

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

DECISION

FILE NUMBER: APL21-001
(Ref. Right-of-way Use Permit 2010-186)

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APPLICANT: Same as Appellant

TYPE OF CASE: Appeal from conditions imposed on Permit 2010-186

EXAMINER DECISION: GRANT IN PART

DATE OF DECISION: May 3, 2021

INTRODUCTION ¹

Central Puget Sound Transit Authority (“Sound Transit”) appeals from seven conditions imposed in the administrative decision of the Mercer Island Community Planning & Development Department (“Department”), issued on December 22, 2020, for a Right-of-way Use Permit and associated applications for the Mercer Island Transit Interchange (“MITI”) Project. (Exhibit 1 ²)

Sound Transit filed the appeal on January 5, 2021. (Exhibit 2)

The subject property is located along North Mercer Way, generally between 77th Avenue SE and 80th Avenue SE (“77th” and “80th,” respectively) and, immediately north of the I-90 corridor. (Exhibit 1003)

The Hearing Examiner (“Examiner”) held a remote prehearing conference with the parties on January 29, 2021. (Exhibit 9003) The prehearing conference is memorialized in Exhibit 9004.

The Examiner held an open record hearing on March 16, 17, 19, and 24, 2021. The hearing was conducted remotely using the “Zoom” platform due to assembly restrictions attendant to the current COVID-19 pandemic. Notice of the hearing was given as required by the Mercer Island City Code (“MICC”). (Exhibit 22)

Pursuant to RoP 224(c), the Examiner entered the following administrative exhibits into the hearing record:

- Exhibit 9001: Letter, Patrick J. Schneider to Hearing Examiner, January 7, 2021 (request for prehearing conference)
- Exhibit 9002: Letter, Hearing Examiner to Principal Parties (scheduling guidance)
- Exhibit 9003: E-mail and Zoom scheduling e-mail, January 12, 2021 (Prehearing conference notice)
- Exhibit 9004: Order Memorializing a Prehearing Conference, issued February 2, 2021
- Exhibit 9005: City’s Partial Motion to Dismiss for Lack of Jurisdiction, filed February 16, 2021
- Exhibit 9006: Declaration of Kim Adams Pratt in Support of City’s Partial Motion to Dismiss, filed February 16, 2021, with Exhibits A – C, to be cited as Exhibits 9006.A – 9006.C
- Exhibit 9007: Sound Transit’s Response to City’s Partial Motion to Dismiss for Lack of Jurisdiction, filed February 26, 2021
- Exhibit 9008: Declaration of Patrick J. Schneider in Support of Sound Transit’s Response to City’s Partial Motion to Dismiss for Lack of Jurisdiction, filed February 26, 2021
- Exhibit 9009: City’s Request for Reply on Partial Motion to Dismiss for Lack of Jurisdiction, filed March 1, 2021

¹ Any statement in this section deemed to be either a Finding of Fact or a Conclusion of Law is hereby adopted as such.

² Exhibit citations are provided for the reader’s benefit and indicate: 1) The source of a quote or specific fact; and/or 2) The major document(s) upon which a stated fact is based. Citations to exhibits that are available electronically in PDF use PDF page numbers, not source document page numbers. While the Examiner considers all relevant documents in the record, typically only major documents are cited. The Examiner’s Decision is based upon all documents in the record.

HEARING EXAMINER DECISION

RE: APL21-001 (Sound Transit v. Mercer Island)

May 3, 2021

Page 3 of 32

- Exhibit 9010: Interlocutory Order on Motion, issued March 2, 2021
- Exhibit 9011: City's Motion to Exclude Witness Testimony and Exhibits and City's Request for Expedited Ruling, filed March 11, 2021, at 12:43 p.m.
- Exhibit 9012: E-mail, Hearing Examiner to Principal Parties, March 11, 2021, at 3:57 P.M. (Providing opportunity for abbreviated response period)
- Exhibit 9013: Sound Transit's Response to City's Motion to Exclude Witness Testimony and Exhibits, filed March 13, 2021, at 7:47 p.m.
- Exhibit 9014: Interlocutory Order on Motion to Exclude, issued March 14, 2021, at 5:00 p.m.
- Exhibit 9015: Sound Transit's Motion for Reconsideration of Interlocutory Order on Motion to Exclude, filed March 15, 2021, at 4:28 p.m.
- Exhibit 9016: Hearing Examiner's Questions for Closing Statements, distributed via e-mail to principal parties on March 22, 2021
- Exhibit 9017.A: Agreed Amended Conditions IV.A, IV.E, VII.H, and VII.I (Red-lined version)
- Exhibit 9017.B: Agreed Amended Conditions IV.A, IV.E, VII.H, and VII.I (Clean version)

Pursuant to RoP 224(d), Respondent Department pre-filed Exhibits 1 - 24 and provided an index listing of those exhibits. Respondent Department also pre-filed its Staff Report but did not assign an exhibit number to it; the Examiner marked it as Exhibit 25. Appellant Sound Transit did not object to entry of those exhibits. The Examiner entered those exhibits into the hearing record. Pursuant to RoP 224(i), during the hearing the Examiner accepted additional exhibits from Respondent Department as follows:

- Exhibit 26: Right-of-way Encroachment Agreement Application Form

Pursuant to RoP 224(e), Appellant Sound Transit pre-filed Exhibits 1001 - 1056 and provided an index listing of those exhibits. Appellant Sound Transit also pre-filed a Prehearing Brief but did not assign an exhibit number to it; the Examiner marked it as Exhibit 1057. Respondent Department moved to exclude 29 of Sound Transit's proposed Exhibits. (Exhibit 9011) Appellant Sound Transit responded. (Exhibit 9013) The Examiner granted Respondent Department's motion in part. (Exhibit 9014; see "Prehearing Motions," below, for further details) Appellant Sound Transit asked the Examiner to reconsider. (Exhibit 9015) That request was addressed during the hearing, was opposed by Respondent Department, and was orally denied by the Examiner. The Examiner entered Exhibits 1000 – 1008, 1010, 1012 – 1016, 1027, 1028 (Item numbers 1 – 13 only), 1031 – 1040, 1046, 1047, and 1050 - 1057 into the hearing record. At the end of the third day of the hearing, the Examiner agreed to enter the following challenged exhibits into the record: Exhibits 1019R, 1020R, 1023R, 1024R, 1025R, and 1030R. Pursuant to RoP 224(i), during the hearing the Examiner accepted additional exhibits from Appellant Sound Transit as follows:

- Exhibit 1058: Sound Transit Resolution No. R2011-10 ("selecting the route, profiles, and station locations for the East Link Light Rail Project"), July 28, 2011
- Exhibit 1059: Sound Transit Resolution No. R2013-09 ("selecting the route, profiles, and station locations for the East Link Light Rail Project, and superseding Resolution No. R2011-10"), April 25, 2013

The Principal Parties opted to submit written closing statements which are herewith entered into the record as follows:

- Exhibit 9018: City of Mercer Island Closing Statement, filed April 8, 2021, with Appendix 1 to be cited as Exhibit 9018.1
Exhibit 9019: Sound Transit’s Closing Argument, filed April 22, 2021
Exhibit 9020: Declaration of Michelle Rusk in Support of Sound Transit’s Closing Argument, filed April 22, 2021, with Exhibits 1 – 6 to be cited as Exhibits 9020.1 – 9020.6

The record closed with receipt of Exhibits 9019 and 9020 on April 22, 2021. The City has the record copy of the exhibits and the exhibit index lists.

The action taken herein and the requirements, limitations and/or conditions imposed by this decision are, to the best of the Examiner’s knowledge or belief, only such as are lawful and within the authority of the Examiner to take pursuant to applicable law and policy.

PREHEARING MOTIONS

Two Interlocutory Orders on prehearing motions were issued.

On February 16, 2021, Respondent Department filed a Partial Motion to Dismiss for Lack of Jurisdiction. (Exhibits 9005; 9006) Appellant Sound Transit filed a written response. (Exhibits 9007; 9008) Respondent Department filed a Request for Reply which the Examiner denied. (Exhibits 9009 and 9010, fourth Recital, respectively) On March 2, 2021, the Examiner issued an Interlocutory Order on the Motion to Dismiss. The Examiner

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

(Exhibit 9010, PDF 3, bold and all-caps in original) The Examiner herewith incorporates Exhibit 9010 herein by reference as if set forth in full.

On March 11, 2021, Respondent Department filed a Motion to Exclude certain named exhibits and potential witnesses. (Exhibit 9011) Appellant Sound Transit filed a written Response. (Exhibit 9013) On March 14, 2021, the Examiner issued an Interlocutory Order on the Motion to Exclude. The Examiner: Granted the Motion as to 21 exhibits; Granted the Motion in Part as to one exhibit; Denied the Motion as to seven exhibits; Granted the Motion to “preclude [witnesses] from testifying regarding the collaborative process with the City and King County Metro to determine Metro’s operational needs;” and confirmed that the March 2, 2021, Order on Motion

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

(Exhibit 9014) The Examiner herewith incorporates Exhibit 9014 herein by reference as if set forth in full; SUBJECT TO modification to it made at the end of the third hearing day when Respondent Department requested entry of and the Examiner entered the following challenged exhibits into the record: Exhibits 1019R, 1020R, 1023R, 1024R, 1025R, and 1030R.

FINDINGS OF FACT

1. General

- 1.1 Sound Transit has appealed seven conditions imposed by the Department on a “master permit” for Sound Transit’s MITI project. The MITI project will provide a modal transfer facility (between bus and light rail) along North Mercer Way in the City. Of the seven original conditions challenged by Sound Transit, Sound Transit and the Department have resolved their differences on four. This Decision will focus on the remaining three challenged conditions.
- 1.2. Sound Transit is a regional transit authority “authorized to plan, construct, and permanently operate a high capacity system of transportation, infrastructure and services to meet regional public transportation needs in the Central Puget Sound region”. (Exhibit 1059, PDF 1, Recital 2) Sound Transit’s primary transportation system is light rail.³ Sound Transit’s initial light rail system runs north and south with Seattle at its center. In 2008, voters approved a system expansion plan, including expansion to the east. The easterly expansion is known as the East Link Extension (“East Link”) and will provide light rail service from Seattle to Redmond, via Mercer Island and Bellevue. (Exhibits 1000, PDF 7 & 31; 1051, PDF 1, Recital 4; 1059, PDF 1; official notice)
- 1.3. Sound Transit is an “essential public facility” (“EPF”). An EPF is:

Any public facility or facilities owned or operated by a unit of local or state government, public or private utility, transportation company, or any other entity that provides a public service as its primary mission, and is difficult to site. Essential public facilities include those facilities listed in RCW 36.70A.200, and any facility that appears on the list maintained by the State Office of Financial Management under RCW 36.70A.200(4).

[MICC 19.16.010, “E” terms]

³ Sound Transit also operates some commuter heavy rail trains on existing rail corridors and has some Sound Transit-branded bus lines operated under contract by other transit agencies.

HEARING EXAMINER DECISION

RE: APL21-001 (Sound Transit v. Mercer Island)

May 3, 2021

Page 6 of 32

- 1.4. Sound Transit issued a Final Environmental Impact Statement (“EIS”) under the State Environmental Policy Act (“SEPA”) for the East Link system in July, 2011. In that same month the Sound Transit Board elected to proceed with construction of East Link and adopted Sound Transit Resolution R2011-10 selecting a route and station locations. (Exhibits 1000, PDF 31; 1058)
- 1.5. On April 25, 2013, the Sound Transit Board adopted Sound Transit Resolution R2013-09, amending certain aspects of the East Link alignment.⁴ The selected alignment crosses Lake Washington in the center lanes of the I-90 floating bridge, thus eliminating the previous HOV⁵ lanes. The Resolution calls for an East Link station on Mercer Island between 77th and 80th. The selected alignment calls for transfer between bus and rail service to occur at the Mercer Island station. (Exhibit 1059, PDF 7 & 9, §§ 1.A & 3) Bus service from Eastside cities to Seattle will terminate at MITI on Mercer Island. Commuters inbound to Seattle by bus from the Eastside will transfer to East Link rail at the MITI facility for the remainder of the trip and vice versa for outbound commuters. (Exhibit 1000, PDF 9; 1002, PDF 7, Figure 1)

Since the MITI will be a bus route terminus, provisions for “layovers” must be provided. A layover occurs between the end of a bus’s trip and the beginning of its next trip. Metro bus drivers’ labor contracts include minimum requirements for layover time. Layovers generally range between 10 and 20 minutes, with a 15 minute average. Without adequate provisions for layover bays, the adopted East Link service plan could not be implemented. (Exhibit 1002, PDF 15 & 16; Katie Chalmers (“Chalmers”) {Metro}, Steve Crosley (“Crosley”) {Metro} testimony)

- 1.6. In April, 2017, Sound Transit issued a SEPA EIS Addendum to further analyze three configuration options for MITI. The three options were: 1) The proposal evaluated in the original EIS with some Eastside bus routes terminating on Mercer Island, some Eastside bus routes continuing on to Seattle, and bus stop and layover spaces along North Mercer Way and 80th; 2) The 77th configuration with a roundabout at the 77th/North Mercer Way intersection and bus stops and layover areas on both sides of North Mercer Way and on the west side of 80th; and 3) The 80th configuration with bus stops on the west side of 80th and bus layover areas along North Mercer Way. (Exhibit 1000, PDF 9)
- 1.7. In the Fall of 2017, Sound Transit and Mercer Island entered into a Settlement Agreement. The Settlement Agreement occurred in the context of “extensive litigation and administrative appeal proceedings” between Sound Transit and Mercer Island. (Exhibit 1051, PDF 2, Recital 14) The Examiner has acknowledged that he lacks authority to interpret the provisions of the Settlement Agreement. (Prehearing Motions, Page 4, ¶ 2, above; Exhibit 9010) Thus, other than acknowledging its existence, the Examiner has not delved into and this Decision will not delve into the provisions of the Settlement Agreement.
- 1.8. Construction on East Link began in 2016; construction on the I-90 portion of the route and the Mercer Island East Link light rail station⁶ began in 2018. Construction of the Mercer Island East

⁴ The amendments did not alter the Mercer Island portion of the route.

⁵ High Occupancy Vehicle.

⁶ The Mercer Island station is located on the I-90 right-of-way between 77th and 80th. (Exhibit 1003)

HEARING EXAMINER DECISION

RE: APL21-001 (Sound Transit v. Mercer Island)

May 3, 2021

Page 7 of 32

Link rail station itself is well underway. (Exhibit 1019R, PDF 3; Jemae Hoffman (“Hoffman”) {Sound Transit} testimony) Sound Transit wants to start construction of the MITI Project in June, 2021. (Eric Beckman (“Beckman”) {Sound Transit} testimony) Sound Transit plans to open East Link for service in 2023. (Exhibit 1019R, PDF 3; 1035, PDF 2, Question 3)

- 1.9. The proposed MITI will be located adjacent to the Sound Transit owned and operated 447-stall Mercer Island Park and Ride facility which is located along the north side of North Mercer Way between 77th and 80th. The Park and Ride is a two-level facility: An upper level accessed from a northerly extension of 80th and a lower level accessed from North Mercer Way via a driveway roughly centered between 77th and 80th. Bus stops, each approximately 225 feet long, currently exist along both sides of North Mercer Way just west of 80th. Sound Transit built the Park and Ride and lengthened the bus stops on North Mercer Way in or around 2005. (Exhibits 3, PDF 5; 1002, PDF 12, Figure 3 and text; 1003; Beckman and Patrick Yamashita (“Yamashita”) {Department} testimony)

The MITI is essentially the “Improved Service Configuration” from the MITI Operational and Configuration Study. (See Finding of Fact 2.2, below.) The plan will construct a turnaround at the 77th/North Mercer Way intersection to allow busses to U-turn at that location, thus obviating the need for regional busses to travel through the Mercer Island Town Center, add a 145-foot long bus layover bay along the north side of North Mercer Way between the Park and Ride driveway and the 77th roundabout (long enough for one articulated bus or two standard 40-foot long busses), and create an approximate 230-foot long bus layover bay on the south side of North Mercer Way between the 77th roundabout and the current bus stop bay. (Exhibits 3, especially PDF 44, 45, and 47; 1002, PDF 19, Figure 6; 1003; Hoffman, James Irish {Sound Transit} testimony) Associated improvements include, but are not limited to: a stormwater runoff detention vault, retaining walls, and drainage piping on the north side of North Mercer Way; re-routing of an existing pathway along the north side of the project; and bus stop appurtenances. Most of the work will occur within existing public right-of-way; a significant portion of the roundabout and the drainage work, and one of two primary retaining walls will be outside of existing right-of-way on the north side of North Mercer Way. (Exhibits 3; 1003)

Westbound busses will exit I-90 at the 80th exit, go north on 80th to North Mercer Way, turn west on North Mercer Way to discharge passengers on the north side of North Mercer Way, make a U-turn around the roundabout, layover on the south side (or north side before going through the roundabout if the south side layover bay is full) until time to start their next eastbound run, load passengers on the south side of North Mercer Way, turn right onto 80th, and then left onto I-90. (Exhibit 1002, PDF 14, Figure 4)

- 1.10. Construction of the roundabout, one of the retaining walls, and the stormwater vault with its associated piping will require work outside of the current right-of-way. Sound Transit has acquired two parcels abutting the north side of North Mercer Way at 77th to facilitate that work. (Exhibits 3, PDF 7; 1003) Sound Transit acquired the westerly parcel (5315101838; variously referred to in the record as the Snethen/Hancock parcel or “Parcel A”) by condemnation in or around January, 2021. (Exhibits 3, PDF 7; 19; 20) Sound Transit acquired the easterly parcel (Assessor’s Account Number

5315101837; variously referred to in the record as the Woo parcel or “Parcel B”) by purchase on or about February 1, 2021. (Exhibits 3, PDF 7; 21)

1.11. Any Conclusion of Law deemed to be a Finding of Fact is hereby adopted as such.

2. The Application Process

2.1. In June, 2018, Sound Transit formed a work group consisting of representatives of Sound Transit, Mercer Island, and King County Metro (“Metro”⁷). The work group’s purpose was to refine the MITI configuration to meet the needs of the three participating agencies. During its first meeting on June 12, 2018, the work group decided to study three design options: An option consistent with the Settlement Agreement; an option preferred by Metro which would include bus layover bays; and a third option to be determined by the work group. (Exhibit 1019R, PDF 5)

The work group met again on September 26, 2018. Sound Transit’s minutes of that meeting indicate that restrictions in the Settlement Agreement “all but prevented” Metro bus service to Mercer Island. The group chose a third option to study: an option adding bus pick-up and drop-off service on 80th. (Exhibit 1020R)

The work group met again on December 12, 2018. Sound Transit’s minutes of that meeting indicate “that the smaller/original roundabout design at the revised location would also result in full property takes, as is the case with the larger roundabout design.” (Exhibit 1023R, PDF 2)

The work group next met on February 19, 2019. Sound Transit’s minutes of that meeting indicate that bus routing on Mercer Island was the central topic of discussion. Metro informed the group that if bus passenger drop-off was not allowed on the north side of North Mercer Way, the proposed north side bus layover bay could not be used. They also discussed traffic impacts should a bus stop be added on 80th at the light rail station’s 80th head house.⁸ (Exhibit 1025R, PDF 2 & 3)

The record does not show any subsequent meetings of this group.

2.2. In March, 2019, a MITI Operational and Configuration Study (the “Study”), prepared by David Evans and Associates (“DEA”) under contract from Sound Transit, was issued. The Study evaluated the operational impacts of the three options outlined by the work group: Limited Service Configuration, Improved Service Configuration, and Optimal Service Configuration. (Exhibit 1002, PDF 15 – 20) The Study recommended implementation of the Optimal Service Configuration. The Study acknowledged that “refinements” to the Settlement Agreement would be necessary if the Optimal Service Configuration were to be adopted. (Exhibit 1002, PDF 28) The Optimal Service Configuration called for the improvements listed in Finding of Fact 1.9, above, plus a southbound

⁷ Metro is a county-wide, public, bus transit provider. Metro partners with Sound Transit to provide regional transit service. Busses branded Sound Transit are operated by Metro. (Beckman testimony)

⁸ The “head house” is the structure that covers the entry from street level down to track level.

bus stop on 80th south of I-90. (Exhibit 1002, PDF 19 & 20) The MITI plan now before the City is essentially the Improved Service Configuration. (Exhibit 3)

- 2.3. On March 13, 2019, Sound Transit and Metro issued a set of FAQs⁹ regarding MITI and bus service to and on Mercer Island. (Exhibit 1028) On April 30, 2019, Sound Transit and Metro issued a document responding to Mercer Island City Council questions. (Exhibit 1034) Those documents indicated that bus layovers of 10 – 20 minutes would be required on both sides of North Mercer Way to meet frequency and schedule coordination between busses and light rail trains. They stated that bus layovers were a necessity since Mercer Island was the route terminus for busses traveling to and from the Eastside. (Exhibits 1028, PDF 2, Question 5, PDF 3, Question 11; 1034, PDF 3, Question 1.d, PDF 4 & 5, Question 2)
- 2.4. On April 11, 2019, Sound Transit submitted its 30% plan set to the Department and asked for comments by April 26th. (Exhibit 1036, PDF 5) Mercer Island staff returned comments to Sound Transit on May 7, 2019. (Exhibit 1036, PDF 2 & 3) On or about February 25, 2020, a Sound Transit staffer asked Mercer Island when Sound Transit would get the City’s 30% plans review comments. City staff advised the Sound Transit staffer that they had been sent on May 7, 2019. On February 26, 2020, the Sound Transit staffer acknowledged receipt of the comments. (Exhibit 1036R, PDF 1 & 2)
- 2.5. On February 25, 2020, Sound Transit and Mercer Island staff held a meeting to review the 30% plans. Sound Transit’s notes from that meeting indicate that they confirmed their “understanding of [the] permit path;” the notes do not spell-out that path. (Exhibit 1036R, PDF 7) They note that bus layover bays are proposed on both sides of North Mercer Way, but that the “City Council has not agreed to north side layover”. (Exhibit 1036R, PDF 8) “Building permit required for retaining walls on north side of roundabout if over 4ft tall”. (Exhibit 1036R, PDF 8) Sound Transit “would convey ROW to City post-construction.”¹⁰ (Exhibit 1036R, PDF 8)

A Sound Transit staffer (Justin Lacson (“Lacson”)) testified that Mercer Island did not submit any comments to Sound Transit in response to Sound Transit’s meeting notes.

- 2.6. DEA submitted the 60% plans to Sound Transit on or about April 3, 2020. (Antony Wilen {DEA} testimony) Mercer Island sent its review comments to Sound Transit in or around May, 2020, and Sound Transit provided its responses in or around July 2020.¹¹ The comments and responses are contained in a matrix with each comment having a unique alpha-numeric identifier. The most relevant items from the 60% plans review comments matrix (Exhibit 1050) are:

Item Number/PDF Page	Mercer Island Comment	Sound Transit Response
CPD10/PDF 14	The north side of the roundabout/sidewalk and the flow control structure and access	ST [sic] proposes to dedicate both properties on north side of roundabout to city as ROW; as code requirements

⁹ Frequently Asked Questions.

¹⁰ “ROW” = right-of-way.

¹¹ The dates for these actions are a little unclear, in part because the most recent e-mail in the chain is undated. (Exhibit 1050, PDF 1)

HEARING EXAMINER DECISION

RE: APL21-001 (Sound Transit v. Mercer Island)

May 3, 2021

Page 10 of 32

	driveway are proposed to be on private property. This area will need to be dedicated to the City as right of way. Check with City planning staff to discuss what is required to dedicate only a portion of the parcels as right of way if that's what you're planning to do.	make the remaining property undevelopable.
CPD34/PDF 17	It appears that a public facility (i.e. stormwater vault) is proposed on the a residentially zoned property to the north of the roundabout. MICC 19.02.010(C)(1) requires that public facilities obtain a Conditional Use Permit (CUP). Please apply for a CUP prior to construction permit application for the stormwater vault.	The stormwater facility is collecting water from city street. ST plan is to dedicate the property to CMI [City of Mercer Island] as right of way.
CPD39/PDF 18	Please clarify the intended land use status of the properties located to the north of the proposed roundabout. <ul style="list-style-type: none"> a. Will these properties remain as real property (private or public) or be dedicated as public right of way? b. If the properties will remain as real property, please include structural setbacks on plan set and confirm that utilities, including the proposed wall north of the roundabout, and the vault are located outside of required setbacks. c. If the property will be dedicated as public right-of-way, please describe how dedication will occur. 	ST plan is to dedicate the property to CMI as ROW.

Note that all three of these comments/responses deal with right-of-way dedication. In CPD34 the Department told Sound Transit that a CUP would be required for the detention vault as it was outside of the right-of-way. Sound Transit's response was simply that it planned to dedicate the private property to the City. In its CPD10 response Sound Transit said that all of Parcels A and B would be dedicated to the City since "the remaining property [would be] undevelopable." None of the responses mentioned timing or partial dedication.

- 2.7. Mercer Island approved the Construction Management Plan (Exhibit 1056) for the MITI project on August 20, 2020 (according to Hoffman's testimony) or on December 1, 2020 (according to the Department's Interim Director, Yamashita's, testimony).

HEARING EXAMINER DECISION

RE: APL21-001 (Sound Transit v. Mercer Island)

May 3, 2021

Page 11 of 32

2.8. A 90% plans “walk-through” occurred on September 3, 2020. (Exhibit 1039) The most relevant items from the 90% plans review comments matrix (Exhibit 9) are:

Item Number/PDF Page	Mercer Island Comment	Sound Transit Response
CPD12/PDF 2 & 3 (formerly CPD10)	60% - CPD10 explained that a CUP permit would be needed prior to construction permit for improvements on residentially zoned property and asked for additional information. Sound Transit’s Designer Response was that “Sound Transit plan is to dedicate the property to CMI as right of way.” The City has received no proposed conveyance terms or other documentation from Sound Transit since this Designer Response at 60%. If conveyance and operating cost terms are not agreed upon prior to application submittal, the City	ST’s legal counsel will respond
CPD34/PDF 6 & 7	60% - CPD34 explained that a CUP permit would be needed prior to construction permit for improvements on residentially zoned property and asked for additional information. Sound Transit’s Designer Response was that “Sound Transit plan is to dedicate the property to CMI as right of way.” The City has received no proposed conveyance terms or other documentation from Sound Transit since this Designer Response at 60%. If conveyance terms and operating cost terms are not agreed upon prior to application submittal, the City may include a condition prohibiting all work on the roundabout, its related improvements, and the stormwater vault until Sound Transit obtains City approval of same.	ST’s legal counsel will respond
CPD38/PDF 8 (formerly CPD39)	60% - CPD39. Sound Transit’s response said, “Sound Transit plan is to dedicate the property to CMI as ROW”. The comment was not fully addressed regarding part	ST’s legal counsel will respond

	<p>c, "If the property will be dedicated as public right-of-way, please describe how dedication will occur". The City has received no proposed conveyance/dedication terms or other documentation from Sound Transit since this Designer Response at 60%. If conveyance terms are not agreed upon prior to application submittal, the City may include a condition prohibiting all work on the roundabout, its related improvements, and the stormwater vault until Sound Transit obtains City approval of conveyance terms.</p>	
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The Department had raised the same issues in the 60% plans review. This time Sound Transit's response was simply that its attorneys would respond. In this review the Department expressly stated that it might have to bar work on Parcels A & B until they were dedicated.

- 2.9. A fundamental question that was unclear during the lead-up to the filing of Sound Transit's applications was exactly what permits Sound Transit needed from Mercer Island for the MITI project.

The first time the document record indicates that a permit list was specifically shared between the Department and Sound Transit was July 7, 2020.¹² On that date Sound Transit sent the Department a list of permits that Sound Transit believed it needed to acquire plus one that it might need to acquire from Mercer Island. (Exhibit 23¹³) The list included:

Permit Type	Number Required	Comments in the list
Building	1	For roundabout retaining walls
Stormwater	3	
Right-of-way Use	3	Geo-tech work, roundabout, bus shelters
Demolition	2	Parcel A & B residences
Clear and Grade	1	Grading Parcels A & B; possibly not needed if Parcels A & B were right-of-way
Tree removal	3	Parcel A, Parcel B, right-of-way
Side Sewer	3	Parcel A disconnect, Parcel B disconnect, reroute third sewer line

¹² One Sound Transit witness (Lacson) testified that Sound Transit sent the permit list to Mercer Island on April 9, 2020. The permit list that is part of Exhibit 23 is undated. At least two of the e-mails in the chain that comprises PDF 1 – 3 in Exhibit 23 indicate that a permit matrix was attached to those e-mails. The Examiner cannot determine which version is represented by PDF 4 & 5.

¹³ The list also included one permit each from King County and the Washington State Department of Transportation, neither of which is listed here.

Water Service Abandonment	2	Parcel A, Parcel B
80 th Frontage Improvements	1	New work on 80 th
Fire Hydrant	1	If any hydrant is added or relocated
Conditional Use (“maybe”)		“Construction of public facilities (i.e. roadway, curb/gutter, sidewalk/path, stormwater vault) on private property - if the property is not conveyed to the City.”

At one time the permit list included a Site Development Permit (“SDP”). On July 14 and September 9, 2020, the Department sent Sound Transit revised versions of the permit list. By September 22, 2020, the SDP had been removed from the list of required permits; Sound Transit asked for confirmation of that fact. The Department provided the requested confirmation on September 23, 2020: “I [Patrick Yamashita, then Interim Department Director] realized that all of that work should fall under the ROW permit so I removed the Site Development permit from the list.” (Exhibit 23, PDF 2 & 3)

On October 12, 2020, Sound Transit provided the Department with a list of the permit applications it would be submitting shortly: Clear and Grade permits, Tree removal Permits, Stormwater Permit, Right-of-way Use Permit, and Building Permit. (Exhibit 1039, PDF 1)

- 2.10. The MICC lists Tree Removal, Right-of-way Use, and SDP applications as “Type I” land use applications. [MICC 19.15.030] Type I application “reviews are based on clear, objective and nondiscretionary standards or standards that require the application of professional expertise on technical issues.” [MICC 19.15.030(A)] Building and grading permits are regulated under Chapter 17.14 MICC. They are also nondiscretionary.

The term “Site Development Permits” is used nowhere in the MICC other than in MICC 19.15.030 where it is listed as a Type I application. On August 11, 2020, Sound Transit requested submittal requirements guidance for the applications it was then preparing. In response the Department provided a form entitled “Submittal Requirements for Site Development/Plat Improvement,” (Exhibit 1037, PDF 1 & 2) That form lays out in considerable detail submittal requirements and procedures for developing a subdivision: Clearing and grading, utilities, stormwater management facilities, streets, etc. (Exhibit 1037, PDF 3 – 9) The instructions state that “[t]he applicant/developer shall construct all plat improvements prior to recording of the final plat and prior to the issuance of a building permit.” (Exhibit 1037, PDF 3)

The Department testified that it initially thought an SDP would make a good master application, but later dropped the SDP from the list of required permits because the MICC lacked any review criteria or procedural guidance for an SDP. (Yamashita testimony)

- 2.11. Another point of some uncertainty in the time leading up to Sound Transit’s submittal of its applications was which parts, if any, of the proposal required issuance of a building permit. The Department’s position is that retaining walls over four feet high and underground stormwater vaults would require building permits if constructed outside public right-of-way, but not if constructed within public right-of-way. Further, the Department’s position is that a Right-of-way Use Permit

HEARING EXAMINER DECISION

RE: APL21-001 (Sound Transit v. Mercer Island)

May 3, 2021

Page 14 of 32

cannot apply to any land outside of a dedicated right-of-way. (Exhibit 1036R, PDF 8; Yamashita testimony)

- 2.12. A third issue that arose before submittal of the applications was dedication of all or portions of Parcels A and B as right-of-way. Throughout the process documented in the preceding Findings of Fact Sound Transit consistently stated that it would dedicate Parcels A and B to the City as right-of-way. At some points it simply said it would dedicate the right-of-way without stating when; at other times it clearly stated its intent to dedicate right-of-way after construction had been completed. Sound Transit also stated that it intended to dedicate the entirety of Parcels A and B to Mercer Island as it felt the residual of those lots would be unusable after construction of the roundabout and the stormwater vault. (Exhibits 1023R, PDF 2; 1036R, PDF 8; 1046; 1050)

Sound Transit has now presented Sound Transit Resolutions regarding disposal of excess property and testimony that it says require it to maximum the value of any property which it acquired with Federal funds but no longer requires (excess property). (Exhibits 1012; 1013; Joanna Valeri (“Valeri”) {Sound Transit}, Beckman testimony)

On June 29, 2020, Sound Transit and Mercer Island staff held a meeting at which dedication of Parcels A and B was discussed. Sound Transit’s notes of that meeting state that Parcel A would be “too small to develop post construction per City code” and that “[v]ery little [of Parcel B would be] remaining post-construction.” (Exhibit 1053) There was apparently substantial discussion about how to dedicate the two parcels, but no one present for either party had any definite guidance to present. (Exhibit 1053)

- 2.13. The approved plan set depicts the entirety of Parcels A and B as part of the project, with landscaping plans for all portions of each that are not within the actual construction zone. (Exhibit 3) Parcels A and B are zoned R-8.4. (Exhibit 24) The R-8.4 zone is a single-family residential zone. [MICC 19.02.005] The minimum permissible area for a lot in the R-8.4 zone is 8,400 square feet (“SF”). [MICC 19.02.020(A)]

Approximately 8,100 SF of Parcel A will not be physically encumbered with project improvements. (Exhibit 1015) A little less than 1,000 SF of Parcel B will remain unencumbered after construction of the stormwater vault. (Exhibit 1016) That latter number is not reliable for two reasons. First, plans for the stormwater vault have not been prepared. Instead, Sound Transit requested, and the Department approved, deferral of structural plan preparation until later in the process. Thus, the actual configuration of the vault is an unknown. (Exhibit 17)

Second, pipes conveying stormwater to and from the vault will crisscross Parcel B. (Exhibit 3, PDF 33)

Neither residual area would qualify as a legal lot.

- 2.14. A final significant issue prior to submittal of the applications was whether a Conditional Use Permit (“CUP”) was needed for construction of the stormwater vault on Parcel B. In Mercer Island, public

rights-of-way are not zoned. [MICC 19.01.040(G), especially subsections (1) and (5)] Therefore, work within the public right-of-way is not regulated by the zoning code. Permitted uses in the R-8.4 zone do not include “stormwater detention vault” (or anything similar). [MICC 19.02.010(A)] Among the conditional uses in the R-8.4 zone are government services,¹⁴ public facilities,¹⁵ and utilities.¹⁶ [MICC 19.02.010(C)(1)]

The Department’s position has consistently been that a stormwater vault is a government service, public facility, and/or utility, thus requiring a CUP if constructed on private property. The Department has consistently stated that construction of the stormwater vault on Parcel B requires a CUP unless Parcel B has been conveyed to the City as right-of-way before its construction begins. The record in this proceeding shows that the Department stated that position to Sound Transit as early as Spring, 2020. (Exhibit 1050) In August, 2020, Sound Transit explained why it disagreed with the department in a lengthy e-mail. (Exhibit 18) Sound Transit testified that the Department never responded to that e-mail.¹⁷ (Lacson testimony) Eventually (on October 20, November 5, December 4, and December 22, 2020) the parties’ attorneys exchanged letters about right-of-way dedication and CUP applicability. (Exhibits 1055; 1054; 1046; 1047) The exchange of letters did not resolve the issues.

2.15. The Department held a pre-application meeting with Sound Transit on October 13, 2020.¹⁸

On October 21, 2020, Sound Transit sent the Department its notes (which were dated October 20, 2020) from the pre-application meeting. (Exhibit 7, PDF 1) The notes include the following statements: “ST [*sic*] stated that it intends to convey the two residential properties to City post-construction.” “ST [*sic*] clarified [it had] letters from both property owners that we can apply for permits. Mercer Island staff indicated that the letters will suffice.” “To facilitate more efficient review, ST [*sic*] will provide the City with a master permit set, the City would then build all associated permits off the master plan set. ROW Use permit to be master permit for project.” (Exhibit 1038, PDF 2)

¹⁴ “*Government Services*: Services provided by the city, King County, the state of Washington, or the federal government including, but not limited to, fire protection, police and public safety activities, courts, administrative offices, and equipment maintenance facilities.” [MICC 19.16.010, “G” definitions]

¹⁵ “*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.” [MICC 19.16.010, “P” definitions] “*Structure*: That which is built or constructed, an edifice or building of any kind, or any piece of work artificially built up or composed of parts joined together in some definite manner.” [MICC 19.16.020, “S” definitions]

¹⁶ “*Utilities*: Facilities providing infrastructure services by a public utility or private utility regulated by the state through fixed wires, pipes, or lines. Such facilities may include water, sewer, storm water facilities (lines, ditches, swales and outfalls) and private utilities such as natural gas lines, telecommunication lines, cable communication lines, electrical lines and other appurtenances associated with these utilities. “Utilities” does not include wireless communication facilities, but does include small cell facilities.” [MICC 19.16.020, “U” definitions]

¹⁷ It was at about that time that the former Director of the Department (Maxim) resigned to work for another city. He was replaced on an interim basis by Yamashita, until the current Interim Director Jeff Thomas (“Thomas”) was hired in Fall, 2020. [Lacson, Yamashita, Thomas testimony]

¹⁸ The date for the pre-application meeting was set on September 18, 2020. (Exhibit 1039)

HEARING EXAMINER DECISION

RE: APL21-001 (Sound Transit v. Mercer Island)

May 3, 2021

Page 16 of 32

On October 22, 2020, Yamashita sent an e-mail to Sound Transit stating that “it appears there are discrepancies [in the notes of the pre-application meeting], and I don’t believe the notes accurately reflect the meeting.” (Exhibit 7, PDF 1)

On October 28, 2020, Yamashita sent a “red-lined” version of Sound Transit’s pre-application meeting notes to Sound Transit. (Exhibit 7, PDF 10 & 11) Yamashita made numerous edits to the notes, adding significant text, including the following points: That the Department had asked about property conveyance in its 60% and 90% plan reviews; that right-of-way conveyance would have to be accepted by the City Council; and that if Parcels A and B were not conveyed to the City before construction, Sound Transit would have to obtain a CUP. (Exhibit 7, PDF 7)

On November 4, 2020, Sound Transit sent the final version of its pre-application meeting notes to the Department. Sound Transit accepted all of Yamashita’s changes. (Exhibit 7, PDF 10, 12 – 14; Lacson testimony)

- 2.16. Sound Transit filed its applications on or about October 23, 2020. The Right-of-way Use Permit application was assigned application number 2010-186. (Exhibits 4, PDF 1 & 2; 12, PDF 3) A building permit application was never assigned an application number. (Exhibit 4, PDF 5) The stormwater permit application was assigned application number 2012-119. (Exhibits 4, PDF 6 – 41; 12, PDF 3) Two clear and grade permit applications were assigned application numbers 2012-153 (Parcel A) and 2012-154 (Parcel B). (Exhibits 4, PDF 3 & 4; 12, PDF 3) Based on the application numbers, the only application that was assigned an application number when it was filed is Right-of-way Use Permit application 2010-186. The others were assigned numbers during the month of December, 2020.¹⁹
- 2.17. Sound Transit’s applications went through three “Completeness Review” cycles before approval. After each review Mercer Island sent an e-mail to Sound Transit identifying items needed before the application package could be considered complete.
 - A. Sound Transit made its first “Completeness check permit package submittal” on October 23, 2020. (Exhibit 1040, PDF 1) The Department issued its first Completeness Review on October 28, 2020. The Department reported that Sound Transit’s tree, clear and grade, and stormwater applications were complete. It noted that the right-of-way use application was incomplete due to questions about conveyance of Parcels A and B. “Sound Transit’s responses to 60% and 90% comments were that real property will be conveyed by Sound Transit to the City as ROW.” It further noted that details about the vault and some other matters were needed. The review made no direct mention of the CUP issue. (Exhibit 5, PDF 1 - 4)

¹⁹ The application numbering scheme is: XXYY-ZZZZ where XX is the last two digits of the year, YY is the two digit month, and ZZZZ is a sequential application number for the month. [Official notice] Thus, the applications with numbers starting 2012 were assigned application numbers in December, 2020.

HEARING EXAMINER DECISION

RE: APL21-001 (Sound Transit v. Mercer Island)

May 3, 2021

Page 17 of 32

- B. Sound Transit made its second “Completeness check permit package submittal” on November 6, 2020. (Exhibit 1040, PDF 1) The Department issued its second Completeness Review on November 12, 2020. The Department reported that Sound Transit’s tree, clear and grade, and stormwater applications were complete. It noted that the right-of-way use application was incomplete due to questions about conveyance of Parcels A and B. “Sound Transit’s responses to 60% and 90% comments were that real property will be conveyed by Sound Transit to the City as ROW.” It further noted that details about the vault and some other matters were needed. The review made no direct mention of the CUP issue. (Exhibit 5, PDF 5 - 7)
- C. Sound Transit made its third “Completeness check permit package submittal” on November 20, 2020. (Exhibit 1040, PDF 1) The Department issued its third Completeness Review on November 25, 2020. The Department reported that Sound Transit’s tree, clear and grade, and stormwater applications were complete and that the right-of-way use application would be complete upon payment of the required application fee. The review made no direct mention of the CUP issue. (Exhibit 5, PDF 8 & 9)
- 2.18. On December 22, 2020, the Department issued Right-of-way Use Permit 2010-186 as a master permit for the MITI Project. The Permit was approved with conditions, one of which (Condition XIII.A) denied construction of the bus layover bay on the north side of North Mercer Way. The individual permits included within the master permit were not listed in the Right-of-way Use Permit. (Exhibit 22)
- 2.19. On December 28, 2020, the Department invoiced Sound Transit for five permit applications: Right-of-way Use Permit #2 (2010-186), Clear & Grade Permit #1 (2012-153), Clear & Grade Permit #2 (2012-154), Stormwater Permit (2012-119), and Tree Removal Permit - ROW + Residence 1 + Residence 2 (2012-096). (Exhibit 12, PDF 3)

Also on December 28, 2020, the Department explained the disposition of the applications: “During the review process, the building permit requirement was eliminated, and we decided to issue just one tree permit to cover the whole project instead of three permits (one for the ROW and two for the residential properties).” (Exhibit 13, PDF 1)

On December 30, 2020, the Department sent Sound Transit an itemized cost breakdown for each of the five permits incorporated into the master Right-of-way Use Permit. (Exhibit 14, PDF 1 & 4)

Later on December 30, 2020, Sound Transit sent an e-mail to the Department objecting to consolidation of the tree permits and omission of the building permit. Sound Transit argued that a Right-of-way Use Permit cannot apply to land outside of the right-of-way. Since Sound Transit did not intend to dedicate any part of Parcels A or B to the City until after completion of construction, it believed it needed separate tree permits for tree work and a building permit for the vault and retaining wall on Parcels A and B. Sound Transit also asked if the conditions on the issued permit applied to all of the five permits. (Exhibit 15, PDF 1 & 2)

On January 5, 2021, the Department replied to Sound Transit's December 30, 2020, e-mail.

The reason a building permit was not issued is because City code section MICC 17.14, Section 105.2(2) exempts work in the public right of way from building permits. The City still performs structural plan review and structural inspection, but the mechanism for permitting this scope of work is the Right of Way Permit (in this case, permit 2010-186).

Regarding the tree permits, the City elected to simplify the tree permitting by issuing one tree permit to cover all removals and replacements for the whole project.

...

Concerning the applicability of the conditions of permit approval issued for ROW Permit 2010-186, the conditions do apply to the ancillary sub permits included in the permit package. The ancillary permits include 2012-153, 2012-154, 2012-119 and 2012-096.

(Exhibit 15, PDF 1)

2.20. Sound Transit filed its appeal on February 5, 2021. (Exhibit 2)

3. Conditions IV.A and IV.E

3.1 Conditions IV.A and IV.E read as follows:

A. The applicant shall comply with the traffic control plan attached to this permit.

...

E. Work that impacts traffic flow must be performed Monday – Friday 9:00 am – 3:30 pm, except legal holidays. Additional time restrictions may be added to this permit to mitigate construction impacts on traffic.

(Exhibit 1, PDF p. 4)

3.2. It became apparent during the hearing that Sound Transit and the City might be close to resolving their disagreement regarding the wording of Conditions IV.A and IV.E. The Examiner asked if they would be willing to work privately to develop mutually acceptable wording. They agreed to do so. The Examiner held the record open for submittal of the results of that effort.

3.3. On April 2, 2021, Sound Transit and the City submitted the following mutually acceptable wording for Conditions IV.A and IV.E:

A. The applicant shall comply with the traffic control plan attached to this permit. However, the contractor may submit a revised traffic control plan for City review.

- E. One lane, two-way traffic control (see traffic control plan drawing E07-TMP002) may only be performed Monday – Friday 9:00 am – 3:30 pm and as needed on Saturdays 9:00 am – 3:30 pm. Additional time restrictions may be added to this permit to mitigate one lane, flagger controlled construction impacts on traffic when frequent and significant traffic delays extend through intersections beyond the limits of the approved traffic control plan(s).

(Exhibit 9017.B; Exhibit 9017.A is the “red-line” version of the amended conditions)

4. Conditions VII.H and VII.I

4.1. Conditions VII.H and VII.I read as follows:

- H. Final asphalt restoration must be completed within 30 days of excavation unless an extension has been granted in advance. The limits of pavement restoration in the public right of way shall be determined by the City Engineer prior to final inspection of the project.
- I. Class B hot mix asphalt or polymer-modified cold asphalt (EZ Street or equal) shall be used for temporary asphalt patches. MC250 cold mix is not allowed. Temporary asphalt patches shall be marked “TEMP” in white paint. Permanent pavement restoration shall be completed within 30 calendar days.

(Exhibit 1, PDF p. 6)

- 4.2. It became apparent during the hearing that Sound Transit and the City might be close to resolving their disagreement regarding the wording of Conditions VII.H and VII.I. The Examiner asked if they would be willing to work privately to develop mutually acceptable wording. they agreed to do so. The Examiner held the record open for submittal of the results of that effort.

- 3.3. On April 2, 2021, Sound Transit and the City submitted the following mutually acceptable wording for Conditions VII.H and VII.I:

- H. Final asphalt restoration must be completed prior to substantial completion and inspection of each phase of construction in the traffic control plan(s). The limits of pavement restoration in the public right of way shall be limited to the approved permit plan set unless pavement has been clearly damaged beyond said limits.
- I. Class B hot mix asphalt or polymer-modified cold asphalt (EZ Street or equal) shall be used for temporary asphalt patches. MC250 cold mix is not allowed. Temporary asphalt patches shall be marked “TEMP” in white paint.

(Exhibit 9017.B; Exhibit 9017.A is the “red-line” version of the amended conditions)

5. Condition XIII.A

5.1. Condition XIII.A reads as follows:

A. New North Mercer Way bus bay

ROW permit application number 2010-186 proposes construction and use of a new curb cut on the north side of North Mercer Way with signage providing “No Parking (Bus only).” See e.g. Plan Sheets E07-CRP002, E07-CMP002, and E07-CMS002. Sound Transit has informed the City by letter from attorney Patrick Schneider dated October 20, 2020 that Sound Transit intends to “use this area as a bus bay for layovers and supplemental passenger drop-offs.” The use of the City’s ROW as a bus bay for layovers and passenger drop-off purposes are not uses authorized under a ROW permit in the Mercer Island City Code (MICC). Ch. 19.09. MICC. These uses are also prohibited by the terms of the 2017 Settlement Agreement Between the City of Mercer Island and The Central Puget Sound Regional Transit Authority (Sound Transit) for the East Link Project (“2017 Agreement”).

Permission to construct the curb cut is denied for the reasons stated above.

(Exhibit 1, PDF p. 11, underlining in original)

5.2. The Department’s position is that a Right-of-way Use Permit may authorize construction within a public right-of-way, but it may not authorize uses of the right-of-way. The Department is effectively saying that Sound Transit may construct the curb cut for the bus layover bay on the north side of North Mercer Way but it may not use it as a bus layover bay unless the City Council gives its approval. The Department posits that nothing in the MICC authorizes a bus layover bay within the right-of-way; only the City Council may authorize such a use of the City’s right-of-way. (Exhibit 9018; Yamashita testimony)

5.3. During the hearing the Department suggested that Sound Transit could apply for a Right-of-way Encroachment Permit under MICC 19.06.060 to use the constructed curb cut as a bus layover bay. (Yamashita testimony)

Section 19.06.060 MICC is entitled “**Encroachment into public right-of-way.**” [Bold in original]

An encroachment is any intrusion, irrespective of height or size, into a sidewalk, street, or other public right-of-way and includes, but is not limited to, fill material, retaining walls, rockeries, plants either deliberately planted or growing from adjacent property, or any other material or structures.

[Emphasis added] The parties do not dispute that a curb is a structure.²⁰ “An encroachment into a public right-of-way is not allowed without an encroachment agreement.” [MICC 19.06.060(B)] A “land owner” must submit an application for an encroachment agreement to the City Engineer. [MICC 19.06.060(C)] An encroachment agreement must “[s]pecify the rights and responsibilities of the city and the adjacent land owner for maintenance and eventual removal of the encroachment.” [MICC 19.06.060(D)(2), emphasis added] An agreement must also “[s]tate that the city shall be entitled to revoke an encroachment agreement at any time, with or without cause and without penalty or liability, and that the property owner shall return the property to the same or better condition than existed prior to the encroachment.” [MICC 19.06.060(D)(6), emphasis added] “An encroachment agreement runs with the land adjacent to and benefited from the encroachment.” [MICC 19.06.060(F), emphasis added] Once the “land owner” has been issued an encroachment agreement by the City Engineer, the land owner must then obtain a right-of-way use permit from the City Engineer. [MICC 19.06.060(G)] Nothing in MICC 19.06.060 provides a role for the City Council in the review and approval of an encroachment agreement.

5.4. Sound Transit’s position is that Mercer Island lacks authority to ban the bus layover bay on the north side of North Mercer Way. It argues that Mercer Island has no inherent authority over uses of public rights-of-way, only such authority as granted by the state. It argues that because of its status as a regional transit authority it does not need Mercer Island’s permission to use rights-of-way within Mercer Island. (Exhibit 9019, PDF 2, 3, & 5)

6. Condition XIII.B

6.1. Condition XIII.B reads as follows:

B. Conveyance of real property as ROW

ROW permit application number 2010-186 includes use of real property that is not City ROW. Specifically, King Count tax parcel numbers 5315101-838 and 5315101-837 (the “Tax Lots”) located north of North Mercer Way ROW are included in the ROW permit application for construction of portions of the roundabout, sidewalk, retaining wall, storm drainage vault and other improvements (the “Improvements”). See e.g. Plan Sheets E07-CRP001, E07-CDP001, E07-UCP001, E07-CMP001, E07-CLP001, E07-SWP001, E07-LHP001, and E07-LPP001. Real property must be City ROW to be included in a ROW permit. MICC 19.06.060.

ROW permit application number 2010-186 is therefore conditioned on the following:

1) Prior to any activity for construction of the Improvements on the Tax Lots, Sound Transit shall obtain the City’s acceptance of a conveyance by deed of the Tax Lots as City ROW.

2) Approved work in the existing City ROW may proceed prior to conveyance by deed of the Tax Lots if Sound Transit is able to show convenient,

²⁰ “*Structure*: That which is built or constructed, an edifice or building of any kind, or any piece of work artificially built up or composed of parts joined together in some definite manner.” [MICC 19.16.010, “S” definitions, emphasis added]

continual, safe vehicle and pedestrian access through the construction zone and obtain written approval of said access from the City Engineer.

3) Work approved on 80th Avenue SE is not affected by this condition.

(Exhibit 1, PDF pp. 11 & 12; underlining in original, double underlining added)

- 6.2. Sound Transit testified that it can take several months for it to go through the excess property disposal process. It also said that it must maximize the public value of any property bought with Federal funds. Sound Transit has also adopted a policy to support Transit Oriented Development (“TOD”) whenever it can when disposing of excess property.²¹ (Exhibits 1012; 1013; Beckman & Valeri testimony)
- 6.3. Sound Transit indicated for the first time during the hearing that it might transfer title to only a portion of Parcels A and B to the City. Sound Transit seemed to be leaning toward transferring all of Parcel B, but perhaps only part of Parcel A. (Valeri testimony) Sound Transit testified that the Department never identified a municipal use for the residual of Parcel A. (Beckman testimony) Sound Transit testified that Yamashita had said in June, 2020, that dedication of both Parcels A and B was appropriate. (Hoffman testimony) Mercer Island’s Deputy Director of Public Works for Operations testified that the City would prefer not to own the entire residual of Parcels A and B. (Alaine Sommargren testimony)
- 6.4. Sound Transit has never dedicated land as right-of-way until after it has completed construction of a facility. Sound Transit says that it sometimes needs area that will eventually become excess for staging and materials storage during construction. Further, it can’t safely select a dedication limit until the construction has been completed and the full extent of a project’s footprint is known. (Valeri testimony)

7. **Condition XIII.C**

7.1. Condition XIII.C reads as follows:

C. Operations and Maintenance Agreement

Pursuant to the 2017 Agreement, Sound Transit is solely responsible for all costs required to construct, implement, and operate the systems and facilities authorized under ROW permit number 2010-186. Prior to final inspection and acceptance by the City of the work and improvements authorized by ROW permit number 2020-186, Sound Transit shall obtain the City’s agreement to an Operations and Maintenance Agreement wherein Sound Transit agrees to reimburse the City for the future costs incurred for maintenance, repair and replacement of these systems and facilities. Upon final inspection and acceptance, Sound Transit must also provide the City with a Bill of Sale for the roundabout related infrastructure.

²¹ The parties agree that the residuals of Parcels A and B, whatever they end up being in the final analysis, would not be conducive for TOD development. (Testimony)

(Exhibit 1, PDF p. 12, underlining in original)

- 7.2. Condition XIII.C is based entirely on the provisions within the Settlement Agreement. (Exhibit 1051; Yamashita testimony)

LEGAL FRAMEWORK ²²

The Examiner is legally required to decide this case within the framework created by the following principles:

Authority

A Right-of-way Use Permit is a Type 1 administrative land use action. [MICC 19.15.030(E), Table A] An appeal from a Type 1 action is subject to an open record hearing before the Examiner. [MICC 19.15.030(E), Table B]

If the [Examiner] finds that there has been substantial error, or the proceedings were materially affected by irregularities in procedure, or the decision was unsupported by material and substantial evidence in view of the entire record, or the decision is in conflict with the city's applicable decision criteria, it may:

- a. Reverse the decision.
- b. Modify the decision and approve it as modified.
- c. Remand the decision back to the decision maker for further consideration.

[MICC 19.15.130(G)] The Examiner's decision on the appeal is final subject to the right of reconsideration and appeal to Superior Court. [MICC 19.15.030(E), Table B; MICC 3.40.110]

Review Criteria

1. If the [Examiner] finds that there has been substantial error, or the proceedings [below] were materially affected by irregularities in procedure, or the decision [below] was unsupported by material and substantial evidence in view of the entire record, or the decision [below] is in conflict with the city's applicable decision criteria, it may:
 - a. Reverse the decision.
 - b. Modify the decision and approve it as modified.
 - c. Remand the decision back to the decision maker for further consideration.
2. If the [Examiner] finds that none of the procedural or factual bases listed above exist and that there has been no substantial error, the [Examiner] may adopt the findings and/or conclusions of the decision body, concur with the decision of the decision body and approve the development proposal as originally approved, with or without modifications.

[MICC 19.15.130(G)(1) & (2)]

²² Any statement in this section deemed to be either a Finding of Fact or a Conclusion of Law is hereby adopted as such.

Vested Rights

“Vesting” serves to “fix” the regulations against which a development application is judged. [*Potala Village Kirkland, LLC v. City of Kirkland*, 183 Wn. App. 191 (2014), *review denied*, 182 Wn.2d 1004, 342 P.3d (2015)]

The City has adopted local regulations governing vesting of land use applications.

Complete applications for land use review of Type I land use reviews, building permits, conditional use permits, design review, short subdivisions and long subdivisions, shall vest on the date a complete application is filed. The department’s issuance of a letter of completion for Type III and IV land use decisions, as provided in this chapter, or the failure of the department to provide such a letter as provided in this chapter, shall cause an application to be conclusively deemed to be vested as provided herein.

[MICC 19.15.170(B)]

The vesting date of the Right-of-way Use application is November 30, 2020.

Vesting is not particularly important in this case as the City has made no development regulations changes that would affect these applications between the time the applications were filed and this date.

Standard of Review

The standard of review is preponderance of the evidence. The applicant has the burden of proof. [MICC 19.15.130(C)]

Scope of Consideration

The Examiner has considered: all of the evidence and testimony; applicable adopted laws, ordinances, plans, and policies; and the pleadings, positions, and arguments of the parties of record.

CONCLUSIONS OF LAW

1. General

- 1.1 It was Strother Martin, the prison camp Captain in the movie “Cool Hand Luke,” who uttered the famous line “What we’ve got here is failure to communicate.”

Failure to communicate is what has, at least in part, led to the present situation between Sound Transit and the Department. Sound Transit never made it clear to the Department until essentially the appeal (with but one exception) that it didn’t intend to dedicate any part of Parcels A and B to the City until after all construction was completed. Whenever the Department said a CUP would be needed if dedication did not occur, Sound Transit simply said it would dedicate those two parcels – but it left off the important qualifier “after completion of the work” - or it said its legal counsel would respond.

For its part, the record indicates that the Department apparently accepted Sound Transit's simple statement – we will dedicate – without ever asking for clarification as to when the dedication would occur or what would be dedicated.

- 1.2. And so they barreled along to issuance of the Right-of-way Use master permit. The Department hadn't seen any dedication, still believed that the stormwater vault and its accoutrements couldn't be built on private property under the aegis of a Right-of-way Use Permit, and hadn't seen a CUP application. Thus it imposed a condition requiring dedication before work on that part of the project could occur. Now, Sound Transit says it hasn't time to either dedicate Parcels A and B before construction begins or to apply for a CUP without adversely affecting its project schedule.
- 1.3. Both parties must understand that the Examiner cannot correct past mis-steps. Nor can the Examiner turn back the clock. The Examiner's obligation is to determine whether the Right-of-way Use Permit and its subordinate permits comply with the MICC as issued and, if they do not, to determine what changes are required to bring them into compliance. In undertaking that obligation the Examiner cannot factor the Settlement Agreement's provisions into the equation. The effect of the Settlement Agreement on all of this is within the purview of the judiciary.
- 1.3. Any Finding of Fact deemed to be a Conclusion of Law is hereby adopted as such.

2. Conditions IV.A and IV.E

- 2.1 The revised wording for Conditions IV.A and IV.E that was jointly proposed by Sound Transit and the City (Exhibit 9017) resolves their dispute over these conditions. Nothing more need be said.

3. Conditions VII.H and VII.I

- 3.1. The revised wording for Conditions VII.H and VII.I that was jointly proposed by Sound Transit and the City (Exhibit 9017) resolves their dispute over these conditions. Nothing more need be said.

4. Condition XIII.A

- 4.1. The City asserts in its closing argument that “the MICC [] does not authorize [a bus layover bay] in its current location - unless and until an agreement for same is reached with the City.” (Exhibit 9018, PDF 5:16 & 17) In support of that position the City cites MICC 19.01.040(G)(5). (Exhibit 9018, PDF 2:14) That code section reads:

Where a public street is officially vacated or abandoned, the land use classification applicable to the abutting property shall apply to such vacated or abandoned street. If a vacated street forms the boundary between two or more zones, the land use classifications of each abutting zone shall extend to the mid-point of the vacated street unless the planning commission recommends and the city council decides otherwise.

[MICC 19.01.040(G)(5), emphasis added] That code section clearly and unambiguously deals only with vacated or abandoned street rights-of-way. It has nothing to do with current rights-of-way. It addresses where zoning boundaries are to be set when a street right-of-way is vacated. It does not establish any procedure or policy regarding uses within a right-of-way. The Examiner is unaware of any provision in the MICC which sets up a process for the City Council to authorize or limit transit uses within a dedicated right-of-way. The zoning code most certainly does not contain any such provisions. Thus consistency with the zoning code is completely irrelevant where, as here, the use is located on property which is not subject to regulation by the zoning code.

- 4.2. The notion that a right-of-way encroachment agreement under MICC 19.06.060 should or could be the vehicle to authorize use of the new curb cut on the north side of North Mercer Way for a bus layover bay is wholly without merit. That code section is clearly not intended to address a regional transit provider's use of public right-of-way. It continually refers to the "adjacent landowner". Sound Transit will not be the adjacent landowner to the right-of-way where the bus layover bay is planned; Sound Transit won't own adjacent private property when the MITI Project has been completed.²³ The encroachment agreement process is clearly intended to address situations where, for example, a landowner wants to build a retaining wall behind his sidewalk within the public right-of-way, or where a shop owner wants to hang a sign above a sidewalk, etc. The right-of-way encroachment agreement as a valid option is a red herring.
- 4.3. The "elephant in the room" regarding this condition is the fact that the MITI plans include construction of a 3-bus layover bay on the south side of North Mercer Way directly opposite the proposed one-bus layover bay on the north side of North Mercer Way – and the Department has expressed no objection to it. If a Right-of-way Use permit is the wrong vehicle to authorize a bus layover bay on the north side of the street, how can it authorize a bus layover bay on the south side of the street? The Department's position is inconsistent.
- 4.4. This condition seems to have created an impossible situation: A Right-of-way Use Permit is not a vehicle by which Sound Transit can obtain permission to operate a bus layover bay on the north side of North Mercer Way according to the Department; bus layover bays are required to operate the MITI according to Metro and Sound Transit; the Department has offered no valid alternative permit process by which the north side layover bay could be approved. That situation violates RCW 36.70A.200, WAC 365-196-550(3)(d), and MICC 19.06.100(A)(2) in that it effectively prevents an approved EPF from being built.

It is also interesting in that the City apparently had no problem previously allowing construction of bus pick-up and drop-off bays on both sides of North Mercer Way. A bus layover bay looks just like a bus pick-up and drop-off bay. Further, the same busses will use both. And, according to Metro's testimony, busses using a layover bay will not be idling, whereas busses dropping-off and picking-up passengers will most likely be idling.

²³ Other than the Park and Ride which is south of the proposed bus layover bay.

The Examiner fails to see the difference. Whether bus layover bays violate the terms of the Settlement Agreement is a question to be considered by and in another forum. The Examiner finds no basis in code to deny permission for a bus layover bay on one side of a street under a Right-of-way Use Permit while allowing a bus layover bay on the other side of the same street and bus drop-off and pick-up bays under a Right-of-way Use Permit. The Examiner will repeal this condition subject to resolution of the implications of the Settlement Agreement by and in another forum.

5. Condition XIII.B

5.1. Condition XIII.B was based on two facts: Sound Transit’s unwavering insistence near the end of the application review process that it would only dedicate all (or part) of Parcels A and B to the City after completion of construction; and the Department’s beliefs that a Right-of-way Use Permit cannot apply to land outside of dedicated right-of-way and that a stormwater detention vault can only be constructed on R-8.4-zoned private property under the auspices of a CUP. There is no question but that once it fully stated its position Sound Transit was adamant that property dedication would only occur after completion of construction when it could do so with the certainty that it wasn’t dedicating property that it would need.

Given those two positions, Condition XIII.B as written was the Department’s only option (short of denying the application).

5.2. In hindsight, Sound Transit should have been more forthright (specific) with the Department early in the process when the divergent positions became known. For quite awhile Sound Transit simply stated that it intended to dedicate necessary right-of-way – without ever clearly saying when it intended to make such a dedication. During that time the Department was saying that Parcels A and B had to be dedicated right-of-way in order for construction of the stormwater vault to occur. While the record indicates that Sound Transit and the Department discussed details of how to make the transfer, it does not indicate that they ever really addressed the question of when to make the transfer.

5.3. The Department’s position on the stormwater vault, however, is at least partially flawed. To require issuance of a CUP, a proposed use must be listed as a conditional use in the zone in which it is to be constructed. Here, the Department hangs its hat on the notion that a stormwater vault constructed by Sound Transit for the benefit of and for dedication to Mercer Island qualifies as a “government service,” “public facility,” and/or “utility.” Where an ordinance defines specific terms used within that ordinance, the definitions control the meaning of those terms. [*HJS Development, Inc. v. Pierce Cty.*, 148 Wn.2d 451, 472, 61 P.3d 1141 (2003)] There can be no doubt that a stormwater vault is a structure, as it is clearly something composed of parts arranged in a logical order. Given the example list in the definition of “government services,” it would be quite a stretch to hold that a stormwater vault is a government service on the order of fire stations, court buildings, and city halls. But it would not be such a stretch to liken a stormwater vault to public works maintenance structures and yards. It would be a stretch to hold that it is a public facility: To say that it is used by the general public in the same sense as are schools, auditoriums, libraries, and theaters does not make a lot of common sense. Whether it is a utility or not is perhaps the most vexing question of all. Sound Transit is not a public utility as it is not in the business of providing any of the services listed in the

HEARING EXAMINER DECISION

RE: APL21-001 (Sound Transit v. Mercer Island)

May 3, 2021

Page 28 of 32

definition. Based solely on that reality, the stormwater vault built by Sound Transit would not be a utility as it would not have been built by a public utility. But once it is turned over to the City it would become a utility because the City does operate public utilities. In sum, the proposed stormwater vault might qualify as a public facility.

This presents a conundrum not dissimilar from another conundrum that dogs this issue. If Parcels A and B were now public right-of-way, this entire issue would be moot: Right-of-way is not zoned; zoning regulations do not apply within right-of-way; the Right-of-way Use Permit would have been able to properly cover construction of the entire roundabout, the retaining wall, and the needed stormwater vault. Dedicate Parcels A and B first and it doesn't matter whether the vault is a public facility because it would be within public right-of-way where the zoning strictures don't apply; dedicate after construction and maybe you can't even build it. On the other hand, requiring a CUP to construct something that won't need a CUP after its construction seems pointless.

- 5.4. This makes no sense. The Department has never said the roundabout, retaining wall, and stormwater vault can't or shouldn't be built. Rather, a perceived technicality is stopping approval of part of an EPF. No local regulation may act to bar an EPF. [RCW 36.70A.200, WAC 365-196-550(3)(d), and MICC 19.06.100(A)(2)] Unfortunately, that is the practical effect of what has happened here.
- 5.5. The developer of a subdivision is required to construct utility systems, including stormwater control facilities, and streets before the plat can be recorded; the plat must be recorded to legally create the lots and the street rights-of-way which serve them. Thus, by law, a subdivision developer must construct roads and utilities before the land they are located on becomes public land. That is essentially the same thing that needs to happen here.

The MICC lists "Site Development Permit" as a Type I land use application. But, oddly, "Site Development Permit" is never again mentioned in the MICC. That notwithstanding, it does exist in Mercer Island's regulatory system as a Type I application. The lack of review criteria does not erase SDP from the list of Type I permits.

- 5.6. An SDP could be a vehicle to solve the turnaround, retaining wall, and stormwater vault conundrum. An SDP could be conditioned to function as does the platting process: The project property could be required to be dedicated to the City after construction, but before final approval and acceptance of the facility by the City. The Examiner cannot issue a permit. Thus, for an SDP to be a way out of this conundrum, the Examiner would have to issue a directed remand of Condition XIII.B for issuance of an SDP containing certain minimum requirements.

Some might argue that other possible solutions are for Sound Transit to dedicate Parcels A and B now or apply for a CUP. Either of those options could solve the problem, but both would likely have a more adverse effect on Sound Transit's project timeline – and have no benefit other than adherence to a process.

The Examiner sees no reason why Sound Transit should not be given the choice of which course to take.

- 5.7. Sound Transit has, at least in part, created its own problem regarding how much of Parcels A and B need to be dedicated to the City. Right up until the hearing Sound Transit was saying that it would dedicate the parcels after construction. None of its communications said anything about having to maximize public value or foster TOD; none of its communications said that it would dedicate only a part of each lot. The submitted plans clearly include the entirety of both Parcels A and B within the project. Proposed site landscaping has been designed for the entirety of both lots right up to the furthest edges.

There does not seem to be any argument against dedication of all of Parcel B. It's residual area would be too small and chopped up to be of any practical use to anyone.

There seems to be agreement that the residual of Parcel A is too small and poorly situated to be used for any TOD. Further, the residual of Parcel A is too small to exist as a legal lot in the R-8.4 zone, so Sound Transit cannot simply do a boundary line adjustment to shrink the size of the lot. It would appear that Sound Transit is left with but four options: Attach the residual to one of the abutting parcels (north or east); split the residual and attach part of it to each of the abutting parcels; dedicate the residual to the City as right-of-way; or a combination of the second and third options. Neither the Examiner, the City, nor Sound Transit can force the adjoining property owners to buy or accept the residual. That solution must remain a private matter between Sound Transit and the abutting property owners. If the SDP process is used to resolve this issue, it must include those options.

6. **Condition XIII.C**

- 6.1. Condition XIII.C is based entirely on the provisions within the Settlement Agreement. Interpretation of those provisions is beyond the scope of the Examiner's authority. Therefore, the Examiner lacks the authority to strip Condition XIII.C from the permit as Sound Transit desires. To do so would require the Examiner to pass a substantive judgement to the effect that the condition did not belong on the permit. The Examiner declines to disturb Condition XIII.C in any way. It is up to a different tribunal to pass judgment on Condition XIII.C.

DECISION

Based upon the preceding Findings of Fact and Conclusions of Law, and the testimony and evidence submitted at the open record hearing, the Examiner **GRANTS IN PART** the appeal of Right-of-way Use Permit 2010-0186 and its subordinate permits:

- A. Conditions IV.A and IV.E are **REVISED** to read as follows based upon the language agreed to by and between Appellant and Respondent:
- A. The applicant shall comply with the traffic control plan attached to this permit. However, the contractor may submit a revised traffic control plan for City review.

HEARING EXAMINER DECISION

RE: APL21-001 (Sound Transit v. Mercer Island)

May 3, 2021

Page 30 of 32

- E. One lane, two-way traffic control (see traffic control plan drawing E07-TMP002) may only be performed Monday – Friday 9:00 am – 3:30 pm and as needed on Saturdays 9:00 am – 3:30 pm. Additional time restrictions may be added to this permit to mitigate one lane, flagger controlled construction impacts on traffic when frequent and significant traffic delays extend through intersections beyond the limits of the approved traffic control plan(s).
- B. Conditions VII.H and VII.I are **REVISED** to read as follows based upon the language agreed to by and between Appellant and Respondent:
- H. Final asphalt restoration must be completed prior to substantial completion and inspection of each phase of construction in the traffic control plan(s). The limits of pavement restoration in the public right of way shall be limited to the approved permit plan set unless pavement has been clearly damaged beyond said limits.
- I. Class B hot mix asphalt or polymer-modified cold asphalt (EZ Street or equal) shall be used for temporary asphalt patches. MC250 cold mix is not allowed. Temporary asphalt patches shall be marked “TEMP” in white paint.
- C. Condition XIII.A is **REPEALED** subject to resolution of the implications of the Settlement Agreement by and in another forum.
- D. Condition XIII.B is **REMANDED** for processing as and issuance of a Site Development Permit for those portions of the MITI Project that are outside of current right-of-way limits. The Site Development Permit must include:
- i. A provision requiring dedication to the City after construction, but before final approval and acceptance by the City, of the MITI Project elements outside of the current right-of-way.
 - ii. A provision providing four options for disposition of the residual (excess) portion of Parcel A: Attach the residual to one of the abutting parcels (north or east); split the residual and attach part of it to each of the abutting parcels; dedicate the entire residual to the City as right-of-way; or a combination of the second and third options.
 - iii. A provision providing for dedication of the entirety of Parcel B to the City as right-of-way.
- AS AN ALTERNATIVE** to the Remand and SDP procedures spelled out above, Sound Transit may opt to accept Condition XIII.B as is and dedicate property in accordance with i., ii., and iii., above, prior to any work outside the present right-of-way.
- E. **DENIES** the appeal with respect to Condition XIII.C for the reasons set forth above.

Decision issued May 3, 2021.

|s/ John E. Galt

John E. Galt
Hearing Examiner

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NOTICE of RIGHT of RECONSIDERATION

This Decision is final subject to the right of any party of record to file with the Department of Community Planning & Development a written request for reconsideration within ten calendar days following the issuance of this Decision in accordance with the procedures of MICC 3.40.110. Any request for reconsideration must allege one or more of the following errors: “1. The decision was based in whole or in part on erroneous facts or information; 2. The decision when taken failed to comply with existing laws or regulations applicable thereto; or 3. An error of procedure occurred that prevented consideration of the interests of persons directly affected by the decision.” [MICC 3.40.110(A)] See MICC 3.40.110 for additional information and requirements regarding reconsideration.

NOTICE of RIGHT of APPEAL

“Any judicial appeal of the hearing examiner’s decision shall be filed in King County superior court pursuant to Chapter 36.70C RCW, the Land Use Petition Act (‘LUPA’). The land use petition must be filed within 21 days of the issuance of the hearing examiner’s decision.” [MICC 3.40.100, ¶ 2]

²⁴ The official Parties of Record register is maintained by the City’s Hearing Clerk.

HEARING EXAMINER DECISION

RE: APL21-001 (Sound Transit v. Mercer Island)

May 3, 2021

Page 32 of 32

The following statement is provided pursuant to RCW 36.70B.130: “Affected property owners may request a change in valuation for property tax purposes notwithstanding any program of revaluation.”