Hearing Examiner John Galt

BEFORE THE HEARING EXAMINER
FOR THE CITY OF MERCER ISLAND

In the Matter of the Appeal of **CENTRAL PUGET SOUND REGIONAL TRANSIT AUTHORITY,** **Petitioner,** v. **CITY OF MERCER ISLAND,** **Respondent.**	No. APL21-001 **SOUND TRANSIT'S CLOSING ARGUMENT**

I. INTRODUCTION

City streets are open to all members of the travelling public, not just to those who live on Mercer Island and do not ride buses. The City's Closing Argument turns this fundamental legal fact on its head and asks the Hearing Examiner to assume that public transportation uses are prohibited on Mercer Island streets unless the City agrees to permit them.

The City is profoundly wrong. City streets are under the sovereign control of the State Legislature, which delegates to local governments such authority as it deems appropriate, and the City cannot prohibit a public transportation use of its streets for the simple reason that the Legislature has not delegated such authority to the City. Instead the Legislature has done the opposite: delegated to Sound Transit and King County Metro the right to use and construct facilities within city streets without franchises – that is, without needing to obtain City permission.

State law limits city authority over Sound Transit and Metro facilities within city streets to the regulation of construction, not use, yet City staff imposed conditions that are without basis

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in its construction codes; that prohibit a public transportation use of a public street; and that transform ministerial permits into discretionary permits that purport to give the City Council the authority to prohibit what the State Legislature allows.

This Closing Argument will (1) explain the legal context in which the City's actions must be viewed; (2) summarize the evidence presented at the hearing that demonstrates the illegality of the City's actions; and (3) respond to the eight questions posed by the Hearing Examiner.

II. ARGUMENT

A. City authority over its streets is limited to the authority delegated by the State Legislature

For over 100 years the Washington courts have stated that City streets are subject to the control of the State Legislature, and City authority is limited to the authority that the Legislature chooses to delegate:

> The legislature, within constitutional limitations, has sovereign control of the streets and highways of the state and the cities.

State ex rel. Spokane & B.C Tel. & Te. Co. v. Spokane, 24 Wash. 53, 59, 63 P. 1116 (1901). A city thus has no inherent power over the use of streets, only such power as the Legislature chooses to delegate: "The state has plenary control over streets, which it may delegate to municipalities." *Chlopeck Fish Co. v. City of Seattle*, 64 Wash. 315, 323, 117 P. 232 (1911). Even a local government's authority to grant franchises is authority delegated by the Legislature:

> The granting of such franchise is a legislative function delegated to the city, and reposed in the council, and can only be exercised in the form prescribed by law.

Schwede v. Hemrich Bros. Brewing Co., 29 Wash. 21, 27-28, 69 P. 362 (1902).

Neither Sound Transit nor Metro need to obtain City permission to use City streets for regional transportation facilities because the Legislature already has given Metro and Sound Transit such permission. A franchise is permission to use a street, *Washington Fruit & Produce Co. v. City of Yakima*, 3 Wn.2d 152, 157, 100 P.2d 8 (1940), and the Legislature decreed that Sound Transit and King County Metro may construct facilities in city streets without local

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franchises:

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

RCW 35.58.330 (emphasis added). This statute delegates to Metro, as a "metropolitan municipal corporation," the authority to build "facilities" in "public streets" without the local government's permission, limiting cities to regulating "construction, installation, and maintenance," not use. RCW 81.112.100 grants to Sound Transit, as a regional transit authority:

> . . . all rights with respect to the construction, acquisition, maintenance, operation, extension, alteration, repair, control and management of high capacity transportation system facilities that are identified in the system plan developed pursuant to RCW 81.104.100 that any . . . metropolitan municipal corporation . . . has been previously empowered to exercise . . . .

In RCW 81.112.100 the Legislature thus delegated to Sound Transit the exclusive power to construct and operate a high capacity transportation system, and the Legislature also delegated to Sound Transit the same rights it delegated to metropolitan municipal corporations in RCW 35.58.330, including the right to construct and maintain facilities in city streets without a franchise. This delegation is fundamental to the framework the Legislature created, which prohibits a single local jurisdiction from thwarting an important regional project. As discussed below in Section E, nothing in RCW 81.112.080, which the City cites, overrides this fundamental framework of regional transit planning and execution, and RCW 81.112.080 is itself a separate *grant* of additional authority to Sound Transit.

B. The issue of whether the City code allows the City to require a conditional use permit is not before the Hearing Examiner

The Conditional Use Permit (CUP) that the City now argues its code requires would be a discretionary decision about use that would give the City veto authority over regional transit facilities. The Hearing Examiner does not need to – and indeed, cannot – decide whether the

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City can require a CUP, however, because this issue is not before him.

Before Sound Transit applied for its permits, the City asserted that a CUP would be required because the stormwater vault on Parcel B would be a "public facility." MICC 19.02.010.C.1. Sound Transit declined to apply for a CUP for many reasons, including the fact that the stormwater vault does not meet the code's definition of a "public facility" in MICC 19.16.010 ("Public Facility: A building, structure, or complex used by the general public. Examples include but are not limited to assembly halls, schools, libraries, theaters and meeting places."). The City then abandoned its CUP argument when it made the Type I decisions that Sound Transit has appealed: the City did not deny the application for want of a CUP, and did not impose a condition that requires Sound Transit to apply for a CUP.

At the hearing, Interim Director Jeff Thomas attempted to revive the issue by not only testifying that a CUP is required because the stormwater vault is allegedly a public facility but also because the Mercer Island Transit Integration Project (hereafter "Project") is an Essential Public Facility ("EPF") under by 19.06.100. Declaration of Michelle Rusk (hereafter "Rusk Decl.") Ex. 2 (Thomas Direct), pp. 7:21-8:4, 12:3-15:7. The City's Closing Argument then devotes multiple pages to arguing that a CUP is required, but Mr. Thomas' testimony is not a decision and the City has not actually made a decision to require a CUP that the Hearing Examiner can review.

The permits at issue in this appeal are non-discretionary Type I permits for which the decision-maker is the "Code Official," and the "Appeal Authority" is the Hearing Examiner. MICC 19.15.030, Table B. A CUP, in contrast, is a discretionary Type IV decision for which the "Hearing Examiner or Design Commission" is the decision-maker, and no administrative appeal is available, only a judicial appeal. Sound Transit has not applied for a CUP; the Hearing Examiner did not conduct a pre-decisional hearing; and the Hearing Examiner cannot make a Type IV decision about an application that has not been made. The Code Official made Type I decisions over which the Hearing Examiner has appellate jurisdiction, but those decisions,

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including conditions XIII.A, B, and C that Sound Transit is appealing, do not require a CUP nor even refer to a CUP, let alone make a CUP-based decision over which the Hearing Examiner has appellate jurisdiction. There is no CUP decision for the Hearing Examiner to review.

C. There is no basis in the City's code for any of the three conditions under appeal

1. XIII.A denies the curb cut needed for the bus layover area that Metro requires without any basis in the code for the denial

Condition XIII.A makes an impermissible discretionary decision about use:

> The use of the City's ROW as a bus bay for layovers and passenger drop-off purposes are not uses [sic] authorized under a ROW permit in the Mercer Island City Code (MICC). Ch. 19.09. MICC.

Nothing in Chapter 19.09 authorizes this denial based on use, as Mr. Yamashita acknowledged over the course of two days of testimony. During cross examination on Wednesday, March 17, Sound Transit's attorney specifically asked where in Chapter 19.09 there is authority for this denial of a transportation use of a right-of-way, and Mr. Yamashita could not identify such authority. *See* Rusk Decl., Ex. 1 (Yamashita Cross), pp. 104:1-105:20. He was invited to come back on Friday, March 19, and identify such code authority, but he did not do so. *Id*. He also could not identify any way in which Sound Transit's plans do not comply with the code. Rusk Decl., Ex. 1 (Yamashita Cross), p. 109:1-10. No City witness was able to identify any authority in the code for Condition XIII.A because no such authority exists. The City's Closing Argument admits the lack of authority, Closing Brief ("Br.") at 17:14-15, and then argues, astonishingly, that *absence* of legislatively adopted authority gives staff unfettered administrative authority to allow layovers on one side of the street while denying layover on the other. This absence-of-authority-creates-authority argument is addressed in Section D below.

2. XIII.B requires Sound Transit to convey property to the City and obtain the City Council's approval of the conveyance before Sound Transit can commence construction of the Project, without any basis in the code for this requirement

Condition XIII.B requires Sound Transit to obtain the City's "acceptance of a conveyance by deed" of Parcels A and B before Sound Transit can commence work on these

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Parcels. Jemae Hoffman, the Development Manager for East Link, and Anthony Wilen, the lead designer and engineer, explained the many reasons why Sound Transit cannot piecemeal work on the Project and needs these Parcels at the outset of construction for staging as well as for construction of the stormwater facilities and roundabout. Joanna Valeri, Sound Transit Senior Legal Counsel, and Eric Beckman, Sound Transit Deputy Executive Director, explained the many reasons, including the property-disposition requirements of federal law, why such conveyances cannot happen until sometime in the future, months from now for Parcel B and many more months or years in the future for Parcel A. Valeri Direct; Beckman Direct. Condition XIII.B effectively prevents construction of the Project unless the City Council – the very Council that is so opposed to the Project that it raised the City's taxes to pay outside counsel to stop it – agrees to accept conveyances of Parcels A and B. A Type I permit is nondiscretionary, but condition XIII.B vests absolute discretion in the City Council.

The only authority that condition XIII.B cites is "MICC 19.06.060," which is entitled "Encroachment into public right-of-way." Nothing in this code section authorizes the City to require Sound Transit to convey Parcels A and B, but Mr. Yamashita asserted that this code reference in XIII.B is a typographical error and the condition should have cited 19.09.060 entitled "Right-of-way use." Rusk Decl., Ex. 1 (Yamashita Cross), pp. 83:10-84:4. Both Mr. Yamashita and Mr. Thomas, however, acknowledged that this code section applies only to land that is right-of-way, and therefore does not apply to Parcels A and B which are not right-of-way. Rusk Decl., Ex. 1 (Yamashita Cross), p. 84:5-21; Ex. 2 (Thomas Cross), pp. 44:21-45:6. Once again, the evidence at the hearing demonstrated that there is *no* authority in the code for this condition.

3. XIII.C is without any basis in the code

Condition XIII.C does not even cite the code, only the Settlement Agreement, as its authority. This condition thus acknowledges that it is unlawful because it is based on the City's disputed interpretation of a contract, not on an adopted regulation.

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D. The City's new, post-hearing argument is indefensible for multiple reasons

The City's Closing Argument makes an entirely new argument that is not found in the conditions themselves or in the code: that "bus layover uses and the like" are not allowed in the City's ROW except by agreement with the City. *See, e.g.*, Br. at 2:7-14 and 17:12-17. This argument:

1) is repudiated by the City's own actions;

2) is simply another argument without support in the code;

3) would result in a new illegality: the exercise of unfettered discretion by administrative officials issuing non-discretionary permits; and

4) is inconsistent with the hundred years of case law summarized above.

The City's post-hearing argument is that because the City's code does not identify "bus layover uses and the like" as uses permitted in the City's ROWs, and because the City's code does not include a process for permitting such uses, that buses cannot use the City's ROW except by agreement with the City. The simplest response to this new argument is that it is repudiated by the City's own actions: the Project includes three bus layover areas on the south side of North Mercer Way that the City is permitting.

The City's Closing Argument cites MICC 19.01.040.G.5 for the proposition that transit use of the City's right-of-way is allowed only through agreement with the City. Br. at 2:12-14. This code section, however, says *nothing of the sort*: it addresses uncertainty in zone boundaries and street vacations, and it has nothing to do with agreements to use the right-of-way. The City also asserts that its decision is supported by code provisions that govern encroachments into the right-of-way and commerce in the right-of-way. Br. 18:19-19:12 (citing MICC 19.06.060 and 19.06.050). Yet this case does not involve either an encroachment or commerce. *Nothing* in City code supports the challenged conditions.

The City in effect is arguing that the absence of legislatively adopted authority in its code gives City staff unfettered administrative authority to deny a public transportation use on one

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side of a street while permitting the same use on the other side of the street. Such a decision is obviously an exercise of discretion, but it is set forth in Type I permits that are, by definition, nondiscretionary. And even if the permits at issue were discretionary Type IV permits, the City Council would be required by State law to legislatively adopt standards to guide the exercise of discretion. It has been a foundational principle of law for generations that the discretion of administrative officials must be limited by adopted standards. *See*, *e.g.*, *Barry & Barry, Inc. v. State Dept. of Motor Vehicles*, 81 Wn.2d 155, 161, 500 P.2d 540 (1972) (holding "Administrators must structure their discretionary power through appropriate safeguards and must confine and guide their discretionary power through standards, principles, and rules"); *accord Anderson v. City of Issaquah*, 70 Wn. App. 64, 80, 851 P.2d 744 (1993) (reversing administrative denial of project based on unwritten and therefore unenforceable requirements and writing "*Barry* does not suggest that an administrative agency acting in the absence of clear legislative guidelines may arbitrarily impose vague, unarticulated and unpublished standards upon the public").

The case law cited above in Section A demonstrates that the City is again simply turning the law on its head: the City's streets are under the ultimate control of the State Legislature, and the Legislature has not delegated to the City the authority to prohibit transportation uses in streets, and certainly not uses that regional transportation agencies created by the Legislature have determined are needed for regional public transportation.

Finally, even if the Legislature had delegated to the City the authority to adopt an ordinance that discriminates against regional transportation uses in the right-of-way, the Mercer Island City Council has not done so. None of the Code sections cited by the City support its position.

E. The State Legislature delegated to Sound Transit the authority to construct transit facilities in City right-of-way without the permission of the City

The City's Closing Argument asks the Hearing Examiner to assume that public

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transportation uses are prohibited in the right-of-way unless specifically authorized in Code. *See* Br. at 17:26-18:10. This turns the law on its head, not only by ignoring the 100 years of case law cited in Section A above, but also by disregarding the affirmative authority that the Legislature has delegated to both Metro and Sound Transit. As discussed above, the controlling statutes are RCW 35.58.330 and RCW 81.112.100, which grant Sound Transit and Metro the authority to "construct or maintain . . . facilities in, along, on, under, over, or through public streets . . . without first obtaining a franchise . . . ." The staff report derides this statutory grant as "only prohibit[ing] cities from requiring a franchise," Ex. 25 (Staff Report) at 8:17-18, but that prohibition displaces any authority the City Council might otherwise have to require Sound Transit to obtain City permission to use City streets. A franchise *is* permission to use city right-of-way, *Washington Fruit & Produce*, 3 Wn.2d at 157, and the City Council cannot require Sound Transit to obtain City permission when the Legislature has decided otherwise.

During the hearing the Hearing Examiner asked Mr. Yamashita whether regulating uses within the right-of-way interjects an element of discretion into an otherwise nondiscretionary permit. Rusk Decl., Ex. 1 (Yamashita Testimony), pp. 128:19-129:19. Mr. Yamashita testified that the question rarely arises because the typical applicant for a ROW use permit is an entity such as PSE, which does not need the City's specific permission to install gas pipes in the street because—according to Mr. Yamashita's testimony—PSE *has a franchise*. *Id*. at pp. 129:20-130:11. By contrasting PSE's franchise with Sound Transit's lack of a franchise, Mr. Yamashita implied that Sound Transit therefore needs the City's permission to construct the Project. But if that were true, the permission would come in the form of a franchise, which the Legislature decided Sound Transit does not need. The statutes give Sound Transit all the rights it would otherwise obtain through a franchise—which Mr. Yamashita acknowledged is all the City needs for a use to be permitted in the ROW.

The City now argues that Sound Transit needs the City's "consent" under RCW 81.112.080(2). It does not, but the Hearing Examiner should not even consider this argument

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because the City persuaded the Hearing Examiner to suppress hours of testimony and dozens of documents that Sound Transit sought to offer to demonstrate that the City has consented.

Despite not being able to offer most of its evidence, Sound Transit presented unrebutted evidence that the City Manager consented to the Project in 2019, when Sound Transit needed to make final decisions about the scope of the Project. *See* Section F below.

Given this unrebutted evidence of consent that is in the record, the Hearing Examiner need not decide whether the City's interpretation of RCW 81.112.080(2) is correct, but it is not. The City takes a few words out of context and thereby makes those few words inconsistent with the statute as a whole and with the companion statutes of RCW 81.112.100 and 35.58.330, which give Sound Transit the authority to construct or maintain facilities in streets without a franchise.

These two statutes expressly give Sound Transit and Metro the authority to construct and maintain their facilities on "public streets," but Section 81.112.080(2) does not even refer to streets: it refers to "public transportation facilities and properties." Different terms must be interpreted to have different meanings. *See Citizens All. for Prop. Rights Legal Fund v. San Juan Cty.*, 184 Wn.2d 428, 440, 359 P.3d 753 (2015). Interpreting "public transportation facilities and properties" to means "public streets" would lead to an absurd result: it would mean that the Legislature in RCW 81.112.080(2) implicitly revoked the authority it granted in 81.112.100 and 35.58.330 and thereby made these statutes meaningless. The City's argument also leads to the absurd conclusion that Sound Transit and Metro, which has the same limitation in its enabling legislation, RCW 35.58.240(2), would have to obtain city permission even to drive buses on city streets, when no other form of transportation requires such permission. The City is asking the Hearing Examiner to ignore basic rules of statutory interpretation that require statutes to be read together and reconciled in a manner that does not lead to absurdity. *City of Lakewood v. Pierce Cty.*, 106 Wn. App. 63, 70-71, 23 P.3d 1 (2001); *Burns v. City of Seattle*, 161 Wn.2d 129, 148-50, 164 P.3d 475 (2007).

In RCW 81.112.080 the Legislature granted Sound Transit broad authority to *acquire*

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public property, including even the power to condemn public lands, as the Washington Supreme Court affirmed in *Central Puget Sound Regional Transit Authority v. WR-SRI 120th North LLC*, 191 Wn.2d 223, 235-36, 422 P.3d 891 (2018), where the Court allowed Sound Transit to condemn a City of Seattle powerline easement in a City of Bellevue right-of-way. The "consent" language relied upon by the City is a *limitation* on the affirmative grant of authority in RCW 81.112.080, not a grant of authority to cities. This limitation applies only to "public transportation facilities and property," not to streets. In building the Project Sound Transit is not exercising the authority granted by RCW 81.112.080: Sound Transit is exercising the authority granted by 81.112.100 and 35.58.330 to construct a regional transportation facility. The statute that the City asks the Hearing Examiner to interpret, RCW 81.112.080, is irrelevant to this proceeding.

F. Even if RCW 81.112.080 were relevant, the City consented when consent was needed – in 2019

Even if RCW 81.112.080(2) did require the City to consent to the Project, unrefuted evidence in the record demonstrates that the City, through its City Manager, did consent. Mercer Island is a noncharter code city with a council-manager plan of government. MICC 2.02.010. Under this form of government, "the city manager is the sole person vested with authority to supervise the administrative affairs of the city." *Citizens for Des Moines, Inc. v. Petersen*, 125 Wn. App. 760, 769, 106 P.3d 290 (2005).

The evidence in the record – principally the testimony of Eric Beckman, Jemae Hoffman, Katie Chalmers, and Stephen Crosley – demonstrates that Sound Transit spent much of 2018 and early 2019 working with City Manager Julie Underwood in a successful effort to agree on a design and footprint for the Project that would meet the needs of Metro and Sound Transit and be acceptable to the City. This year-long collaboration resulted in the consensus recommendations set forth in the "Mercer Island Transit Interchange Operational and Configuration Study" dated March, 2019, that David Evans and Associates, under the supervision of Anthony Wilen,

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prepared for the participants ("DEA Study"). Ex. 1002. Sound Transit is building the "Improved Service Configuration" described in the DEA Study, which includes the bus layover area on the north side of North Mercer Way that Condition XIII prohibits (as Jemae Hoffman testified, this layover area is labeled "Additional Flexible Curb Space" on Figure 6 of the Study because the City's Project Manager thought this was "a good idea."). Rusk Decl., Ex. 5 (Hoffman Rebuttal), pp. 1-2 at 1:07:05–1:09:38; *see also* Ex. 1002 at ST000075. The DEA Study also clearly describes this area as layover, for example on pages 13 and 17. Ex. 1002 at ST000074, and ST000078.

Eric Beckman testified that he believed based on his conversations with City Manager Underwood in 2019, that the City approved the Project. Rusk Decl., Ex. 3 (Beckman Direct), p. 17:6-10. Mr. Beckman also testified that the current City Manager, Jessi Bon, who replaced Julie Underwood later in 2019, has never proposed an alternative to the Project during his 10-12 conversations with her. *Id*. at pp. 17:11-18:4.

Stephen Crosley, who oversees all bus-rail integration for Metro, testified that bus layover on both the north and south sides of North Mercer Way is required to provide the level of service that Metro needs to serve the region, and to his knowledge the City has never proposed an alternative location for this layover space. Rusk Decl., Ex. 4 (Crosley Direct), pp. 7:5-10:21, 11:9-13.

Documents in the record also reflect the City Manager's consent to the Project in 2019, demonstrated by the efforts of the participants in the DEA Study, including Ms. Underwood, to explain its conclusions to the City Council and the community. For example, the response to Question 18 of the "FAQs" published on the City's website, confirms that staff from Sound Transit, Metro, and the City reviewed the DEA study and jointly "recommended the highest scoring configuration," which includes the bus layover area on the north side of North Mercer Way. Ex. 1028 at ST000186. Exhibit 1032 also specifically states:

The planned layover spaces on the north and south sides of N. Mercer Way, as

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> outlined in the Improved and Optimal Configurations, are essential to meet KCM's operational needs."

Ex. 1032 at ST000236 (Questions and Answers prepared by Sound Transit and provided to the City of Mercer Island, at its request, for the City's "Let's Talk" page). The answer to Question 5 of the "FAQs" displayed on the City's website, Exhibit 1028 (ST000182) (*see also* Exhibit 1035 at ST000260), specifically states:

> Metro will need to utilize layover space on the north and south sides of North Mercer Way to meet King County Metro's operational needs.

The City offered *no* evidence to rebut this evidence that the City Manager consented to the Project in 2019, at the time when Sound Transit needed to finalize the Project footprint and conceptual design in order to open East Link on schedule in 2023.

G. The City's conditions preclude the siting of an Essential Public Facility

The evidence summarized in the prior section is not only unrebutted evidence of consent, it is unrebutted evidence that the Project, including the bus layover area on the north side of North Mercer Way, is required to meet Metro's operational needs, which the City itself explained to the world on its website, as demonstrated by Exhibit 1028 quoted above.

The Project is a component of East Link, which is the essential public facility ("EPF") at issue in this appeal. The Growth Management Act at RCW 36.70A.200 prohibits local government from precluding EPFs, and the State regulations adopted by the Department of Commerce to implement the GMA, at WAC 365-196-550(3)(d), specifically prohibit the local EPF process that Mr. Thomas' testimony and the City's Closing Argument threaten to impose:

> If the essential public facility and its location have been evaluated through a state or regional siting process, the county or city may not require the facility to go through the local siting process.

Sound Transit is not proposing to site an EPF; it is attempting to construct the EPF that the Sound Transit Board approved by means of Resolution No. R2011-10 in 2011 and Resolution R2013-09 in 2013. *See* Exs. 1058 & 1059. An EPF includes not only its component parts but also its ancillary functions. *City of Des Moines v. Puget Sound Reg'l Council*, 98 Wn.

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App. 23, 108 Wn. App. 836, 846, 988 P.2d 27 (1999) (rejecting attempt of local government to prohibit hauling of dirt from the construction site for the third runway). The evidence demonstrates that the Project that Sound Transit is constructing is required to accommodate Metro's operational needs, as Stephen Crosley testified, so the challenged conditions prevent completion of the bus/rail integration Project that has been part of East Link since its inception.

The City's closing brief concedes that local EPF regulation cannot apply if an EPF was previously evaluated through a regional siting process, Br. at 11:4-5, which happened here, long ago. And Mr. Beckman testified that no local government has attempted to subject a Sound Transit facility to a local EPF process. Rusk Decl., Ex. 6, (Beckman Rebuttal), p. 1 at 1:45:40–1:47:08.

The City argues that the Project differs from the configuration studied in the SEPA Addendum, Br. at 11:7-15, but SEPA is irrelevant to whether the City can subject a regional EPF to a local EPF process, and Sound Transit, not the City, is the SEPA lead agency, as James Irish testified. In addition, the changes to the Project since the SEPA Addendum in 2017 are not material for purposes of either SEPA or the GMA: at the City's request Sound Transit is shortening the length of bus layover area on the north side of North Mercer Way and removing a proposed local bus stop from 80th. Minor changes in design to a regional EPF do not create a new EPF that allows a new, local permitting process by the City.

The Sound Transit Board approved East Link long ago, so the City's responsibility today is to not preclude it. The only reason for the City to subject East Link to its local EPF process is to give itself discretion to deny what the regional agency approved, but only construction permits remain to be issued – all discretionary decisions were made long ago.

H. Conditions XIII.B and XIII.C violate RCW 82.02.020

Under RCW 82.02.020 the City bears the burden of demonstrating that its exactions "are reasonably necessary as a direct result of the proposed development." The City made no attempt to meet this evidentiary burden at the hearing, and did not even address its burden in its Closing

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Argument, thereby conceding that conditions XIII.B & C violate the statute.

Condition XIII.B prohibits Sound Transit from constructing the Project until the City Council approves a conveyance of Parcels A and B to the City, and Condition XIII.C requires Sound Transit to pay the City to maintain these parcels and the affected portion of the City's street forever. Both conditions serve the Council's goal of precluding the Project, but there is no evidence that either condition is "reasonably necessary as a direct result" of the Project.

Even if Federal and State property disposition laws allowed Sound Transit to give real property to the City prior to constructing the Project and determining the logical boundary of the right-of-way (and they do not, as Joanna Valerie and Eric Beckman explained), and even if the Mercer Island City Council could require the regions taxpayers to maintain a portion of a City street in perpetuity, which it manifestly cannot, these exactions of real property and money from Sound Transit's regional taxpayers are not voluntary and do not mitigate an impact of the Project, in violation of RCW 82.02.020. *Cf. Isla Verde Int'l Holdings v. City of Camas*, 146 Wn.2d 740, 758, 49 P.3d 867 (2002).

I. The Hearing Examiner can and should reverse his interlocutory ruling that conditions supported only by contract can remain in a Type I permit

The City cites the Settlement Agreement as authority for conditions XIII.A and C, but as Sound Transit explained in response to the City's motions to dismiss and to suppress evidence, a city government may not use its regulatory authority to enforce rights it claims through its contracting power. The Hearing Examiner makes the final, appealable decision on behalf of the City, *see* RCW 36.70C.020(2) (defining "land use decision" as the final decision of the officer with the highest level of authority, including appeals), and therefore the Hearing Examiner must decide whether he will affirm the use of a contract as a source of law to support a condition on a Type I permit.

An interlocutory decision is by definition subject to modification at any time prior to a final decision. *See, e.g.*, *Adcox v. Children's Orthopedic Hosp. & Med. Ctr.*, 123 Wn.2d 15, 37,

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864 P.2d 921 (1993) ("A judge may reverse or modify a pretrial ruling at any time prior to the entry of final judgment."); *Steel v. Olympic Early Learning Ctr.*, 9 Wn. App. 2d 1004, *review denied sub nom. Steel v. Olympia Early Learning Ctr.*, 194 Wn.2d 1010, 452 P.3d 1237 (2019) (Unpublished) ("Here, the November 2012 written order was not a final order. Therefore, the court had authority to revisit and reverse its previous nonfinal order."); *State v. Kinard*, 39 Wn. App. 871, 873, 696 P.2d 603 (1985) ("A trial court's order or ruling is subject to revision at any time before final judgment.").

The Hearing Examiner can and should modify his interlocutory order and strike the challenged conditions. The evidence at the hearing, and now the City's own closing argument, confirm that Conditions XIII.A and XII.C are unsupported by City Code and have no place in a Type I decision.

III. ANSWERS TO EXAMINER QUESTIONS

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

As discussed above in section II.G, this question is answered by WAC 365-196-550(3)(d):

> (d) If the essential public facility and its location have been evaluated through a state or regional siting process, the county or city may not require the facility to go through the local siting process.

East Link is a single EPF that comprises tracks, stations, and bus/rail integration facilities, and that was sited through a regional process that ended with a Sound Transit Board vote in 2013.

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

The omission of "right-of-way" is not significant because, as discussed in section II.E, RCW 81.112.080(2) is irrelevant to this appeal and Sound Transit is not acquiring right-of-way. The Project is an exercise of Sound Transit's authority to construct "facilities" in "public streets"

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without a franchise, RCW 35.58.330 & RCW 81.112.100, not an exercise of Sound Transit's authority to acquire or use "public transportation facilities and properties" under RCW 81.112.080(2). The term the Legislature used in 81.112.080 – "public transportation facilities and properties" – cannot be read to include streets, the term the Legislature used in RCW 35.58.330 – without making the statutes contradict and negate one another. And if a street is interpreted to be a "public transportation facility and property" then Metro and Sound Transit could not even drive their buses on city streets (thereby making "use" of the streets) without the City's consent. The restriction would also apply to Metro because in RCW 35.58.240(2) the Legislature used the same "consent" language to limit Metro's power to acquire property.[1]

RCW 81.112.080 *expands* Sound Transit's authority to *acquire* property, as demonstrated by *WR-SRI 120th*, 191 Wn.2d at 236, (approving condemnation of City of Seattle utility easement within City of Bellevue right-of-way). But Sound Transit does not need to acquire a street in order to construct "facilities" within it, because RCW 35.58.330 and RCW 81.112.100 give Sound Transit the authority to construct regional transit facilities on city streets without acquiring them. And Sound Transit is not acquiring street right-of-way, it is improving existing right-of-way and acquiring two private parcels so that the City can make portions of the parcels right-of-way when the Project is completed and those portions can be transferred to the City.

The City, moreover, does not provide public transportation services; it relies on Sound Transit and Metro for that. The City thus has no "public transportation facilities and properties" for Metro or Sound Transit to acquire or use. A street, on which any mode of transportation is allowed, is not a public transportation facility, where only public transit is allowed. *Cf.* WAC 365-196-430(2)(c)(iii)(B)(I) (listing as examples of "public transportation facilities": "regional and intercity rail, and local, regional, and intercity bus service, paratransit, or other services.").

[1] In fact, the same "consent" language governs Metro's acquisition and use of city-owned sewer facilities, RCW 35.58.200(2); city-owned water supply facilities, RCW 35.58.220(2); city-owned garbage disposal facilities, RCW 35.58.280(2); and city-owned parks, RCW 35.58.290(2). In each section, the legislature authorizes Metro to provide a specific public service, but where a local government is already meeting that specific public need, Metro must cooperate with the local government. Mercer Island does not provide public transportation services.

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

As discussed above in section II.F, the City Manager is "the sole person vested with authority to supervise the administrative affairs of the city." *Citizens for Des Moines*, 125 Wn. App. at 769. The evidence in the record – the DEA Study and the testimony of multiple Sound Transit and Metro witnesses – demonstrates that City Manager Julie Underwood consented to the Project in 2019 after participating in a year-long review of the Project and potential alternatives.

As discussed in section II.E above, such constent, even though it was cooperatively obtained, was not needed because the Legislature delegated to both Sound Transit and Metro the authority to construct and maintain regional transportation facilities in city streets without obtaining city consent. RCW 35.58.330 and RCW 81.112.100.

Furthermore, the City should not be allowed to talk about consent. It argued in its Motion to Exclude that arguments, testimony, and exhibits regarding City consent "are under the Court's jurisdiction." City's Motion to Exclude at 3. Yet, the City's Closing wields "consent" as a sword, relying on the City's alledged withholding of such consent (contrary to the evidence in the record) after it succeeded in preventing Sound Transit from submitting most of its evidence regarding consent. Before the hearing began the City persuaded the Hearing Examiner that the issue of consent is for a court to decide, and the City should not be allowed to argue questions of consent at the end of the hearing.

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

It is common for cities, counties, and the State Department of Transportation to expand a street, road or highway by acquiring a portion of an adjoining lot. Such a partial acquisition does not render the remainder of the lot illegal, but the remainder may become legally non-conforming if it no longer complies with minimum lot requirements. This is what will happen in the future with Parcel A when Sound Transit transfers to the City the portion of this lot that is

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needed for right-of-way purposes. Most of Parcel B is needed for the Project, but the remainder of Parcel A will drop below the minimum lot size in the zone and also will lose access to a street. This remainder of Parcel A thus will become nonconforming to the current Code for these reasons, but it will not become illegal. Its noncomforming status will affect its market value because it cannot be redeveloped as a residential lot, but it may still have substantial market value. For example, one of the owners of the four adjoining residential lots may wish to acquire the remainder of Parcel A and combine it with a portion of the owner'adjoining lot by means of a lot line revision, thereby making the new, combined lot a conforming lot again.

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

No ROW use permit or other land use permit is required to authorize Sound Transit to construct facilities in a public street, because RCW 35.58.330 & 81.112.100 already authorize Sound Transit to do so. Other entities that wish to construct facilities in the right-of-way, such as utility companies, must obtain a franchise, not a land use permit. Rusk Decl., Ex. 1 (Yamashita Testimony), pp. 128:19-130:11. The City's closing argument asserts that bus layover areas are prohibited in all of the City's rights-of-way unless the City Council allows it on a case-by-case basis, but nothing in the MICC supports this assertion, as discussed above in section II.D. The falsity of the City's assertion is revealed by the simple fact that the same, non-discretionary ROW Permit the City argues cannot authorize a bus layover on the north side of the street authorizes *three* such layovers on the south side of the same street.

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

Yes.

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

The language of the conveyance controls, whether the grant is by deed or dedication, but the difference only matters if and when a street is vacated. In almost all instances, the dedicator

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of a right-of-way generally continues to own the underlying land, while the city "acquires only the right of passage, with powers and privileges necessarily implied in the grant of the easement." *Rainier Ave. Corp. v. City of Seattle*, 80 Wn.2d 362, 366, 494 P.2d 996 (1972), *citing Puget Sound Alumni of Kappa Sigma, Inc., v. City of Seattle*, 70 Wn.2d 222, 422 P.2d 799 (1967). If the intent is to convey ownership of the underlying land, in addition to the right-of-way, the dedicator must include language granting fee ownership to the city or county. *Kiely v. Graves*, 173 Wn.2d 926, 934, 271 P.3d 226 (2012) (quoting 6 Wash. St. Bar Ass'n, Washington Real Property Deskbook § 91.9(1) (3d ed. 2001)).

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

No, the Hearing Examiner may not issue a building permit in the first instance. The Hearing Examiner does have jurisdiction to remand with directions for the Department to issue a permit, which is what he should do here because the record demonstrates (1) that a building permit is required for the retaining walls and stormwater facilities on Parcels A and B, and (2) that Sound Transit's application complies with all applicable code requirements.

Dated this 22nd day of April, 2021.

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DECLARATION OF SERVICE

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

On the date indicated below, I caused **SOUND TRANSIT'S CLOSING ARGUMENT** to be filed with the Hearing Examiner for the City of Mercer Island and served on the persons listed below in the manner indicated:

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DATED this 22nd day of April, 2021 at Seattle, Washington.

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