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BEFORE THE HEARING EXAMINER OF THE CITY OF MERCER ISLAND

In Re The Appeal of:

CENTRAL PUGET SOUND TRANSIT  
AUTHORITY,

Petitioner,

v.

CITY OF MERCER ISLAND,

Respondent.

No. APL21-001

CITY’S PARTIAL MOTION TO  
DISMISS FOR LACK OF  
JURISDICTION

I. INTRODUCTION

The City of Mercer Island (“City”) respectfully requests that the Hearing Examiner dismiss two issues in the appeal filed by the Center Puget Sound Transit Authority (“Sound Transit”), the appeal of Conditions XIII.A. and Conditions XIII.C., because the Hearing Examiner lacks jurisdiction over these issues. Sound Transit’s Assignments of Error for Condition XIII.A (new bus bay) and Condition XIII.C (operations and maintenance agreement) are both terms addressed in a 2017 Settlement Agreement between the parties (“Settlement Agreement”). The Settlement Agreement expressly requires all disputes be resolved by the processes agreed to in the Settlement Agreement. Those processes do not include the City’s usual administrative appeal process. Further, in ongoing Superior Court

1 litigation in 2020, both parties acknowledged the Court’s sole and exclusive jurisdiction over  
2 the Settlement Agreement terms.

3 II. STATEMENT OF FACTS

4 The facts provided herein are only those relevant to this Partial Motion to Dismiss  
5 For Lack of Jurisdiction (“Motion”). There is no dispute that in 2017, the parties entered into  
6 a Settlement Agreement. Appeal of Conditions of Permit Approval for Permit No. 2010-186  
7 (“Appeal”) at 2 and Appeal at Exhibit A, Condition XIII.A and Condition XIII.C. Sound  
8 Transit has also clearly explained in its Appeal that the Settlement Agreement “is not  
9 otherwise relevant to this Appeal because it is a contract [only] enforceable in superior court.”  
10 Appeal at 2.

11 Pursuant to the express terms of the Settlement Agreement<sup>1</sup>, the City filed litigation  
12 in Superior Court in October 2020 (“2020 Action”), seeking declaratory relief and to enforce  
13 the plain terms of the Settlement Agreement. Declaration of Kim Adams Pratt in Support of  
14 City’s Partial Motion to Dismiss For Lack of Jurisdiction (“Decl. Pratt”) at 1, Ex. A. Sound  
15 Transit filed an Answer and Counterclaims in the 2020 Action, in which Sound Transit also  
16 asks the Court to interpret the Settlement Agreement. *Id.* at 1, Ex. B. The City filed its Reply  
17 to the Counterclaims and discovery between the parties is ongoing. *Id.* at 1, Ex. C.

18 III. EVIDENCE RELIED UPON

19 The City of Mercer Island relies on the pleadings on file and the Declaration of Kim  
20 Adams Pratt in Support of the City’s Partial Motion to Dismiss For Lack of Jurisdiction, filed  
21 herewith.

22 IV. ISSUES PRESENTED

23 A. Is Sound Transit’s Appeal of Condition XIII.A (new North Mercer Way curb cut)  
24 outside the Hearing Examiner’s jurisdiction? Yes.

25 \_\_\_\_\_  
26 <sup>1</sup> Section 17 of the Settlement Agreement provides for a three-stage dispute resolution process. At the conclusion  
of such process, the parties to the dispute are then free to file suit. Decl. Pratt at 1, Exhibit A, Settlement  
Agreement at 12 - 13.

1 B. Is Sound Transit’s Appeal of Condition XIII.C (Operation and Maintenance  
2 Agreement) outside the Hearing Examiner’s jurisdiction? Yes.

3 V. ARGUMENT

4 Under the City of Mercer Island’s Hearing Examiner Rules of Procedures (“RoP”),  
5 any party may request dismissal of all or part of an appeal at any time with notice to all  
6 parties. RoP 204. If the facts in an appeal are legally insufficient to support the appeal,  
7 dismissal under this rule is appropriate. *See Doe v. Benton County*, 200 Wn.App 781, 787,  
8 403 P.3d 861 (2017), review denied, 190 Wn. 2d 1006 (2018). Put simply, if the Hearing  
9 Examiner cannot legally grant the relief sought, the only appropriate remedy is to dismiss the  
10 issue or appeal.

11 A. The Mercer Island City Code limits the Hearing Examiner’s jurisdiction to matters  
12 strictly delegated by the Mercer Island City Code.

13 The issue of jurisdiction is a foundational one. A court or tribunal must have subject  
14 matter jurisdiction in order to decide a case; in the absence of subject matter jurisdiction, a  
15 court or tribunal has no power to act. *See Eugster v. Wash. State Bar Assoc.*, 198 Wn. App.  
16 758, 774, 397 P.3d 131 (2017); see also MICC 3.40.050. Washington Courts have long  
17 established that a hearing examiner has very limited subject matter jurisdiction and in fact,  
18 may “exercise only those powers conferred either expressly or by necessary implication.”  
19 *Chaussee v. Snohomish County Council*, 38 Wn. App. 630, 636 P.2d 1084 (1984), citing *State*  
20 *v. Munson*, 23 Wn. App. 522, 524, 597 P.2d 440 (1979). *See, also, Woodinville Water Dist. v.*  
21 *King County*, 105 Wn. App. 897, 906, 21 P.3d 309 (2001) (“hearing examiners have only the  
22 authority delegated to them by the Council.”). An examination of the MICC establishing the  
23 Hearing Examiner’s authority reveals that Sound Transit’s appeal of Conditions XIII.A. and  
24 Conditions XIII.C. reach beyond the scope of the Hearing Examiner’s jurisdiction.

25 The MICC does not delegate to the Hearing Examiner the authority to interpret and  
26 enforce settlement agreements/contracts between the City and a third party. Chapter 3.40

1 MICC, *Hearing Examiner*, creates the office of the hearing examiner and provides in part as  
2 follows:

3 3.40.020 Purpose – Function and jurisdiction

4 A. The hearing examiner will hear and decide upon applications and appeals  
5 as designated in this code.

6 3.40.050 Dismissal of untimely appeals.

7 On its own motion or on the motion of a party, the hearing examiner shall  
8 dismiss an appeal for untimeliness or lack of jurisdiction.

9 Chapter 19.15 MICC, *Administration*, identifies the “processes, authorities and  
10 timing for administration of development permits” and also establishes “public noticing and  
11 hearing procedures, decision criteria, appeal procedures, dispute resolution and code  
12 interpretation.” MICC 19.15.010(A). Chapter 19.15 MICC provides for the hearing examiner  
13 to hear appeals of Type I, II, and III permit application decisions, and to hold open record  
14 pre-decision hearings and make the decision for Type IV permit applications. MICC  
15 19.15.030, Table B, Review Processing Procedures. There are no provisions within the MICC  
16 providing the Hearing Examiner authority over interpretation or enforcement of contracts or  
17 settlement agreements in particular.

18 Sound Transit’s appeal of Condition XIII.A and Condition XIII.C are not properly  
19 before the Hearing Examiner because they directly relate to administration of the Settlement  
20 Agreement. Both of these Conditions, by their express terms, are invoking and implementing  
21 terms of the Settlement Agreement:

22 Condition XIII.A: . . . “These are uses also prohibited by the terms of the  
23 2017 Settlement Agreement Between the City of Mercer Island and The  
24 Central Puget Sound Regional Transit Authority (Sound Transit) for the East  
25 Link Project (“2017 Agreement”).

26 Condition XIII.C: “Pursuant to the 2017 Agreement, Sound Transit is solely  
responsible for all costs required to construct, implement, and operate the  
systems and facilities authorized under ROW permit number 2010-186. . . .”

1 Under the plain language of the MICC, there is no authority for the Hearing Examiner  
2 to decide if the City appropriately conditioned ROW Use Permit No. 2010-186 with regard  
3 to the new curb cut and execution of an operation and maintenance agreement, because these  
4 conditions implement the terms of the Settlement Agreement. Therefore, the Hearing  
5 Examiner lacks jurisdiction to consider any issues relating these two Conditions or grant any  
6 relief relating to the Settlement Agreement.

7 B. Sound Transit's administrative appeal of the City's permit conditioning authority  
8 under the Settlement Agreement is an unlawful collateral attack on the Settlement  
9 Agreement.

10 Sound Transit seeks to circumvent the Settlement Agreement terms it previously agreed  
11 to by asking the Hearing Examiner to pretend the Settlement Agreement does not exist. This  
12 constitutes a collateral attack on the City's rights under the Settlement Agreement and is an  
13 attempt by Sound Transit to render meaningless the rights the City negotiated in the  
14 Settlement Agreement. A decision on the appeal of Conditions XIII.A. and Conditions  
15 XIII.C. would nullify the terms the City and Sound Transit jointly negotiated and agreed to  
16 in the Settlement Agreement. Sound Transit cannot evade implementation of the Settlement  
17 Agreement by attempting to receive a ruling by the Hearing Examiner in contravention of the  
18 Settlement Agreement's established process for resolving disputes. Therefore, Sound  
19 Transit's appeal of Conditions XIII.A. and Conditions XIII.C. should be dismissed.

20 C. The Hearing Examiner should not rule regarding the Conditions because the City  
21 and Sound Transit are actively engaged in litigation regarding the Settlement  
22 Agreement and such a ruling could interfere with the outcome of that litigation.

23 The City and Sound Transit are pursuing resolution of their Settlement Agreement  
24 disputes in King County Superior Court. Neither party is arguing the Hearing Examiner has  
25 jurisdiction over interpretation or enforcement of the Settlement Agreement. Decl. Pratt at 1,  
26 Ex. A – C. A ruling on Conditions XIII.A. and Conditions XIII.C. in this administrative  
appeal proceeding could inadvertently interfere with the litigation currently pending between  
the parties. Should the Hearing Examiner's decision conflict with the ultimate ruling by the

1 Superior Court, this will result in additional appeals and additional unnecessary litigation  
2 between the parties.

3 VI. CONCLUSION

4 The Hearing Examiner lacks jurisdiction to decide matters that are subject only to the  
5 dispute resolution procedures laid out by the Settlement Agreement. Sound Transit's appeal  
6 of permit Conditions XIII.A. and Conditions XIII.C. is an unlawful collateral attack on the  
7 Settlement Agreement and seeks to undo the promises made by Sound Transit in that  
8 Settlement Agreement. Finally, the Hearing Examiner should not rule on permit Conditions  
9 XIII.A. and Conditions XIII.C. because such permit conditions are subject to and impacted  
10 by the King County Superior Court litigation currently in progress between the parties. The  
11 City respectfully requests that the Hearing Examiner dismiss Sound Transit's appeal of  
12 Conditions XIII.A. and Conditions XIII.C.

13 DATED this 16th day of February, 2021.

14 MADRONA LAW GROUP, PLLC

15  
16 By: /s/ Kim Adams Pratt  
17 Kim Adams Pratt, WSBA No. 19798  
Eileen M. Keiffer, WSBA No. 51598

18 **CITY OF MERCER ISLAND**  
19 **OFFICE OF THE CITY ATTORNEY**

20  
21 By: /s/ Bio Park  
22 Bio Park, WSBA No. 36994

23 *Attorneys for the City of Mercer Island*  
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**DECLARATION OF SERVICE**

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I, Tori Harris, declare and state:

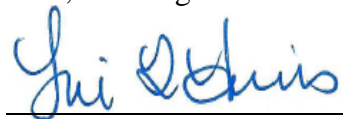
1. I am a citizen of the State of Washington, over the age of eighteen years, not a party to this action, and competent to be a witness herein.

2. On the 16th day of February, 2021, I served a true copy of the foregoing City’s Partial Motion to Dismiss for Lack of Jurisdiction on the following counsel of record using the method of service indicated below:

Stephen G. Sheehy, WSBA No. 13304 Sound Transit / Legal Department 401 South Jackson Street Seattle, WA 98104-2826  Co-Counsel for Petitioner	<input type="checkbox"/> First Class, U.S. Mail, Postage Prepaid <input type="checkbox"/> Legal Messenger <input type="checkbox"/> Overnight Delivery <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> E-Mail: <a href="mailto:stephen.sheehy@soundtransit.org">stephen.sheehy@soundtransit.org</a> <input type="checkbox"/> EService pursuant to LGR
Patrick J. Schneider, WSBA No. 11957 Steven J. Gillespie, WSBA No. 39538 Michelle Rusk, WSBA No. 52826 Foster Garvey PLLC 1111 Third Avenue, Suite 3000 Seattle, WA 98101  Co-Counsel for Petitioner	<input type="checkbox"/> First Class, U.S. Mail, Postage Prepaid <input type="checkbox"/> Legal Messenger <input type="checkbox"/> Overnight Delivery <input type="checkbox"/> Facsimile <input checked="" type="checkbox"/> E-Mail: <a href="mailto:pat.schneider@foster.com">pat.schneider@foster.com</a> <a href="mailto:steve.gillespie@foster.com">steve.gillespie@foster.com</a> <a href="mailto:michelle.rusk@foster.com">michelle.rusk@foster.com</a> <input type="checkbox"/> EService pursuant to LGR

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

DATED this 16th day of February, 2021, at Seattle, Washington.

  
 \_\_\_\_\_  
 Tori Harris