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BEFORE THE HEARING EXAMINER FOR THE CITY OF MERCER ISLAND

Central Puget Sound Regional Transit Authority,	
	Appellant,
v.	
City of Mercer Island,	
	Respondent.

No. APL21-001

SOUND TRANSIT'S PREHEARING BRIEF AND WITNESS LIST

**I. INTRODUCTION AND RELIEF REQUESTED**

Bus service between Mercer Island and Seattle will cease when the East Link light rail line opens in 2023. Bus routes that today cross the I-90 floating bridge into Seattle will instead drop off their passengers next to the new East Link light rail stations, including the Mercer Island station, where these passengers will board East Link for the final leg of their trip. Conversely, eastbound passengers traveling to destinations not directly served by light rail will take East Link to Mercer Island, where they will transfer to waiting buses. The Mercer Island Transit Integration (“MITI”) Project at the center of this appeal provides the infrastructure necessary for these transfers to happen.

When the MITI Project is completed, westbound buses will exit I-90 from the HOV off-ramp onto northbound 80th Avenue SE. Buses will take a left (westbound) on North Mercer Way and drop off passengers at the existing bus stop of the north side of North Mercer Way. Buses will then make a 180-degree turn at the roundabout Sound Transit is constructing at 77th

1 Ave SE (the first intersection west of 80<sup>th</sup>), and travel back east to pick up eastbound passengers  
2 at the existing bus stop on the south side of North Mercer Way, all within one City block and  
3 without needing to travel through Mercer Island’s Town Center. Buses will then return east  
4 using the eastbound I-90 HOV on-ramp.

5 In between dropping-off and picking-up passengers, these buses must have room to  
6 “layover,” whenever necessary, until their next scheduled or needed departure. King County  
7 Metro determined, and the prior City Manager confirmed, that the bus layover area that the City  
8 is refusing to approve provides the minimum area needed to accommodate the regional buses  
9 that will continue to travel to Mercer Island after East Link opens. Neither the City Manager nor  
10 her staff has identified any alternative to this layover area that Metro needs for its operations.

11 East Link will not only improve transit service for the region, it will halve the number of  
12 regional buses traveling to Mercer Island: whereas 36-39 buses currently visit the island in a  
13 typical peak hour, that number will drop to about 16-20 buses per peak hour once East Link  
14 opens. The eliminated bus trips will either be replaced by the light rail system or by bus routes  
15 that drop off and pick up passengers at other light rail stations, such as South Bellevue.

16 The State Legislature has given both Sound Transit and King County Metro the authority  
17 to construct and operate regional transportation facilities within cities, but the Mercer Island  
18 permit conditions at issue in this appeal attempt to prevent completion of this regional  
19 transportation network. These conditions violate State law, but even more fundamentally they  
20 are not authorized by any City regulation:

- 21 • **Condition XIII.A** prohibits construction of the curb cut that is needed to create the new bus  
22 layover area that Metro requires for its regional operations. The City thus makes a  
23 discretionary decision regarding which transit uses it will permit in the right-of-way, but a  
24 ROW permit is a nondiscretionary permit that does not give the City that choice, MICC  
25 19.15.030. The only code authority cited in this condition is “Ch. 19.09 MICC,” but nothing  
26 in this or any other chapter of the code authorizes the City to deny a transportation use of

1 street right-of-way, and even if there were such authority in the code, it would be preempted  
2 by the state statutes that authorize Sound Transit and Metro to construct and operate regional  
3 transit facilities. The tardy staff report for this hearing<sup>1</sup> re-asserts that a ROW permit cannot  
4 authorize a transit use in the right-of-way, but no land use entitlement, and certainly no  
5 discretionary land use decision, is needed to establish a “transit use” in public rights-of-way  
6 because rights-of-way exist for transportation uses. The City is using its ministerial  
7 permitting process to make a discretionary decision to deny a specific transportation use for  
8 reasons that have nothing to do with its code requirements.

- 9 • The staff report cites MICC 19.06.060 as providing “a separate avenue by which new uses of  
10 the ROW must be consented to by the City,” but that section is irrelevant to the MITI Project.  
11 Entitled “Encroachment into right-of-way,” that section governs adjoining property owners  
12 seeking to construct encroaching structures unrelated to public transportation. *See* MICC  
13 19.06.060.A. The MITI Project will not create infrastructure that includes an *encroachment*  
14 into the City’s right-of-way, the MITI Project will *become* the City’s right-of-way. It is  
15 properly permitted under MICC 19.09.060 (“Right-of-way use”), not 19.06.060  
16 (“Encroachment into right-of-way”).
- 17 • Finally, the City’s Code creates no requirement to obtain the City’s consent to the MITI  
18 Project. And even if State law required the City’s consent, the City has already consented in  
19 multiple ways: It selected the 77<sup>th</sup> alignment as described in the SEPA Addendum. The City  
20 signed a Settlement Agreement that the Hearing Examiner previously ruled he will not  
21 interpret. The City Manager and staff worked with King County Metro and Sound Transit  
22 staff on a yearlong collaborative process that confirmed that Metro’s operational needs  
23 require the MITI Project that Sound Transit is constructing. Nothing in the City code  
24 requires the City’s consent, and if the City believes that State Law requires its consent to be

25 <sup>1</sup> The Hearing Examiner Rules require staff to publish the staff report “not less than 10 days prior to the scheduled  
26 hearing.” The staff report here was distributed eight days before the hearing, the day before this brief is due,  
depriving Sound Transit of the three days to respond required by the Rules.

1 served by regional transit, and also believes it has not already given such consent, it can  
2 make that argument in court.

- 3 • **Condition XIII.B** prohibits Sound Transit from beginning construction of the MITI Project  
4 until “the City’s acceptance by deed” of two residential properties that Sound Transit did not  
5 own when the City issued this condition, but has now acquired in order to construct the  
6 project. The authority that the City cites in the condition is MICC 19.06.060 entitled  
7 “Encroachment into public right-of-way,” which, for the reasons mentioned above, is  
8 irrelevant to the MITI Project. Nothing in this code section, or any other, authorizes the City  
9 to require Sound Transit to convey real property to the City prior to allowing work to  
10 commence, or authorizes the City to delay approval of construction until the City Council  
11 decides whether, and on what conditions, to accept the conveyance. The staff report  
12 abandons the pretense that Council approval is mandated by the MICC. Instead, staff argues  
13 that the right-of-way permit is the only way to entitle the project without requiring a  
14 conditional use permit. The City code does not support the need for a CUP, which is a  
15 discretionary permit; Sound Transit has not applied for a CUP; and the merits of whether a  
16 CUP is needed are not before the Hearing Examiner on this appeal of the ROW permit that  
17 the City did issue. The staff report also argues that State law endows Council with the sole  
18 authority to acquire property, which it does not: RCW 35A.11.020 authorizes but does not  
19 require the City Council to acquire property. Nothing in State law or the City code requires  
20 legislative action to accept dedication of right-of-way required by a permit condition. If  
21 right-of-way is improved in accordance with an issued approval such as a right-of-way  
22 permit (or, more commonly, as part of a plat approval), the sole decision for the local  
23 government is to confirm that the improvements to be dedicated comply with standards.  
24 Nothing in the code authorizes the city to transform a ministerial permit into a discretionary  
25 permit by requiring legislative approval of an applicant’s compliance with a permit  
26 condition. In addition, nothing in the Code authorizes the City to withhold issuance of the

1 building permit that the City previously and repeatedly agreed is needed to construct the  
2 portion of the MITI Project that is on the two residential parcels; the City now has refused to  
3 issue that building permit even though Sound Transit’s application complies with all  
4 requirements of the building code.

- 5 • **Condition XIII.C** requires Sound Transit to pay for the perpetual operation and maintenance  
6 of City property – including the same property that condition XIII.B requires Sound Transit  
7 to convey to the City. Neither the Conditions nor the staff report cite any code authority for  
8 this condition requiring regional taxpayers to fund the operation and maintenance of City  
9 property and facilities. The staff report offers no argument on Condition XIII.C, but appears  
10 to presume that the condition’s lack of code support somehow means the condition must  
11 remain, *see* staff report at 7:23-8:2, which is incorrect. Because the City concedes that  
12 Condition XIII.C has no support of City Code, the condition has no place in a Type I  
13 approval and must be stricken. If the City feels that Sound Transit is breaching a contract,  
14 the City’s remedy lies with the Superior Court, not with a condition on a Type I permit.

15 In addition, Sound Transit appeals additional conditions – IV.A & E, and VII.H & I –  
16 because they are inconsistent with the Traffic Control Plan and the Construction Management  
17 Plan that the City already has approved. Sound Transit hopes to reach agreement with the City  
18 regarding changes to these conditions before the hearing begins.

## 19 II. BRIEF OVERVIEW OF FACTS

20 In 2008, the voters of King and Pierce County approved ST-2, which included funding  
21 for East Link, a new light rail line connecting the cities of Redmond, Bellevue, Mercer Island,  
22 and Seattle. In 2011, the Federal Transit Administration, the Washington State Department of  
23 Transportation, and Sound Transit together completed the Final Environmental Impact Statement  
24 for East Link, which included an analysis of the impacts of bus/rail integration. In 2017 Sound  
25 Transit issued an Addendum to this FEIS that analyses the impacts of two specific options for  
26 bus/rail integration at the Mercer Island Station: the 80<sup>th</sup> Avenue SE Configuration preferred by

1 King County Metro and Sound Transit, and the 77<sup>th</sup> Avenue SE Configuration preferred by the  
2 City. Sound Transit and Metro deferred to the City, and Sound Transit is now attempting to  
3 construct the 77<sup>th</sup> Avenue SE Configuration chosen by the City.

4 The Addendum explains that the 77<sup>th</sup> Avenue SE Configuration includes “. . . bus drop-  
5 off and pick-up areas, and bus layover areas on both sides of N Mercer Way . . . .” Even though  
6 the City chose the 77<sup>th</sup> Avenue SE Configuration analyzed in the Addendum, the City opposes  
7 creation of the layover area on the north side of North Mercer Way, and even opposes the  
8 existing bus stop that has been there for many years.

9 Sound Transit and Metro spent much of 2018 and 2019 with the City Manager and her  
10 staff in a collaborative process to determine whether there were alternatives to the MITI Project  
11 that would meet Metro’s operational needs. During this collaborative process, King County  
12 explained its operational needs and all three parties explored options to meet those needs. The  
13 City, Sound Transit, and King County Metro all agreed at the conclusion of this collaborative  
14 process that the current MITI Project meets Metro’s operational needs. Sound Transit and Metro  
15 then spent almost six months collaborating with the City Council and City Manager and her staff  
16 in an effort to identify alternatives to the bus stop and layover area on the north side of North  
17 Mercer Way, but at the conclusion of this collaboration all participants, including the City  
18 Manager, agreed that there is no such alternative, and that the bus layover area and bus stop on  
19 the north side of North Mercer Way are required for Metro to integrate its regional bus service  
20 with East Link.

21 The MITI Project thus implements the 77<sup>th</sup> Avenue SE Configuration analyzed in the  
22 SEPA Addendum that the City chose and that its City Manager confirmed is necessary to meet  
23 Metro’s operational needs. This Configuration required Sound Transit to acquire two residential  
24 properties that abut North Mercer Way to the north, in order to construct the roundabout and  
25 associated improvements including a retaining wall, stormwater vault, and improved sidewalk  
26 and trail. On April 25, 2019, the Sound Transit Board adopted Resolution No. R2019-12

1 authorizing acquisition of these two parcels, and Sound Transit acquired ownership in February,  
2 2021, after the City imposed the conditions that Sound Transit is appealing.

3 Beginning in February, 2020, Sound Transit staff worked closely with City staff to ensure  
4 that Sound Transit’s applications would comply with City code requirements. Staff from both  
5 agencies agreed repeatedly throughout the design and application process that a building permit  
6 is needed for the retaining wall and stormwater vault on the residential parcels, and Sound  
7 Transit submitted an application for this building permit that complies with all code  
8 requirements.

9 To make permit processing simpler, City staff directed Sound Transit to provide the City  
10 with one master plan set for all applications, instead of individual plan sets for each application.  
11 Sound Transit submitted this master plan set as directed, depicting all improvements needed for  
12 the Project, both those within City right-of-way and those on the adjoining residential lots.

13 After months of collaborative pre-application work, including City staff review of plans  
14 at the 60%, 90%, and 100% design milestones, Sound Transit submitted its application on  
15 October 23, 2020, and the City deemed Sound Transit’s application complete on November 30,  
16 2020. On December 22, 2020, the City notified Sound Transit of the decisions at issue in this  
17 appeal. The City’s decision document is an email that is ambiguous about which permits the  
18 City is actually issuing, other than a right-of-way (“ROW”) permit, but the City clarified that it is  
19 imposing all the conditions that Sound Transit is appealing on each permit that it issued. Sound  
20 Transit initially understood that the decision included the building permit, but on December 28,  
21 2020, six days after its decision, the City notified Sound Transit by email that it had “eliminated”  
22 the building permit and multiple tree removal permits, even though both the City code and State  
23 law require a building permit for the stormwater vault and for the retaining wall on the  
24 residential lots, and the City code requires the tree permits. City staff later explained that the  
25 City had eliminated the building permit and tree permits because such permits are not required  
26

1 for work in right-of-way, and the Conditions require Sound Transit to dedicate the residential  
2 property as right-of-way before starting work.

3 As explained below, Sound Transit cannot convey title to the residential lots ahead of  
4 construction as required by the City's conditions, nor is a conveyance necessary for construction  
5 of the MITI Project. The City asserts that the City Council must approve such conveyance,  
6 which means a legislative process over which the City has full discretionary authority. Sound  
7 Transit has no control over a delay by the Council in passing legislation, or over the conditions  
8 the Council may impose on acceptance of the conveyance. Lot A includes about 8,000 square  
9 feet of property that is needed for construction staging but is not needed for the final MITI  
10 Project and for which the City has not identified any right-of-way use. Sound Transit will  
11 evaluate the disposition of this 8,000 square feet in accordance with the standards adopted by the  
12 Sound Transit Board, and must comply with Federal and State requirements, before conveying  
13 title to property deemed to be surplus to the needs of the transit system. In addition, Sound  
14 Transit needs to retain ownership of the residential lots property for construction staging  
15 throughout the construction of the Project, in order to minimize impacts to the City right-of way.

16 Construction of the MITI Project will take more than one year because the City requires  
17 Sound Transit to maintain two-way traffic on North Mercer Way throughout construction and  
18 comply with stringent construction hours. The Sound Transit Board is scheduled to approve the  
19 construction contract for the MITI Project this month, March 2021, and construction is scheduled  
20 to commence in April or May.

### 21 **III.LEGAL AUTHORITY AND ARGUMENT**

22 Sound Transit's witnesses and documentary evidence will establish that Conditions  
23 XIII.A, XIII.B, and XIII.C are unlawful because they are without foundation in the City's code  
24 and violate State law in multiple ways. In addition, the internal inconsistency in Conditions  
25 IV.E, VII.H, & VII.I makes them unworkable: they require compliance with the approved Traffic  
26 Control Plan, *see* Condition IV.A, then impose requirements that are inconsistent with that plan.



1 **A. Sound Transit’s application complies with all City code requirements, and**  
2 **Conditions XIII.A, B, and C are not authorized by any authority**

3 The evidence will show that Sound Transit (1) collaborated with the City for ten months  
4 to ensure that its applications comply with the code; (2) the applications do comply; and (3)  
5 nothing in the City’s decision documents identifies any non-compliance with the code.  
6 Conditions XIII.A, B, and C do not ensure compliance with the code or any other law: instead  
7 they unlawfully prohibit construction of an Essential Public Facility.

8 Sound Transit’s applications comply with the code, and the ministerial permits at issue  
9 must be issued as a matter of right when an application complies with applicable code. *State ex*  
10 *rel. Ogden v. City of Bellevue*, 45 Wn.2d 492, 275 P.2d 899 (1954) (“A building or use permit  
11 must issue as a matter of right upon compliance with the ordinance.”); *see also, e.g., Mission*  
12 *Springs, Inc. v. City of Spokane*, 134 Wn.2d 947, 960, 954 P.2d 250 (1998) (collecting cases and  
13 writing that an applicant “is entitled to its immediate issuance upon satisfaction of relevant  
14 ordinance criteria and the State Environmental Policy Act of 1971”). “The building department  
15 of the city has no discretion to refuse a permit save to ascertain if the proposed structure  
16 complies with the zoning regulations. Once that is done and the appropriate fee tendered by the  
17 applicant, the building department must issue the building permit.” *State ex rel. Craven v. City*  
18 *of Tacoma*, 63 Wn.2d 23, 27, 385 P.2d 372 (1963) (granting writ of mandamus compelling  
19 defendant city to issue building permit for a lot in a plat that had not yet received final plat  
20 approval).

21 In Condition XIII.A the City asserts that an entire chapter of its code – Chapter 19.09 –  
22 authorizes the City to prohibit transit use in a City street. Nothing in Chapter 19.09 authorizes  
23 such an absurdity, and the code would violate both State law and the state constitution if it did.  
24 As the state Supreme Court recognized a century ago, “The highways of the state include the  
25 streets in the cities of the state. The streets are therefore subject to the paramount and primary  
26 control of the Legislature.” *State v. Howell*, 85 Wash. 281, 289, 147 P. 1162, 1165 (1915). State

1 law at RCW 35.58.330 grants to metropolitan municipal corporations and to regional transit  
2 authorities the right to operate in city streets without a franchise (without local legislative  
3 approval):

4 A metropolitan municipal corporation shall have power to construct or maintain  
5 metropolitan facilities in, along, on, under, over, or through public streets,  
6 bridges, viaducts, and other public rights-of-way without first obtaining a  
7 franchise from the county or city having jurisdiction over the same: PROVIDED,  
8 That such facilities shall be constructed and maintained in accordance with the  
9 ordinances and resolutions of such city or county relating to construction,  
10 installation and maintenance of similar facilities in such public properties.

11 State law gives this same right to Sound Transit. RCW 81.112.100.

12 Sound Transit applied for construction permits from the City pursuant to the proviso in  
13 RCW 35.58.330, which authorizes cities to regulate construction and maintenance pursuant to  
14 adopted regulations. Nothing in the proviso authorizes a city to prohibit construction of regional  
15 transit facilities, or to impose conditions that have nothing to do with adopted regulations for  
16 construction and maintenance. The obvious purpose of RCW 35.58.330 and RCW 81.112.100 is  
17 to ensure that a single jurisdiction cannot do what Mercer Island is attempting to do: block  
18 construction of regionally approved and needed infrastructure.

19 Similarly, nothing in MICC 19.06.060 – the section cited by the City as authority for  
20 Condition XIII.B – authorizes the City to refuse to issue a building permit for work on property  
21 not owned by the City, or to require a regional transit authority to give property to the City and  
22 obtain the City’s discretionary acceptance of a deed to that property, before that regional transit  
23 authority can construct a regional transit facility. That section does not govern the MITI Project,  
24 which does not create a private encroachment into the right-of-way, but rather is creating new  
25 right-of-way that the City will hold and control. Even if the section did apply, by relying on  
26 MICC 19.06.060 to justify such a condition, City staff interprets the City’s code in a manner that  
violates the statutes cited above, RCW 35.58.330 and 81.112.100, as well as Article XI, § 11 of  
the Washington State Constitution (authorizing local government to adopt such ordinances as are  
not in conflict with the general laws).

1           When construction is complete, Sound Transit is prepared to convey to the City as right-  
2 of-way the portions of the two residential lots that are needed for right-of-way use. Given the  
3 size of the stormwater vault and related infrastructure on Lot B, which consume most of this lot,  
4 Sound Transit is prepared to convey the entirety of Lot B to the City. Sound Transit is unaware  
5 of facts that would allow it to similarly convey the entirety of Lot A because after construction of  
6 the MITI Project, approximately 8,000 square feet of this residential lot will remain that appears  
7 to be surplus to any right-of-way use. The City does not even attempt to cite authority in its code  
8 for Condition XIII.C, which requires Sound Transit’s regional taxpayers to pay indefinitely for  
9 the operation and maintenance of City property and facilities.

10           The lack of support in City code for any of these conditions demonstrates their illegality,  
11 and the Hearing Examiner need go no further to rule in Sound Transit’s favor. However,  
12 because this administrative appeal is Sound Transit’s opportunity to make its evidentiary record  
13 and preserve its arguments for subsequent judicial proceedings, the remainder of this brief (and  
14 the evidence at the hearing) will establish Sound Transit’s right to relief for multiple additional  
15 reasons.

16 **B.     City staff cannot condition a Type I permit on its interpretation of a contract**

17           The Hearing Examiner ruled in his Interlocutory Order on the City’s Partial Motion to  
18 Dismiss, that “[t]he question before the Examiner is whether City Code provides appropriate  
19 support for the conditions.” Conditions XIII.A and XIII.C cite as authority the Settlement  
20 Agreement, which is a contract, and the Examiner’s prior ruling compels the rejection of these  
21 conditions insofar as they based on this contract.<sup>2</sup> Sound Transit will not present evidence  
22 regarding the Settlement Agreement or its interpretation, except as necessary to explain why  
23 certain actions were taken, but Sound Transit advances again the arguments in this section to  
24 preserve them in the event the City appeals the Examiner’s decision.

25 <sup>2</sup> As discussed above in Section V.A, Condition XIII.A also cites Chapter 19.09 MICC as additional support, but  
26 Chapter 19.09 MICC (titled “Property Development”) contains no section that supports the conclusion that the City  
may reject a curb cut requested by a Regional Transit Authority to support transit uses.

1 Conditions XIII.A and XIII.C both cite the Settlement Agreement as authority even  
2 though the City Council has not adopted this contract as a regulation. A contract does not  
3 provide any regulatory authority for a condition on a Type I permit, and according to City code,  
4 “Type I reviews are based on clear, objective and nondiscretionary standards or standards that  
5 require the application of professional expertise on technical issues.” MICC 19.15.030.A. The  
6 City filed a suit in October of 2020 asserting its interpretation of the Settlement Agreement,  
7 Sound Transit filed a counterclaim, and the parties are currently litigating the correct  
8 interpretation. Where the parties to a contract dispute its meaning, that contract cannot be a  
9 “clear, objective, and nondiscretionary” regulatory standard.

10 Even though the City invoked the court’s jurisdiction over the contract, the City also used  
11 its regulatory authority to grant itself the same remedy it seeks in court. By inserting conditions  
12 that implement its unilateral and disputed interpretation of the contract, the City usurps the  
13 Court’s jurisdiction. A city’s right to enforce a contract is no different from the right possessed  
14 by any party to a contract. *See, e.g., City of Spokane v. Spokane Gas & Fuel Co.*, 175 Wash.  
15 103, 109, 26 P.2d 1034 (1933) (noting a City’s police power must not be confused with its right  
16 to exercise its contractual power), *Scott Paper Co. v. City of Anacortes*, 90 Wn.2d 19, 28, 578  
17 P.2d 1292 (1978) (“The obligation of the City, where it contracted in its proprietary capacity, is  
18 the same as that of a private individual or corporation.” (citing 10 McQuillins 29.05, at 230));  
19 *accord* 10A McQuillin Mun. Corp. § 29:132 (3d ed.) (“A municipal corporation is bound by, and  
20 may sue and be sued on, all contracts which it may legally enter into in the same manner as a  
21 private corporation or an individual.”). A city cannot use its regulatory authority to enforce a  
22 contract, it must enlist the help of a court. *See City of Spokane, supra*, 175 Wash. at 109  
23 (quoting McQuillin favorably by analogy: “The right of the state or the municipality by  
24 delegated power to regulate rates by compulsion is a police power, and must not be confused  
25 with the right of a city to exercise its contractual power to agree with a public service company  
26 upon the terms of a franchise.”).

1 If the City believes that Sound Transit’s proposed use of the right-of-way for bus layover  
2 and passenger drop-off violates a contract, the City must so convince a court, and must  
3 successfully move the court to order specific performance. City staff cannot pre-judge the  
4 outcome of a contractual dispute by imposing its disputed interpretation of contractual provisions  
5 on non-discretionary permits when the applications for those permits comply with all applicable  
6 regulations.

7 **C. The Conditions preclude the siting of an Essential Public Facility**

8 The facts at the hearing will establish that the MITI Project is an essential component of  
9 an Essential Public Facility, or “EPF”: difficult-to-site facilities protected under the state Growth  
10 Management Act that deliver essential public services. *See* RCW 36.70A.200. Regional transit  
11 authority facilities are EPFs by decree of the State Legislature. RCW 36.70A.200(1)(a) (listing  
12 “regional transit authority facilities as defined in RCW 81.112.020” as an EPF). The GMA  
13 expressly prohibits local governments from adopting comprehensive plans and development  
14 regulations that preclude the siting of EPFs, and the Growth Management Hearings Board and  
15 courts agree that the GMA’s prohibition must inform project decisions or local governments  
16 would be able to thwart the legislature’s protection for EPFs. *See, e.g., Central Puget Sound*  
17 *Regional Transit Authority v. City of Tukwila*, CPSGMHB No. 99-3-0003, Final Decision and  
18 Order, 1999 WL 33100213 at \*4 (1999) (“[A]fter the regional decision is made, ***the city then has***  
19 ***a duty to accommodate the essential public facility***, and the exercise of its land use powers may  
20 only impose reasonable conditions and mitigations that will not effectively preclude the essential  
21 public facility by rendering it impracticable.” (emphasis added)); *accord Washington State Dep’t*  
22 *of Corr. v. City of Kennewick*, 86 Wn. App. 521, 533–34, 937 P.2d 1119 (1997), *as amended on*  
23 *denial of reconsideration* (June 26, 1997) (drawing an inference based on the GMA’s prohibition  
24 on preclusion of EPF that unsubstantiated neighborhood fears about the impacts of an EPF are  
25 not relevant to a permitting decision for an EPF). The GMA’s EPF protections extend to  
26 proposals to expand an existing EPF, and also to “necessary support activities.” *City of Des*

1 *Moines v. Puget Sound Regional Council*, 108 Wn. App. 836, 844-47, 988 P.2d 27 (1999) (“The  
2 legislative purpose of RCW 36.70A.200(2) would be defeated if local governments could  
3 prevent the construction or operation of an EPF. Thus, if an activity is indeed “necessary” to a  
4 construction of an EPF, a local plan may not stop it from occurring.”).

5 After a yearlong collaborative effort exploring alternatives, the City Manager agreed that  
6 the configuration in the MITI Project is the only one that meets Metro’s operational needs. Now,  
7 in its staff report, staff deride this configuration as merely Sound Transit’s “**preferred** location”  
8 or its “first *preference* for construction of bus layover,” Staff Report at 11:2, 11:12 (emphasis in  
9 original), but the staff report once again fails to set forth an alternative configuration that will  
10 allow bus/rail integration to work at the Mercer Island light rail station. None exists, and the  
11 City is precluding construction of an EPF.

12 It is the City, not Sound Transit, that chose the 77<sup>th</sup> Avenue SE Configuration studied in  
13 the SEPA Addendum; and it is the former City Manager who agreed with Metro and Sound  
14 Transit that there is no alternative to the layover area that Condition XIII.A prohibits. This bus  
15 layover area is not Sound Transit’s “preferred” location: the facts demonstrate that it is the  
16 required location for the 77<sup>th</sup> Avenue SE Configuration chosen by the City.

17 Contrary to the staff report’s assertion at 10:22-26, the City’s EPF code at MICC  
18 19.06.100 has no relevance to the MITI Project. That section establishes a process for  
19 identifying, siting, and regulating EPFs, MICC 19.06.100.A.1, but the Mercer Island Station was  
20 identified and sited years ago, and the City’s authority to regulate it at this point is limited to  
21 nondiscretionary permits, not the conditional use permit regime envisioned in that section, MICC  
22 19.06.100.D. That section expressly disavows an intent to preclude the siting of new EPFs,  
23 MICC 19.06.100.A.2, and bus/rail integration has been part of the Mercer Island station since the  
24 Federal Transit Authority, WSDOT, and Sound Transit issued the FEIS in 2011. The MITI  
25 Project is at least as essential to the functioning of East Link as offsite dirt-hauling was to the  
26

1 construction of the third runway in *City of Des Moines*, 108 Wn. App. at 846, and the City  
2 cannot exercise non-existent regulatory authority in its code to preclude its construction.

3 The evidence at the hearing will demonstrate that the MITI Project is necessary to the  
4 function of East Link, and that the City knows this full well since its City Manager spent over a  
5 year working with Sound Transit and Metro in an effort to find another design acceptable to the  
6 City that could meet Metro’s operational needs. The City Manager confirmed that no such  
7 alternative exists, and she, Sound Transit, and Metro all explained this conclusion to the City  
8 Council. The City has a “duty to accommodate” the MITI Project and cannot impose permit  
9 conditions that prevent its construction, which is what Conditions XIII.A, B, and C do.

10 **D. Conditions XIII.B and C violate RCW 82.02.020 by improperly exacting money and**  
11 **property that is not necessary to mitigate direct impacts of the MITI project**

12 Condition XIII.B requires Sound Transit to convey to the City the entirety of two  
13 residential lots before commencing work. As explained above, this condition requires Sound  
14 Transit to obtain the City Council’s legislative acceptance of the conveyance prior to  
15 commencing work in the future right-of-way. In addition, approximately 8,000 square feet of  
16 Lot A appears to have no transit or other right-of-way use after construction, and Sound Transit  
17 cannot convey this surplus property to the City without first demonstrating a return on the public  
18 investment in the property, in compliance with Federal and State laws regarding surplus  
19 property. In addition, Condition XIII.C requires Sound Transit to pay for the perpetual  
20 maintenance and operation of City property, including the same property that Condition XIII.B  
21 requires Sound Transit to convey to the City on the City’s terms. These exactions of real  
22 property and money from Sound Transit’s regional taxpayers are not voluntary and do not  
23 mitigate an impact of the MITI Project, in violation of RCW 82.02.020. *Cf. Isla Verde*  
24 *International Holdings v. City of Camas*, 146 Wn.2d 740, 758, 49 P.3d 867 (2002) (holding that  
25 a requirement to set aside 30% of property as open space violated RCW 82.02.020).  
26

1 A Hearing Examiner who makes a final decision for a City must ensure that the decision  
2 complies with State law, including RCW 82.02.020. *See, e.g., City of Federal Way v. Town &*  
3 *Country Real Estate, LLC*, 161 Wn. App. 17, 58 (2011) (concluding that hearing examiner had  
4 jurisdiction to hear challenge to imposition of transportation impact fee on plat approval,  
5 reversing the hearing examiner's ruling on RCW 82.02.020 grounds on its merits). The City  
6 bears the burden of demonstrating that, as a direct result of the MITI Project, the City must own  
7 the two residential lots before Sound Transit can commence construction; and the City cannot  
8 show that Sound Transit must pay for the perpetual operation and maintenance of property and  
9 facilities that the City is demanding to own. *Cf. Isla Verde, supra*, at 755-56 (holding that city  
10 bears the burden under RCW 82.02.020). The issue for issuance of ministerial permits is  
11 whether the applications comply with code, not who owns the property.

12 **E. The Condition XIII.B transforms ministerial permits to which Sound Transit is**  
13 **entitled as a matter of right into discretionary permits subject to the legislative will**  
14 **of the City Council**

15 Without any authority in the code or any other law, Condition XIII.B transforms  
16 ministerial permits into discretionary permits. Condition XIII.B does so by not only requiring  
17 Sound Transit to convey the entirety of two residential lots to the City, but by also requiring that  
18 the City Council accept the conveyances before Sound Transit can commence construction.

19 The City of Mercer Island is a noncharter code city organized under the Council-Manager  
20 Plan of government set forth in Ch. 35A.13 RCW. MICC 2.02.010. RCW 35A.13.080(4) grants  
21 the city manager *all* executive power, and the council can exercise only legislative authority,  
22 RCW 35A.13.230, which is inherently discretionary.

23 As discussed above, the State Legislature granted to Sound Transit's Board, not to the  
24 Mercer Island City Council, the discretion to decide what facilities are needed for East Link.  
25 RCW 81.112.100; RCW 35.58.330. The City cannot impose a condition on a ministerial  
26 construction permit that overrides the will of the State Legislature and gives the City Council  
veto power over regional transit facilities.



1 **F. Conditions IV.A & E and VII.H & I are inconsistent and unworkable**

2 The evidence at the hearing will establish that it is impossible to comply with the  
3 Conditions because of internal inconsistencies. Condition IV.A requires the applicant to  
4 “comply with the traffic control plan attached to this permit.” Then Condition IV.E requires that  
5 “[w]ork that impacts traffic flow must be performed Monday – Friday 9:00 am – 3:30 pm, except  
6 legal holidays. Additional time restrictions may be added to this permit to mitigate construction  
7 impacts on traffic.” Condition IV.E. These two conditions are inconsistent.

8 The approved Traffic Control Plan (incorporated by reference in Condition IV.A) and the  
9 Construction Management Plan for this construction project provide that the hours of  
10 construction are Monday-Friday, 7:00AM to 5:00PM, and Saturday from 9:00AM to 4:00PM (as  
11 needed), in accordance with MICC 8.24.020.Q. Yet, Condition IV.E restricts weekday work to  
12 the hours of 9:00AM to 3:30PM. In addition, Condition E does not make sense for a roadway  
13 construction project, and the approved Traffic Control Plan allows for daily single lane closures  
14 Monday through Friday and sometimes on Saturdays.

15 Other conditions also contradict Condition IV.A. Condition VII.H requires final asphalt  
16 restoration within 30 days of excavation without a prior extension. But Phase two of the Traffic  
17 Control Plan provides for approximately four months between excavation and reconstruction, not  
18 30 days. Similarly, Condition VII.I requires pavement restoration within 30 calendar days (of  
19 what it does not specify), but the Traffic Control Plan anticipates much longer timelines.

20 **IV. WITNESS LIST**

21 At the hearing, Sound Transit may offer the testimony of the witnesses listed below.  
22 Sound Transit reserves the right to identify additional witnesses as rebuttal witnesses.

- 23 **1. Jemae Hoffman** is the East Link Light Rail Development Manager for Sound Transit.  
24 She will describe the MITI Project, the collaborative process with the City and King  
25 County Metro to determine Metro’s operational needs, and the application process with  
26 the City.

- 1   **2. Katie Chalmers** is the Service Planning Supervisor for King County Metro. She will  
2 describe current bus service to Mercer Island, and how that will change once East Link  
3 opens. She will describe why bus/rail integration at the Mercer Island Station requires  
4 bus layover areas and bus stops on both the north and south sides of North Mercer Way,  
5 and she will describe the collaborative process among Sound Transit, King County  
6 Metro, and the City to determine Metro’s operational needs.
- 7   **3. Stephen Crosley** is the Transit Integration Program Manager for King County Metro.  
8 He will describe existing bus operations on North Mercer and how they must change for  
9 bus/rail integration to work at the Mercer Island Station. He will describe the  
10 collaborative process among Sound Transit, King County Metro, and the City to  
11 determine Metro’s operational needs.
- 12   **4. James Irish** is currently Senior Advisor to Sound Transit’s Office of Environmental  
13 Affairs and Sustainability. Prior to his retirement in 2017 he was Deputy Director of the  
14 Office. He will describe the environmental review of the MITI Project.
- 15   **5. Anthony Wilen** is the Project Manager for the MITI Project and a Professional Engineer  
16 at David Evans and Associates, Inc. He will explain the design of the Project and its  
17 compliance with applicable regulations. He also will describe meetings with City staff  
18 during the application process.
- 19   **6. Justin Lacson** is the Corridor Permit Manager for East Link. He will describe meetings  
20 and communications with City staff to prepare the plans and applications for the  
21 construction permits at issue in this appeal.
- 22   **7. Joanna Valeri** is Senior Legal Counsel at Sound Transit. She will describe the legal  
23 requirements and policies that apply to Sound Transit’s disposition of real property.
- 24   **8. Luke Lamon** is Government & Community Relations Corridor Manager for East Link.  
25 He will describe the collaborative process among Sound Transit, King County Metro, and  
26 the City.

1 **9.** **Eric Beckman** is Sound Transit’s Deputy Executive Director, a Professional Engineer,  
2 and a member of Sound Transit’s Real Property Utilization Committee. He will describe  
3 communications with the City about the MITI Project, and will explain the steps that  
4 Sound Transit must follow to dispose of the two residential lots that Sound Transit  
5 acquired in order to construct the MITI Project.

6 **V. CONCLUSION**

7 Conditions IV.A & E and VII.H & I are unworkable and inconsistent, and Sound Transit  
8 hopes that the City will modify these conditions before the hearing, so that Sound Transit need  
9 not present evidence about them.

10 The remaining three conditions, XIII.A, XIII.B, AND XIII.C, are unlawful for the  
11 multiple reasons set forth above, beginning with the lack of authority in the City code for any of  
12 them. Sound Transit asks that these conditions be stricken from all permits that the City has  
13 issued, and that the Hearing Examiner also confirm that Sound Transit is entitled to immediate  
14 issuance of the building and tree permits for which Sound Transit applied, so that construction of  
15 the MITI Project can proceed without further delay.

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

17  
18 *s/ Stephen G. Sheehy*  
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*s/Patrick J. Schneider*  
*s/Steven J. Gillespie*  
*s/Michelle Rusk*

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*Attorneys for Petitioner Sound Transit*

1 **DECLARATION OF SERVICE**

2 I, Nikea Smedley, under penalty of perjury under the laws of the State of Washington,  
3 declare as follows:

4 On the date indicated below, I caused **SOUND TRANSIT’S PREHEARING BRIEF**  
5 **AND WITNESS LIST** to be filed with the Hearing Examiner for the City of Mercer Island and  
6 served on the persons listed below in the manner indicated:  
7

8 City of Mercer Island Hearing Examiner [ ] Via Facsimile  
9 John Galt [ ] Via Legal Messenger  
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11 Email: [jegalt755@gmail.com](mailto:jegalt755@gmail.com)

12 Kim Adams Pratt, WSBA No. 19798 [ ] Via Facsimile  
13 Eileen M. Keiffer, WSBA No. 51598 [ ] Via Legal Messenger  
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8  
9 *Attorneys for Plaintiff City of Mercer Island,*  
10 *Washington*

11 DATED this 9<sup>th</sup> day of March, 2021 at Seattle, Washington.

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*s/Nikea Smedley*

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Nikea Smedley, Legal Practice Assistant

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