allow for any necessary additions and alterations in
5 the City's presentation of its case.

6 II. DISCUSSION

7 Sound Transit blatantly defies the Order on Motion, stating it will present evidence
8 regarding the Settlement Agreement or its interpretation "as necessary to explain why certain
9 actions were taken." Sound Transit's Prehearing Brief and Witness List ("Sound Transit
10 Brief") at 11. There is no such exception in the Order on Motion permitting the parties to
11 submit evidence regarding the dismissed issues if such evidence is "explanatory" in nature.
12 Such an exception would indeed defeat the purpose of the Order on Motion and provide the
13 parties a convenient way to circumvent the Hearing Examiner's Order on Motion. Pursuant
14 to the plain language of the Order on Motion, testimony, documentary evidence, and
15 argument regarding the Settlement Agreement must be excluded.
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18 There is no dispute that the City and Sound Transit disagree on whether use and
19 construction of a proposed new bus layover area on north side of North Mercer Way is in
20 derogation of the terms of the Settlement Agreement, and that the parties are currently
21 litigating this dispute in King County Superior Court, Case No. 20-2-15730-9 SEA. Sound
22 Transit Brief at 12. However, despite the Order on Motion, Sound Transit argues no less than
23 six different times in its Prehearing Brief that former City Manager Julie Underwood
24 agreed/consented/confirmed changes to the terms of the Settlement Agreement regarding the
25 disputed bus layover area. Sound Transit Brief at 3, 6, 14, and 15. These arguments,
26

1 testimony, and exhibits regarding assertions about what Ms. Underwood agreed to for the bus
2 layover are under the Court's jurisdiction and acknowledged as same by the Order on Motion.
3 These arguments are only relevant to the Superior Court Settlement Agreement litigation and
4 not to right-of-way conveyance issues, regulation of Essential Public Facilities, traffic control
5 plans, or final asphalt restoration terms.

6 Sound Transit also lists a number of exhibits and testimony topics directly related to
7 the Settlement Agreement, again in violation of the Order on Motion. To wit, Sound Transit
8 even submits the Settlement Agreement itself as a proposed exhibit. The City asks the
9 Hearing Examiner to confirm that all testimony regarding same and the following exhibits
10 will be excluded from the hearing:
11

12 Exhibit 1009 Letter from Bill Bryant to Jamae Hoffman

13 Exhibit 1011 Second Letter to the Community from Your City Council

14 Exhibit 1017 Mercer Island – Sound Transit Settlement Agreement: Transit
15 Integration Meetings – Summary

16 Exhibit 1018 Mercer Island Bus/Rail Integration – Engagement Summary

17 Exhibit 1019 Email and Meeting Minutes from Mercer Island Transit Interchange
18 meetings at Mercer Island City Hall on June 12, 2018

19 Exhibit 1020 Email and Meeting Minutes from Mercer Island Transit Interchange
20 meeting at Mercer Island City Hall on September 26, 2018

21 Exhibit 1021 Meeting Outcomes/Summary from Public Participation meeting at
22 Mercer Island on November 29, 2018

23 Exhibit 1022 Meeting Outcomes/Summary from Roundabout meeting at Mercer
24 Island on December 4, 2018

25 Exhibit 1023 Email and Meeting Outcomes/Summary from Executive Steering
26 Committee 1 meeting at Mercer Island on December 12, 2018

Exhibit 1024 Email and Meeting Outcomes/Summary from Executive Steering
Committee 2 meeting at Mercer Island on January 9, 2019

- 1 Exhibit 1025 Email and Meeting Outcomes/Summary from 80th Avenue SE Bus
2 Stop Tech meeting at Mercer Island on February 19, 2019
- 3 Exhibit 1026 Email and attachments regarding Settlement Agreement and Transit
4 Interchange
- 5 Exhibit 1027 “Responses to Councilmember Questions from March 19, 2019 Study
6 Session – Mercer Island Transit Interchange Operational and Configuration Study”
- 7 Exhibit 1028 “Bus Service Planning and Operational F&AQs”
- 8 Exhibit 1029 “Response to MI Council Comments”
- 9 Exhibit 1030 Email and attachment regarding Mercer Island Transit Interchange
10 FAQ
- 11 Exhibit 1031 Email and attachment regarding Mercer Island Transit Interchange
12 Questions
- 13 Exhibit 1032 Emails and attachments regarding Mercer Island Transit Interchange
14 Questions
- 15 Exhibit 1033 Q&A of the Day: How Will Bus/Rail Interchange Operate Safely?
- 16 Exhibit 1034 King County Metro and Sound Transit Response to Mercer Island City
17 Council Questions / Data Requests
- 18 Exhibit 1035 Email and attachments regarding Consolidated FAQ and Responses
- 19 Exhibit 1041 Letter from Jessi Bon to Eric Beckman
- 20 Exhibit 1042 Letter from Eric Beckman to Jessi Bon
- 21 Exhibit 1043 Letter from Peter Rogoff to Jessi Bon
- 22 Exhibit 1044 Letter from Jessi Bon to Peter Rogoff
- 23 Exhibit 1045 Letter from Peter Rogoff to Jessi Bon
- 24 Exhibit 1048 Mercer Island Lawsuit Factsheet
- 25 Exhibit 1049 Emails and attachments regarding DEA Report revisions
- 26 Exhibit 1051 Settlement Agreement between the City of Mercer Island and Sound
Transit

1 The City requests that Jamae Hoffman be precluded from testifying regarding the
2 “collaborative process with the City and King County Metro to determine Metro’s
3 operational needs” because this testimony violates the Order on Motion. Sound Transit
4 Witness List at 17. Sound Transit offers Ms. Hoffman’s testimony to explain the process
5 City Manager Underwood participated in regarding the Parties’ post Settlement Agreement
6 discussions. Specifically, Sound Transit asserts Ms. Underwood agreed/consented/confirmed
7 changes to the terms of the Settlement Agreement regarding the bus layover area. This type
8 of testimony is explicitly prohibited by the Order on Motion.
9

10 The City further requests that Katie Chalmers, Stephen Crosley, and Luke Lamon be
11 precluded from testifying regarding the “collaborative process among Sound Transit, King
12 County Metro, and the City to determine Metro’s operational needs.” Sound Transit Witness
13 List at 18. Like Hoffman’s testimony, Sound Transit offers this testimony regarding the
14 process City Manager Underwood participated in. This testimony also violates the Order on
15 Motion and should be excluded for the same reason as stated above for Ms. Hoffman.
16

17 Sound Transit also erroneously argues that in the Order on Motion the Hearing
18 Examiner held that references to the Settlement Agreement in permit conditions will be
19 stricken. Sound Transit Brief at 5. This is incorrect. The Hearing Examiner made it clear he
20 was not going to consider the Settlement Agreement one way or the other: “Any concerns
21 about the relationship between the Settlement Agreement and the Permit Conditions would
22 have to be raised in another forum.” Order on Motion at 2. The City respectfully requests
23 confirmation that the Hearing Examiner is not striking Settlement Agreement terms from the
24 permit conditions but leaving all Settlement Agreement disputes for the Court to decide.
25
26

1 Sound Transit claims in its Prehearing Brief that it needs to present this information
2 to the Hearing Examiner to preserve them in the event of a Land Use Petition Appeal (LUPA).
3 Sound Transit Brief at 11. LUPA, however, specifically allows a party to supplement the
4 record for the LUPA hearing with “[m]atters that were outside the jurisdiction of the body or
5 officer that made the land use decision.” RCW 36.70C.120(2)(c). Preserving an appeal is not
6 a necessary or valid reason to admit evidence, testimony or argument that violates the terms
7 of the Order on Motion.

8
9 **III. CONCLUSION**

10 The Motion on Order dismissed for lack jurisdiction any argument that permit
11 conditions are “justified by or in conflict” with the Settlement Agreement. Sound Transit
12 submits evidence and argument in blatant violation of the Order on Motion and attempts an
13 end run around the Order on Motion by characterizing such evidence as “explanatory.” The
14 City respectfully requests the Hearing Examiner strike the arguments, exhibits, and testimony
15 described in this Motion.

16 DATED this 11th day of March, 2021.

17
18 MADRONA LAW GROUP, PLLC

19
20 By: /s/ Kim Adams Pratt
21 Kim Adams Pratt, WSBA No. 19798
Eileen M. Keiffer, WSBA No. 51598

22
23 **CITY OF MERCER ISLAND**
OFFICE OF THE CITY ATTORNEY

24
25 By: /s/ Bio Park
Bio Park, WSBA No. 36994

26 *Attorneys for the City of Mercer Island*

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DECLARATION OF SERVICE

I, Tori Harris, declare and state:

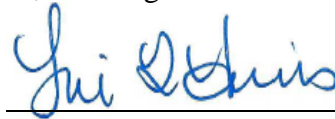
1. I am a citizen of the State of Washington, over the age of eighteen years, not a party to this action, and competent to be a witness herein.

2. On the 11th day of March, 2021, I served a true copy of the foregoing City’s Motion to Exclude Witness Testimony and Exhibits and City’s Request for Expedited Ruling 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 11th day of March, 2021, at Seattle, Washington.



Tori Harris