

The Honorable Beth M. Andrus
Dept. 35, W-219
Hearing Date: April 13, 2017, @ 2:00 p.m.

SUPERIOR COURT OF WASHINGTON IN AND FOR KING COUNTY

CENTRAL PUGET SOUND REGIONAL
TRANSIT AUTHORITY, a regional transit
authority, d/b/a SOUND TRANSIT

No. 17-2-05191-8 SEA

and

**ORDER GRANTING PETITIONERS'
MOTION FOR PRELIMINARY
INJUNCTION AND WRIT OF
PROHIBITION**

WASHINGTON STATE DEPARTMENT OF
TRANSPORTATION, an agency of the State
of Washington responsible for construction and
operation of the State Highway System,

Plaintiffs/Petitioners,

v.

CITY OF MERCER ISLAND,
WASHINGTON, a code city,

Defendant/Respondent.

INTRODUCTION

Sound Transit brought this lawsuit seeking injunctive relief and writs of mandamus and/or prohibition to overturn four actions taken by the City of Mercer Island (City) relating to the East Link light rail project. The four actions are: (1) Ordinance No. 17-05 dated March 13, 2017 which imposed a six month moratorium on accepting and processing any permits for development of light rail in the I-90 right-of-way; (2) Ordinance No. 17-06 dated March 13, 2017 which imposed a six month moratorium on accepting and processing any permits relating to the siting of any essential public facility, including the East Link light rail project; (3) a March 16, 2017 decision

ORDER GRANTING IN PART MOTION AND APPLICATION OF
SOUND TRANSIT - 1

KING COUNTY SUPERIOR COURT
516 THIRD AVENUE, ROOM C-203
SEATTLE, WASHINGTON 98104
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1 of Scott Greenberg, Development Services Director for the City, to suspend processing of Sound
2 Transit’s building permit application for a light rail transit station; and (4) a March 16, 2017
3 Development Code Interpretation #17-01, issued by Mr. Greenberg on behalf of the City.

4 The Court considered the pleadings identified in Appendix A to this order and argument
5 of counsel. Based on these materials, the Court GRANTS the motion for a preliminary injunction
6 and the application for a writ of prohibition for the reasons set out below.

7 **FACTUAL BACKGROUND**

8 I-90 is a state limited access highway consisting of eight motor vehicle lanes, including
9 three general purpose lanes in each direction and two reversible high occupancy vehicle (HOV)
10 lanes in the center. *Freeman v. State*, 178 Wn.2d 387, 390, 309 P.3d 437 (2013).

11 In 1976, the cities of Seattle, Mercer Island, and Bellevue entered into an agreement with
12 King County, Metro, and the Washington State Highway Commission (the predecessor to the
13 Washington State Department of Transportation, or WSDOT), resulting in the present I-90
14 configuration. These governmental entities agreed that any future improvements to I-90 would
15 include two lanes dedicated for transit use, designed to be convertible to a “fixed guideway” (rail)
16 system.

17 Sound Transit and WSDOT spent several years planning a light rail system for the I-90
18 right-of-way and the use of the HOV lanes in conjunction with that system. They developed a
19 plan, known as “R-8A,” to restripe and add two HOV lanes to the outer lanes, new HOV access
20 ramps on Mercer Island, and improvements to HOV access at Bellevue Way. *Id.* at 391.

21 In 2004, the parties—including the City and Sound Transit—amended the 1976 agreement
22 to document the ultimate configuration of the light rail system and HOV lane designations. They
23 agreed that I-90 would be modified to allow a light rail system to be constructed in the center two
24 lanes and to redesignate new HOV lanes in the roadway immediately adjacent to the light rail lines.
25 In 2008, voters approved taxes to construct the East Link light rail line to serve Seattle, Mercer
26 Island, Bellevue, and Redmond in the I-90 right-of-way as contemplated by the 2004 addendum.

1 In 2011, WSDOT and Sound Transit entered into an umbrella agreement for the lease of
2 the center lanes for light rail. The agreement states that the center lanes will not be “presently
3 needed” for highway use once the new HOV lanes open and that WSDOT will transfer control of
4 the leased center lanes to Sound Transit once the replacement HOV lanes are open to traffic. *Id.*
5 at 392. The validity of this lease was upheld in *Freeman v. State*.

6 After the Washington Supreme Court issued its decision in *Freeman* in 2013, the City
7 entered into a 2014 Letter Agreement with Sound Transit relating to the permitting and design
8 review of the planned light rail transit station on Mercer Island. The City agreed:

9 The footprint of the Mercer Island Station is located entirely within the I-90 right-
10 of-way under the control of the Washington State Department of Transportation
11 (WSDOT). An Umbrella Agreement and Airspace Lease executed November 3,
12 2011, were entered into between Sound Transit and WSDOT for the construction,
13 operation and maintenance of the Mercer Island Station. WSDOT believes that a
14 city’s regulatory role is limited to issuance of administrative permits such as
15 building, mechanical, and electrical permits and that cities do not have the
16 jurisdiction to regulate or exercise land use discretion over the design and
17 construction of a high-capacity transportation facilit[y] located within State right-
18 of-way. This position and approach has been and will be consistently followed in
19 Seattle, Bellevue and Redmond for review and approval of other portions of the
20 East Link Project located within WSDOT right-of-way.

21 The City of Mercer Island appointed a Mercer Island Advisory Group (MIAG),
22 with concurrence of City Council, to review the architecture and art of Mercer
23 Island Station. ... The MIAG’s role is to review and provide recommendations for
24 the design of the Light Rail facility, via the City’s approval of a building permit for
25 the station. **Thus, the permitting process for the Mercer Island Station will be
26 administrative in nature, and will not consist of a land use action through Title
19 of the Mercer Island Municipal Code (emphasis added).**

27 This agreement was signed by Don Billen, Deputy Project Director for the East Link Project with
28 Sound Transit, and Noel Treat, the Mercer Island City Manager.

29 On June 9, 2016, Sound Transit submitted its building permit application for the Mercer
30 Island Station to the City. The City did not review the application to determine if it complied with
31 the City’s land use code, located in Title 19 of the Mercer Island City Code (MICC), because
32 neither Sound Transit nor the City’s Director of Development Services, Scott Greenberg, believed

1 then that the project was subject to those laws. On September 6, 2016, the City's Planning
2 Department notified Sound Transit that it had "approved" the station plans. The City's Building
3 Department began its review for compliance with the City's Construction Code, located in MICC
4 Title 17, in August 2016. It issued plan review comments in August, September, and November
5 2016. There appears to have been a miscommunication regarding Sound Transit's responses to
6 the last set of comments. Sound Transit thought it had transmitted the requested information to
7 the City via an FTP site in December 2016. The City has no record of receiving this material until
8 April 14, 2017, when the miscommunication came to light in this lawsuit. The City has not issued
9 the transit station permit because the Building Department's construction review has not yet been
10 completed.

11 On August 5, 2016, the Federal Highway Administration (FHWA) notified WSDOT and
12 the City that single occupancy vehicle (SOV) traffic cannot, under federal law, use the new I-90
13 HOV lanes. The FHWA noted that there could be solutions to ensure that Mercer Island residents
14 can continue to access I-90, such as designating the new HOV lanes for part-time HOV usage
15 during peak periods, designating the new lanes as toll lanes rather than HOV lanes to permit SOV
16 traffic to use the lanes at the prevailing price, or developing other mitigation such as new or
17 modified access points or other traffic improvements. On February 1, 2017, WSDOT sent a letter
18 to the City outlining various long-term proposals it had analyzed with the FHWA and City to
19 ensure access to I-90, including building a new ramp connecting Island Crest Way to the right side
20 of westbound I-90; converting some portion of the HOV lanes to toll lanes (which would require
21 legislative approval); and conversion of the R-8A HOV lanes to general purpose lanes between
22 Island Crest Way and Seattle. WSDOT indicated that while these various proposals are being
23 vetted, WSDOT intends to turn over the center lanes to Sound Transit to begin construction of East
24 Link light rail in the summer of 2017.

25 The City responded in two significant ways. First, it suspended Sound Transit's Shoreline
26 Substantial Development Permit (SSDP), an action Sound Transit challenged in *Central Puget*

1 *Sound Regional Transit Authority v. City of Mercer Island*, No. 17-2-05193-4. The Court ruled in
2 favor of Sound Transit in that matter and entered a preliminary injunction prohibiting the City
3 from revoking the SSDP.

4 Second, the City enacted the two moratoria at issue in this case. Ordinance No. 17-05
5 imposed a moratorium on accepting, processing, or issuing any building permit relating to the light
6 rail project in the I-90 right-of-way based on the assertion that the Mercer Island zoning code does
7 not permit such a use. Ordinance No. 17-06, invoking the Growth Management Act (GMA) and
8 the City’s comprehensive plan, imposed a moratorium on the acceptance, processing, or approval
9 of any building permits that (a) would cause intersections to decline below acceptable service
10 standards or that (b) relate to the siting or development of any “essential public facility,” including
11 the East Link light rail. The City noted it had not developed what is called a “transportation
12 concurrency ordinance” that complied with RCW 36.70A.070(6)(b), and it wanted to suspend
13 further development until it could adopt such an ordinance.

14 On February 22, 2017, Mr. Greenberg sent a letter to Sound Transit informing it that the
15 City was unable to continue reviewing the building permit for the Mercer Island Station for four
16 reasons: first, light rail was not a permissible use of the I-90 right-of-way under MICC Title 19;
17 second, the application was incomplete in that it failed to identify how Sound Transit intended to
18 comply with Mercer Island’s parking requirements in MICC Title 19; third, the application was
19 incomplete because it did not indicate how Sound Transit would meet the GMA’s concurrency
20 requirement; and fourth, the application did not provide adequate information to allow the City to
21 conduct a State Environmental Policy Act (SEPA) review. He wrote “[b]ecause the FEIS does not
22 analyze the adverse impacts caused by Mercer Island SOV traffic being unable to use the HOV
23 lanes, Sound Transit must prepare a Supplemental EIS (SEIS) for the East Link project.”

24 On March 16, 2017, Mr. Greenberg amended this letter. He withdrew his position that the
25 building permit application was “incomplete.” However, citing a Development Code
26 Interpretation of the same date, Mr. Greenberg reaffirmed his contention that—contrary to the

1 2014 Letter Agreement—the City’s zoning code **does** apply to this project. He also stated that
2 under this code, there was no provision permitting the use of light rail in the I-90 right-of-way. He
3 noted that the City was in the process of adopting an amendment to the zoning ordinance to rectify
4 this issue. Mr. Greenberg also withdrew his demand that Sound Transit perform an SEIS. Instead,
5 he stated that Mercer Island required Sound Transit “to provide additional environmental review
6 of the action conditions of the project,” citing MICC 19.07.120(H)(3) and WAC 197-11-600(3)(b),
7 (4)(c), and (4)(d). Finally, Mr. Greenberg withdrew any assertion that the application did not meet
8 a GMA concurrency requirement.

9 The March 16, 2017 Development Code Interpretation #17-01, as summarized in Mr.
10 Greenberg’s letter, concludes that the existing Mercer Island zoning code does not permit light rail
11 in the I-90 right-of-way. He concluded “[b]ased on my interpretation of the City’s development
12 code, as guided by Ordinance No. B-57, Sound Transit’s proposed project is not a permitted use
13 within the Mercer Island I-90 Right-of-Way portion of the Public Institution Zone and is prohibited
14 by the City’s development code.”

15 This lawsuit followed shortly thereafter. The Court conducted oral argument on the motion
16 for a preliminary injunction and the merits of Sound Transit’s application for writs of mandamus
17 and/or prohibition on April 13, 2017.

18 After the hearing, the City has taken steps that change the posture of this case. First, on
19 Monday, April 17, 2017, the City lifted the moratorium set out in Ordinance No. 17-05 after
20 passing an emergency amendment to its zoning code to expressly authorize light rail as a
21 permissible use in the I-90 right-of-way. Ordinance No. 17C-10 provides:

22 **Section 1. Amendment to Section 19.05.010(B).** Section 19.05.010(B) of the
23 Mercer Island City Code is hereby amended as follows (new text underlined):

24 Mercer Island I-90 Right-of-Way Added to Public Institution Zone. The entire area
25 within the Mercer Island I-90 right-of-way, including, but not limited to, the
26 roadway, street overcrossings, lids, open space, recreation areas, linear greenbelts
and the park-and-ride lot area as approved by the city on November 14, 1983, and
incorporated in the right-of-way plan approved by WSDOT on May 1, 1987, shall

1 be part of the public institution zone. The uses of the Mercer Island I-90 right-of-
2 way shall be limited to the following. Light rail facilities shall be a permitted use
3 within the I-90 center roadway as the term center roadway is used in the August
4 2004 Amendment to the I-90 Memorandum Agreement dated December 1976. All
5 other uses within of the Mercer Island I-90 right-of-way shall be conditional uses,
6 and shall be consistent with the uses outlined ~~maintained~~ as set forth in the city-
7 approved I-90 related documents identified in Ordinance No. B-57 §1(4), adopted
8 on November 23, 1987.

9 In a supplemental filing dated April 18, 2017, the City represented to the Court that the
10 moratorium in Ordinance No. 17-05 has now been lifted, and the City has resumed the processing
11 of Sound Transit's building permit for the Mercer Island Station. Although the ordinance
12 permitting light rail is "interim" in nature, the City anticipates that the ordinance will become final
13 once it has complied with the public hearing requirements.

14 Second, Ordinance No. 17C-10 also provides that Sound Transit's building permit no.
15 1606-138 "shall be reviewed under the land use control ordinances and construction codes in effect
16 on the date the complete application for this building permit was filed," except that the emergency
17 amendment to Sections 19.05.010(B) set out in Section 1 of the ordinance will apply to the building
18 permit. During oral argument on April 13, 2017, counsel for the City represented to the Court that
19 the City considers Sound Transit's permit application to be "complete" (contrary to the February
20 22, 2017 Greenberg letter) and that, as a result, the GMA moratorium in Ordinance No. 17-06
21 does not apply to Sound Transit's pending building permit application. In the April 18, 2017
22 supplemental filing, the City confirmed this representation: "The Mercer Island Station and the
23 light rail facility Sound Transit intends to construct in the I-90 center roadway therefore are not
24 subject to the remaining moratorium (Ordinance No. 17-06) or any land use control regulations
25 adopted as a result of that moratorium."

26 With regard to the City's March 16, 2017 request for additional environmental information,
on April 5, 2017, Sound Transit issued an Addendum to the East Link FEIS. This Addendum, the
executive summary of which was provided to the Court, contains 400 pages of analysis of the 25
intersections and I-90 ramps on Mercer Island to assess the traffic impacts resulting from the

1 change in SOV ramp access at Island Crest Way. The Addendum also identifies locations
2 requiring mitigation and identifies improvements at ramps and intersections that will mitigate
3 impacts of diverted traffic. Some of the recommended improvements and mitigation will require
4 a street use permit from the City.

5 In response to the April 17, 2017 passage of Ordinance No. 17C-10, Sound Transit argues
6 that the lifting of the moratorium does not resolve whether the City has the legal authority to
7 impose zoning requirements on Sound Transit. Because the City has decided to prepare a
8 Supplemental EIS before taking action on the pending building permit, an action Sound Transit
9 contends the City has no legal authority to take, Sound Transit argues the City is unlawfully
10 interfering with its vested rights and delaying the project.

11 ANALYSIS

12 1. Mootness

13 The Court finds a number of issues raised in Sound Transit's initial motion to be moot. A
14 case or issues in a case become moot when the court can no longer provide effective relief. *4518*
15 *S. 256th, LLC v. Gibbon*, 195 Wn. App. 423, 433, 382 P.3d 1 (2016). First, Sound Transit asked
16 this Court to order the City to resume processing its building permit application for the Mercer
17 Island Station. With the lifting of the moratorium in Ordinance No. 17-05, and the City's assurance
18 that it has resumed processing the application, this request for relief is moot. Any request for
19 injunctive relief or for a writ of mandamus addressing this issue is DENIED for this reason.

20 Second, Sound Transit also asked the Court to order the City to process its building permit
21 application under the law in effect on its filing date pursuant to RCW 19.27.095(1). The City has
22 conceded this point in Ordinance No. 17C-10. Thus, this request is moot as well, and neither
23 injunctive relief nor a writ of mandamus is necessary.¹

24
25
26 ¹ The parties disagree as to what laws were in effect on the date the complete application was
filed with the City, an issue the Court addresses below.

1 Finally, Sound Transit asked the Court to rule that under the 1976 Agreement and 2004
2 Addendum to that Agreement, the 2014 Letter Agreement, and MICC 19.05.010(A)(4) and (B),
3 light rail is already a permitted use in the I-90 right-of-way. With the passage of Ordinance No.
4 17C-10, the City has now explicitly passed legislation deeming light rail to be a permitted use and
5 made this ordinance retroactive to cover the Sound Transit East Link project. Further, the Court
6 deems the issue irrelevant because, as will be explained below, the Court finds that WSDOT's
7 regulatory authority over the I-90 right-of-way preempts city zoning regulations. Thus, there is no
8 need to render an advisory ruling on whether the City's code permitted light rail use before this
9 lawsuit commenced. Injunctive relief and/or a writ of mandamus is inappropriate as to this issue
10 as well.

11 The decision to lift one moratorium, the acknowledgement that the second moratorium
12 does not apply to the light rail project, and the City's resumption of processing Sound Transit's
13 building permit narrow the issues before this Court: does the City have the legal authority to
14 impose zoning requirements on a project constructed entirely within the WSDOT limited access
15 highway right-of-way when the project is nested within an active limited access highway? The
16 City contends that it has the authority under RCW 47.12.120(2) to do so and a corresponding
17 obligation under SEPA, RCW 36.70B.030, to ensure that the project complies with the City's
18 zoning requirements. The City further argues that the extent and scope of its zoning authority is
19 subject to LUPA and, under RCW 43.21C.075, Sound Transit's sole remedy is a LUPA appeal
20 only after the City determines what conditions, if any, to attach to the transit station building
21 permit.

22 Sound Transit argues, in contrast, that allowing the City to impose any zoning regulations
23 on the light rail project violates article XI, section 11 of the Washington constitution and various
24 statutes including RCW 47.52.090 that give exclusive regulatory jurisdiction to WSDOT. Both
25 Sound Transit and WSDOT contend that the state has preempted the City's zoning authority within
26 the I-90 right-of-way. The Court addresses each of these arguments below.

1 **2. Subject Matter Jurisdiction**

2 Before this Court can reach the legal merits, the Court must ensure it has subject matter
3 jurisdiction. Under the Land Use Petition Act (LUPA), RCW 36.70C.030, a LUPA petition is the
4 exclusive means of judicial review of any “land use decision.” If a decision is reviewable under
5 LUPA, it is not properly before the Court through the statutory writ process. RCW 7.16.360.

6 A LUPA “land use decision” is “a final determination by a local jurisdiction’s body or
7 officer with the highest level of authority to make the determination, including those with authority
8 to hear appeals on: (a) [a]n application for a project permit or other governmental approval required
9 by law before real property may be improved . . . ; (b) [a]n interpretative or declaratory decision
10 regarding the application to a specific property of zoning or other ordinances or rules regulating
11 the improvement, development, modification, maintenance, or use of real property” RCW
12 36.70C.020.

13 When, however, a city takes an action that adversely affects the vested rights of a permit
14 applicant, courts have determined that injunctive relief or relief via the statutory writ process is
15 available. *See Valley View Indus. Park v. City of Redmond*, 107 Wn.2d 621, 623, 733 P.2d 182
16 (1987) (developer brought mandamus and declaratory judgment action to compel issuance of
17 building permit); *Allenbach v. City of Tukwila*, 101 Wn.2d 193, 195, 676 P.2d 473 (1984)
18 (landowner brought mandamus action to compel issuance of building permit); *State ex rel. Ogden*
19 *v. City of Bellevue*, 45 Wn.2d 492, 496, 275 P.2d 899 (1954) (same).

20 The Court concludes that the City’s decision to apply its zoning code to the light rail project
21 is not an “interpretative or declaratory decision” under RCW 36.70C.020(b). That provision
22 relates to decisions by code officials as to *how* a zoning code provision will affect a specific
23 proposed development project. It does not apply to a city’s conclusion that it has the legal authority
24 to invoke its zoning laws *after* the city has agreed its zoning laws do not apply, a permit applicant
25 relied on that agreement in preparing the application, and the applicant’s rights have vested. The
26

1 Court concludes that it has subject matter jurisdiction over the validity of the City’s actions and
2 that LUPA is not Sound Transit’s exclusive remedy as to this particular legal issue.

3 **3. Standard for Preliminary Injunction**

4 Sound Transit brought this declaratory judgment action under RCW ch. 7.24 seeking an
5 order that the City lacks the legal authority to impose zoning requirements on Sound Transit’s light
6 rail project. “[O]ne who seeks relief by temporary or permanent injunction must show (1) that he
7 has a clear legal or equitable right, (2) that he has a well-grounded fear of immediate invasion of
8 that right, and (3) that the acts complained of are either resulting in or will result in actual and
9 substantial injury to him.” *Tyler Pipe Indus., Inc. v. Dep’t of Revenue*, 96 Wn.2d 785, 792, 638
10 P.2d 1213 (1982). “Since injunctions are addressed to the equitable powers of the court, the listed
11 criteria must be examined in light of equity including balancing the relative interests of the parties
12 and, if appropriate, the interests of the public.” *Kucera v. State, Dep’t of Transp.*, 140 Wn.2d 200,
13 209-10, 995 P.2d 63 (2000).

14 “In deciding whether a party has a clear legal or equitable right, the court examines the
15 likelihood that the moving party will prevail on the merits.” *Rabon v. City of Seattle*, 135 Wn.2d
16 278, 285, 957 P.2d 621 (1998). On a preliminary injunction motion, the court adjudicates the
17 ultimate rights in the case if “essential facts are not in dispute and the only issue is the likelihood
18 that plaintiff will prevail on the merits.” *Id.*

19 In this case, the parties agree that Sound Transit’s rights in the building permit application
20 have vested and that it has the right to have its permit application processed under the laws in
21 effect at the time its application was complete in June 2016. The parties dispute whether City
22 zoning regulations—generally applicable to other such permit applications—are a part of the laws
23 that govern this application because of the unique location of the proposed building. This Court
24 concludes they are not.

25 The Court concludes that WSDOT’s authority to control and regulate zoning and
26 construction in the I-90 right-of-way preempts the field, leaving no room for the City to regulate

1 land uses in the right-of-way. Under RCW 47.04.040, all title, rights and interest in state highway
2 rights-of-way vest with the State. The legislature delegated plenary power to WSDOT to manage
3 state limited access highway facilities, including I-90. RCW 47.01.260(1); RCW 47.24.020(2);
4 RCW 47.52.090; *Seattle Bldg. & Constr. Trades Council v. City of Seattle*, 94 Wn.2d 740, 748,
5 620 P.2d 82 (1980).

6 Sound Transit will construct the light rail project and the facilities associated with that
7 project completely within the State’s right-of-way. The facilities will be completely nested within
8 an active interstate highway. Any zoning requirement the City may impose on the light rail project
9 will necessarily impact the limited access plan that WSDOT has adopted and the legislature has
10 approved for I-90. “As between state and local governments, the State has plenary control over
11 its limited access facilities, and local governments have only those rights and powers which the
12 legislature has seen fit to accord them. Those rights and powers are administrative in nature, rather
13 than legislative.” *Seattle Bldg. & Const. Trades Council*, 94 Wn.2d at 748 (city has no authority
14 to forbid continuation of WSDOT plan to construct I-90 facilities).

15 Furthermore, under RCW 47.52.090, WSDOT and governmental entities owning or
16 operating an urban public transportation system may enter into agreements to construct, maintain,
17 use, regulate, or vacate limited access facilities for the use of that facility by “streetcars, trains, or
18 other vehicles forming a part of an urban public transportation system.” It goes on to provide that
19 “[w]ithin incorporated cities and towns the title to every state limited access highway vests in the
20 state, and, notwithstanding any other provision of this section, the department shall exercise full
21 jurisdiction, responsibility, and control to and over the highway from the time it is declared to be
22 operational as a limited access facility by the department” Although the contractual
23 arrangement between WSDOT and Sound Transit is not a “cooperative agreement” under this
24 provision, the statute provides clear legislative guidance that the State has vested power in
25 WSDOT and not local jurisdictions to regulate land uses for public transportation in the highway
26 right-of-way.

1 Article XI, section 11 of the Washington constitution provides that “[a]ny county, city,
2 town or township may make and enforce within its limits all such local police, sanitary and other
3 regulations as are not in conflict with general laws.” Within this authority, a municipality may
4 enforce an ordinance touching on the same matter as a state law, provided that state law is not
5 intended to be exclusive and the ordinance does not conflict with the general law of the state. *King*
6 *County v. Taxpayers of King County*, 133 Wn.2d 584, 611, 949 P.2d 1260 (1997). The Court
7 concludes that any attempt by the City through its zoning code to prevent the light rail project from
8 proceeding is in conflict with WSDOT’s exclusive jurisdiction over the use of limited access
9 highway for public transportation systems.

10 The City argues that under RCW 42.12.120, the legislature chose **not** to preempt local
11 zoning regulations in situations such as here, where WSDOT has leased two lanes of the highway
12 not needed for vehicular traffic. In *Freeman v. State*, a group of citizens challenged the legality of
13 the WSDOT/Sound Transit lease under article II, section 40 of the Washington state constitution
14 and RCW 47.12.120. The Supreme Court rejected this legal challenge. In analyzing WSDOT’s
15 statutory authority under RCW 47.12.120, the Supreme Court made several statements relevant to
16 this dispute. First, the Supreme Court noted that “the parties do not dispute that light rail is a
17 nonhighway purpose.” *Freeman*, 178 Wn.2d at 394. Second, it found that “WSDOT plans to
18 lease the highway facility to Sound Transit, pursuant to RCW 47.12.120.” *Id.* at 397. Third, in
19 finding that WSDOT has the discretion to determine that the center two lanes are not needed for a
20 highway purpose, the Supreme Court cited to a provision of an umbrella agreement between
21 WSDOT and Sound Transit in which WSDOT agreed that “upon the completion of the R8A
22 Project and the completion of all the necessary obligations and actions identified in this Agreement
23 . . . , the Center Roadway will no longer be needed for highway purposes.” *Id.* at 400.

24 The City of Mercer Island relies on this language from *Freeman* to contend that the statute
25 that allowed WSDOT to lease the center lanes to Sound Transit also grants to the City the legal
26 authority to impose zoning requirements on Sound Transit’s use of this land, requiring this Court

1 to deny Sound Transit's motion for a preliminary injunction or statutory writ. RCW 47.12.120
2 provides in pertinent part:

3 **Lease of unused highway land or air space**

4 The department may rent or lease any lands, improvements, or air space above or
5 below any lands that are held for highway purposes but are not presently needed.

The rental or lease:

- 6 (1) Must be upon such terms and conditions as the department may determine;
7 (2) *Is subject to the provisions and requirements of zoning ordinances of political
subdivisions of government . . . (emphasis added).*

8 The legal issue is a very close call. Ultimately, the Court finds persuasive Sound Transit's
9 argument that the specific authorization given to WSDOT to regulate all aspects of urban mass
10 transportation systems within the I-90 highway rights-of-way overrides the more general zoning
11 authority granted to local jurisdictions in RCW 47.12.120. While the I-90 light rail lease may have
12 occurred under the authority of RCW 47.12.120, one cannot overlook the clear language of RCW
13 47.52.090 that grants to WSDOT the exclusive jurisdiction to determine what happens when
14 portions of a highway right-of-way are used for public transportation systems. Giving each
15 municipality along the I-90 right-of-way the authority to use local zoning laws to prevent
16 construction of light rail facilities would completely undermine the plenary authority given to
17 WSDOT to manage and regulate the use of state highways.

18 The Court's conclusion is further supported by the clear terms of the 2014 Letter
19 Agreement the City entered into with Sound Transit in which the City agreed that its zoning code,
20 MICC Title 19, does not apply to the light rail project. The Letter Agreement contained a correct
21 statement of the law. Sound Transit has the right to have its building permit application evaluated
22 based on this statement of the law as it existed when its rights vested. The City's post-vesting
23 reversal constitutes an attempt to change the laws applicable to the building permit, and thus
24 unlawfully impairs Sound Transit's vested rights.

1 The Court ultimately concludes that Sound Transit has established a likelihood of
2 prevailing on the merits of the legal claim that allowing the City to apply its zoning code to the
3 light rail project violates article XI, section 11 and interferes with Sound Transit’s vested rights.

4 The Court also concludes that Sound Transit has established a well-founded fear of an
5 immediate invasion of its vested rights. The City’s March 16, 2017 letter and briefing in this case
6 demonstrate that the City intends to spend several months evaluating the light rail project to
7 determine what traffic mitigation measures it can impose on Sound Transit under Title 19 of its
8 zoning code. Given the inapplicability of the zoning code to this project, such a delay in processing
9 the permit would invade Sound Transit’s legal rights.

10 Sound Transit has also established actual and substantial injury. The City’s actions have
11 led to significant confusion and unpredictability as to what it expects of Sound Transit, when it
12 will complete its assessment of the pending permit, and what conditions it might choose to include
13 in any permit that issues. For example, the City first claimed the application was “incomplete,”
14 which raised red flags for Sound Transit regarding its vested rights, but then rescinded that finding.
15 It claimed light rail was not a permitted use under its zoning code and indicated it needed six
16 months to determine whether to authorize it, but when that decision was challenged, it almost
17 immediately amended its zoning code on an emergency basis to authorize this use. The City
18 informed Sound Transit that it had the legal authority to require Sound Transit to perform a
19 Supplemental EIS and then withdrew that demand, claiming it would prepare one of its own
20 instead. This series of actions has caused delays in commencement of the light rail project and
21 will lead to substantial expense if the permitting issue is not resolved expeditiously.

22 Finally, the Court has weighed the equities of granting the injunction or statutory writ and
23 denying the requested relief. The Court concludes that the equities weigh in favor of Sound
24 Transit. There have been decades of effort, with the City’s close involvement, to plan the design
25 and construction of this light rail project. The State, the federal government, King County, and
26 several cities in the region have worked hard to accommodate the needs of all stakeholders. There

1 has been enormous public financial investment just to get to this point. Delaying the project will
2 cost millions of dollars to the taxpayers.

3 The City has serious and well-founded concerns regarding the traffic and safety impacts
4 that the HOV lane designation will have on SOV drivers seeking to access I-90. But these
5 problems will exist whether the Court issues an injunction or not. The City has not sought to
6 enjoin WSDOT from turning over the center lanes to Sound Transit; this transfer will happen
7 within weeks. The HOV/SOV access problems will manifest itself at that time, regardless how
8 this Court rules. The City has alternative remedies for addressing its concerns, either through an
9 appeal of Sound Transit's SEPA decision or through the contract action it has separately filed
10 against Sound Transit or WSDOT.

11 For this reason, the Court will preliminarily enjoin the City of Mercer Island from invoking
12 any provision of Title 19 of the Mercer Island City Code to prevent Sound Transit from placing
13 any light rail facilities, including the Mercer Island Station, in the I-90 right-of-way.

14 **4. Standard for Writ of Mandamus or Prohibition**

15 Sound Transit has also filed an application for a statutory writ of mandamus and/or
16 prohibition under RCW 7.16.150 – 7.16.320. It seeks a court order requiring the City to process
17 its building permit application by a date certain and prohibiting the City from refusing to issue the
18 building permit until it completes its own SEIS analysis.

19 A writ of mandamus compels the performance of an act which the law requires a
20 government must perform. RCW 7.16.160. A party requesting a writ of mandamus must
21 demonstrate (1) the party subject to the writ is under a clear duty to act; (2) the applicant has no
22 plain, speedy and adequate remedy under law; and (3) the applicant is beneficially interested.
23 *Eugster v. City of Spokane*, 118 Wn. App. 383, 402, 76 P.3d 741 (2003). “Mandamus is
24 appropriate to compel a government official or entity to comply with [the] law when the claim is
25 clear and there is a duty to act.” *Id.* at 404 (quotation and citation omitted). Mandamus can direct
26

1 an officer to exercise a mandatory discretionary duty, but cannot direct the manner of exercising
2 that discretion.

3 The Court declines to mandate that the City issue the building permit by any specified date.
4 Sound Transit has not identified any clear legal duty for the City to process a complicated
5 construction permit within two weeks. While the City must make a decision on a permit
6 application, there is no regulation requiring such a decision be made within any time period. Don
7 Cole, the building official for the City, has testified that because the City did not receive Sound
8 Transit's responses to the City's November 2016 comments until April 2017, a review for
9 compliance with the construction code will take several months. He stated that the City will ensure
10 that the construction review is done expeditiously. The City is entitled to follow its standard
11 process for reviewing construction documents for projects of this size and complexity.

12 Sound Transit also requests that the Court enter a writ of prohibition stopping the City from
13 preparing an SEIS and withholding the permit until that work is done. A writ of prohibition arrests
14 proceedings of any tribunal, corporation, board or person when such proceedings are in excess of
15 the jurisdiction of that tribunal, corporation, board or person. "A writ of prohibition is a drastic
16 measure, which is to be issued only when two conditions are met: (1) absence or excess of
17 jurisdiction, and (2) absence of a plain, speedy, and adequate remedy in the course of legal
18 procedure. The absence of either one precludes the issuance of the writ." *Skagit County Pub.*
19 *Hosp. Dist. No. 304 v. Skagit County Pub. Hosp. Dist. No. 1*, 177 Wn.2d 718, 722-23, 305 P.3d
20 1079 (2013) (quotation and citation omitted).

21 Sound Transit and the City disagree as to whether the City must make its building permit
22 decision based solely on environmental assessments Sound Transit has performed or whether the
23 City may prepare its own SEIS and base building permit conditions on that analysis. The City has
24 determined that Sound Transit's Addendum to the FEIS "is insufficient for the analysis it must
25 undertake under SEPA" and that state law requires it to prepare and issue an SEIS. The City relies
26 on *Columbia Riverkeeper v. Port of Vancouver USA*, No. 92335-3, 2017 WL 1192120 (Wash.

1 March 16, 2017) for the proposition that two governmental entities may have SEPA obligations.
2 In *Columbia Riverkeeper*, the Supreme Court noted that SEPA’s primary focus is on the decision-
3 making process. *Id.* at *4. “SEPA seeks to ensure that environmental impacts are considered and
4 that decisions to proceed, even those completed with the knowledge of likely adverse
5 environmental impacts, be ‘rational and well-documented.’” *Id.* (quoting 24 Washington Practice:
6 Environmental Law & Practice § 17.1 at 192 (2d ed. 2007)). “To prevent piecemeal decision-
7 making and to ensure continuity in environmental review, SEPA regulations designate a lead
8 agency to complete each EIS.” *Columbia Riverkeeper* at *4 (citing WAC 197-11-050). The lead
9 agency is the agency with main responsibility for complying with SEPA’s procedural requirements
10 and “shall be the only agency responsible for . . . [p]reparation and content of [an EIS].” WAC
11 197-11-050(2). In the *Columbia Riverkeeper* case, the Energy Facilities Site Evaluation Council
12 (EFSEC) was designated the lead agency under SEPA for evaluating the construction of a
13 petroleum-based energy facility on the Port of Vancouver’s property. The Supreme Court held
14 that the Energy Facilities Site Location Act did not preempt or eliminate the Port’s authority to
15 approve or veto the project. Because it held that the Port had plenary authority to determine
16 whether to lease property under its control, both the Port and the lead agency were subject to
17 SEPA’s mandates.

18 The Court finds this case to be distinguishable from *Columbia Riverkeeper*. In this case,
19 Sound Transit is the designated lead agency under SEPA for evaluating the construction of the
20 light rail project in the I-90 right-of-way, and WSDOT is the only agency with jurisdiction to
21 regulate land uses within the I-90 right-of-way. Unlike the EFSEC and the Port of Vancouver,
22 there is no shared jurisdiction between WSDOT, Sound Transit, and the City. Given the Court’s
23 determination that WSDOT’s authority to control and regulate construction within the I-90 right-
24 of-way preempts the field, the City is not an “agency with jurisdiction” under WAC 197-11-602(3)
25 and has no obligation or right under SEPA to prepare an SEIS and to delay the issuance of the
26 building permit until the SEIS is completed. The Court concludes that the City’s decision to

1 prepare an SEIS and to refrain from issuing the Mercer Island Station building permit until the
2 SEIS is completed is an action in excess of its jurisdiction, warranting relief under a writ of
3 prohibition.

4 **ORDER**

5 Based on the foregoing, the Court hereby ORDERS as follows:

6 1. The City of Mercer Island is preliminarily enjoined from invoking any provision
7 of Title 19 of the Mercer Island City Code to prevent Sound Transit from placing any light rail
8 facilities, including the Mercer Island Station, in the I-90 right-of-way.

9 2. The City of Mercer Island is prohibited from delaying the issuance of the Mercer
10 Island Station building permit based on the alleged inadequacy of the Sound Transit FEIS
11 Addendum.

12 3. Sound Transit's request that the City be required to process the building permit no
13 later than May 12, 2017 is DENIED.

14 4. Pursuant to RAP 2.3(b)(4), the Court hereby certifies that the order involves a
15 controlling question of law as to which there is substantial ground for a difference of opinion and
16 that immediate review of this order may materially advance the ultimate termination of the
17 litigation.

18 Dated this 21st day of April, 2017.

19 *Electronic signature attached*

20 _____
21 The Honorable Beth M. Andrus

APPENDIX A

Sub #	Description
1	Petition for Writ of Mandamus
12	Amended Complaint
14	Sound Transit's Motion for Preliminary Injunction and Writ Application
15	Declaration of Don Billen
16	Declaration of Jeremy Eckert
17	Declaration of Sepehr Sobhani
18	Declaration of Chris Ward
19	Declaration of Randall Thomsen
20	Declaration of Randall Thomsen
21	City of Mercer Island's Opposition to Motion for Preliminary Injunction and Writ Application
22	Declaration of Steve Heitman
23	Declaration of Andrew Kwasniak
24	Declaration of Holly Mercier
25	Declaration of Linda Pineau
26	Declaration of Gary Plano
27	Declaration of Noel Treat
28	Declaration of Allison Spietz
29	Declaration of Scott Greenberg
30	Praeipce re Missing Ex. 4 to Greenberg Decl. and Ex. 6 to Speitz Decl.
31	Praeipce re Signature page to Treat Declaration
32	Defendant's Supplement to Opposition to Motion for Preliminary Injunction and Writ Application
35	Declaration of Perry Weinberg
38	Sound Transit's and WSDOT's Reply to City's Opposition to Motion for Preliminary Injunction and Writ Application
39	Declaration of Dirk Bakker
40	Declaration of Jeremy Eckert
41	Declaration of James Irish
42	Declaration of Lenea Laird
43	Declaration of Tia Raamot
45	Declaration of Shane Cramer
46	Declaration of Chris Ward
48	City of Mercer Island's Second Supplement to Opposition
49	Sound Transit's Supplemental Brief
50	Declaration of Paul Lawrence
51	Declaration of Philip Paine
52	Declaration of Chris Ward
53	Declaration of Perry Weinberg
55	City of Mercer Island's Third Supplement to Opposition

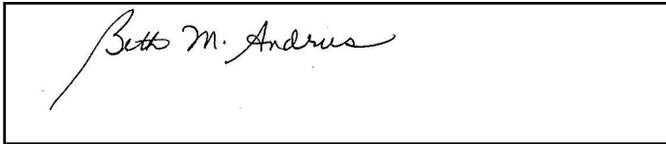
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56	Second Declaration of Scott Greenberg
57	Declaration of Don Cole
58	Declaration of Randall Thomsen

King County Superior Court
Judicial Electronic Signature Page

Case Number: 17-2-05191-8
Case Title: CENTRAL PUGET SOUND REGIONAL TRANSIT
AUTHORITY VS MERCER ISLAND CITY OF
Document Title: ORDER GRANTING PRELIM. INJ.

Signed by: Beth Andrus
Date: 4/21/2017 4:08:39 PM



Judge/Commissioner: Beth Andrus

This document is signed in accordance with the provisions in GR 30.

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