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**BEFORE THE HEARING EXAMINER
FOR THE CITY OF MERCER ISLAND**

In the Matter of the Appeal of

No. APL21-001

**CENTRAL PUGET SOUND TRANSIT
AUTHORITY,**

**SOUND TRANSIT’S RESPONSE TO
CITY’S PARTIAL MOTION TO
DISMISS FOR LACK OF
JURISDICTION**

Petitioner,

v.

CITY OF MERCER ISLAND,

Respondent.

I. INTRODUCTION

The Hearing Examiner has jurisdiction over appeals of Type I decisions, a fact that the City asserted to its advantage in Superior Court.

On February 5, eleven days before the City filed its motion in this case, the City asserted to Judge Ramseyer that the Hearing Examiner has jurisdiction over *all* of Sound Transit’s appeal issues, including Conditions XIII.A and XIII.C, and the City asked the Court to dismiss Sound Transit’s LUPA appeal of Permit Number 2010-186 because Sound Transit needs to exhaust its administrative remedies by first appealing to the Hearing Examiner (the City’s Motion to the Court, Sound Transit’s Response, the City’s Reply, and the Court’s Order are all attached to the Declaration of Patrick J. Schneider submitted in support of this Response).

**SOUND TRANSIT’S RESPONSE TO CITY’S
PARTIAL MOTION TO DISMISS FOR LACK OF
JURISDICTION - 1**

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1 Then on February 17, the next day after the City filed its motion in this case asserting the
2 Hearing Examiner lacks such jurisdiction, the City filed its Reply brief in Superior Court, again
3 arguing that the Hearing Examiner has jurisdiction over Sound Transit’s appeal. For example, at
4 page 2 , lines 18 - 23:

5 The MICC places no limit on the Hearing Examiner’s jurisdiction to hear appeals
of decisions and determinations of the City’s building official.

6 Similarly, the City Engineer’s conditioning of a ROW permit is a Type I
7 permit decision appealable to the Hearing Examiner. MICC 19.15.030, Table A
and B. There is a clear administrative appellate procedure for both issues.

8 On February 19 the Court accepted the City’s argument that the Hearing Examiner has
9 jurisdiction over all issues raised by Sound Transit’s appeal, and the Court granted the City’s
10 motion to dismiss the LUPA petition “without prejudice” to Sound Transit’s ability to bring a
11 new LUPA appeal, if necessary, after a future decision by the Hearing Examiner.

12 The Court’s Order is dispositive and binding, and requires the Hearing Examiner to deny
13 the City’s motion to dismiss Sound Transit’s appeal of Conditions XIII.A and XIII.C. Sound
14 Transit nonetheless responds below to the merits of the City’s argument because that argument is
15 based on the false assertion that Sound Transit is asking the Hearing Examiner to interpret a
16 contract. Sound Transit’s appeal does not require the Hearing Examiner to interpret a contract,
17 only to recognize that the Settlement Agreement *is* a contract and not an enacted regulation.
18 Conditions XIII.A and XIII.C are unlawful because they are not based on the code and instead
19 are an attempt by the City to impose its interpretation of a disputed contract on the other party to
20 the contract.

21 As explained below, at the upcoming hearing the Hearing Examiner will have both the
22 jurisdiction and responsibility to grant Sound Transit’s appeal by striking Conditions XIII.A and
23 XIII.C.

24 II. FACTS

25 The relevant facts are simple: the Settlement Agreement is a contract; the City filed a
26 Complaint in Superior Court alleging that Sound Transit is breaching this contract; and Sound

1 Transit filed a Counterclaim alleging that the City is breaching this contract. *See* the attachments
2 to the Declaration of Kim Adams Pratt In Support Of City’s Partial Motion To Dismiss.

3 The Superior Court has not decided this dispute, and Conditions XIII.A and XIII.C both
4 acknowledge that they are based on the City’s interpretation of this disputed contract.
5 Conditions XIII.A states (emphasis added):

6 These uses are also prohibited by the terms of the **2017 Settlement Agreement**
7 **Between the City of Mercer Island and The Central Puget Sound Regional Transit**
8 **Authority (Sound Transit) for the East Link Project (“2017 Agreement”).**

9 And Condition XIII.B states:

10 Pursuant to the **2017 Agreement**, Sound Transit is solely responsible for all costs
11 required to construct, implement, and operate the systems and facilities authorized
12 under ROW permit number 2010-186.

13 **III.ARGUMENT**

14 The right-of-way permit and the ancillary permits that Sound Transit is appealing are all
15 “Type I decisions,” which the City’s code defines in MICC 19.15.030.A (emphasis added):

16 A. *Type I*. Type I reviews are based on clear, objective and **nondiscretionary**
17 **standards** or standards that require the application of professional expertise on
18 technical issues.

19 Type I permits are, by the City’s own definition, “nondiscretionary.”

20 Where an application for a non-discretionary permit satisfies the applicable regulations,
21 government must issue it. *State ex rel. Ogden v. City of Bellevue*, 45 Wn.2d 492, 275 P.2d 899
22 (1954) (“A building or use permit must issue as a matter of right upon compliance with the
23 ordinance.”); *see also, e.g., Mission Springs, Inc. v. City of Spokane*, 134 Wn.2d 947, 960, 954
24 P.2d 250 (1998) (collecting cases and writing that an applicant “is entitled to its immediate
25 issuance upon satisfaction of relevant ordinance criteria and the State Environmental Policy Act
26 of 1971”). “The building department of the city has no discretion to refuse a permit save to
ascertain if the proposed structure complies with the zoning regulations. Once that is done and
the appropriate fee tendered by the applicant, the building department must issue the building
permit.” *State ex rel. Craven v. City of Tacoma*, 63 Wn.2d 23, 27, 385 P.2d 372 (1963) (granting

1 writ of mandamus compelling defendant city to issue building permit for a lot in a plat that had
2 not yet received final plat approval).

3 The City's Motion depends on the false presumption that Sound Transit's appeal requires
4 interpretation of the Settlement Agreement. It does not. Rather, Sound Transit's appeal depends
5 on the fact that conditions XIII.A and XIII.C are not based on "clear, objective and
6 nondiscretionary standards or standards that require the application of professional expertise on
7 technical issues," as required by MICC 19.15.030.A, but are instead based on a disputed
8 interpretation of a contract. There is no need for the Hearing Examiner to review the Settlement
9 Agreement, except perhaps to confirm that it is what all parties agree it is: a contract signed by
10 the City Manager and Sound Transit's Chief Executive Officer. It is not the type of "clear,
11 objective and nondiscretionary" regulation that staff can use to condition a Type I permit, as
12 evidenced by the very fact that the parties are engaged in litigation over its correct interpretation.

13 The Settlement Agreement will be interpreted by the Court, but the relevant fact for
14 purposes of this appeal is that the Settlement Agreement is a negotiated contract to which the
15 City, like Sound Transit, is a party. The City has no more right to impose its interpretation of the
16 contract on Sound Transit than Sound Transit has a right to impose its interpretation on the City.
17 In common with any party to any contract, the City must assert its contractual rights in Superior
18 Court.

19 The Mercer Island City Code grants to the Hearing Examiner jurisdiction to hear appeals
20 of Type I permits, and the issue on appeal is whether the conditions are consistent with the code,
21 not on whether they reflect the City's interpretation of a disputed contract. Sound Transit's
22 appeal does not ask the Hearing Examiner to interpret the Settlement Agreement, only to
23 recognize that it is a contract and not a regulation.

24 The City's motion to dismiss Sound Transit's appeal of issues XIII.A and XIII.B must be
25 denied because the Superior Court already has determined that the Hearing Examiner has
26 jurisdiction to hear Sound Transit's appeal. Even without such a binding decision from the

1 Court, however, the motion must be denied because it is based on the false assertion that Sound
2 Transit is asking the Hearing Examiner to interpret the Settlement Agreement. Sound Transit is
3 asking the Hearing Examiner to interpret the code; the Settlement Agreement is not the code; and
4 conditions based on the Settlement Agreement are not based on the code.

5 Dated this 26th day of February, 2021.

6
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Attorneys for Petitioner

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 RESPONSE TO CITY’S**
5 **PARTIAL MOTION TO DISMISS FOR LACK OF JURISDICTION** to be filed with the
6 Hearing Examiner for the City of Mercer Island and served on the persons listed below in the
7 manner indicated:
8

9 City of Mercer Island Hearing Examiner [] Via Facsimile
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Mercer Island, WA 98040 [] Via US Mail, postage prepaid
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8 ***Attorneys for Plaintiff City of Mercer Island,***
9 ***Washington***

10 DATED this 26th day of February, 2021 at Seattle, Washington.

11 *s/Nikea Smedley*
12 Nikea Smedley, Legal Practice Assistant