

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

INTERLOCUTORY ORDER on MOTION to EXCLUDE

FILE NUMBER: APL21-001

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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”) has before him the appeal filed on January 5, 2021, by Central Puget Sound Transit Authority (“Sound Transit”) from seven of the conditions imposed by the City of Mercer Island (“City”) on Right-of-Way Use Permit 2010-186 (the “Permit”), issued on December 22, 2020. The Permit is needed for construction of Sound Transit’s Mercer Island Transit Integration Project (“MITI Project”). Sound Transit identifies its seven appeal issues by the condition numbers used in the Permit: Permit Conditions IV.A, IV.E, VII.H, VII.I, XIII.A, XIII.B, and XIII.C; and

WHEREAS, Sound Transit and the City entered into a settlement agreement (the “Settlement Agreement”) in 2017 regarding the MITI Project. Litigation between the City and Sound Transit regarding

the Settlement Agreement was in part dismissed without prejudice (allowing re-filing after conclusion of the present appeal proceedings) and in part stayed by the Superior Court on February 19, 2021; and

WHEREAS, on February 16, 2021, the City filed a Partial Motion to Dismiss for Lack of Jurisdiction (the “City’s Motion”) asking the Examiner to dismiss Sound Transit’s appeal of Permit Conditions XIII.A and XIII.C for lack of jurisdiction; and

WHEREAS, on March 2, 2021, the Examiner issued an Interlocutory Order on Motion (“Order on Motion”) in response to the City’s Motion, the operative portion of which reads as follows:

The Examiner herewith **DISMISSES** (for lack of jurisdiction) any argument that Permit Conditions XIII.A and XIII.C are justified by or in conflict with the Settlement Agreement or that equity should be a consideration. The Examiner will not consider the applicability of the Settlement Agreement as a basis or foundation for the conditions, nor will the Examiner consider equity. The question before the Examiner is whether City Code provides appropriate support for the conditions. Testimony, evidence, and/or argument regarding the content and applicability of the Settlement Agreement or equity will not be allowed.

[Order on Motion, p. 3]; and

WHEREAS, the hearing on the merits in this matter will convene remotely at 9:00 a.m. on Tuesday, March 16, 2021; and

WHEREAS, at 12:43 p.m. on Thursday, March 11, 2021, the City filed a Motion to Exclude Witness Testimony and Exhibits and City’s Request for Expedited Ruling (“Motion to Exclude”). The Motion to Exclude asks the Examiner to exclude 29 of Sound Transit’s 57 pre-filed exhibits and preclude four of Sound Transit’s nine proposed witnesses “from testifying regarding the ‘collaborative process with the City and King County Metro to determine Metro’s operational needs’” on the grounds that they would conflict with the Examiner’s March 2, 2021, Order on Motion. The Motion to Exclude also asks the Examiner to confirm “that the Hearing Examiner is not striking Settlement Agreement terms from the permit conditions but leaving all Settlement Agreement disputes for the Court to decide.” [Motion to Exclude, 5:23/24 – 5:24/25]; and

WHEREAS, due to the short time period between the filing of the Motion to Exclude and the start of the hearing, the Examiner was not able to provide the usual 10 days for receipt of a response from Sound Transit. By e-mail sent at 3:57 p.m. on March 11, 2021, the Examiner advised Sound Transit that he would be able to consider any response received by noon on Sunday, March 14. Sound Transit submitted its response to the Examiner by e-mail at 7:43 p.m. on Saturday, March 13, 2021 (“Sound Transit’s Response to Motion to Exclude”); and

WHEREAS, Sound Transit asserts that the challenged pre-filed exhibits are necessary for four purposes, one of which is “to rebut the argument . . . that Sound Transit does not have the City’s permission to construct this Essential Public Facility.” [Sound Transit’s Response to Motion to Exclude, 4:9 – 11] The argument that the City has previously granted permission to construct the MITI Project is an equitable argument. As the Examiner noted in the Order on Motion, a hearing examiner lacks the jurisdiction to consider equitable arguments. [*Chaussee v. Snohomish County*, 38 Wn. App. 630, 638, 689 P.2d 1084

(1984) (concurring with the undersigned who held that he had to apply duly enacted regulations as written and could not consider equitable arguments)] To the extent that the complained-of pre-filed exhibits and anticipated testimony serve to only or primarily further an equitable argument, they would be in conflict with *Chaussee* and the Order on Motion. They would be appropriate for exclusion; and

WHEREAS, Sound Transit asserts that the challenged documents and anticipated testimony are necessary to provide the history and context of the process that led to the Permit. [Sound Transit’s Response to Motion to Exclude, 4:12 – 5:9] Application processing history is not relevant to “whether City Code provides appropriate support for the [challenged] conditions.” [Order on Motion, p. 3] Sound Transit also correctly notes that at least one of the City’s pre-filed documents mentions the Settlement Agreement. [Sound Transit’s Response to Motion to Exclude, 4:22/23 – 5:2] There is no motion before the Examiner to exclude any City pre-filed documents. Nevertheless, the Examiner intends to ignore Settlement Agreement references in all documents; and

WHEREAS, Sound Transit asserts that “the Settlement Agreement must be admitted into evidence” in order for the Examiner to determine “whether the Settlement Agreement meets the standard of MICC 19.15.030,” the code section containing the standards associated with Type 1 permits such as the Permit. [Sound Transit’s Response to Motion to Exclude, 5:22 – 24 and 5:19 – 21, respectively] The Examiner disagrees with the premise that he must determine whether the Settlement Agreement meets the standards of MICC 19.15.030. As stated in the Order on Motion, the Examiner is not the proper party to make rulings on the Settlement Agreement. The Examiner will allow the Settlement Agreement (pre-filed Exhibit 1051) to be entered into the record, solely to eliminate any mystery as to its content; and

WHEREAS, Sound Transit asserts that the challenged documents are necessary “to establish that the challenged conditions preclude the siting of an Essential Public Facility” (“EPF”). [Sound Transit’s Response to Motion to Exclude, 6:1 – 8/9; quote from 6:1/2, bold omitted] The challenged documents relating to this concern are essentially records of discussions over time. The result of those discussions is reflected in proposed Exhibits 1001 and 1002, the March 2019 Mercer Island Transit Interchange Operational and Configuration Study. The evolution of MITI and the positions of the parties during that evolution are irrelevant to the question of whether the challenged permit conditions are supported by applicable code or would prevent construction of an EPF; and

WHEREAS, Sound Transit asserts that it needs the challenged documents to show that the City has already given its “consent” to the MITI Project. [Sound Transit’s Response to Motion to Exclude, 6:17/18 – 24] The question of prior City “consent” is a question in equity beyond the scope of the Examiner’s jurisdiction; and

WHEREAS, Sound Transit’s position is that it wants the Examiner to strike in their entirety Permit Conditions XIII.A and XIII.C if he finds that they are not supported by code, regardless of the fact that they contain references to the Settlement Agreement. [Sound Transit’s Response to Motion to Exclude, 7:1 – 24] The Examiner intended his statement in the Order on Motion that he “will not consider the applicability of the Settlement Agreement as a basis or foundation for the conditions” to mean that he would not take any action regarding the Settlement Agreement. Were the Examiner to strike Permit Conditions XIII.A and XIII.C he would be indirectly (or perhaps not so indirectly) ruling that the Settlement Agreement references did not belong in the Permit conditions. Such a result would, in the Examiner’s opinion, amount to exceeding the scope of his jurisdiction; and

WHEREAS, Washington’s appellate courts recognize the right of quasi-judicial bodies to act summarily in appropriate situations.

Since Const. art. 4 and the Superior Court Civil Rules do not exclusively reserve summary procedures to the judiciary, there is no logic that compels us to consider separation of powers as a roadblock to the use of efficient judicial procedures in the field of administrative law. If there does not exist a genuine issue of material fact, there is no reason why an administrative board or agency should be denied an opportunity to handle the matter summarily, passing on the issue of law presented.

[*ASARCO, Inc. v. Air Quality Coalition*, 92 Wn.2d 685, 696-97, 601 P.2d 501 (1979), citations omitted] In *Eastlake Community Council v. City of Seattle* [64 Wn. App. 273, 276, 823 P.2d 1132 (1992)] Division I of the Court of Appeals held that even where a quasi-judicial body’s regulating procedures do “not contain any provisions authorizing agencies to grant summary judgment”, they may do so when acting in a quasi-judicial role under the principle set down in *ASARCO*; and

WHEREAS, some may feel that the Examiner has unduly parsed (limited) his jurisdiction in this appeal. The Examiner has consciously and conservatively limited his jurisdiction in light of the litigation between the City and Sound Transit regarding the Settlement Agreement. The Examiner believes that the appropriate forum in which to argue the meaning, implications, and applicability of the Settlement Agreement (in general and specifically with respect to the Permit) is in court, not before the Examiner; and

WHEREAS, exclusion of evidence in appeal hearings is neither rare nor unusual. In fact, the undersigned routinely enters pre-filed exhibits into the record at the outset of an appeal hearing. Part of the undersigned’s routine is to ask opposing parties if anyone has an objection to entry of the pre-filed exhibits. If an objection is raised, the undersigned hears brief oral argument on the objection and then orally rules on admissibility. The City’s Motion to Exclude and Sound Transit’s Response to Motion to Exclude are essentially merely formalization of that normal, routine process; and

WHEREAS, in the interest of time and efficiency, the Examiner will bundle his action and a brief reason therefor in the Order which follows.

NOW, THEREFORE, the Hearing Examiner issues the following:

ORDER

A. Motion to Exclude Exhibits:

1. Exhibit 1009: Motion **GRANTED**. This document directly addresses the Settlement Agreement and falls within the scope of what was barred by the Order on Motion.

2. Exhibit 1011: Motion **GRANTED**. This document directly addresses the Settlement Agreement and falls within the scope of what was barred by the Order on Motion. Further, it is a document from the City's legislative branch which has no bearing on the issues before the Examiner.
3. Exhibit 1017: Motion **GRANTED**. This document directly addresses the Settlement Agreement and falls within the scope of what was barred by the Order on Motion.
4. Exhibit 1018: Motion **GRANTED**. This document directly addresses the Settlement Agreement and falls within the scope of what was barred by the Order on Motion.
5. Exhibit 1019: Motion **GRANTED**. This document directly addresses the Settlement Agreement and falls within the scope of what was barred by the Order on Motion.
6. Exhibit 1020: Motion **GRANTED**. This document directly addresses the Settlement Agreement and falls within the scope of what was barred by the Order on Motion.
7. Exhibit 1021: Motion **GRANTED**. This document directly addresses the Settlement Agreement and falls within the scope of what was barred by the Order on Motion.
8. Exhibit 1022: Motion **GRANTED**. This document directly addresses the Settlement Agreement and falls within the scope of what was barred by the Order on Motion.
9. Exhibit 1023: Motion **GRANTED**. This document directly addresses the Settlement Agreement and falls within the scope of what was barred by the Order on Motion.
10. Exhibit 1024: Motion **GRANTED**. This document directly addresses the Settlement Agreement and falls within the scope of what was barred by the Order on Motion.
11. Exhibit 1025: Motion **GRANTED**. This document directly addresses the Settlement Agreement and falls within the scope of what was barred by the Order on Motion.
12. Exhibit 1026: Motion **GRANTED**. This document directly addresses the Settlement Agreement and falls within the scope of what was barred by the Order on Motion.
13. Exhibit 1027: Motion **DENIED**. This document, though of dubious relevance to the Permit issues before the Examiner, is not overtly related to the Settlement Agreement or equitable considerations.
14. Exhibit 1028: Motion **GRANTED IN PART**. The portion of this document which directly addresses the Settlement Agreement must be excluded as it falls within the scope of what was barred by the Order on Motion. Therefore, Items 14 – 21 are **EXCLUDED**; Items 1 – 13 are not.
15. Exhibit 1029: Motion **GRANTED**. This document directly addresses the Settlement Agreement and falls within the scope of what was barred by the Order on Motion.

16. Exhibit 1030: Motion **GRANTED**. This document directly addresses the Settlement Agreement and falls within the scope of what was barred by the Order on Motion.
17. Exhibit 1031: Motion **DENIED**. This document, though of dubious relevance to the Permit issues before the Examiner, is not overtly related to the Settlement Agreement or equitable considerations.
18. Exhibit 1032: Motion **DENIED**. This document, though of dubious relevance to the Permit issues before the Examiner, is not overtly related to the Settlement Agreement or equitable considerations.
19. Exhibit 1033: Motion **DENIED**. This document neither addresses the Settlement Agreement nor raises equitable considerations.
20. Exhibit 1034: Motion **DENIED**. This document, though of dubious relevance to the Permit issues before the Examiner, is not overtly related to the Settlement Agreement or equitable considerations.
21. Exhibit 1035: Motion **DENIED**. This document, though of dubious relevance to the Permit issues before the Examiner, is not overtly related to the Settlement Agreement or equitable considerations.
22. Exhibit 1041: Motion **GRANTED**. This document directly addresses the Settlement Agreement and falls within the scope of what was barred by the Order on Motion.
23. Exhibit 1042: Motion **GRANTED**. This document directly addresses the Settlement Agreement and falls within the scope of what was barred by the Order on Motion.
24. Exhibit 1043: Motion **GRANTED**. This document directly addresses the Settlement Agreement and falls within the scope of what was barred by the Order on Motion.
25. Exhibit 1044: Motion **GRANTED**. This document directly addresses the Settlement Agreement and falls within the scope of what was barred by the Order on Motion.
26. Exhibit 1045: Motion **GRANTED**. This document directly addresses the Settlement Agreement and falls within the scope of what was barred by the Order on Motion.
27. Exhibit 1048: Motion **GRANTED**. This document directly addresses the Settlement Agreement and falls within the scope of what was barred by the Order on Motion.
28. Exhibit 1049: Motion **GRANTED**. This document presents suggested edits of a Sound Transit document by prior City staff. It would be relevant only to argue equitable considerations, a topic which falls within the scope of what was barred by the Order on Motion.

29. Exhibit 1051: Motion **DENIED**. The Settlement Agreement will be admitted solely to have a copy of it in the record. As stated in the Order on Motion: “Testimony, evidence, and/or argument regarding the content and applicability of the Settlement Agreement or equity will not be allowed.”

B. Motion to Preclude Testimony:

Motion **GRANTED**, but not in the form requested. The City asks the Examiner that Sound Transit proposed witnesses Jamae Hoffman, Katie Chalmers, Stephen Crosley, and Luke Lamon “be precluded from testifying regarding the ‘collaborative process with the City and King County Metro to determine Metro’s operational needs’”. Based on the documents presently available to the Examiner, it would appear that such testimony would in all probability address the Settlement Agreement and present equity issues, both of which are beyond the scope of this proceeding. Thus, such testimony would be out of order. However, instead of precluding only those four witnesses from testifying on those topics, it is far more appropriate to preclude all witnesses from testifying on those topics. Therefore, **ALL WITNESSES ARE PRECLUDED FROM TESTIFYING REGARDING THE COLLABORATIVE PROCESS WITH THE CITY AND KING COUNTY METRO TO DETERMINE METRO’S OPERATIONAL NEEDS**. The Examiner will ignore references to that “process” in documents already submitted (such as briefs).

C. Motion to Confirm:

The Examiner’s Order on Motion does not indicate that the Examiner intends to strike Settlement Agreement references from any of the challenged conditions. As is stated at the bottom of page 2 in the Order on Motion, “[a]ny concerns about the relationship between the Settlement Agreement and the Permit Conditions would have to be raised in another forum”.

ORDER issued March 14, 2021, at 5:00 p.m.

|s| *John E. Galt*

JOHN E. GALT
Hearing Examiner