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**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 RESPONSE TO  
CITY OF MERCER ISLAND’S  
MOTION FOR RECONSIDERATION**

Sound Transit submits this response to the City’s May 12<sup>th</sup> motion for reconsideration. Sections A through D of this Response use the same headings as the corresponding sections of the “City’s Motion,” which in fact is brought by the Department, not by the City. The Hearing Examiner is the City’s decision-maker; the Department is the party moving for reconsideration of what would otherwise have been the City’s final Decision.

As discussed below, the Department’s motion rests on flawed premises, factual assertions that contradict the evidence in the record, and unsworn testimony of the Department’s attorneys, offered after the close of evidence, about the interpretation and effect of the very Settlement Agreement that they successfully persuaded the Hearing Examiner to disregard in his Decision.

**SOUND TRANSIT’S RESPONSE TO CITY OF  
MERCER ISLAND’S MOTION FOR  
RECONSIDERATION - 1**

**FOSTER GARVEY PC  
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SEATTLE, WASHINGTON 98101-3292  
PHONE (206) 447-4400 FAX (206) 447-9700**

1 **A. “Finding Relating to Essential Public Facility”**

2 Sound Transit agrees that East Link is the EPF at issue rather than Sound Transit itself,  
3 and Sound Transit has no objection if the Hearing Examiner wishes to clarify Finding of Fact  
4 1.3. Clarification is unnecessary, however, because such clarification is irrelevant to the  
5 remainder of the Hearing Examiner’s Decision, which makes it clear that East Link is the EPF at  
6 issue, for example in Conclusion of Law 4.4.

7 **B. “Findings Regarding Settlement Agreement Terms**

8 The Department asks that Finding of Fact 2.1 “be stricken in its entirety,” not because it  
9 is inaccurate but because, according to the City, it is “not relevant” and “will potentially conflict  
10 with findings of fact and conclusions of law subsequently made in the appropriate forum for  
11 Settlement Agreement disputes.”

12 Sound Transit objects to the Department’s motion to strike Finding of Fact 2.1. The  
13 Department does not identify any inaccuracy in this Finding, so there’s no merit to the City’s  
14 asserted concern that it “will potentially conflict” with future findings and conclusions. The  
15 Finding is based on evidence in the record to which the Department did not object when it was  
16 presented, and the Department should not be heard after the hearing to object to the relevance of  
17 evidence it did not object to when offered.

18 **C. “Findings Relating to North Side Bus Layover”**

19 The Department asks the Hearing Examiner to “correct” Finding of Fact 1.9 to state the  
20 145-foot-long bus layover is long enough for one bus to pull in and out. Sound Transit objects to  
21 this “correction” because it serves no purpose other than to further the City’s efforts to limit  
22 Metro’s operations. The Hearing Examiner’s finding does not impose a permit condition that  
23 either authorizes or prohibits Metro from using the layover in a particular way, but the  
24 Department’s request is an obvious attempt to limit Metro from using the north layover area for  
25 more than one bus at a time.

1 The language to which the Department objects is a parenthetical in a long sentence that  
2 explains the utility of the layover area (the italics are added to depict the language the City asks  
3 the Hearing Examiner to strike):

4 The plan will construct a turnaround at the 77<sup>th</sup>/North Mercer Way intersection to  
5 allow busses to U-turn at that location, thus obviating the need for regional buses  
6 to travel through the Mercer Island Town Center, add a 145-foot long bus layover  
7 bay along the north side of North Mercer Way between the Park and Ride  
8 driveway and the 77<sup>th</sup> roundabout (*long enough for one articulated bus or two  
9 standard 40-foot long busses*), and create an approximately 230-foot-long bus  
10 layover on the south side of North Mercer Way between the 77<sup>th</sup> roundabout and  
11 the current bus stop bay.

12 The Department’s objection to Finding of Fact 1.9 is unrelated to any issue in this appeal,  
13 and instead is an expression of the City’s improper effort to limit Metro’s operations even though  
14 Metro is not a party to this appeal. The testimony that the Department itself refers to says that  
15 the 145-foot long bus layover is big enough for an articulated bus, and the Hearing Examiner  
16 made a reasonable inference that 145 feet is long enough for two 40-foot buses. The relevant  
17 fact for purposes of this appeal is that the layover area that Condition XIII.A prohibits is 145 feet  
18 long; the issue of how many buses will use that 145-foot-long area will depend on Metro’s future  
19 decisions about its operations, not on Finding of Fact 1.9.

20 **D. “Findings and Conclusions Regarding South Side Bus Bays”**

21 Sound Transit objects to every aspect of the Department’s request in section D of its  
22 Motion, which asks the Hearing Examiner to strike more of Finding of Fact 1.9 than it moved to  
23 strike in section C of its motion; to strike the entirety of Conclusion 4.3; and to strike a sentence  
24 from Conclusion 4.4. The Department supports its request by making false assertions about the  
25 evidence in the record, and by presenting improper, unsworn testimony from the Department’s  
26 attorneys about an issue that the Department persuaded the Hearing Examiner he did not have  
jurisdiction to consider.

The City’s motion repeatedly makes the false assertion that the plans for the MITI Project  
do not include construction of the bus layover area on the south side of North Mercer Way. The

1 plans do include such construction, as the Hearing Examiner accurately stated in the Finding and  
2 Conclusions to which the City objects.

3 Attached to this Response are copies of three sheets from the approved plan set, Exhibit  
4 3. Sheet 1 (E07-CRY002) shows the typical street sections. Detail 5 at the top of the page  
5 specifically identifies bus layover areas on both the north and south sides of North Mercer Way.  
6 The other two attached sheets, E07-CRP002 and E07-CMP002, provide detail about these north  
7 and south side layover areas. Both sheets include a hashed line that shows the boundary between  
8 the WSDOT Limited Access Area to the south and the City's street right-of-way to the north:  
9 this dashed line is easiest to see on Sheet E07-CMP002 where it is labeled "WSDOT LIMITED  
10 ACCESS." A small portion of the southern layover area falls within the WSDOT Limited  
11 Access Area, but a significant portion of the proposed south side bus layover area falls within the  
12 Mercer Island street right-of-way. Condition XIII.A prohibits construction of the north side bus  
13 layover only, thereby approving construction of the south side bus layover within the City's  
14 street that is depicted on these three plan sheets. The Hearing Examiner correctly concluded that  
15 the non-discretionary ROW Permit improperly prohibited the construction of bus layover space  
16 on the north side of the street while authorizing a similar facility on the south side of the same  
17 street.

18 The Department's motion asserts repeatedly and falsely that these plan sheets do not  
19 depict such construction of a bus layover area on the south side of North Mercer Way. Most  
20 specifically:

21 **At Page 4, lines 3-5 the Department asserts** (underline in original):

22 Critical here, the Right-of-way permit approval of the Exhibit 3 plans set does not  
23 include new construction for a bus bay on the south side of North Mercer Way.  
24 The existing south side bus bay pavement was not extended or replaced in the  
25 approved plans. . . .

26 **At page 4, line 25 to page 5, line 1 the Department asserts** (underline in original):

As explained above, the Exhibit 3 approved plans do not authorize construction or  
use of any bus layover bays on the south side of North Mercer Way. No such

1 construction or use was applied for by Sound Transit in Exhibit 3 or the permit  
2 applications in Exhibit 4.

3 **At page 5, lines 9 – 12 the Department asserts** (underline in original):

4 . . . the Right-of-way Use Permit under appeal did not include approval for use of  
5 bus layover or drop-off/pick-up bays on the south side of North Mercer Way or  
6 even for construction of the same.

7 The Hearing Examiner’s Findings and Conclusions accurately reflect the content of  
8 Exhibit 3, and the Department’s motion does not. Relying on its false assertions about the  
9 record, the Department asks the Hearing Examiner to strike another clause from the same  
10 sentence in Finding of Fact 1.9 to which the Department objects in section C of its motion: (the  
11 italicized portion of this quoted sentence is the language that the Department asks the Hearing  
12 Examiner to delete in section C of its motion; the underlined clause is the language that the  
13 Department asks be stricken in section D of its Motion):

14 The plan will construct a turnaround at the 77<sup>th</sup>/North Mercer Way intersection to  
15 allow busses to U-turn at that location, thus obviating the need for regional buses  
16 to travel through the Mercer Island Town Center, add a 145-foot long bus layover  
17 bay along the north side of North Mercer Way between the Park and Ride  
18 driveway and the 77<sup>th</sup> roundabout (*long enough for one articulated bus or two*  
19 *standard 40-foot long busses*), and create an approximately 230-foot-long bus  
20 layover on the south side of North Mercer Way between the 77<sup>th</sup> roundabout and  
21 the current bus stop bay.

22 Based on the same false assertions about the record, the Department also asks the  
23 Hearing Examiner to strike the entirety Conclusion of Law 4.3:

24 The “elephant in the room” regarding this condition is the fact that the MITI plans  
25 include construction of a 3-bus layover bay on the south side of North Mercer  
26 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 busy layover bay on the south  
side of the street? The Department’s position is inconsistent.

And the Department asks the Hearing Examiner to strike one sentence from Conclusion  
of Law 4.4:

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

1 bay on the other side of the same street and bus drop-off and pick-up bays under a  
2 Right-of-way Use Permit.

3 This Finding, and these Conclusions, accurately reflect both Exhibit C and the testimony  
4 in the record and the Department's baseless motion should be denied.

5 In addition to making false assertions about the record, the Department also attempts to  
6 support its motion by making unsworn (and disputed) assertions about the meaning of the  
7 Settlement Agreement, even though the Department persuaded the Hearing Examiner to exclude  
8 such evidence before the hearing. On February 16<sup>th</sup> the Department brought its Partial Motion to  
9 Dismiss for Lack of Jurisdiction, arguing that "The MICC does not delegate to the Hearing  
10 Examiner the authority to interpret and enforce settlement agreements/contracts between the City  
11 and a third party." In response the Hearing Examiner issued his prehearing Order on March 2,  
12 2021:

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

21 Yet the Department's Motion for Reconsideration includes assertions such as these by the  
22 Department's attorneys. On page 3, lines 20 – 22:

23 Consistent with its position at the hearing, the City is allowing bus layover use on  
24 the south side of North Mercer Way because the City Council agreed to the same  
25 in the 2017 Settlement Agreement.

26 Later on page 3 at lines 23 – 24:

... staff is not approving that use through a Right-of-way permit. Council  
approved it in a contract with Sound Transit: specifically, the Settlement  
Agreement.

Such assertions are examples of the very "[t]estimony, evidence, and/or argument  
regarding the content and applicability of the Settlement Agreement" that the Department  
persuaded the Hearing Examiner to prohibit the parties from presenting. Except that this

1 testimony from the Department's attorneys is even more improper because it is presented in an  
2 unsworn, post-hearing motion without factual foundation in the record for the attorneys'  
3 testimony. Sound Transit specifically requested that the Hearing Examiner accept evidence  
4 regarding the Settlement Agreement to support the conclusion that the City had consented to the  
5 configuration of the MITI Project, but the Department persuaded the Examiner to reject that  
6 request and Sound Transit was unable to present the case it had prepared on the issue. Yet now  
7 that the record is closed, the Department asks the Hearing Examiner to accept unsworn  
8 representations regarding the Settlement Agreement as evidence that the City consented to bus  
9 layovers on the south side of the street and not the north side. Sauce for the gander is sauce for  
10 the goose. The Department is as bound by the Examiner's interlocutory orders as is Sound  
11 Transit, and the Examiner should disregard the Department's belated and unsworn testimony  
12 regarding the Settlement Agreement.

13 The record before the Hearing Examiner demonstrates that Sound Transit profoundly  
14 disagrees with the Department's post-hearing testimony about what the City Council agreed to in  
15 the Settlement Agreement: as already explained in Sound Transit's Closing Argument, neither  
16 Sound Transit nor Metro need the City Council's permission to make transit use of a city street.  
17 Sound Transit applied for construction permits, not use permits. The Hearing Examiner should  
18 deny the Department's motion for reconsideration.

19 Dated this 19<sup>th</sup> day of May, 2021.

21 s/ Stephen G. Sheehy  
22 Stephen G. Sheehy, WSBA #13304  
23 Managing Legal Counsel  
24 CENTRAL PUGET SOUND  
25 REGIONAL TRANSIT AUTHORITY  
26 401 S. Jackson St.  
Seattle, WA 98104  
Telephone: 206-398-5000  
Email: stephen.sheehy@soundtransit.org

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*s/Patrick J. Schneider*  
*s/Steven J. Gillespie*  
*s/Michelle Rusk*

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Michelle R. Rusk, WSBA # 52826  
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*Attorneys for Petitioner*

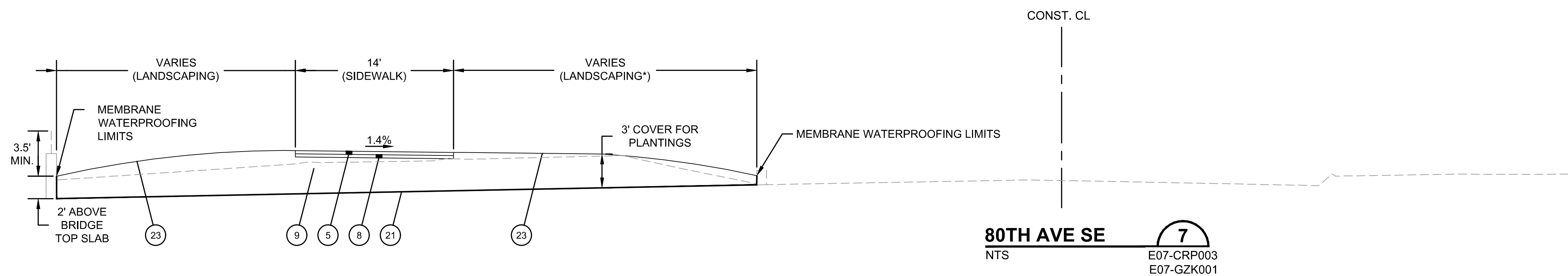
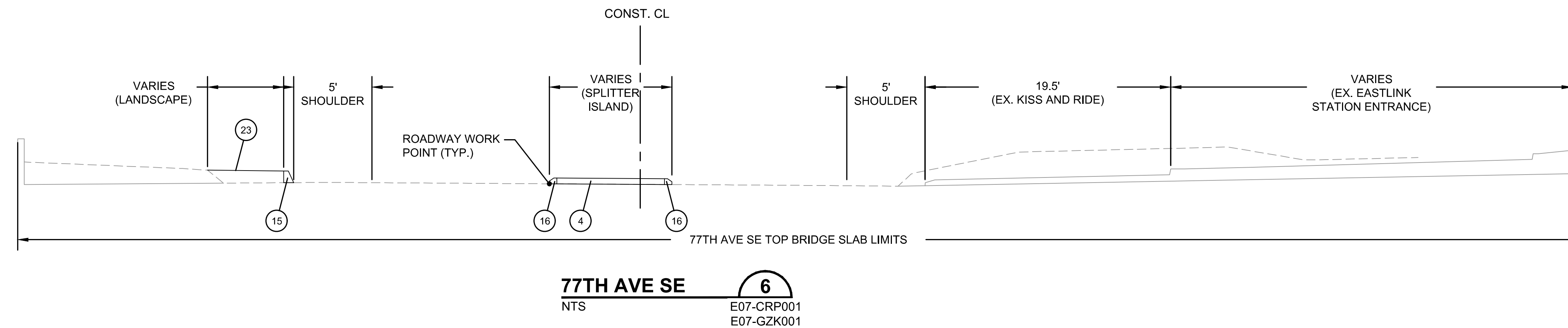
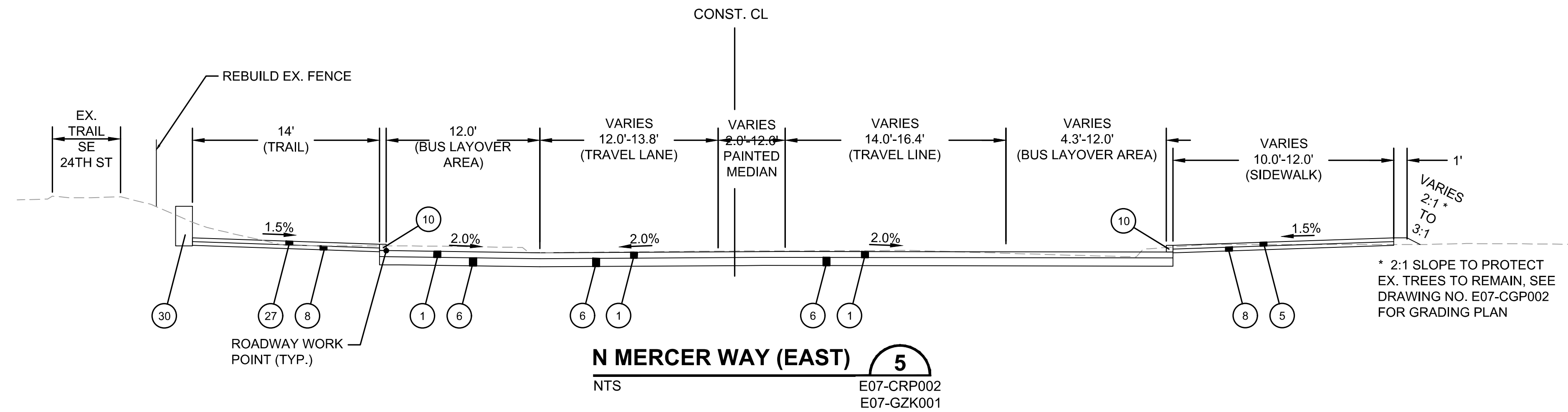


**CONSTRUCTION NOTES**

- 1 0.83' CEMENT CONCRETE PAVEMENT. SEE DRAWING NOS. E07-LHP001 TO E07-LHP-003 FOR JOINT LAYOUT.
- 4 0.33' PATTERNED CONCRETE, SEE DRAWING NOS. E07-CRP004 FOR SPLITTER ISLAND PLAN AND E07-CRD001 FOR CONCRETE DETAILS.
- 5 CEMENT CONCRETE SIDEWALK PER WSDOT STD. PLAN F-30.10-03 WITHOUT SMOOTH TROWELED EDGES.
- 6 0.50' CSBC.
- 8 0.50' CSTC.
- 9 GRAVEL BORROW, DEPTH VARIES.
- 10 CEMENT CONCRETE TRAFFIC CURB PER DETAIL ON E07-SWD005.
- 15 CEMENT CONCRETE TOP BRIDGE SLAB CURB PER PER DRAWING NO. E07-SWD005.
- 16 MOUNTABLE CEMENT CONCRETE TRAFFIC CURB PER DRAWING NO. E07-SWD005.
- 21 EXISTING MEMBRANE WATERPROOFING LAYER TO REMAIN. REPAIR AS NEEDED.
- 23 PLANTING SOIL. SEE DRAWING NOS. E07-LPP001 TO E07-LPP003 FOR LANDSCAPE PLAN.
- 27 0.33' HMA CL. 1/2 IN. PG 58H-22. (TWO LIFTS)
- 30 SOLDIER PILE WALL

**GENERAL NOTES**

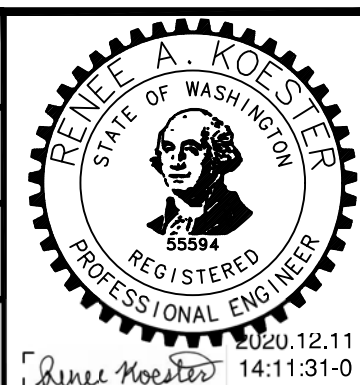
- 1. SEE DRAWING NOS. E07-CRP001 TO E07-CRP003 FOR ROADWAY PLANS AND ROUNDABOUT LAYOUT.
- 2. CEMENT CONCRETE BRIDGE TOP SLAB OVER I-90 SHALL NOT BE REMOVED OR DAMAGED AS PART OF THIS PROJECT. ALL WORK ON THE BRIDGE TOP SLAB SHALL BE DOWELED ONTO OR MOUNTED ON TOP THE EXISTING DECK.
- 3. EXISTING MEMBRANE WATERPROOFING LAYER ON I-90 BRIDGE TOP SLAB SHALL NOT BE DISTURBED BY CONSTRUCTION ACTIVITIES. CONTRACTOR SHALL EXCAVATE TO MEMBRANE AND REPAIR AS NEEDED.



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**ISSUED FOR BID**

DESIGNED BY:  
R. KOESTER  
DRAWN BY:  
O. AHRENSFELD  
CHECKED BY:  
M. FELIBERTI  
APPROVED BY:  
A. WILEN



**DAVID EVANS AND ASSOCIATES INC.**  
14432 SE Eastgate Way, Suite 400  
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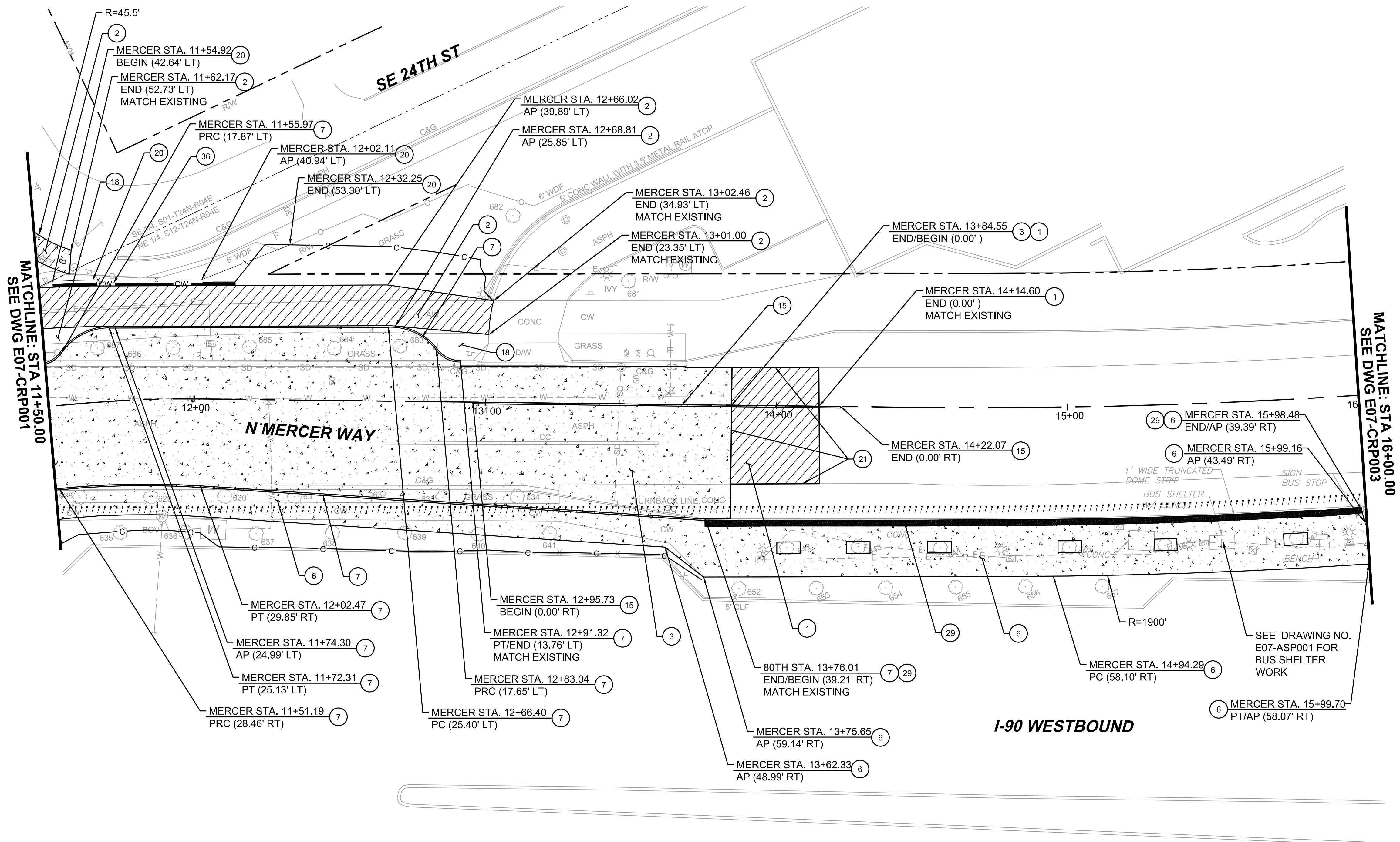
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CONTRACT No.:  
RTA/AE 0072-19  
DATE:  
12/11/2020

**EAST LINK EXTENSION  
MERCER ISLAND TRANSIT INTERCHANGE**  
77TH AVE SE, 80TH AVE SE, & N MERCER WAY  
TYPICAL SECTIONS

DRAWING No.:  
**E07-CRY002**  
LOCATION ID:  
E07  
SHEET No.:  
9 OF 104  
REV:  
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No.	DATE	DSN	CHK	APP	REVISION

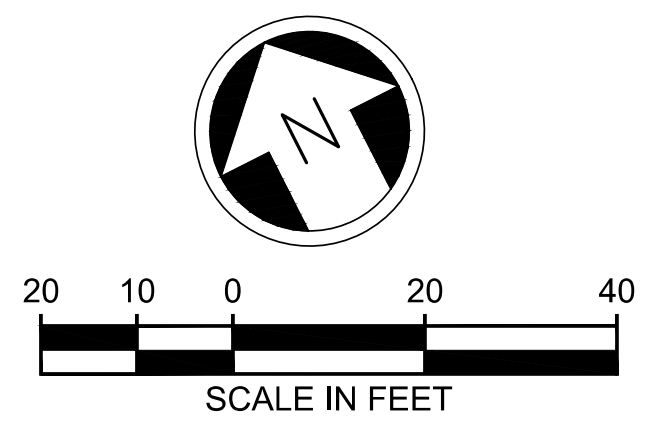
SUBMITTED BY: A. WILEN DATE: 12/11/2020 REVIEWED BY: M. LU DATE: 12/11/2020



- CONSTRUCTION NOTES:**
- ① 0.67' HMA CL. 1/2 PG 58H-22 (THREE LIFTS).
  - ② 0.33' HMA CL. 1/2 PG 58H-22 (TWO LIFTS).
  - ③ 0.83' CEMENT CONCRETE PAVEMENT.
  - ⑥ CEMENT CONCRETE SIDEWALK PER WSDOT STD. PLAN F-30.10-03, SEE DRAWING NOS. E07-LHP001 TO E07-LHP003 FOR HARDSCAPE PLANS.
  - ⑦ CEMENT CONCRETE TRAFFIC CURB PER DETAIL ON E07-SWD005.
  - ⑮ CEMENT CONCRETE, TYPE 6, EXTRUDED CURB PER WSDOT STD. PLAN F-10.42-00.
  - ⑱ PROPOSED LANDSCAPED AREAS, SEE DRAWING NOS. LPP001-LPP003 FOR LANDSCAPING PLANS.
  - ⑳ REBUILD WOOD FENCE WITH SALVAGED MATERIALS
  - ㉑ HMA TRANSITION JOINT PER WSDOT STD. PLAN A-40.10-04.
  - ㉒ INSTALL 2' WIDE DETECTABLE WARNING SURFACE PER WSDOT STD. PLAN F-45.10-02 ALONG BACK OF EXISTING CURB.
  - ㉓ SOLDIER PILE WALL, SEE DRAWING NOS. E07-SWP001 AND E07-SWW001 FOR STRUCTURAL WALL PLANS AND PROFILES.

- GENERAL NOTES:**
1. SEE DRAWING NOS. E07-CRY001 TO E07-CRY003 FOR TYPICAL SECTIONS.
  2. SEE DRAWING NOS. E07-CSP001 TO E07-CSP003 FOR T.E.S.C. AND SITE PREPARATION PLANS.
  3. SEE DRAWING NO. E07-CRP004 FOR TRAFFIC ISLAND DETAILS.
  4. SEE DRAWING NOS. E07-CDP001 TO E07-CDP003 FOR DRAINAGE PLANS.
  5. SEE DRAWING NOS. E07-CMP001 TO E07-CMP003 FOR CHANNELIZATION & SIGNING PLANS.
  6. SEE DRAWING NOS. E07-UCP001 TO E07-UCP003 FOR UTILITY PLANS.
  7. SEE DRAWING NOS. E07-LPP001 TO E07-LPP003 FOR LANDSCAPING PLANS.

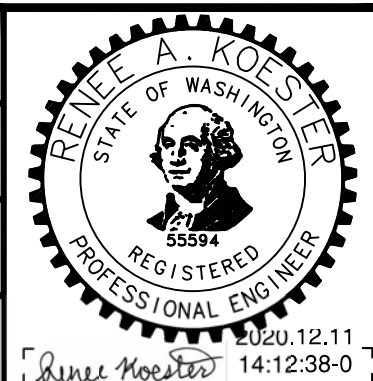
- LEGEND:**
- HOT MIX ASPHALT PAVEMENT
  - CEMENT CONCRETE PAVEMENT



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**ISSUED FOR BID**

DESIGNED BY:  
R. KOESTER  
DRAWN BY:  
O. AHRENSFELD  
CHECKED BY:  
M. FELIBERTI  
APPROVED BY:  
A. WILEN



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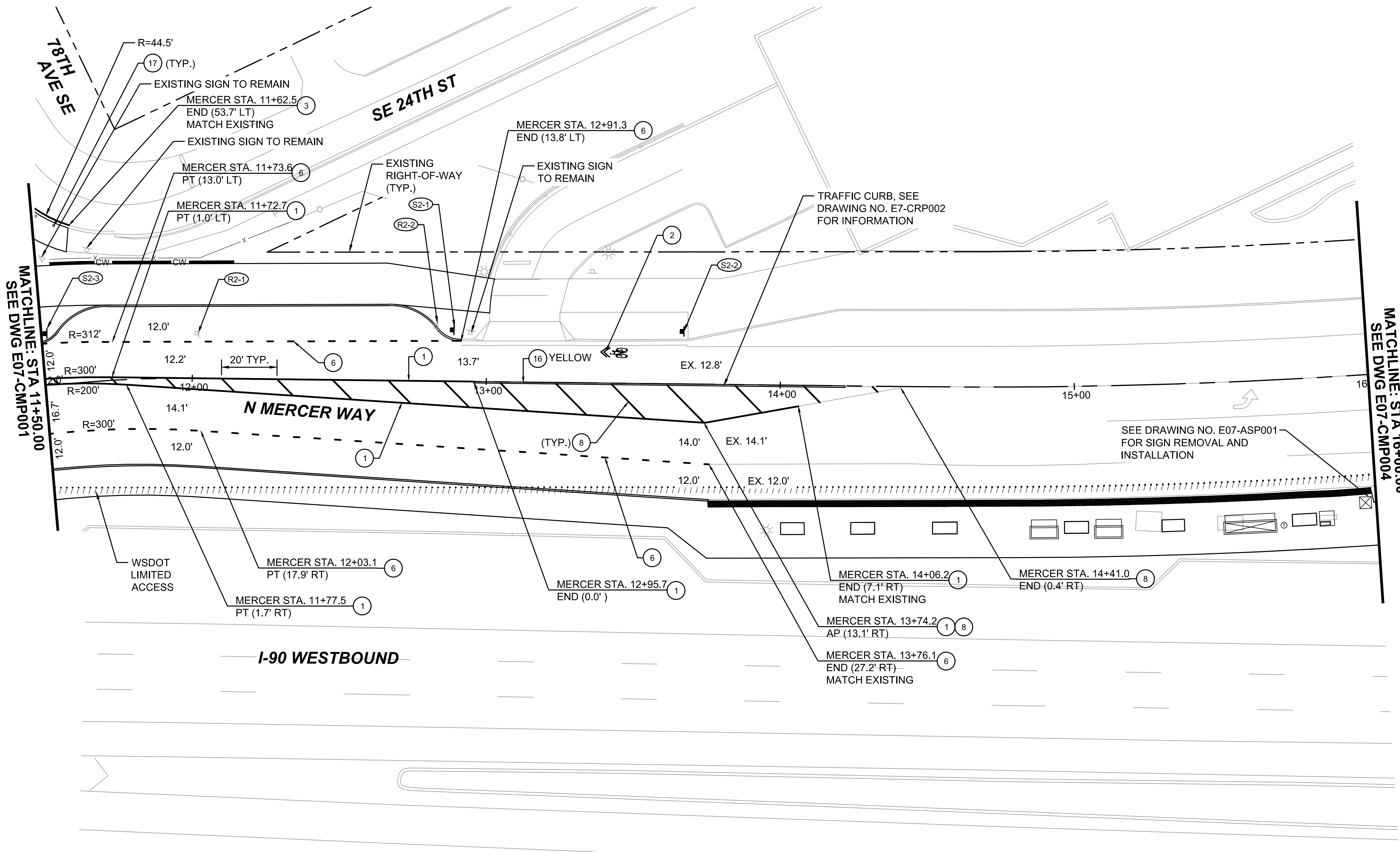


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CONTRACT No.:  
RTA/AE 0072-19  
DATE:  
12/11/2020

**EAST LINK EXTENSION  
MERCER ISLAND TRANSIT INTERCHANGE**  
77TH AVE SE, 80TH AVE SE, & N MERCER WAY  
ROADWAY AND PAVING PLAN

DRAWING No.:  
**E07-CRP002**  
LOCATION ID:  
E07  
SHEET No.:  
21 OF 104  
REV:  
0

SUBMITTED BY: A. WILEN DATE: 12/11/2020 REVIEWED BY: M. LU DATE: 12/11/2020



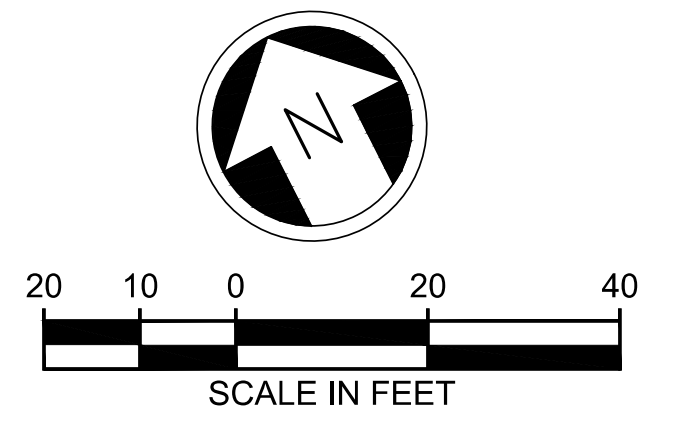
- CHANNELIZATION NOTES:**
- ① YELLOW DOUBLE CENTERLINE RPMS PER CITY OF MERCER ISLAND STD. DETAIL TR-7A.
  - ② BICYCLE SHARROW SYMBOL PER CITY OF MERCER ISLAND STD. DETAIL TR-16.
  - ⑥ WHITE WIDE DOTTED LANE LINE PER WSDOT STD. PLAN M-20.10-02.
  - ⑧ YELLOW CROSSHATCH MARKING PER WSDOT STD. PLAN M-24.60-04.
  - ⑨ YELLOW EDGE LINE PER WSDOT STD. PLAN M-20.10-02.
  - ⑯ PAINT CURB, COLOR AS NOTED.
  - ⑰ INSTALL FLEXIBLE GUIDE POST, SURFACE MOUNT AT 7' O.C. PER WSDOT STD. PLAN M-40.10-03.

- GENERAL NOTES**
1. SEE DRAWING NOS. E07-CMS001 AND E07-CMS002 FOR SIGN SCHEDULE.
  2. ALL STRIPING WITHIN WSDOT RIGHT OF WAY TO BE PROFILED PLASTIC LINES, TYPE "D" MMA PLASTIC, PER WSDOT STD. PLAN M-20.20-02, UNLESS OTHERWISE NOTED.
  3. CONTRACTOR SHALL REMOVE ALL EXISTING CONFLICTING CHANNELIZATION MARKINGS

- LEGEND**
- (R#) REMOVE SIGN
  - (S#) INSTALL SIGN
  - ◻ EXISTING SIGN
  - ◼ PROPOSED SIGN

**CHANNELIZATION SYMBOL SCHEDULE**

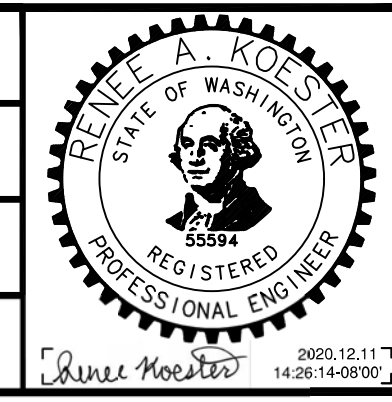
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	N. MERCER WAY	
	13+43.8	10.3' LT



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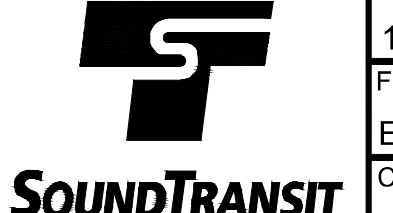
**ISSUED FOR BID**

DESIGNED BY:  
R. KOESTER  
DRAWN BY:  
O. AHRENSFELD  
CHECKED BY:  
M. FELIBERTI  
APPROVED BY:  
A. WILEN



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LINE IS 1" AT FULL SCALE



SCALE:  
1" = 20'  
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CONTRACT No.:  
RTA/AE 0072-19

**EAST LINK EXTENSION  
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CHANNELIZATION AND SIGNING PLAN

DRAWING No.:  
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LOCATION ID:  
E07  
SHEET No.:  
45 OF 104  
REV:  
0

SUBMITTED BY: A. WILEN      DATE: 12/11/2020      REVIEWED BY: M. LU      DATE: 12/11/2020

1 **DECLARATION OF SERVICE**

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

4 On the date indicated below, I caused **SOUND TRANSIT’S RESPONSE TO CITY OF**  
5 **MERCER ISLAND’S MOTION FOR RECONSIDERATION** to be filed with the Hearing  
6 Examiner for the City of Mercer Island and served on the persons listed below in the manner  
7 indicated:  
8

9 City of Mercer Island Hearing Examiner [ ] Via Facsimile  
John Galt [ ] Via Legal Messenger  
10 9611 SE 36<sup>th</sup> Street [X] Via E-mail  
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19 OFFICE OF THE CITY ATTORNEY [ ] Via Facsimile  
CITY OF MERCER ISLAND [ ] Via Legal Messenger  
20 Bio Park, WSBA No. 36994 [X] Via E-mail  
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24 *Attorneys for Plaintiff City of Mercer Island,*  
25 *Washington*

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8 *Attorneys for Plaintiff City of Mercer Island,*  
9 *Washington*

10 DATED this 19<sup>th</sup> day of May, 2021 at Seattle, Washington.

11 *s/Nikea Smedley*

12 \_\_\_\_\_  
13 Nikea Smedley, Legal Practice Assistant