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The Honorable Catherine Shaffer
Hearing: December 17, 2021
With Oral Argument: 9:00 a.m.

SUPERIOR COURT OF WASHINGTON FOR KING COUNTY

CITY OF MERCER ISLAND, WASHINGTON, a municipal corporation, Plaintiff, v. CENTRAL PUGET SOUND REGIONAL TRANSIT AUTHORITY, dba, SOUND TRANSIT, Defendant.	No. 20-2-15730-9 SEA (*linked* to Nos. 17-2-05191-8 SEA, 17-2-05193-4 SEA, and 21-2-07570-0 SEA) ~~[PROPOSED]~~ ORDER GRANTING SOUND TRANSIT'S MOTION FOR SUMMARY JUDGMENT AND DENYING PLAINTIFF'S MOTION FOR PRELIMINARY INJUNCTION

THIS MATTER came on for hearing before this Court pursuant to Sound Transit's Motion for Summary Judgment and Plaintiff's Motion for Preliminary Injunction, both filed on November 19, 2021. This Court considered the records and files contained herein, including the following:

1. Sound Transit's Motion For Summary Judgment;
2. Declaration of Jemae Hoffman in Support of Sound Transit's Motion For Summary Judgment, with exhibits;
3. Declaration of Stephen Crosley in Support of Sound Transit's Motion For Summary Judgment;
4. Declaration of Patrick J. Schneider in Support of Sound Transit's Motion For Summary Judgment, with exhibits;

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

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5. Plaintiff's Response to Defendant's Motion For Summary Judgment;

6. Second Declaration of Jason Kintner in Support of Plaintiff's Response to Defendant's Motion For Summary Judgment;

7. Declaration of Benson Wong in Support of Plaintiff's Response to Defendant's Motion For Summary Judgment;

8. Second Declaration of Charles Wittmann-Todd in Support of Plaintiff's Response to Defendant's Motion For Summary Judgment, with exhibits;

9. Plaintiff's Motion For Preliminary Injunction;

10. Declaration of Charles Wittmann-Todd in Support of Plaintiff's Motion For Preliminary Injunction, with exhibits;

11. Declaration of Wendy Weiker in Support of Plaintiff's Motion For Preliminary Injunction;

12. Declaration of Jason Kintner in Support of Plaintiff's Motion For Preliminary Injunction;

13. Declaration of Brian Mills in Support of Plaintiff's Motion For Preliminary Injunction;

14. Sound Transit's Opposition to Plaintiff's Motion For Preliminary Injunction;

15. Declaration of Jemae Hoffman in Support of Sound Transit's Opposition to Plaintiff's Motion For Preliminary Injunction, with exhibits;

16. Declaration of Katherine Chalmers in Support of Sound Transit's Opposition to Plaintiff's Motion For Preliminary Injunction;

17. Declaration of Eric Beckman in Support of Sound Transit's Opposition to Plaintiff's Motion For Preliminary Injunction;

18. Sound Transit's Reply in Support of Motion for Summary Judgment;

19. Reply Declaration of Eric Beckman In Support of Sound Transit's Motion for Summary Judgment;

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

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20. Reply Declaration of Katherine Chalmers In Support of Sound Transit's Motion for Summary Judgment;

21. Reply Declaration of Jemae Hoffman In Support of Sound Transit's Motion for Summary Judgment, with exhibits;

22. Plaintiff's Reply in Support of Motion for Preliminary Injunction;

23. Third Declaration of Jason Kintner in Support of Plaintiff City of Mercer Island's Motion for Preliminary Injunction;

24. Declaration of Jessi Bon in Support of Plaintiff City of Mercer Island's Motion for Preliminary Injunction;

25. Declaration of Kirsten Taylor in Support of Plaintiff City of Mercer Island's Motion for Preliminary Injunction;

26. Second Declaration of Brian Mills in Support of Plaintiff City of Mercer Island's Motion for Preliminary Injunction;

27. Proposed orders submitted by Plaintiff and Defendant;

Based on the record in this case and the other linked cases before this Court, as well as the oral argument of the parties, and being otherwise fully informed, NOW, THEREFORE, it is hereby ORDERED as follows:

(1) Sound Transit's Motion for Summary Judgment is **GRANTED** for the reasons explained in the Court's oral ruling on December 17, 2021, a transcript of which is attached hereto and incorporated herein.

(2) Plaintiff's Motion for Preliminary Injunction is **DENIED** for the reasons explained in the Court's oral ruling on December 17, 2021, a transcript of which is attached hereto and incorporated herein.

(3) The issue of damages for the City's breaches of the Settlement Agreement is reserved for future proceedings.

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

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DATED this 21 day of December, 2021.

The Honorable Catherine Shaffer

Presented by:

s/Stephen G. Sheehy
Stephen G. Sheehy, WSBA #13304
Managing Legal Counsel
CENTRAL PUGET SOUND
REGIONAL TRANSIT AUTHORITY
401 S. Jackson St.
Seattle, WA 98104
Telephone: 206-398-5000
Email: stephen.sheehy@soundtransit.org

s/Patrick J. Schneider
s/Steven J. Gillespie
s/Rylan Weythman
s/Justice J. Brooks, I
Patrick J. Schneider, WSBA No. 11957
Steven J. Gillespie, WSBA No. 39538
Rylan Weythman, WSBA No. 45352
Justice J. Brooks, I, *Pro Hac Vice*
FOSTER GARVEY PC
1111 Third Avenue, Suite 3000
Seattle, Washington 98101-3292
Telephone: (206) 447-4400
Facsimile: (206) 447-9700
Email: pat.schneider@foster.com
steve.gillespie@foster.com
rylan.weythman@foster.com
justice.brooks@foster.com

s/ Paul J. Lawrence
s/ Jacob A. Zuniga
Paul J. Lawrence, WSBA # 13557
Jacob A. Zuniga, WSBA #48458
Pacifica Law Group LLP
1191 Second Avenue, Suite 2000
Seattle, WA 98101-3404
Telephone: (206) 245-1700
Facsimile: (206) 245-1750
Email: paul.lawrence@pacificalawgroup.com
jacob.zuniga@pacificalawgroup.com

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Attorneys for Central Puget Sound Regional Transit Authority, dba, Sound Transit

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

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IN THE SUPERIOR COURT OF THE STATE OF WASHINGTON

IN AND FOR THE COUNTY OF KING

CITY OF MERCER ISLAND, Petitioner, v. CENTRAL PUGET SOUND REGIONAL TRANSIT AUTHORITY, Respondent.	King County Cause No. 20-2-15730-9

VERBATIM REPORT OF PROCEEDINGS

Had in the above entitled cause before the HONORABLE CATHERINE SHAFFER, Superior Court Judge for the State of Washington, County of King, on December 17, 2021.

APPEARANCES

MALAIKA M. EATON
CHARLES S. WITTMAN-TODD
Attorney at Law
On Behalf of the Petitioner

PATRICK J. SCHNEIDER

Attorney at Law
On Behalf of the Respondent

Miranda L. Seitz, CCR, RPR
Official Court Reporter
King County Courthouse
516 Third Avenue
Seattle, Washington 98104
(206) 263-5863
mseitz@kingcounty.gov

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8:32 AM

* * * * *

THE COURT: Good morning, everybody. Why don't we just have Sound Transit and the City state their appearances?

MR. SCHNEIDER: Good morning, Your Honor. I'm Pat Schneider appearing on behalf of Sound Transit.

MS. EATON: And good morning, Your Honor. Malaika Eaton appearing on behalf of the City of Mercer Island. With me is my colleague, Charles Wittmann-Todd, and I believe Mayor Benson Wong from the City is also here with us.

THE COURT: Who's arguing for the City today?

MS. EATON: I will be arguing, Your Honor.

THE COURT: All right. Well, I think I've read everything that was submitted on the City's motion for preliminary injunction and Sound Transit's motion for summary judgment. Sound Transit filed a little earlier so they're going to start. I was able to find time for you this morning to allow for up to a half an hour of argument per side, and I appreciate everybody's flexibility in being here a little bit

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earlier than we initially scheduled because I know you agreed it's probably to your advantage to get to fully flesh out your arguments. So, folks, what I'm planning is that in whatever order it would like, Sound Transit starts and tells me how much of their 30 minutes they want to reserve; and then whatever order the City would like to address the two motions before me, the City responds and tells me how much time they want to reserve, okay? And then I'll hear again from Sound Transit and then I'll hear again from the City and then I'll give you a ruling.

All right. So let's go ahead and start with you, Mr. Schneider, and the rest of us will mute so that we can hear you. Go right ahead.

MR. SCHNEIDER: Thank you, Your Honor. I would like to reserve approximately 15 minutes for my response in reply. If you could, if I'm still talking after 15 minutes, please let me know and I'll wrap it up.

Constructing a light rail system is a lengthy process. The voters approved East Link in 2008. The final environmental impact statement was completed in 2011. The Sound Transit Board approved the construction of East Link and its current alignment in 2011. Construction began in 2017, and the City

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commenced the litigation attempting to stop the construction that led to the settlement agreement that you are interpreting today. Sound Transit responded, obtained two preliminary injunctions and a writ of prohibition. In the settlement agreement, the City agreed to dismiss its lawsuit, but Sound Transit's lawsuits remain in effect and are linked together before this court.

The settlement agreement called for a collaborative process with King County Metro, which was not a party to the settlement agreement, because it was not a party to the litigation. That collaboration happened. It took approximately a year, from early 2018 until early 2019. During the course of that collaborative process, Sound Transit reminded the City repeatedly, as Jemae Hoffman has demonstrated in her declarations and one of the attachments, that Sound Transit's schedule called for and required a decision about the MITI project at the Mercer Island light rail station, called for the Sound Transit Board to make a decision by April of 2019. All of the participants in the collaboration were aware of that schedule, which is why the DEA study was completed in March of 2019, and in fact the Sound Transit Board did act in April of 2019 to approve the acquisition of the two private

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parcels which are needed for the configuration that the City wants.

At the conclusion of the collaborative process, all of the participants had many meetings with the City Council in an effort to explain to the City Council why Metro had not agreed to the configuration that the City wanted. The facts and the law were presented to the City Council over the course of many meetings, both formal council meetings and individual meetings within council members' offices. That process was a political process because everyone knew that the City Council could initiate more litigation, which is in fact what has happened, if it weren't convinced of the -- of what the city manager had already been convinced of, which is that Metro's requirements -- Metro's operations require sufficient bus layover area at the Mercer Island station for it to operate as a terminus. That was a political process, not a legal one. It was not required by the settlement agreement, which makes no mention of any future action by the City Council, and it's not required by state law because the city manager has full, complete plenary authority over the administrative affairs of the City; and the administration of the contract is administrative, not legislative.

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Six months after the Sound Transit Board made -- took its action to proceed with the configuration at 77th Avenue Southeast, the City's new city manager wrote a letter purporting to withhold approval of Metro's demands. That letter demonstrates in and of itself what is fundamentally wrong with the City's position in this lawsuit. Sound -- Metro did not make demands because Metro does not need the City's permission to do anything. It is not a party to the settlement agreement. It has authority under state law to build and operate the regional transit facilities that it needs, and so Metro did not make any demands of the City because it did not need to make any demands. Metro, at the behest of the city manager, Julie Underwood, wrote a letter to help explain to the City Council why Metro had not agreed. Its explanation of its operational needs is in no way a demand because it was not a party to the lawsuit, and under state -- or the settlement agreement and under state law, it does not need a local city council's permission to build and operate its regional transit facilities.

The legal context in which the settlement agreement was written is that Metro and Sound Transit both as regional transit agencies have the authority to build

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and operate their necessary facilities in city streets. The City has only the rights that the contract gave it. It has no right to otherwise veto these regional transit facilities, and the rights the contract gave the City are entirely contractual rights and they are contractual rights vis-à-vis Sound Transit. They have nothing to do with Metro because Metro was not a party. Metro collaborated and participated for a year in the collaborative process because it wants to cooperate with all of its cities, as does Sound Transit, but it was not required to do anything and it is certainly not required to obtain the City's permission. In fact, if Sound Transit were not building this -- the MITI project for bus/rail integration, Metro would have the authority to come in and build it itself. It is not bound in any way by this contract and has all of the authority that the state legislature has given it.

So what contractual rights does the City have? Section -- with regard to the MITI project bus/rail integration? Section 4.1 of the settlement agreement could not be more clear that Metro is required to agree to what Sound Transit agreed with the City about. Sound Transit was willing and did agree to build the configuration in the City in the way the

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City wanted if Metro agreed. Section 4.1 is very clear about that and Section 4.1 simply reflects the state of the law, which is that Metro is its own independent agency and gets to make its own decisions about where bus transit facilities are needed and how they're going to operate. The fact that Metro did not agree at the end of the collaboration is -- is the only material fact for purposes of this lawsuit. The collaboration happened, Metro did not agree, therefore Sound Transit is not required to build the facility that the City wants it to build because Metro has -- Metro is not subject in any way to Sound Transit's contractual rights with the City.

Now, the City makes a big issue of whether it has reasonably withheld consent under Section 4.3 of the settlement agreement. One never reaches that issue because Metro did not agree. But for sake of argument, the City's withholding of consent is clearly unreasonable for at least four separate reasons, beginning with the fact that Metro did not agree to the configuration that it wants. In addition, the City's purporting to withhold consent six months after Julie Underwood had clearly given it is manifestly unreasonable. We have submitted eight separate declarations that talk about the things that Julie

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Underwood did and -- and what she agreed to and the City has not rebutted any of that in any way. None of the declarations that the City had submitted in any way contradict what all of Sound Transit's and Metro's declarations have said about Julie Underwood's agreement.

The parties went through a planning process with professional planners. Katie Chalmers and Stephen Crosley were the lead planners for Metro with regard to regional transit and bus/rail integration and they devoted a year to the City, and at the conclusion of that process, Julie Underwood was persuaded that Metro's operational needs require what Sound Transit is building. But it wouldn't matter for purposes of this contract whether Julie Underwood agreed or not because the purpose of the year-long collaboration was not to persuade the City of anything; it was to see whether Metro could agree and Metro did not agree. But the City's subsequent, after-the-fact withholding of consent is unreasonable because Julie Underwood was persuaded and -- and came to the same place about Metro's operational needs as did Metro.

Perhaps the most fundamental reason why the City's withholding of consent is unreasonable is that the City has never offered an alternative bus layover area

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to Metro that would allow Metro's operations, minimal operations to work. It did not do so during the collaboration, it did not do so after the collaboration, and it has not done so in the pleadings that have been presented to this Court. The declaration of Jason Kintner is illustrative that the City submitted with its reply. Mr. Kintner alleges that well, we looked at alternatives in this working group and -- and they were rejected. Well, as the declaration of Jemae Hoffman makes clear, that working group was entirely a city group. It was not something that Metro participated in or that Sound Transit participated in, although Sound Transit answered questions and supplied information. And it's the City that rejected its own, you know, after-the-fact look at the 80th Avenue Southeast alternative. And Mr. Kintner does not tell this Court what the alternatives were. So he says well, we looked at alternatives, but he doesn't tell us what they were. So never, from the beginning until this day, has the City ever identified an alternative that would allow Metro to have the layover area it needs for its bus/rail operations. And the City Council does not get to decide what Metro's operational needs or requirements are. The contract did not give them that

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right and it could not because they were not a party to the agreement.

THE COURT: You're a minute away from your 15-minute deadline.

MR. SCHNEIDER: Thank you.

Because the City has not offered an alternative, its efforts this morning are simply an effort to stop bus/rail integration at the Mercer Island station. The facts are uncontroverted that Metro needs that layover space. The City is attempting to prevent Metro from getting that layover space. Metro is not a party to this agreement, and nothing could demonstrate more palpably that the City's position is unreasonable than the fact that it wants this Court to deny construction of a layover space that the facts demonstrate is needed for reasonable transit operations.

Thank you, Your Honor. I'll stop here.

THE COURT: Thank you. You're right at the 15-minute mark.

And, Ms. Eaton, I'll hear from you. Tell me how much time you want to reserve for your second round.

MS. EATON: Your Honor, I'd like to reserve 12 minutes of my time, and I too would appreciate a warning if Your Honor is able to do so.

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Thank you, Your Honor, and thank you for the additional time and the guidance about how this hearing would go. The parties do appreciate the organization. I'd like to focus my argument on the areas that the Court has any questions about, so certainly I welcome questions from the Court. I want to structure it in a way that I think addresses first the overlapping issues.

THE COURT: No. Ms. Eaton, I will be frank with you and tell you that I found much of the City's briefing bewildering, so I'm just going to be listening to you. I'm not going to be asking questions.

MS. EATON: All right. Thank you, Your Honor.

With respect to the issues, there are a number of issues that overlap; so, in other words, overlap between the City's motion for preliminary injunction and Sound Transit's motion for summary judgment. Those relate primarily to Section 4, and then there's a few what I'll call ancillary arguments that Sound Transit makes in its summary judgment motion relating to conditioning of permits and the filing of the lawsuit being a breach of the agreement that are somewhat unrelated. I'd like to start with the

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Section 4 arguments because I believe those are core to both motions.

And I think what the evidence shows is that Sound Transit made a deal with the City that it admits, frankly because it must -- you know, there's a -- there's an email from literally the day after the agreement was signed that it admits it was dismayed about. It was dismayed that it had to agree to these Section 4 protections. It did so specifically to prevent a hearing on the City's request for a preliminary injunction that was set to be heard the very next morning. So, in other words, half an hour short of midnight is when this deal was entered into. That's at Exhibit B. And Sound Transit was intent on ensuring that the City's motion not be heard. That is why it reached a deal. Mr. Rogoff admits it was under immense pressure to do so.

Our requested injunction is very narrow. It asks only to prevent one curb cut and Sound Transit is notably silent. It presents absolutely no evidence whatsoever to this Court that delaying the construction of just that curb cut will have any impact at all on its construction schedule. And that's critical, Your Honor, because I do want to emphasize what this motion is not and what this case

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is not. Sound Transit has tried to portray this case as some sort of effort by Mercer Island to stop light rail or stop the MITI project. That is not the case. And in fact the evidence before you, if you look even at Exhibit A, is that the Mercer Island welcomes light rail. We want light rail. But what we do want is Sound Transit to abide by the agreement it struck, including the important protections in Section 4. And there's no dispute, Your Honor, that the curb cut would violate the agreement as written, those Section 4 protections as written because -- and in fact, there's no dispute that those protections were core to the City. Mr. Rogoff candidly admitted that it was a must-have and that this was a major issue for the City, and he also candidly admitted that was what he was dismayed about, was that he had to agree to these protections.

But core to both motions on Section 4 are the following questions. First, has Sound Transit shown that the conditioned precedent to Metro's involvement has been met, that Metro buses are, quote, necessary? Second, did Metro provide its consent in 2007 -- or 2017, excuse me, when it -- Mr. Gannon wrote a letter approving the Section 4 configuration and limitations? Three, are the changes that have been demanded -- and

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I want to be clear. It's not Metro. It's Sound Transit that is making these demands because it is Sound Transit that is a party to the agreement and it is Sound Transit that is proceeding with construction based on those demands. And are those limited to Section 4.3, which are the negotiable limitations? Number four, whose approval is required; is it the city manager or the City? Number five, was that approval given? Number six, if not, and of course we believe the evidence clearly shows it was not, was it reasonably withheld? And then finally, number seven, did Sound Transit comply with the dispute resolution provisions of the agreement?

Now, the evidence before the Court shows that the City is likely to prevail on each of those questions on the merits, and of course we only have to show a likelihood of success; and because of the nature of Section 4, we don't even have to show that we're likely to prevail on all of them because virtually any one of them would suffice. On the flip side, Sound Transit's motion is exactly the opposite because of Section 4 and the way it is written. Sound Transit has to prevail on every single one of those and has to convince you that there is no material dispute of fact as to any of those issues. It has failed on all of

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them, and I'd like to walk the Court through some of the key arguments responding to Mr. Schneider's points.

So, first of all, Metro buses being necessary, Sound Transit doesn't dispute that this agreement was carefully negotiated for months. The parties picked their words very carefully. It also doesn't dispute that Metro buses being necessary is a conditioned precedent in the agreement, which legally means that it is Sound Transit's burden to show that that's true. The evidence before the Court; primarily the admissions of Mr. Rogoff and Mr. Gannon as well as frankly Sound Transit's own declarants, Mr. Beckman, and then our declarants as well, show that Sound Transit has the capacity. It is currently serving Mercer Island with its buses and it can continue to do so. It has simply chosen not to, and in fact, there's no evidence that Sound Transit even evaluated whether it could serve Mercer Island as was its burden. There's no evidence that, frankly, it did anything of the sort. Instead, it has attempted to use Metro as a way to get around the Section 4 limitations to which it agreed. And we know that Sound Transit has the option of using its own buses because, number one, it's doing so now; and, number two, it -- it admits it

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will continue to do so using basically the same route, just going to the South Bellevue station instead of Mercer Island.

And one core piece of the issues that Mr. Schneider has not addressed, and frankly Sound Transit's motion didn't either, is that -- you know, he keeps talking about Sound Transit and Metro's authority; but he ignores that the City's consent is required by statute, and that's RCW 81.112.080(2). This provision specifically contemplates that the City and Sound Transit, quote, may contract for the use of this kind of property on terms acceptable to both. That is exactly what the agreement is. It's a contract between the City and Sound Transit permitted by RCW 81.112.080 and Sound Transit seeks to violate that contract without the City's consent. And in fact, the evidence also shows that Sound Transit's mixing apples and oranges on this point. Their declarants say only that Sound Transit does not have the capacity to, quote, duplicate Metro's local bus services. But, Your Honor, that's not the right issue. We're not asking them to duplicate Metro's local services, and in fact, those routes are carved out of Section 4 repeatedly. So basically we're talking about three routes, and their own declarants do not deny that they

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could provide those services and it's their burden to show that.

They also can't rely on the City's participation in the collaborative process to argue some sort of waiver of this because the agreement prohibits that argument. Section 21.3 is a contract provision that specifically says even if you fail to seek prompt compliance, that is not a waiver. The parties negotiated that provision as well. Nor are we asking the Court to order Metro to do or not do anything. Sound Transit is in fact, as the evidence before this Court shows -- this is specifically Mr. Rogoff's testimony and Mr. Gannon's admissions. Sound Transit and Metro coordinate their routes, and where Sound Transit provides routes, Metro does not need to. So Metro is simply being used as a distraction in this issue.

On Metro's consent, the evidence is very clear. And I will say on this one, Sound Transit admits that Metro agreed in its 2017 letter to the 77th street configuration, but then it ignores what the rest of the language of that letter actually says. And at the very least, Your Honor, as the Court is required to in response to Sound Transit's motion, the evidence shows and the jury could reasonably find that Metro's letter, which is our Exhibit I, combined with

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Mr. Gannon's admissions about what that letter put the City on notice of and did not, and combined with the -- Exhibit S to -- to our -- I believe this is the opposition, the second Wittmann-Todd declaration -- where there was a meeting between Sound Transit and Metro secret from Mercer Island, the City was not told, where they met before the agreement was signed to, quote, ensure there are no technical flaws with the configuration and its limitations before moving forward with the City to approve. Those -- that evidence in combination is certainly sufficient for a reasonable jury to find that Metro consented, whether just to the 4.2 limitations or frankly to all of them, viewed in the light most favorable to the City.

THE COURT: Okay. You have run up into your 12 minutes if you want to reserve the rest of your time, or you can keep going.

MS. EATON: I'm sorry, Your Honor. I meant 12 minutes for rebuttal, so I think I've got maybe 5 minutes.

THE COURT: Go right ahead.

MS. EATON: Thank you.

And then we all -- it's undisputed, Your Honor, that the demands that Sound Transit is making include changes to Section 4.2 as well as 4.3, and Sound

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Transit has provided absolutely no analysis to this Court as to why the parties would have treated those two sections so differently if, as Sound Transit contends, basically the City's rights under 4.3 are meaningless if Metro disagrees. That's not what the contract says. That's not even what Metro understood. If you look at the emails that we submitted of Metro's own internal discussions, Metro understood that the only provisions that were negotiable were those in Section 4.3.

And as to approval, Sound Transit spends a lot of time trying to argue that the city manager at the time, quote, unquote, approved. But, Your Honor, the evidence is far from it. The best that they can do, viewed in their favor, is that the DEA study was a recommendation to council. The law that they ignore is contrary. So, for example, council and council alone has the power to make decisions relating to the use of property. That is RCW 35a.11.020. They do not cite that; they do not address it at all. And only for the first time on reply, when we pointed out that they had absolutely no law and no evidence for their argument that this was a city manager decision, did they cite Ruano, but that case actually cuts against them because the test addresses permanence and this of

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course would be a permanent revision to property. But if you actually look at the case law that they didn't cite, and again, you know, they cited this for the first time on reply, the cases actually say that this inquiry is very, quote, fact specific and it's a multifactor test that Sound Transit didn't even address. I'm citing there to a case called Global Neighborhood, and the cite is 7 Wn. App. 2d 354 at page 396 for the multifactor test and that it is fact specific.

Nor does Sound Transit frankly address the fact that the agreement itself makes clear that this is a council decision. Section 4.3 says that this is the City's decision whether to reasonably reject requested changes. Elsewhere in the agreement, it references the city manager when that is what's meant, but that's not the case here. And of course Sound Transit fails to come to terms with its own internal records which we got in this litigation that show that it was repeatedly told this was a council decision, and Ms. Taylor's declaration, which makes clear that the City's personnel never told Sound Transit that this was a city manager or other city personnel decision to make and instead emphasized that council approval would be required. So Sound Transit's argument that

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the city manager changed positions frankly is irrelevant from the outset, but it's also wrong on the facts.

THE COURT: I think you're confusing the implementation of the agreement, the assent to the agreement by the city manager and what Metro did under 4.3. But having said that, you've got two minutes before you get to your eighteen minutes.

MS. EATON: Thank you, Your Honor.

It speaks to the wrong issue because of course when the city manager did send the October 2019 letter, it was with council approval in advance. And of course there's no evidence before the Court, certainly not viewed in the light most favorable to the City, that there was any approval of Metro demands which came after, and of course their argument also ignores the plain language of Section 4.3 which gives the City the right.

And then finally I'll speak to one last point, Your Honor, before I reserve my time. They -- they talk about not providing alternatives, but frankly the evidence before the Court is that Sound Transit rejected the alternatives the City proposed without even consulting with Metro. If you read the Chalmers reply declaration and the Kintner and Wong

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declarations, we proposed -- we proposed alternatives including layover alternatives. Sound Transit rejected them out of hand and apparently never even bothered to consult with Metro before doing so. And of course finally, and in conclusion, there's no dispute that Sound Transit failed to use the dispute resolution processes for its Section 4 issues and frankly for any of the issues it now raises which precluded Your Honor from proceeding with respect to any of their summary judgment motion, and also show our entitlement to relief on the preliminary injunction standard.

Thank you, Your Honor. I'll reserve the remainder of my time.

THE COURT: You have 12 minutes remaining.

All right. Mr. Schneider, we're going back to you for 15 minutes.

MR. SCHNEIDER: Thank you, Your Honor.

The issue of whether Metro's buses are necessary is an issue that the -- that Metro and the King County Council get to decide; not Sound Transit, not the City Council, and frankly, not this Court; in a proceeding to which Metro is not a party. Metro -- Katie Chalmers, a professional planner with Metro, has explained that they are in the process of deciding how

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to modify Metro's nine separate bus routes that currently come to -- well, eight of them currently come to Mercer Island. She said one of them was temporarily suspended because of the pandemic. But Metro is in the process of planning what routes and how those nine bus routes are going to change. The City refers to three bus routes, presumably is referring to the three bus routes that serve Mercer Island itself. But Metro is planning the regional bus routes that currently travel I-90 into downtown Seattle that are no longer going to do so because of the advent of East Link, and Metro decides what buses are necessary. The City's argument ignores the different statutory authority between Metro and Sound Transit. With Sound Transit's authority to operate buses being interim authority for express routes, it has no ability to supplant, duplicate, displace Metro's regional bus routes. They are -- they are local in the sense that they're not express, but they are regional and it's the regional transaction system that is at issue here in this proceeding.

The City cites a statute that it referred to I think in one sentence in its briefing, 81.112.080. It does not in any way give the City authority to trump the plenary authority that the state legislature has

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and has delegated in part to Metro and to King County to decide what regional transit infrastructure is needed. Mr. Gannon's letter did not give consent. It's obvious from the content of the letter itself. It's also obvious from the conduct of the City for the years after the letter was written and before it commenced this litigation. If Mr. Gannon's letter had agreed to the configuration that the City wants this Court to require Sound Transit to not build or to build, depending on how you approach that issue, then the collaborative process would've been unnecessary and the City Council would not have entered into an agreement that called for a future collaborative process. That future collaborative process took place and Metro did not agree, and the purpose of the process was, again, not to persuade the City of anything. It was to determine whether Metro could agree to what the City wanted and Metro did not agree. Sound Transit didn't write the letter.

It's -- the letter came from the head of Metro. The letter is not a legally-binding contract with the City in any way. And the letter simply -- the letter was written because Julie Underwood, the city manager, emailed Mr. Gannon and said the Council's concerned that the contract, the settlement agreement gives

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Metro veto authority over what the City wants. Exactly right. That's what -- the contract the City entered into agreed that Metro did have veto authority because Metro was not a party to the agreement and Metro gets to decide what regional transit facilities it needs for its operations. So all that letter does is say that the -- that Metro supports the 77th Avenue Southeast configuration. It repeatedly refers to future work together, future collaboration, all of which happened. It does not in any way preclude the process, the year-long -- year-and-a-half-long process that followed.

It was not consent, and even if it was, it was -- would've been Metro's consent which they were free to withdraw because that letter was not a binding contract in any way. But, again, the plain terms of the letter and the City's conduct for a year and a half after the letter was written indicates that this is a lawyer's argument made for the purpose of litigation. It has nothing to do with the understanding of the parties at the time the letter was written and the settlement agreement was entered into. Sound Transit is building exactly what the settlement agreement said it would build, which is the configuration to which Metro agrees. The -- Section

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4.2 and 4.3 set forth the agreement between the City and Sound Transit, not Metro; and Section 4.1 says what we've agreed to, you, City, we, Sound Transit, all depends on Metro's agreement. Metro's agreement has not been obtained and that is the dispositive fact for purposes of this litigation.

The City Council does not have executive authority. I commend the Court's attention, the comments from the then City Attorney Kari Sand on the drafts of the DEA report and we -- which she made it clear that no council action was required because this document, the DEA study is -- is an implementation of the settlement agreement. It's not an amendment of it; and nothing in the settlement agreement itself requires us to come back to the Council, and the Council's authority over real property is subject to the state legislature's plenary authority over city streets and the state legislature has decided that a local city council does not get to decide on behalf of regional transit agencies what transit use is made of city streets.

With regard to the City's motion for a preliminary injunction, not only is the City unlikely to prevail on the merits, but it cannot show irreparable harm. Sound Transit -- if the Court were to disagree with Sound Transit and the -- the layover area is

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constructed, it can be unconstructed. There is no irreparable harm to the City. What there is is substantial serious harm to the region if this layover area cannot be constructed because, as I've already said, Metro is currently in the process of planning its regional bus routes and deciding which ones will come to the Metro island station. If they can't come to the station, Metro's transit for a substantial portion of eastern King County is put in limbo, and so there's a substantial regional interest. The equities do not weigh in favor of the parochial interests of the City, and the City has utterly failed to show the irreparable harm that goes with -- or that it is required for a preliminary injunction. But, again, the City cannot prevail on the merits of this case because Sound Transit -- or because Metro has not agreed to what the City wants Sound Transit to build, and it's Metro's buses and Metro's operations that are at issue in this -- in this proceeding to which Metro is not a party.

I'd like to just conclude by going back to Julie Underwood again, the city manager who participated in the process with Metro's professional planners and with Sound Transit's planners and ended up agreeing that Metro's operations require this. Julie, there's

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no question she agreed. We have eight declarations that say that, that are un-rebutted, and what Julie failed to do was persuade the City Council politically of the need for this. But the politics of the Mercer Island City Council do not get to trump the law and the facts, and the law is that Metro decides its operations. It's not a party to this agreement, and the facts are undisputed that its operations require this facility. And by the way, even Ms. Eaton this morning in her argument to this Court does not tell us what any of these alternatives were that the City has identified that would satisfy Metro's operations. We're supposed to take it on faith that they exist, but they can't be identified to this Court anymore than they could be identified to Metro.

Thank you, Your Honor. I'm concluded.

THE COURT: Thank you. And a little ahead of time.

All right. Ms. Eaton, you have up to 12 minutes. Go ahead.

MS. EATON: Thank you, Your Honor. A few points.

So, first of all, with respect to the argument that the City somehow would not have participated in the collaborative process if Metro buses were not

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necessary or if Metro had consented, that argument is a non sequitur, Your Honor. Of course we would have. The idea was to try to find a solution that was better for everyone, that was more flexible for everyone. But in fact, that didn't happen, and Sound Transit's own internal documents show that by -- by mid-2019, they were, quote, not interested in hearing from the City, which is of course why they rejected the alternatives proposed out of hand without apparently even sharing them with Metro. So we -- we tried to collaborate for good reason. It's the right thing to do. Frankly, it's required by the agreement. But Sound Transit cut that off and was not interested in hearing from the City, although it didn't tell the City that.

For the first time, I heard counsel say that Metro was free to withdraw the consent that it provided in 2017. There is no evidence that that is what the agreement requires, and in fact, the language says the opposite. It says that the consent should be written, which of course the 2017 consent was, and it does not provide any authority for withdrawal. And then, you know, the -- the letter is actually pretty darn clear. It says we'll work with the City to implement the provisions of Section 4.2, and Mr. Gannon admitted

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very candidly that letter did not put the City on notice of any concerns about layover space, about north side operations, none of it.

And then with respect to the City's reasonable rejection, what is -- I heard Mr. Schneider say that it's undisputed that Metro's concerns were reasonable. To the contrary, Your Honor, we provided ample evidence that the City's rejection was reasonable. Metro did not tell the City any -- what was accurate in fact on layovers. It tried to tell the City that its collective bargaining agreement wouldn't allow it to have limitations on layovers. Not true. The collective bargaining agreement which we submitted which they have never addressed shows, to the contrary, that there are limits. Mr. Gannon admitted we can make reasonable limits. He said that we can -- even say if a bus driver wants an 85-minute layover, we can reject that, and yet Metro is here asking the City to agree to no limits, day or night, 24 hours a day for as long as they want. That is unreasonable on its face, Your Honor, and we've submitted significant evidence on that.

And of course then with respect to injury and harm, what you heard from Mr. Schneider today was exactly the same strawman argument that they put in their

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brief. But, Your Honor, they've submitted no actual evidence to you that their construction schedule will be impacted in any way by the injunction that we request. And of course it was their burden to do so, so they're trying to pile on harms that there's no evidence to support in order to try to make the balance favor them. And then they say well, we can just undo it, we can undo it. But, Your Honor, they also don't dispute that -- the law and the facts that we cited that show that this is an injury that cannot be easily remedied by money. It's also a continuing injury, and under Kucera and other cases along those lines, those are exactly the type of injuries for which injunctive relief is appropriate, and it's similarly appropriate when a right has been granted by contract. Having your contract rights violated is a significant injury.

That also, Your Honor, goes to the issue of the last prong of Sound Transit's argument, because their own construction schedule submitted as the first exhibit to Ms. Hoffman's reply declaration shows that nothing the City has done has had any impact on their schedule. Their proposed schedule says that they wouldn't even start construction until January 2021 and that it would take many, many months for the MITI

project to be constructed. Our evidence shows they broke ground already. They're ahead of schedule. So, again, they've presented no evidence to Your Honor that they would be harmed in any way or that the MITI project would be impacted in any way by simply asking that they wait until our hearing date in March so that the merits of the dispute can be resolved between the parties at trial, as they should be, because there are many issues that a jury ought to and should address. And for that, Your Honor, we have a contract right, we have a significant injury that cannot be remedied by money, and Sound Transit has not shown any harm whatsoever to its construction schedule.

So we would ask that you grant our motion for preliminary injunction, which again is very narrow, and that you deny each of the requests Sound Transit makes for summary judgment because there are ample disputes of fact on all of the issues; and frankly as to each of Sound Transit's issues, there are numerous bases on which Sound Transit has not even shown that the Court can reach the merits because either it hasn't shown conditioned precedent, it hasn't shown that it complied with dispute resolution and in fact it's undisputed that it did not, and it hasn't shown that it actually made the claims it now seeks to have

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the Court resolve against the City on summary judgment. Thank you, Your Honor.

THE COURT: Thank you. All right, folks. I'm going to ask you to go ahead and mute if you would, and I'm going to move fairly quickly through my ruling here.

Let me say at the outset that -- although I hear lots of lawyerly spin and I read a fair amount of lawyerly spin as I worked my way through the evidence in this case and the briefing, that this is a pretty undisputed background from the Court's point of view. And I'm going to quickly roll through it and point out this isn't the first time the Court has seen the parties and taken a look at the overall project that we're dealing with here.

The matter before me, as everybody knows, centers on the configuration and operation of the Mercer Island Transit Integration Project, or MITI, that Sound Transit is building next to the Mercer Island light rail station. And the issues that are here are issues that were previously the subject of very active litigation in our court. The light rail project has been underway for a very long period of time as Mr. Schneider pointed out at the beginning of his argument when he went through the history of the Sound

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Transit project. The City was notified in 2017 that the I-90 bridge center would be closed, and the City took actions to protect Mercer Island's single-occupant vehicles in the HOV lanes. The City Council passed development moratoria that delayed building permits related to the City's I-90 right-of-way or the citing of essential public facilities, the City revoked the Shoreline Substantial Development Permit it had issued previously to Sound Transit; all of this in an effort to get Mercer Island's single-occupant vehicles into the reconfigured HOV lanes on I-90.

So Sound Transit brought lawsuits in 2017 and prevailed. Judge Andrus issued a preliminary injunction and denied Mercer Island's motion to dismiss, and also issued another preliminary injunction and a writ of prohibition that forbade the City from applying its zoning regulations to the I-90 right-of-way and revoking the Shoreline Development Permit. I'm aware that there was another preliminary injunction that was due to be argued before Judge Andrus when the parties tentatively agreed to settle their 2017 litigation, but I also note the background here is that Sound Transit prevailed and the City made significant concessions in the settlement agreement

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about things it would not do again. And let me turn briefly to some of that language in the settlement agreement, because despite the attacks that the City has made on Metro's happiness about entry into the settlement agreement, Metro's conversations with Mercer Island outside of the presence of -- strike that. Conversations with Metro outside of the presence of Mercer Island, I really don't think I have any dispute at all that this settlement agreement was entered into and that the City authorized its representative to enter into the settlement agreement. So let me turn to a couple of the provisions in the agreement that are at issue for me here.

There's Section 14.3. That said that the parties agreed that the agreement provided all reasonable and appropriate mitigation for the project, and the City agreed there was no basis in fact or law for the City to exercise its regulatory authority to impose additional mitigation on the project. But the City committed that it would exercise its regulatory authority only to order compliance with regulations that applied to the project, for example that a building permit comply with the building code and that an electrical permit comply with the electrical code. But the City was just before me, last time I had

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substantial litigation by these parties, in direct violation of this provision, of 14.3. And there's no dispute about that, that the City went ahead and exercised its regulatory authority to impose additional mitigation on the project. There's no promise in this settlement agreement that the City could prohibit curb cuts or impose any other additional provisions, and as I pointed out at the last hearing, there's no basis in the law either for the City to have done that. So I have a direct violation of the settlement agreement under 14.3, really undisputed facts before me.

I also have a direct violation of the settlement agreement under 15.1(h), which the City said, I quote, the City will not commence any further litigations -- strike that. Proceedings, new litigation, or new regulatory actions impacting the project, period. The dispute resolution provision that the City relies on here to go ahead and violate that prevision, which it did by filing the current litigation, specifically says except as otherwise specified in this agreement, in the event a dispute under the dispute resolution project is not resolved, then the parties can file suit. But the City cannot file suit, under the express provisions of 15.1(h), impacting the project.

Today, the City is asking me for an injunction impacting the project. I don't know how I could have a more direct violation of the settlement agreement.

But let me turn to where you folks have put a lot of your attention, which is the specifics with regard to the area where Sound Transit is moving ahead with its curb cut so it can construct its facility in a way that appropriately services not just Mercer Island, but everybody else that will be using the regional transit authority, and that's the procedure that moved forward under Sections 4.1 and 4.3 in particular of the settlement agreement.

The parties specifically addressed the very matters that are at issue here in 4.1 and 4.3. And in 4.1, they specifically agreed, the City did, that to the extent King County Metro buses are necessary to coordinate service, the parties agreed that the configuration could not be implemented without Metro's agreement and that the parties would would work collaboratively with Metro and obtain consent where necessary and document such concurrence as appropriate. Now, the City has argued to me, without explaining why it has any authority to decide this, that Metro buses are not necessary to coordinate service. But as I think Sound Transit points out, and

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it really seems so obvious that I don't understand why the City has argued to the contrary to me, that's not the City's call. It's not the Court's call. It's not the City Council's call. Whether Metro buses are necessary is something that Metro and the King County Council determine, and they already have. The City presents this argument about the necessity of buses for the very first time in this litigation. You would think it would've come up when the parties were working under the settlement agreement, and perhaps it didn't because it's self-evidently an argument that I can't entertain. King County Metro thinks its buses are necessary, the Council thinks its buses are necessary; that is part of this project and I'm not going to second guess it, nor can the City, nor will I read the City's ability to decide whether things are necessary for this project into this contract which doesn't afford the City any such right. It's an unreasonable reading on its face that the City advances here and no doubt that explains why it's such a last-minute reading that I'm getting.

So what I have here is the Metro buses are necessary to coordinate service because that's what Metro and the County Council, in combination with Sound Transit which is working on this project, have

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decided and that is the end of that. That means that the 77th Avenue configuration can't be implemented without Metro's agreement, and that to get the concurrence of Metro, it had to be documented. And you know what? There isn't any concurrence by Metro anywhere in this record to the terms that the City has tried to impose by way of conditions on its permits, which are, by the way, forbidden by the settlement agreement provision I just talked about, or otherwise. The letter that's been cited to me is not a concurrence to these specific conditions. Those provisions occur nowhere. That -- there is absolutely no evidence before me that the Metro concurred with the provisions that the City wants here. Yes, the Council wants them, but that doesn't mean Metro okayed it; and that's what was required under Section 4.1. I don't have any documentation of such concurrence as the -- as 4.1 requires. I don't think I have to revisit all of the work that was done with Metro to deal with the City's concerns.

I also want to turn specifically here to Section 4.3 of the settlement agreement because that's right on point as to the issues that are before me today. And 4.3 says the parties have further agreed on the following additional modifications to the 77th Avenue

Southeast configuration; one being pick-up and drop-offs on the south side of North Mercer Way, which is where Mercer Island wants them, and the other being the limitation of bus layovers to 15 minutes during the afternoon peak period and no idling. Okay. But the thing about these two provisions, which are also at issue in the current litigation, are that this provision, 4.3, says the City will not unreasonably withhold its approval to changes in one or more of these two specific provisions based on Metro operational concerns. Well, Metro has operational concerns as to both of these matters; that's well-documented in the record before me. But the City has unreasonably withheld its approval to both of those provisions, and that's undisputed on the record before me too. I cannot view the City's withholding of approval as reasonable here given the fact that this is essentially Metro's call, and the City hasn't explained why it's reasonable for it to decide that I guess it knows better than Metro how things should operate here on North Mercer Way and as to the length of layovers.

I mean, I can't do much about the agreement here that the City negotiated. The City realized I guess at the time it was negotiating that Metro operational

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concerns were going to inhibit the City's ability to withhold its approval, but then I guess the City changed its mind. I don't know. I can't account for it, but all I can really say is it seems to me I have obvious violations of the settlement agreement under 15.1(h) and 14.3 and what looked to me like additional violations under 4.1 and 4.3. The only area where I really can't say that Sound Transit is right as a matter of law that the City violated the settlement agreement is the area on the amount that Sound Transit might be committed to pay because I can't make that forecast on the record I have here. I understand Sound Transit's concerns, that the cap might be violated because of the City's actions here in the current litigation that's been before the Court, but I -- I just don't know and I don't draw those inferences in favor of Sound Transit on an unknown record. Otherwise, Sound Transit prevails on summary judgment on its argument that the City has breached the settlement agreement in multiple respects. Let me see if I want to say anything more about that before I turn to the preliminary injunction motion.

I don't know that I need to get into the argument that Sound Transit makes about who had power under the project because to me, the question isn't really what

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authority did the city manager have versus the County -- the City Council. The question to me is what was the City bound to do and not do under the settlement agreement as a whole, and that's really where the focus of the Court's discussion of the breaches I see has been. You know, I think it is clear beyond any question that this city manager had power to enter into this agreement and negotiate in the way that it was negotiated. It seems to me to the extent that we're dealing at all with the power of the City Council, we're dealing with whether or not Mercer Island unreasonably refused to accord deference to Metro's concerns on the two provisions that I just talked about. And on that, yes, I think it's clear as a matter of law that they did. But I don't think I have to get into the weeds on who had authority to do what. I'm looking at Mercer Island's overall obligations under this settlement agreement.

I guess the thing I really do want to highlight though is something that Sound Transit said in its briefing and its opening brief that I heartily agree with here. You know, the settlement agreement, Sound Transit said in its briefing, was entered into to pave a path to completion of the Mercer Island light rail station and associated bus/rail integration. Sound

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Transit made substantial concessions and contributed significant money to ameliorate claimed impacts on the project. The City gained no right to veto any part of the project. The only open issue is whether Metro would concur with the City's preferred configuration and its desired operational constraints, and the answer, Sound Transit's briefing points out, was no, not everything the City wanted. That should've been the end of the story; instead, the City reverted back to its obstructionist behavior and breached the settlement agreement in multiple ways. I think that is all dead on. That's how I view the way this has played out.

Let me turn now briefly to the preliminary injunction motion that Mercer Island has brought here. I'm going to recite again what the requirements are because we should be talking about those for granting a motion before the Court. I don't need to re-recite the background here, but I will point out that preliminary injunctions are not things that courts issue at the drop of a hat. We look for a clear, plain case.

The City has to establish for the Court a clear legal or equitable right, a well-granted fear of immediate invasion of that right, and that the act

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complained of will result in actual and substantial injury. And on these three inquiries, especially the first and the third, the City's request for injunction flounders.

First, there is no right, frankly, to get this injunction under the clear language of the settlement agreement. The City's out of court on interfering with this project. The City agreed to that. It's not something the City can back away from. So that's problem number one. There's a conditioned precedent to the City being here, and that is that the City can't get in the way of this project, which is exactly what this injunction asks the Court to do. I can't imagine a more clear violation of the City's own agreement.

In addition, as I've just discussed, the agreement at issue also allows Sound Transit to construct the project consistently with the studies that have been done and Metro need. There is no study that supports the City's obstruction here. The curb cut is something that has been examined, and to the extent I understand these technical studies here, Sound Transit's need to make it is clear on this record. The City, as I've already discussed, doesn't have any authority to decide whether Metro's buses are

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necessary to the project, not to mention I think the City's argument on this is probably flat wrong. But, again, it's just not the City's call.

And the City cannot establish to me any clear likelihood of success on the merits. I just don't see it. I don't see that Sound Transit has breached the agreement at all and I don't see any likelihood that the City will prevail on its underlying arguments, especially given that the City shouldn't be here under its agreement not to get back into litigation to stop or hold up this project. I'm not going to get into the issue of whether there's immediate invasions of a clear legal or equitable right, other than to say I don't see any clear legal or equitable here, ergo an invasion of one is really hard to see.

I'll also point out that Sound Transit's right, if ultimately the City's legal arguments prevail in some other court than mine, I don't see why the curb cut can't be restored and I don't see why that's irreparable injury to the City to allow the curb cut and the project to go forward. Equities-wise, I don't think that Sound Transit has to recite to me the immense amount of work and moving parts that it has put in place to move forward this project, including Mercer Island's part of this project. I see no reason

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to demand that Metro provide me yet again with all of the information it's given to me about the size, scope, and immediacy of this project. I've seen that before on the last motion. You know, Metro doesn't have to keep showing it to me over and over again for the Court to be aware of it. I'm not going to pretend that I just came off of a vegetable truck and rolled into this court and suddenly heard about this case. That's just not what happened here. You know, I don't see any way that the balance of equities would favor Mercer Island here, even assuming that there was a colorable right that Mercer Island was pursuing.

I didn't understand, frankly, a good deal of the argument that I read in this case. I thought it was more clearly explained in oral argument by the City, but I simply cannot agree with the City's position. It's not supported by the facts or the law before me, and the request for a preliminary injunction is denied with prejudice.

All right, folks. Thank you for devoting lots of time and energy to really superb legal work, even if the Court struggled with understanding some of it, and excellent oral argument. And I look forward to getting Sound Transit's proposed orders since Sound Transit is prevailing on both of these actions. I'd

like Sound Transit to please review those with the City, but I want the orders in place for me to enter them by no later than the end of the day on Monday.

All right, everybody. We're in recess.

MR. SCHNEIDER: Thank you, Your Honor.

9:43 AM

(Court adjourned.)

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Ex. 1075-55/55

STATE OF WASHINGTON)
) ss. Reporter's Certificate
COUNTY OF KING)

I, Miranda L. Seitz, Registered Professional Reporter, Certified Court Reporter, in and for the State of Washington;

Do hereby certify;

That to the best of my ability, the foregoing is a true and correct transcription of my shorthand notes as taken on the date and at the time and place as shown on page one hereto;

That I am not related to any of the parties to this litigation and have no interest in the outcome of said litigation;

Dated this 17th day of December, 2021.

Miranda L. Seitz

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