

HONORABLE BETH M. ANDRUS
Dept. 35
Noted for May 23, 2017
WITH ORAL ARGUMENT

SUPERIOR COURT FOR THE STATE OF WASHINGTON
IN AND FOR THE COUNTY OF KING

CITY OF MERCER ISLAND,

Plaintiff,

vs.

WASHINGTON STATE DEPARTMENT
OF TRANSPORTATION, an agency of the
State of Washington; ROGER MILLAR,
acting in his capacity as the Secretary of the
Washington State Department of
Transportation; and CENTRAL PUGET
SOUND REGIONAL TRANSIT
AUTHORITY, a Washington regional
transit authority,

Defendants.

Case No. 17-2-03884-9 SEA

CITY OF MERCER ISLAND'S
MOTION FOR A PRELIMINARY
INJUNCTION

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I. INTRODUCTION AND RELIEF REQUESTED

The agreements among these parties require that in the event of any loss of mobility to Mercer Island because of the East Link project, the parties consult in good faith and meaningfully seek to reach concurrence about the measures they will take to redress that loss. WSDOT and Sound Transit promised to “satisfactorily address” “any loss of mobility” with the concurrence of the City “prior to” WSDOT’s closure of the I-90 center lanes. The closure of the I-90 center lanes is imminent and yet Sound Transit and WSDOT claim (contrary to Sound Transit’s own mobility study) there will be no mobility impacts and that the City is entitled to no recourse. They evince a view that reaching “concurrence” means nothing more than unilaterally presenting a position and demanding that the City agree.

In this motion, the City seeks a narrowly-tailored injunction that will provide Sound Transit and WSDOT the keys to its dissolution. The City requests that the Court enjoin WSDOT from closing the I-90 center lanes, and Sound Transit from commencing work there, until they have complied with their contractual obligations to (1) meaningfully consult with the City to (2) reasonably and in good faith seek to reach concurrence with the City about the loss of mobility expected to occur and the measures they will implement to redress that loss.¹ The City requests an order directing that this consultation be overseen by a Special Master who will report to the Court, with the Court retaining the ability to either extend or dissolve the injunction as appropriate. An injunction need not delay the project at all,² but denying injunctive relief will allow WSDOT and Sound Transit to ignore their binding commitments to the City.

¹ The City does not seek by this motion an order directing WSDOT and Sound Transit to accede to any request the City makes, however unreasonable. But equally, “concurrence” to “satisfactorily address” mobility impacts to Mercer Island requires more than a take it or leave it approach.

² This motion is noted for May 23, 2017, and was filed and noted on the earliest possible date given that it necessarily must respond to Sound Transit’s mobility study (released April 5) and underlying data (released April 28). *See* note 86. The City suggested a briefing and hearing schedule to accommodate the schedule constraints of opposing counsel, *see* note 87, suggesting oppositions be due May 23 and the reply May 26, with a noting date of May 31. Sound Transit would not agree but suggested the Court could hold a scheduling conference on May 17, with which the City agrees.

1 The relief the City seeks is neither unusual nor unprecedented; it is entirely within the
2 Court's authority; and it is consistent with the parties' 1976 Memorandum Agreement (1976
3 Agreement) as amended (2004 Amendment).³ The City does not contend that the obligation of
4 concurrence gives the City (or any party) an absolute veto. Rather, the contractual requirement of
5 concurrence is bounded by the requirement that all parties act in good faith. There is no evidence
6 the City has acted unreasonably in determining the loss of mobility or the measures to redress it.
7 WSDOT, in contrast, has stated that while it will "consult" with the City, it has already and
8 unilaterally determined that there will be no loss of mobility and no mitigation is required. The
9 consultation WSDOT offers is illusory: WSDOT will meet with the City to convince it to accede
10 to WSDOT's determinations, not to take into consideration the City's loss of mobility analysis.
11 The appointment of a Special Master, paid equally by the parties, to supervise the process and
12 report to the Court the progress of the consultative process, will protect against unreasonable
13 conduct or demands.

14 Sound Transit and WSDOT have claimed they are helpless to counter what they assert is an
15 unexpected and recent decision by the Federal Highway Administration (FHWA) to prohibit
16 Mercer Island single occupancy vehicles (SOVs) from using lanes and an associated onramp
17 designated for high occupancy vehicles (HOVs), including the new R8A lanes on I-90's outer
18 roadways. The truth is much different. The limited discovery WSDOT produced after the City
19 moved to compel makes clear that WSDOT has known of FHWA's position since at least
20 November 2013. Rather than promptly notify the City and use the time to consult, develop
21 alternatives, and seek concurrence, WSDOT instead chose to mislead the City into believing the
22 loss of mobility would be partially mitigated by R8A access, while "crossing [its] fingers" (in the
23 words of WSDOT's Sound Transit Liaison) that the problem miraculously would solve itself.

24 _____
25 ³ In crafting a narrowly tailored request for injunctive relief and in recognition of the regional importance of the light
rail expansion, the City does not even seek an injunction as broad as the contractual obligation owed by WSDOT and
Sound Transit (i.e., that mitigation measures be in place prior to the closure).

1 WSDOT and Sound Transit have acted to avoid reaching concurrence, starting with
2 WSDOT's deception about the FHWA position, then waiting three years until the eve of
3 construction to study Mercer Island mobility while largely excluding the City from that process,
4 and then strategically fixating on a claim that there will be no loss of mobility to Mercer Island,
5 when Sound Transit's own study (albeit flawed in many ways) establishes the opposite. The
6 closure will severely impact traffic and safety on Mercer Island, creating gridlock in the Town
7 Center, forcing thousands of vehicles onto side streets in residential areas and school zones,
8 increasing travel times, jeopardizing the safety of school children and bicyclists, and affecting
9 transit operations.

10 WSDOT and Sound Transit have the tools to address this loss of mobility notwithstanding
11 FHWA's position. WSDOT controls when the I-90 center lanes close, the designation of the new
12 R8A lanes and associated ramps, and the conditions of Sound Transit's use of the I-90 center
13 lanes. Sound Transit has the financial resources, Legislative approval, and legal obligation to
14 mitigate the adverse impacts of its project by building adequate commuter parking, improving
15 streets and intersections, providing additional bus service, creating a suitable bus-rail integration
16 program, and funding emergency response improvements.

17 The City urged WSDOT and Sound Transit to act earlier. WSDOT and Sound Transit
18 should not be allowed to evade their commitment to reach agreement prior to the closure simply
19 because their own delay has created their own schedule compression.

20 II. STATEMENT OF FACTS

21 A. The Affected Jurisdictions Unanimously Objected to the Highway Commission's 22 Proposed Expansion of I-90.

23 In the 1970s, WSDOT's predecessor,⁴ the Washington State Highway Commission
24 (Commission), proposed a substantial redesign and expansion of State Route 10, now known as
25 Interstate 90 (I-90). In place of the then-existing, four-lane roadway crossing Mercer Island from

⁴ See RCW 47.01.031.

1 Bellevue to Seattle, the Commission proposed to build a ten-lane highway.

2 The City expressed concerns about the project, grounded in Mercer Island's unique
3 geography. The island has no ferry and only one roadway connects the island to the mainland.
4 Consequently, the City always has sought to preserve the ability of its residents and visitors to
5 access SR 10/I-90.^{5,6} The City objected to the project unless the Commission changed its design
6 and operation, including dedicating a lane solely to persons traveling from Mercer Island to
7 Seattle.⁷ At the time, the volume of traffic to and from Mercer Island justified its own lane, and
8 the City feared that the increased cross-lake traffic drawn to the new highway would make
9 accessing the highway from the island difficult or impossible.⁸

10 The City of Seattle objected to the 10-lane proposal because of the impacts that an
11 expanded highway would have on its neighborhoods.⁹ Its insistence on a smaller configuration put
12 Seattle's interests in direct conflict with Mercer Island's, because the demand for a dedicated lane
13 required more lanes.¹⁰ Metro requested lanes dedicated solely to transit, and Bellevue, on behalf of
14 its own commuters, also demanded changes.¹¹ These disagreements resulted in a lengthy stalemate

15 ⁵ Unless otherwise noted, all exhibits are to the Thomsen Declaration filed with this motion.

16 ⁶ See City of Mercer and Town of Mercer Island, Joint Resolution No. 100 (March 4, 1963) ("Of prime importance to
17 Mercer Island . . . are the details of access to the proposed interstate system and retention of access to the local arterial
18 systems . . . ") (Ex. 1); see I-90 Sub-Committee, Mercer Island Community Objectives for I-90 (Apr. 23, 1970)
19 ("Design of I-90 should: 1. [p]rovide adequate service off-Island and on-Island for easy movement between the Island
20 . . . ") (Ex. 2).

21 ⁷ See, e.g., I-90 Committee, Meeting Minutes at 1 (Aug. 11, 1970) (finding the proposed design acceptable if "there is
22 provided a Mercer Island lane in each direction") (Ex. 3); City of Mercer Island, Resolution No. 619 (Apr. 22, 1974)
23 (Ex. 4); City of Mercer Island, Meeting Minutes (Oct. 28, 1974) (guideline for I-90 was providing access lanes for
24 Mercer Islanders) (Ex. 5); City of Mercer Island, Resolution No. 658 (June 9, 1975) (supporting construction of I-90
25 provided Mercer Island is "assured westbound access in a lane originating on Mercer Island") (Ex. 6); City of Mercer
Island, Resolution No. 666 (Jan. 12, 1976) ("essential" to Mercer Island's approval of the project was to "add lanes for
the free flow of westbound Mercer Island traffic from Island Crest Way") (Ex. 7).

⁸ *Mercer Islanders Oppose I-90 Plan*, Seattle Times, Oct. 6, 1976, at A6 (Ex. 8); I-90 Committee, Meeting Minutes
(Apr. 13, 1971) ("[p]resently Mercer Island generates 1/3 of the Highway traffic") (Ex. 9).

⁹ See City of Seattle, Resolution No. 25131 (Jan. 14, 1976) (opposing proposal for a 10-lane freeway) (Ex. 10).

¹⁰ *City Council Rejects Mercer I-90 Plan*, Seattle Post-Intelligencer, Nov. 2, 1976, at A3 (Ex. 11).

¹¹ The City of Bellevue ultimately sided with Mercer Island, acknowledging that it could only support a configuration
that accommodated Mercer Island access. See Letter from City of Bellevue Mayor Vanik to Seattle City Council

1 among all the parties about I-90's design and expansion.

2 After years of deadlock, in 1976, the Commission and the affected jurisdictions engaged in
3 extended mediation¹² and agreed to a compromise that addressed each jurisdiction's concerns.¹³
4 The written agreement that resulted (the 1976 Agreement¹⁴) has been a model of regional
5 cooperation and the cornerstone of a forty-year history of the affected jurisdictions jointly
6 managing the local use of I-90.

7 **B. The 1976 Agreement Resolved the Dispute, and the Parties Agreed That**
8 **Concurrence Was a Prerequisite to Future Action.**

9 To meet Seattle's complaint, the parties agreed to reduce the size of the proposed highway
10 between Seattle and Mercer Island from ten lanes to eight, with three westbound lanes, three
11 eastbound lanes, and two center reversible lanes.¹⁵ To meet Mercer Island's demand for a
12 dedicated lane and equitable access,¹⁶ the parties agreed Mercer Island traffic (including SOVs)
13 could use the I-90 center roadway, subject to the potential priority of "carpools" and transit.¹⁷

14 The parties further agreed that the Commission would design I-90 so that a fixed guideway
15 system (undefined) could later be built, but the Commission would first need to "accommodate the
16 Mercer Island traffic that would be affected by that fixed future guideway."¹⁸ Thus, the 1976

17 _____
(Sept. 20, 1976) (Ex. 12).

18 ¹² See Resolution No. 690, City of Mercer Island (Nov. 8, 1976) (Ex. 13).

19 ¹³ *Mediators Take Four Hours to Forge I-90 Agreement*, Seattle Times, Nov. 4, 1976, at A14 (Ex. 14).

20 ¹⁴ 1976 Agreement (December 1976) (Ex. 20).

21 ¹⁵ 1976 Agreement at 3-4 (Ex. 20).

22 ¹⁶ Letter from Wash. St. Highway Comm'n Dir. Bulley to citizen (Oct. 11, 1976) ("The elected officials of Mercer
23 Island have been very active in expressing the desires of Mercer Island in the mediation meeting that are currently
24 underway.") (Ex. 65).

25 ¹⁷ 1976 Agreement at 4-5 (Ex. 20). The Commission and the other affected jurisdictions recognized Mercer Island's
"unique position." *I-90 Negotiations Focusing on Details*, Mercer Island Reporter, June 10, 1976, at 25 (quoting
mediator) (Ex. 15).

¹⁸ Verbatim Transcript, Wash. St. Highway Comm'n, at 93-94 (Sept. 28, 1976) (Ex. 16); Meeting Minutes, Wash. St.
Highway Comm'n, at 7818 (Sept. 28, 1976) (same) (Ex. 17); see also Mercer Island I-90 Committee, Meeting
Minutes, at 1 (Oct. 12, 1976) (requesting City Council to insist that construction occur in a way that would "provide
capacity for a Mercer Island lane to Seattle when and if the transit lanes are converted to fixed guideways") (Ex. 18);
Bellevue, Mercer Island Ask Some Changes in I-90 Plans, Seattle Times, Sept. 19, 1976, at F12 (quoting City of

1 Agreement required that any “subsequent mode of operation of the facility,” such as installation of
2 a fixed guideway system, would consider “equitable access for Mercer Island,” and would “be
3 based upon existing needs as determined by the Commission **in consultation with the affected**
4 **jurisdictions, pursuant to paragraph 14** of this agreement.”¹⁹

5 Paragraph 14 restricted the Commission from acting in the future without the “concurrence
6 of the parties” as a “prerequisite” to that action “to the greatest extent possible under law”:

7 This agreement represents substantial accommodations by the parties of positions
8 held heretofore. Such accommodations were made in order to achieve a
9 unanimous agreement upon which to proceed with the design and construction of
10 I-90 and related projects. This agreement, therefore, sets forth the express intent
11 of the existing governing bodies that the parties to this agreement understand that
12 their respective governing bodies are limited in the degree to which they can bind
13 their successors with respect to the exercise of governmental powers vested in
14 those governing bodies by law. Accordingly, **the Commission will take no**
action which would result in a major change in either the operation or the
15 capacity of the I-90 facility **without prior consultation with and involvement of**
the other parties to this agreement, with the intent that **concurrence of the**
parties be a prerequisite to Commission action to the greatest extent possible
under law.²⁰

16 The parties understood that the “concurrence” and “consultation” required in the 1976
17 Agreement was not merely aspirational. For the next 28 years, the Commission/WSDOT adhered
18 to the 1976 Agreement’s requirement that the parties’ concurrence was a prerequisite to action.²¹

19 **C. In the 2004 Amendment, the Parties Agreed That Use of I-90 for Light Rail Would**
20 **Be Conditioned on Preserving Mercer Island Mobility and Access.**

21 In the early 2000s, Sound Transit began planning for development of a high capacity
22 transport system, including studying how that system would cross Lake Washington. By 2003, the
23 use of I-90 for that system was likely, and the parties deliberated how to accommodate that

24 Mercer Island Mayor Aubrey Davis that the proposal should provide for alternatives for the island’s traffic if the
25 transit lanes are converted to transit use only) (Ex. 19).

¹⁹ 1976 Agreement at 5 (emphasis added) (Ex. 20).

²⁰ 1976 Agreement ¶ 14, at 12–13 (emphasis added) (Ex. 20).

²¹ See *infra* note 93 and accompanying text.

1 potential configuration and change in I-90's mode of operation. The parties concluded that
2 installation of additional lanes on the outer roadways (now called the R8A lanes) would allow for
3 exclusive use of the center lanes for high capacity transit. The City supported the R8A project on
4 the condition that the Commission and Sound Transit address any impacts to Mercer Island before
5 eliminating Mercer Island's existing access to the center lanes.²²

6 From Fall 2003 to November 2004, the parties to the 1976 Agreement plus Sound Transit
7 negotiated the terms of that change, culminating in an amendment to the 1976 Agreement (the
8 2004 Amendment).²³ The 2004 Amendment protected the City's interests, requiring in Provision 7
9 that the Commission "identif[y] and satisfactorily address[]" Mercer Island's loss of mobility
10 "prior to" the closure of the center lanes:

11 To the extent of **any loss of mobility to and from Mercer Island** based on the
12 outcome of studies, **additional transit facilities and services such as additional**
13 **bus service, parking available for Mercer Island residents**, and other measures
14 **shall be identified and satisfactorily addressed** by the Commission, in
15 **consultation with** the affected jurisdictions **pursuant to paragraph 14** of the
16 **[1976] Agreement, prior to the time** the center roadway converts to High
17 Capacity Transit.²⁴

18 The City specifically negotiated for the "prior to" and "consultation" language to ensure that
19 agreed-to mitigation of the City's loss of mobility would occur before the center lanes closed.²⁵

20 Until recent months, WSDOT and Sound Transit had reaffirmed their obligations under the
21 1976 Agreement and the 2004 Amendment. Since 2004, Sound Transit repeatedly has stated it is

22 ²² See Letter from Mercer Island City Council to Sound Transit Board of Directors and WSDOT (Nov. 13, 2003)
(suggesting measures "that will be worked out concurrently with the planning for high-capacity transit") (Ex. 21).

23 ²³ See City of Mercer Island, City Council Minutes, Special Meeting (Oct. 27, 2003) (Ex. 22); City of Mercer Island,
City Council Minutes, Regular Meeting (Nov. 17, 2003) (Ex. 23); City of Mercer Island, City Council Minutes,
Regular Meeting (June 21, 2004) (Ex. 24).

24 ²⁴ 2004 Amendment Prov. 7 at 4 (emphasis added) (Ex. 25).

25 ²⁵ Mercer Island City Council Minutes at 2 (Oct. 27, 2003) (inserting "satisfactorily") (Ex. 22); Mercer Island City
Council Agenda Bill No. 3825 at 1 (Dec. 1, 2003) ("modifications track fairly closely with what the Council requested
in October") (Ex. 53); Mercer Island City Council Minutes at 4 (Aug. 2, 2004) (inserting "prior to") (Ex. 54);
Metropolitan King County Transportation Committee Staff Report at 2 (Aug. 25, 2004) (describing City of Mercer
Island's proposed amendments and inclusion of the "consultation" provision) (Ex. 52).

1 “committed” to the provisions of both agreements,²⁶ writing as recently as July 2015 that it would
2 work with the City of Mercer Island [and] the Mercer Island public . . . to identify
3 issues to be addressed with regard to implementation of and access to East Link
4 light rail and connecting bus service on Mercer Island, **including obligations**
under the 2004 Amendment . . . and other matters involving the East Link light
5 rail that directly impact the City of Mercer Island.²⁷

6 WSDOT similarly has acknowledged its obligations, recently describing Provision 7 as requiring
7 “that **measures should be undertaken to prevent the loss of mobility** of Mercer Island residents
8 **prior to the time the center roadway converts to high capacity transit.**”²⁸ WSDOT stressed,
9 “[g]iven the isolated nature of living in an island community with only one roadway on and off the
10 island, it is imperative the mobility of Mercer Island residents be given serious consideration.”²⁹

11 **D. WSDOT Misled the City into Believing WSDOT Would Meet Its Contractual**
12 **Obligations by Allowing Mercer Island SOV Traffic to Use the New R8A Lanes.**

13 In September 2005, the City, Sound Transit, and other jurisdictions formally requested
14 WSDOT to allow all Mercer Island traffic to use the planned R8A lanes, in order to “address
15 mobility access for Mercer Island traffic under the terms of the [2004] Amendment (Provision
16 #7).”³⁰ On September 29, 2006, WSDOT issued a document entitled, “Access Plan for Mercer
17 Island.” In this initial access plan, WSDOT rejected the proposal that Mercer Island traffic use the
18 new R8A lanes.³¹ After the City objected, WSDOT Secretary MacDonald and the Governor’s
19 Chief of Staff Fitzsimmons reversed this initial plan in a formal letter, stating:

20 ²⁶ Sound Transit Motion No. M2004-63 at 2 (2004 Amendment “commits Sound Transit to the guiding principles for
21 implementing [High Capacity Transit] in the I-90 roadway”) (Aug. 12, 2004) (Ex. 66); Letter from Sound Transit,
22 Cities of Bellevue, Mercer Island, and Seattle, and King County to WSDOT Secretary MacDonald at 1 (Sept. 8, 2005)
23 (signatories “remain committed to the provisions of both the MOA [1976 Agreement] and the [2004] Amendment”) (Ex. 40). All non-legislative Sound Transit Board actions are made by motion. Sound Transit Rules & Operating
24 Procedures § 8(A)(C).

25 ²⁷ Sound Transit Motion No. M2015-67 at 1 (July 23, 2015) (emphasis added) (Ex. 30).

²⁸ Letter from WSDOT Acting Secretary Millar to FHWA at 1 (May 16, 2016) (emphasis added) (Ex. 31).

²⁹ Letter from WSDOT Acting Secretary Millar to FHWA at 2 (May 16, 2016) (emphasis added) (Ex. 31).

³⁰ Letter from Sound Transit, Cities of Bellevue, Mercer Island, and Seattle, and King County to WSDOT Secretary MacDonald at 1 (Sept. 8, 2005) (Ex. 40).

³¹ Access Plan for Mercer Island at 9 (Sept. 29, 2006) (Ex. 41).

1 The Governor's Office and the Washington State Department of Transportation
2 **intend to honor our understanding of the agreement reached by the**
3 **signatories regarding Mercer Island access to HOV lanes.** We have concluded
4 that when the center roadway is converted to high capacity transit, Mercer Island
5 residents **should be permitted HOV lane access until the HOV lanes are**
6 **converted to high occupancy toll (HOT) lanes or another tolling regimen.**³²

7 The Legislature's 2007–2009 appropriations bill made this commitment the law:

8 Expenditure of the funds on construction is **contingent upon revising the access**
9 **plan for Mercer Island traffic such that Mercer Island traffic will have access**
10 **to the outer roadway high occupancy vehicle (HOV) lanes** during the period of
11 operation of such lanes following the removal of Mercer Island traffic from the
12 center roadway and prior to conversion of the outer roadway HOV lanes to high
13 occupancy toll (HOT) lanes. Sound Transit may only have access to the center
14 lanes when alternative R8A is complete.

15 Laws of 2008, ch. 121, § 306(3); Laws of 2009, ch. 8, § 304(3) (emphasis added). WSDOT
16 revised the access plan as directed, calling for Mercer Island traffic access to the new R8A lanes.³³

17 To the City's knowledge, that access plan remains operative today and never has been revised.

18 But recent discovery revealed a critical fact that WSDOT never disclosed: at the same time
19 WSDOT was stating publicly that Mercer Island traffic would be allowed to use the R8A/HOV
20 lanes, WSDOT knew at least as early as November 2013 that FHWA would not allow this. In
21 November 2013, the City asked WSDOT's Regional Administrator (Lorena Eng) to provide "the
22 status of the design" of the new R8A lanes "and how WSDOT intends to honor the [December
23 2006] commitment from Secretary MacDonald and Chief of Staff Fitzsimmons."³⁴ In an internal
24 email, WSDOT's Sound Transit Liaison³⁵ wrote to Regional Administrator Eng, stating "The
25 Fitzsimmons letter is interpreted to give permission to MI SOV traffic to use the R8A HOV lanes.

32 Letter from WSDOT Secretary MacDonald and Governor Chief of Staff Fitzsimmons to Mercer Island Mayor Cairns (Dec. 22, 2006) (emphasis added) (Ex. 42).

33 Revised Access Plan for Mercer Island at 9 (Apr. 23, 2007) (Ex. 43); *id.* at Introductory Letter (stating it "restates our intention to allow Mercer Island residents access to the high occupancy vehicle (HOV) lanes in the outer roadway of I-90 when the center roadway is converted to High Capacity Transit") (Ex. 43).

34 Email from City Manager Conrad to WSDOT Reg'l Admin. Eng (Nov. 25, 2013) (Ex. 32).

35 The fact this information came from WSDOT's Sound Transit Liaison makes it reasonable to assume that Sound Transit had the same information.

1 FHWA, not being a signatory of the MOA, **has said no to that scenario.**³⁶ Six weeks later,
2 Regional Administrator Eng finally wrote back to the City. She did not tell the City that FHWA
3 had “said no.” Instead, she said the opposite: “Sorry for the delay At this time **WSDOT**
4 **intends to follow the approach outlined in the December 22, 2006 letter to Mercer Island.**”³⁷
5 Nearly two years later in 2015, when the City’s Mayor wrote to WSDOT urging WSDOT to act on
6 its Provision 7 obligations,³⁸ WSDOT Secretary Peterson directed her staff to make a “personal
7 call follow up with some assurances,” still not revealing to the City that FHWA had “said no.”³⁹

8 **E. WSDOT and Sound Transit Are in Breach of Their Agreement with the City.**

9 Until mid-2016, the City believed it was productively negotiating the mitigation required
10 under the 2004 Amendment with Sound Transit and WSDOT. Those negotiations assumed, as
11 WSDOT had repeatedly told the City, that all Mercer Island traffic would use the new R8A lanes
12 and associated onramps once the I-90 center lanes closed.⁴⁰ That is, a premise of the negotiations
13 was Mercer Island SOV access to the new R8A lanes, and the parties were negotiating the
14 additional mitigation required because of mobility impacts even with that access. In mid-2016,
15 however, Sound Transit retreated from terms the parties had agreed to (which the City had
16 transferred from a term sheet to a 24-page draft agreement), suddenly claiming its representative
17 lacked authority to negotiate.⁴¹ Then on August 5, 2016, FHWA publicly announced for the first

18 _____
19 ³⁶ Email from WSDOT Sound Transit Liaison Counts to WSDOT Ass’t Sec’y Stone, Reg’l Admin. Eng (Nov. 25, 2013) (Ex. 34).

20 ³⁷ Email from WSDOT Reg’l Admin. Eng to City Manager (Jan. 16, 2014) (Ex. 33).

21 ³⁸ Letter from City Mayor Bassett to WSDOT Sec’y Peterson (Sept. 17, 2015) (“WSDOT and Sound Transit need to keep in mind that the center roadway cannot legally close unless and until the required mitigation is in place. . . . Mercer Islanders are not going to be stranded due to inaction.”) (Ex. 35).

22 ³⁹ Email from WSDOT Sec’y Peterson to WSDOT officials (Sept. 17, 2015) (Ex. 35).

23 ⁴⁰ Bassett Decl. ¶ 4.

24 ⁴¹ Bassett Decl. ¶ 4, Ex. 1. Sound Transit previously has argued to the court that it never has known what the City
25 envisions by way of mitigation. That is inaccurate. The barring of Mercer Island SOVs from the R8A lanes has meant the City’s requested mitigation has evolved, but not fundamentally changed. The City always has sought, for example, adequate commuter parking for Mercer Island residents, intersection and street improvements, and a workable bus-rail integration system. *See id.*; *see also* Letter from Mercer Island City Council to Sound Transit and WSDOT at 2 (Nov.

1 time what WSDOT (and likely Sound Transit) had known for three years, but was contrary to
2 WSDOT's reassurances and FHWA's own earlier official project documents:⁴² FHWA would not
3 authorize Mercer Island SOVs to use lanes designated as HOV.⁴³

4 Notwithstanding the FHWA letter and over the City's protest because of the impacts it
5 would cause to the City (*see infra* Facts Section F), WSDOT announced on February 1, 2017, that
6 it still would designate the new R8A lanes as HOV only, thus barring Mercer Island SOV use.⁴⁴
7 WSDOT rejected the City's suggested alternatives that would comply with FHWA's decision but
8 retain Mercer Island mobility (such as designating the new R8A lanes "Express" or "Managed"
9 rather than "HOV").⁴⁵ Making matters even worse for the City, WSDOT also announced that it
10 would designate the Island Crest Way onramp as "HOV only," meaning the vast majority of
11 Mercer Island traffic will be barred from accessing I-90 from the City's main arterial street,⁴⁶
12 contrary to basic, long-standing assumptions on which the design of I-90 and the City's street plan
13 are based.⁴⁷ WSDOT also intends to close the 77th Avenue onramp, further restricting the ability

14 _____
15 13, 2003) (Ex. 21).

16 ⁴² FHWA Record of Decision at 11 (Nov. 17, 2011) ("all bus routes, HOVs, and Mercer Island drivers would be
17 rerouted to the outer roadway HOV lanes") (Ex. 67); Letter from FHWA Div. Admin. Mathis to WSDOT (June 22,
18 2011) (approving WSDOT's access plan for once the I-90 center lanes close but stating, the "on ramp connecting
19 Island Crest Way to the WB I-90 HOV lane . . . should be monitored and closed to single occupant vehicles use if
20 significant collision frequency and severity begin to occur.") (Ex. 51).

21 ⁴³ Letter from FHWA Div. Admin. Mathis to WSDOT Secretary Millar and City Manager Lancaster (Aug. 5, 2016)
22 (Ex. 44).

23 ⁴⁴ Letter from WSDOT Secretary Millar to City Mayor Basset (Feb. 1, 2017) (Bassett Decl. Ex. 2).

24 ⁴⁵ Letter from WSDOT Secretary Millar to City Mayor Basset (Feb. 1, 2017) (outlining and rejecting City's
25 suggestions) (Bassett Decl. Ex. 2).

⁴⁶ Island Crest Way is Mercer Island's only "principal arterial." *See* Mercer Island Compr. Plan, Transp. Element at
11-12, 13 ("Principal Arterials carry the highest volumes of traffic and provide the best mobility in the roadway
network. These roads generally have higher speed limits, higher traffic volumes, and limit access to adjacent land
uses."). (Ex. 39)

⁴⁷ As early as 1971, the Commission recognized the importance of ensuring that Mercer Island had "major access
points in the [Central Business District] at Island Crest Way" to "encourage regional facilities in the [Central Business
District]" and so that I-90 "would not divert Island traffic away from the existing streets that carry high volumes."
Mercer Island I-90 Design Conference, Job Meeting Notes at 14 (Mar. 29-31, 1971) (Ex. 38); *see also* Design Public
Hearing, S.R. 90 West Shore Mercer Is. to East Channel Bridge at 22 (Oct. 30, 1971) ("This lane reduction and lane
add [at Island Crest Way] is necessary to obtain balanced traffic flow through this interchange and to prevent serious

1 of Mercer Island vehicles to access I-90. WSDOT states it intends to close and transfer control of
2 the center lanes on June 3, 2017.

3 Just a few weeks ago, on April 5, WSDOT and Sound Transit strategically released two
4 reports commissioned by Sound Transit (titled Interstate 90 and Mercer Island Mobility Study and
5 East Link Extension 2017 SEPA Addendum). WSDOT issued a memorandum purporting to rely
6 on the analysis on which those reports are based. WSDOT's April 5, 2017 memorandum states
7 that Sound Transit's "mobility study provides the facts needed for decision making regarding
8 any needed mobility improvements for Mercer Island."⁴⁸ The memorandum then states, "Based on
9 the results of [Sound Transit's] Mobility Study . . . , there is no need to propose implementing
10 measures to address a loss of mobility under the 2004 Amendment."⁴⁹ WSDOT thus purports to
11 have unilaterally made the determinations under Provision 7 of the 2004 Amendment (that there is
12 no loss of mobility and no required mitigation) based solely on Sound Transit's analyses, having
13 never sought the City's concurrence as to the scope or methodology used to create the reports.⁵⁰

14 Just as WSDOT has reached its conclusions without seeking the City's concurrence, Sound Transit
15 concluded and formally stated that no further discussions are necessary to comply with the 2004
16 Amendment: "**Based on the mobility study, except for efforts to agree on the proposed [five]**
17 **intersection improvements, no additional consultation or concurrence efforts among the**
18 **signatories are required and no additional mitigation is required** before opening the R-8A
19 HOV lanes and converting the center roadway to light rail use."⁵¹

20
21 access restriction for Mercer Island traffic.") (Ex. 68).

22 ⁴⁸ WSDOT Memorandum at 1 (Apr. 5, 2017) (emphasis added) (Bassett Decl. Ex. 5).

23 ⁴⁹ WSDOT Memorandum at 1 (Apr. 5, 2017) (Bassett Decl. Ex. 5). Sound Transit's analysis actually demonstrates the
24 opposite, confirming an appreciable decline in mobility in several critical areas. *See infra* Facts Section F2. The
25 City's own experts have just begun analyzing the analyses and already have identified numerous inaccuracies which,
when corrected, point to a drastic loss of mobility. *Id.*

⁵⁰ Bassett Decl. ¶ 6.

⁵¹ Sound Transit Motion M2017-53 at 1 (Apr. 27, 2017) (emphasis added) (Bassett Decl. Ex. 4).

1 WSDOT and Sound Transit have rejected the City's efforts to approach the matter
2 collaboratively, and instead excluded the City from critical aspects of Sound Transit's analysis in
3 determining whether a loss of mobility exists (including, critically, the scope of evaluation, of
4 which Sound Transit took a very narrow view, *see infra* Facts Section F2),⁵² while working
5 together on a joint public relations campaign.⁵³ Instead of collaborating with the City to ensure an
6 objective, balanced assessment, and instead of sharing the underlying data with the City (which the
7 City formally requested on February 17, 2017), WSDOT relied on Sound Transit's analysis alone,
8 and then both resisted requests for discovery and refused to produce the underlying data until April
9 28, 2017, just before it was necessary to file this motion.⁵⁴ They did so knowing the City could not
10 evaluate Sound Transit's analysis or itself undertake a meaningful study without that data.

11 WSDOT and Sound Transit are well aware of their responsibilities under the agreements,
12 but neither took even minimally adequate steps to collaborate, adequately study mobility impacts
13 to the City, or reach concurrence with the City. They ignored the City's urging years ago that
14 "substantive meetings" begin about the obligations under Provision 7 of the 2004 Amendment.⁵⁵
15 WSDOT has known since November 2013 that it needed to determine the loss of mobility and
16 mitigate the impacts caused by barring Mercer Island SOVs from the new R8A lanes, but did
17 nothing. WSDOT instead merely "cross[ed its] fingers" that the problem would go away, as
18 WSDOT's Sound Transit Program Lead put it in November 2013.⁵⁶ When the problem did not go
19 away, Sound Transit commissioned a study to try and make it go away, somehow concluding that
20

21 ⁵² Bassett Decl. ¶ 6.

22 ⁵³ *See, e.g.*, Sound Transit-WSDOT emails (Ex. 69).

23 ⁵⁴ Bassett Decl. ¶ 7.

24 ⁵⁵ The City's Mayor sent a formal letter to WSDOT (copied to Sound Transit) on September 17, 2015 stating, "Our
25 Council . . . was very concerned . . . that WSDOT [stated it] did not anticipate substantive meetings between your
Department and the City beginning until early 2016. . . . [T]he planning for this work should have begun years ago. . . .
Mercer Islanders are not going to be stranded due to inaction." (Ex. 35).

⁵⁶ Dylan Counts (WSDOT Sound Transit Program Lead) email (Nov. 25, 2013) (Ex. 34).

1 thousands of vehicles per hour could be diverted onto residential streets and into Mercer Island's
2 Town Center, all without any loss of mobility.

3 More recently, Sound Transit has actively resisted mediating this matter, telling this Court
4 a month ago, "that takes time, and that's time we don't have."⁵⁷ Although WSDOT and Sound
5 Transit created the schedule compression, they undoubtedly will claim that an injunction will
6 cause construction delay. But the injunction the City seeks need not delay the project. A
7 collaborative process, in which all parties' studies and proposed mitigation measures are
8 considered, should lead to a resolution fair to all parties, could begin immediately, and could
9 conclude within days or at least well before there is any adverse impact on the East Link project.⁵⁸

10 **F. The Impacts to Mercer Island Will Be Significant.**

11 **1. The City will experience a dramatic loss of mobility to and from Mercer
12 Island when the center lanes are closed.**

13 Under WSDOT and Sound Transit's current plan, the ability of vehicles and pedestrians to
14 safely and efficiently move throughout Mercer Island and onto and off I-90 will be drastically
15 reduced. The following is a preliminary summary of the expert opinions being developed by the
16 City's traffic and mobility experts (the Transpo Group and Tatum Group).⁵⁹

17 The closure of the I-90 center lanes, the closure of the 77th Avenue SE onramp, and the
18 closure of the Island Crest Way onramp to SOVs will cause a massive shift of traffic to local
19 streets, including North Mercer Way, the streets throughout Town Center, SE 40th Street, SE 24th
20 Street, and West Mercer Way.⁶⁰ The diversion of traffic and increased volume will cause a ripple
21 effect on mobility throughout Mercer Island.⁶¹ Even using Sound Transit's own data,

22 ⁵⁷ *Sound Transit v. Mercer Island*, No. 17-2-05191-8, Transcript at 66–68 (Apr. 13, 2017) (Ex. 75).

23 ⁵⁸ Christensen Decl. ¶¶ 10–12.

24 ⁵⁹ If the Court deems it necessary to hear expert testimony in order to issue the requested injunction, the City requests
25 the Court schedule an evidentiary hearing for May 31, 2017. *See infra* Section IV, Evidence Relied Upon.

⁶⁰ Haldors Decl. ¶ 6, Ex. 1 at 3–4 & Exh. C; Kwasniak Decl. ¶ 8, Ex. 1 at 8–11.

⁶¹ Haldors Decl. ¶ 6, Ex. 1 at 3–4 & Ex. C; Kwasniak Decl. ¶¶ 8–12, Ex. 1 at 8–12.

1 approximately 4,000 vehicles per day use Island Crest Way to access I-90, and the closure of the
2 center lanes will cause at over 75 percent of those vehicles to divert elsewhere to other access
3 points on the island.⁶² This will be in addition to the thousands of daily trips shifting from the 77th
4 Avenue SE onramp, which also will be eliminated.⁶³ Streets such as West Mercer Way, SE 40th
5 Street, SE 27th Street, and North Mercer Way already operate at high traffic volume during peak
6 travel times, and the elimination of the access ramps to I-90 will dramatically increase congestion
7 and travel time as commuters and buses struggle to reach the two remaining onramps, both of
8 which already operate with delays.⁶⁴

9 Apart from causing massive disruption to mobility on Mercer Island, this traffic dislocation
10 will make trips from the center of Mercer Island to Seattle take up to three times longer, and result
11 in significant increases in travel time (both westbound and eastbound) for virtually every other
12 customary travel pattern.⁶⁵ Sound Transit and WSDOT acknowledge that increased travel time and
13 a decline in mobility will exist⁶⁶ between Seattle and Mercer Island whether measured by SOVs or
14 “overall person travel times”;⁶⁷ whether that travel occurs during the morning or evening peak
15 hours; and whether measured during the period of construction or after light rail is operational.⁶⁸

16 The diversion of traffic will force passenger, freight, and emergency vehicles onto routes

17 ⁶² Kwasniak Decl. ¶ 9.

18 ⁶³ Haldors Decl. ¶ 6, Ex. 1 at 3–4; Kwasniak Decl. ¶ 10.

19 ⁶⁴ This fact is illustrated by evaluating the 76th Avenue westbound entrance ramp, which will experience an increase
20 from 175 to over 1,230 vehicles during the morning peak hour, causing substantial delays and leading to significant
21 backups along North Mercer Way and 76th Avenue. Kwasniak Decl. ¶ 10, Ex. 1 at 8–25.

22 ⁶⁵ Haldors Decl. ¶ 5, Ex. 1 at 3; Kwasniak Decl. ¶¶ 14–15.

23 ⁶⁶ Sound Transit and WSDOT only disagree as to the amount of that loss and whether they can offset the improvement
24 in travel times for certain modes of travel between the City and Bellevue by treating all travel time in the aggregate.
25 Their attempt to offset travel times ignores the clear language in the 2004 Amendment that refers to “any” loss of
mobility, as well as the 2004 Amendment’s intent to address impacts to loss of mobility to any traffic displaced by the
center lanes notwithstanding mobility benefits from installation of the R8A lanes.

⁶⁷ Thomsen Decl. Ex. 73. As defined by Sound Transit, overall person travel times consists of a weighted-by-person
travel time for all modes of travel (SOV, HOV, and transit).

⁶⁸ Thomsen Decl. Ex. 73. The sole exception identified in Sound Transit’s Addendum is during the morning peak
hours where an SOV or HOV is traveling eastbound from Seattle to Mercer Island.

1 with minimal safety and street improvements.⁶⁹ Traffic volume along North Mercer Way adjacent
2 to the existing park-and-ride facility will nearly double, increasing from 549 to 925 (or more)
3 vehicles during the morning peak hour.⁷⁰ This increase in traffic, coupled with the fact that
4 commuters must cross the street from the park-and-ride facility to the bus stop (and future light rail
5 station), creates a high risk situation that without suitable mitigation will result in several
6 additional crashes per year, including collisions with pedestrians, of which statistically at least one
7 will be fatal.⁷¹ Volume will increase in other areas that are at high-risk of auto-pedestrian
8 conflicts, including West Mercer Way and SE 40th Street, both of which pass elementary schools
9 and playfields.⁷² Sound Transit concedes the decline in safety on Mercer Island streets,
10 acknowledging that even with its conservative assumptions, “the closure of the I-90 roadway and
11 its ramps would shift the locations where crashes occur in the future,” i.e., will shift crashes from
12 I-90 to Mercer Island streets.⁷³

13 A future light rail system will not resolve these impacts. The light rail system will not be
14 operational until 2023 at the earliest, and the impacts to mobility will continue even after it is
15 operational, another fact Sound Transit acknowledges. During the six-year (or more) construction
16 period, Mercer Island residents and businesses will have no way to ameliorate the drastic loss of
17 mobility and safety. Sound Transit’s existing Mercer Island park-and-ride facility is at capacity by
18 7:30 a.m. every weekday, with about 50% of the facility used by commuters from off-island.⁷⁴
19 There is limited intra-island bus service, and transit is accessed from North Mercer Way, where the

20 ⁶⁹ Kwasniak Decl. ¶ 20, Ex. 1 at 10–25.

21 ⁷⁰ Kwasniak Decl. ¶ 19.

22 ⁷¹ Kwasniak Decl. ¶¶ 16–21, Ex. 1 at 12, 28–30.

23 ⁷² Kwasniak Decl. ¶ 20, Ex. 1 at 15–17.

24 ⁷³ Sound Transit estimates that there will be at least two more crashes per year—every year—due to the proposed
25 changes to I-90, an increase of 6.7% over existing conditions.

⁷⁴ This percentage was determined before Sound Transit’s closure of the South Bellevue and Overlake park-and-rides.
See Haldors Decl. Ex. 1 at 8–9; Kwasniak Decl. Ex. 1 at 11; *Huge Park-and-Ride Closure Leaves Angry Commuters
Feeling Stranded*, Seattle Times, May 8, 2017, at A1 (Ex. 47).

1 congestion and safety impacts will be most acute.⁷⁵ Once light rail is operational, these traffic and
2 safety impacts will be compounded by the fact that Sound Transit has no plan to offer parking at
3 the Mercer Island Station dedicated to Mercer Island commuters as the 2004 Amendment
4 contemplates.⁷⁶ This is despite Sound Transit's forecast that there will be 2,500 daily boardings at
5 the station, and Sound Transit's existing park-and-ride holds fewer than 500 vehicles and is fully
6 utilized.⁷⁷ Mercer Island commuters cannot benefit from light rail if they cannot access it.

7 **2. Sound Transit's mobility analysis is fundamentally flawed.**

8 The City's experts already have concluded⁷⁸ that Sound Transit's methodology and data are
9 flawed in at least these respects:

- 10 • **Failure to adequately analyze traffic diversion.** Sound Transit's modeling was
11 limited to a handful of intersections immediately adjacent to I-90, largely ignoring
12 impacts to Mercer Island streets more distant from I-90, but which will also be
seriously affected.⁷⁹
- 13 • **Failure to account for unique characteristics of Mercer Island streets and
14 intersections.** Sound Transit's modeling neglects to account for the characteristics of
15 local streets and intersections, such as West Mercer Way, SE 40th Street, SE 27th
16 Street, and North Mercer Way, which have unique capacity limitations. For example,
West Mercer Way is a non-arterial two-lane route that travels through a school zone,
lacks pedestrian sidewalks, and has blind curves, steep slopes, and numerous private
driveway-street intersections.⁸⁰
- 17 • **Failure to adequately quantify traffic diversion.** The City's experts' traffic counts
18 and evaluation shows that Sound Transit's data underestimates the actual existing

19 ⁷⁵ Haldors Decl. Ex. 1 at 8; Kwasniak Decl. 18–19, Ex. 1 at 11–12.

20 ⁷⁶ See 2004 Amendment Prov. 7 at 4 (“additional transit facilities and services such as . . . parking available for Mercer
Island residents”) (Ex. 25).

21 ⁷⁷ East Link Project Final Environmental Impact Statement App. J, Response to Comment EL652-5 & -6 (2011) (“At
[the Mercer Island Station], the transit ridership forecast model predicted by 2030 there will be 2,500 daily boardings .
22 . . . It is expected that people not able to park at a park-and ride station will either use another station that has available
parking or change their mode of travel.”) (Ex. 46).

23 ⁷⁸ The City only very recently received Sound Transit/WSDOT's reports and days ago received the underlying data, so
this work is continuing.

24 ⁷⁹ This deficiency is visually represented at Exhibit B of Haldors Decl. Ex. 1; see also Haldors Decl. ¶ 8, Ex. 1 at 4–5;
Kwasniak Decl. ¶ 23, Ex. 1 at 10–11, 32–33.

25 ⁸⁰ Haldors Decl. ¶¶ 8–9, Ex. 1 at 5–6, 7 Kwasniak Decl. ¶ 23, Ex. 1 at 27–30, 32–33.

1 traffic volume, resulting in a gross underestimation of the diversion of vehicles to local
2 streets and intersections.⁸¹

- 3 • **Failure to properly evaluate safety impacts.** Sound Transit's reports fail to
4 adequately address safety by erroneously relying on a predictive Highway Safety
5 Manual Safety Performance Functions without calibrating for local conditions. This
6 resulted in an underestimation of the traffic and safety impacts.⁸²
- 7 • **Invalid offsetting of travel times.** While acknowledging that both SOV and overall
8 person travel time will increase, Sound Transit's study offsets those declines in
9 mobility with other purported improvements. This "offset" distorts the significant
10 impacts that occur to particular modes of travel (like SOVs, which comprise the vast
11 majority of all Mercer Island traffic).⁸³
- 12 • **Invalid offsetting of safety.** Sound Transit also offsets the decline in safety on Mercer
13 Island with supposed gains elsewhere on I-90. Increased safety risks on Mercer Island
14 cannot be justified simply because that harm has been diverted from elsewhere.⁸⁴
- 15 • **Inaccurate conclusions about the impact of bus and light rail.** Sound Transit
16 concludes that bus or light rail will ameliorate the loss of mobility, but, as described
17 above, the actual facts make that unlikely.⁸⁵

18 III. STATEMENT OF ISSUE

19 Should the Court grant a preliminary injunction barring WSDOT from closing the I-90
20 center lanes and Sound Transit from beginning construction there until they have complied with
21 their contractual obligation to reasonably seek concurrence with the City on the loss of mobility
22 and measures to address it, as determined by the Court with the assistance of a Special Master?

23 IV. EVIDENCE RELIED UPON

24 This motion relies on the declarations (and attached exhibits) filed today of Bruce Bassett,
25 Eric Christensen, Bruce Haldors, Andrew Kwasniak, and Randall Thomsen. If the Court believes
live expert testimony about the impacts to mobility (including visual representations) would be

22 ⁸¹ Haldors Decl. Ex. 1 at 2-3; Kwasniak Decl. ¶ 25, Ex. 1 at 32-33.

23 ⁸² Kwasniak Decl. ¶¶ 27-28, Ex. 1 at 26-30.

24 ⁸³ Haldors Decl. ¶ 9, Ex. 1 at 6; Kwasniak Decl. ¶ 29, Ex. 1 at 31-33.

25 ⁸⁴ Kwasniak Decl. ¶ 28, Ex. 1 at 26-29.

⁸⁵ Haldors Decl. ¶ 9, Ex. 1 at 7-9; Kwasniak Decl. ¶ 30, Ex. 1 at 30, 31.

1 helpful or necessary to determine the issue of injunctive relief,⁸⁶ the City respectfully requests the
2 Court set an evidentiary hearing on May 31, 2017.⁸⁷

3 V. AUTHORITY

4 A. The City Is Entitled to a Preliminary Injunction.

5 WSDOT and Sound Transit made a binding commitment that prior to closing the I-90
6 center lanes, they would reasonably seek concurrence with the City on the loss of mobility
7 expected from that closure and the measures to address it. They have abdicated this duty,
8 unilaterally declaring (contrary even to Sound Transit's own analysis) that there is no loss of
9 mobility and no mitigation needed. They should not be permitted to close the I-90 center lanes and
10 begin construction until they have engaged in the required consultative process and reasonably
11 sought concurrence with the City.

12 Preliminary injunctions are "designed to preserve the status quo until the trial court can
13 conduct a full hearing on the merits" of the complaint. *SEIU Healthcare 775NW v. Dep't of Soc.*
14 *& Health Servs.*, 193 Wn. App. 377, 392, 377 P.3d 214 (2016). To obtain a preliminary
15 injunction, the City must establish: (1) a clear legal or equitable right, meaning it will likely prevail
16 on the merits of its claim; (2) a well-grounded fear of immediate invasion of that right; and (3) an
17 actual and substantial injury that has resulted or will result from the wrongdoing alleged in the
18 complaint. *Tyler Pipe Indus., Inc. v. Dep't of Revenue*, 96 Wn.2d 785, 792-93, 638 P.2d 1213
19 (1982). In considering these requirements, the Court also considers whether the balance of
20 equities weighs in favor of a preliminary injunction. *Nw. Gas Ass'n v. Wash. Utils. & Transp.*
21 *Comm'n*, 141 Wn. App. 98, 122, 168 P.3d 443 (2007).

22 Each of these factors is met here. The City is entitled to a preliminary injunction barring

23 ⁸⁶ Until April 28, 2017, WSDOT and Sound Transit thwarted the City's effort to obtain the source data and
24 methodology underlying Sound Transit's study (which itself was not released until April 5, 2017). Bassett Decl. ¶ 7.
25 The City has diligently pursued the modeling data and information in the short time frame this case has been pending
but was only very recently provided this information, *id.*, necessitating the filing of this motion prior to finalization of
its experts' opinions.

⁸⁷ Counsel for Sound Transit notified the City he is unavailable May 20-28, 2017.

1 WSDOT from closing the I-90 center lanes and Sound Transit from beginning its construction on
2 the center lanes until they satisfy their contractual obligations.

3 **B. WSDOT and Sound Transit Have Failed to Satisfy Their Contractual Obligations,**
4 **Which Breach Will Imminently Cause Actual and Substantial Injury to the City.**

5 **1. The 1976 Agreement and 2004 Amendment are enforceable contracts that**
6 **bind WSDOT and Sound Transit.**

7 Each of the parties to the 1976 Agreement made significant concessions that allowed I-90
8 to be built as it exists today. The City relinquished its demand for a lane dedicated exclusively to
9 Mercer Island traffic. In exchange, the parties agreed that Mercer Island traffic would have the
10 right to use the reversible center lanes, along with transit and carpools, subject only to Paragraph
11 14, which required “concurrence of the parties” as a “prerequisite” to any change to that mode of
12 operation. This exchange of consideration makes the agreement enforceable. *See Storti v. Univ. of*
13 *Wash.*, 181 Wn.2d 28, 37, 330 P.3d 159 (2014) (parties must have agreed to some “bargained for
14 legal detriment”). WSDOT’s and Sound Transit’s promises in the 2004 Amendment are equally
15 enforceable, because they were made in exchange for the City’s relinquishment of the right under
16 the 1976 Agreement that Mercer Island traffic could use the I-90 center lanes. *See King v.*
17 *Riveland*, 125 Wn.2d 500, 505, 886 P.2d 160 (1994) (“[c]onsideration is any act, forbearance,
18 creation, modification or destruction of a legal relationship”). The 2004 Amendment itself states
19 the basis for the provisions protecting the City: “all parties recognize the I-90 facility as . . . the
20 only means of mobility to and from Mercer Island.”⁸⁸

21 Both at the time of contracting and thereafter, WSDOT and Sound Transit recognized that
22 they were bound by the terms of the agreement. The 1976 Agreement states it “represents
23 substantial accommodations by the parties of positions held heretofore . . . [,]made in order to
24 achieve unanimous agreement upon which to proceed with the design and construction of I-90 and

25 ⁸⁸ 2004 Amendment at 2 (Ex. 25).

1 related projects.”⁸⁹ Indeed, the agreement evolved from a “Memorandum of Understanding” to a
2 “Memorandum Agreement.”⁹⁰ Until recently, WSDOT’s actions reflected an understanding that
3 Paragraph 14 required it to reach consensus with the affected jurisdictions. As required by the
4 1976 Agreement, the Commission established a “I-90 Review Committee” of representatives of
5 those jurisdictions to “monitor and advise the Commission” and to reach consensus on any
6 changes.⁹¹ For three decades, the affected jurisdictions relied on this promise⁹² and conferred on
7 many issues involving I-90, and agreed to any material change to I-90 before the change
8 occurred.⁹³ Throughout, the Commission reassured the affected jurisdictions that it would “comply
9 with the wording and with the intent of the agreement.”⁹⁴

10 In 2004, WSDOT spoke of the “legitimate concern o[f] what happens to Mercer Island”
11 after the closure of the I-90 center lanes, and cautioned against the “political and irrational
12 impossibility” of WSDOT taking the position, “Mercer Island you are permanently entitled to
13 those middle lanes” under the 1976 Agreement and then “we changed our mind.”⁹⁵ WSDOT heard
14 testimony from a State representative that Provision 7 (then referred to as the “mitigation
15 Amendment”) provided “more protection for the Island in terms of what the [mitigation] options
16

17 ⁸⁹ 1976 Agreement ¶ 14 (Ex. 20); *see also* Letter from Wash. St. Highway Comm’n Dir. Bulley to Chairman of
18 Transportation Committees for the State Legislature (Jan. 27, 1977) (“Agreement has been reached between various
local governments regarding the section of I-90 across Lake Washington and Mercer Island between I-5 and I-405.”)
(Ex. 48).

19 ⁹⁰ *Compare* Draft (Oct. 15, 1976) (Ex. 49) *with* Draft (Nov. 9, 1976) (Ex. 50).

20 ⁹¹ *See* 1976 Agreement ¶ 11 (Ex. 20); Letter from Wash. St. Highway Comm’n Eng’r Bogart (Jan. 7, 1977) (Ex. 56).

21 ⁹² *See, e.g.*, Declaration of City of Seattle Mayor Charles Royer (May 20, 1980) (“The City of Seattle’s support for the
project [I-90] has always been conditioned upon the assurances contained in the Memorandum Agreement.”) (Ex. 57).

22 ⁹³ *See, e.g.*, Resolution No. 26120, City of Seattle (Oct. 9, 1979) (requesting agreement to a pedestrian and bicycle
facility of a particular specification) (Ex. 58); Letter from City of Bellevue Mayor Foreman to WSDOT (Apr. 16,
1980) (requesting agreement on minimum width of bike lanes) (Ex. 59); Mercer Island I-90 Committee Meeting,
Agenda (July 25, 1978) (flyer stop/park and ride lots, landscaping) (Ex. 60); Mercer Island I-90 Committee Meeting,
Agenda (Feb. 1, 1979) (safety improvements, activities to be allowed under bridges, design concepts) (Ex. 61).

24 ⁹⁴ Letter from Wash. St. Highway Comm’n Dir. Bulley to Metro (May 3, 1978) (Ex. 62); *see also* Letter from Wash.
St. Highway Comm’n Dir. to City of Seattle (Nov. 28, 1978) (DOT “intends to comply with the agreement”) (Ex. 63).

25 ⁹⁵ Wash. St. Transp. Comm’n, Meeting Minutes, at 3609–10 (Sept. 15–16, 2004) (Ex. 28).

1 might be” if Mercer Island lost access to the center lanes.⁹⁶ In approving the 2004 Amendment,
2 WSDOT acknowledged that its terms were binding, stating:

3 In this respect the changes that will necessarily be made in access to I-90 from
4 Mercer Island roadways **will require future traffic management actions to**
5 **assure the equitable access of Mercer Island** and all other communities to the
6 roadway.⁹⁷

7 Sound Transit has affirmed that the 1976 Agreement and 2004 Amendment are binding. In
8 2004, Sound Transit stated that the 2004 Amendment “**commits Sound Transit** to the guiding
9 principles for implementing [High Capacity Transit] in the I-90 roadway.”⁹⁸ In 2005, Sound
10 Transit stated it “**remain[s] committed** to the provisions of both the MOA and the Amendment,”
11 and that “the intent and terms of the MOA, as amended” entitle the City to “measure[s] to address
12 mobility access for Mercer Island traffic under the terms of the Amendment (Provision #7).”⁹⁹ In
13 July 2015, Sound Transit again acknowledged its “obligations under the 2004 Amendment.”¹⁰⁰

14 The binding nature of these agreements is consistent with state law and public policy.
15 Sound Transit, WSDOT, and the City are authorized to enter into contracts to fulfill their statutory
16 authority and objectives. *See, e.g.*, RCW 81.112.070 (“[a regional transit] authority may contract
17 with any governmental agency . . . for the purpose of planning, constructing, or operating any
18 facility”). The Legislature has declared that regional agreements are important tools to resolve
19 complex issues. *See, e.g.*, RCW 39.34.010; *Swinomish Indian Tribal Cmty. v. Skagit Cty.*, 138
20 Wn. App. 771, 779–80, 158 P.3d 1179 (2007) (the Interlocal Cooperation Act “manifest[s]
21 legislative intent favoring cooperation and joint planning”); *see also* RCW 47.06.010 (“The

22 ⁹⁶ Wash. St. Transp. Comm’n, Meeting Minutes, at 3596 (Sept. 15–16, 2004) (comments of State Rep. Jarret) (Ex. 28).

23 ⁹⁷ Wash. St. Transp. Comm’n, Resolution No. 667 (Sept. 16, 2004) (Ex. 29).

24 ⁹⁸ Sound Transit Motion No. M2004-63 at 2 (Aug. 12, 2004) (Ex. 66).

25 ⁹⁹ Letter from Sound Transit, Cities of Bellevue, Mercer Island, and Seattle, and King County to WSDOT Secretary MacDonald at 1 (Sept. 8, 2005) (Ex. 40); *see also* Sound Transit, Long-Range Plan Final SEIS, Vol. 2, Sound Transit Comment Response No. L-016-001 at 2 (June 2005) (emphasis added) (recognizing “the requirements of the 1976 MA and Amendment” include that it implement “mitigation measures”) (Ex. 64).

¹⁰⁰ Sound Transit Motion No. M2015-67 (July 23, 2015) (Ex. 30).

1 legislature also recognizes that transportation planning authority is shared on the local, regional,
2 and state levels, and that this planning must be a comprehensive and coordinated effort.”).

3 **2. WSDOT and Sound Transit agreed that the I-90 center lanes would not close**
4 **until after they had reasonably sought concurrence with the City about the**
5 **loss of mobility and the measures to address the loss.**

6 The 2004 Amendment requires that, in exchange for the City’s release of its contractual
7 right to use the I-90 center lanes, WSDOT must “identif[y] and satisfactorily address[.]” “any loss
8 of mobility to and from Mercer Island” “prior to the time the center roadway converts to High
9 Capacity Transit.”¹⁰¹ WSDOT must do this “in consultation with the affected jurisdictions
10 pursuant to paragraph 14 of the [1976] Agreement.”¹⁰² Paragraph 14 requires WSDOT to
11 reasonably seek the “concurrence of the parties” “to the greatest extent possible under law” as a
12 “prerequisite” to any action.¹⁰³ Together, these provisions mean WSDOT must “consult[.]” and
13 reasonably seek “concurrence” with Sound Transit and the City on:

- 14 • Quantifying the “loss of mobility to and from Mercer Island” expected to be caused
15 by closure of the I-90 center lanes;
- 16 • “[I]dentif[y]ing” “measures” that would mitigate that loss of mobility; and
- 17 • Ensuring those measures are “satisfactorily addressed” “prior to” the closure.

18 The word “concurrence” obligates WSDOT to seek consensus. “Concurrence” means
19 “agreement or union in action.”¹⁰⁴ And “to address” means “to make straight,” “set in order,” or
20 “make right,”¹⁰⁵ which must be done “satisfactorily.” These words (“concurrence” and

21 ¹⁰¹ 2004 Amendment Prov. 7 at 4 (Ex. 25). Provision 7 is quoted in full at page 7.

22 ¹⁰² 2004 Amendment Prov. 7 at 4 (Ex. 25).

23 ¹⁰³ 1976 Agreement ¶ 14 at 13 (Ex. 20). Paragraph 14 is quoted in full at page 6.

24 ¹⁰⁴ *Webster’s Third New International Dictionary* 472 (Philip Babcock Gove et al. eds., 2002). “We generally give
25 words in a contract their ordinary, usual, and popular meaning unless the entirety of the agreement clearly
demonstrates a contrary intent.” *Hearst Commc’ns, Inc. v. Seattle Times Co.*, 154 Wn.2d 493, 503–04, 115 P.3d 262
(2005).

26 ¹⁰⁵ *Webster’s Third New International Dictionary* 24. Meanings of later derivation include “to direct the efforts or turn
the attention of (oneself)” but are used as a reflexive verb (i.e., to address oneself to), which would not be an
appropriate interpretation of the 2004 Amendment’s requirement to “satisfactorily address” mitigating measures.

1 “satisfactorily address”) would be superfluous if the provision is interpreted to require only that
2 WSDOT unilaterally issue a statement that no loss of mobility will occur, based on a flawed study
3 that Sound Transit alone commissioned (which, in fact, shows a loss of mobility for Mercer
4 Island), with no obligation to seek agreement concerning the data, methodology, or conclusions in
5 that study or the measures required. *See GMAC v. Everett Chevrolet, Inc.*, 179 Wn. App. 126, 135,
6 317 P.3d 1074 (2014) (court should “give[] effect to all of the words in a contract”).

7 This means that at a minimum¹⁰⁶ WSDOT must seek agreement with the City on the loss of
8 mobility and the measures required to eliminate that loss. This does not mean that the City may
9 unreasonably withhold its concurrence. All contracts impose an “implied duty of good faith and
10 fair dealing that obligates the parties to cooperate with each other so that each may obtain the full
11 benefit of performance.” *Rekhter v. Dep’t of Soc. & Health Servs.*, 180 Wn.2d 102, 112, 323 P.3d
12 1036 (2014) (quotation marks omitted). The City could not oppose Sound Transit’s quantification
13 of the loss of mobility and identification of measures to redress it without providing its own
14 analysis, just as WSDOT cannot rely solely on Sound Transit’s study. The City has done so, and it
15 now is time for WSDOT and Sound Transit to fairly consider that analysis and seek concurrence.

16 Inclusion of the language that “any loss of mobility” be “satisfactorily addressed . . . prior
17 to” closure of the I-90 center lanes and that the parties would engage in “consultation” was “hard-
18 fought”¹⁰⁷ and specifically bargained for,¹⁰⁸ even requiring the parties to reapprove the 2004

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21 ¹⁰⁶ The 2004 Amendment is most properly interpreted as requiring that the measures be implemented prior to the
closure of the I-90 center lanes, but in this motion the City is not insisting on enforcement of that by injunction.

22 ¹⁰⁷ Mercer Island City Council Agenda Bill No. 3810 at 3 (Oct. 27, 2003) (“While the MOA amendment creates a new
regional vision for I-90 operations, this hard-fought principle establishes the region’s recognition that I-90 is the only
mobility choice for Mercer Island’s residents.”) (Ex. 27).

23 ¹⁰⁸ Mercer Island City Council Minutes at 2 (Oct. 27, 2003) (inserting “satisfactorily”) (Ex. 22); Mercer Island City
Council Agenda Bill No. 3825 at 1 (Dec. 1, 2003) (“modifications track fairly closely with what the Council requested
24 in October”) (Ex. 53); Mercer Island City Council Minutes at 4 (Aug. 2, 2004) (inserting “prior to”) (Ex. 54);
Metropolitan King County Transportation Committee Staff Report at 2 (Aug. 25, 2004) (describing City Of Mercer
25 Island’s proposed amendments and inclusion of the “consultation” provision) (Ex. 52).

1 Amendment.¹⁰⁹ In a letter to WSDOT and Sound Transit in November 2003, the City recognized
2 that “in order to achieve high-capacity transit, we understand Mercer Island may need to give up
3 the rights in the 1976 agreement,” but asked for “assurances that Islanders will be given the means
4 to use the high-capacity transit system” and a “commitment to implement an appropriate solution,”
5 such as “additional parking spaces” or “better bus service,” **“that will be worked out**
6 **concurrently with the planning for high-capacity transit.”**¹¹⁰ Provision 7 of the 2004
7 Amendment contains nearly this exact commitment.¹¹¹ In passing Resolution No. 1337, which
8 authorized the Mayor to sign the 2004 Amendment, the City Council stated it “interprets
9 ‘satisfactorily addressed’ as meaning that such mitigation has been completed and/or constructed
10 to Mercer Island’s reasonable satisfaction prior to such conversion.”¹¹² Sound Transit knew of this
11 contemporaneous interpretation of Provision 7, and there is no evidence of contrary intent.¹¹³

12 WSDOT and Sound Transit recognized that the 2004 Amendment “preserved” Mercer
13 Island access. “Preserve” means “to keep safe from injury, harm, or destruction,”¹¹⁴ meaning
14 mobility was meant to be preserved through mitigation. The use of the term “preserve” means
15 WSDOT and Sound Transit understood that mitigation measures would have to be implemented
16 prior to the closure of the I-90 center lanes. WSDOT repeatedly stated that the purpose of the
17 2004 Amendment was to “preserve” Mercer Island mobility. In agreeing to Provision 7, the

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19 ¹⁰⁹ See Wash. St. Transp. Comm’n, Meeting Minutes at 3569 (Aug. 18–19, 2004) (“The Mercer Island City Council
20 added an Amendment to the Memorandum of Agreement; therefore, it needs to be re-approved by King County
21 Council, Bellevue City Council and Seattle City Council . . .”) (Ex. 55); Metropolitan King County Transportation
22 Committee Staff Report at 2 (Aug. 25, 2004) (Ex. 52).

23 ¹¹⁰ Letter from Mercer Island City Council to Sound Transit Board of Directors and WSDOT at 2 (Nov. 13, 2003)
24 (emphasis added) (Ex. 21).

25 ¹¹¹ 2004 Amendment Prov. 7 at 4 (Ex. 25).

¹¹² City of Mercer Island Resolution No. 1337 (Aug. 2, 2004) (Ex. 26).

¹¹³ Sound Transit, Long-Range Plan Final SEIS, Vol. 2, Sound Transit Comment Response No. L-016-002 at 2 (June
2005) (emphasis added) (recognizing “the requirements of the 1976 MA and Amendment” include that it implement
“mitigation measures”) (Ex. 64).

¹¹⁴ Webster’s Third New International Dictionary at 1794.

1 Commission was advised that its purpose was to “**preserve[]** Mercer Island access.”¹¹⁵ Sound
2 Transit shared WSDOT’s understanding that the 2004 Amendment “preserved” the City’s rights to
3 mobility it secured in 1976. Advocating for adoption of the 2004 Amendment, Sound Transit’s
4 representative testified: “this Amendment doesn’t do anything immediately to Mercer Island’s
5 access, in fact, this Amendment actually **preserves Mercer Island access.**”¹¹⁶

6 As recently as 2016, WSDOT described Provision 7 as requiring “that **measures should be**
7 **undertaken to prevent the loss of mobility of Mercer Island residents prior to** the time the
8 center roadway converts to high capacity transit.”¹¹⁷ See *Hearst*, 154 Wn.2d at 502 (“subsequent
9 acts and conduct of the parties” relevant in determining intent); *Hollis v. Garwall, Inc.*, 137 Wn.2d
10 683, 695, 974 P.2d 836 (1999) (“extrinsic evidence may be relevant in discerning . . . intent, where
11 the evidence gives meaning to words used in the contract”). Similarly, Sound Transit re-
12 committed in July 2015 “to work with the City of Mercer Island [and] the Mercer Island public . . .
13 to identify issues to be addressed with regard to implementation of and access to East Link light
14 rail . . . , **including obligations under the 2004 Amendment . . .** and other matters involving the
15 East Link light rail that directly impact the City of Mercer Island.”¹¹⁸

16 The 1976 Agreement secured the City’s right to use the I-90 center lanes. In light of the
17 contemporaneous and subsequent statements made by the City, WSDOT, Sound Transit, and the
18 other signatories, any reasonable interpretation of the 2004 Amendment must recognize that the
19 City did not relinquish this right without a firm commitment to ensure that no loss of mobility
20 occurred without agreement on measures to address and compensate for the loss.

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22 ¹¹⁵ Wash. St. Transp. Comm’n, Meeting Minutes, at 3596 (Sept. 15–16, 2004) (comments of State Representative Fred Jarret) (Ex. 28).

23 ¹¹⁶ Wash. St. Transp. Comm’n, Meeting Minutes, at 3594–95 (Sept. 15–16, 2004) (comments of Agnes Govern, Director of Regional Express Bus and Commuter Rail Projects Department, Sound Transit) (emphasis added) (Ex. 28).

24 ¹¹⁷ Letter from WSDOT Acting Secretary Millar to FHWA Administrator Mathis at 1 (May 16, 2016) (emphasis
25 added) (“[g]iven the isolated nature of living in an island community with only one roadway on and off the island, it is imperative the mobility of Mercer Island residents be given serious consideration”) (Ex. 31).

¹¹⁸ Sound Transit Motion No. M2015-67 (July 23, 2015) (Ex. 30).

1 **3. WSDOT and Sound Transit should be estopped from closing and converting**
2 **the I-90 center lanes before reasonably seeking concurrence with the City**
3 **about loss of mobility and measures to address the loss.**

4 Even if the Court concludes that WSDOT and Sound Transit's commitments do not give
5 rise to a contractual obligation, the City is likely to prevail on its alternative claim that WSDOT
6 and Sound Transit are promissory estopped from closing and converting the I-90 center lanes
7 before achieving concurrence with the City. *See Flower v. T.R.A. Indus., Inc.*, 127 Wn. App. 13,
8 31, 111 P.3d 1192 (2005) (promissory estoppel may be used as a sword to enforce promises in the
9 absence of a valid contract). "The elements of promissory estoppel are '(1) [a] promise which
10 (2) the promisor should reasonably expect to cause the promisee to change his position and
11 (3) which does cause the promisee to change his position (4) justifiably relying upon the promise,
12 in such a manner that (5) injustice can be avoided only by enforcement of the promise.'" *Clipse v.*
13 *Commercial Driver Servs., Inc.*, 189 Wn. App. 776, 796, 358 P.3d 464 (2015) (citation omitted).

14 Here, the evidence demonstrates that, in the negotiations culminating in the 2004
15 Amendment, WSDOT and Sound Transit induced the City to relinquish its then-existing right to
16 access the I-90 center lanes in exchange for WSDOT's and Sound Transit's promise that they
17 would reasonably seek concurrence with the City regarding the loss of mobility and the measures
18 to mitigate the loss prior to the closure of the I-90 center lanes. The City justifiably relied on
19 WSDOT and Sound Transit's express promises and then reassurances that the City's mobility
20 would be preserved through this process.¹¹⁹

21 Injustice can be avoided only by enforcing WSDOT's and Sound Transit's promise to
22 reach concurrence with the City regarding the loss of mobility and mitigating measures before
23 closure of the I-90 center lanes. *See, e.g., King*, 125 Wn.2d at 514–15 (affirming injunction
24 enforcing promise to avoid injustice); *Luther v. Nat'l Bank of Commerce*, 2 Wn.2d 470, 484, 98
25 P.2d 667 (1940) (affirming specific performance to enforce promise to avoid "gross injustice").

¹¹⁹ *See supra* Authority Section B2.

1 **4. The City has a well-grounded fear its contract rights will be invaded which**
2 **will cause actual and substantial injuries.**

3 WSDOT and Sound Transit have disavowed any intent even to seek concurrence about the
4 loss of mobility and measures to address it prior to closure and conversion of the I-90 center lanes.
5 Instead, they have (1) claimed that no loss of mobility will occur and no mitigation measures are
6 required, without having consulted with the City or sought its concurrence,¹²⁰ and (2) concluded
7 that no consultation with the City is necessary.¹²¹ These statements “of intent not to perform a
8 party’s obligations” amount to a breach in the form of anticipatory repudiation. *Wallace v.*
9 *Kuehner*, 111 Wn. App. 809, 816, 46 P.3d 823 (2002).

10 WSDOT’s and Sound Transit’s explicit statements conclusively establish that unless
11 directed by the Court, they will not even seek to reach concurrence with the City about the loss of
12 mobility and measures to redress it prior to closure of the center lanes. *See Tyler Pipe*, 96 Wn.2d
13 at 792 (requiring “a well-grounded fear of immediate invasion” of right). As described earlier
14 (Statement of Facts, Section F), the City’s residents and businesses will suffer actual and
15 substantial injuries from gridlock, as manifested in the expected increase in travel times,
16 heightened safety hazards to pedestrians and bicyclists, as well as rise in car crashes and
17 automobile-pedestrian impacts. *See id.* (requiring that “actual and substantial injury” will result
18 from the wrongdoing alleged).

19 **C. The Equities Weigh Heavily in the City’s Favor, and a Damages Action Will Not**
20 **Compensate for the Lost Contract Right.**

21 Finally, the equities weigh heavily in the City’s favor. *See Karl B. Tegland*, 15
22 *Washington Practice: Civil Procedure* § 44:9 (2d ed.) (2009) (listing equitable factors). First, the
23 City has a right to preserve its mobility and access to I-90, a right guaranteed in contract and

24 ¹²⁰ WSDOT Memorandum at 1 (Apr. 5, 2017) (because Sound Transit’s study “finds there is no loss of mobility to or
25 from Mercer Island, there is no need to propose implementing measures to address a loss of mobility under the 2004
26 Amendment”) (Bassett Decl. Ex. 5).

27 ¹²¹ Sound Transit Motion M2017-53 at 1 (Apr. 27, 2017) (“no additional consultation or concurrence efforts among the
28 signatories are required”) (Bassett Decl. Ex. 4).

1 critical to the City's well-being given its unique geography. Second, a damages action cannot
2 make the City whole. While some aspects of "loss of mobility" may be quantified (e.g., increase
3 in commute time), and the cost of mitigation measures to counteract the loss of mobility (e.g., a
4 parking garage) are quantifiable, the contract right the City negotiated was that the parties would
5 "satisfactorily address" the issue "prior to" the closure. An award of money damages later cannot
6 fully compensate the City for this "unique" right "that cannot be replaced with money." *Bauman*
7 *v. Turpen*, 139 Wn. App. 78, 94, 160 P.3d 1050 (2007) (affirming injunction).

8 Third, the relative hardship on Mercer Island is substantial, whereas the preliminary
9 injunction will preserve the status quo and will allow the contract to be enforced. Enjoining
10 WSDOT and Sound Transit is not at odds with support for the development of the East Link
11 project. An injunction does not need to delay the project. The injunction will provide the judicial
12 oversight to ensure that WSDOT and Sound Transit honor their commitments to the City.
13 WSDOT and Sound Transit have at their disposal a variety of mitigating measures to address the
14 loss of mobility to Mercer Island (e.g., improving access to transit through commuter parking and
15 last-mile solutions, designating the new R8A lanes as managed lanes or express lanes, constructing
16 additional ramps to access I-90 from Mercer Island and vice-versa, preserving access to particular
17 I-90 ramps for Mercer Island traffic).

18 Any purported hardship to WSDOT and Sound Transit is the product of their own lack of
19 diligence, candor, and good faith. WSDOT (and likely Sound Transit) knew by November 2013
20 that WSDOT would bar Mercer Island SOVs from the new R8A lanes and associated ramps, but
21 delayed evaluating the loss of mobility from that configuration until the eleventh hour, all the
22 while lulling the City into a sense of security that they would honor the City's contract rights in
23 part by allowing that access. If WSDOT and Sound Transit can simply complain that they need
24 not comply with their contractual obligations because doing so would be expensive or cause delay,
25 they will have succeeded in destroying the contract right the City negotiated.

1 Finally, the relief the City seeks is practical, narrowly tailored, and capable of enforcement
2 by court order. The proposed injunction gives WSDOT and Sound Transit the power to dissolve
3 the injunction by meaningfully consulting with the City to reasonably and in good faith seek to
4 reach concurrence as required by the contract, and the appointment of a Special Master ensures
5 reasonable demands and conduct.

6 VI. CONCLUSION

7 The Court should enjoin WSDOT and Sound Transit from closing and converting the I-90
8 center lanes until they comply with their clear contractual obligation to reasonably seek
9 concurrence with the City on the loss of mobility and measures to redress it, in a collaborative
10 process overseen by the Court.

11 DATED this 15th day of May, 2017.

12 CITY OF MERCER ISLAND

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15
16 By 

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CERTIFICATE OF SERVICE

I, Lynn Van Eyck, swear under penalty of perjury under the laws of the State of Washington to the following:

- I am over the age of 21 and not a party to this action.
- On May 15, 2017, I caused the preceding document to be served via the following method(s):

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s/ Lynn Van Eyck
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