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**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 MOTION FOR  
RECONSIDERATION OF  
INTERLOCUTORY ORDER ON  
MOTION TO EXCLUDE**

**Petitioner,**

v.

**CITY OF MERCER ISLAND,**

**Respondent.**

Sound Transit asks the Hearing Examiner to reconsider his Interlocutory Order on Motion to Exclude issued March 14, 2021, which prohibits Sound Transit from offering evidence of facts necessary for its appeal.

Under the Land Use Petition Act, Chapter 36.70C RCW, it is the Hearing Examiner’s decision that will be reviewed by a court, not the staff’s permitting decision. *See* RCW 36.70C.020(2) (defining “land use decision” as the decision of the local official with appellate jurisdiction). Sound Transit understands this Interlocutory Order to mean that the Hearing Examiner intends to leave in place Conditions XIII.A and XIII.C, even if he determines they are not supported by the City’s code; if so, the Hearing Examiner will necessarily be deciding on behalf of the City that the City can condition permits based on the City’s interpretation of a

**SOUND TRANSIT’S MOTION FOR  
RECONSIDERATION OF INTERLOCUTORY  
ORDER ON MOTION TO EXCLUDE - 1**

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1 disputed contract instead of on adopted regulations. Under LUPA, if the Hearing Examiner does  
2 not strike conditions that are not based on code, it is the Hearing Examiner’s decision that will  
3 not be based on code. The Order expresses reluctance to “take any action regarding the  
4 Settlement Agreement,” but under LUPA, if the Examiner leaves Conditions XIII.A and XIII.C  
5 intact despite their lack of support in Code, the *Hearing Examiner*, not staff, would be the  
6 official taking action regarding the Settlement Agreement.

7 In addition, in the eighth “Whereas” clause of the Interlocutory Order, the Examiner  
8 writes that “The argument that the City has previously granted permission to construction the  
9 MITI Project is an equitable argument,” and this conclusion results in the Hearing Examiner  
10 striking exhibits and ordering the witnesses not to testify “regarding the collaborative process  
11 with the City and King County Metro to determine Metro’s operational needs.”

12 Sound Transit is offering the evidence that the Hearing Examiner is excluding to support  
13 Sound Transit’s legal arguments, not equitable arguments it may raise in another forum with  
14 jurisdiction in equity. Sound Transit has statutory rights under the Growth Management Act,  
15 RCW 36.70A.200 because it is constructing an essential public facility that the City cannot  
16 preclude; and Sound Transit has statutory rights under Chapter 81.112 RCW as a regional transit  
17 authority that has the statutory right to site regional transportation facilities within cities. The  
18 City in its Staff Report, makes legal and factual arguments about these statutes: for example, at  
19 page 9, lines 19 – 26, the City argues that Sound Transit has not obtained the consent from the  
20 City that it asserts that RCW 81.112.080(2) requires. The evidence that the Interlocutory Order  
21 prohibits Sound Transit from offering is evidence that the City has given consent sufficient to  
22 satisfy the statute, an argument that is separate from and does not depend on any equitable  
23 theories. If the Hearing Examiner does not allow evidence relevant to Sound Transit’s statutory  
24 rights, the Hearing Examiner will be deciding, on behalf of the City, that the City need not make  
25 permitting decisions that comply with statutory law. This is a legal issue, not an equitable one.

1 Pursuant to Hearing Examiner Rule 504 and MICC 3.40.110.A.1-2, Sound Transit asks  
2 the Hearing Examiner to reconsider, and to allow presentation of the evidence that has been  
3 stricken and prohibited by the Interlocutory Order.

4 Dated this 15<sup>th</sup> day of March, 2021.

5  
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*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 MOTION FOR**  
5 **RECONSIDERATION OF INTERLOCUTORY ORDER ON MOTION TO EXCLUDE** to  
6 be filed with the Hearing Examiner for the City of Mercer Island and served on the persons listed  
7 below in the manner indicated:  
8

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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/Shbien Cross*  
12 Shbien Cross, Legal Practice Assistant