

**BEFORE THE HEARING EXAMINER for the  
CITY of MERCER ISLAND**

**ORDER REVISING A DECISION  
AFTER  
RECONSIDERATION**

**FILE NUMBER:** APL21-001  
(Ref. Right-of-way Use Permit 2010-186)

**APPELLANT:** Central Puget Sound Transit Authority  
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**APPLICANT:** Same as Appellant

**TYPE OF CASE:** Appeal from conditions imposed on Permit 2010-186

**WHEREAS**, the City of Mercer Island Hearing Examiner (“Examiner”) issued a Decision in the above-entitled matter on May 3, 2021; and

**WHEREAS**, on May 12, 2021, Respondent Mercer Island Community Planning & Development Department (“Department”) filed a timely Motion for Reconsideration (“Motion”). The Examiner received the Motion on May 12, 2021; and

**WHEREAS**, the authority and procedures for reconsideration of Examiner Decisions are spelled out in the Mercer Island City Code (“MICC”):

A. Any final decision by the hearing examiner may be reconsidered by the hearing examiner, provided a request for reconsideration by a party of record is received within 10 days of the date of the decision by the hearing examiner, if:

1. The decision was based in whole or in part on erroneous facts or information;
2. The decision when taken failed to comply with existing laws or regulations applicable thereto; or
3. An error of procedure occurred that prevented consideration of the interests of persons directly affected by the decision.

B. The hearing examiner shall reconsider a final decision based upon the above criteria. The hearing examiner shall issue a decision on the request for reconsideration within 14 days of receiving a request for reconsideration, denying the request or correcting the decision as the examiner determines necessary.

[MICC 3.40.110] Thus, the Examiner has but two options in response to a Motion: Deny it or issue a revised Decision, either of which must be completed within 14 days of the date the Examiner receives the Motion; and

**WHEREAS**, the following documents received/generated during the reconsideration process are herewith assigned exhibit numbers for identification:

- Exhibit 9021: Hearing Examiner Decision, APL21-001, May 3, 2021  
Exhibit 9022: City of Mercer Island’s Motion for Reconsideration, filed and received May 12, 2021  
Exhibit 9023: E-mails, Schneider to Examiner, May 14, 2021, at 4:08 p.m. and Examiner to Principal Parties, May 15, 2021, at 10:12 a.m. (Request for and authorization to submit response)  
Exhibit 9024: Sound Transit’s Response to City of Mercer Island’s Motion for Reconsideration, filed and received May 19, 2021, at 9:29 a.m.; and

**WHEREAS**, the Department asks that Findings of Fact 1.3, 1.9, and 2.1, and Conclusions of Law 4.3 and 4.4 be revised or stricken as specifically identified in the Motion:

A. Finding of Fact 1.3 consists of an introductory sentence fragment followed by a quoted code provision. The introductory sentence fragment reads as follows:

Sound Transit is an “essential public facility” (“EPF”). An EPF is:

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The Department asserts that an EPF is a facility, not an agency. The Department believes that the Examiner intended to refer to Sound Transit's East Link Extension, not to Sound Transit itself. (Exhibit 9022, PDF 2:6 – 2:12)

This request falls within the scope of MICC 3.40.110(A)(1) and is properly before the Examiner for reconsideration.

Sound Transit agrees that it is the East Link Extension, not Sound Transit, that is the EPF. (Exhibit 9024, PDF 2:1 – 2:6)

The Department and Sound Transit are correct: The Examiner made an obvious, inadvertent error. The sentence should have read: "Sound Transit's East Link Extension is an 'essential public facility' ('EPF'). An EPF is:" That correction must be made.

- B. Finding of Fact 1.9 is a three paragraph Finding. The Department's Motion concerns two aspects of the second paragraph. That paragraph reads as follows:

The MITI is essentially the "Improved Service Configuration" from the MITI Operational and Configuration Study. (See Finding of Fact 2.2, below.) The plan will construct a turnaround at the 77<sup>th</sup>/North Mercer Way intersection to allow busses to U-turn at that location, thus obviating the need for regional busses to travel through the Mercer Island Town Center, add a 145-foot long bus layover bay along the north side of North Mercer Way between the Park and Ride driveway and the 77<sup>th</sup> roundabout (long enough for one articulated bus or two standard 40-foot long busses), and create an approximate 230-foot long bus layover bay on the south side of North Mercer Way between the 77<sup>th</sup> roundabout and the current bus stop bay. (Exhibits 3, especially PDF 44, 45, and 47; 1002, PDF 19, Figure 6; 1003; Hoffman, James Irish {Sound Transit} testimony) Associated improvements include, but are not limited to: a stormwater runoff detention vault, retaining walls, and drainage piping on the north side of North Mercer Way; re-routing of an existing pathway along the north side of the project; and bus stop appurtenances. Most of the work will occur within existing public right-of-way; a significant portion of the roundabout and the drainage work, and one of two primary retaining walls will be outside of existing right-of-way on the north side of North Mercer Way. (Exhibits 3; 1003)

First, the Department asserts that the parenthetical phrase regarding the proposed north side bus layover bay "(long enough for one articulated bus or two standard 40-foot long busses)" is not supported by the testimony. The Motion states that Sound Transit witness Hoffman testified that the north side bus layover bay was "for one bus to be able to pull in and out" and that Sound Transit witness Irish testified that the north side bus layover bay was for one bus. The Department asks that the unsupported statement about space for multiple busses at the north side bus layover bay be stricken. (Exhibit 9022, PDF 2:24 – 3:13)

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Second, the Department asserts that the MITI project which is subject to the Right-of-way Use Permit will not “create an approximate 230-foot long bus layover bay on the south side of North Mercer Way between the 77<sup>th</sup> roundabout and the current bus stop bay” as stated in that same paragraph. The Department asks that the quoted text (together with the preceding conjunction “and” be stricken from the Decision. The Motion states, *inter alia*, that there will be no additional curb cut made on the south side of North Mercer Way for a bus layover bay and that the Settlement Agreement (which is not before the Examiner) authorized use of existing curb space in that area for bus layover use. (Exhibit 9022, PDF 3:14 – 4:17)

These requests fall within the scope of MICC 3.40.110(A)(1) and are properly before the Examiner for reconsideration.

Sound Transit objects to the requested changes. Sound transit believes that the Department’s first objection is “an improper effort to limit Metro’s operations”. As to the Department’s second objection, Sound Transit argues that while the plans show a “small portion” of the south side bus layover bay to be within WSDOT limited access right-of-way, much of that layover bay is within the City’s right-of-way. Sound Transit objects to the Department’s mention of the Settlement Agreement. (Exhibit 9024, PDF 2:18 – 7:18; first quote at 3:9/10; second quote at 4:10)

As to the first aspect of this part of the Motion, the Examiner concurs in part with the Department. Hoffman testified after the morning recess on the first day that “we made it [referring to the proposed 145-foot long bus layover bay on the north side of North Mercer Way] the shortest possible as we proceeded into design for one bus to pull in and pull out.” [Zoom recording starting at c. 2:34:59]. Irish testified in the second part of his testimony<sup>1</sup> on the afternoon of the first hearing day that the plans contemplate bus layover bays to accommodate a total of three busses: one on the north side and two on the south side of North Mercer Way. [Zoom recording starting at c. 4:05:20] Irish later said “I believe it [referring to the proposed 145-foot long bus layover bay on the north side of North Mercer Way] is intended to accommodate either a articulated bus or shorter 40-foot busses that are not articulated;” Irish then said, in response to a question which posited that the south side bus layover bay was designed to accommodate two busses and which asked what type of busses, that the south side bus layover bay would accommodate “either the longer articulated busses or the shorter busses.” [Zoom recording starting at c. 4:07:10] Neither Hoffman nor Irish said how many smaller busses could be accommodated in either bus layover bay: Irish said the design was for a total of three busses to layover at one time; Hoffman said that the north side bus layover bay was the shortest possible for one bus. The text in the Decision slightly misconstrued the testimony and needs to be corrected.

As to the second aspect of this part of the Motion, the Examiner did not read the plans carefully enough regarding the south side bus layover bay. The Department is partly correct: No new curb cut

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<sup>1</sup> Irish’s testimony was interrupted to take public testimony starting at a predetermined time.

*per se* is proposed along the south side of North Mercer Way (as is proposed along the north side) to create a new bus layover bay. However, the existing south side curb and gutter will be removed and partially shifted to the south between the roundabout and the existing bus stop to create the south side bus layover area. (Exhibit 3, PDF 11 – 13 & 21) The Finding should be clarified.

C. Finding of Fact 2.1 reads as follows:

In June, 2018, Sound Transit formed a work group consisting of representatives of Sound Transit, Mercer Island, and King County Metro (“Metro”). The work group’s purpose was to refine the MITI configuration to meet the needs of the three participating agencies. During its first meeting on June 12, 2018, the work group decided to study three design options: An option consistent with the Settlement Agreement; an option preferred by Metro which would include bus layover bays; and a third option to be determined by the work group. (Exhibit 1019R, PDF 5)

The work group met again on September 26, 2018. Sound Transit’s minutes of that meeting indicate that restrictions in the Settlement Agreement “all but prevented” Metro bus service to Mercer Island. The group chose a third option to study: an option adding bus pick-up and drop-off service on 80<sup>th</sup>. (Exhibit 1020R)

The work group met again on December 12, 2018. Sound Transit’s minutes of that meeting indicate “that the smaller/original roundabout design at the revised location would also result in full property takes, as is the case with the larger roundabout design.” (Exhibit 1023R, PDF 2)

The work group next met on February 19, 2019. Sound Transit’s minutes of that meeting indicate that bus routing on Mercer Island was the central topic of discussion. Metro informed the group that if bus passenger drop-off was not allowed on the north side of North Mercer Way, the proposed north side bus layover bay could not be used. They also discussed traffic impacts should a bus stop be added on 80<sup>th</sup> at the light rail station’s 80<sup>th</sup> head house. (Exhibit 1025R, PDF 2 & 3)

The record does not show any subsequent meetings of this group.

[Footnotes omitted]

The Department asks that Finding of Fact 2.1 be stricken in its entirety because it includes information about

the MITI configuration agreed to in the 2017 Settlement Agreement, alternatives to same, and apparent conclusions drawn about impacts to bus service from terms in the Settlement Agreement. . . . [T]he Finding on these topics will potentially conflict with

findings of fact and conclusions of law subsequently made in the appropriate forum for Settlement Agreement disputes, as the Decision aptly notes elsewhere.

(Exhibit 9022, PDF 2:13 – 23, quotation from 2:15 – 2:17 & 2:19 – 2:22)

This request arguably falls within the scope of MICC 3.40.110(A)(2); the Examiner elects to read that provision liberally and accept this request for reconsideration.

Sound Transit opposes this requested change: “The Finding is based on evidence in the record to which the Department did not object when it was presented, and the Department should not be heard after the hearing to object to the relevance of evidence it did not object to when offered.” (Exhibit 9024, PDF 2:7 – 2:17, quote from 2:15 – 2:17)

The Settlement Agreement is mentioned only once in Finding of Fact 2.1: The first paragraph accurately states that Exhibit 1019R says that one of the three alternatives to be studied was to be consistent with the Settlement Agreement. That reference makes no conclusion regarding the effect of the Settlement Agreement on the current Right-of-way Use Permit. Every statement and quote in Finding of Fact 2.1 is sourced from documents that were admitted into the record; none are sourced from the Settlement Agreement. The Motion does not allege any error in Finding of Fact 2.1. The Finding is relevant as a brief summary of actions among the participants which constitute part of the history of the development of the MITI design which was submitted to the Department for approval. The Examiner finds no reason to strike Finding of Fact 2.1.

D. Conclusion of Law 4.3 reads as follows:

The “elephant in the room” regarding this condition is the fact that the MITI plans include construction of a 3-bus layover bay on the south side of North Mercer Way directly opposite the proposed one-bus layover bay on the north side of North Mercer Way – and the Department has expressed no objection to it. If a Right-of-way Use permit is the wrong vehicle to authorize a bus layover bay on the north side of the street, how can it authorize a bus layover bay on the south side of the street? The Department’s position is inconsistent.

The Department asks that this Conclusion be stricken based on the Examiner’s mis-reading of the project plans discussed with Finding of Fact 1.9, above. (Exhibit 9022, PDF 4:18 – 5:5)

This request falls within the scope of MICC 3.40.110(A)(1) and is properly before the Examiner for reconsideration.

Sound Transit strongly opposes striking Conclusion of Law 4.3. (Exhibit 9024, PDF 2:18 – 7:18)

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The Examiner concludes that Conclusion of Law 4.3 has a pejorative tenor which is inappropriate in this Decision. Further, Conclusion of Law 4.3 contains a factual error and is unnecessary as support for the Decision ultimately reached. The Conclusion will be stricken.

E. Conclusion of Law 4.4 is a three paragraph Conclusion. The Department’s Motion concerns one sentence in the third paragraph. That paragraph reads as follows:

The Examiner fails to see the difference. Whether bus layover bays violate the terms of the Settlement Agreement is a question to be considered by and in another forum. The Examiner finds no basis in code to deny permission for a bus layover bay on one side of a street under a Right-of-way Use Permit while allowing a bus layover bay on the other side of the same street and bus drop-off and pick-up bays under a Right-of-way Use Permit. The Examiner will repeal this condition subject to resolution of the implications of the Settlement Agreement by and in another forum.

The Department asks the Examiner to strike the third sentence in this paragraph (“The Examiner finds no basis in code to deny permission for a bus layover bay on one side of a street under a Right-of-way Use Permit while allowing a bus layover bay on the other side of the same street and bus drop-off and pick-up bays under a Right-of-way Use Permit.”) for the same reasons that Conclusion of Law 4.3 should be stricken. (Exhibit 9022, PDF 5:6 – 5:15)

This request falls within the scope of MICC 3.40.110(A)(1) and is properly before the Examiner for reconsideration.

Sound Transit strongly opposes striking the third sentence in this paragraph. (Exhibit 9024, PDF 2:18 – 7:18)

The Examiner concludes that the third sentence in this paragraph is unnecessary as support for the Decision ultimately reached. That sentence will be stricken. Further, the “difference” mentioned in the first sentence in this paragraph relates to the Examiner’s mis-reading of the plans. It, too, will be stricken; and

**WHEREAS**, the Examiner concludes for the reasons set forth above that the Decision as issued on May 3, 2021, should be revised as discussed above; and

**WHEREAS**, any of the above recitals deemed to be Findings of Fact and/or Conclusions of Law are hereby adopted as such.

**NOW, THEREFORE**, the Examiner **GRANTS IN PART** the request for reconsideration and **REVISES** the Decision as follows:

A. Finding of Fact 1.3. The introductory sentence fragment in Finding of Fact 1.3 is **REVISED** to read:

Sound Transit’s East Link Extension is an “essential public facility” (“EPF”). An EPF is:

The remainder of Finding of Fact 1.3 is unchanged.

B. Finding of Fact 1.9. The second paragraph of Finding of Fact 1.9 is **REVISED** to read:

The MITI is essentially the “Improved Service Configuration” from the MITI Operational and Configuration Study. (See Finding of Fact 2.2, below.) The plan will: construct a roundabout at the 77<sup>th</sup>/North Mercer Way intersection to allow busses to U-turn at that location, thus obviating the need for regional busses to travel through the Mercer Island Town Center; add a 145-foot long bus layover bay along the north side of North Mercer Way (long enough for one bus to pull in and out) by creating a new curb cut between the Park and Ride driveway and the 77<sup>th</sup> roundabout; and add a bus layover bay on the south side of North Mercer Way (long enough for two busses) by realigning the curb, part of which will be shifted to the south, between the 77<sup>th</sup> roundabout and the existing bus stop. A portion of the south side layover bay will be within WSDOT right-of-way; a portion will be within City right-of-way. (Exhibits 3, especially PDF 11, 12, 20, 21, 44, 45, and 47; 1002, PDF 19, Figure 6; 1003; Hoffman, James Irish {Sound Transit} testimony) Associated improvements include, but are not limited to: a stormwater runoff detention vault, retaining walls, and drainage piping on the north side of North Mercer Way; re-routing of an existing pathway along the north side of the project; and bus stop appurtenances. Most of the work will occur within existing public right-of-way; a significant portion of the roundabout and the drainage work, and one of two primary retaining walls will be outside of existing right-of-way on the north side of North Mercer Way. (Exhibits 3; 1003)

The remainder of Finding of Fact 1.9 is unchanged.

C. The Motion is **DENIED** as to Finding of Fact 2.1.

D. Conclusion of Law 4.3 is **STRICKEN** and replaced with the following placeholder:

[This Conclusion of Law was stricken after Reconsideration. Subsequent Conclusions of Law have not been renumbered.]

E. Conclusion of Law 4.4. The third paragraph of Conclusion of Law 4.4 is **REVISED** to read:

Whether bus layover bays violate the terms of the Settlement Agreement is a question to be considered by and in another forum. The Examiner will repeal this



condition subject to resolution of the implications of the Settlement Agreement by and in another forum.

The remainder of Conclusion of Law 4.4 is unchanged.

F. Except as expressly stated above, the Decision as issued on May 3, 2021, is unchanged.

**ORDER** issued May 20, 2021.

*/s/ John E. Galt*

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John E. Galt  
Hearing Examiner

### **NOTICE OF RIGHT OF APPEAL**

The initial Decision, as revised by this Order Revising a Decision after Reconsideration, is the final and conclusive action for the City. “Any judicial appeal of the hearing examiner’s decision shall be filed in King County superior court pursuant to Chapter 36.70C RCW, the Land Use Petition Act (‘LUPA’). The land use petition must be filed within 21 days of the issuance of the hearing examiner’s decision.” [MICC 3.40.100, ¶ 2]

The following statement is provided pursuant to RCW 36.70B.130: “Affected property owners may request a change in valuation for property tax purposes notwithstanding any program of revaluation.”