



MEMORANDUM

TO: Lake Forest Park City Council
Mayor Jeff Johnson

CC: Phillip Hill, City Administrator

FROM: Kim Adams Pratt

DATE: June 5, 2023

RE: Project authority of City, Sound Transit, and WSDOT

The City Council and the Administration have been working simultaneously on multiple facets of Sound Transit's Bus Rapid Transit ("BRT") project within State Route 522 in Lake Forest Park. The City Council and the Mayor have received many public comments formally and informally and the City Council held a public hearing regarding draft regulations for retaining walls that would apply to the BRT project. This memo is intended to provide legal analysis of code, statutes, and case law regarding some of the questions posed and comments received by City Council and the Mayor.

1. What power, if any, does the City have to direct the design of the BRT project?

City authority. The City has authority over development projects within the City, but that authority is restricted by the State Legislature's adoption of safeguards for Sound Transit projects and the express grant of authority to the Washington State Department of Transportation ("WSDOT") over the state highway system.

The City has general authority to adopt ordinances to regulate its local or municipal affairs consistent with all powers possible for a city under the state Constitution and not specifically denied to cities like Lake Forest Park. RCW 36.70A.040, RCW 35A.11.020. Specifically for the BRT project, the City has authority to adopt development regulations that are consistent with its Comprehensive Plan, are rationally related to a legitimate City interest, and are not arbitrary or capricious (unreasoning, disregarding or not considering facts). Regulations must also have nexus and rough proportionality when applied to a project. The nexus rule permits only those regulations or conditions necessary to mitigate a specific adverse impact of the project. *Honesty in Environmental Analysis and Legislation (HEAL) v. Central Puget Sound Growth Management Hearings Bd*, 96 Wn.App. 522, 534, 979 P.2d 864, 866 (1999).

Essential Public Facilities (EPFs). The City's authority is juxtaposed against the authority the State Legislature granted to Sound Transit in RCW Chapters 81.104 (High Capacity Transportation Systems) and 81.112 (Regional Transit Authorities); granted to the WSDOT over state highways in RCW 47.01.260(1); and the protections afforded to both entities' Essential Public Facilities ("EPFs") in the Growth Management Act ("GMA").

State Route 522 and Sound Transit's BRT project are EPFs as defined in the GMA, and "no local comprehensive plan or development regulation may preclude the siting of essential public facilities." RCW 36.70A.200(5). "Preclusion" is defined in case law as rendering the EPF impractical" or "incapable of being performed or accomplished by the means employed or at command." The restrictions on local regulation apply to both the initial siting and the expansion of an EPF. *City of Des Moines v. Puget Sound Regional Council*, 98 Wn. App 23, 988 P.2d 27 (1999). Reasonable city permitting and mitigation requirements that increase the cost of an EPF, however, have been found to not "preclude" the siting of the EPF. *Id.* at 34.

Below is the definition of EPFs in the GMA and state statutory provisions specific to WSDOT (RCW 47.06.140(1)) and Sound Transit (RCW 81.112.030(1)) facilities:

RCW 36.70A.200(1) . . . Essential public facilities include those facilities that are typically difficult to site, such as airports, state education facilities and state or regional transportation facilities as defined in RCW 47.06.140, regional transit authority facilities as defined in RCW 81.112.020, state and local correctional facilities, solid waste handling facilities, and inpatient facilities including substance abuse facilities, mental health facilities, group homes, community facilities as defined in RCW 72.05.020, and secure community transition facilities as defined in RCW 71.09.020. . . .

RCW 47.06.140(1) The legislature declares the following transportation facilities and services to be of statewide significance: Highways of statewide significance as designated by the legislature under chapter 47.05 RCW, the interstate highway system,

RCW 81.112.020(3) "Facilities" means any lands, interest in land, air rights over lands, and improvements thereto including vessel terminals, and any equipment, vehicles, vessels, trains, stations, designated passenger waiting areas, and other components necessary to support the system.

WSDOT authority. In addition to EPF protection, WSDOT has authority over state highways under RCW 47.01.260(1) as follows:

exercise all the powers and perform all the duties necessary, convenient, or incidental to the planning, locating, designing, constructing, improving, repairing, operating, and maintaining state highways, including bridges and other

structures, culverts, and drainage facilities and channel changes necessary for the protection of state highways . . .

The Legislature granted WSDOT preemptive authority over the above items. WSDOT would presumably argue that its authority preempts the “field,” the entire topic of state highways, and that it therefore has exclusive control over regulation. The City could argue that there is “conflict” preemption instead and that the test is whether the City’s regulation allows what WSDOT forbids or prohibits what WSDOT allows. *Port of Tacoma v. Save Tacoma Water*, 4 Wn. App.2d 562, 575 (2018).

Sound Transit authority. The State Legislature has granted Sound Transit the authority in general to plan and implement a high capacity transportation system in this region. RCW 81.112.010. This includes all powers necessary to implement a high capacity transportation system including planning, design, construction and operation of the facilities. RCW 81.104.100, RCW 81.112.070. WSDOT is specifically tasked with providing system and project planning review and monitoring. RCW 81.104.100.

The authority that the City has to regulate the BRT project is limited by WSDOT’s authority over all aspects of design, construction, and maintenance of state highways facilities and by its inability to preclude an EPF considering the means employed by Sound Transit and WSDOT to construct the project.

2. Hypothetically, could the City deny construction permits if Sound Transit’s design does not use queue jumps?

A court would most likely determine that this is a design issue within the authority of WSDOT and Sound Transit. Under the *City of Des Moines* case, Sound Transit would presumably argue that the bus lane is the “means employed” by Sound Transit for the BRT project and that the City would be precluding an EPF if it denied a project permit because a northbound bus lane was used instead of queue jumps.

3. Hypothetically, could the City require Sound Transit to reduce the number of trees to be removed for the BRT project to less than 200?

A court would most likely find that setting a maximum of 200 trees for removal is not rationally related to the City’s very legitimate interest in tree protection. It is not rational because the 200 is not based on a study or facts finding that the EPF can be constructed, using the means chosen, and only remove 200 trees. Specific information would be needed to justify any maximum set on tree removal. However, upon submittal of permits, the City will review the trees slated by Sound Transit for removal and may determine that certain trees called out for removal should be saved or require special care so that they remain viable. This review will be based on Chapter 16.14. LFPMC and a case-by-case analysis done by a qualified arborist.

4. Hypothetically, could the City require Sound Transit to improve noise mitigation for the BRT project?

A court would most likely determine that this is a design issue within the authority of WSDOT. The City could argue it has authority to consider regulations that do not “conflict” with WSDOT and federal funding requirements. City noise regulations would require an understanding of the state and federal regulations being applied and study of possible additional requirements that do not conflict with WSDOT while also mitigating damage from the BRT project.

5. Hypothetically, could the City require Sound Transit to perform new post-pandemic ridership study before permits are issued?

A court would most likely determine that the City has no authority over those type of planning decisions for high capacity transit projects. That authority was expressly granted to Sound Transit by the State Legislature.

As noted at the beginning of this memo, the City Council and the Administration have been working on multiple approaches to mitigate impacts of the BRT project. This memo is not intended to discuss all of that work, but instead to provide legal analysis related to permitting issues raised by the public. At the June 8, 2023, Council meeting the Administration will also be presenting information regarding its negotiations with Sound Transit and WSDOT to mitigate impacts of the BRT project on the City.