

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 OF MERCER ISLAND  
CLOSING ARGUMENT

I. INTRODUCTION

The City of Mercer Island (“City”) cooperated in good faith with the Central Puget Sound Transit Authority (“Sound Transit”) to expeditiously review and process the Mercer Island Transit Interchange (“MITI”) permit application. The City identified and brought to the attention of Sound Transit significant noncompliance issues early at 60% plans review. These included the bus layover use location, a stormwater vault for public rights-of-way collection and treatment in a residential zone, and operation and maintenance costs. Sound Transit chose to recklessly press forward, ignoring requests for information and ignoring Mercer Island City Code (“MICC”) requirements. Now that its chosen scheduled start for construction looms in June, Sound Transit casts about for blame, casting blame on City staff, on the City Council, on anyone but itself. However, Sound Transit only has itself to blame for choosing to push forward without working with the City to resolve the problems the City identified for Sound Transit almost a year ago.

II. CONDITIONS XIII.A., XIII.B. AND XIII.C.

A. Condition XIII.A. denying the proposed Bus Layover use is supported by the MICC.

Condition XIII.A. denies Sound Transit the use of the City’s North Mercer Way rights-of-way for its proposed bus layover use because the use is not an authorized use under the

1 MICC in its current location - unless and until an agreement for same is reached with the  
2 City. City Engineer Patrick Yamashita testified that an application under MICC 19.09.060  
3 for a Right-of-way use permit is not the mechanism to authorize “use” of rights-of-way. It  
4 only authorizes construction of proposed improvements. 3/17/2021 Direct Yamashita, Staff  
5 Report at 5-6. Sound Transit does not dispute the lack of authority in MICC 19.09.060 to  
6 authorized “uses” of City rights-of-way. Prehearing Brief at 9.

7 Using its statutorily granted authority, the City Council has classified land within the  
8 City into zones and established the use of land within those zones. MICC 19.01.010. *Infra*  
9 Question 5. Under MICC 19.01.040(H)(1), only uses specifically permitted in a zone are  
10 authorized in that zone. 3/19/2021 Direct Thomas, *Infra* Question 5. Bus layover uses and  
11 the like are authorized in the Public Institute zone and the Planned Business Zone. *Id.*

12 City rights-of-way are not included within zones, but within City rights-of-way, the  
13 MICC uses agreements/contracts as a mechanism to authorize uses other than public passage.  
14 *Id.*, MICC 19.01.040(G)(5), *Infra* Question 5. State law also specifically requires an  
15 agreement/contract if Sound Transit seeks to use existing rights-of-way for Sound Transit  
16 purposes. *Infra* Question 5.

17 As part of its review of the 60% plans and again for the review of 90% plans, the City  
18 asked Sound Transit to clarify its intended use for the new curb cut on the north side of North  
19 Mercer Way. Ex. 8 at 7(CPD35), Ex. 9 at 7(CPD35), 3/17/2021 Direct Yamashita. This  
20 information was necessary for review of the MITI project. The general purpose of the Title  
21 19 MICC is to protect and promote health, safety, and the general welfare through the  
22 regulation of development within the City. MICC 19.01.010. City staff cannot carry out this  
23 purpose without an applicant providing information regarding the intended use of a proposed  
24 improvement. The burden is on the applicant to provide City staff with all information  
25 deemed necessary by City staff to determine if the permit application complies with City  
26 regulations, and the burden is on the applicant to prove that the proposal complies with

1 applicable regulations and criteria. MICC 19.15.060(A). The burden is not on the City to  
2 disprove compliance with the MICC.

3 Sound Transit did not respond to the City’s very direct question regarding the use of  
4 the new North Mercer Way curb cut for six months. When it finally did respond to the City’s  
5 question, the information it provided to the City was not accurate. By letter dated October  
6 20, 2020, the City was told it would be used for “bus bay layovers and supplemental  
7 passenger drop-offs.” Ex. 10 at 4. It was not until the first day of the hearing that the City  
8 learned from Sound Transit witnesses that the area would not be used for passenger drop-  
9 offs, but only bus layover use, which was described as providing bus operators work breaks  
10 and a location for buses to be parked during scheduling catch-up periods (“Bus Layover  
11 use”). 3/16/2020 Testimony J. Hoffman and K. Chalmers.

12 In October 2020, Sound Transit indignantly responded as if it had no obligation to  
13 explain these fundamental facts to the City during permit review. Exhibit 10. Jamae Hoffman  
14 testified on rebuttal that Bus Layover use information had been given to the City 18 months  
15 before permit submittal for the City’s webpage/newsletter, and that the approved plans  
16 themselves showed the City what use would be made of the curb cut. 3/24/2021 Rebuttal  
17 testimony J. Hoffman, Exhibit 1035 at 260. However, Exhibit 1035 was not part of Sound  
18 Transit’s permit submittal. Ex. 3, Ex. 4, Ex. 8, and Ex. 9.

19 Additionally, the information Ms. Hoffman relied on during cross examination  
20 regarding Sound Transit’s 90% plan responses is related to volume of passengers only.  
21 3/24/2021 Cross examination J. Hoffman; Ex. 9 at 7 (CPD36); Ex. 1031 at 227 (Appendix  
22 chart to 19-06-12 Additional Questions from MI). It does not provide information on the  
23 intended use of the new curb cut on North Mercer Way. As for the approved plans, Sound  
24 Transit did not submit its complete plans until November 30, 2020, and a “No Parking (Bus  
25 Only)” sign does not explain what bus use will be made of the curb cut. Ex. 3 at 45 and 49.  
26 Given that Sound Transit’s own explanation changed from October 2020 to March 2021, it

1 is readily apparent that Sound Transit did not provide clear information to the City regarding  
2 the use of the new curb cut.

3 During the hearing, Sound Transit made erroneous and wild accusations against City  
4 staff of slowing down the permit process and outrageous allegations that the City Council  
5 dictates permit review/outcomes. 3/17/2021 Cross Yamashita, 3/19/2021 Cross Cole,  
6 3/16/2021 Direct Lacson. Just the opposite, however, occurred. The City kept the permitting  
7 review process insulated in accord with the MICC. City staff did not add documents or  
8 information to its permit review from the City's webpage/newsletter or elsewhere. City  
9 Engineer Yamashita and Building Official Cole both testified that the City Council played  
10 no role in permit review, and in fact, City staff made review of this permit application top  
11 priority and completed its review within very short timeframes. 3/17/2021 Direct and Cross  
12 Yamashita, 3/19/2021 Direct and Cross Cole.

13 Instead of providing necessary information, Sound Transit continued to push forward  
14 with its theory that RCW 81.112.100 together with RCW 35.58.330 authorizes Sound Transit  
15 to use City rights-of-way without City agreement (despite the plain language of RCW  
16 81.112.080(2). Prehearing Brief at 10. Sound Transit took the spurious position that City staff  
17 must, without consideration of any other code provisions in MICC, issue a Right-of-way use  
18 permit for the Bus Layover curb cut and signage because Sound Transit's submittals  
19 complied with the applicable construction code. Prehearing Brief at 9. In support, Anthony  
20 Wilen testified for Sound Transit that his review for code compliance was only for the  
21 construction codes. He did not review for applicable zoning code compliance. 3/16/2021  
22 Direct and Cross Wilen.

23 Contrary to Sound Transit's assertions, however, Washington case law provides that  
24 a ministerial permit may only be granted if it is also consistent with the municipality's zoning  
25 code. In *State v. Ogden*, cited by Sound Transit, the Court expressly recognizes that a property  
26 owner's right to use his property is subject to the "terms of the zoning ordinances applicable

1 thereto,” and that only when there is compliance with the zoning ordinances must a building  
2 or use permit be issue as a matter of right. 45 Wn.2d 492, 495, 275 P.2d 899 (1954).

3 Washington’s cases on this subject are intertwined with the vested rights doctrine.  
4 Development rights vest when the party applies for a building permit, and “this rule, of  
5 course, assumes that the permit applied for and granted be consistent with the zoning  
6 ordinances and building codes in force at the time of application for the permit.” *Eastlake*  
7 *Community Council v. Roanoke Associates, Inc.*, 82 Wn.2d 475, 481, 513 P.2d 36 (1973);  
8 *See also, Juanita Bay Valley Community Association v. City of Kirkland*, 9 Wn. App. 59, 61,  
9 510 P.2d 1140 (1973) (land use permits otherwise available “as a matter of right” must be  
10 withheld to implement the State Environmental Policy Act). Case law and the MICC dictate  
11 that the City Engineer is not authorized to issue a Right-of-way use permit under MICC  
12 19.09.060 if the use or the structure is not authorized in the zoning code or by agreement with  
13 the City. MICC 19.01.040(H)(1)-(2), *Infra* Question 5.

14 Condition XIII.A. denying Sound Transit the use of the City’s North Mercer Way  
15 rights-of-way for its proposed Bus Layover use should be upheld by the Hearing Examiner.  
16 The Condition is supported by the MICC which does not authorize this use in its current  
17 location - unless and until an agreement for same is reached with the City.

18 B. Condition XIII.B requiring conveyance of rights-of-way prior to the start of construction  
19 is supported by the MICC.

20 Condition XIII.B. requires conveyance of rights-of-way to the City prior to the start  
21 of construction on residentially zoned lots. There are two available options under the MICC  
22 for permitting this work: a right-of-way permit or a conditional use permit. Sound Transit  
23 told the City it **would not** apply for a conditional use permit, leaving only one available  
24 option. The City imposed Condition XIII.B. to alleviate the requirement for a conditional use  
25 permit that would otherwise be necessary in MICC for public infrastructure on residentially  
26 zoned lots. 3/17/2021 Direct Yamashita, 3/19/2021 Direct Thomas. Condition XIII.B. is also  
necessary for construction of the roundabout and related improvements included in Sound

1 Transit's Right-of-way use permit application where the land is currently residentially zoned  
2 and not rights-of-way. Ex. 4 at 1-2, 5.

3 Community Planning & Development Interim Director Jeff Thomas testified that on  
4 residentially zoned land, a conditional use permit ("CUP") is required for public facilities.  
5 MICC 19.02.010(C)(1). The MITI's stormwater vault and its appurtenances are slated for  
6 construction on lots that currently remain residentially zoned. Ex. 3 at 33; 3/19/2021 Direct  
7 Thomas. Sound Transit explained that the stormwater vault will "provide water quality and  
8 water storage functions for City-maintained right-of-way." Ex. 10 at 3. Director Thomas  
9 explained that the definition of "public facility" in MICC 19.16.010 includes a structure used  
10 by the general public, that the stormwater vault is a structure as defined by MICC 19.16.010,  
11 and that because the stormwater vault is being used for public rights-of-way water treatment  
12 and storage it is being used by the general public.

13 The definition of public facility provides examples, but those examples are not  
14 exclusive. Director Thomas explained that the nature of a CUP is to make sure that an  
15 uncommon use in the zone is conditioned to fit within the zone. 3/19/2021 Direct Thomas.  
16 The definition and the policy behind it would apply to publicly owned stormwater facilities,  
17 water reservoirs, and other like public utility uses. Similar examples from other  
18 municipalities include the Issaquah Municipal Code section 18.02.080 and the Vancouver  
19 Municipal Code section 20.150.040(D). Owners in the residential zone need to be afforded  
20 the public scrutiny and input to make sure the uncommon use is made compatible.

21 Again, it was Sound Transit's decision that dictated the approach the City took. The  
22 City raised the CUP/public facility issue to Sound Transit at 60% plans review on May 5,  
23 2020. Ex. 8 at 7 (CPD34). Sound Transit made very clear it **would not** apply for a CUP.  
24 Instead, its response/solution was that Sound Transit was going to dedicate the residential  
25 lots as rights-of-way. Ex. 8 at 7 (CPD34). Director Thomas confirmed conveyance of the  
26 residentially zoned property as rights-of-way would alleviate the CUP requirement because  
the property would no longer be residentially zoned. 3/19/2021 Direct Thomas. Condition

1 XIII.B. allows the MITI project to proceed forward without the code required CUP process  
2 for residentially zoned property.<sup>1</sup>

3 Sound Transit demands that the building permits it applied for on the residential lots  
4 be issued regardless of the CUP requirement. Consistent with the case law described above  
5 recognizing ministerial permits may only be issued if in compliance with the zoning code,  
6 the MICC specifically provides that the Building Official must reject an application if the  
7 construction documents do not conform to the requirements of the construction code, the  
8 Construction Administrative Code, and other pertinent laws or ordinances. MICC 17.14.010,  
9 §105.3.1, §107.3. Because the use that Sound Transit seeks to construct is not allowed in a  
10 residential zone, City personnel could not issue a building permit. Sound Transit refused the  
11 only available paths: it refused to apply for a CUP, which would have allowed construction  
12 of otherwise impermissible uses on lots that remained residential; and it refused to dedicate  
13 the property as right-of-way, which would have allowed it to make use of the right-of-way  
14 permit that the City authorized.

15 Sound Transit attempted to argue that the City somehow waived the CUP code  
16 requirement because it was not on Sound Transit's list of permits in an agenda for the October  
17 2020 preapplication meeting. 3/16/2021 Direct Lacson. The preposterous idea that an  
18 applicant's agenda waives a code requirement is not based on any code reality, and Mr.  
19 Lacson admitted that at the same preapplication meeting City Engineer Yamashita reiterated  
20 the CUP requirement. 3/17/2021 Cross Lacson. The hearing testimony showed that the City  
21 continued to present the CUP/ROW conveyance options and Sound Transit continued its  
22 refusal to apply for a CUP. 3/17-19/2021 Direct and Redirect P. Yamashita. The City has an  
23 obligation to provide an applicant with information regarding the requirements for a proposed  
24

---

25 <sup>1</sup> Counsel for Sound Transit claimed during the hearing that Sound Transit "refused to choose" between the  
26 CUP and the rights-of-way conveyance. 3/17/2021 Cross Yamashita. That argument is not supported by the  
factual record, but in any event, refusing to choose, in other words, refusing to comply with the MICC is not an  
option for applicants. Applicants have the burden of proving MICC compliance. MICC.19.15.040(A).



1 project; it does not have either the obligation or the right to force an applicant to apply for a  
2 permit the applicant refuses to seek.

3 City Engineer Yamashita and Deputy Public Works Director Alaine Sommargren  
4 testified that City staff were not apprised by Sound Transit staff that Sound Transit intended  
5 to convey less than all of the two residentially zoned lots, or that Sound Transit has adopted  
6 its own lengthy administrative process in order to convey the property to the City for rights-  
7 of-way use. 3/17/2021 Direct Yamashita, 3/19/2021 Direct Sommargren. Deputy Director  
8 Sommargren testified that while working through the landscaping, tree replacement and  
9 irrigation on the residential lots, City staff and Sound Transit staff openly worked under the  
10 premise that the lots would be conveyed in full to the City. This is why she had Sound Transit  
11 change from drip irrigation to pop-up heads so the City would be maintaining one type of  
12 system and why certain species of plants and trees were chosen so that they matched others  
13 the City was already maintaining in its system. There was no motive for the City to accept  
14 more land for maintenance than was necessary. 3/19/2021 Direct Sommargren.

15 Likewise, before the hearing, Sound Transit's written responses only told City staff  
16 that the residential lots would be conveyed to the City. Ex. 8 at 4(CPD10), 7(CPD34),  
17 8(CPD39), 11(PW12), and 15(PK 13). The City recognizes that while Sound Transit's  
18 responses at 60% plans review did not contractually bind it to convey the entirety of the lots,  
19 Sound Transit's responses show why the City conditioned the permit on conveyance of all of  
20 the two lots.

21 When the City saw for the first time Exhibits 1015 and 1016 as exhibits for this  
22 hearing and received Sound Transit's Prehearing Brief stating that the entirety of both lots  
23 may not be conveyed to the City even after construction is complete, the City reevaluated  
24 Condition XIII.B. It had been imposed to alleviate the CUP requirement in 19.02.010(C)(1).  
25 City Engineer Yamashita testified that the CUP requirement could be satisfied by conveying  
26 all of tax lot 531510-1837 (referred to as Lot B during the hearing) where the stormwater  
vault will be located and the southeast corner of tax lot 531510-1838 (referred to as Lot A



1 during the hearing) where a pipe for the stormwater vault is proposed. 3/19/2021 Direct  
2 Yamashita. The City is not opposed to the Hearing Examiner amending Condition XIII B. so  
3 that Sound Transit is only required to convey all of Lot B and the southeast corner of Lot A  
4 to alleviate the CUP requirements. See Appendix 1 attached.

5 Additionally, given that Sound Transit no longer commits to conveyance of all of Lot  
6 A to the City, the irrigation system for the Lot A area not included as rights-of-way in Exhibit  
7 1015 must be conditioned by the Hearing Examiner on having a water meter separate from  
8 the City's existing meter. 3/19/2021 Direct Sommargren. See Appendix 1. Also, to  
9 accommodate Sound Transit's assertion that for staging it must maintain "satisfactory  
10 continuing control" of the real property, the City is not opposed to the Hearing Examiner  
11 conditioning the permit accordingly. 3/17/2021 Direct Valerie. An acceptable condition  
12 would allow Sound Transit to use the portions of Lot A and B conveyed to the City for staging  
13 so it maintains "satisfactory continuing control" until completion of construction as if it were  
14 the fee title owner of the land. See Appendix 1 attached.

15 Eric Beckman testified for Sound Transit that it would need three to four months to  
16 go through its internal administrative processes to convey all of Lot B to the City. He  
17 explained that this was a shorter timeframe than Lot A because it was certain that Lot B was  
18 necessary for rights-of-way purposes (utilities). 3/17/2021 Direct Beckman. The same is true  
19 of the southeast corner of Lot A that is needed to accommodate the stormwater vault pipe.  
20 The City brought the CUP issue to Sound Transit's attention on May 5, 2020. Mr. Beckman  
21 admitted as of the start of the hearing, Sound Transit had not even started its internal  
22 administrative process for conveyance. Any delay from Sound Transit's own internal  
23 processes (and its apparent failure to even start those processes) is self-inflicted and not  
24 relevant to any permit conditions issued by the City.

25 The City's Staff Report provides the statutory and MICC provisions that authorize  
26 the City Council only to accept conveyances of real property. Staff Report at 12. Sound  
Transit presented no evidence during the hearing that the City Council would do anything

1 other than accept a deed from Sound Transit. Conjecture to the contrary in Sound Transit’s  
2 Prehearing Brief or its Counsel’s cross examination, is only that – speculation. City councils  
3 in Washington are well aware of the decision in *Mission Springs, Inc. v. City of Spokane*  
4 where the Court held that “willful and unreasoning” actions to withhold a permit may lead to  
5 litigation. 134 Wn.2d 947, 962, 954 P.2d 250 (1998).

6 C. Condition XIIIIC. is outside the jurisdiction of the Hearing Examiner.

7 Condition XIIIIC. imposed an operations and maintenance agreement prior to final  
8 inspection of the MITI improvements pursuant to the terms of the 2017 Settlement  
9 Agreement between the parties. The Hearing Examiner ruled on March 2, 2021 that  
10 “testimony, evidence, and/or argument regarding the content and applicability of the  
11 Settlement or equity will not be allowed,” and that “concerns regarding the relationship  
12 between the Settlement Agreement and the Permit Conditions would have to be raised in  
13 another forum.” For this reason, the City acknowledged during the hearing that Condition  
14 XIIIIC. was not imposed using code authority and will wait for resolution of this disputed  
15 condition in the appropriate forum, which is the existing litigation the City filed last year  
16 relating to the proper interpretation of the Settlement Agreement.

17 II. HEARING EXAMINER QUESTIONS

18 1. How does a regional EPF relate to individual municipal EPF procedural ordinances?

19 The Growth Management Act (GMA) requires the comprehensive plans and  
20 development regulations of cities to include a process for identifying and siting essential  
21 public facilities (“EPF”). RCW 36.70A.200(1) – (2). The City first adopted its EPF code  
22 provision in October 2017. WAC 365-196-550(1)(e) provides that cities may not require use  
23 of the local EPF process for a facility that “would otherwise be allowed by the development  
24 regulations.” A bus layover area is not a permitted use in City owned rights-of-way. *See supra*  
25 at 2; *infra* Question 5. City EPF regulations may not “preclude the siting of essential public  
26 facilities if their combined effects would make siting of an essential public facility impossible  
or impracticable.” WAC 365-196-550(3)(a). However, a city may “impose reasonable

1 permitting requirements and require mitigation of essential public facilities adverse effects,”  
2 and an EPF is not precluded simply because the local process “would be too costly or time  
3 consuming to comply with.” WAC 365-196-550(3)(b)-(c).

4 A city’s local process may not be required if the EPF “and its location have been  
5 evaluated through a state or regional siting process.” WAC 365-196-550(d). While Sound  
6 Transit is apparently arguing that the Mercer Island Transit Interchange (“MITI”) was  
7 evaluated through the SEPA process, the MITI has been altered since Sound Transit’s SEPA  
8 evaluation. The MITI impacts have not, therefore, been fully evaluated under the regional  
9 siting process. Exhibit 1002. The description and depiction of the 77<sup>th</sup> Avenue SE  
10 configuration in the East Link Extension 2017 SEPA Addendum (“Addendum”) is not the  
11 configuration Sound Transit presented to the City in the approved plans for the MITI project.  
12 Ex. 1002 at 9, 42, and 44; Ex. 3. The “bus drop-off area” depicted in the Addendum for the  
13 77<sup>th</sup> Avenue SE configuration has been eliminated. Indeed, Sound Transit witnesses testified  
14 that while the “bus pick up” area on 80<sup>th</sup> Avenue has been eliminated, no additional SEPA  
15 analysis was performed. 3/16/2021 Direct and Cross Hoffman and Irish.

16 The purpose of the local essential public facilities process is to allow a city “to impose  
17 reasonable conditions to mitigate the impacts of the project while ensuring that its  
18 development regulations do not preclude the siting of an essential public facility.” WAC  
19 365-196-550(6)(a). Sound Transit’s focus in using the Addendum was whether the additional  
20 information and analysis substantially changed the analysis of significant impacts and  
21 alternatives in the EIS. WAC 197-11-706. The Addendum concludes that “[n]o new probable  
22 significant adverse environmental impacts would arise” from the 77<sup>th</sup> Avenue SE  
23 configuration. Ex. 1000 at 21. Local EPF processes, however, are authorized to require  
24 mitigation for all impacts arising from the EPF, not just impacts having a probable significant  
25 adverse impact. The City’s EPF process in MICC 19.06.100, expressly states it is not to be  
26 used to preclude a new EPF but it does provide the City with “additional regulatory authority  
to require mitigation of impacts that may occur.” MICC 19.06.100(3)(c).

1 To prove the Bus Layover use is essential to the EPF, Sound Transit presented Exhibit  
2 1002, its MITI Operational and Configuration Study dated March 2019 (the “Study”). The  
3 Study is premised on alternatives that do not match Sound Transit’s configuration in the  
4 approved plan set, Exhibit 3. This caused artificial results when Sound Transit used the Study  
5 in the hearing to support its “essential element” argument. The Limited Service Configuration  
6 (“LSC”) scored overall the lowest of the new configurations. Study at 21. The LCS studied,  
7 however, included a time limit on bus layovers of no more than 15 minutes, and a prohibition  
8 on any pick-up or drop-off of bus passengers on the north side of North Mercer Way. Study  
9 at 10-11. No layover time limit is addressed or imposed in Sound Transit’s permit submittal  
10 material or the City’s Decision, and testimony for Sound Transit during the hearing openly  
11 acknowledged the use of the existing bus drop-off area on the north side of North Mercer  
12 Way. Exhibit 1000 at 44. 3/16/2021 Direct Irish and Hoffman. The Study also assumes that  
13 “any final roundabout design will include a direct multi-modal connection point to the I-90  
14 trail.” Study at 18. Testimony for both parties explained that this direct connection is not  
15 included in the final roundabout design. 3/19/2021 Redirect Yamashita, 3/24/2012 Rebutal  
16 cross Hoffman. Ms. Hoffman promised it would be completed, but no details or commitment  
17 has been provided by Sound Transit. 3/24/2012 Rebutal cross Hoffman. During review under  
18 the City’s EPF process, the Study would be peer reviewed and perhaps updated to match the  
19 Sound Transit MITI proposal.

20 Sound Transit raised for the first time in its administrative appeal that the Bus Layover  
21 use is required for the EPF and seeks to use the EPF status as both a sword and a shield. It  
22 belatedly seeks the protections provided for EPFs by arguing that no changes can be required  
23 to its plans but rejects the process that comes with the EPFs (public participation plan,  
24 conditional use public hearing, independent consultant review), which Sound Transit avoided  
25 by not raising the Bus Layover/EPF essential element issue during permit review. MICC  
26 19.06.100.

1 The City did not require Sound Transit to go through the EPF process because it did  
2 not appear Sound Transit wished to make use of this provision. However, given Sound  
3 Transit's belated insistence that the Bus Layover use is entitled to the benefits of EPF status,  
4 after having amended its proposal post-Addendum, that decision comes with consequences.  
5 Accordingly, the Hearing Examiner should remand for compliance with the City's EPF  
6 process in MICC19.06.100.

7 2. Regarding RCW 81.112.080(2), the word "right-of-way" is not in the list of items that may  
8 be "acquired." Is that significant? Does this section apply to bus travel on and use of city  
9 street rights-of-way? Does the requirement for city "consent" apply to bus use of an existing  
10 street right-of-way? If King County Metro ("Metro") were the authority constructing the bus  
11 layover (that will be used by its busses) would the analysis be different? Please provide case  
12 law citations, if any are available.

13 The term rights-of-way is used in the following phrase in RCW 81.112.080(2):  
14 "together with all lands, rights-of-way, property, equipment, and accessories necessary for  
15 such high capacity transportation systems." The relevant portion of the statute in this case,  
16 however, is as follows:

17 Public transportation facilities and properties which are owned by any city,  
18 county, county transportation authority, public transportation benefit area, or  
19 metropolitan municipal corporation may be acquired or used by an authority  
20 only with the consent of the agency owning such facilities. Such agencies are  
21 hereby authorized to convey or lease such facilities to an authority or to  
22 contract for their joint use on such terms as may be fixed by agreement  
23 between the agency and the authority.

24 This portion of the statute refers to "facilities and properties" owned by a City. The  
25 broad term "properties" is not defined in Chapter 81.112 RCW, but "facilities" is defined as  
26 "any lands, interest in land, air rights over land, and improvements thereto including vessel  
terminals, and any equipment, vehicles, vessels, trains, stations, designated passenger waiting  
areas and other components necessary to support the system." Emphasis added. RCW  
81.112.020(3).

In this case, the "facility" owned by the City is land or an interest in land, and  
specifically, the City's interest in the North Mercer Way rights-of-way. It is not significant  
that the above quoted section of the statute does not include the term "rights-of-way" because

1 it defines “facility” to include “lands” and “interests in land,” which necessarily includes  
2 rights-of-way. The only prerequisites for requiring consent of a city for a public transportation  
3 facility is that the pertinent interest in the land is owned<sup>2</sup> by the City. The Bus Layover use  
4 of City rights-of-way proposed by Sound Transit falls within the consent requirement of the  
5 statute. Ex. 3 at 45.

6 RCW 81.112.080(2) is analyzed by the Court in *Central Puget Sound Regional*  
7 *Transit Authority v. WR-SRI 120<sup>th</sup> North LLC*, 191 Wn. 2d 223, 422 P.3d 891 (2018). The  
8 issue in the case was whether Sound Transit could condemn Seattle’s electric transmission  
9 line easement located in Bellevue. In reviewing RCW 81.112.080, the Court explained that  
10 to interpret a statute’s plain language the Court examined the text of the statute, the context  
11 of the statute in which the provision is found, related provisions, and the statutory scheme as  
12 a whole. *Id.* at 234. The Court recognized that it could not “interpret a statute in a way that  
13 renders a portion meaningless, superfluous, or leads to an absurd result.” *Id.* The Court found  
14 that while the use in RCW 82.112.080(2) of the terms “all lands, rights-of-way, property” is  
15 a broad grant of condemnation power to Sound Transit, it is not limitless. *Id.* at 236. The  
16 Court reviewed the section of the statute requiring “consent of agencies owing such  
17 facilities,” and held that:

18 The meaning of this provision is clear: the only way Sound Transit can acquire  
19 the property from another public transportation agency is with the agency’s  
20 consent.

21 *Id.* at 237.

22 It is inconceivable that the legislature did not know that building a massive  
23 multijurisdictional transit system would require passage through public land.  
24 In fact, the legislature explicitly requires Sound Transit to cooperate with  
25 other public entities that provide transportation services. *Id.* Thus, the  
26 legislature granted Sound Transit authority to condemn “all land,” adding only  
the caveat that Sound Transit must obtain consent to acquire other public  
transportation land. RCW 81.112.080(2).

---

<sup>2</sup> As related to Hearing Examiner question 7., the definition of facilities as “lands or interests in land” means that “owning” is either ownership in fee simple or ownership of easement rights. RCW 81.112.020(3).



1 *Id.* at 238.

2 The proposed Bus Layover use is located in existing City rights-of-way that is  
3 currently in use by the City for curb and gutter, part of an asphalt path, a fire hydrant, five  
4 street trees, electrical conduit/junction box, and a sign. Ex. 3 at 12 and 45.

5 In regard to King County Metro’s rights to use City rights-of-way under its authority  
6 in RCW 35.58.330, the question is not before the Hearing Examiner because Sound Transit  
7 is the applicant in this case. Eric Beckman testified that King County Metro (“Metro”)  
8 operates Sound Transit buses by contract for Sound Transit. 3/17/2021 Direct Beckman.  
9 Metro is not exercising its statutory authority for construction of the MITI project  
10 improvements. Even leaving that issue aside, RCW 35.58.330 grants metropolitan municipal  
11 corporations the right to use public rights-of-way without obtaining a franchise. But the  
12 statute does not give Metro the authority to eliminate a city or county’s existing use of public  
13 rights-of-way, or to interfere to an extent that is tantamount to destruction. See, *Central Puget*  
14 *Sound Regional Transit Authority Like Sound Transit* at 246.

15 In its Prehearing Brief Sound Transit cited to Metro’s authority in RCW 35.58.330 as  
16 having been extended to Sound Transit pursuant to RCW 81.112.100 and thus authorizing  
17 use of the City’s streets without City approval. Prehearing Brief at 10. This interpretation of  
18 RCW 81.112.100 and 35.58.330, however, renders the explicit consent provision in RCW  
19 81.112.080(2) meaningless, which a court will not do. Sound Transit’s interpretation would  
20 effectively take away the rights of cities to consent to the acquisition or use of their facilities.  
21 Instead, the law provides that Sound Transit does not have to obtain a franchise from the City,  
22 but it must cooperate with the City and contract with the City for the joint use of the rights-  
23 of-way “on such terms as may be fixed by agreement between [Sound Transit] and the  
24 [City].”

25 3. Who has authority to give “consent” for the City? By what process is it exercised? How is  
26 “consent” documented? Where is the process spelled out?

The City Council is the entity authorized to consent on behalf of the City pursuant to  
RCW 81.112.080(2). The City Council, as the City’s legislative authority, is the body that



1 exercises authority over the “use . . . of public ways, real property of all kinds . . . or any other  
2 improvements or use of real or personal property.” RCW 35A.11.020. The “use” of City  
3 rights-of-way under the consent requirement in RCW 81.112.080(2) fall directly within the  
4 authority of the City Council.

5 RCW 81.112.080(2) provides that one process for obtaining consent<sup>3</sup> must be by  
6 contract between Sound Transit and the City: “Such agencies are hereby authorized to convey  
7 or lease such facilities to an authority or to contract for their joint use on such terms as may  
8 be fixed by agreement between the agency and the authority.” Emphasis added. Sound  
9 Transit understands the process. Indeed, the 2017 Settlement Agreement between the parties  
10 is such a contract and includes terms regarding use by Sound Transit of City rights-of-way,  
11 but notably *prohibits* the use Sound Transit seeks now. The Settlement Agreement was  
12 authorized by the City Council and, by its terms, may only be amended by written agreement  
13 of the parties. A City Manager does not have statutory or code authority to override the  
14 written contractual agreement of the City Council (either orally or written). RCW  
15 35A.13.080, RCW 35.18.060, Chapter 3.02 MICC. The Hearing Examiner previously ruled  
16 that the terms of the Settlement Agreement are outside the jurisdiction of the Hearing  
17 Examiner.

18 4. Can a municipal corporation which acquired an entire, conforming parcel for public use,  
19 dispose of a surplus portion of that parcel which does not conform with applicable zoning?  
20 In other words, may a municipal corporation create an illegal lot by disposing of a surplus  
21 portion of a legal lot?

22 No, the municipal corporation could not sell/transfer the surplus portion of the legal  
23 lot and continue to own a nonconforming portion of the lot. Land must be divided in accord  
24 with Chapter 58.17 RCW and local regulations that comply with same. A lot line revision  
25 pursuant to MICC 19.08.070 could be used to merge a nonconforming remainder into an  
26 adjacent, legal lot. This would not create an additional lot but would make the adjacent legal  
lot larger. The lot line revision could not be approved, however, if the municipal corporation

---

<sup>3</sup> The statute anticipates conveyance, lease, or a use agreement with the transit authority.

1 continued to own the portion of the lot used for a public purpose if that portion became  
2 nonconforming as a result of the lot line revision. Creating a lot of insufficient area and  
3 dimension violates the approval criteria in MICC 19.08.070(c) and RCW 58.17.940(6). If  
4 the public purpose portion of the lot were also being merged into other property such as  
5 existing rights-of-way or an adjacent legal lot, then the lot line revision for the surplus portion  
6 could be approved.

7 5. If the Right-of-way Use Permit is not the proper permit to authorize use of a portion of  
8 an existing street right-of-way as a bus layover area, what municipal permit process would  
9 be required? If there isn't one, is the City saying that bus layover areas are prohibited uses  
10 in the City?

11 Sound Transit demands to use City owned rights-of-way for the purpose of providing  
12 bus operators work breaks and a location for buses to be parked during scheduling catch-up  
13 periods ("Bus Layover use"). 3/17/2021 Direct and Cross Chalmers. There is not a permit  
14 identified in the MICC that would authorize this Bus Layover use of the City owned rights-  
15 of-way. That is why Condition XIII.A. cites to all of chapter 19.09. MICC. No such  
16 permitting process exists in the entirety of the chapter. 3/17/2021 Direct Yamashita. The  
17 City is not, however, asserting that Bus Layovers uses are prohibited in the City. Rather, in  
18 this case, an agreement must be reached with the City for such use.

19 The City has authority to control the use and development of City owned rights-of-  
20 way as both the regulatory authority and as the owner of property rights in the rights-of-way.  
21 RCW 35.63.080 – 35.63.120 (Council adoption of plans and regulations for development of  
22 municipalities), RCW 36.70A.040(3)( Council required to adopt comprehensive plan and  
23 development regulations), RCW 35.77.010 (Council adoption of transportation plan), RCW  
24 35.78.010 (Council classification and designation of city streets), RCW 35A.11.020 (Council  
25 authority to control regulation, use, and beautification of public ways), RCW  
26 81.112.080(2)(agreement of city required for Sound Transit use of rights-of-way).

In the exercise of this authority, the City has made Bus Layover and similar uses  
permitted uses only in certain areas in the City. The City established in MICC

1 19.01.040(H)(1) that land within the City’s boundaries will not be used for uses not listed as  
2 authorized uses in a zoning district:

3 H. Except as hereinafter provided:

4 1. No land, building, structure or premises shall be used for any purpose or  
5 in any manner other than a use listed in this code, or amendments thereto, for  
6 the zone in which such land, building, structure or premises is located.

7 2. No building or structure shall be erected . . . except in conformity with the  
8 requirements of this development code or amendments thereto.

9 During the administrative appeal hearing, Sound Transit argued that this basic principle was  
10 reversed - the City had to establish that the use was expressly “not allowed.” 3/17/2021 Cross  
11 Yamashita. There is no support for that position in the MICC or state statute.

12 The MICC designates Bus Layover and similar uses as permitted uses in specific  
13 zones throughout the City. The Public Institutions zone (“PI”) created in MICC 19.05.010  
14 lists as a permitted use “[t]ransit facilities including transit stops and associated parking lots.”  
15 In the Planned Business Zone (“PBZ”) a transit center, transit stops, and associated parking  
16 are encouraged and recognized as providing a public benefit in this location. MICC  
17 19.04.010(A). Exhibit 24 shows that while the PBZ zone is relatively small and only in the  
18 southern end of the City, the PI zone is extensive and located throughout the I-90 corridor in  
19 the City. It is not the case that the City has prohibited Bus Layover uses, instead, the City has  
20 selected where in the City they are permitted uses in zoning districts.

21 Outside of zoning districts, the City has also used its authority to require City  
22 permission for use of rights-of-way that go beyond the general public’s use of roads and  
23 sidewalks for passage. If Sound Transit were seeking to use the rights-of-way within the  
24 Town Center zone for the “benefit of private commerce” then a permit for “private commerce  
25 on public property” would apply. MICC 19.06.050. When private commerce is not at issue,  
26 MICC 19.06.060 authorizes encroachment agreements for intrusions into a sidewalk, street,  
or other public rights-of-way. MICC 19.06.060(A).

1 The Hearing Examiner expressed skepticism during the hearing that the  
2 encroachment agreement in MICC 19.06.060 is applicable to Sound Transit. The City  
3 recognizes that a unique set of facts is presented with development of the first bus/rail  
4 interchange in the City and that the existing code section was not tailored for this unique  
5 scenario. But, what MICC 19.06.060 (encroachment agreements) and 19.06.050 (private  
6 commerce in rights-of-way) show is that the City Council intends to retain control of the uses  
7 made of its rights-of-way. Sound Transit must obtain the City's agreement to use City owned  
8 rights-of-way for a Bus Layover use. The MICC does not provide for such use without the  
9 City's agreement. An agreement on use, in some format, is required to be approved by the  
10 City Council. This is consistent with the contract rights reserved by state statute for cities,  
11 counties, transportation authorities, and other like entities when Sound Transit seeks to use  
12 their facilities for Sound Transit regional transportation uses. RCW 81.112.080(2).

13 6. Is a bus layover area a "structure" as defined in MICC 19.16.010?

14 19.16.010 Structure: That which is built or constructed, an edifice or building of any  
15 kind, or any piece of work artificially built up or composed of parts joined together in some  
16 definite manner.

17 The Bus Layover area is comprised of curbing and signage. Ex. 3 at 45. The curbing  
18 would meet the definition of structure in MICC 19.16.010, but neither City Engineer  
19 Yamashita nor Building Official Cole testified that the Bus Layover improvements were  
20 structures that would require a building permit or structural review under a Right-of-way use  
21 permit. Once agreement is reached on the "use," the City could issue a Right-of-way use  
22 permit under MICC 19.09.060 for construction of a bus layover area.

23 7. Is dedicated right-of-way (as opposed to deeded right-of-way) owned by the municipality,  
24 or does the municipality only have usage rights?

25 By deed or dedication, Washington's courts determine whether municipal rights are  
26 in fee-simple or easement rights on a case-by-case basis in order to determine the intent of  
the owner who conveyed the property. *Kiely v. Graves*, 173 Wn.2d 926, 934, 271 P.3d 226  
(2012). The general rules of interpretation being as follows:

1  
2  
3  
4  
5  
6  
7  
8  
9  
10  
11  
12  
13  
14  
15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26

Any deed to a local government specifically for highway, right of way, or any public purpose could be interpreted as a dedication conveying an easement only. If the intent is to grant a fee interest, that intent should be clearly stated and the use should be unrestricted or, if the use is a condition, the condition should be clearly stated with a specific right of reversion.

*Id.* citing *Washington Real Property Deskbook* §91.9(1) (3d ed. 2001). No evidence was presented during the administrative hearing regarding the nature of the conveyance to the City of the North Mercer Way rights-of-way.

8. Is the Hearing Examiner authorized to issue a building permit?

The Hearing Examiner is authorized to grant or deny the appeal; grant the appeal with conditions, modifications, and restrictions necessary to carry out state law and the MICC; or remand the decision back to the decision maker for further consideration. MICC 3.40.020. None of these alternatives authorizes the Hearing Examiner to issue a permit. The Hearing Examiner is authorized, however, to remand the decision not to issue a permit to the decision maker and in light of the Hearing Examiner’s findings and conclusions issue a permit if so authorized under the MICC. For instance, Building Official Don Cole testified that if the retaining wall straddling the boundary line of the two residentially zoned lots is not to become City rights-of-way prior to construction, issuance of a building permit would be appropriate. 3/19/2021 Direct Cole.

DATED this 8<sup>th</sup> day of April, 2021.

MADRONA LAW GROUP, PLLC

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

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

By: /s/ Bio F. Park  
Bio F. Park, WSBA No. 36994

*Attorneys for the City of Mercer Island*

**DECLARATION OF SERVICE**

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 8th day of April, 2021, I served a true copy of the foregoing City of Mercer Island’s Closing Argument on the following counsel of record using the method of service indicated below:

<p>Stephen G. Sheehy, WSBA No. 13304  Sound Transit / Legal Department  401 South Jackson Street  Seattle, WA 98104-2826</p> <p>Co-Counsel for Petitioner</p>	<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
<p>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</p> <p>Co-Counsel for Petitioner</p>	<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 8th day of April, 2021, at Seattle, Washington.

Tori Harris