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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 OF MERCER ISLAND'S
MOTION FOR RECONSIDERATION

I. RELIEF REQUESTED

Respondent City of Mercer Island (“City”) respectfully requests that the Hearing Examiner reconsider portions of the final decision issued on May 3, 2021 (“Final Decision”). The City asks that Findings of Fact 1.3 and 1.9 be revised or stricken to reflect the testimony and exhibits admitted into evidence during the hearing. The City also asks that Finding of Fact 2.1 and Conclusion of Law 4.3 be stricken and that portions of Conclusion of Law 4.4 be stricken to reflect the revised Findings of Fact.

II. LEGAL AUTHORITY

Section 3.40.110 of the Mercer Island City Code (“MICC”) authorizes the Hearing Examiner to reconsider a final decision when a motion requesting same is filed within 10 days of the date of the final decision. The standard to grant reconsideration is not an onerous one. Reconsideration is authorized if the final decision was based in whole or in part on

1 erroneous facts or information, the decision failed to comply with existing laws or
2 regulations, or there was an error in procedure. MICC 3.40.110.A. The City respectfully
3 requests reconsideration of the following Final Decision Findings of Fact and Conclusions of
4 Law as they are in whole or in part based on erroneous facts or information.

5 **III. POINTS FOR RECONSIDERATION**

6 **A. Finding Relating to Essential Public Facility**

7 Finding of Fact 1.3 appears to state that Sound Transit itself is an essential public
8 facility (“EPF”). Final Decision at 5. Given that Sound Transit is a regional transit authority
9 as noted in Finding of Fact 1.2, and that immediately before this language the Final Decision
10 is discussing East Link, the City asks the Hearing Examiner to correct this Finding of Fact to
11 state that the East Link facility is an EPF, rather than Sound Transit, the regional transit
12 authority.

13 **B. Findings Regarding Settlement Agreement Terms**

14 The City also asks that Finding of Fact 2.1 be stricken in its entirety. The Finding
15 includes information regarding the MITI configuration agreed to in the 2017 Settlement
16 Agreement, alternatives to same, and apparent conclusions drawn about impacts to bus
17 service from terms in the Settlement Agreement. The Finding by the Hearing Examiner on
18 these topics is not relevant to the Hearing Examiner’s jurisdiction over “whether City Code
19 provides appropriate support for conditions.” Exhibit 9010 at 3. Rather, the Finding on these
20 topics will potentially conflict with findings of fact and conclusions of law subsequently
21 made in the appropriate forum for Settlement Agreement disputes, as the Decision aptly notes
22 elsewhere. Decision at 27, 30. Therefore, the City respectfully requests that Finding of Fact
23 2.1 be stricken in its entirety.

24 **C. Findings Relating to North Side Bus Layover**

25 Finding of Fact 1.9 provides that the 145-foot-long bus layover bay along the north
26 side of North Mercer Way is “long enough for one articulated bus or two standard 40-foot-

1 long buses.” Final Decision at 7. Testimony of Jemae Hoffman and James Irish are cited in
2 support of this Finding of Fact. Ms. Hoffman testified on March 16th (Zoom recording
3 beginning 2:34:45) on cross examination about Exhibit 1000, figure 2-4. She was asked how
4 many buses will fit into the 145-foot layover area on the north side of North Mercer Way. In
5 response, Ms. Hoffman testified that Sound Transit had made the layover area as short as
6 possible as it proceeded into design and it was “for one bus to be able to pull in and out.” Mr.
7 Irish, also testifying on March 16th (Zoom recording beginning 4:07:00) on cross examination
8 about Exhibit 1000, figure 2-4. Mr. Irish confirmed that 145-foot layover is either for an
9 articulated bus or a shorter bus that is used. There was no testimony during the hearing that
10 the 145-foot layover is long enough for two standard 40-foot buses to pull in and out; instead,
11 the testimony was that this layover was for one bus. The City asks the Hearing Examiner to
12 correct this Finding of Fact to state that the 145-foot-long bus layover is long enough for one
13 bus to pull in and out.

14 D. Findings and Conclusions Regarding South Side Bus Bays

15 Finding of Fact 1.9 further provides that the plan will “create an approximately 230-
16 foot-long bus layover on the south side of North Mercer Way between the 77th roundabout
17 and the current bus stop bay.” Final Decision at 7. Exhibit 3, pages 44, 45, and 47 are cited
18 in support of this Finding of Fact. The concept of a south side bus bay being constructed is
19 carried into Conclusion of Law 4.4 and 4.5.

20 Consistent with its position at the hearing, the City is allowing bus layover use on the
21 south side of North Mercer Way because the City Council agreed to the same in the 2017
22 Settlement Agreement. Consistent with the City’s position on Rights-of-way permits during
23 the hearing, staff is not approving that use through a Rights-of-way permit. Council approved
24 it in a contract with Sound Transit: specifically, the Settlement Agreement. Exhibit 8 at 7,
25 CPD35. Testimony and evidence regarding the City Council’s agreement to bus layover use
26 on the south side of North Mercer Way were not presented to the Hearing Examiner because

1 there were no appeal issues regarding this use on the south side and, as the Hearing Examiner
2 has ruled, the 2017 Settlement Agreement is not within the Hearing Examiner’s jurisdiction.

3 Critical here, the Rights-of-way permit approval of the Exhibit 3 plans set does not
4 include new construction for a bus bay on the south side of North Mercer Way. The existing
5 south side bus bay pavement was not extended or replaced in the approved plans. The
6 sidewalk on the south side of North Mercer Way is being replaced, but it is located entirely
7 in Washington Department of Transportation rights-of-way, not in City rights-of-way.
8 Exhibit 3 at 5 and 88. None of Sound Transit’s permit applications or responses to 60% and
9 90% plans discuss use of a new south side bus layover. Exhibit 8 and 9. A new use was not
10 permitted by the Rights-of-way use permit. In other words, none of the permits at issue
11 authorized construction of a new or revised bus bay on the south side of North Mercer Way
12 (any such authorization would need to include the Washington Department of Transportation)
13 and the permit did not authorize any new use (because such use was already authorized and
14 approved by the Settlement Agreement).

15 The City therefore requests that the following be stricken from Finding of Fact 1.9:
16 “and create an approximately 230-foot-long bus layover on the south side of North Mercer
17 Way between the 77th roundabout and the current bus stop bay.”

18 Following from the correction to Finding of Fact 1.9, the City also asks that
19 Conclusion of Law 4.3 be stricken. Final Decision at 26. Conclusion of Law 4.3 asserts that
20 the Exhibit 3 approved plans “include construction of a 3-bus layover bay on the south side
21 of North Mercer Way – and the Department has expressed no objection.” The Conclusion of
22 Law also asks “[i]f a Right-of-way permit is the wrong vehicle to authorize a bus layover on
23 the north side of the street, how can it authorize a bus layover bay on the south side of the
24 street? The Department’s position is inconsistent.”

25 As explained above, the Exhibit 3 approved plans do not authorize construction or
26 use of any bus layover bays on the south side of North Mercer Way. No such construction or

1 use was applied for by Sound Transit in Exhibit 3 or the permit applications in Exhibit 4. The
2 use and/or construction of 3-bus layover bay on the south side was not addressed or
3 authorized by the City in a Rights-of-way use permit. The use of south side bus layover areas
4 are dealt with in the 2017 Settlement Agreement between the parties, interpretation of which
5 the Examiner has held is the responsibility of another forum.

6 Finally, the City requests that Conclusion of Law 4.4 be stricken where it provides
7 that “[t]he Examiner finds no basis in code to deny permission for a bus layover bay on one
8 side of the street under a Right-of-way Use Permit while allowing bus layover on the other
9 side of the same street and drop-off and pick up bays under a Right-of-way Use Permit.” As
10 detailed above, there is no evidence to support this conclusion of Law; the Right-of-way Use
11 Permit under appeal did not include approval for use of bus layover or drop-off/pick-up bays
12 on the south side of North Mercer Way or even for construction of the same. There was also
13 no evidence presented during the hearing from either Sound Transit or the City as to the
14 permits or approvals obtained years prior for the existing improvements on the south side of
15 North Mercer Way. Such information was irrelevant to these proceedings.

16 IV. CONCLUSION

17 The City respectfully requests that the Hearing Examiner reconsider portions of the
18 Final Decision. For the reasons stated above, the City asks that Findings of Fact 1.3 and 1.9 be
19 revised or stricken to reflect the testimony and exhibits admitted into evidence during the
20 hearing. The City also asks that Finding of Fact 2.1 and Conclusion of Law 4.3 be stricken
21 and that portions of Conclusion of Law 4.4 be stricken to reflect the revised Findings of Fact.

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DATED this 12th day of May, 2021.

MADRONA LAW GROUP, PLLC

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

CITY OF MERCER ISLAND
OFFICE OF THE CITY ATTORNEY

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

Attorneys for the City of Mercer Island

1 **CERTIFICATE OF SERVICE**

2 I certify that I am a citizen of the United States of America and a resident of the State
3 of Washington. I am over the age of eighteen, and I am competent to be a witness herein.


4 On this 12th day of May, 2021, I caused the foregoing document to be served on the
5 parties as indicated below:

6 Stephen G. Sheehy, WSBA No. 13304 7 Sound Transit / Legal Department 8 401 South Jackson Street 9 Seattle, WA 98104-2826 10 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
11 Patrick J. Schneider, WSBA No. 11957 12 Steven J. Gillespie, WSBA No. 39538 13 Michelle Rusk, WSBA No. 52826 14 Foster Garvey PLLC 15 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

16 I declare under penalty of perjury under the laws of the State of Washington that the
17 foregoing is true and correct.

18 DATED this 12th day of May, 2021 at Seattle, Washington

19 **MADRONA LAW GROUP, PLLC**

20 

21 Tori Harris