

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

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

In the Matter of the Appeal of

No. APL21-001

**CENTRAL PUGET SOUND TRANSIT  
AUTHORITY,**

**SOUND TRANSIT’S RESPONSE TO  
CITY’S MOTION TO EXCLUDE  
WITNESS TESTIMONY AND  
EXHIBITS**

**Petitioner,**

v.

**CITY OF MERCER ISLAND,**

**Respondent.**

**I. INTRODUCTION**

The City’s Motion to Exclude misstates the scope and effect of the Hearing Examiner’s Interlocutory Order and misstates the arguments and factual assertions in Sound Transit’s prehearing brief.

The Interlocutory Order correctly concluded that the Hearing Examiner lacks jurisdiction over arguments that Conditions XIII.A and XIII.C are either “justified by or in conflict with the Settlement Agreement.” The Order did not address other arguments, let alone suppress facts or exclude evidence supporting other arguments. The egregiously false premise of the Motion is that Sound Transit intends to defy the Hearing Examiner’s Interlocutory Order by arguing that the Settlement Agreement does not support the challenged conditions, which is an argument that

**SOUND TRANSIT’S RESPONSE TO CITY’S  
MOTION TO EXCLUDE - 1**

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

1 Sound Transit has not made and will not make. The evidence the City seeks to express is  
2 relevant to the issues that are properly before the Hearing Examiner; to the arguments set forth in  
3 Sound Transit’s Prehearing Brief, and to Sound Transit’s response to the arguments set forth in  
4 the City’s Staff Report that it filed eight days before the hearing instead of the required ten days.

5 In addition, the Motion includes a de facto request for reconsideration of the Hearing  
6 Examiner’s Interlocutory Order that should also be denied. The Interlocutory Order does not—  
7 indeed, cannot—mean that Conditions XIII.A and XIII.C remain valid until a superior court  
8 reverses them on the grounds that they violate the Settlement Agreement, as the City’s Motion  
9 suggests. Rather, the Interlocutory Order expressly provides that the Hearing Examiner will  
10 entertain argument regarding whether Conditions XIII.A and XIII.C find support in the City’s  
11 Code *independent of* whatever the Settlement Agreement means: “The question before the  
12 Examiner is whether City Code provides appropriate support for the conditions.” The evidence  
13 will establish that they do not, and without that support, they must be stricken from the Type I  
14 permit. If the City disagrees with that conclusion, it can appeal the Hearing Examiner’s decision  
15 and ask the Superior Court to bless a condition in a nondiscretionary permit based on the City’s  
16 interpretation of a contract that is foreign to the city’s code. Otherwise, if the City wishes to  
17 enforce a contractual right, then the City must obtain that contractual remedy in court.

18 **II. RESPONSE**

19 As appellant, Sound Transit has the responsibility and right to build a factual record to  
20 support its appeal. The appeal issues before the Hearing Examiner include, without limitation,  
21 whether the City’s Code supports the challenged conditions, whether the challenged conditions  
22 preclude the siting of an Essential Public Facility, and whether, contrary to the assertion in the  
23 staff report, the City has consented to the MITI Project that it is prohibiting Sound Transit from  
24 constructing. No authority supports the City’s request that the Hearing Examiner exclude such  
25 relevant and necessary evidence.

1 As an initial matter, the Examiner should deny the Motion solely on the ground that the  
2 City's Motion is insufficiently supported by argument. As the moving party, the City bears the  
3 burden of establishing that each piece of evidence it seeks to exclude is inadmissible. Rather  
4 than do so, the City simply includes a laundry list of exhibits and testimony, Motion at 3:12-  
5 4:26, and then asks the Hearing Examiner to assume that each piece of challenged evidence is  
6 only relevant to a single argument that is outside of the Hearing Examiner's jurisdiction. The  
7 City does not even attempt to demonstrate that the evidence is not relevant to the multiple issues  
8 properly before the Hearing Examiner.

9 **A. The evidence Sound Transit will offer at the hearing is relevant to questions over**  
10 **which the Hearing Examiner has jurisdiction**

11 The proffered evidence is relevant and admissible under the Rules of Evidence adopted  
12 by the Washington Courts, and it is certainly admissible under the more relaxed rules governing  
13 Hearing Examiner proceedings. Under RoP 3.16(b), the Hearing Examiner admits all probative  
14 evidence that would be accepted by reasonably prudent people:

15 The hearing generally will not be conducted according to technical rules relating  
16 to evidence and procedure. Any relevant evidence shall be admitted if it is the  
17 type that possesses probative value commonly accepted by reasonably prudent  
people in the conduct of their affairs. Irrelevant, immaterial, unreliable, or unduly  
repetitious evidence may be excluded. The rules of privilege shall be effective to  
the extent recognized by law.

18 The evidence that Sound Transit will offer at the hearing satisfies both the judicial standard and  
19 the Hearing Examiner's standard.

20 Instead of making the showing that it must make in order to exclude evidence, the City's  
21 Motion relies on misstating the Hearing Examiner's Interlocutory Order. In its earlier motion to  
22 strike, the City asked the Examiner to dismiss Sound Transit's appeal of Conditions XIII.A and  
23 XIII.C in their entirety, but the Examiner did not grant that relief. Rather, the Interlocutory  
24 Order dismissed any arguments that Conditions XIII.A and XIII.C are either "justified by or in  
25 conflict with the Settlement Agreement or that equity should be a consideration." Sound Transit  
26 will not make either argument, and did not advance any such argument in its Prehearing Brief.

1 The recitation of facts in Sound Transit’s Prehearing Brief did not so much as mention the  
2 Settlement Agreement, and none of Sound Transit’s arguments depend on how the Settlement  
3 Agreement should be interpreted.

4 The Interlocutory Order is narrow in scope. It did not suppress facts, and did not  
5 constrain Sound Transit’s ability to present its appeal. As discussed below, consistent with the  
6 Interlocutory Order, the proffered evidence is admissible (1) to establish the factual  
7 circumstances that led to the challenged permit decision, (2) to demonstrate that the challenged  
8 conditions are unsupported by City Code, (3) to establish that the challenged conditions preclude  
9 the siting of an Essential Public Facility, and (4) to rebut the argument presented in the City’s  
10 staff report that Sound Transit does not have the City’s permission to construct this Essential  
11 Public Facility.

12 **1. The proffered evidence is necessary to establish the factual story behind the**  
13 **challenged permit and the appeal**

14 The Interlocutory Order did not suppress facts or prohibit the parties from offering  
15 evidence to establish the history of the permitting process. Nothing about the Interlocutory  
16 Order prevents Sound Transit from introducing evidence to explain what happened as Sound  
17 Transit designed the MITI Project in collaboration with King County Metro and the City, or to  
18 explain what happened during the permitting process that led to the decisions that Sound Transit  
19 is appealing. Those facts need to be in the record so that the Hearing Examiner (and a reviewing  
20 court) can apply the law to them, and no law supports the City’s request to exclude such facts,  
21 just as nothing in the Interlocutory Order requires witnesses to omit parts of the factual story  
22 because those facts might relate to an argument that Sound Transit is not making.

23 The Settlement Agreement suffused the permitting process, as the City’s own exhibits  
24 demonstrate. City Exhibit 9, for example, is a matrix with City comments on Sound Transit’s  
25 plans at the 90% level of design, and the City’s comments repeatedly quote from the Settlement  
26

1 Agreement – see Items CPD35, CPD36, and CPF37. Yet the City does not seek to suppress its  
2 own evidence that refers to the Settlement Agreement.

3 The factual story cannot be told without referring to the Settlement Agreement, because  
4 the Settlement Agreement is the reason things happened the way they did over the past three  
5 years. Explaining what happened – and thereby creating the factual record necessary to decide  
6 all the issues before the Hearing Examiner – is not inconsistent with the Hearing Examiner’s  
7 Order; the Hearing Examiner does not need to interpret the Settlement Agreement to understand  
8 the factual history of what happened; and Sound Transit agrees that the meaning of the  
9 Settlement Agreement will not be litigated in this forum.

10 **2. The proffered evidence is relevant to Sound Transit’s argument that**  
11 **Conditions XIII.A and XIII.C are unsupported by City Code**

12 The Interlocutory Order did not prohibit Sound Transit from arguing that Conditions  
13 XIII.A and XIII.C are unsupported by City Code. In fact, the Interlocutory Order says the  
14 opposite: “The question before the Examiner is whether City Code provides appropriate support  
15 for the conditions.” Sound Transit’s evidence will establish that the answer to that question is  
16 “no.”

17 As Sound Transit argued in its Prehearing Brief and will argue at the hearing, a Type I  
18 decision must be based on “clear, objective and nondiscretionary” standards, MICC 19.15.030.A,  
19 and insofar any condition is not so supported, it cannot be included in a Type I decision. The  
20 Settlement Agreement itself is relevant evidence regarding whether the Settlement Agreement  
21 meets the standard of MICC 19.15.030, as is the fact that the City filed suit against Sound Transit  
22 asking the superior court to interpret the Settlement Agreement. No interpretation or  
23 construction of the Settlement Agreement is necessary to answer that question, but the  
24 Settlement Agreement must be admitted into evidence.

1           **3.       The proffered evidence is relevant to establish that the challenged conditions**  
2           **preclude the siting of an Essential Public Facility**

3           The Interlocutory Order did not prohibit the parties from offering evidence that  
4           establishes that the challenged conditions preclude the siting of an Essential Public Facility and  
5           thereby violate the City’s obligations under the Growth Management Act. The evidence will  
6           show that the MITI Project’s configuration is the only way to meet Metro’s operational  
7           requirements for bus rail integration at the 77<sup>th</sup> Avenue SE Configuration chosen by the City, and  
8           by prohibiting construction the City is prohibiting an essential element of an Essential Public  
9           Facility.

10          The City’s Motion falsely asserts that Sound Transit’s prehearing brief “argues no less  
11          [sic] than six different times” that the City Manager “agreed/consented/ confirmed changes to the  
12          terms of the Settlement Agreement.” Motion at 1:22-2:1; *see also* 5:6-7. No filing submitted by  
13          Sound Transit asserts that the City Manager agreed to change the Settlement Agreement. Rather,  
14          Sound Transit’s prehearing brief asserted, and the admissible evidence will establish, that the  
15          City Manager agreed, at the conclusion of a lengthy collaboration with Metro and Sound Transit,  
16          that the MITI Project is the only configuration that meets Metro’s operational requirements for  
17          bus/rail integration.

18           **4.       The proffered evidence is relevant to rebut the City’s argument that Sound**  
19           **Transit lacks the City’s “consent”**

20          The Interlocutory Order also did not prohibit Sound Transit from offering evidence and  
21          argument to rebut the City’s own arguments. The staff report asserts that Sound Transit cannot  
22          proceed with the MITI Project until it receives “consent” that the City asserts it has not granted,  
23          yet the City’s Motion now seeks to suppress the evidence that demonstrates that the City  
24          Manager provided that consent at the conclusion of a year-long collaboration with Metro and  
25          Sound Transit to determine the design of the Project.  
26

1 **B. The Hearing Examiner should deny the City’s implicit request for reconsideration**

2 At 5:16-25, the Motion requests extraordinary relief not identified in the pleading’s title:  
3 the Motion seeks to turn the Hearing Examiner’s decision on its head by requesting  
4 “confirmation that the Examiner is not striking Settlement Agreement terms from the permit  
5 conditions but leaving all Settlement Agreement disputes for the Court to decide.” In other  
6 words, the City requests the Hearing Examiner to uphold permit conditions that the City admits  
7 are based on a contract instead of on lawfully adopted regulations. The City cites no authority  
8 for this request because there is no such authority, and the City is simply asking the Hearing  
9 Examiner to bless the City’s abuse of its regulatory power.

10 To correct the City’s characterization of Sound Transit’s position, the Hearing Examiner  
11 should not simply strike references to the Settlement Agreement from the challenged conditions.  
12 Rather, consistent with the Interlocutory Order, if Sound Transit establishes that Conditions  
13 XIII.A and XIII.C are unsupported by Code (which they are), they cannot be part of a Type I  
14 decision and the Examiner must strike the conditions in their entirety. The Interlocutory Order  
15 confirms that the Hearing Examiner has jurisdiction to rule whether the challenged conditions  
16 are unsupported by Code. Whether the substance of those conditions is supported by something  
17 other than Code is irrelevant, but the Hearing Examiner cannot affirm a condition that is  
18 unsupported by Code.

19 A city, in common with any party to a contract, can enforce its contract rights only in  
20 superior court. Using its regulatory (permitting) authority to impose its view of a contract  
21 violates fundamental tenets of municipal law. *See, e.g., City of Spokane v. Spokane Gas & Fuel*  
22 *Co.*, 175 Wash. 103, 109, 26 P.2d 1034 (1933). And here, the City already *has* filed suit on the  
23 contract, so the parties will litigate the question. There was no need, and the City had no  
24 authority, to transform the City’s view of the contract into a permit condition.

1 **III. CONCLUSION**

2 Sound Transit has not argued and will not argue that the conditions it is appealing are  
3 either “justified by or in conflict with the Settlement Agreement.” Sound Transit is fully  
4 complying with the Hearing Examiner’s Interlocutory Order, and the evidence Sound Transit  
5 will offer at the hearing is relevant to the issues that are properly before the Hearing Examiner  
6 and admissible under the Rules of Evidence, as well as under the more relaxed evidentiary rules  
7 of RoP 3.16(b). This is not a close question, Sound Transit requests that the Hearing Examiner  
8 deny the City’s Motion to Exclude.

9 Dated this 13<sup>th</sup> day of March, 2021.

10  
11 *s/ Stephen G. Sheehy*  
12 \_\_\_\_\_  
13 Stephen G. Sheehy, WSBA #13304  
14 Managing Legal Counsel  
15 CENTRAL PUGET SOUND  
16 REGIONAL TRANSIT AUTHORITY  
17 401 S. Jackson St.  
18 Seattle, WA 98104  
19 Telephone: 206-398-5000  
20 Email: [stephen.sheehy@soundtransit.org](mailto:stephen.sheehy@soundtransit.org)

21  
22 *s/Patrick J. Schneider*  
23 *s/Steven J. Gillespie*  
24 *s/Michelle Rusk*  
25 \_\_\_\_\_  
26 Patrick J. Schneider, WSBA #11957  
Steven J. Gillespie, WSBA #39538  
Michelle Rusk, WSBA #52826  
FOSTER GARVEY PC  
1111 Third Avenue, Suite 3000  
Seattle, Washington 98101-3292  
Email: [pat.schneider@foster.com](mailto:pat.schneider@foster.com)  
[steve.gillespie@foster.com](mailto:steve.gillespie@foster.com)  
[michelle.rusk@foster.com](mailto:michelle.rusk@foster.com)  
Telephone: (206) 447-4400  
Facsimile: (206) 447-9700

*Attorneys for Petitioner*



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 **SOUND TRANSIT’S RESPONSE TO CITY’S**  
5 **PARTIAL MOTION TO DISMISS FOR LACK OF JURISDICTION** to be filed with the  
6 Hearing Examiner for the City of Mercer Island and served on the persons listed below in the  
7 manner indicated:  
8

9 City of Mercer Island Hearing Examiner [ ] Via Facsimile  
John Galt [ ] Via Legal Messenger  
10 9611 SE 36<sup>th</sup> Street [X] Via E-mail  
Mercer Island, WA 98040 [ ] Via US Mail, postage prepaid  
11 Telephone: (425) 259-3144  
12 Email: jegalt755@gmail.com

13 Kim Adams Pratt, WSBA No. 19798 [ ] Via Facsimile  
Eileen M. Keiffer, WSBA No. 51598 [ ] Via Legal Messenger  
14 Madrona Law Group PLLC [X] Via E-mail  
14205 SE 36th Street [ ] Via US Mail, postage prepaid  
15 Suite 100, PMB 440  
16 Bellevue, WA 98006  
Telephone: (425) 201-5111  
17 Email: kim@madronalaw.com  
eileen@madronalaw.com

18 OFFICE OF THE CITY ATTORNEY [ ] Via Facsimile  
19 CITY OF MERCER ISLAND [ ] Via Legal Messenger  
20 Bio Park, WSBA No. 36994 [X] Via E-mail  
City Attorney [ ] Via US Mail, postage prepaid  
21 9611 S.E. 36th Street  
Mercer Island, Washington 98040  
22 Email: bio.park@mercerisland.gov  
23 mary.swan@mercerisland.gov

24 *Attorneys for Plaintiff City of Mercer Island,*  
25 *Washington*  
26

1 Adam Rosenberg, WSBA #39256  
2 WILLIAMS, KASTNER & GIBBS, PLLC  
3 601 Union Street, Suite 4100  
4 Seattle, WA 98101  
5 Telephone: (206) 628-6600  
6 Fax: (206) 628-6611  
7 Email: arosenberg@williamskastner.com

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 March, 2021 at Seattle, Washington.

11 *s/Nikea Smedley*  
12 \_\_\_\_\_  
13 Nikea Smedley, Legal Practice Assistant