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**BEFORE THE
SURFACE TRANSPORTATION BOARD**

STB Finance Docket No. FD 36161

**CITY OF SAMMAMISH, WA –
PETITION FOR DECLARATORY ORDER**

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**KING COUNTY, WASHINGTON’S REPLY TO PETITION FOR DECLARATORY
ORDER**

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TABLE OF CONTENTS

	<u>Page</u>
I. INTRODUCTION	1
II. STATEMENT OF FACTS	3
A. The Contentious Creation of the ELST	3
B. The County’s Initial Development of the ELST	5
C. The City’s Limited Rights in the Intersections	6
D. The City’s Attempts To Impose Unsafe and Unreasonable Conditions On Construction of the ELST	8
E. The Litigation Before Judge Coughenour.....	11
III. ARGUMENT.....	12
A. The Board’s General Authority To Exercise Discretion To Provide Declaratory Relief is Concurrent	12
B. There Is No Basis For The Board To Open a Declaratory Order Proceeding	15
C. The City Fails To Provide Any Valid Reason To Open A Declaratory Proceeding.....	17
1. Judge Coughenour’s Decision Was Based on State Law Issues and the Language of the Easements Themselves	17
2. The Board Orders Cited By The City Do Not Compel, Or Even Support, Opening A Proceeding.....	21
3. None Of the City’s Hyperbolic Legal Arguments Present Any Reason For The Board To Depart From Its Precedent Here	24
D. The Board Should Not Accept The City’s Suggestion To Effectively Make Determinations In This Matter In The Guise Of “Guidance”	26
E. If The Board Decides To Grant The Petition, The County Requests the Board To Set A Procedural Schedule To Allow Time For Factual Discovery and the Presentation Of A Fully Developed Factual Record.....	27
IV. CONCLUSION	28

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I. INTRODUCTION

This case is the latest installment in the long-running efforts by the City of Sammamish (the “City”) to block development and use of the East Lake Sammamish Trail (the “ELST”), being built on a railbanked corridor owned by King County (the “County”). This case arises from the City’s effort to assert authority over the ELST where it crosses two small streets. The City’s problem is that it lacks that authority as a matter of state law, and its attempt to use the Board to evade state law limits necessarily fails.

First, the City claims it has the authority to regulate construction of the ELST in the crossings, even though the City cannot show that it has the kind of property interest required by Washington law to exercise such authority. Second, the City insists it has the authority to impose conditions on the crossings that are so unreasonable and unsafe that its own Hearing Officer rejected them as unjustified. Third, Judge Coughenour of the U.S. District Court for the Western District of Washington ruled that the City lacked authority to regulate the crossings *as a matter of Washington State law and without reaching any preemption issues*.

Recognizing that Judge Coughenour’s decision effectively ends the City’s efforts to disrupt construction of the ELST, and desperate to regain the power it thought it had, the City filed this

Petition in the hope of persuading the Board to interject itself in the ongoing judicial proceedings and somehow reverse Judge Coughenour's decision. To justify Board intervention, the City describes Judge Coughenour's decision as a sweeping decree holding that federal law categorically preempts all City regulatory authority over the entire ELST. But, Judge Coughenour made no such holding; the City's Petition rests on a falsehood, and must be denied.

In fact, as is apparent from the face of his decision, Judge Coughenour did **not** base his decision on preemption grounds. His decision was based on state law and the construction of the property rights held by the City under the easements from BNSF granting the crossing rights. Judge Coughenour expressly declined to rule on the preemption issue. Indeed, when the City filed its opening brief before the Ninth Circuit in its appeal of Judge Coughenour's order, the City expressly recognized that Judge Coughenour "analyzed the dispute as one of comparative property rights," that the "property rights theory was clearly the linchpin" of his analysis, and that he concluded that "preemption is not an issue." The City's attempt to now recast Judge Coughenour's decision as a preemption decision is directly contrary to its arguments presented to the Ninth Circuit Court of Appeals. Flying in the face of its own contradictory positions, the City takes bits of dicta from Judge Coughenour's decision out of context, adding a substantial dose of speculative fear, to conjure a decision that was never made and hopes that the Board will not notice.

The City, therefore, fails to present any issue that merits granting the Petition and opening a proceeding. The matter is before Judge Coughenour (and the Ninth Circuit) and neither Judge Coughenour nor the Ninth Circuit have referred a question to the Board. Judge Coughenour's only ruling in the case – granting the County's request for a preliminary injunction – was based solely on a state law issue regarding the scope of the City's crossing easements. Judge Coughenour expressly declined to rule on the County's preemption claim (or other claims). If Judge

Coughenour’s ruling on the easements becomes the basis for his final decision in the case, that issue would be completely determinative regardless of the answer to the preemption issue. There is simply no reason for the Board to institute a proceeding or address the preemption issue. Accordingly, the Board should deny the City’s Petition.

II. STATEMENT OF FACTS

A. The Contentious Creation of the ELST

This matter is the latest chapter in the “highly contentious matter” that is the “disposition of the Redmond–Issaquah [railroad] line” and the creation of the ELST. *Redmond-Issaquah R.R. Pres. Ass’n v. Surface Transp. Bd.*, 223 F.3d 1057, 1058 (9th Cir. 2000). As the Board knows, the original efforts by BNSF to abandon the line and the attempt by King County to railbank the line were the subject of intense litigation and controversy. Initially, The Land Conservancy of Seattle and King County (“TLC”), a non-governmental organization, sought to acquire the line from BNSF through the Board’s exemption procedures, suggesting that TLC intended to provide rail service instead of BNSF. The Board subsequently revoked TLC’s authority, but allowed BNSF’s abandonment to go forward. *See, e.g., The Land Conservancy of Seattle and King County – Acquisition and Operation Exemption – The Burlington Northern and Santa Fe Ry. Co.*, STB Finance Docket No. 33389; *The Land Conservancy of Seattle and King County – Abandonment Exemption – in King County, WA*, STB Docket No. AB-508X; *The Burlington Northern and Santa Fe Ry. Co. – Abandonment Exemption – in King County, WA*, STB Docket No. AB-6 (Sub-No. 380X) (served May 13, 1998) (the “*TLC Acquisition Proceedings*”).¹ The focus of that

¹ The City wrongly suggests that the County was somehow involved in an attempt to manipulate the Board’s procedures based on TLC’s initial effort to acquire the Corridor. City Pet. at 5. That is not correct. The County was not a party to that proceeding and the Board did not find that the County had in any way acted improperly or inappropriately. The focus was solely on TLC’s effort to gain control of the Corridor through the exemption process without an intent to provide rail service. *TLC Acquisition Proceedings* at 5. The Board noted that the County had filed a Statement of Willingness to Accept Financial Responsibility and act as the trail sponsor for the Corridor. *Id.*

controversy was the efforts of residents near the line to prevent by any means, including potential abuse of the Offer of Financial Assistance (“OFA”) process², the creation of a trail. *Id.* at 14; *see also The Burlington Northern and Santa Fe Ry. Co. – Abandonment Exemption – in King County, WA In the Matter of an Offer of Fin. Assistance*, STB Docket No. AB-6 (Sub-No. 380X) at 7-8 (served Aug. 5, 1998) (rejecting OFA by residents as a pretext to stop the trail because “the record does not permit us to conclude that the offer is motivated by a desire to provide continued rail service”). That decision was affirmed by the Ninth Circuit. *Redmond-Issaquah R.R. Pres. Ass’n*, *supra*.

Ultimately, BNSF sold its property interest in the Corridor to TLC and King County in 1998 and the Board approved a Notice of Interim Trail Use, railbanking the line and identifying King County as the trail sponsor. *The Burlington Northern and Santa Fe Ry. Co. – Abandonment Exemption – in King County, WA*, STB Docket No. AB-6 (Sub-No. 380X) at 7-8 (served Sept. 16, 1998); *The Land Conservancy of Seattle and King County — Abandonment Exemption — in King County, WA*, No. AB-6 (Sub 380X), at 1 (Sept. 16, 1998).

That did not end local attempts to prevent development of the trail, however. When King County began to plan and construct an interim gravel trail in the corridor, it applied for the appropriate permits from the City, which had recently been incorporated. *Friends of the East Lake Sammamish Trail v. City of Sammamish*, 361 F.Supp.2d 1260, 1266 (W.D. Wash. 2005). A City Hearing Officer denied the permit because he concluded that alternatives with less environmental impact existed by building the trail in a different location. *Id.* at 1266-67. That decision was

at 5, n. 7. If anything, that demonstrates only that the County has always sought to act as the trail sponsor for the Corridor using the lawful mechanisms provided by the Trails Act, as the County has in fact done. The City of Sammamish’s suggestions are untrue and underscore the kinds of misstatements of the record that suffuse its Petition.

² *See* 49 U.S.C. § 10904.

overturned by Judge Coughenour who held that the provision of City law that requires consideration of alternative locations of the trail stood as an obstacle to the implementation of the Trails Act and was preempted. *Id.* at 1274.³

B. The County’s Initial Development of the ELST

The ELST is an 11-mile “missing link” in a 44-mile-long regional trail corridor that will connect the Burke-Gilman Trail, the Sammamish River Trail, the Marymoor Connector Trail, and the Issaquah-Preston Trail, linking Seattle and the Salish Sea to the Eastside and the Cascade Foothills. Declaration of Gina Auld (“Auld Decl.”) at ¶ 3 (attached as Exhibit 1). The ELST is a King County park. Once construction is completed, it will provide a multi-use recreational trail and non-motorized transportation corridor to residents from the City of Sammamish, King County, and throughout the region. *Id.* at ¶ 4. In accord with its duties as Trail Sponsor, King County completed construction of an interim, gravel trail in 2006. *Id.*

The County is currently in the midst of upgrading the interim, gravel trail to a permanent, paved trail. *Id.* To manage that construction, the County has divided the 11-mile ELST into five segments for planning purposes. *Id.* Construction of the first three segments (Redmond Segment, Issaquah Segment, and North Sammamish Segment) were completed between 2011 and 2015. *Id.* Construction of the fourth segment, South Segment A, which lies between SE 43rd Way and SE 33rd Street in the City of Sammamish, is complete and was reopened to the public on January 17,

³ In addition, adjacent property owners have kept up an almost constant barrage of litigation asserting a range of property interests in the corridor in an effort to block or impede the County’s development of the ELST. *See, e.g., King County v. Rasmussen*, 143 F.Supp.2d 1225 (W.D. Wash. 2001) (Rothstein, J.), *aff’d*, 299 F.3d 1077 (9th Cir. 2002); *Citizens for Safe & Legal Trails v. King Cty.*, 118 Wash. App. 1048 (2003) (unpublished); *Ray v. King County*, 120 Wash. App. 564 (2004); *Friends of the East Lake Sammamish Trail v. City of Sammamish*, 361 F.Supp.2d 1260 (W.D. Wash. 2005); *Beres v. United States*, 97 Fed. Cl. 757 (Fed. Cl. 2011); *Neighbors et al. v. King County*, No 15-2-20483-1 (King Cty. Sup. Ct. 2015); *Hornish v. King County*, 182 F. Supp. 3d 1124 (W.D. Wash. 2016) (Pecham, J.); *C.M. Bailie, LLC, et al., v. King County*, No. 17-2-11448-31 (Snohomish Cty. Sup. Ct. 2017).

2018. The fifth segment, South Segment B, also lies within the City of Sammamish, and is currently undergoing permit review by the City.

Throughout the development and construction of the ELST, the County has sought to cooperate with the City and has complied with City permitting procedures. Those procedures have been onerous, expensive, and delayed development of the ELST. Auld Dec. at ¶ 15 (Ex. 1). As detailed below, the City through its permitting processes also sought to impose unreasonable conditions that appear intended to hinder, if not block, completion of the ELST and to prevent potential users from actually enjoying the trail because of unsafe circumstances that the City's proposed conditions would create.

C. The City's Limited Rights in the Intersections

The focus of this case is whether the City has the authority to impose unsafe and unreasonable conditions on the ELST where it crosses two small roads, 206th Avenue, SE and SE 33d Street (the "Intersections"). The City's authority over the Intersections under state law depends on two public crossing easements granted by BNSF in 1972 and 1992, respectively. Declaration of Robert Nunnenkamp ("Nunnenkamp Decl.") at Exs. 6-7 (attached as Exhibit 2). If those easements do not convey sufficient rights in the roadway, the City may not regulate those crossings as public streets under Washington law. Accordingly, as a matter of Washington law, the precise language and nature of rights conveyed under the easements is critical to assess whether the City has any regulatory authority over the crossings.⁴

⁴ The County's specific property interest in the Intersections derives from two grants to the Seattle, Lake Shore and Eastern Railroad ("SLS&E"). The SLS&E acquired the portion of the Corridor eventually crossed by SE 33rd Street as a land grant from the United States through the General Railway Right of Way Act of 1875, 18 Stat. 482, 43 U.S.C. §§ 934-939 (repealed 1976). Nunnenkamp Dec. at Ex. 5. 1875 Land Grants are construed as railroad easements. See *Marvin M. Brandt Revocable Trust v. US*, 134 S. Ct. 1257 (U.S. 2014). The SLS&E acquired the portion of the Corridor crossed by 206th Avenue SE through the grant of a fee interest. Nunnenkamp Dec. at Ex. 5. The BNSF succeeded to the SLS&E's interests, and the County succeeded to BNSF's interests.

One easement, allowing what is now 206th Avenue SE to cross the Corridor, grants the grantee (originally King County) a non-exclusive right to cross the Corridor but reserves to BNSF

and its successors and assigns, ***the right to construct***, maintain, use, operate, relocate, reconstruct and renew such tracks and ***facilities as it may at any time, and from time to time, desire*** within the limit of the land hereinbefore described, ***including the right and privilege to use said land for any and all purposes***, not inconsistent with the use therefore for purposes [sic].

Nunnenkamp Decl. at Ex. 6 (emphasis added) (Ex. 2). The second easement, allowing what is now SE 33rd Street to cross the Corridor, also grants a non-exclusive crossing right to the grantee (also King County at the time) and reserves to BNSF,

and its successors and assigns, reserves all rights to use the property hereinbefore described ***for any and all purposes whatsoever*** not inconsistent with the easement hereby granted, ***including***, but not limited to, ***the right to construct***, maintain, report, renew, reconstruct, replace and operate present tracks and future tracks, communication, signal and electric power lines, utilities and ***other types of facilities on said property when deemed necessary or expedient*** to the Railway Company.

Nunnenkamp Decl. at Ex. 7 (emphasis added) (Ex. 2).

When BNSF sold the corridor to King County in 1998, all property rights held by BNSF in the corridor transferred to King County, where they remain. *Hornish*, 182 F. Supp. 3d at 1130; 16 U.S.C. § 1247(d). Those rights include BNSF's superior and reserved rights in the two crossing easements. When the City of Sammamish incorporated, it only succeeded to whatever limited crossing rights the County had received from BNSF in the two crossing easements; the County retained, however, its rights in the underlying fee *and* BNSF's superior rights in the two crossing easements. *King County v. City of Sammamish*, Case No. 17-cv-921, *Order Granting King County's Motion for Preliminary Injunction*, at 6 (D. Wash. Aug. 8, 2017) (the "P.I. Order") (attached as Exhibit 9).

D. The City's Attempts To Impose Unsafe and Unreasonable Conditions On Construction of the ELST

The current dispute first arose in the context of the County's effort to secure a Shoreline Substantial Development Permit ("SSDP") for South Segment A pursuant to the Washington Shoreline Management Act. The SSDP application process designed by the City has been lengthy and expensive for King County. For example, the City took almost a year to review the County's permit application for the 1.1-mile-long South Segment A. After that lengthy review process, the City imposed a number of unnecessary, unlawful and burdensome permit conditions that were later stricken in administrative proceedings *by the City's own Hearing Examiner*. See *In re SSDP issued to King Cty. Parks and Recreation*, No. SSDP2014-00171 at 41-47 (Sammamish Hr'g Exam'r, Feb. 8, 2016) (finding "no legitimate justification" for City condition) (attached as Exhibit 3); *Sammamish Homeowners v. City of Sammamish*, No. 15-012c, at 21 (Shorelines Hr'g Bd., Sept. 15, 2016) (finding a drainage condition was "not reasonable and not consistent with the City's authority.") (attached as Exhibit 4). On review of the permits under Washington law, the Shorelines Hearing Board concluded that some of the City's conditions were unrelated to compliance with Shorelines Management Act. See *Sammamish Homeowners*, at 22-26 (Ex. 4); *In re SSDP issued to King Cty. Parks and Recreation*, at 43 ("The City cannot delegate its permit authority to neighbors, nor can it create a condition which effectively grants to neighbors a veto power over the project.") (Ex. 3).

The condition that is the focus of the current District Court action between King County and the City is the City's requirement that stop signs point to trail users at the Intersections. Declaration of Kevin Brown ("Brown Decl.") at Exs. 2-3 (attached as Exhibit 5). 206th Avenue SE is a minor dead-end street providing access to just 15 waterfront homes. Declaration of Yammie Ho ("Ho Decl.") at ¶ 3 (attached as Exhibit 6). Although SE 33rd Street serves 46

waterfront homes, those residents have two other access points across the ELST. *Id.* at ¶ 3. By contrast, King County’s environmental impact statement projects between 2,500 and 4,000 trail users will cross the Intersections on peak days. *See* excerpts from ELST Master Plan Trail, Final Environmental Impact Statement at 3.7-10 (April 19, 2010) (attached as Exhibit 7). Based on a careful review of the relative use of the ELST and the two streets under Washington State traffic and engineering standards, the County determined that stop signs should face automobile traffic on the Intersections, effectively giving ELST users the right of way. Brown Decl. at ¶¶ 8-9 (Ex. 5).

In its decision on the SSDP for South Segment A, however, the City sought to change the stop sign priority at the 206th Avenue intersection to give road traffic the right-of-way. Under the City’s desired intersection designs, stop signs would be pointed toward trail users and motor vehicle traffic would cross the ELST without any traffic control devices requiring drivers to stop or yield, in direct conflict with Washington laws like RCW 46.61.235(1). Auld Decl. at ¶ 8 (Ex. 1); Declaration of Bill Schultheiss (“Schultheiss Decl.”) at ¶¶ 4-6 (attached as Exhibit 8).

The County appealed that decision (among others) to the City’s Hearing Officer. After considering substantial evidence from the parties, including testimony from King County’s ELST engineer, Yammie Ho, the Sammamish Hearing Examiner deemed the *City’s* design unsafe because “[w]ithout adequate departure sight distance bicyclists will be very vulnerable to being hit in the intersection by vehicles on 206th Avenue SE.” *In re SSDP issued to King Cty. Parks and Recreation*, at 45-46 (Ex. 3.) On appeal, the Washington Shorelines Hearing Board agreed that the City’s “unusual condition” regarding the stop signs was improper, finding it was unrelated to compliance with the Shoreline Management Act. *Sammamish Homeowners*, at 26-27 (Ex. 4).

Although the City's Hearing Examiner declared the City's intersection design unsafe for trail users, the City not only renewed its demand for this unsafe design at 206th Avenue SE, but also attempted to impose that design on the SE 33rd Street intersection. Subsequently, the County met with City officials in an attempt to resolve the impasse. In a meeting in January, 2017, City officials stated for the first time that the City was unsure if it possessed valid rights-of-way for the Intersections under Washington law. Auld Decl. at ¶ 10 (Ex. 1). Without a valid right-of-way under Washington law, the City would not have regulatory authority over the Intersections. The City indicated it would research the issue and get back to King County. *Id.* at ¶ 10-11.

Nonetheless, and in order to avoid further construction delays on South Segment A, King County decided to submit applications for City right-of-way permits ("ROW permits") for work in the Intersections, expressly reserving its objection that the City did not have the power to impose the conditions, while its staff continued to review the City's property rights in the Intersections. *Id.* at Ex. 1 (Ex. 1). Ultimately, the County determined that the City's rights under the crossing easements were not sufficient to give the City authority over the Intersections. Accordingly, the County withdrew its ROW Permit applications. *Id.* at ¶ 13 (Ex. 1).⁵ In response, the City threatened to issue a Stop Work Order for work in the Intersections, reaffirmed its demand that King County adopt an unsafe design for the Intersections, and threatened to stop all work on ELST segments in the City. Brown Decl. at Ex. 2 (Ex. 5).⁶

⁵ Contrary to the City's assertion (Petition at 18-25), the conditions of the Clearing and Grading Permit are not at issue because the requirement to obtain ROW Permits only applies if the City has regulatory authority over the Intersection. As discussed above, the City lacks that authority.

⁶ The City asserts that it performed an "engineering analysis" of the Intersections to support its view. Petition at 11. That is misleading, at best. The City never provided the County with an "engineering analysis" of the Intersection during the parties' months long discussion of the Intersection; only conclusory statements in a letter from the City. *Id.* The only report by the City purporting to be an "engineering analysis" of the Intersections was done by the City's litigation expert submitted in opposition to the County's preliminary injunction motion, which was prepared *post facto* to defend the City's actions.

The City's actions threatened to prevent the use of the ELST. During construction, all of South Segment A was temporarily closed and trail users were required to find alternative routes. Auld Decl. at ¶ 4 (Ex. 1). Ensuring safe trail access and use—and limiting construction closures—is a fundamental part of King County's mission as Trail Sponsor for the ELST. Brown Decl. at ¶¶ 6-9 (Ex. 5). Because the City's conditions on constructing the Intersections were unsafe, the County could not reopen the ELST if required to comply with the City's unreasonable and unsafe conditions. *Id.*

E. The Litigation Before Judge Coughenour

In response to the City's actions that threatened to block operation of the ELST, on June 14, 2017, King County filed suit in federal court seeking declaratory and injunctive relief to prevent the City from imposing its unsafe and unreasonable conditions on the Intersections and to prevent the City from blocking further work on the ELST. The County raised claims under Washington State law as well as a claim that the City's actions were preempted by seeking to impose unreasonable and unsafe conditions on the County's use and development of the railbanked ELST. The City responded to the lawsuit by issuing a stop work order. Auld Decl. at Ex. 2 (Ex. 1).

After extensive briefing, supported by numerous affidavits and other supporting material, Judge Coughenour granted the County's Motion for Preliminary Injunction on August 8, 2017. P.I. Order, attached as Exhibit 9. His decision focused on the "likelihood of success on the merits" prong of the preliminary injunction standard. After summarizing the County's position that the City's actions were preempted by the ICCTA and the Trails Act, and briefly summarizing preemption law, P.I. Order at 4-5, Judge Coughenour relied on state law issues and the language of the easements themselves to conclude that the County had shown a likelihood of success on the merits that the City lacked authority over the Intersections as a matter of state law, *id.* at 5-6. In

reaching that decision, Judge Coughenour made clear that he was *not* reaching the County’s arguments on preemption. *Id.*

The City subsequently appealed Judge Coughenour’s decision to the Ninth Circuit. In the City’s opening brief, it argued that Judge Coughenour was wrong to analyze “the dispute as one of comparative property rights” and took issue with the fact that Judge Coughenour did not address the merits of the preemption issue. *King County v. City of Sammamish*, Case No. 17-35642, *Defendant-Appellant’s Opening Brief*, at 21 (9th Cir. Filed Oct. 10, 2017) (“City Appeal Br.”) (attached as Exhibit 10); *id.* at 36 (“In the District Court’s view, the City had no such authority because the County’s easements purportedly gave the County ‘exclusive control’ of the corridor, and the City had not demonstrated ‘superior’ property rights. This property-rights theory was clearly the linchpin of the District Court’s analysis...”). There has been no further activity before Judge Coughenour pending resolution of the City’s appeal.

After the injunction was granted, the County completed construction of South Segment A, including work in the Intersections and placement of the stop signs facing the traffic on the streets, not facing the trail users. Segment A was reopened for public use on January 17, 2018.

III. ARGUMENT

A. The Board’s General Authority To Exercise Discretion To Provide Declaratory Relief is Concurrent

The Board has the discretion to issue a declaratory order to “eliminate a controversy or remove uncertainty.” *14500 Limited LLC – Petition for Declaratory Order*, STB Finance Docket No, 35788, at 2 (Served June 5, 2014) (citing 5 U.S.C. §554(e) and 49 U.S.C. § 721). Although the Board has exclusive jurisdiction over remedies with respect to regulation of rail transportation, the Board has long recognized that it shares “concurrent jurisdiction with courts to determine preemption.” *Id.*

Recognizing that concurrent jurisdiction, the Board has generally declined to exercise its discretion to open a proceeding when the issue is pending before a court unless the court asks the Board for its views. For example, in *Maumee & Western Railroad Corp. and RMW Ventures, LLC – Petition for Declaratory Order*, STB Finance Docket No. 34354, at 2-3 (Served March 3, 2004), the Board declined to open a declaratory proceeding in a crossing dispute because “the courts are well suited to address” such a dispute, and no court had requested the Board’s assistance. *See also Brookhaven Rail Terminal and Brookhaven Rail, LLC – Petition for Declaratory Order*, STB Finance Docket No. 35819 at 4 (Served Aug. 28, 2014) (holding petition in abeyance pending concurrent judicial proceedings); *Brookhaven Rail Terminal and Brookhaven Rail, LLC – Petition for Declaratory Order*, STB Finance Docket No. 35819 at 4 (Served Aug. 30, 2016) (opening proceeding *after* court requested Board’s determination on a specific preemption question); *Reading, Blue Mountain & Northern Railroad Co. – Petition for Declaratory Order*, STB Docket No. FD 35956 at 7 (Served June 6, 2016) (denying part of Petition raising preemption issues because “the preemption issues . . . are already pending in state court and that court is familiar with and has the necessary expertise to interpret the reach of the state law provision.”).

The Board has made clear that “crossing cases are typically resolved in state courts.” *Maumee & Western Railroad* at 2. Concerns of whether actions under state law would “impermissibly interfere with railroad operations” are routinely adjudicated in state and federal courts, and the Board will decline to open a declaratory order proceeding to address those issues unless requested by a court. *Id.* *See also, Lincoln Lumber Co. – Petition for Declaratory Order – Condemnation of Railroad Right-Of-Way for a Storm Sewer*, STB Docket No. FD 34915, at 3 (Served Aug. 13, 2007) (denying Petition for Declaratory Order to determine whether condemnation proceeding was preempted because state courts could decide issue).

The Board has also declined to exercise its discretion to open a proceeding when the case can be decided on state law issues. As the Board has explained:

The issues in this case stem from a property dispute that originated in Illinois state court and is now back in the state court. Viking Partners' complaint is based on a claim that an easement agreement was violated, and thus primarily involves the application of state property law, which are questions that the state court should resolve. In addition, the state court is able to address any preemption arguments that may become relevant and has not referred any issues to the Board. Under these circumstances, we will deny the petition for declaratory order.

Ingredion Incorporated – Petition for Declaratory Order, STB Finance Docket No. 36014, at 3 (Served Sept. 30, 2016). Similarly, in *Mid-America Locomotive and Car Repair, Inc. – Petition for Declaratory Order*, STB Docket No. FC 34599 (Served June 6, 2005), the Board declined to grant a petition and open a proceeding where a state law issue could be decisive. The Board also recognized that if the state law issue was not decisive, the state court could address any preemption issues remaining. *Id.* Conversely, the Board has declined to provide declaratory relief when resolving an issue within its jurisdiction “would have no bearing on the state court’s application of state property law” *JBG Properties, LLC – Petition for Declaratory Order*, STB Docket No. FD 35817, at 5 (Served May 22, 2015).

Indeed, the Board is so reluctant to interject itself in cases that could turn on state law issues that it has pulled back from granting declaratory relief when a potentially decisive state law issue emerges, even after the Board has initially opened a proceeding. In *City of Milwaukie – Petition for Declaratory Order*, STB Finance Docket No. 35625 (Served March 25, 2013), the Petition and initial reply indicated that only an issue of federal preemption was presented. Based on that, the Board granted the petition and opened a proceeding. Subsequently, however, the respondent raised an independent state law issue that could resolve the matter without reaching preemption. Because of that potentially determinative issue of state law, the Board held that “because there are

outstanding state property law issues that must be decided first, *we will not resolve the preemption question presented here at this time.*” *City of Milwaukee* at 1 (emphasis added).

Applying these standards, it is clear that the Board should deny the City’s Petition and decline to open a declaratory order proceeding.

B. There Is No Basis For The Board To Open a Declaratory Order Proceeding

On the face of the Petition, as read in light of Judge Coughenour’s actual decision, it is clear that the City has not presented any reason for the Board to open a proceeding. First, the City’s Petition is in effect an appeal from Judge Coughenour’s August 8, 2017 Order granting a preliminary injunction, which order is already on appeal to the Ninth Circuit. Neither the District Court nor the Court of Appeals has asked the Board for its assistance or for a ruling. The Board does not sit as a special court of appeals for cases involving railbanked corridors, and does not interject itself into ongoing judicial proceedings where the court has concurrent jurisdiction. Pursuant to *Maumee & Western* and the other precedent discussed above, the Board should deny the Petition to allow the judicial process to resolve the case, including appeals, unless and until a court seeks the Board’s views.

Second, Judge Coughenour’s decision was based solely and decisively on the state law question of the City’s regulatory authority over the Intersections in light of the limited easement rights the City holds in the Intersections. P.I. Order at 5 (Ex. 9). If that issue becomes the basis for Judge Coughenour’s final decision in the case, it would dispose of the case without any need to reach federal preemption issues. Pursuant to *Milwaukee, supra* and *JBG, supra* the Board should deny the Petition to allow the court to decide the state law issues first, which may decide the entire case, and then address any remaining preemption issues if any actually form the basis for the court’s decision.

Third, the preemption issue is within the concurrent jurisdiction of both the court and the Board. Judge Coughenour in particular, as well as the Western District of Washington and the Ninth Circuit in general, have substantial experience and expertise addressing ICCTA preemption issues, as well as Trails Act issues.⁷ The courts currently deciding the case are well qualified to address the issue should it arise, and can certainly seek Board assistance if necessary. Pursuant to *Maumee & Western*, and the other cases cited above, there is no reason for the Board to address an issue within the court's expertise and jurisdiction.

Finally, there is no controversy that the Board needs to resolve. Construction of South Segment A of the ELST, including the Intersections, is complete and that portion of the ELST is open and functioning. The specific issues that gave rise to the preliminary injunction are moot. The County continues to cooperate with the City and to seek permits where legally required for construction of the remaining portions of the ELST in the City. To the extent the County has issues with the City's permitting process, state law procedures for review of such decisions, including judicial review, are adequate and those courts may always seek assistance from the Board if needed. In short, there is no current controversy that justifies the use of Board resources.

Conversely, this is not the kind of case where the Board *has* opened a proceeding. No court has referred a question to the Board. There is no issue in the case that falls within the Board's exclusive adjudicatory jurisdiction. The preemption issue raised by the City is not the decisive

⁷ *Redmond-Issaquah R.R. Pres. Ass'n v. Surface Transp. Bd.*, 223 F.3d 1057, 1058 (9th Cir. 2000) (upholding Board's denial of an OFA by trail opponents); *Friends of the East Lake Sammamish Trail v. City of Sammamish*, 361 F.Supp.2d 1260, 1266 (W.D. Wash. 2005) (finding certain permitting requirements under City law preempted by Trails Act); *King County v. Rasmussen*, 143 F.Supp.2d 1225 (W.D. Wash. 2001) (Rothstein, J.), *aff'd*, 299 F.3d 1077 (9th Cir. 2002) (rejecting property owner's challenge to King County's title in portion of ELST); *Kaseburg v. Port of Seattle*, Case No. (W.D. Wash. 2014) (Coughenour, J.) (rejecting property owner's challenge to King County's title in portion of railbanked line because railbanking preserved title); *Ioppolo v. Port of Seattle*, (W.D. Wash. 2015) (Coughenour, J.) (same); *Hornish v. King County*, 182 F. Supp. 3d 1124 (W.D. Wash. 2016) (Pechman, J.) (railbanking preserved all of railroad's property rights in ELST for use by trail sponsor); *City of Auburn v. United States*, 154 F. 3d 1025 (9th Cir. 1998) (local environmental review of railroad project preempted).

issue in the case. Board action is not needed to resolve any current controversy. Because the Petition ticks every box that causes the Board to deny petitions for a declaratory order and ticks none of the boxes that causes the Board to grant a petition, the Board should deny the City's Petition and allow the judicial process to resolve the case.

C. The City Fails To Provide Any Valid Reason To Open A Declaratory Proceeding

The City's Petition rests on the notion that Judge Coughenour's August 8, 2017 Order constituted a sweeping new statement of law that categorically preempts virtually all local regulation of a railbanked corridor. Petition at 1-2, 19-22. Having asserted its view of Judge Coughenour's decision, the City argues it is contrary to Board precedent and would lead to near chaos in future trail cases. *Id.* at 22-25. Accordingly, the City argues that the Board must step in to correct the alleged error and restore order to the system.

The fundamental problem with the City's Petition is that the premise on which it rests is patently false. Judge Coughenour did not decide the case on preemption grounds, he did not offer any dicta finding the City's authority to be categorically preempted, and none of the parade of horrors the City imagines has occurred or will occur. Judge Coughenour's August 8, 2017 Order rested on state law grounds. His discussion of preemption is dicta, and in any event, does not suggest the sweeping rule of law the City describes. The City knows this, and has admitted to the Ninth Circuit that Judge Coughenour's decision was based on state law issues. *E.g., City Appeal Br.* at 21; 36 (Ex. 10). The Petition is based on false premises and should be denied.

1. Judge Coughenour's Decision Was Based on State Law Issues and the Language of the Easements Themselves

The City's Petition relies on one phrase taken from a paragraph of dicta in which Judge Coughenour summarized the basic law regarding preemption. Petition at 17 (quoting P.I. Order at 5). As Judge Coughenour made clear in the first sentence of the next paragraph, "[h]owever,

the touchstone of this dispute is whether the City has the right to impose zoning and safety regulations at all.” P.I. Order at 5. Judge Coughenour then analyzed the language of the property rights held by King County and the very limited rights granted to the City in the crossing easements to conclude that the City lacked the authority to regulate the crossings at all, *as a matter of state easement law*. *Id.* at 5-6. Judge Coughenour stated expressly that he did not address the County’s preemption argument:

Because the City likely does not have authority, the Court need not address King County’s other arguments. The other arguments – federal preemption and the competing [crossing] designs – are based on the premise that the City has limited authority to regulate activities at intersections. At this time, King County has shown a likelihood of success on its claim that [the City] does not have the authority to regulate the intersections.

Id. at 6-7.

Judge Coughenour did not reach or decide the preemption issue in the case, and there is no basis for Board intervention. Judge Coughenour’s decision is very similar to the court’s decision in *JBG Properties* in which state law issues regarding contract language were decisive. There, the Board declined to open a proceeding because the state law issue was decisive. *JBG Properties* at 5. Moreover, the Board recognized that the petitioner sought to invoke preemption to “shield it from the consequences” of its own breach of contract, and declined to help. *Id.* at 7. The Board further recognized the irony of *JBG Properties*, as a non-railroad, invoking preemption as a sword against a railroad, effectively “stand[ing] the purpose of § 10501(b) on its head.” *Id.* Here too, because the state law issues are determinative, the Board should not address the preemption issue raised by the City, as a non-railroad seeking to control development of a Board-sanctioned trail.

Moreover, the City’s Petition relies on simple fabrication by presenting only selected quotes from the decision to create a false impression of Judge Coughenour’s decision. For example, the City claims that:

The trial court has made the expansive legal categorical findings that, “like any active railroad line, state and local attempts to control a railbanked line are preempted by the ICCTA” and that the City of Sammamish “does not have the authority to regulate” the trail corridor and crossing activities to protect the public health and safety of its citizens.

Petition at 2. That grossly misstates Judge Coughenour’s decision because it cuts and pastes two phrases from different parts of the decision to misrepresent his true decision, and further omits key language that clarifies that Judge Coughenour’s preemption dicta was in line with precedent.

The first quote in that line – “like any active railroad line, state and local attempts to control a railbanked corridor are preempted by the ICCTA” – is taken from Judge Coughenour’s summary in dicta of the federal framework for railbanked corridors. P.I. Order at 5. The second quote – “[the City] does not have the authority to regulate” – is taken from the first line of the next paragraph in which Judge Coughenour states the basis for his decision on the language of the easement itself under state law. *Id.* at 6. The two phrases do not connect in the decision, and read in context both completely contradict the City’s argument.

With respect to the first quoted phrase regarding ICCTA preemption, the City’s claim that Judge Coughenour’s decision would strip the City of all regulatory authority over the ELST is belied by the very next sentence in the decision, in which Judge Coughenour stated:

State and local governments have limited powers to regulate these corridors, including “the right to impose zoning and safety regulations on the trails so long as those regulations do not interfere with . . . the trail manager’s right and ability to maintain the right-of-way as a recreational trail.” *Blendu v. F. of Weiser River Trail, Inc.*, 1999 WL 33944266, at *6 (D. Idaho June 10, 1999); see *Friends of E. Lake Sammamish Trail*, 316 F. Supp. 2d at 1274 (“Plaintiffs argue that these [city] regulations [on recreation trails] apply only to the extent that they do not frustrate development of the trail on the railbanked right of way. This Court agrees.”).

P.I. Order at 5 (Ex. 9). Obviously, Judge Coughenour did not hold or state that the City’s authority was categorically preempted.⁸ Judge Coughenour acknowledged that the City may regulate the ELST within certain limits.⁹ He stated only that “like any active railroad line, state and local attempts to *control* a railbanked corridor are preempted by the ICCTA” (emphasis added).¹⁰ *Id.* “Control” is far broader and more intrusive than “regulate.” Case law construing the Trails Act makes clear that local regulation cannot control a railbanked corridor by, for example, preventing implementation of a trail. *Blendu v. F. of Weiser River Trail, Inc.*, 1999 WL 33944266, at *6 (D. Idaho June 10, 1999); *Friends of E. Lake Sammamish Trail*, 316 F. Supp. 2d 1260, 1274 (W.D. Wash. 2005). The statement that local “control” is preempted is consistent with that law, and does not indicate the broad categorical preemption suggested by the City.

The second quoted phrase – “[the City] does not have the authority to regulate” – also omits language and context that disproves the City’s argument. That sentence comes at the end of Judge Coughenour’s discussion of the City’s limited power under the crossing easements. P.I.

⁸ Again, the City is fully aware of the state law basis of Judge Coughenour’s decision. Its appeal to the Ninth Circuit is based on the (baseless) argument that Judge Coughenour erred by deciding the case on state law grounds, rather than preemption grounds. The City should not be permitted to take the very different position here and argue to the Board that Judge Coughenour’s decision was somehow based on preemption grounds.

⁹ In a Motion for Reconsideration filed with Judge Coughenour, the City also acknowledged that the City may regulate the ELST within certain limits. See City’s Motion for Reconsideration at 5 (“The Court has previously acknowledged the City’s authority to apply local land-use and safety regulations to recreational trails operating in inactive railroad corridors, so long as such regulations do not frustrate the County’s ability to develop a recreational trail in the railbanked right-of-way.” (citing *Friends of E. Lake Sammamish Trail v. City of Sammamish*, 361 F. Supp. 2d 1260, 1274 (W.D. Wash. 2005))).

¹⁰ The City also claims that Judge Coughenour’s statements in Footnote 2 (p. 5) that “railbanked corridors are regulated the same as a railway would be” is evidence of a broad preemptive holding. Petition at 17. But, it is no such thing. First, of course, it was not the basis of the Court’s decision regarding the City’s lack of authority under state law. Second, there is a difference between how “railbanked corridors” are regulated, which remain subject to STB jurisdiction, and the scope of preemption. As discussed above, Judge Coughenour recognized that not all local authority is preempted even while the railbanked corridor remains subject to the STB’s exclusive jurisdiction. Further, Judge Coughenour was reacting to the City’s overbroad claim that railbanking the corridor somehow reduced the extent of the trail sponsor’s rights in the corridor. The City is simply angry that Judge Coughenour rejected its argument and improperly asks the Board to reverse that finding rather than rely on appropriate appellate review by the Ninth Circuit.

Order at 6 (Ex. 9). As discussed above, the “however” that begins that discussion serves to differentiate his prior discussion about preemption from the following discussion about the City’s “right to impose zoning and safety regulation at all” *under state law*. As Judge Coughenour made clear at the end of his discussion of state law, he never reached or decided the preemption issue. *Id.*

The City’s fabricated cut-and-paste of Judge Coughenour’s decision cannot change the fact that his August 8 Order was based on state law issues and did not include the sweeping categorical preemption holding as claimed by the City. Under this Board’s established precedent, such state law issues should be resolved in the courts and do not justify opening a declaratory proceeding, even where preemption issues have also been presented in the case. *Ingredion Inc.* at 3 (declining petition for declaratory order where state court decision turned on state law issues).

2. The Board Orders Cited By The City Do Not Compel, Or Even Support, Opening A Proceeding

The Board decisions cited by the City do not support its position. The City relies on *City of Milwaukie – Petition for Declaratory Order*, STB Finance Docket No. 35625 (Served March 25, 2013), for the notion that the Board has opened a declaratory proceeding while the parties were litigating and appealing an injunction. Petition at 20-21. But that is not what *City of Milwaukie* held, and it distorts the Board’s decision.

First, the procedural posture of the litigation in *City of Milwaukie* was materially different than here. The dispute arose from efforts by Milwaukie to enforce local law and impose fines and penalties for alleged violations of local ordinances. The enforcement proceedings were in Milwaukie’s Municipal Court. While one proceeding was on appeal and another proceeding was pending in Municipal Court, Milwaukie itself stayed its proceeding and filed its Petition for Declaratory Order. Thus, *City of Milwaukie* is very much like the cases where a court refers a

question to the Board because Milwaukie paused its own enforcement proceedings to obtain a Board Order. That is fundamentally different from the case here, where the City seeks Board intervention in order to interject the Board into an ongoing judicial proceeding without the Court's request or consent.

Second, as presented in the petition, Milwaukie's petition raised only an issue of federal preemption. Based on that, the Board granted the petition and opened a proceeding. Subsequently, however, the respondent raised in its reply an independent state law issue that could resolve the matter without reaching preemption. Because of that potentially determinative issue of state law, the Board held that "because there are outstanding state property law issues that must be decided first, *we will not resolve the preemption question presented here at this time.*" *City of Milwaukie* at 1 (emphasis added). Instead, the Board offered "guidance to the court that will address the state law question." Thus, the Board did not purport to resolve the preemption; it offered only generic "guidance" that briefly summarized preemption law. *Id.* at 5.

If *City of Milwaukie* has any relevance here, it underscores that the City's Petition should be denied. Had the *City of Milwaukie's* Petition been presented as turning on a state law issue, the Board would not have opened a proceeding. Here, it is apparent from the face of Judge Coughenour's Order that this case is more likely than not to be decided on state law issues. Based on the Board's analysis in *City of Milwaukie*, it should deny the Petition and allow the court to resolve the case on the state law issues raised therein. As the Board further recognized in *City of Milwaukie*, if the court needs to address preemption issues, it is well suited to do so without Board assistance and the Board would be available if the *court* requested Board assistance. Nothing in *City of Milwaukie*, however, supports the City's argument that the Board can or should open a

proceeding to address a preemption issue not decided by Judge Coughenour, in a case that may never address preemption, and when Judge Coughenour has not requested the Board's advice.

The other cases cited by the City are of no more help. In *Chadwick's of Boston, LTD – Petition for Declaratory Order – Certain Rates and Practices of United Parcel Service, Inc.*, 1995 MCC LEXIS 49, *5-6 (Served June 21, 1995), the Interstate Commerce Commission ("ICC") agreed only to address issues in its *exclusive* jurisdiction. The ICC also *declined* to address issues that were in the concurrent jurisdiction of the court and that the court had not yet reached. *Id.* *Chadwick's of Boston* does not support the City's argument that the Board should address state law issues that are not in the Board's jurisdiction *at all*, preemption issues over which the court and the Board enjoy concurrent jurisdiction, or preemption issues that the court has not yet reached (and need not reach).

In *The Illinois State Toll Highway Authority – Petition for Declaratory Order*, STB Docket No. FD 36075 (Served Jan. 17, 2017), the Board instituted a proceeding only after the court had dismissed Soo Line's preemption claim as unripe. *Soo Line Railroad Co. v. Illinois State Toll Hwy Auth.*, Case No. 15-cv-10328 Memorandum Opinion and Order (March 29, 2016) (dismissing case for lack of ripeness). Although that decision was on appeal at the time the Petition was filed at the Board, no court was actively considering the preemption issue and no court had made a decision on the merits of the preemption issue. *The Illinois State Toll Highway Authority* does not support the City's argument that a declaratory proceeding is appropriate when (as here) a federal court has made a potentially dispositive decision based on state law issues, has retained jurisdiction over the preemption issue, and has not requested Board assistance.

3. None Of the City's Hyperbolic Legal Arguments Present Any Reason For The Board To Depart From Its Precedent Here

The bulk of the City's Petition is devoted to battling against the false effigy of Judge Coughenour's decision it has conjured. Accordingly, the City's entire Petition is based on a false premise, and a detailed response is neither appropriate nor necessary. A few points are worth making, however, to drive home the lack of merit to the City's petition.

The City argues that its permits are "presumptively not" preempted or categorically preempted. Petition at 22-25. As discussed above, however, Judge Coughenour did not hold that the City's permits were preempted or categorically preempted, rendering the City's argument irrelevant. Moreover, as the cases cited by the City make clear, and as the City itself acknowledges, local regulations may be categorically preempted if they fall into one of two types or may be preempted on an as-applied basis. Both types of preemption require a degree of analysis to apply, however, and the Board has not articulated the "presumption" against preemption as the City asserts. As in *JBG Industries*, the City should not be allowed to use preemption to escape the consequences of its limited authority under the state law governing its easements to cross the County's right-of-way; nor should it be allowed to invoke preemption principles to impair sanctioned trail development.

Similarly, the City's arguments regarding ICCTA preemption, the definition of rail transportation, and Trails Act preemption (Petition 25-33), although incorrect, are not ripe for consideration here because Judge Coughenour did not decide those issues and the state law issues can, and should, resolve the case. Furthermore, as the cases cited by both the City and Judge Coughenour make clear, courts enjoy concurrent jurisdiction with the Board on those issues and are fully capable of addressing them. To date, Judge Coughenour has not addressed those issues and has not made any decision on preemption. It is simply premature and unnecessary for the

Board to open a proceeding to address questions over which the court has jurisdiction and on which the court has not yet ruled.

Finally, the City raises a parade of horrors it speculates will result from Judge Coughenour's decision if the Board does not intervene. Petition at 35. None of those speculative fears justifies Board action. First, all are based on the mistaken premise that Judge Coughenour held that the ICCTA and the Trails Act categorically preempt all City authority over the corridor. As detailed above, that is not true. Judge Coughenour made *no* ruling on preemption and expressly acknowledged local regulatory authority. The City repeatedly and consistently ignores that important acknowledgment in an effort to make Judge Coughenour's decision appear to be something it is not.

Second, the City's worries that the County would build parking lots or erect crossing guards that would close off the Intersections to automobile traffic entirely are utterly unfounded. The County proposed no such thing, and, no parking lots or crossing guards blocking traffic have been constructed at the Intersections. In any event, the easements to the City expressly limit the County's reserved powers to those "not inconsistent with the" crossing rights. Nunnenkamp Decl. at Ex. 6 & 7 (Ex. 2). Thus, the easements themselves provide the City with a remedy under state law in the event the County sought to close the crossings entirely. State law provides the controlling law, and there is no reason or basis for the Board to intervene.

Third, the City's fears are simply unfounded. For years, the County has submitted to the City's permitting and review processes, despite the enormous expense and delay that has resulted. Although the County has argued, successfully, that the City has from time to time exercised its authority in an unjustified manner, it has complied with all valid procedures. When an issue arises about the City's authority, such as the issue regarding the Intersections, the County has sought

judicial guidance. Even after Judge Coughenour's decision, the County has continued to comply with City procedures and permit requirements on the other portions of the ELST. Indeed, in response to the City's concerns, the County agreed to narrow the scope of Judge Coughenour's injunction order to focus on the Intersections.¹¹ The City's concerns are baseless, speculative fears that do not justify Board action.

D. The Board Should Not Accept The City's Suggestion To Effectively Make Determinations In This Matter In The Guise Of "Guidance"

Apparently recognizing that this case does not merit opening a proceeding, the City asks, in the alternative, for the Board to issue a series of "findings" in the form of "guidance." Petition at 36-38. In other words, the City wants to have it both ways by getting specific "findings" without affording the Board the benefit of a full record. Although the Board does, on occasion, provide such guidance even while denying a Petition for Declaratory Order, such guidance would not be appropriate in this case.

First, the underlying dispute, and ultimately the preemption issue if it were to be addressed, depends in large part on a close factual analysis of the trail design, the City's actions, Washington law, and the procedural history of the City's permitting process to understand how the City's actions would impair safety and the use of the ELST. The litigation over the preliminary injunction illustrates the potential scope of that issue. There, the parties submitted a total of 18 declarations,

¹¹ Judge Coughenour's August 8, 2017 Order granting Preliminary Injunction originally concluded that "The City shall not take any additional actions to impede or delay King County's construction of the ELST, including attempts to require stop signs oriented towards trail users at the intersections with 206th Avenue and SE 33rd Street." The City filed a Motion for Clarification and/or Reconsideration, arguing that this language could prevent the City from enforcing the terms of already issued permits or for reviewing King County's Shoreline Substantial Development Permits for Segment 2b and a related parking facility. Judge Coughenour issued a minute order asking the parties to confer about the scope of the preliminary injunction. The parties did so. King County and the City agreed that the language of the Order should be amended to be limited to "actions to impede or delay King County's construction of the intersections at 206th Avenue and SE 33rd Street, including any attempts to require stop signs oriented towards trail users." August 31, 2017 Stipulation and Proposed Revision to Preliminary Injunction and Order at 1 (attached as Exhibit 11).

69 exhibits, and 148 pages of briefing. The County expects the submissions here to be of even greater magnitude. In addition, the County would seek discovery from the City and perhaps from third-parties to fully develop the issues. Only with a full factual record following such discovery could the Board make the kind of findings the City requests. Moreover, given the need to litigate the preemption issue, the District Court is better suited to such intense discovery and fact-finding, particularly knowing that the Board is available to provide advice and guidance on the federal preemption issues if requested, and if those issues actually become a basis for the court's decision.

E. If The Board Decides To Grant The Petition, The County Requests the Board To Set A Procedural Schedule To Allow Time For Factual Discovery and the Presentation Of A Fully Developed Factual Record

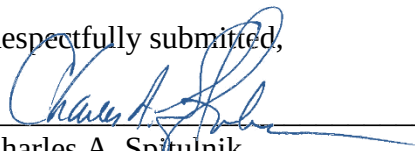
The County has deliberately not briefed the substance of the preemption issues raised by the City for the simple reason that the issue is not ripe or appropriate for Board resolution while the case remains before the District Court, especially 1) where the District Court's decision on preliminary injunction was based on a state law issue, 2) where the District Court itself has not decided the preemption issue or asked for Board assistance, and 3) where the factual record before this Board has not been fully developed. If, nonetheless, the Board decides to open a proceeding, the County requests that the Board establish a schedule that allows several months for the parties to conduct discovery and assemble the appropriate factual and legal record to assist the Board in addressing the issues raised. The County notes that the proceedings before the District Court so far have been limited to the preliminary injunction issue and the parties have not taken discovery or developed a complete record in that case. If the Board chooses to address the substance of the City's Petition, a factual record will need to be developed here to illustrate how preemption principles apply in the specific facts of this matter. Although it would be an enormous waste of the resources – of the County, the City, and the Board and its staff – to conduct discovery on preemption issues when preemption is not the determinative issue in the District Court, if the Board

takes up the preemption issue at this time, discovery will be needed for the Board to properly address the preemption issues raised by the City and to ensure the County its due process rights.

IV. CONCLUSION

The City's Petition is based on a misrepresentation of Judge Coughenour's decision, and in fact contradicts how the City itself has described Judge Coughenour's decision to the Ninth Circuit. The fact is that Judge Coughenour held as a matter of state law that the City lacks the authority to regulate the Intersections and never reached the preemption issue. The City knows this, and seeks to end-run that decision by recasting Judge Coughenour's decision as something it is not. Under the Board's well-established precedent, it should deny the Petition so Judge Coughenour and the Ninth Circuit can decide the case on state law issues, or exercise their concurrent jurisdiction over preemption issues if preemption becomes relevant. Until one of those Courts asks for the Board's assistance, however, there is no basis for the Board to exercise its jurisdiction in this state law dispute.

Respectfully submitted,



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Counsel for King County, Washington

Dated: January 29, 2018

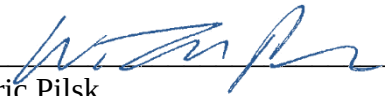
CERTIFICATE OF SERVICE

I hereby certify that I have this day caused to be served a copy of the foregoing **KING COUNTY, WASHINGTON'S REPLY TO PETITION FOR DECLARATORY ORDER** upon the following parties of record in this proceeding by email and first-class mail with postage prepaid and properly addressed:

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East Lake Sammamish Trail, and Friends
of the Burke Gilman Trail



W. Eric Pilsk

Dated: January 29, 2018

EXHIBITS

- Exhibit 1 Declaration of Gina Auld in Support of Plaintiff King County's Motion for Preliminary Injunction
- Exhibit 2 Declaration of Robert Nunnenkamp in Support of Plaintiff King County's Motion for Preliminary Injunction
- Exhibit 3 City of Sammamish Hearing Examiner Decision, Feb. 8, 2016
- Exhibit 4 Shorelines Hearing Board, State of Washington, Findings of Fact, Conclusions of Law and Order, Sept. 15, 2016
- Exhibit 5 Declaration of Kevin Brown in Support of Plaintiff King County's Motion for Preliminary Injunction
- Exhibit 6 Declaration of Yammie Ho in Support of Plaintiff King County's Motion for Preliminary Injunction
- Exhibit 7 East Lake Sammamish Master Plan Trail, Final Environmental Impact Statement (April 19, 2010) (Excerpts)
- Exhibit 8 Declaration of Bill Schultheiss in Support of Plaintiff King County's Motion for Preliminary Injunction
- Exhibit 9 Order Granting King County's Motion for Preliminary Injunction (D. Wash. Aug. 8, 2017)
- Exhibit 10 City of Sammamish Defendant-Appellant's Opening Brief
- Exhibit 11 Stipulation and Proposed Revision to Preliminary Injunction, August 31, 2017

EXHIBIT 1

THE HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

KING COUNTY,

Plaintiff,

v.

CITY OF SAMMAMISH,

Defendant.

No. 2:17-cv-00921-JCC

**DECLARATION OF GINA AULD IN
SUPPORT OF PLAINTIFF KING
COUNTY'S MOTION FOR
PRELIMINARY INJUNCTION**

I, Gina Auld, declare and state the following:

1. I am over eighteen years of age. I have a Bachelor of Science degree in Civil Engineering from the University of Washington. I also have a background in heavy construction. I have personal knowledge of the facts contained in this declaration and am otherwise competent to testify to the matters in this declaration.

2. Following college, I worked for the King County Wastewater Division for 21 years building multi-million dollar projects, including treatment plants and pump stations. I am currently employed by the King County Parks Department as a Capital Projects Manager where I oversee the East Lake Sammamish Trail ("ELST") project. I have managed similar projects over the course of my career, including construction of the Burke-Gillman trail through Lake Forest Park from 2006-2010.

DECLARATION OF GINA AULD IN SUPPORT OF
PLAINTIFF KING COUNTY'S MOTION FOR PRELIMINARY
INJUNCTION – 1
No. 2:17-cv-00921-JCC

Daniel T. Satterberg, Prosecuting Attorney
CIVIL DIVISION, Litigation Section
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(206) (296-8820 Fax (206) 296-8819

1 3. I have been the project manager on the ELST since 2006. Since taking this
2 position, King County Parks has completed permanent segments of the trail running through the
3 cities of Redmond, Issaquah, and Sammamish. Once completed with a paved surface, the ELST
4 will complete a regional network of trails. The ELST is an 11-mile missing link in a 44-mile-
5 long regional trail corridor that will connect the Burke-Gilman Trail, the Sammamish River
6 Trail, the Marymoor Connector Trail, and the Issaquah-Preston Trail. The regional network of
7 trails will connect Seattle to the Eastside and the Cascade Foothills. The ELST is a King
8 County park, and once complete will provide a multi-use recreational trail and non-motorized
9 transportation corridor to residents throughout the region.

10 4. King County completed construction of an interim, gravel trail in 2006. That
11 trail is now being upgraded to a paved, permanent trail. The ELST is divided into five segments
12 for planning purposes. Construction of the first three segments was completed between 2011
13 and 2015. We are currently constructing ELST South Sammamish Segment A, and engaged in
14 permitting and design for South Sammamish Segment B. To construct the permanent trail,
15 King County temporarily closed the gravel, interim trail in South Segment A and began
16 construction on December 19, 2016. During construction, all of South Sammamish Segment A
17 is considered a construction zone and closed to public use.

18 5. From a professional standpoint, working with the City of Sammamish ("City")
19 to obtain permits and construct the ELST has been difficult, and the conditions imposed by the
20 City have been far more onerous than those imposed by Redmond and Issaquah. For example,
21 the City has repeatedly impeded King County's attempts to even submit permit applications for
22 South Sammamish Segment B, the final segment of the ELST. With regard to South
23 Sammamish Segment A, it took almost a year for the City to review and issue a shoreline
24 substantial development permit. Once issued, the permit included numerous unreasonable and
25 overly burdensome permit conditions. As a result, the County was forced to appeal these permit

1 conditions to both the City's Hearing Examiner and the Shoreline Hearings Board. This
2 administrative appeal process was lengthy and expensive for the County. As a result of these
3 delays, the County missed a favorable bidding climate and the bid came in nearly \$1 million
4 over the engineer's original cost estimate. The magnitude of this loss is likely higher because
5 an earlier bid would have likely come in under the engineer's cost estimate.

6 6. One of the things that made permitting of South Sammamish Segment A difficult
7 is that the City did not confine itself to appropriate regulatory conditions. Instead, the City has
8 attempted to use its regulatory authority to benefit the private interests of waterfront
9 homeowners who have often opposed trail construction or sought to drastically limit its scope.
10 For example, two of the conditions the City attached to the shoreline substantial development
11 permit required the County to "coordinate" and "work with" neighboring property owners with
12 regards to project design. The County appealed both of these conditions to the City's Hearing
13 Examiner. One of these conditions was settled, but the challenge to the other condition was
14 heard by the Hearing Examiner who determined that this condition was inappropriate as it
15 unlawfully delegated permit authority to neighboring property owners and gave the neighbors
16 "veto power over the project."

17 7. Many of these homeowners have openly encroached on public property within
18 the ELST rail corridor ("Corridor") building amenities like gardens, tennis courts, cabanas and
19 other extensive landscaping features for their own private use. The City has repeatedly
20 requested that the County narrow the ELST trail to minimize impacts to neighboring property
21 owners and to avoid removing trees and vegetation installed on County property and used as
22 privacy screens by adjacent property owners. The City continued to make this request even
23 after our design engineer explained that the trail is being designed to comply with applicable
24 safety standards and guidelines and that the proposed width is necessary to safely accommodate
25 the estimated volume of users. The City has also interfered with other trail design issues

1 including include requiring King County to use WSDOT 2009 Standards instead of the
2 WSDOT 2014 Standards used on all other trail segments and limiting the sight triangles at
3 intersections between the ELST and driveways and City street crossings.

4 8. As part of the shoreline substantial development permit for South Segment A, the
5 City added a permit condition requiring stop signs to face trail users at the intersections of 206th
6 Avenue SE. King County opposed this condition because it was an unsafe intersection design
7 and was inconsistent with applicable safety standards. The County was forced to appeal this
8 condition to the City's Hearing Examiner. During that administrative proceeding, the County
9 presented evidence that this design was unsafe, including the testimony of an outside expert
10 William Schultheiss. The Hearing Examiner ruled that the City's intersection design was
11 unsafe and struck the permit condition relating to intersection design at 206th Avenue SE. The
12 Shorelines Hearing Board later struck the same condition from the permit, but on different
13 grounds.

14 9. The City required King County to obtain a clearing and grading permit before
15 beginning construction in South Sammamish Segment A. Following approval of the shoreline
16 substantial development permit, the City issued its clearing and grading permit for South
17 Sammamish Segment A. The clearing and grading permit had no provisions relating to any
18 particular intersection with the trail. Rather, the City included a very general provision in the
19 clearing and grading permit requiring the County to obtain right of way permits in areas where
20 the trail crossed City rights of way.

21 10. On January 24, 2017, Frank Overton and I met with the City to discuss the
22 intersections at 206th Avenue SE and SE 33rd Street ("Intersections"). At this meeting, Frank
23 Overton, King County Parks Capital Project Management Supervisor, asked the City what kind
24 of property interest it was claiming at these crossings. Frank Overton informed the City
25 representatives that the County was unable to locate any records of a City property interest in

1 the crossings. In the meeting, the City representatives examined online databases and maps.
2 They were unable to locate any evidence that these crossings were City right of way. The City
3 representatives appeared surprised and said that they would get back to us after conducting
4 research about this.

5 11. On several occasions after this meeting, I contacted the City to inquire about the
6 status of this research and whether the City had been able to locate any records or proof of City
7 property interests in these crossings. In addition, Frank Overton also inquired to determine
8 what kind of legal rights the City was claiming in the corridor. I never received a formal
9 response from the City on this issue.

10 12. While waiting for the City's response and before obtaining copies of the crossing
11 easements, the County submitted a right of way permit application for the Intersections. We
12 submitted the right of way permit application in order to minimize the risk of project delays
13 since we were unsure of the outcome of the City's inquiry into the legal status of the road
14 crossing. The application pointed out that King County was filing under protest and did not
15 believe the City had authority over the Intersections. A true and correct copy of the right of way
16 permit application submitted by King County, dated May 4, 2017, is attached as **Exhibit 1**.

17 13. The County was ultimately able to obtain deeds demonstrating that the railroad
18 only gave the City limited crossing easements for the Intersections and specifically reserved the
19 right to conduct construction activities within those Intersections. Because King County is the
20 successor in interest to the railroad's property rights, King County determined that no City right
21 of way exists in these crossings and therefore no right of way permit is required by the
22 conditions of the permit. As a result, King County Parks Director Kevin Brown formally
23 notified the City that the County was withdrawing its permit application in a letter dated May
24 23, 2017. As a result, King County would be responsible for the intersection design and could
25 avoid the unsafe design proposed by the City.

1 14. In response, the City sent King County a letter threatening a stop work order on
2 June 9, 2017. Kevin Brown responded with the County's position on June 14, 2017. The focus
3 of King County's concerns was the City's effort to impose an unsafe design at both
4 Intersections.

5 15. After King County filed suit in this matter, the City issued a stop work order for
6 all construction in the Intersections. A true and correct copy of the City of Sammamish Stop
7 Work Order for the East Lake Sammamish Trail South Segment A, dated June 16, 2017, is
8 attached as **Exhibit 2**. In a letter to the City, dated June 16, 2017, I urged them to reconsider
9 the stop work order because the actual construction of the Intersections will be the same,
10 regardless of the ultimate orientation of the stop signs. A true and correct copy of this letter is
11 attached as **Exhibit 3**. Because placement of the stop signs is one of the last steps in the
12 construction process, it makes no sense to preclude all construction steps up to the point of stop
13 sign placement. In response, the City provided no justification for blocking current construction
14 activities at the Intersections pending judicial resolution of our dispute.

15 16. Application of the City's stop work order to construction steps preceding stop
16 sign placement will substantially delay the planned July/August 2017 reopening of the trail.
17 The City's stop work order has already prevented paving activities at the Intersections, which
18 were scheduled to take place on the Monday following the stop work order. There are a
19 substantial number of other construction activities necessary to complete construction of the
20 Intersections prior to stop sign placement. We estimate it will take a *minimum* of 30-45 days to
21 complete construction of the Intersections and get the project back on schedule once the stop
22 work order is lifted. If the stop work order persists beyond the summer/fall construction season,
23 this delay will substantially increase.

24 17. The City's actions are also causing King County to incur substantial damages
25 related to the delay. For example, there are costs associated with rescheduling and remobilizing

1 paving for the intersections. There are also costs related to the overall delay of project
2 completion of \$5-6,000 per day, which could easily increase.

3 18. The safety of trail users is King County's preeminent concern. An intersection
4 that favors cars over pedestrians is unsafe under the anticipated trail and roadway volumes.

5 I declare under penalty of perjury of the laws of the United States and the State of
6 Washington that the foregoing is true and correct.

7 DATED this 26th day of June, 2017.

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11 Gina Auld

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DECLARATION OF GINA AULD IN SUPPORT OF
PLAINTIFF KING COUNTY'S MOTION FOR PRELIMINARY
INJUNCTION – 7

No. 2:17-cv-00921-JCC

Daniel T. Satterberg, Prosecuting Attorney
CIVIL DIVISION, Litigation Section
900 King County Administration Building
500 Fourth Avenue
Seattle, Washington 98104
(206) (296-8820 Fax (206) 296-8819

CERTIFICATE OF SERVICE

I hereby certify that on June 26, 2017, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

David A. Linehan
Michael R. Kenyon
Kim Adams Pratt
Kenyon Disend, PLLC
11 Front Sreet South
Issaquah, WA 98027-3820
David@KenyonDisend.com
Mike@KenyonDisend.com
David@KenyonDisend.com
***Attorneys for Defendant
City of Sammamish***

DATED: June 26, 2017

s/ David I. Freeburg
David I. Freeburg

EXHIBIT 1



RIGHT-OF-WAY PERMIT

801 228th Avenue SE
Sammamish, WA 98075
www.sammamish.us

Phone: 425-295-0500
Fax: 425-295-0600

JOB START / INSPECTION REQUEST LINE: (425) 295-0515 – 48 HOURS NOTICE REQUIRED

Subject to all terms, conditions, and provisions written or printed below or on any part of this form

PERMISSION IS HEREBY GRANTED TO:

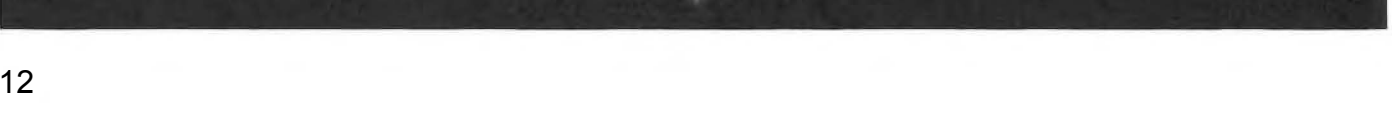
Contractor/Applicant Gina Auld King County Parks Phone 206.477.4552 Date 04/28/2017
Address 201 South Jackson Street, Suite 700 City Seattle State WA Zip 98104
Email: Gina.Auld@kingcounty.gov
Description of work in the public right-of-way: Improvements to trail crossings
For (Name and Phone): East Lake Sammamish Trail (ELST)
Project Address: Intersections of ELST at SE 33rd St. and 206th St Email: _____

1. Utility to be placed/Installed per City approved drawing (attached hereto). Project Valuation \$ \$ 10,000.00
2. Any underground work shall require notification by the applicant to prevent damage to other underground installations, Gas, Power, Telephone, Cable TV, Water, Sewer or Storm Drain. To locate underground utilities, call 811.
3. This permit shall expire if no work has commenced within 180 days of permit issuance.
4. All trenches to have a backfill of not less than 36 inches (depth – to top of the pipe) and the finished surface will conform with the original surface, unless otherwise approved in writing by the City Engineer.
5. All trenches located beneath paved (asphalt or concrete) surfaces or driveways, or located beneath roadway shoulders (within 3 feet of edge of road) shall be back-filled with crushed surfacing top course (5/8-inch minus) or controlled density fill (CDF). Backfill shall be placed and compacted in maximum 6-inch lifts to 95% of standard density. Native excavated materials cannot be utilized for backfill in these areas.
6. All trenches located outside of paved (asphalt or concrete) surfaces or driveways, or outside roadway shoulders shall be back-filled in 6-inch lifts with suitable excavated material compacted to 95% of standard density. When unsuitable on-site native backfill material exists (material cannot achieve minimum compaction requirements), then trenches shall be back-filled with import gravel base, Class B, material as furnished and supplied by the Grantee. This permit does not warrant the availability or presence of suitable native materials for trench backfill.
7. All compaction shall be mechanically tamped to achieve the desired level of compaction. Water settling will not be allowed.
8. All asphalt pavement restoration shall be made with a minimum 6-inch lift of compacted (95% standard density) CSTC (5/8-inch minus) and 3-inch minimum (compacted thickness) of HMA 1/2-inch. The pavement restoration shall extend a minimum of 12-inches (each side) beyond the constructed trench widths. When existing asphalt thickness is found to be greater than 2 inches, HMA 1/2-inch shall be placed, in maximum 2-inch lifts, to a depth of 1-inch over existing pavement thickness. Seal edges with sealer CSS1 and seal surface joint with hot asphalt.
9. Special trench and pavement restoration will be required for trenching through concrete or "asphalt over concrete" pavement roadways. The Grantee shall procure those additional requirements from the City prior to commencing work under this permit.
10. Before repair of asphalt concrete cuts, the City shall be notified (24-hour prior) of pending work and all such work shall be made by experienced personnel with adequate equipment. All paving material shall be HMA 1/2-inch (PG64-22).
11. No pavement cuts across streets, roads, or driveways constructed of HMA or Portland Cement Concrete shall be made, unless approval has been granted by the Public Works Director, or the City Engineer, or his authorized representative, in writing for such crossing. Only mechanical saws specifically made for this purpose shall make all pavement cuts, or as otherwise approved.
12. Property owners and/or residents along this project shall have the right of safe ingress and egress at all times.
13. At no time during construction will any roadway be entirely closed, unless otherwise approved. One-way traffic shall be maintained at all times. Traffic control and construction signs shall be provided, installed, and maintained in accordance with the latest issue of

the Manual on Uniform Traffic Control Devices (MUTCD). All flaggers shall be State certified. Approved traffic control plans must be on site at all times.

14. A crushed rock (minimum 2-inch compacted thickness) surface shall be placed for gravel shoulder restoration, as shown on approved plans. Where grass sod currently exists, a 4-inch lift of compacted topsoil and grass sod shall be reinstalled. Where construction occurs on a graveled surface, a 2-inch compacted lift of crushed rock surfacing (5/8-inch minus) shall be provided to all disturbed graveled surfaces.
15. Once work commences, it shall be diligently pursued until completed to the satisfaction of the City Public Works Department.
16. A temporary patch of cold mix asphalt (4-inch minimum compacted thickness) will be placed and maintained on all road crossings and driveways after back filling. A permanent patch shall be placed within 30 days after completion. Permanent patching will be done by the permittee.
17. A COPY OF THIS PERMIT MUST BE PRESENT AT THE WORK SITE AT ALL TIMES. WORK MUST CONFORM 100% TO PERMIT.
18. No work shall be done under this permit until the party or parties to whom it is granted shall be communicated with and received instructions, if required, from the local school district, police, private utility companies, and local Fire Marshall. The Fire Marshall and Police Department must be notified prior to and after completion of the work or project.
19. [REDACTED]
20. **Payment of all permit fees shall be calculated by the City of Sammamish and paid by the Permittee before issuance of this permit, unless the applicant is a utility and covered under the current utility billing arrangement.**
21. A record "as built" of city-owned facilities must be provided to the City in an approved format upon completion of the project.

GENERAL PROVISIONS APPLICABLE TO ALL RIGHT-OF-WAY PERMITS

- A. During the progress of the work, such barriers and warning signs (in accordance with the Manual on Uniform Traffic Control Devices) shall be erected and maintained by the Grantee as may be necessary or as may otherwise be directed by the City for the protection of the traveling public; the barriers shall be properly lighted when necessary and promptly removed when the project is completed. 24-inch cones with 6-inch reflector bands shall be used.
- B. 
- C. Except as herein authorized, no excavation shall be made or obstacle placed within the limits of a city street or easement in such a manner as to interfere with the travel over said road, or create a safety hazard.
- D. If the work done under the Permit interferes in any way with the drainage of the city streets, or causes damage, the Grantee shall wholly and at his own expense, make such provisions as the City Engineer may direct to take care of said drainage and/or damage. Installation of any utilities in any City storm conveyance system is strictly prohibited (except right angle crossings). When ditch sections or open conveyance systems are disturbed, the ditch section or conveyance system shall be restored and armour plated with quarry spalls to the City's satisfaction. The Grantee is responsible for protecting the storm system from erosion. Existing systems shall be protected and cleaned as required. The Grantee shall utilize Best Management Practices outlined by the Department of Ecology.
- E. On completion of said work, all rubbish and debris shall be immediately removed and the roadway and roadside shall be left neat and presentable and satisfactory to the City Engineer or designee.
- F. Grantee shall comply with the Washington State Electrical Code, Washington State Department of Transportation Standard Specifications, current edition. Where any conflicts exist, the City shall be the sole judge as to the prevailing requirement(s).
- G. No work shall be permitted on Sunday or City Holidays in accordance with SMC 16.05.030, or between the hours of 8:00 p.m. and 7:00 a.m. Monday through Friday, and 6:00 p.m. and 9:00 a.m. Saturdays, except in the case of an emergency and then only upon notification and approval of the City.
- H. Notify local Fire District and City Public Works Department before opening any trench across any roadway and again when project is complete.
- I. 
- J. 
- K. 
- L. 
- M. 
- N. 
- O. 

P.

- Q. Clean-up of excavation and debris material shall be accomplished concurrently with the burying operation. At no time shall there be debris and/or excavated material extending along the area of construction for more than 500 feet without specific additional written approval of the City.
- R. INITIAL _____ All temporary patches shall be maintained by the contractor until such time as the permanent pavement patch is in place. Final patch shall be completed within 30 days after first opening the trench. If the contractor is unable to maintain a patch for whatever reason, the City will patch it and charge the contractor the actual cost plus overhead.

Notice:

By making this permit application King County does not waive, and intends to fully preserve, all rights King County possesses to the Corridor, including its ownership and control of the Corridor at issue in this permit application as well as other portions of the Corridor. King County does not concede that any permit is required from the City to undertake work or modify traffic control in the area of the Corridor at issue. Nor does King County agree that the City has any power to impose conditions on the County as part of any process to review or issue such permit.

I have read and understand all terms and conditions contained on both pages of this document with the exception of those provisions that are stricken. The stricken provisions (Items # 19, B, and I thru P) do not apply because King County owns the property at issue, the ELST corridor is a railbanked corridor and subject to federal preemption, and King County has authority and discretion over the design of the ELST as it is a King County owned and operated essential public facility.

Issued By: _____

Title: _____

Date: _____

Signed: _____

Printed Name: _____

Telephone No.: _____

Dated this _____

day of _____

☐ Surety Bond Required – Amount _____☐ Cash Deposit Required – Amount _____☐ Assignment of Funds Required – Amount _____

By making this permit application King County does not waive, and intends to fully preserve, all rights King County possesses to the Corridor, including its ownership and control of the Corridor at issue in this permit application as well as other portions of the Corridor. King County does not concede that any permit is required from the City to undertake work or modify traffic control in the area of the Corridor at issue. Nor does King County agree that the City has any power to impose conditions on the County as part of any process to review or issue such permit.

EXHIBIT 2

CITY OF SAMMAMISH Community Development

801 228th Avenue SE, Sammamish, WA 98075
Phone: 425-295-0500 Fax: 425-295-0600
www.sammamish.us

Under the authority of SMC 14.30.080, 16.15.110, & 23.70.010
ALL PERSONS ARE HEREBY ORDERED TO IMMEDIATELY

STOP WORK

PREMISES LOCATION: East Lake Sammamish Trail Segment 2A

This order is issued due to the following violation(s) of City Ordinance(s):

SMC 14.30.010 & 14.30.040 – Work within public right-of-way without a City-issued right-of-way use permit; namely, construction activity (including demolition, grading, paving, and related prep work) within 206th Ave. SE, SE 33rd St., and East Lake Sammamish Pkwy.

SMC 16.15.070(4)(d) – Clearing and grading work that is not provided for in the approved Clearing and Grading permit for this project; namely, excavation, clearing, grading, and installation work within the public right-of-way.



Signature

Signature



City Engineer



Community Development Director

POSTED: 6/26/17

AM/PM 0930

* **WARNING** *

-DO NOT REMOVE THIS NOTICE-

Any person who shall continue any work after having been served with a stop work order except such work as that person is directed to perform to remove a violation or unsafe condition, shall be subject to penalties as prescribed by law. (SMC Ch. 23.100)

Any appeal of this stop work order must be filed pursuant to SMC 23.110.010(1) & (2) and will be heard by the Hearing Examiner under the procedures set forth in SMC Chapter 20.10

EXHIBIT 3



King County

Parks and Recreation Division

Department of Natural Resources and Parks
King Street Center, KSC-NR-0700
201 South Jackson, Room 700
Seattle, WA 98104

June 16, 2017

Lindsey Ozbolt, Associate Planner
Department of Community Development
City of Sammamish
801 22th Avenue SE
Sammamish, WA 98075

RE: East Lake Sammamish Trail – South Sammamish Segment A
Stop Work Notice

Dear Lindsey,

This is written in regards to the Stop Work Notice King County received from the City of Sammamish on the South Sammamish A project. The notice is very general so I am requesting clarification on the following:

1. The Notice appears to require the County is to Stop Work on the entire South Sammamish A segment. Does this Notice mean the Contractor should stop all work on the project?
2. If the Notice does not apply to the entire project, specifically, what are the limits of this Stop Work Notice?
3. The Contractor has scheduled paving of the trail to begin Monday morning. Does this Stop Work Notice impact the Contractor's ability to move forward with this scheduled activity?
4. The paving activity requires a consecutive "train" of trucks, pavers and rollers. Would this equipment be able to pass thru the intersections to continue paving? If the equipment is not allowed to pass thru the intersections it would result in additional mobilizations costs every time the equipment would have to go up to the Parkway and set up further down the trail.

Please note that stopping construction of these intersections will result in the following schedule and cost impacts:

1. A second mobilization will result in additional mobilization costs.
2. Because the second paving activity will be so small, the asphalt costs will be higher.

East Lake Sammamish Trail – South Sammamish Segment A

Stop Work Notice

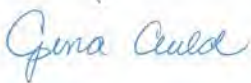
June 16, 2017

3. Because the second paving activity will be small it could easily get bumped for a larger paving job. This could result in additional schedule impacts.
4. Unfinished intersections would impact the County's ability to open the trail as the appropriate safety features for the trail would be incomplete.
5. The City's actions will result in a delay of re-opening of the trail. The contractor has reported that he expects the project will be substantially complete by mid-August. Parks intention is to open the trail to the public shortly thereafter (and to complete the landscaping during the planting season - October-November). However, Parks will not be able to open this segment to the public if the intersections are not completed as this would pose safety risks. Public interest in reopening Segment A is very high. I would like emphasize that no matter what decision is made on the signage at these two intersections, or the authority to regulate these intersections, the actual construction of these intersections will be exactly the same. Construction will include a patterned concrete intersection with bollards, striping, warning bands and signage (intersection ahead). The City's decision to block construction thus achieves no real purpose except to delay the project and harm public enjoyment. The better route would be to let construction continue on schedule while King County and the City work out their relative regulatory authority in the pending court case.

I hope the City will reconsider construction of these two intersections.

Please contact me at 206-724-1296 or at gina.auld@kingcounty.gov if you have any questions or if you need additional information.

Thank you,



Gina Auld
Capital Projects Manager

Attachments: Stop Work Notice

Cc: David Pyle, Community Development Director, City of Sammamish
Steve Leniszewski, Public Works Director, City of Sammamish
Andrew Zagars, City Engineer, City of Sammamish
Lindsey Ozbolt, Associate Planner, City of Sammamish
Jenny Bailey, Project Manager, Parametrix

East Lake Sammamish Trail – South Sammamish Segment A

Stop Work Notice

June 16, 2017

Kevin Brown, Director, Parks and Recreation Division, Department of Natural Resources and Parks (DNRP)

Frank Overton, Capital Projects Managing Supervisor, Parks and Recreation Division, (DNRP)

Deena Hall, Project Manager, Parks and Recreation Division, (DNRP)

EXHIBIT 2

THE HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

KING COUNTY,

Plaintiff,

v.

CITY OF SAMMAMISH,

Defendant.

No. 2:17-cv-00921-JCC

**DECLARATION OF ROBERT
NUNNENKAMP IN SUPPORT OF
PLAINTIFF KING COUNTY'S
MOTION FOR PRELIMINARY
INJUNCTION**

I, Robert Nunnenkamp, declare and state the following:

1. I am employed as a Property Agent with the King County Division of Parks and Recreation. I have held this position since 2000. I am over the age of eighteen, have personal knowledge of the facts stated below and am otherwise competent to testify regarding these matters. As a property agent for King County, my duties include inspection and inventories of County property along the East Lake Sammamish Trail ("ELST").

I. Historical Traffic Control Signs.

2. I have reviewed available records regarding traffic control signals used before construction of the interim, gravel trail for the ELST.

3. A video recording incorporated as Exhibit 1 shows many of the traffic control devices used along the Corridor before removal of the railroad tracks and construction of the

1 interim trail. The intersection between the Corridor and 206th Ave SE is visible at 6:06 of this
 2 video. The intersection between the Corridor and SE 33rd Street is visible at 9:48 of this video.
 3 Neither intersection contains a stop sign facing toward freight trains on the tracks. In fact, the
 4 video shows that not one crossing along the Corridor had a stop sign oriented towards trains
 5 traveling on the tracks. By contrast, numerous intersections contained stop signs or crossbuck
 6 signs facing vehicles crossing the tracks. As shown at 6:06 of the video, vehicles driving on 206th
 7 Ave SE were subject to a crossbuck sign when crossing the tracks.

8 4. Attached as Exhibit 2 are true and correct copies of photographs showing the
 9 condition of 206th Ave SE prior to removal of the railroad tracks and construction of the interim
 10 trail. As shown in this photograph, vehicles driving on 206th Ave SE were subject to a crossbuck
 11 sign when crossing the tracks.

12 5. Attached as Exhibit 3 is a true and correct copy of a photograph showing the
 13 condition of SE 33rd Street prior to removal of the railroad tracks and construction of the interim
 14 trail. As shown in this photograph, vehicles driving on SE 33rd Street were subject to a crossbuck
 15 sign when crossing the tracks.

16 **II. Property Deeds.**

17 6. Attached as Exhibit 4 is a true and correct copy of King County deed No. 171984
 18 granting property from the Northern Pacific Railway Company to the Seattle and International
 19 Railway Company, dated October 22, 1898. This deed granted the Seattle and International
 20 Railway Company, a predecessor of BNSF Railway Co., the portion of the Corridor later crossed
 21 by 206th Avenue SE.

22 7. Attached as Exhibit 5 is a true and correct copy of a document titled “Right of Way
 23 and Track Map, Northern Pacific Ry., Seattle Div. – Snoqualmie Br., Woodinville to Sallal,
 24 Wash.,” originally dated 1917, with subsequent annotations. The “Schedule of Properties” within
 25 this document shows that a predecessor of BNSF Railway Co obtained the portion of the Corridor

1 later crossed by SE 33rd Street as a land grant from the United States through an act of Congress
2 dated March 3, 1875.

3 8. Attached as Exhibit 6 is a true and correct copy of an easement from Burlington
4 Northern Railroad Company to King County granting a public crossing easement at the area now
5 known as 206th Ave SE, dated June 15, 1992.

6 9. Attached as Exhibit 7 is a true and correct copy of an easement from Burlington
7 Northern, Inc. to King County granting a public crossing easement at the area now known as SE
8 33rd Street, dated June 27, 1972.

9
10 I declare under penalty of perjury of the laws of the United States that the foregoing is
11 true and correct.

12 DATED this 23rd day of June, 2017 at Seattle, Washington.

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14 
15 Robert Nunnenkamp
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CERTIFICATE OF SERVICE

I hereby certify that on June 26, 2017, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

David A. Linehan
Michael R. Kenyon
Kim Adams Pratt
Kenyon Disend, PLLC
11 Front Sreet South
Issaquah, WA 98027-3820
David@KenyonDisend.com
Mike@KenyonDisend.com
David@KenyonDisend.com
***Attorneys for Defendant
City of Sammamish***

DATED: June 26, 2017

s/ David I. Freeburg
David I. Freeburg

**(Video Recording Submitted to the
Clerk of the Court for Filing)**

EXHIBIT 1

EXHIBIT 2





EXHIBIT 3



EXHIBIT 4

88

his heirs and assigns, and against all and every person, or persons whomsoever lawfully claiming or to claim the same, or any part thereof, we shall and will warrant and firmly defend.

In witness whereof, the said part of the just part have hereunto set our hands and seals the day and year first above written.

signed, sealed and delivered

William Ray seals

in presence of

Louisa M. Ray seals

J. B. Stinson seals

J. H. Gibson seals

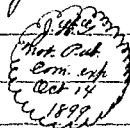
State of Washington
County of King } J.B.

I, J. H. Gibson, a notary public in and for the State of Washington, residing at Issaquah, in the above named County and State, duly commissioned, sworn and qualified do hereby certify that on this the 22 day of Nov. AD 1898 before me personally appeared William Ray and Louisa Ray to me known to be the individuals described in, and who executed the within instrument and acknowledged that they signed and sealed the same as their free and voluntary act and deed for the uses and purposes therein mentioned.

And the said Louisa Ray wife of the said William Ray upon an examination by me separate and apart from her said husband, when the contents of said instrument were by me fully made known unto her, and she was by me fully apprised of her rights and the effect of signing the within instrument, did freely and voluntarily, separate and apart from her said husband, acknowledge the same, acknowledging that she did so voluntarily of her own free will, and without the fear of or coercion from her husband, execute the same as her free and voluntary act and deed for the uses and purposes therein mentioned.

Given under my hand and official seal this the 22 day of Nov. AD 1898.

J. H. Gibson



Notary public in and for the State of Washington,
residing at Issaquah in said County.

Filed for record at request of J. H. Gibson Dec. 22 - 1898 @ 4:15 min past 10 A.M.

E. H. Emerson

County Auditor

By R. B. Upper Deputy

171984

Northern Pacific Railway Company

to

Deed

Seattle and International Railway Company

Contract No. 46-111

127

Washington Contract No. 840

Deed No. 12367

Northern Pacific Railway Company

This deed, made the twenty-second day of October in the year of our Lord one thousand eight hundred and ninety-eight, by the Northern Pacific Railway Company, a corporation duly incorporated under the laws of the State of Wisconsin, party of the first part, and the Seattle and International Railway Company, a corporation organized under the laws of the State of Washington, of the City of Seattle, in the County of King and State of Washington, party of the second part, Witnesseth:

Whereas, the party of the first part, has contracted to sell and convey to the party of the second part, the parcels of the lands hereinafter described, free from encumbrance, for the price hereinafter specified:

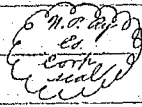
Therefore, in compliance with said contract, the party of the first part, in consideration of the sum of forty three and ²/₁₀₀ 43.20 dollars, unto it paid, the receipt of which is hereby acknowledged, does grant bargain and convey unto the said party of the second part its successors and assigns, the following described tracts of land, situate in the County of King State of Washington, that is to say: A strip of land one hundred (100) feet in width, that is, fifty (50) feet in width on each side of the center line of the main track of the railroad of the party of the second part as the same is now located and constructed over and across lot two (2) of section sixteen (16), northeast quarter of southwest quarter (N.E. 1/4 of S.W. 1/4) southwest quarter of southwest quarter (S.W. 1/4 of S.W. 1/4) southeast quarter of southwest quarter (S.E. 1/4 of S.W. 1/4) and southwest quarter of southeast quarter (S.W. 1/4 of S.E. 1/4) of section twenty five (25) and southeast quarter of northeast quarter (S.E. 1/4 of N.E. 1/4) of section twenty seven (27) in township twenty four (24), north of range six (6), and southwest quarter of southwest quarter (S.W. 1/4 of S.W. 1/4) of section thirteen (13) in township twenty three (23), north of range eight (8), all east of the Willamette Principal Meridian, containing according to the United States Government survey fifteen and ⁵/₁₀₀ 15.50 acres, more or less, reserving and excepting from said lands such as are now known, or shall hereafter be ascertained, to contain coal or iron, and also the use of such surface ground as may be necessary for mining operations and the right of access to such reserved and excepted coal and iron lands, for the purpose of exploring, developing and working the same, and also subject to an easement in the public for any public roads heretofore established and existing over and across any part of said land. Together with the hereditaments and appurtenances thereunto belonging or in anywise appertaining, with the reservations and exceptions before stated.

To have and to hold, the said lands and appurtenances, unto the said party of the second part, its successors and assigns forever, free and clear of all liens, charges and encumbrances, except taxes and assessments, if any, levied or assessed for the year 1898 and subsequent years upon the conditions and subject to the reservations aforesaid. The said party of the first part, for itself and its successors, covenants and agrees to and with the said party of the second part, its successors and assigns, that it will warrant and defend the title to the said premises, forever, except as against the taxes and assessments aforesaid which if any, the said party of the

second part hereby assumes to pay:

As witness whereof, the said party of the first part has caused these presents to be sealed with its corporate seal, and signed by its President, the day and year first above written.

sealed and delivered



Northern Pacific Railway Company

in the presence of

By C. D. Mullen, President

Richard B. Jones

Attest: W. H. Emmell Assistant Secretary

Henry A. Ekman

State of Minnesota

County of Ramsey } ss

On this twenty first day of November 1898, before me personally appeared C. D. Mullen, to me personally known, who being by me duly sworn, did say that he is the President of the Northern Pacific Railway Company the corporation which executed the foregoing instrument, and that the seal affixed to said instrument is the corporate seal of said corporation, and that said instrument was signed and sealed in behalf of said corporation, by authority of its Board of Directors, and said C. D. Mullen acknowledged said instrument to be the free act and deed of said corporation.

As witness whereof, I have hereunto set my hand and affixed my official seal, at my office, in the City of St. Paul, the day and year last aforesaid.



C. W. Corbett

Notary Public Ramsey Co. Minn.

Filed for record at request of Grantor Dec. 23- 1898 @ 1.5 min past 11 A.M.

E. H. Green

County Auditor

By R. R. Upper Deputy

172023

Duncan Graham

to

Deed of Mining Claim

W. D. Begg

This indenture, made the 17th day of June in the year our Lord one thousand eight hundred and ninety seven, between Duncan Graham, single of Seattle, Wash. the party of the first part, and W. D. Begg of Seattle the party of the second part, Witnesseth that the said party of the first part, for and in consideration of the sum of eight hundred dollars, lawful money of the United States of America, to him in hand paid by the said party of the second part, the receipt whereof is hereby acknowledged, have granted, bargained, sold, remised, released, and forever quit claimed, and by these presents do grant, bargain, sell, remise, release, and forever quit claim unto the said party of the second part, and to his heirs and assigns the following described Mining Claims situated in Miller River Mining District, King County, State of Washington described as follows, to wit: Stephen Boy, Stephen Cook and

EXHIBIT 5



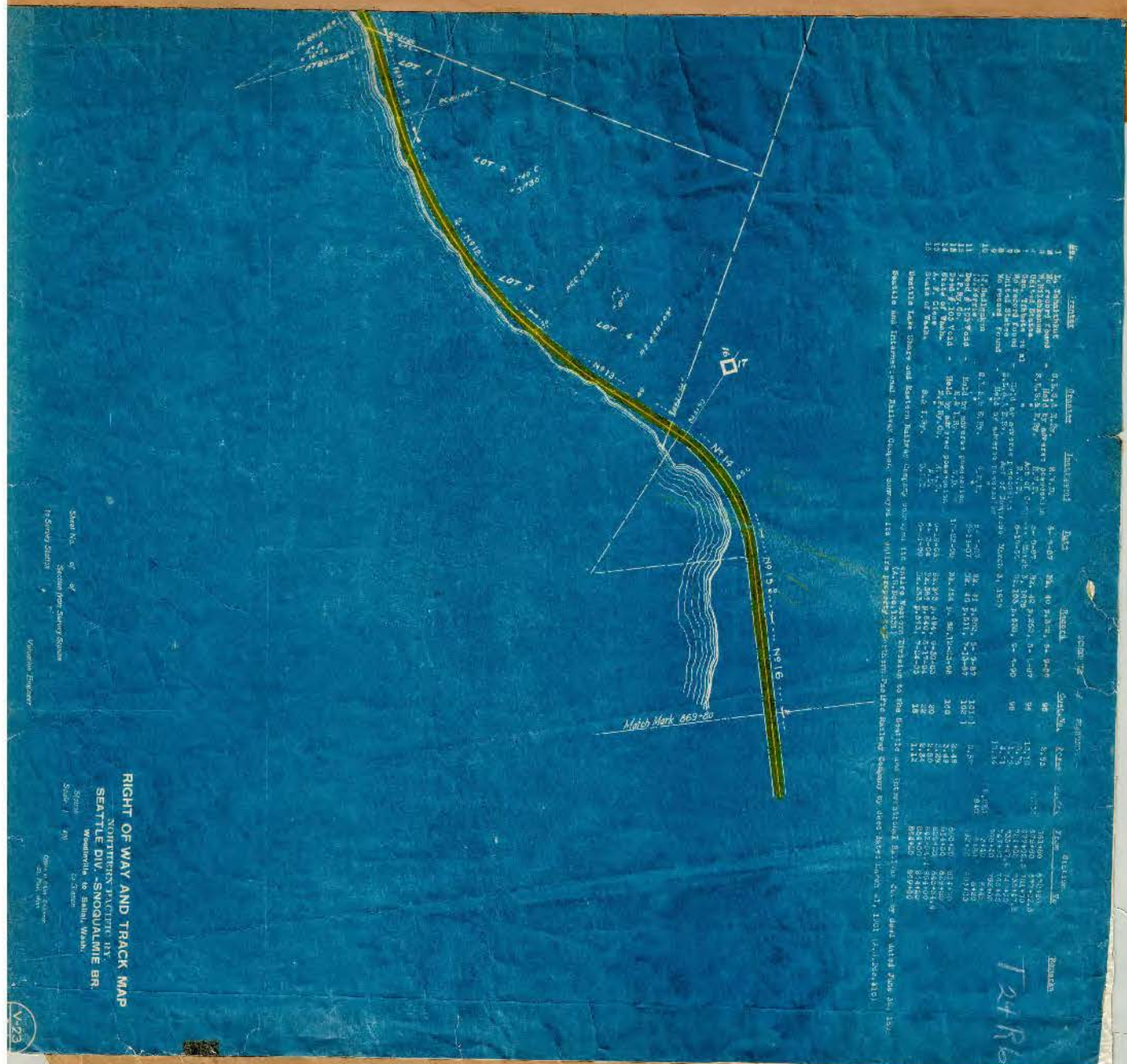


EXHIBIT 6

Filed For Record At The Request Of

7-1992-010 Parcel 1
206th Avenue SE*Vesta Jane Smith*
King County Real Property Division**EASEMENT**

KNOW ALL MEN BY THESE PRESENTS, that BURLINGTON NORTHERN RAILROAD COMPANY (formerly named Burlington Northern Inc.), a Delaware corporation, whose address for purposes of this instrument is 2100 First Interstate Center, 999 Third Avenue, Seattle, Washington 98104, Grantor, for Three Thousand and No/100 Dollars (\$ 3,000.00) to it paid by KING COUNTY, Grantee, and the promises of the Grantee hereinafter specified, does hereby remise, release and quitclaim unto the Grantee, subject to the terms and conditions hereinafter set forth, an EASEMENT for the construction, maintenance, replacement and removal of 206th Avenue Southeast, hereinafter called street, over, upon and across the following described premises, situated in King County, State of Washington, to-wit:

A 60.0 foot wide portion of said Railroad Company's 100.0 foot wide Snowqualmie Branch Line right of way, being 50.0 feet wide on each side of the said Railroad Company's Main Track centerline, situated in Government Lot 2, Section 17, T24N, R6E, Willamette Meridian, in said King County, as shown outlined in red on attached Exhibit "A", which by this reference is made a part thereof.

RESERVING, however, unto the Grantor, its successors and assigns, the right to construct, maintain, use, operate, relocate, reconstruct and renew such tracks and facilities as it may at any time, and from time to time, desire within the limits of the land hereinbefore described, including the right and privilege to use said land for any and all purposes, not inconsistent with the use thereof for purposes.

The foregoing easement is made subject to and upon the following express conditions:

1. To existing interests in the above-described premises to whomsoever belonging and of whatsoever nature and any and all extensions and renewals thereof, including but not limited to underground pipe line or lines, or any type of wire line or lines, if any.
2. Any and all cuts and fills, excavations or embankments necessary in the construction, maintenance, or future alteration of said ** shall be made and maintained in such manner, form and extent as will provide adequate drainage of and from the adjoining lands and premises of the Grantor; and wherever any such fill or embankment shall or may obstruct the natural and pre-existing drainage from such lands and premises of the Grantor, the Grantee shall construct and maintain such culverts or drains as may be requisite to preserve such natural and pre-existing drainage, and shall also wherever necessary, construct extensions of existing drains, culverts or ditches through or along the premises of the Grantor, such extensions to be of adequate sectional dimensions to preserve the present flowage of drainage or other waters, and of materials and workmanship equally as good as those now existing.
3. The Grantee shall bear the cost of removal, relocation or reconstruction of any and all right of way fences, telephone or telegraph poles, or other facilities, the removal, relocation or reconstruction of which may be made necessary by reason of the use of said premises for said street purposes.

EXCISE TAX NOT REQUIRED
King Co. Records Division

By *L. C. Smith* Deputy

4. The Grantee shall, at its own cost and expense, make adjustment with industries or other lessees of Grantor for buildings or improvements that may have to be relocated, reconstructed or destroyed by reason of the construction and maintenance of said street on said premises.
5. For any encumbrance or interest affecting the described premises as set forth in Sections 2 and 3 hereinabove.
6. For any work performed in the State of Washington, nothing in this agreement is intended to be construed as an indemnification against the sole negligence of the Grantor, its officers, employees or agents. Moreover, for any work performed in the State of Washington, the Grantee specifically and expressly agrees to indemnify the Grantor against all loss, liability and damages, including environmental damage, hazardous materials damage, or penalties or fines that may be assessed, caused by or resulting from the concurrent negligence of (a) the Grantor or the Grantor's agents or employees, and (b) the Grantee or the Grantee's agents or employees, to the extent of the Grantee's negligence.

For any work performed in the State of Washington, the Grantee specifically and expressly waives any immunity it may have under Washington Industrial Insurance, Title 51 RCW, and acknowledges that this waiver was mutually negotiated by the parties hereto.

For so long as this easement shall survive, all contracts between the Grantee and its contractor, for either the construction herein provided for or maintenance work on the street within any easement area described herein or shown on the exhibit attached hereto, shall require the contractor to protect and hold harmless the Grantor and any other railroad company occupying or using the Grantor's right of way or line of railroad against all loss, liability and damage arising from activities of the contractor, its forces or any of its subcontractors or agents; and shall further provide that the contractor shall:

A. Furnish to the Grantor a railroad protective liability policy in the form provided by FHFM 6-6-2-2, or as such form may be hereafter amended or supplanted, and any other pertinent instructions issued by the Federal Highway Administration, Department of Transportation. The combined single limit of said policy shall not be less than Two Million Dollars (\$2,000,000.00) for all damages arising out of bodily injuries to or death of any person or persons and for all damages arising out of loss or destruction of or injury or damage to property in any one occurrence, and, subject to that limit a total (or aggregate) limit of not less than Six Million Dollars (\$6,000,000.00), for all damages arising out of bodily injuries to or death of any person or persons and for all damages arising out of or loss or destruction of or injury or damage to property during the policy period. Said insurance policy executed by a corporation qualified to write the same in the State in which the work is to be performed, shall be in the form and substance satisfactory to the Grantor and shall be delivered to and approved by the Grantor's Regional Chief Engineer prior to the entry upon or use of its property by the contractor. This being a potentially perpetual easement, Grantor reserves the right to require higher limits of insurance in the future as may be commercially reasonable at the time.

B. Carry regular Contractor's Public Liability and Property Damage Insurance as specified in FHFM 6-6-2-2, or as such form may be hereafter

supplanted or amended, and any other pertinent instructions issued by the Federal Highway Administration, Department of Transportation, providing for a limit of not less than One Million Dollars (\$1,000,000.00) for all damages arising out of the bodily injuries to or death of one person, and, subject to that limit for each person, a total limit of not less than Two Million Dollars (\$2,000,000.00) for all damages arising out of bodily injuries to or death of two or more persons in any one accident; and providing for a limit of not less than One Million Dollars (\$1,000,000.00) for all damages to or destruction of property in any one accident and subject to that limit a total (or aggregate) limit of not less than Two Million Dollars (\$2,000,000.00) for all damages to or destruction of property during the policy period. A certified copy of the policy providing said Contractor's Public Liability and Property Damage Insurance executed by a corporation qualified to write the same in the State in which the work is to be performed, in form and substance satisfactory to the Grantor, shall be delivered to and approved by the Grantor's Regional Chief Engineer prior to the entry upon or use of the Grantor's property by the contractor. This being a potentially perpetual easement, Grantor reserves the right to require higher limits of insurance in the future as may be commercially reasonable at the time.

If the Grantee, its contractor, subcontractors or agents, in the performance of the work herein provided or by the failure to do or perform anything for which it is responsible under the provisions hereof, shall damage or destroy any property of the Grantor, such damage or destruction shall be corrected by the Grantee in the event its contractor or the insurance carriers fail to repair or restore the same.

7. The Grantee shall notify the Regional Chief Engineer of the Grantor at least five days prior to entering the Grantor's right of way.
8. The Grantee shall, or shall require its contractor to, notify the Grantor's Regional Chief Engineer a sufficient time in advance whenever the Grantee or its contractor is about to perform work on or adjacent to Grantor's right of way and tracks to enable Grantor to furnish flagging and such other protective service as might be necessary and Grantee shall reimburse Grantor for the cost thereof
9. All construction, maintenance and improvements of said street shall be done at no expense to the Grantor.
10. The Grantor does not warrant its title to said premises nor undertake to defend the Grantee in the peaceable possession, use or enjoyment thereof; and the grant herein made is subject to all outstanding rights or interest of others, including the tenants and licensees of the Grantor.
11. The Grantee or its contractor(s) shall telephone Grantor's Communication Network Control Center at (800) 533-2891 (a 24 hour number) to determine if fiber optic cable is buried anywhere on the premises; and if so, the Grantee or its contractor(s) will contact the Telecommunications Company(ies) involved, and make arrangements with the Telecommunications Company(ies) for protection of the fiber optic cable prior to beginning any work on the premises.

TO HAVE AND TO HOLD THE SAME, together with all the hereditaments and appurtenances thereunto belonging to Grantee for public use and enjoyment for he purposes aforesaid and for no other purpose whatsoever subject to the terms and conditions hereinbefore stated.

IN WITNESS WHEREOF, the said BURLINGTON NORTHERN RAILROAD COMPANY has caused this instrument to be signed by its authorized officers, and the corporate seal affixed on the 15th day of June, 1992.

BURLINGTON NORTHERN
RAILROAD COMPANY

BY D. P. Schneider
D. P. Schneider, Director
Title Services & Field Support

ATTEST:

BY Victoria H. Vasquez
Victoria H. Vasquez
Assistant Secretary

STATE OF TEXAS)
COUNTY OF TARRANT) ss.

On this 15th day of June, 1992, before me, the undersigned, a Notary Public in and for the State of Texas, duly commissioned and sworn, personally appeared D. P. Schneider and Victoria H. Vasquez, to me known to be the Director - Title Services & Field Support, and Assistant Secretary, respectively, of Burlington Northern Railroad Company, the corporation that executed the foregoing instrument, and acknowledged the said instrument to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and on oath stated that they are authorized to execute the said instrument and that the seal affixed is the corporate seal of said corporation.

Witness my hand and official seal hereto affixed the day and year first above written.

Arline Nichols
Notary Public in and for the State of Texas

Residing at: Ft. Worth, TX.

My appointment expires: December 20, 1992

BN 8868 Issaquah, WA



9206301491

TO HAVE AND TO HOLD THE SAME, together with all the hereditaments and appurtenances thereunto belonging to Grantee for public use and enjoyment for the purposes aforesaid and for no other purpose whatsoever subject to the terms and conditions hereinbefore stated.

IN WITNESS WHEREOF, the said BURLINGTON NORTHERN RAILROAD COMPANY has caused this instrument to be signed by its authorized officers, and the corporate seal affixed on the _____ day of _____, 19____.

BURLINGTON NORTHERN
RAILROAD COMPANY

ACCEPTED:
KING COUNTY

BY

Jesus Sanchez
Title
JESUS SANCHEZ FOR
KING COUNTY EXECUTIVE

BY

J. H. Ilkka
Director - Title Services

ATTEST:

BY

Title

BY

Anita D. Wells
Assistant Secretary

STATE OF WASHINGTON)
COUNTY OF KING) ss.

On this _____ day of _____, 19____, before me, the undersigned, a Notary Public in and for the State of Washington, duly commissioned and sworn, personally appeared J. H. Ilkka and Anita D. Wells, to me known to be the Director - Title Services, and Assistant Secretary, respectively, of Burlington Northern Railroad Company, the corporation that executed the foregoing instrument, and acknowledged the said instrument to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and on oath stated that they are authorized to execute the said instrument and that the seal affixed is the corporate seal of said corporation.

Witness my hand and official seal hereto affixed the day and year first above written.

Notary Public in and for the State of Washington

Residing at: _____ Seattle, Washington

My appointment expires: _____ January 9, 1993

BN 8868 Issaquah, WA

9206301491

EASEMENT REQUIRED
SHOWN IN RED

E. LAKE SAMMAMISH

LOT 2 SEC 17
T.24N., R.6E., WM

791+86.5

15

822+49.1 & Crossing:
MP 15+3063 (15.58)

SIDEWALK
206TH

AVE SE

PARKWAY SE

BN RIW

2105' to E. line Sec. 17

ISSAQUAH

BN RIW

EXHIBIT A
BN RAILROAD CO

SEATTLE REGION - WOODINVILLE - ISSAQUAH

EASEMENT REQUIRED FOR
206TH AVE. SE. (ALEXANDERS
ON THE LAKE (MPI 15.58)
ISSAQUAH, WA.

SCALE 1"=40'

CHIEF ENGINEER, REGION - SEATTLE 7-16-86

JMC

EXHIBIT 7

721020067E

COUNTY OF KING

BURLINGTON NORTHERN INC.

By [Signature]
Vice President

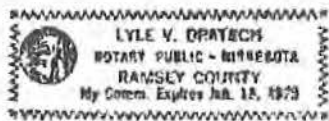
Attest:

~~Secret~~

STATE OF MINNESOTA)
) ss
County of Ramsey)

On this 27th day of June, 1972, before me, the undersigned, a Notary Public in and for the State of Minnesota, duly commissioned and sworn, personally appeared G. F. DEFIEL and R. M. O'KELLY to me known to be the Vice President and Secretary, respectively of Burlington Northern Inc., the corporation that executed the foregoing instrument, and acknowledged the said instrument to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and on oath stated that they were authorized to execute the said instrument, and that the seal affixed is the corporate seal of said corporation.

WITNESS MY HAND AND OFFICIAL SEAL hereto affixed the day and year first above written.



Notary Public in and for the State of Minnesota
residing at St. Paul.
My Commission expires June 13, 1973

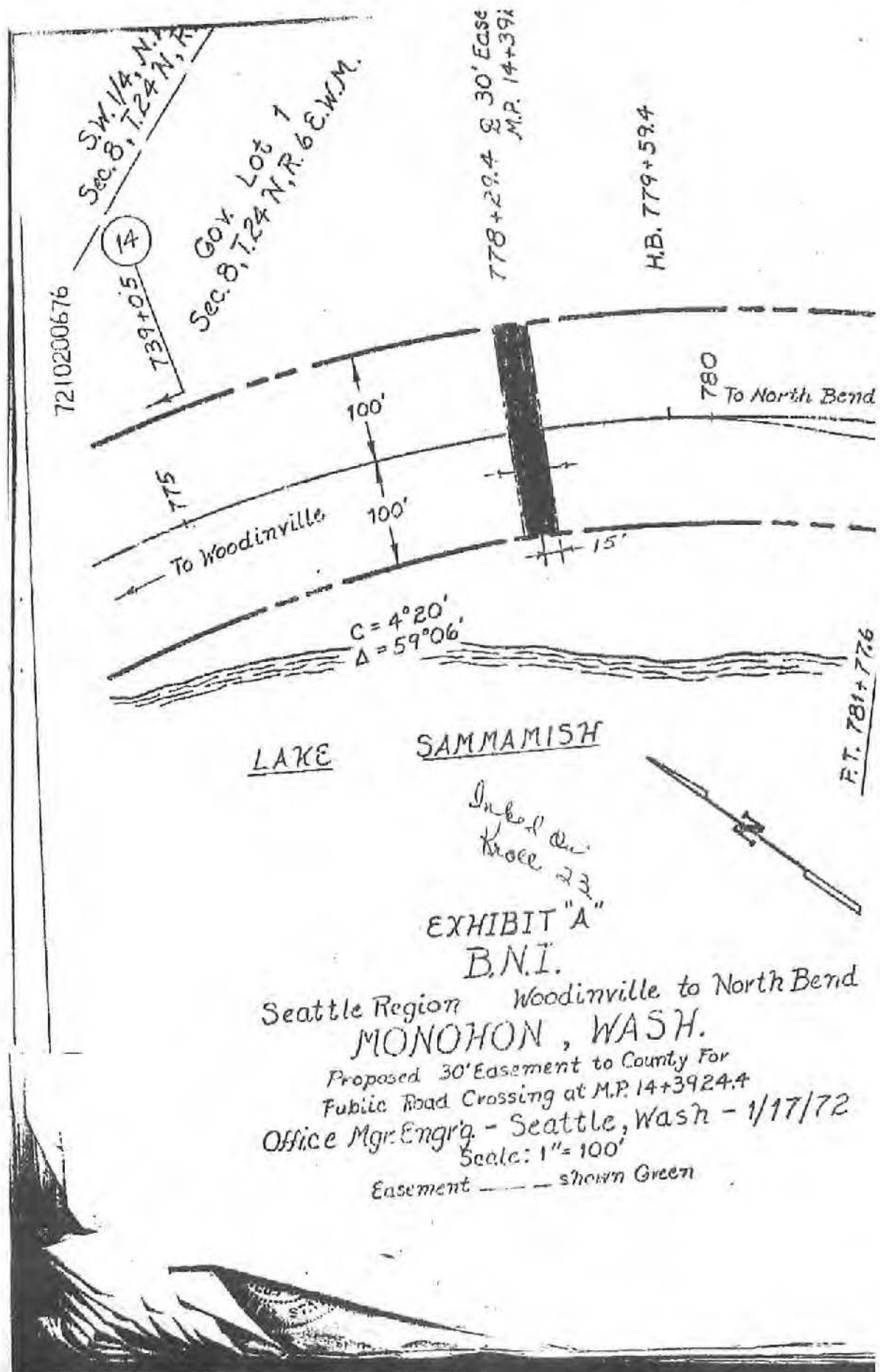


EXHIBIT 3

**BEFORE the HEARING EXAMINER for the
CITY of SAMMAMISH**

DECISION

FILE NUMBER: SSDP2014-00171

APPELLANTS: Lake Sammamish 4257 LLC
C/o Duncan Greene ¹
Van Ness Feldman LLP
719 Second Avenue, Suite 1150
Seattle, WA 98104-1728
dmg@vnf.com

SHO, Herbert & Elynne Moore, and Philip Bradbury
C/o John T. Ludlow ²
Hanson Baker Ludlow Drumheller P.S.
2229 112th Avenue NE, Suite 200
Bellevue, WA 98004
jludlow@hansonbaker.com

APPLICANT/APPELLANT: King County
c/o Barbara Flemming/Devon Shannon/Kevin Wright
King County Prosecuting Attorney's Office, Civil Division
King County Courthouse
516 Third Avenue W400
Seattle, WA 98104
mary.livermore@kingcounty.gov

RESPONDENT: City of Sammamish
C/o Kim Adams Pratt/David Linehan
Kenyon Disend, PLLC
11 Front Street South
Issaquah, WA 98027-3820
kim@kenyondisend.com

TYPE OF CASE: Three appeals from approval of a Substantial Development Permit issued pursuant to the Shoreline Management Act of 1971

EXAMINER DECISION: 1) Lake Sammamish 4257 LLC's withdrawal of its appeal is accepted;

¹ Mr. Greene did not participate in the actual hearing: His client settled with the City and King County prior to the start of the hearing. (See Settlements/Stipulations section, below.)

² Mr. Ludlow did not participate in the actual hearing: Tom Hornish substituted for Mr. Ludlow on December 16, 17, and 18, 2015; Erin Stines substituted for Mr. Ludlow on January 28, 2016.

HEARING EXAMINER DECISION

RE: SSDP2014-00171 (ELST South Sammamish Segment A Appeals)

February 8, 2016

Page 2 of 46

2) SHO, Herbert & Elynne Moore, and Philip Bradbury's appeal is DENIED; and 3) King County's appeal is GRANTED in PART

DATE OF DECISION: February 8, 2016

INTRODUCTION ³

On or about July 7, 2015, the City of Sammamish (City) Department of Community Development (Department) approved the Shoreline Substantial Development Permit (SSDP) application of King County (King County or simply the County) under City file number SSDP2014-00171. (Exhibit 9001.1.A ⁴) The project for which the subject SSDP was issued is to widen and pave a 1.3 mile segment (Segment A) of the East Lake Sammamish Trail (ELST) lying within a rail-banked section of a railroad right-of-way in the City. (Exhibit 1 *et al.*)

Three appeals were filed with the City Hearing Examiner (Examiner) from the Department's approval of SSDP2014-00171. Lake Sammamish 4257 LLC (LS 4257) filed its appeal on July 24, 2015, raising eight issues. (Exhibit 9001) SHO (Sammamish Homeowners), Herbert & Elynne Moore, and Philip Bradbury (collectively Owners) filed their appeal on July 27, 2015, raising four issues (Owners Appeal Issues 4.2.1 – 4.2.4). (Exhibit 9002) King County filed its appeal on July 28, 2015, challenging 10 permit conditions and raising Federal preemption (County Appeal Issues II.a – II.k). (Exhibit 9003)

The subject property is the southern 1.3 miles of the ELST extending north from the Sammamish/Issaquah city line.

The Examiner held a prehearing conference with the parties on September 23, 2015. The prehearing conference is memorialized in Exhibit 9011.

The Examiner convened an open record hearing on December 16, 2015; the hearing concluded on January 28, 2016, after more than 23 hours of testimony over four days (December 16, 17, and 18, 2015; and January

³ Any statement in this section deemed to be either a Finding of Fact or a Conclusion of Law is hereby adopted as such.

⁴ Exhibit citations are provided for the reader's benefit and indicate: 1) The source of a quote or specific fact; and/or 2) The major document(s) upon which a stated fact is based. While the Examiner considers all relevant documents in the record, typically only major documents are cited. The Examiner's Decision is based upon all documents in the record.

The City numbered each page of most of its exhibits (Similar to "Bates" numbering.), including those where the original document was paginated. The two sets of page numbers do not always agree. Wherever available, the Examiner will use the exhibit page numbers assigned by the City rather than the original document page numbers.

Some exhibits include subparts. A citation to an exhibit with subparts that does not specify a subpart is a citation to the exhibit as a whole.

HEARING EXAMINER DECISION

RE: SSDP2014-00171 (ELST South Sammamish Segment A Appeals)

February 8, 2016

Page 3 of 46

28, 2016). The Department gave notice of the hearing as required by the Sammamish Municipal Code (SMC); day-to-day continuations were announced on the record. (Exhibits 14, 16, and 17)

Pursuant to City of Sammamish Hearing Examiner Rule of Procedure (RoP) 224(c) and Exhibit 9011, ¶ 4, the Examiner entered the following administrative exhibits into the hearing record:

- Exhibit 9001: City of Sammamish Administrative Appeal Form from LS 4257, filed July 24, 2015
- Exhibit 9001.1: Notice of Appeal from LS 4257 filed July 24, 2015
- Exhibit 9001.1.A: Notice of Decision for Shoreline Substantial Development Permit, SSDP2014-00171 and Findings/Conclusions/Decision Shoreline Substantial Development Permit, SSDP2014-00171, issued July 7, 2015
- Exhibit 9002: Notice of Appeal from Owners, filed July 27, 2015
- Exhibit 9002.1: Land Use Permit Application Form, SSDP2014-00171
- Exhibit 9002.2: Findings/Conclusions/Decision Shoreline Substantial Development Permit, SSDP2014-00171, issued July 7, 2015
- Exhibit 9003: City of Sammamish Administrative Appeal Form from King County filed July 28, 2015
- Exhibit 9003.1: Appeal of City of Sammamish Decision for Shoreline Substantial Development Permit 2014-00171 from King County, filed July 28, 2015
- Exhibit 9004: City of Sammamish's Motion to Dismiss All Appeals for Lack of Jurisdiction, filed August 11, 2015
- Exhibit 9005: King County's Response to City of Sammamish's Motion to Dismiss, filed August 19, 2015
- Exhibit 9006: Appellant [LS 4257's] Response in Opposition, filed August 21, 2015
- Exhibit 9007: Owners' Joinder in Opposition, filed August 21, 2015
- Exhibit 9008: Interlocutory Order Denying Motion to Dismiss, issued August 25, 2015
- Exhibit 9009: Letter, Examiner to Principal Parties, August 25, 2015 (scheduling)
- Exhibit 9010: Notice of Prehearing Conference, issued September 2, 2015
- Exhibit 9011: Order Memorializing a Prehearing Conference, issued September 24, 2015
- Exhibit 9012: Motion for Summary Judgment, filed October 23, 2015 (with Exhibits 1 – 3, to be cited as Exhibits 9012.1 – 9012.3)
- Exhibit 9013: King County's Motion to Dismiss, filed October 23, 2015 (with Exhibits 1 – 5, to be cited as 9013.1 – 9013.5)
- Exhibit 9014: Appellant [LS 4257's] Response in Opposition to King County's Motion to Dismiss, filed November 6, 2015 (with Exhibits 1 – 4, to be cited as Exhibits 9014.1 – 9014.4)
- Exhibit 9015: City of Sammamish's Response to SHO's Motion for Summary Judgment, filed November 6, 2015
- Exhibit 9016: Declaration of Mona Davis in Support of City of Sammamish's Response to Motion for Summary Judgment, filed November 6, 2015 (with Exhibits A – D, to be cited as Exhibits 9016.A – 9016.D)

HEARING EXAMINER DECISION

RE: SSDP2014-00171 (ELST South Sammamish Segment A Appeals)

February 8, 2016

Page 4 of 46

- Exhibit 9017: [Owners'] Response to King County's Motion to Dismiss, filed November 6, 2015
- Exhibit 9018: Declaration of Thomas E. Hornish, filed November 6, 2015
- Exhibit 9019: Declaration of Herbert Moore, filed November 6, 2015 (with Exhibits 1 – 3, to be cited as Exhibits 9019.1 – 9019.3)
- Exhibit 9020: Declaration of Phillip Bradbury, filed November 6, 2015
- Exhibit 9021: Declaration of Rush Riese, filed November 6, 2015 (with Exhibits 1 – 4, to be cited as Exhibits 9021.1 – 9021.4)
- Exhibit 9022: Declaration of Rick Cline, filed November 6, 2015 (with Exhibits 1 – 4, to be cited as Exhibits 9022.1 – 9022.4)
- Exhibit 9023: King County's Response to [Owners'] Summary Judgment Motion and King County's Motion to Strike, filed November 6, 2015
- Exhibit 9024: [Owners'] Reply to King County's Response to Motion for Summary Judgment, filed on November 13, 2015
- Exhibit 9025: Declaration of John T. Ludlow, filed November 13, 2015
- Exhibit 9026: [Owners'] Reply to City's Response to Motion for Summary Judgment, filed on November 13, 2015
- Exhibit 9027: King County's Reply to Appellants' Responses to King County's Motion to Dismiss, filed November 13, 2015 (with Exhibits 1 – 3, to be cited as Exhibits 9027.1 – 9027.3); and
- Exhibit 9028: Interlocutory Order on Motions, issued November 18, 2015
- Exhibit 9029: Letter, Ludlow to Hearing Examiner, November 25, 2015 (responding to ¶ 2(D) of Exhibit 9028)
- Exhibit 9030: E-mail, Hearing Examiner to Principal Parties, December 4, 2015 (establishing time limits for the hearing)

Pursuant to RoP 224(d) and Exhibit 9011, ¶ 4, Respondent Department pre-filed Exhibits 1 - 17 and provided an index listing of those exhibits.⁵ The Examiner assigned Exhibit number 18 to the Department's Pre-Hearing Memorandum. No objections were raised to entry of those exhibits. The Examiner entered those exhibits into the hearing record. Pursuant to RoP 224(i) the Examiner accepted additional exhibits during the hearing from the Department as follows:⁶

- Exhibit 19: Joint Stipulation between City and County Regarding Condition 10, filed December 16, 2015
- Exhibit 20: Joint Stipulation, Voluntary Withdrawal of Appeal, and request for Dismissal, filed by LS 4257, December 16, 2015, with Exhibits A – C to be cited as Exhibits 20A - 20C

⁵ During preparation of this Decision the Examiner realized that the document listed as Exhibit 12 (a November 20, 2014, letter from Monica Leers of King County Parks) was not entered as a City exhibit. Listed Exhibit 13 is actually Exhibit 12, listed Exhibit 14 is actually Exhibit 13, and Exhibit 14 is a copy of the text of the appeal hearing notice. The Leers letter was not entered into the record by any party.

⁶ Public comments were entered as Department exhibits even though they were not generated by the Department.

HEARING EXAMINER DECISION

RE: SSDP2014-00171 (ELST South Sammamish Segment A Appeals)

February 8, 2016

Page 5 of 46

- Exhibit 21: Photograph of ELST/206th Avenue SE crossing
- Exhibit 22: King County Critical Areas Mitigation Guidelines, November 10, 2012 (excerpts)
- Exhibit 23: Manual on Uniform Traffic Control Devices, 2009 Edition, pp. 1 and 803
- Exhibit 24: A Policy on Geometric Design of Highways and Streets, 2011 6th Edition, p. 9-38
- Exhibit 25: 2009 King County Surface Water Design Manual, pp. 1-12 and 1-51 – 1-54
- Exhibit 26: Code Interpretation – Environmentally Critical Areas Regulations, July 29, 2010
- Exhibit 27: Hearing statement, Reid Brockway, December 18, 2015
- Exhibit 28: E-mail, Ryan Harasimowicz, December 30, 2015
- Exhibit 29: E-mail, Roger Burton, December 30, 2015
- Exhibit 30: E-mail, John Bissell, December 30, 2015
- Exhibit 31: E-mail, Chip Greaves, December 30, 2015
- Exhibit 32: E-mail, Steven Glasgow, December 30, 2015
- Exhibit 33: E-mail, Mike J. Ubezzi, December 30, 2015
- Exhibit 34: Joint Stipulation between City and County Regarding Condition 17, filed January 28, 2016, with Exhibits A – C to be cited as Exhibits 35A - 35C
- Exhibit 35: Joint Stipulation between City and County Regarding SSDP Conditions 4, 7, and 8, filed January 28, 2016
- Exhibit 36: Letter, Cascade bicycle Club (Jeff Aken), filed January 28, 2016
- Exhibit 37: Testimony given January 28, 2016, by Reid Brockway
- Exhibit 38: Statement from Ann Lewis, filed January 28, 2016

Pursuant to RoP 224(e) and Exhibit 9011, ¶ 4, Appellant LS 4257 pre-filed Exhibits 1001, 1003, 1007, 1009, 1011, 1033, 1035, 1043, and 1055 and provided an index listing of those exhibits. No objections were raised to entry of those exhibits. The Examiner entered those exhibits into the hearing record.

Pursuant to RoP 224(e) and Exhibit 9011, ¶ 4, Appellant Owners pre-filed Exhibits 2001 - 2013. ⁷ No objections were raised to entry of those exhibits. The Examiner entered those exhibits into the hearing record.

Pursuant to RoP 224(e) and Exhibit 9011, ¶ 4, Applicant/Appellant King County pre-filed Exhibits 3001 - 3033 and provided an index listing of those exhibits. ⁸ The Examiner assigned Exhibit number 3034 to King County's Pre-Hearing Brief. No objections were raised to entry of those exhibits. The Examiner entered those exhibits into the hearing record. During the hearing the parties agreed to divide Exhibit 3028 into three parts, identified as follows:

- Exhibit 3028A: DVD taken on December 8, 2015
- Exhibit 3028B: Driveway 1 Aerial Photograph Index and seven photographs
- Exhibit 3028C: Driveway 2 Aerial Photograph Index and seven photographs

⁷ Those 13 exhibits are all photographs. Owners' witness Hornish described the location of each photograph during his testimony.

⁸ The County inadvertently identified its exhibits as Exhibits 1 – 33. The Examiner directed the parties to convert those numbers to 3001 – 3033.

HEARING EXAMINER DECISION

RE: SSDP2014-00171 (ELST South Sammamish Segment A Appeals)

February 8, 2016

Page 6 of 46

Pursuant to RoP 224(i) the Examiner accepted additional exhibits during the hearing from King County as follows:

- Exhibit 3035: King County's witness list and associated curriculum vitae
- Exhibit 3036: Letter, Department of the Army, Seattle District, Corps of Engineers, Re: NWS-2015-605, January 12, 2016
- Exhibit 3037: Interlocal Agreement Between King County and the City of Sammamish Relating to Processing of Building and Land Use Applications, April 4, 2012, together with First Amendment, August 22, 2012
- Exhibit 3038: William Schultheiss curriculum vitae, filed January 28, 2016
- Exhibit 3039: Memorandum from Bill Schultheiss, January 26, 2016
- Exhibit 3040: Guide for the Development of Bicycle Facilities, 2012, Fourth Edition, Chapter 5, consisting of pp. 5-1 – 5-56
- Exhibit 3041: Trail Crossing – 206th Avenue SE Vehicle Queues, prepared by Yammie Ho, January 27, 2016⁹

The Deputy City Clerk has the record copy of all exhibit index lists and exhibits.

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

MOTIONS

On August 11, 2015, Respondent City filed a Motion to Dismiss All Appeals for Lack of Jurisdiction. (Exhibit 9004) On August 19, 2015, King County filed a response supporting the City's Motion. (Exhibit 9005) On August 21, 2015, LS 4257 and Owners filed Responses in opposition to the City's Motion. (Exhibits 9006; 9007) On August 25, 2015, the Examiner issued an Interlocutory Order Denying Motion to Dismiss. (Exhibit 9008)

Three motions were filed pursuant to a schedule established during the September 23, 2015, prehearing conference: Owners' Motion for Summary Judgment, filed on October 23, 2015 (Exhibit 9012); King County's Motion to Dismiss, filed on October 23, 2015 (Exhibit 9013); and King County's Motion to Strike, incorporated within King County's Response to the Motion for Summary Judgment, filed on November 6, 2015 (Exhibit 9023). Responses and Replies, together with supporting declarations, were filed. (Exhibits 9014 – 9027) On November 18, 2015, the Examiner issued an Interlocutory Order on Motions which: Denied Owners' Motion for Summary Judgment; Denied King County's Motion to Dismiss Owners for lack of standing; Dismissed LS 4257's Appeal Issue 1 and Owners' Appeal Issues 4.2.1 and 4.2.2; Denied King County's Motion to Strike; and held that LS 4257's Appeal Issue 8 was moot. (Exhibit 9028)

⁹ Identity of the author and date of preparation of this document were established during the open record hearing.

HEARING EXAMINER DECISION

RE: SSDP2014-00171 (ELST South Sammamish Segment A Appeals)

February 8, 2016

Page 7 of 46

The Examiner incorporates herein by reference as if set forth in full both Interlocutory Orders (Exhibits 9008 and 9028).

SETTLEMENTS/STIPULATIONS

On or about December 16, 2015, LS 4257, King County, and the City entered into a Joint Stipulation, Voluntary Withdrawal of Appeal, and Request for Dismissal (Joint Stipulation). (Exhibit 20) The Joint Stipulation resolved all issues of concern to LS 4257. The Joint Stipulation includes design changes in the vicinity of Station 224+00 (Exhibits 20A and 20B) which the signators of the Joint Stipulation state will appropriately implement Condition 5. The Joint Stipulation asks the Examiner to “impose an additional condition on the SSDP requiring compliance with this Joint Stipulation unless events outside of their control make it impossible to construct improvements to the drainage system depicted in Exhibit B” to the Joint Stipulation. (Exhibit 20, p. 2, ll. 7 – 10) Finally, LS 4257 withdrew its appeal in its entirety and King County withdrew its challenge to Condition 5. (Exhibit 20, p. 2, ll. 12 – 17) LS 4257’s withdrawal of its appeal is herewith formally acknowledged. This Decision will not further address LS 4257’s appeal.

King County and the City reached three Stipulations which effectively render moot five of King County’s appeal issues. (Exhibits 19, 34, and 35) Each appeal issue covered by the Stipulations will be addressed in the body of this Decision.

FINDINGS OF FACT

A. General

- A.1. The Findings of Fact and Conclusions of Law in this Decision each begin with a General section which is followed by sections devoted to each of the active appeal issues. The section headings in the Findings of Fact and Conclusions of Law are identical. The Findings of Fact and Conclusions of Law in this decision are grouped by topic only for the reader's convenience. Such groupings do not indicate any limitation of applicability to the decision as a whole.
- A.2. King County Department of Natural Resources and Parks, Parks & Recreation Division, proposes to widen and pave South Sammamish Segment A (Segment A) of the ELST Interim Trail in conformance with the County Trail Master Plan.¹⁰ The ELST, an overall 11-mile trail linking Issaquah and Redmond, runs roughly parallel with the eastern shoreline of Lake Sammamish within the “rail-banked” former Burlington Northern-Santa Fe (BNSF) railroad corridor, generally abutting

¹⁰ This Decision employs the following naming convention: Interim Trail means the trail as it exists currently; Master Plan Trail means the trail as proposed to be widened under the current permit; and ELST means the trail in general without distinction between the Interim and the Master Plan versions.

HEARING EXAMINER DECISION

RE: SSDP2014-00171 (ELST South Sammamish Segment A Appeals)

February 8, 2016

Page 8 of 46

the west side of East Lake Sammamish Parkway SE (Parkway).¹¹ Segment A is approximately 1.3 miles long, starting at the Issaquah-Sammamish city boundary and extending north to SE 33rd Street. The Interim Trail consists of an approximately 10-foot wide crushed rock surface on top of the old railroad bed, fencing, guardrails, and signage. The project consists of widening and paving the trail to a 12-foot width with 2-foot-wide gravel shoulders plus one foot of clearing on both sides. Consequently, the width of the Master Plan Trail will be 18 feet. Minor changes to the existing grade and alignment maybe required. Where necessary, drainage facilities, guardrails, fences, signs, retaining walls, and traffic controls (bollards) will be constructed to ensure safety, protection of critical areas and existing trees, and to separate the ELST from private properties. (Exhibits 4; 9, p. 25; 9001.1.A; *et al.*)

A.3. The Redmond portion of the ELST was completed in 2011; the Issaquah portion of the ELST was completed in 2013. The project is one of three segments of the ELST in the City. The north segment, extending approximately 2.4 miles south from the Redmond city line, received an SSDP on September 3, 2013, to upgrade it from an Interim Trail to the Master Plan Trail; that segment was completed in 2015. Segment A will be the second segment of the ELST to be upgraded in the City; it will extend north from the already improved segment within the City of Issaquah to SE 33rd Street. (Exhibits 4; 3025; 3027; testimony)

A.4. King County acquired the “rail-banked” former BNSF corridor in 1998 for development into a trail. The corridor runs roughly parallel with the Lake Sammamish shoreline, but does not touch the shoreline. For virtually the entire length of the corridor there are houses between the corridor and the lake.¹² The ELST is a link in the County’s regional trail system. (Exhibits 2a, Vol. 1, pp. 20 and 45 - 49; 4; 3029)

The County’s concept was to first develop an Interim Use Trail (Interim Trail) to be followed by development of the Master Plan Trail. (Exhibit 2a, Vol. 1, p. 50)

A.5. The City was incorporated in August, 1999. Upon incorporation, the new City entered into an Interlocal Agreement (ILA) with King County spelling out responsibilities for processing land development and building permit applications which were pending at the time of incorporation. That ILA had expired by Spring, 2012. On April 4, 2012, the City and King County entered into a follow-on ILA (2012 ILA) to essentially renew the original ILA. The 2012 ILA, like the original ILA, provided that “[t]he County’s East Lake Sammamish Trail permits” “shall continue to be processed by the County.” (Exhibit 3037, quotes from p. 4, § 6)

¹¹ For the sake of simplicity, the trail will be presumed to run north-south, with the lake to its west. All directions in this Decision will be based on that convention. (Some record documents adopted a convention that the Trail runs east-west and that the lake is south of the Trail. (For example, Exhibit 9.))

¹² A number of the owners of parcels between the corridor and the lake hotly dispute King County’s ownership interest in and right to develop the BNSF corridor. (Exhibits 9002; 9018; 9020 – 9025)

HEARING EXAMINER DECISION

RE: SSDP2014-00171 (ELST South Sammamish Segment A Appeals)

February 8, 2016

Page 9 of 46

The term “processed by the County” means, for land development applications which do not require a pre-decision quasi-judicial hearing (a class of applications which includes SSDP applications), that “the County will continue to process such applications and shall make a report and recommendation to the City’s designated decision-maker. Any decisions to approve, deny, or approve with conditions such applications shall be made by the City.” (Exhibit 3037, pp. 1 and 2, § 1.3)

The 2012 ILA was to be effective for 36 months from the date it was approved by the City and County Councils “unless mutually extended by written agreement of the parties”; either party may terminate the 2012 ILA “upon 90 days advance written notice to the other.” (Exhibit 3037, p. 4, § 7)

The 2012 ILA became effective on or about July 18, 2012. It was extended for an additional 36 months by written agreement executed by both parties on July 14, 2015. (Exhibit 9016.A, pp. 9 and 10) The 2012 ILA is in effect.

- A.6. King County issued a Final Environmental Impact Statement (FEIS) for the Interim Trail in 2000. (Exhibit 2a, Vol. 1, p. 51) The FEIS was issued under SEPA’s phased review procedures: A separate EIS was prepared for the ELST Master Plan Trail. That FEIS was issued in June, 2009. (Exhibit 2)

Because Federal funds are involved in the development of the ELST, a Record of Decision (ROD), issued pursuant to Federal regulatory procedures, was issued on August 4, 2010. In addition to documenting the chosen final ELST alignment, the ROD lists mitigation measures which King County committed to employ in development of the ELST. Those measures address surface runoff and erosion, geologic issues, fisheries, wetlands and vegetation, wildlife, safety, traffic and parking, views, neighborhood concerns, and cultural resources. (Exhibit 3)

- A.7. The final segment of the Interim Trail opened for use in April, 2006. (Testimony)

- A.8. Lake Sammamish is classified as a Shoreline of Statewide Significance under the Shoreline Management Act of 1971 (SMA), Chapter 90.58 RCW (SMA). (Exhibit 9001.1.A, p. 5, Finding 12) The ELST lies wholly or partially within 200 feet of the ordinary high water mark of Lake Sammamish. (Exhibit 4) Therefore, the ELST lies within the jurisdictional area of the SMA.

The SMA requires local jurisdictions to prepare and adopt Shoreline Master Programs (SMPs) which are subject to review and approval by the Washington State Department of Ecology (Ecology). [RCW 90.58.090] The City’s current SMP was adopted in 2009 and amended in 2011 to comply with directives from Ecology. [Title 25 SMC] The SMP incorporates by reference into the SMP all but four sections of Chapter 21A.50 SMC, Environmentally Critical Areas. [SMC 25.01.070]

The version of Chapter 21A.50 SMC which existed in 2009 when the current SMP was adopted had been adopted by Ordinance O2005-193, effective on January 3, 2006. In 2013, the City adopted Ordinance O2013-350 which made substantial changes to Chapter 21A.50. [Official notice] The City

HEARING EXAMINER DECISION

RE: SSDP2014-00171 (ELST South Sammamish Segment A Appeals)

February 8, 2016

Page 10 of 46

has sent Ordinance O2013-350 to Ecology for review and approval as a revision to the adopted SMP. Ecology has not yet responded. (Testimony)

Therefore, the Segment A proposal is subject to Title 25 SMC, but the Critical Areas regulations which must be followed are those in Chapter 21A.50 SMC as it existed in 2006; in other words, the Ordinance O2005-193 version, not the Ordinance O2013-350 version. SMC citations to Chapter 21A.50 SMC in this Decision will clearly state which version of the SMC is being referenced: “current” means the Ordinance O2013-350 version; “former” means the Ordinance O2005-193 version.

- A.9. The Segment A project meets the threshold requirements to require issuance of an SSDP under the SMA. Thus, on July 31, 2014, King County, in accordance with the 2012 ILA, filed an application for an SSDP with the King County Department of Permitting and Environmental Review (DPER). That application included “60% Review Submittal” plans for the Segment A project. (Exhibit 1)
- A.10. DPER performed application review pursuant to the 2012 ILA. During that review process, DPER had available to it, among other materials, drainage reports (Exhibits 5; 9; 3010; 3013), vegetation management plans (Exhibits 6; 10; 3008), a geotechnical report (Exhibit 7), and a critical areas study (Exhibit 8). Comments from the public were received; the City submitted review comments to DPER in January, 2015. (Exhibit 11; testimony) As a consequence of that review process, the County developed and submitted “90% Review Submittal” plans in February 2015, and “95% Review Submittal” plans in April, 2015. (Exhibit 4; testimony) Exhibit 3007 lists the changes between the 90% and 95% Review Submittal plans.
- A.11. On or about June 23, 2015, DPER submitted to the City a draft SSDP decision document recommending approval of an SSDP for Segment A based on the 95% Review Submittal plans subject to eight conditions. (Exhibit 3002; testimony)
- A.12. King County asked the City to issue the SSDP as quickly as possible in order that the County could preserve eligibility to receive certain grant funds. Notwithstanding that the City had outstanding concerns/issues, the City obliged: The SSDP at issue in these appeals was issued on July 7, 2015, approximately two weeks later (a period which included the 4th of July national holiday). The City believed that resolution of its concerns could be deferred to construction plan review by imposing some general conditions. The SSDP as issued by the City was subject to 19 conditions. Conditions 2 – 8 resulted in large measure from comments which had been received during the public comment period. (Exhibits 11; 9001.1.A; testimony) Little, if any, dialogue occurred between King County and the City between receipt of the draft permit on June 23rd and the City’s issuance of the SSDP on July 7th. (Testimony) The three appeals which are the subject of this Decision followed.
- A.13. The County asserts that the ELST is an essential public facility (EPF) and that conditions which “are so onerous, cost prohibitive and unreasonable that they have the effect of precluding the siting of an

HEARING EXAMINER DECISION

RE: SSDP2014-00171 (ELST South Sammamish Segment A Appeals)

February 8, 2016

Page 11 of 46

[EPF]" violate RCW 36.70A.200(5)¹³ and, therefore, are impermissible. (Exhibit 9003, p. 13, ll. 6 and 7; see also Exhibit 3034, pp. 14 and 15, § IV(D)) King County's appeal asserts that Conditions 3 – 8, 10, 14, and 17 fall into that category. (Exhibit 9003, p. 13, ll. 5 – 10)

... 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, and secure community transition facilities as defined in RCW 71.09.020.

[RCW 36.70A.200(1)]

- A.14. The only mention of "essential public facility" in the entire SMC is in SMC 20.05.100(2)(b) which excludes EPF applications from the permit processing time limits established elsewhere in the code.
- A.15. The City Comprehensive Plan (Comp Plan) applicable to this ELST application (2003 version, updated through 2013) discusses EPFs in Chapter VIII. The text identifies two EPFs in Sammamish: "an adult care center, and a shelter, whose locations are kept confidential by the State of Washington." [Comp Plan, p. VIII-2] It states that "King County has not designated any existing or planned essential public facilities in the City of Sammamish." [*Ibid.*]

The Comp Plan provides guidance for determining what ought to be considered an EPF:¹⁴

A facility should be classified as an essential public facility if the [*sic*¹⁵] has one or more of the following characteristics:

- a. The facility meets the Growth Management Act definition of an essential public facility,
- b. The facility is on a State, County or City list of essential public facilities,
- c. The facility serves a significant portion of the County or metropolitan region or is part of a Countywide service system,
- d. The facility is the sole existing facility in the County for providing that essential public service, or
- e. The facility, conveyance, or site: (1) is used to provide services to the public; (2) is necessary to adequately provide a public service, or (3) provides services that are delivered by government agencies, private or non-profit organizations under

¹³ "No local comprehensive plan or development regulation may preclude the siting of essential public facilities."

¹⁴ The Comp Plan states that the City should compile a list of EPFs within the City. [Comp Plan, p. VIII-3, EPFP-1.1] No such list has been generated to the best of the Examiner's knowledge.

¹⁵ The word "the" appears to be a scrivener's error. The likely intended word was "it."

HEARING EXAMINER DECISION

RE: SSDP2014-00171 (ELST South Sammamish Segment A Appeals)

February 8, 2016

Page 12 of 46

contract to or with substantial funding from government agencies, or private firms or organizations subject to public service obligations.

[Comp Plan, p. VIII-3, EPFP-1.2]

A.16. Any Conclusion of Law deemed to be a Finding of Fact is hereby adopted as such.

B. Owners Appeal Issue 4.2.3

B.1. Owners allege that the City “[i]mproperly applied applicable wetland regulations in establishing the proposed Trail alignment”. (Exhibit 9002, p. 2, § 4.2.3) Owners make two alternative arguments in support of this issue. First, they argue that areas delineated as wetlands along the east, upslope side of the trail are not actually wetlands at all, but are drainage ditches. If those features are drainage ditches, the widening contemplated in the project could be shifted easterly instead of being generally centered on the existing Interim Trail, thus keeping the trail farther from the residences that line the area between the ELST and the lake shoreline. (Testimony)

In the alternative, Owners allege that if those features are indeed wetlands, then the ELST cannot be developed at all as it would pass through the required buffers for the wetlands. Current 21A.50.290(2)(a) SMC, which expressly allows required wetland buffers to be truncated by the ELST, has not as yet been accepted by Ecology as a component of the SMP and, thus, is not a part of the applicable SMP regulations. Similar provisions were contained in former SMC 21A.50.290(1)(a), but that language did not expressly apply to the ELST. Owners argue that a 2010 interpretation of the former section, which held that the ELST was benefitted by the code provision, cannot be used either as it was never submitted to Ecology for its review and approval. (Testimony)

B.2. “Wetlands do not include those artificial wetlands intentionally created from nonwetland sites, including, but not limited to, irrigation and drainage ditches,”¹⁶ [SMC 21A.15.1415, italics in original]

B.3. Numerous (approximately 78) wetlands along the 11-mile ELST corridor were delineated and discussed in the 2009 ELST FEIS. (Exhibit 2, pp. 129 – 149) The field work for that delineation took place in 1999 – 2000 and was updated in 2007 - 2008. (Exhibit 2a, Vol. 1, p. 130; testimony) Thirty-two of those wetlands were categorized as “modified slope wetlands” in which “topography and water flow were modified by road or railroad construction such that they now include some natural slope wetland, but also constructed depressions and/or ditches.” (Exhibit 2a, Vol. 1, p. 133) Habitat

¹⁶ The current SMC requires delineation of wetlands to comply with “the federal 1987 Wetland Delineation Manual (Environmental Laboratory, 1987) and the United States Army Corps of Engineers (USACE) Interim Regional Supplement for Western Mountains, Valleys, and Coast Region (USACE, 2010), or such other manuals adopted by the Department of Ecology pursuant to RCW [90.58.380](#) and WAC [173-22-035](#), as amended.” [current SMC 21A.15.1415] That requirement cannot be applied in this case as it was adopted as part of ordinance O2013-350 and has not as yet been approved by Ecology for use within the SMP.

HEARING EXAMINER DECISION

RE: SSDP2014-00171 (ELST South Sammamish Segment A Appeals)

February 8, 2016

Page 13 of 46

within jurisdictionally-required buffers was described as “generally in poor condition.” (Exhibit 2a, Vol. 1, p. 136)

- B.4. The County had Segment A “re-evaluated in 2013 and 2014 to update any areas where changes may have occurred due to recent development or natural conditions in the project vicinity”. (Exhibit 8, p. 18) That work confirmed the presence of all or part of five wetlands within Segment A, all located on the eastern, upslope side of the trail adjacent to the rail bed. Most, if not all, of the five wetlands include a ditch within them. (Exhibit 8) All were rated as category III or IV wetlands, requiring a 50 foot buffer. (Exhibit 8, p. 33, Table 3-1)
- B.5. Owners presented photographs depicting current maintenance and evidence of past maintenance of ditches along the upslope side of the ELST by King County. A number of those photographs depict activity outside Segment A. (Exhibits 2001 – 2006; testimony) The remainder depict activity within Segment A. (Exhibits 2007 – 2013; testimony) Owners presented no substantive evidence or expert testimony challenging the wetland delineations.
- B.6. The U.S. Army Corps of Engineers (USACE) issued a Preliminary Jurisdictional Determination (JD) for the five wetlands within Segment A on December 31, 2015. The JD means that USACE has determined that those five wetlands “will be treated as jurisdictional waters of the U.S. for purposes of computation of impact area and compensatory mitigation requirements”. (Exhibit 3036, January 12, 2016 letter, p. 2; JD Form, p. 1)
- B.7. The required 50 foot buffers for all five of the delineated wetlands within Segment A extend well west of the ELST. (Exhibit 8, pp. 157 – 160)
- B.8. The Ordinance O2005-193 version of Chapter 21A.50 SMC included a provision allowing truncation of a required wetland buffer where the buffer was crossed by a street:

Where a legally established and constructed street transects a wetland buffer, the department may approve a modification of the standard buffer width to the edge of the street if the isolated part of the buffer does not provide additional protection of the wetland and provides insignificant biological, geological or hydrological buffer functions relating to the wetland. If the resulting buffer distance is less than 50 percent of the standard buffer for the applicable wetland category, no further reduction shall be allowed.

[Former SMC 21A.50.290(1)(a)]

- B.9. The SMC defines “street” as “a public or recorded private thoroughfare providing pedestrian and vehicular access through neighborhoods and communities and to abutting property.” [SMC 21A.15.1245] That definition has not changed since in or around 2003. [Official notice]

HEARING EXAMINER DECISION

RE: SSDP2014-00171 (ELST South Sammamish Segment A Appeals)

February 8, 2016

Page 14 of 46

- B.10. On July 29, 2010, the then Director of the Department, acting under authority granted to him by Chapters 21A.05 and 21A.100 SMC, issued a Code Interpretation of former SMC 21A.50.290(1)(a). The Director noted that the definition of “street” included public thoroughfares “providing pedestrian and vehicular access” and that the dictionary definition of “thoroughfare” included “street, or the like”. The Director concluded that the trail “is consistent with the definition of street” contained in the SMA. (Exhibit 26)

The Director concluded that the specific property west of the ELST which gave rise to the interpretation in 2010 provided no “geologic, hydrologic, or biological protection functions” for the wetland on the east side of the ELST at that location. The Director therefore concluded that the area west of the ELST on that property was not subject to any wetland buffer requirement. (Exhibit 26)

The Department has followed the 2010 Director’s Code Interpretation “broadly” ever since its issuance in matters relating to the ELST. (Testimony)

- B.11. The Director’s 2010 Code Interpretation of former SMC 21A.50.290(1)(a) was not presented to Ecology for its review. Owners argue that it should have been as it amounts to an amendment of the SMC and thus an amendment of the SMP. The City argues that it did not have to be submitted to Ecology as an interpretation is not a code amendment. (Testimony and argument)
- B.12. The City’s position is that the areas west of the ELST within the regulatory wetland buffers provide virtually no biological, geological or hydrological functions for the wetlands on the east side of the ELST. Therefore, based on former SMC 21A.50.290(1)(a) and the 2010 Director’s Code Interpretation, the Department concludes that the wetland buffers end at the eastern edge of the ELST. (Testimony)
- B.13. Former SMC 21A.50.290(1)(a) was relocated (it became current SMC 21A.50.290(2)(a)) and was amended by Ordinance O2013-350:

Where a legally established and constructed street or the East Lake Sammamish Trail transects a wetland buffer, the department may approve a modification of the standard buffer width to the edge of the street or the East Lake Sammamish Trail if the isolated part of the buffer does not provide additional protection of the wetland and provides insignificant biological, geological or hydrological buffer functions relating to the wetland. If the resulting buffer distance is less than 50 percent of the standard buffer for the applicable wetland category, no further reduction shall be allowed.

[Current SMC 21A.50.290(2)(a), text amendments underlined]

- B.14. The project as proposed will result in temporary impacts to less than 0.01 acres of wetland and 0.55 acres of wetland buffers. The project as proposed will permanently impact 0.28 acres of wetland

HEARING EXAMINER DECISION

RE: SSDP2014-00171 (ELST South Sammamish Segment A Appeals)

February 8, 2016

Page 15 of 46

buffers. (Exhibits 8; 9001.1.A, pp. 7 – 10) King County has proposed mitigation for those impacts. (Exhibit 8, pp. 51 – 56)

C. Owners Appeal Issue 4.2.4

C.1. Owners allege that the SSDP “[a]llows the County to connect newly installed surface water drainage lines to existing private drainage lines serving neighboring properties”. (Exhibit 9002, p. 2, l. 22)

C.2. Owners Appeal Issue 4.2.4 is non-specific as to the lines and/or parcels to which it refers. Owners questioned King County regarding one specific location: A culvert and drainage pipe being replaced generally between Stations 229+00 and 229+85, the outflow from which passes through or adjacent to the McNaughton property. (Exhibit 4, p. 28) An existing 12” clay culvert passes beneath the Interim Trail at approximately Station 229+85, discharging into a catchbasin adjacent to a wood retaining wall. From the catchbasin water flows southerly through a 12” pipe along the east side of East Lake Sammamish Shore Lane SE (Shore Lane) for about 85 feet before making a sharp turn to the west to cross beneath Shore Lane and follow more or less along the south McNaughton property line to a discharge point on the Lake Sammamish shoreline.¹⁷ (Exhibits 4, pp. 9 and 28; 3010, p. 3-11 and Fig. 3-1¹⁸) There is apparently no formal easement for the pipe beneath the McNaughton or adjacent property. (Testimony)

Project plans require replacement of the wood retaining wall with a taller masonry retaining wall at the base of the rail bed embankment in this area. That necessitates replacement of the catchbasin and pipes. The plan has a new catchbasin installed on the east side of the ELST to provide a better vertical transition to a replacement catchbasin on the west side of the ELST; a new catchbasin is proposed to replace the sharp bend in the drainage pipe where it turns west to run beneath Shore Lane. The pipes connecting those three catchbasins will be enlarged to 18”. (Exhibits 4, pp. 28 and 40)

C.3. The individually named appellants (Moore and Bradbury) own lakefront properties within the Segment A area. Moore’s property is along the Issaquah-Sammamish city line at approximately Station 217+00 at the south end of the project. The nearest drainage features in the vicinity of the Moore property are Driveway #1 (See Part D Findings of Fact, below.) and cross culverts at approximately Station 218+45: A 24” corrugated metal pipe (CMP) culvert beneath the Trail discharging to a 16” pipe beneath Shore Lane. That pipe discharges towards property owned by Vanderhoeven and reaches the lake through an open channel. (Exhibits 4, pp. 8 and 26; 3010, p. 3-11 and Fig. 3-1) The project will make no changes to those pipes. (Exhibits 4, p. 26; 3010, p. 5-2)

¹⁷ It appears from the plans that the drainage pipe is actually beneath the adjoining owner’s property (Morning West LLC) rather than beneath McNaughton’s. (Exhibit 4, p. 28) Identification of the owner beneath whose property the pipe is located is immaterial to the outcome of this appeal.

¹⁸ Exhibit 3010 is the May, 2015 final version of King County’s Technical Information Report (TIR). The County provided a copy of an earlier draft TIR (Exhibit 9, December, 2014, watermarked “DRAFT” on pp. 7 and 8) to the City prior to the City’s issuance of the SSDP in July, 2015. It did not provide a copy of Exhibit 3010 to the City prior to decision issuance. (Buitrago testimony) The Examiner is using the final TIR, not the draft TIR.

HEARING EXAMINER DECISION

RE: SSDP2014-00171 (ELST South Sammamish Segment A Appeals)

February 8, 2016

Page 16 of 46

Bradbury's property is located at approximately Station 255+75. The nearest drainage feature to the Bradbury property is an 18" concrete culvert beneath the Trail which discharges to a 12" pipe beneath Shore Lane, both located at about Station 256+35. At the end of that pipe, water falls about six feet before flowing through an open concrete and cobblestone channel to the lake. (Exhibits 4, pp. 11 and 12; 3010, p. 3-14 and Fig. 3-3) The project will make no changes to those pipes. (Exhibits 4, p. 34; 9, p. 5-3)

- C.4. Developers in the City must control storm water runoff from their projects in compliance with the 2009 King County Surface Water Design Manual and a City Addendum thereto (collectively 2009 KCSWDM). (Exhibit 3010, p. 2-1) Approximately 337.5 acres located upslope of the ELST to the east, most lying east of the Parkway, drain to or across Segment A. Those 337+ acres are divided by natural terrain features into threshold discharge areas (TDAs). TDAs 1a and 1b drain towards the culvert at Station 218+45; TDA 3 drains toward the culvert at Station 229+85; and TDA 8 drains to the culvert at Station 256+35. (Exhibits 5, p. 6; 3010, Fig. 1-3)

TDA	ELST Trail Areas (Acres)			Percent Increase	TDA Area (Acres)	Trail %
	Existing Impervious	Net New Impervious	Total Impervious			
1	0.49	0.21	0.70	42.9	31.7	2.2
3	0.33	0.20	0.53	60.6	5.9	9.0
8	0.83	0.45	1.28	54.2	42.0	3.0

(Exhibit 3010, p. 1-2 {Table 1-1} and Fig. 1-3; percentages calculated from the data)

- C.5. TDA 1 extends from Station 216+79 to Station 222+50. TDA 3 extends from Station 229+15 to Station 234+50. TDA 8 extends from Station 249+25 to Station 261+50. (Exhibit 3010, pp. 3-11, 3-12, 3-14)
- C.6. The 2009 KCSWDM requires new developments to control flow rates unless an exemption applies. One of the exemptions holds that the "flow control facility requirement is waived for any threshold discharge area in which the difference in the 100-year peak runoff flow rate (ΔQ_{100}) between the developed site condition and the historical site condition does not exceed 0.1 cfs [cubic feet per second]." (Exhibit 3010, p. 4-3; see 2009 KCSWDM § 1.2.3.1.B) "[T]he historical site condition (forest) is assumed as the pre-developed condition." (Exhibit 3010, p. 4-3) Since the Interim Trail is not forested but is predominantly crushed rock, presumed to be relatively impervious, actual current runoff is greater than the baseline used for drainage calculations, thus resulting in a conservative result: The baseline against which future runoff is calculated is much lower than actual current runoff. If runoff increase is less than 0.1 cfs over calculated baseline, the increase will be much less than 0.1 cfs over actual current conditions. (Testimony)

TDAs 1 and 8 qualify for this exemption: Their calculated increase over historic runoff conditions is 0.1 cfs or less. (Exhibit 3010, p. 4-3, Table 4-2) In addition, TDA 8 will employ infiltration trenches

HEARING EXAMINER DECISION

RE: SSDP2014-00171 (ELST South Sammamish Segment A Appeals)

February 8, 2016

Page 17 of 46

which will be designed to infiltrate all Trail runoff in that TDA up to the 100-year storm. (Exhibit 3010, pp. 4-3 and 4-4)

- C.7. TDA 3 qualifies for a different flow control exemption: Direct discharge. (Exhibit 3010, p. 4-3)
- C.8. The conveyance capacity of the culvert systems located at Stations 218+45, 229+85, and 256+35 was calculated to determine if they could handle flows after development of the project.

Station 218+45. The smaller 16" culvert in this system "may have enough capacity to contain the 25-year design storm, but not the 100-year design storm." Because the project will contribute 0.1 cfs or less to the flow during the 100-year storm event, King County has no obligation under the 2009 KCSWDM to enlarge any of the components of this conveyance system. (Exhibit 3010, p. 3-21)

Station 229+85. The culverts at this location will have adequate capacity to convey the 25-year design storm. Backwater calculations indicate that the replacement system with the new catchbasins will not overflow at any catchbasin at flow rates up to 6.0 cfs. The 100-year design storm flow rate is 5.9 cfs.¹⁹ (Exhibit 3010, pp. 5-4 and 5-5)

Station 256+35. This culvert is in TDA 8. All ELST runoff in TDA 8 will be infiltrated. Therefore, the amount of water contributed to this culvert from the ELST will be reduced from current contributions. (Exhibit 3010, p. 3-22)

D. County Appeal Issue II.a (Condition 2)

- D.1. King County alleges that Condition 2's requirement that "drainage from driveway #1 and driveway #2 shall be substantially captured and managed" places an illegal burden on it to control surface water runoff which is neither caused by nor exacerbated by its project. (Exhibit 9003, pp. 2 and 3; the quote is from Exhibit 9001.1.A, p. 12)
- D.2. Condition 2 reads as follows:

A Grading Permit (KC File GRDE14-0052) must be approved prior to commencing project construction. Grading plans showing the proposed trail widening and paving and associated site improvements, including required landscaping, restoration and mitigation plantings, shall be in substantial conformance with the 95% Review Submittal Plans prepared by Parametrix, received April 24, 2015. As part of the grading permit review, drainage from driveway #1 and driveway #2 shall be substantially captured and managed. As part of a larger drainage improvement in that

¹⁹ King County first attempted to secure a drainage easement across the McNaughton property so it could completely separate ELST flows from other flows in TDAs 2 and 3 and route the former through a new conveyance to Lake Sammamish. When it was unable to secure such an easement, it reconsidered use of the existing systems. (Exhibit 3010, p. 4-2)

HEARING EXAMINER DECISION

RE: SSDP2014-00171 (ELST South Sammamish Segment A Appeals)

February 8, 2016

Page 18 of 46

area, additional improvement may be required if deemed appropriate by the City. All construction shall be in compliance with the approved stormwater manual.

(Exhibit 9001.1.A, p. 12)

- D.3. Driveway 1 is located at approximately Station 217+75; Driveway 2 is located at approximately Station 220+75. Both driveways are located within TDA 1. (Exhibits 4, p. 8; 3010, Fig. 4-1) Both driveways slant down-slope from the Parkway to Shore Lane, crossing the ELST along the way. Both driveways are paved. (Exhibits 4, p. 8; 3028)
- D.4. Widening to convert the Interim Trail into the Master Plan Trail will require changing the grade of Driveways 1 and 2 from a point about 15 feet above (east of) to a point about 15 feet below (west of) the Interim Trail. (Exhibit 8, p. 17) The existing sag vertical curve on the east side of the Trail at each driveway will be deepened by a maximum of about one foot to meet the wider trail; the existing crest vertical curve on the west side of the Trail at each driveway will be built up a little over one foot maximum to account for the wider trail. (Exhibit 8, pp. 44 and 45) The average grade of each driveway will be unchanged as the Parkway and Shore Lane elevations (the starting and ending points of the driveway grades) will remain unchanged. Existing impervious surface area of each driveway will not be increased. (Exhibit 3010, Fig. 4-1)
- D.5. Water from above the east side of the Parkway flows down onto the east edge of the Parkway during rain storms. Some, not captured in the catchbasin system along the east side of the Parkway, sheet flows across the Parkway, ponds along the west shoulder of the Parkway, flows north and south until it reaches Driveways 1 and 2, and then flows down Driveways 1 and 2 as sheet flow. Those flows cross the Interim Trail and then flow onto Shore Lane. They pond along the west side of Shore Lane before eventually entering one of several catchbasins along the west side of Shore Lane. (Exhibit 3028) Residents in the area (Moore and Bolger) have filed multiple complaints with the City about flooding of their properties. Moore's garage and basement have flooded; Bolger has made similar complaints. The flooding problems are exacerbated by clogging of culverts and catchbasins in the area. (Exhibit 3010, pp. 3-15 – 3-17)
- D.6. The project will not be contributing any additional flows to Driveways 1 and 2. (Exhibit 3010, pp. 3-15 – 3-17)
- E. County Appeal Issue II.b (Condition 3)
- E.1. King County alleges that the requirements in Condition 3 that the existing culvert at Station 218+50 "be further analyzed" for specified purposes and that the County "shall coordinate with the City and neighboring property owners" regarding these topics exceed the City's authority and impose an inappropriate burden on the County. (Exhibit 9003, pp. 3 and 4)
- E.2. Condition 3 reads as follows:

HEARING EXAMINER DECISION

RE: SSDP2014-00171 (ELST South Sammamish Segment A Appeals)

February 8, 2016

Page 19 of 46

Prior to Site Development Plan approval and issuance of a grading permit by the City, the culvert located at station 218.5 [*sic* ²⁰] shall be further analyzed by the County. Additional information/studies shall be submitted to the City to detail culvert stormwater capacity, fish passage potential, and the stormwater outfall location. The applicant shall coordinate with the City and neighboring properties owners on culvert replacement and other needed work for improved fish passage, where appropriate, and any needed flood control measures on this stream (located between stations 218 and 219). Plans submitted for the site development/grading permit shall reflect the successful outcome of this coordination effort.

(Exhibit 9001.1.A, pp. 12 and 13)

- E.3. The City's counsel (Pratt) agreed during the hearing to remove the "fish passage" portion of Condition 3 on the basis that King County had submitted sufficient information on that topic. (Statement of counsel) See Exhibit 3013.
- E.4. King County calculated flow rates contributory to and the capacity of the culvert system at Station 218+45. Calculated flow rates from the Trail and from off-site properties within TDA 1 for design storms are:

	Trail Right-of-way Flow	Off-site TDA 1a Flow	Off-site TDA 1b Flow	Total Contributing Flow
Flow Rate (5-Min Timestep)	cfs	cfs	cfs	cfs
Q _{2YR}	0.10	3.05	3.27	6.42
Q _{25YR}	0.20	8.13	8.72	17.05
Q _{100YR}	0.34	14.63	15.67	30.64

(Exhibit 3010, p. 3-16)

The capacity of the 16" culvert is 17.02 cfs, slightly less than the calculated 25-year storm event flow rate and significantly less than the 100-year storm event flow rate. The calculations show that the open channel downstream of the 16" culvert crossing the Vanderhoeven property would have a channel depth of 0.88 feet during the 25-year storm event and 1.2 feet during the 100-year storm event. Since the channel is only one foot deep, it would be expected to overtop during the 100-year storm event. (Exhibit 3010, p. 3-16)

²⁰ The stationing reference in the Condition uses an incorrect format: "station 218.5" should be "station 218+50." This is the same culvert referred to above and in many record documents as located at Station 218+45.

HEARING EXAMINER DECISION

RE: SSDP2014-00171 (ELST South Sammamish Segment A Appeals)

February 8, 2016

Page 20 of 46

- E.5. As stated in Finding of Fact C.6, above, King County has no obligation to perform any remedial work on the 16" culvert or downstream open channel since ELST's flow contribution during the 100-year storm event will be not more than 0.10 cfs above the calculated historical 100-year flow rate.
- F. County Appeal Issue II.c (Condition 4)
- F.1. King County alleged that the requirement in Condition 4 to narrow the paved trail surface between Stations 216+50 and 220+50 in order to preserve additional trees along the west side of the ELST exceeded the City's authority and would have required it to construct a trail not meeting the 2012 AASHTO ²¹ Bike Guide. (Exhibit 9003, p. 5; testimony)
- F.2. King County and the City negotiated a resolution to this issue: The County will tighten the clearing and grubbing limits in this trail segment to increase the number of trees to be saved in the segment from 0 to 11, to increase the number of trees to be removed from 5 to 7, and to reduce the number of trees to be monitored from 20 to 7. (Exhibits 35, p. 2; 35A – 35C)
- F.3. King County and the City ask the Examiner to "adopt Exhibits [35A – 35C] as an agreed implementation of Condition #4". (Exhibit 35, p. 2, l. 19)
- G. County Appeal Issue II.d (Condition 5)
- G.1. King County alleged that the requirement in Condition 5 to "work with neighboring property owners" regarding a stormwater vault "in the vicinity of [S]tations 224 through 230+50" exceeded the City's authority and wrongly delegated authority over the project to private citizens. (Exhibit 9003, pp. 6 and 7; quote from Exhibit 9001.1.A, p. 13)
- G.2. King County, the City, and LS 4257 negotiated a Joint Stipulation to resolve this issue: King County will eliminate a planned storm water vault and move a planned retaining wall further east; LS 4257 will make certain improvements to a drainage channel through its property and provide a drainage covenant across its property to Lake Sammamish. (Exhibit 20, pp. 1 and 2) These agreements are reflected in Exhibits 20A – 20C.
- G.3. The Joint Stipulation asks that the Examiner "impose an additional condition on the SSDP requiring compliance with this Joint Stipulation unless events outside of their control make it impossible to construct improvements to the drainage system depicted in Exhibit B" to the Joint Stipulation. (Exhibit 20, p. 2, ll. 7 – 10)
- H. County Appeal Issue II.e (Condition 6)
- H.1. King County alleges that the requirement in Condition 6 to have ELST traffic STOP sign controlled at the 206th Avenue SE crossing is contrary to accepted shared use path guidelines. The County asserts that "right of way priority [should be given] to the trail users based on volume of use." (Exhibit 9003, pp. 7 and 8; quote from p. 7)

²¹ American Association of State Highway and Transportation Officials.

HEARING EXAMINER DECISION

RE: SSDP2014-00171 (ELST South Sammamish Segment A Appeals)

February 8, 2016

Page 21 of 46

H.2. Condition 6 reads as follows:

A condition will be applied to the site development/grading permit that the stop sign on 206th Avenue SE (station 239+00) shall be relocated to have trail users stop and not control traffic on the public roadway.

(Exhibit 9001.1.A, p. 13)

- H.3. 206th Avenue SE is a public cul-de-sac which runs more or less westerly from the Parkway across the Interim Trail at approximately Station 239+00.²² It is a local access street which serves 15 single-family residences, all located west of the ELST. Its speed limit by City ordinance is 25 miles per hour (mph). The distance between the west edge of the Parkway pavement and the east edge of the Interim Trail is about 52 - 65 feet.²³ The Trail crosses 206th Avenue SE at essentially a right angle. (Exhibits 2a, Vol. 1, p. 288; 4, pp. 5 and 10; 12; 21; testimony)
- H.4. The Interim Trail is currently, and has been for the 10 years that the Interim Trail has been open, STOP sign controlled at 206th Avenue SE: Trail users must stop at the crossing; 206th Avenue SE users have right of way priority. Bicycle/pedestrian crossing warning signs are posted on both the west- and eastbound approaches to the Interim Trail on 206th Avenue SE; a NO PARKING sign is also posted on the westbound approach.²⁴ (Exhibits 4, pp. 3 and 10; 9, p. 47; 12, pp. 5 and 6; 21; testimony)
- H.5. King County's project plans reverse the priority at the 206th Avenue SE crossing: The plans give the ELST right of way priority and require traffic on 206th Avenue SE to stop. (Exhibit 4, pp. 56 and 63)
- H.6. The Parkway is a designated Minor Arterial which currently carries about 17,000 vehicles on an average day (ADT).²⁵ In the vicinity of the 206th Avenue SE intersection the Parkway is a two lane

²² In reality, 206th Avenue SE runs more north-south than it does east-west. But in keeping with the directional convention adopted for this Decision and recognizing that 206th Avenue SE crosses the Interim Trail at nearly a right angle, it will be assumed to run east-west. (Exhibits 12; 21)

²³ Exhibit 3018 says the distance is 52 feet. The scaled distance from Exhibit 4, p. 10, is about 55 feet. Testimony indicated that the distance measured in the field is 65 feet.

²⁴ Exhibit 4, p. 10, clearly denotes the presence of the signs on the westbound approach. They are also visible (in reverse in the background) in the photograph in Exhibit 12 at page 6.

Exhibit 4, p. 10, does not indicate the presence of any warning signs on the eastbound approach. However, the double bicycle/pedestrian crossing warning sign is prominent in the foreground of the photograph in Exhibit 12 at page 6; the back of that sign is visible in the background in the photograph in Exhibit 12 at page 5. There does not appear to be a NO PARKING sign on the eastbound approach. (*Ibid.*)

²⁵ This volume figure was provided in testimony (Zagars). The 2009 FEIS provides a range of Parkway volumes from 9,800 to 45,100 ADT, depending upon location. For the segment of the Parkway south of SE 33rd Street, the FEIS reports 16,600 ADT. (Exhibit 2a, Vol. 1, p. 290) SE 33rd Street is the north end of Segment A. Therefore, the Examiner believes that Zagars was referring to that segment of the Parkway when he testified.

HEARING EXAMINER DECISION

RE: SSDP2014-00171 (ELST South Sammamish Segment A Appeals)

February 8, 2016

Page 22 of 46

street with paved shoulders. There is no protected turn lane at the intersection.²⁶ The speed limit on the Parkway is 35 mph. (Exhibit 2a, Vol. 1, p. 288; testimony)

The nearest traffic signal on the Parkway to the north is at Louis Thompson Road NE, approximately 3.5 miles north of the 206th Avenue SE intersection; the nearest traffic signal on the Parkway to the south is at SE 51st Street in Issaquah, approximately 1.6 miles south of the 206th Avenue SE intersection. A roundabout is located at the Parkway/SE 43rd Way intersection, approximately 0.5 miles south of the 206th intersection. Roundabouts generally do not cause a traffic “platooning” affect. (Official notice; locations and distances confirmed by Google Earth imagery (last visited February 3, 2016) and MapQuest route distances)

- H.7. The average daily vehicle trip generation rate for a single-family residence pursuant to Institute of Transportation Engineers (ITE) data is 9.52. (Exhibit 3019) City code and standards require use of ITE data for trip generation calculations. [SMC 14.10.020(2)(a), SMC 14.15.020(6), and Interim Public Works Standard PWS.15.020(D)(3)(a)] Given that 206th Avenue SE serves 15 single-family residences, its calculated ADT is 143 ($9.52 \times 15 = 142.8$). The generally accepted rule of thumb is that ten percent of ADT (14 trips in this case) usually occurs during the PM peak traffic hour. [Official notice]
- H.8. When the FEIS was issued in 2009, King County expected that the ELST would draw “from 2,500 users on a peak weekday to 4,000 users on a peak weekend day, based on user counts from the Sammamish River Trail.” (Exhibit 2a, Vol. 1, p. 298) King County continues to use those estimates. (Exhibit 3041; testimony)

Based on studies conducted for the Burke-Gilman/Sammamish River Trails in the years 1995 and 2000, weekday trail usage is generally highest during the AM and PM commute periods, with approximately 16 percent of the total daily volume occurring during the trail peak hour (6 to 7 p.m.) on a typical weekday. Weekend peak volumes typically occur during the midday hours and taper off in the evening; approximately 11 percent of the total daily volume occurred during the peak hour (12 to 1 p.m.) on a typical weekend day.

(Exhibit 2a, Vol. 1, p. 298) The record in this proceeding does not contain any update of that information or more specific information. King County believes that current volumes are probably much lower than those predictions, at least partly because the Interim Trail is crushed rock surfaced. The County expects volumes to increase measurably once the ELST is fully widened and paved. (Testimony)

²⁶ The record contains conflicting testimony regarding the existence of turn lanes at the Parkway/206th Avenue SE intersection. Zagars, the City Engineer, testified that a left turn lane existed at that intersection. Berry, the developer of the subdivision served by 206th Avenue SE, testified that there was no left turn lane at the 206th Avenue SE intersection. The Examiner takes official notice that Google Earth imagery (last viewed February 3, 2016) indicates that Berry is correct.

HEARING EXAMINER DECISION

RE: SSDP2014-00171 (ELST South Sammamish Segment A Appeals)

February 8, 2016

Page 23 of 46

- H.9. Subsection 7.12.295(A) King County Code addresses speed on County trails: “No person shall travel on a trail at a speed greater than is reasonable and prudent under the conditions and having regard to the actual and potential hazards then existing. ... Travel at speeds in excess of 15 miles per hour shall constitute in evidence a prima facie presumption that the person violated this section.” [sic.]
- H.10. The FEIS identifies seven different types of crossing situations along the ELST. Type 1 crossings are for high-volume streets where signalized intersections are adjacent. Type 2 crossings are for low volume streets; Type 2 crossings assign right of way to the street with the Trail STOP sign controlled. Types 3 through 7 are for various residential driveway configurations. (Exhibit 2a, Vol. 1, pp. 85 – 94)

Although the FEIS recognizes 206th Avenue SE as a local access street (Exhibit 2a, Vol. 1, p. 288), it does not assign it to one of the seven crossing types. (Exhibit 2a, Vol. 1, p. 303)

- H.11. The ELST is a highway under state law.

State motor vehicle laws are contained in Title 46 RCW, Motor vehicles. The definitions in Chapter 46.04 RCW generally apply to all provisions in Title 46 RCW. [RCW 46.04.010] A “highway” is “the entire width between the boundary lines of every way publicly maintained when any part thereof is open to the use of the public for purposes of vehicular travel.” [RCW 46.04.197] A “vehicle” “includes every device capable of being moved upon a public highway and in, upon, or by which any persons or property is or may be transported or drawn upon a public highway, including bicycles. ... Bicycles are not considered vehicles for the purposes of chapter 46.12, 46.16, or 46.70 RCW. ...”²⁷ [RCW 46.04.670] Therefore, the ELST is a highway by definition as it is publicly maintained and is open to bicycle usage.

- H.12. The FEIS lists three guidance documents which shaped proposed ELST crossing designs: The 1999 edition of AASHTO’s Guide for the Development of Bicycle Facilities (1999 AASHTO Bike Guide); the 2001 edition of AASHTO’s A Policy on Geometric Design of Highways and Streets (2001 AASHTO Green Book); and the 2006 edition of the Washington State Department of Transportation Design Manual (2006 WSDOT Design Manual). (Exhibit 2a, Vol. 1, pp. 301 and 302)

Based on those guidance documents, the FEIS states that a bicycle would require a 125-foot minimum stopping sight distance for a posted speed of 15 mph and that motor vehicles require 115 feet of stopping sight distance for a 20 mph travel speed. If a motor vehicle is required to yield to trail traffic, the motorist when 10 feet from the edge of the trail must be able to see a bicyclist 250 feet down the trail if the bicyclist is traveling at 20 mph. If that situation cannot be met, then, if the trail user is to have right of way priority, the motor vehicle must be STOP sign controlled. (*Ibid.*)

²⁷ Chapters 46.12, 46.16, and 46.70 RCW deal, respectively, with titling and registration requirements, license requirements, and dealer and manufacturer requirements. None have any bearing on the present applications.

HEARING EXAMINER DECISION

RE: SSDP2014-00171 (ELST South Sammamish Segment A Appeals)

February 8, 2016

Page 24 of 46

- H.13. Trail design guidance documents currently in use include the 2012 AASHTO Bike Guide, 2001 AASHTO Green Book,²⁸ the 2012 WSDOT Design Manual, and the 2009 Manual on Uniform Traffic Control Devices – including Revisions 1 and 2 (2009 MUTCD).²⁹
- H.14. The ELST is a “shared use path” in AASHTO, WSDOT, and MUTCD terminology.³⁰ [2012 AASHTO Bike Guide, § 5.1; WSDOT Design manual, § 1515.01; 2009 MUTCD, § 1A.13, Definition 191] The ELST/206th Avenue SE crossing is a “mid-block” crossing. [2012 AASHTO Bike Guide, § 5.3.1; testimony]

The 2012 AASHTO Bike Guide includes guidance for assigning right of way priority at shared use path/street mid-block crossings. It advises that speed differential, available sight distance, and relative volumes/speeds on the path and street should be taken into account. The least amount of restriction needed for effective control should be employed. [2012 AASHTO Bike Guide, § 5.3.2]

In conventional roadway intersection design, right of way is assigned to the higher volume and/or higher speed approach. In the case of a path-roadway intersection, user volumes on the path should be considered. While in many cases roadways will have greater volumes, user volumes on popular paths sometimes exceed traffic volumes on minor crossed streets. In such situations, total user delay may be minimized if roadway traffic yields to path traffic, and given bicyclists’ reluctance to lose momentum, such an operating pattern often develops spontaneously. In such situations, “YIELD” or “STOP” control is more appropriately applied on the roadway approaches (given an analysis of speeds, sight distances, and so forth as described below).

Changes in user volumes over time should also be considered. New shared use paths are often built in segments, resulting in low initial volumes. In that case, assignment of priority to roadway traffic is usually appropriate. However, path volumes may increase over time, raising the need to re-examine priority assignment. Traffic flows at path-roadway intersections should be reviewed occasionally to confirm that the priority assignment remains appropriate.

²⁸ The record contains two pages (cover and page 9-38) from the 2011 AASHTO Green Book. The 2011 AASHTO Green Book has not yet been adopted by the Federal Highway Administration (FHWA). It may be used as guidance pending its adoption. The 2001 AASHTO Green Book is still in current use. [fhwa.dot.gov/design/greenbook2011.cfm, last visited February 3, 2016] Neither the 2001 nor the 2011 AASHTO Green Book are currently available on the FHWA web site; the 2011 AASHTO Green Book is available on the AASHTO web site only by purchase.

²⁹ Excerpts from some of those documents are contained in the record. (Exhibits 23; 24; 3015; 3021; 3023) Where a fact being cited is contained in one of the excerpts, the citation will be in parentheses and will list the exhibit and the source section information. Where a fact being cited is not contained in one of the excerpts, the citation will be in brackets and will list only the source section information.

³⁰ The 2012 AASHTO Bike Guide does not hyphenate the term “shared use;” the 2009 MUTCD and the 2012 WSDOT Design Manual do. Unless in a quote, the Examiner will use the AASHTO style.

HEARING EXAMINER DECISION

RE: SSDP2014-00171 (ELST South Sammamish Segment A Appeals)

February 8, 2016

Page 25 of 46

[2012 AASHTO Bike Guide, p. 5-33]

- H.15. The 2012 WSDOT Manual's chapter on shared use paths provides "possible design solutions, which should be treated with appropriate flexibility as long as doing so complies with corresponding laws, regulations, standards, and guidance." (Exhibit 3015, p. 1515-1; WSDOT Design Manual, §1515.01) It lists the 2012 AASHTO Bike Guide and the 2009 MUTCD as "Design Guidance" documents. (Exhibit 3015, p. 1515-2; WSDOT Design Manual, §1515.02(2))

The 2012 WSDOT Manual says: "Design shared-use paths to maintain speeds at or below" 12 mph when approaching intersections. (Exhibit 3015, p. 1515-3; WSDOT Design Manual, §1515.04(1))

The 2012 WSDOT Manual says: "Clearly define who has the right of way and provide sight distance for all users at shared-use path and roadway intersections." (Exhibit 3015, p. 1515-11; WSDOT Design Manual, §1515.05(1)) Among the considerations when designing mid-block crossings are "traffic right of way assignments" and "sight distances for both bicyclists and motor vehicle operators". (*Ibid.*)

The 2012 WSDOT Design Manual says "Determine the need for traffic control devices at path/roadway intersections by using MUTCD warrants and engineering judgment. Bicycles are considered vehicles in Washington State" (Exhibit 3015, p. 1515-13; 2012 WSDOT Design Manual, § 1515.05(1)(a))

- H.16. The 2009 MUTCD provides uniform standards for traffic signs, signals, and pavement markings. The 2009 MUTCD classifies its textual provisions into one of four categories: Standard ("a statement of required, mandatory, or specifically prohibitive practice regarding a traffic control device"); Guidance ("a statement of recommended, but not mandatory, practice in typical situations"); Option ("a statement of practice that is a permissive condition and carries no requirement or recommendation"); and Support ("an informational statement that does not convey any degree of mandate, recommendation, ..."). [2009 MUTCD, § 1A.13,01.A, .B, .C, and .D, respectively ³¹] The MUTCD "shall not be a legal requirement for [traffic control devices] installation." [2009 MUTCD, § 1A.09, Standard]

Engineering judgment should be used to establish intersection control. The following factors should be considered:

- A. Vehicular, bicycle, and pedestrian traffic volumes on all approaches;
- B. Number and angle of approaches;
- C. Approach speeds;
- D. Sight distance available on each approach; and
- E. Reported crash experience.

³¹ The 2009 MUTCD uses distinctive font styles for each of the four categories. All distinctive fonts have been omitted from 2009 MUTCD quotes used in this Decision.

HEARING EXAMINER DECISION

RE: SSDP2014-00171 (ELST South Sammamish Segment A Appeals)

February 8, 2016

Page 26 of 46

[2009 MUTCD, § 2B.04, Guidance]

The use of traffic signals is subject to warrant analysis; the use of STOP and YIELD signs are not. [2009 MUTCD § 4C.01; see also §§ 2B.05, 2B.07, and 2B.09] To be effective, traffic control devices “should” fulfill a need, command attention, be clear, command respect, and give adequate notice. (Exhibit 23; 2009 MUTCD, § 1A.02, Guidance)

“YIELD or STOP signs should be used” in “one or more of” four circumstances, only one of which is remotely applicable to the ELST/206th Avenue SE crossing: “Intersection of a less important road with a main road where application of the normal right-of-way rule would not be expected to provide reasonable compliance with the law”. [2009 MUTCD, § 2B.04, Guidance] “At intersections where a full stop is not necessary at all times, consideration should be given to using less restrictive measures such as YIELD signs”. [2009 MUTCD, § 2B.06, Guidance]

H.17. Part 9 of the 2009 MUTCD specifically addresses traffic controls for bicycle facilities.

STOP ... signs ... shall be installed on shared-use paths at points where bicyclists are required to stop.

YIELD ... signs ... shall be installed on shared-use paths at points where bicyclists have an adequate view of conflicting traffic as they approach the sign, and where bicyclists are required to yield the right-of-way to that conflicting traffic.

(Exhibit 3023; 2009 MUTCD, § 9B.03, Standard)

When placement of STOP or YIELD signs is considered, priority at a shared-use path/roadway intersection should be assigned with consideration of the following:

- A. Relative speeds of shared-use path and roadway users,
- B. Relative volumes of shared-use path and roadway traffic, and
- C. Relative importance of shared-use path and roadway.

Speed should not be the sole factor used to determine priority, as it is sometimes appropriate to give priority to a high-volume shared-use path crossing a low-volume street, or to a regional shared-use path crossing a minor collector street.

When priority is assigned, the least restrictive control that is appropriate should be placed on the lower priority approaches. STOP signs should not be used where YIELD signs would be acceptable.

(Exhibit 3023; 2009 MUTCD, § 9B.03, Guidance)

H.18. Bicyclists’ compliance (or lack thereof) with traffic control devices complicates assignment of priority at path-street crossings.

HEARING EXAMINER DECISION

RE: SSDP2014-00171 (ELST South Sammamish Segment A Appeals)

February 8, 2016

Page 27 of 46

Bicyclists approach an intersection at a far greater speed than pedestrians, and they desire to maintain their speed as much as practical. The result may be the need to remind bicyclists of their responsibility to yield or stop, while not confusing the issue of who has the legal right of way at mid-block crossings.

[2012 AASHTO Bike Guide, p. 5-32]

Application of intersection controls (“YIELD” signs, “STOP” signs, or traffic signals) should follow the principle of providing the least amount of restriction that is effective. Installing unwarranted or unrealistically restrictive controls on path approaches in an attempt to “protect” path users can result in path users disregarding the signs and other traffic control devices at the intersection. This can lead to a loss of respect for traffic control at more critical locations.

A common misconception is that the routine installation of stop control for the pathway is an effective treatment for preventing crashes at path-roadway intersections. Poor bicyclist compliance with “STOP” signs at path-roadway intersections is well documented. Bicyclists tend to operate as though there are “YIELD” signs at these locations: they slow down as they approach the intersection, look for oncoming traffic, and proceed with the crossing if it is safe to do so. “YIELD” control (either for vehicular traffic on the roadway or for users on the pathway) can therefore be an effective solution at some mid-block crossings, as it encourages caution without being overly restrictive.

[2012 AASHTO Bike Guide, p. 5-34, emphasis added]

- H.19. North- or southbound vehicles on the Parkway turning into 206th Avenue SE will travel only about 60 feet after making their turn before encountering the ELST. (Exhibit 4, p. 56) Northbound vehicles must execute a left turn across southbound Parkway traffic, which in the PM peak hour could amount to approximately 850 vehicles or about 15 vehicles per minute. (Assumes a 50 – 50 northbound – southbound traffic split which may or may not be accurate in the PM peak hour.) Southbound right turning vehicles must slow down and execute a hard right with fast moving traffic behind them. (Testimony)
- H.20. “Sight distance is a principal element of roadway and path intersection design. At a minimum, provide stopping sight distance for both the roadway and the path at the crossing. Decision sight distance is desirable for the roadway traffic.” (Exhibit 3015, p. 1515-14; 2012 WSDOT Design Manual, § 1515.05(1)(a)(5))
- H.21. According to the 2012 WSDOT Design Manual,

HEARING EXAMINER DECISION

RE: SSDP2014-00171 (ELST South Sammamish Segment A Appeals)

February 8, 2016

Page 28 of 46

The distance needed to bring a shared-use path user to a complete stop [known as “stopping sight distance”] is a function of the user’s perception and braking reaction times, the initial speed, the coefficient of friction between the wheels and the pavement, the braking ability of the user’s equipment, and the grade.

[2012 WSDOT Manual, §1515-04(5), p. 1515-10]

The stopping sight distance for a bicycle traveling at 15 mph on a flat trail is approximately 102 feet using the formula contained in the 2012 AASHTO Bike Guide ($(15^2 \div (30 \times 0.16)) + (3.67 \times 15) = 101.925$). [2012 AASHTO Bike Guide, p. 5-17, Table 5-4, U.S. Customary formula] The stopping sight distance for a bicycle traveling at 12 mph on a flat trail is approximately 75 feet. [2012 WSDOT Design Manual, p. 1515-20]

Stopping sight distance for an automobile assumes a driver’s eye height of 3.5 feet and an object height of 2.0 feet above the road surface. The stopping sight distance for an automobile on a flat grade is 80 feet at 15 mph, 115 feet at 20 mph, 155 feet at 25 mph, and 200 feet at 30 mph. (Exhibit 3021; 2011 AASHTO Street Guide, p. 9-41, Table 9-8) Stopping sight distance increases on down-grades and decreases on up-grades. [2012 AASHTO Bike Guide, pp. 5-18 and 5-19]

- H.22. The ELST has little, if any, grade at the 206th Avenue SE crossing. 206th Avenue SE has a modest down grade from the Parkway to the ELST; the down grade continues to the west beyond the ELST. (Exhibits 4, p. 10; 12, pp. 5 and 6; 21)
- H.23. According to the 2012 WSDOT Design Manual, “Decision sight distance values are greater than stopping sight distance values because they give the driver an additional margin for error and afford sufficient length to maneuver at the same or reduced speed rather than to just stop.” [2012 WSDOT Design Manual, § 1260.05] The Decision sight distance for a design speed of 30 mph is 220 feet for a “rural” stop and 490 feet for an “urban” stop. [*Ibid.*]
- H.24. A third type of sight distance is intersection sight distance.

The driver of a vehicle that is stopped and waiting to cross or enter a through roadway needs obstruction-free sight triangles in order to see enough of the through roadway to complete all legal maneuvers before an approaching vehicle on the through roadway can reach the intersection.

[2012 WSDOT Design Manual, § 1310.05, ¶ 2] The basic intersection sight distance formula where grades are not a factor is: $S_i = 1.47Vt_g$, where S_i is intersection sight distance (in feet), 1.47 is a constant, V is the design speed (in mph) of the through street, and t_g is the time gap (in seconds). For a passenger car crossing a through street, t_g is 6.5 seconds. [2012 WSDOT Design Manual, p. 1310-40] Intersection sight distance is 115 feet for a design speed of 12 mph (as recommended by the 2012

HEARING EXAMINER DECISION

RE: SSDP2014-00171 (ELST South Sammamish Segment A Appeals)

February 8, 2016

Page 29 of 46

WSDOT Design Manual for shared use paths at intersection approaches) and 143 feet for a design speed of 15 mph. (Calculated)

Intersection sight distance is measured from a point in the travel lane approaching the stop where the driver's eye is presumed to be. Typically, that point is 18 feet from the edge of the through street's travel lane. But it can be reduced to as little as 10 feet if necessary. [2012 WSDOT Design Manual, § 1310.05, ¶¶ 4 and 6]

- H.25. A related concept is intersection sight triangles: Approaching sight triangles and departure sight triangles. Approaching sight triangles provide clear visibility for vehicles on intersecting legs of the intersection to see one another and stop or yield before colliding. Departure sight triangles provide clear visibility for a stopped vehicle to see an approaching vehicle on the cross street/path far enough away to make a safe crossing of the street/path. A departure sight triangle is essentially a depiction of intersection sight distance.

According to King County, for an uncontrolled or YIELD controlled path/street intersection where the ELST has priority and where the trail design speed is 18 mph and the 206th Avenue SE design speed is 15 mph, the approaching sight triangle requires a clear line of sight to a point 180 feet down the trail to the left from a point on 206th Avenue SE 75 feet from the near edge of the ELST and to a point 180 feet down the trail to the right from a point on 206th Avenue SE 75 feet from the near edge of the ELST. (Exhibit 3020, July 2015 document, ³² p. 3)

According to King County, for a STOP controlled street intersection with the ELST where the ELST has priority and where the trail design speed is 18 mph and the 206th Avenue SE design speed is 15 mph, the departure sight triangle requires that a stopped vehicle have a clear line of sight to a point 175 feet down the trail to the left from a point on 206th Avenue SE 10 feet from the near edge of the ELST and to a point 175 feet down the trail to the right from a point on 206th Avenue SE 10 feet from the near edge of the ELST. (Exhibit 3020, July 2015 document, p. 4)

- H.26. Sight distance at the ELST/206th Avenue SE crossing is severely limited in some places by existing evergreen vegetation and subdivision monument signs. Masonry monument signs are located on each side of 206th Avenue SE, approximately 10 feet west of the Interim Trail and between two and five feet off the edges of the 206th Avenue SE pavement. Large conifers exist behind (west of) those signs and north of the northern sign. Deciduous trees and scrub brush populate the area between the ELST and the Parkway north of 206th Avenue SE. None of the exhibits depict any significant vegetation in the area between the ELST and the Parkway south of 206th Avenue SE. (Exhibits 4, p. 10; 12, pp. 5 and 6; 21; 3031)
- H.27. Stopping sight distance requirements are easily met for both north- and southbound travel on the ELST at the 206th Avenue SE crossing: The ELST is nearly level and almost straight for several hundred feet north and south of the crossing. (Exhibits 4, p. 10; 21)

³² A prior (March 2014) version of this document appears in two places in the record: As part of Exhibits 3018 and 3020.

HEARING EXAMINER DECISION

RE: SSDP2014-00171 (ELST South Sammamish Segment A Appeals)

February 8, 2016

Page 30 of 46

Stopping sight distance is available for eastbound but not for westbound traffic on 206th Avenue SE. Even though 206th Avenue SE curves towards the northeast as it approaches the ELST, the curve appears gentle enough that at least 155 feet of stopping sight distance is available.

The same cannot be said for westbound traffic on 206th Avenue SE for one simple and immutable reason: The distance between the Parkway and the ELST (52 – 65 feet) is less than the stopping sight distance for vehicles travelling only 15 mph (80 feet). Therefore, a vehicle entering 206th Avenue SE from the Parkway would have insufficient space to stop if something popped up on the ELST in front of it.

- H.28. Intersection sight distance is not adequate from northbound ELST looking west or east. It will be remembered that intersection sight distance is the distance a stopped vehicle must be able to see to safely cross a street. The street in this case is 206th Avenue SE which has a posted speed limit of 25 mph. Design speed is 5 mph greater than posted speed. Therefore, the required intersection sight distance would be 290 feet. (Exhibit 12, p. 3) Intersection sight distance to the west from a northbound stopped bicycle is at best 55 – 60 feet because of the subdivision monument sign and nearby conifers. Available intersection sight distance to the east from a stopped northbound bicycle on the ELST is equally short because of the proximity of the Parkway. Intersection sight distance from a southbound stopped bicycle to the west is adequate, but is not adequate to the east, again because of the proximity of the Parkway. (Exhibits 12, pp. 1 and 4³³; 3031, Exhibit B)
- H.29. Intersection sight distance for vehicles stopped on 206th Avenue SE at the ELST is more than 150 feet in all four directions: Westbound traffic looking north and south on the ELST and eastbound traffic looking north and south on the ELST. (Exhibits 4, p. 56; 3031, Exhibit A)
- H.30. Approaching sight distance triangles for an uncontrolled or YIELD controlled crossing would not be met at the ELST/206th Avenue SE crossing. The trees and subdivision monument signs would block the clear sight triangles on at least three of the four quadrants of the intersection. (Exhibits 4, p. 56; 3020, July 2015 document)
- H.31. King County assigned right of way priority to the ELST at the 206th Avenue SE crossing “because the potential volume of the trail will exceed the vehicular volumes of driveways.” (Exhibit 12, p. 1; testimony) (See also Exhibit 3018, p. 1: “As a result, the trail is given priority over the local roads at both intersections [206th Avenue SE and 33rd Street SE].”) Therefore, King County’s plans depict STOP sign control on 206th Avenue SE at the ELST crossing. (Exhibit 4, p. 56)

King County’s consulting licensed civil engineer (Ho) testified that she would not “stamp” plans that required placement of a STOP sign for the ELST at 206th Avenue SE “if not warranted.” (The City Engineer (Zagars) testified that the City would not prepare and “stamp” plans for the County.)

³³ The sight triangles drawn on p. 4 of Exhibit 12 represent required intersection sight distance for stopped bicycles on the ELST, not available sight distance.

HEARING EXAMINER DECISION

RE: SSDP2014-00171 (ELST South Sammamish Segment A Appeals)

February 8, 2016

Page 31 of 46

King County argues that STOP sign placement “is not a shoreline issue and [Condition 6] is not properly imposed through shoreline permit review.” (Exhibit 34, p. 12, ll. 11 – 13)

Finally, in its closing argument, King County asserted that the ELST is located within a right-of-way owned by King County, that there is no evidence that the 206th Avenue SE right-of-way supersedes the ELST right-of-way, and that, therefore, sole jurisdiction to place traffic control devices within the ELST right-of-way rests with King County. In other words, King County asserts that the City has absolutely no say in the placement of traffic control devices anywhere within the ELST right-of-way. (Argument of counsel)

- H.32. The City Engineer testified that the City regulates the placement of traffic control devices anywhere within the City. The City argues that because of traffic speeds on the Parkway, motorists turning from the Parkway onto 206th Avenue SE will be focused on Parkway traffic until they have safely entered 206th Avenue SE and would then have inadequate distance to stop before crossing the ELST. Therefore, the STOP control should be for trail users as it has been for the past 10 years. The City also points out that an eastbound motorist on 206th Avenue SE would have two STOP signs within a distance of about 75 feet and would be inclined to ignore one of them, most likely the first (ELST) one. The City would be satisfied with YIELD control for ELST users at that crossing. (Testimony)

The City also argues that ELST use varies greatly by season, day of week, and time of day. It posits that motorists would frequently encounter no trail users after stopping and would, over time, begin to ignore the STOP sign. The City notes that volume is only one of many considerations in assignment of priority at crossings. (Testimony)

The City opposes King County’s insistence that the STOP sign at the ELST/206th Avenue SE crossing be switched to control street traffic instead of ELST traffic. (Testimony)

- H.33. The record contains no traffic impact analysis, no current traffic counts on the public street system, no current usage data for the Interim Trail, no speed analysis for traffic on either the Interim Trail or the street system, and no data regarding temporal distribution of traffic on either the Interim Trail or the public street system.
- H.34. The August, 2010 Record of decision contains no mitigation measures that specifically apply to the ELST/206th Avenue SE crossing nor that would impinge on either traffic control alternative before the Examiner. (Exhibit 3, pp. 11 and 12 ³⁴)

I. County Appeal Issue II.f (Condition 7)

³⁴ One mitigation measure states: “Provide signage at critical intersections, including Waverly Shores Private Boat Launch at 33rd Street, warning trail users that they are approaching a congested intersection.” (Exhibit 3, p. 11) Another states in relevant part: “Informational and regulatory signs would also be installed at all such crossings for trail users and road-based vehicles.” (Exhibit 3, p. 12)

HEARING EXAMINER DECISION

RE: SSDP2014-00171 (ELST South Sammamish Segment A Appeals)

February 8, 2016

Page 32 of 46

- I.1. King County alleged that the requirement in Condition 7 to narrow the Master Plan Trail between Stations 259+25 and 260+75 in order to preserve additional trees along the west side of the trail exceeded the City's authority and would have required it to construct a trail not meeting the 2012 AASHTO Bike Guide. (Exhibit 9003, pp. 8 and 9; testimony)
- I.2. King County and the City negotiated a resolution to this issue: The County will tighten the clearing and grubbing limits in this trail segment to shift all of the 43 significant trees in the segment from monitor to save. (Exhibits 35, p. 3; 35A – 35C)
- I.3. King County and the City ask the Examiner to “adopt Exhibits [35A – 35C] as an agreed implementation of Condition #7”. (Exhibit 35, p. 3, l. 4)

J. County Appeal Issue II.g (Condition 8)

- J.1. King County alleged that the requirement in Condition 8 to obtain separate tree removal permits for removal of all “save” or “monitor” trees and that obtaining such permits “may entail providing an arborist report and/or meeting with neighboring property owners” exceeded the City's authority and would impose an inappropriate burden on the County. (Exhibit 9003, pp. 9 and 10; quote from Exhibit 9001.1.A, p. 13)

- J.2. The full text of Condition 8 reads as follows:

Significant trees shown on the approved plans as being “save” or “monitor” within the clearing limits require a separate tree removal permit authorization from the City prior to removal. Obtaining a permit may entail providing an arborist report and/or meeting with neighboring property owners.

(Exhibit 9001.1.A, p. 13)

- J.3. King County and the City negotiated alternative wording for Condition 8:

Significant trees shown on the approved plans as being “save” or “monitor” within the clearing limits require a separate tree removal permit authorization from the City prior to removal. Obtaining a permit may entail providing an arborist report. The City will provide a decision on a tree removal permit application within 24 hours, excluding weekends and holidays, of receipt by the City of a County application and, if required by the City, a County supplied arborist's report on the tree(s) that are the subject of the application.

(Exhibit 35, p. 3) King County and the City ask the Examiner to “adopt this language as an agreed implementation of Condition #8”. (Exhibit 35, p. 3, l. 16)

K. County Appeal Issue II.h (Condition 10)

HEARING EXAMINER DECISION

RE: SSDP2014-00171 (ELST South Sammamish Segment A Appeals)

February 8, 2016

Page 33 of 46

- K.1. King County alleged that Condition 10 (“Where fences, retaining walls, or a combination of fence and retaining wall exceed four feet in height, adequate provisions shall be made to allow wildlife passage at intervals along the trail.”) exceeded the City’s authority and was unnecessary. (Exhibit 9003, pp. 10 and 11; Condition 10 quoted from Exhibit 9001.1.A, p. 13)
- K.2. King County and the City negotiated a resolution to this issue: The County demonstrated to the City’s satisfaction that “the multiple intersection breaks in the trail design” will provide ample opportunity for wildlife to cross the trail. (Exhibit 19, p. 1, ll. 21 and 22)
- K.3. King County and the City ask the Examiner to delete Condition 10. (Exhibit 19, p. 1, ll. 22 and 23)

L. County Appeal Issue II.i (Condition 14)

- L.1. King County alleges that the requirement in Condition 14 that “all shrubs and trees installed in mitigation planting areas shall meet a 100% survival standard one year following City acceptance of as-built mitigation plans” and “meet an 80% survival standard during mitigation monitoring years 2 through 5” is unrealistic and not attainable. (Exhibit 9003, pp. 11 and 12; testimony; quotes from Exhibit 9001.1.A, p. 14)

- L.2. Condition 14 reads as follows:

In addition to mitigation performance standards described in the critical area mitigation plans, all shrubs and trees installed in mitigation planting areas shall meet a 100% survival standard one year following City acceptance of as-built mitigation plans. All shrubs and trees installed in mitigation planting areas shall meet an 80% survival standard during mitigation monitoring years 2 through 5. Planting shall occur as needed to meet these standards in any mitigation monitoring year these standards are not met.

(Exhibit 9001.1.A, p. 14)

- L.3. The City testified that for at least the past 10 years it has required survival rates as set forth in Condition 14 for all environmentally critical area mitigation plans. (Testimony)
- L.4. DPER has created Critical Areas Mitigation Guidelines (DPER Guidelines) for use by persons preparing critical area mitigation plans required for permits issued by King County. The DPER Guidelines require that the mitigation plan provide that “During Year One, every failed planting must be replaced.” (Exhibit 22, p. 6, § Two.12.1) “Design Guidelines” in the DPER Guidelines includes “100% survival by Year One, EITHER 85% survival by Year Three OR demonstrate that species diversity and distribution mimic reference standard wetlands.” (Exhibit 22, p. 9, § Three.II.1.1.3)
- L.5. King County wants the Examiner to replace Condition 14 with the mitigation performance standards contained in its consultant’s critical areas study: At least 80% survival of planted woody species in

HEARING EXAMINER DECISION

RE: SSDP2014-00171 (ELST South Sammamish Segment A Appeals)

February 8, 2016

Page 34 of 46

Year 1; at least 35% areal coverage of native woody species in Year 3; and at least 60% areal coverage of native woody species in Year 5. (Exhibit 8, p. 55)

King County notes that the comparable condition on the City's SSDP for the North Segment simply required that the project meet the provisions in the critical areas study submitted with that application. (Exhibit 3027, p. 7, Condition 5)

L.6. The City testified that Condition 5 on the North Segment SSDP resulted from an "oversight" and that if it could be done over, the City would impose the equivalent of Condition 14. The City also argues that an "areal coverage" standard can be met with native volunteer species which may not guarantee the species diversity desired in a wetland revegetation plan. (Testimony)

M. County Appeal Issue II.j (Condition 17)

M.1. King County alleged that Condition 17 ("A critical areas study must be provided with the site development application that demonstrates how the project meets Critical Aquifer Recharge Area (CARA) protection requirements in SMC 21A.50.280 during and post construction.") was unnecessary because it had "submitted a critical areas study that demonstrates compliance with the requirements of SMC 21A.50.280. The County has already met this condition." (Exhibit 9003, p. 12; Condition 17 quoted from Exhibit 9001.1.A, p. 14)

M.2. King County and the City negotiated a resolution to this issue: The County demonstrated to the City's satisfaction "that, based on information submitted by the County, Condition 17 has been satisfied subsequent to issuance of the SSDP." (Exhibit 34, p. 1)

M.3. King County and the City ask the Examiner to find "that Condition 17 has been satisfied." (Exhibit 34, p. 1)

N. County Appeal Issue II.k (Federal preemption)

N.1. King County alleges that the conditions which it appealed: "are preempted by operation of" a variety of federal laws; violate RCW 36.79A.200(5) relating to limitations on the authority to condition an Essential Public facility (EPF); and "conflict with the SEPA conditions imposed on the April 2010, Final EIS." (Exhibit 9003, pp. 12 and 13)

N.2. The County did not present evidence or argument on this issue beyond that in its appeal, its Prehearing Brief, and its closing statement. (Exhibits 3034; 9003; argument of counsel)

LEGAL FRAMEWORK ³⁵

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

³⁵ Any statement in this section deemed to be either a Finding of Fact or a Conclusion of Law is hereby adopted as such.

HEARING EXAMINER DECISION

RE: SSDP2014-00171 (ELST South Sammamish Segment A Appeals)

February 8, 2016

Page 35 of 46

Authority

An SSDP is a Type 2 land use application. [SMC 20.05.020, Exhibit A] An appeal from the Department's action on a Type 2 land use application requires an open record hearing before the Examiner. The Examiner makes a final decision on the appeal which is subject to the right of reconsideration and (normally) appeal to Superior Court. [SMC 20.05.020, 20.10.240, 20.10.250, and 20.10.260] In the case of an SSDP, however, appeal would be to the State Shorelines Hearings Board. (See Exhibit 9008.)

The Examiner's decision may be to grant or deny the application or appeal, or the examiner may grant the application or appeal with such conditions, modifications, and restrictions as the Examiner finds necessary to make the application or appeal compatible with the environment and carry out applicable state laws and regulations, including Chapter 43.21C RCW and the regulations, policies, objectives, and goals of the interim comprehensive plan or neighborhood plans, the development code, the subdivision code, and other official laws, policies and objectives of the City of Sammamish.

[SMC 20.10.070(2)]

Review Criteria

Section 20.10.200 SMC sets forth requirements applicable to all Examiner Decisions:

When the examiner renders a decision ..., he or she shall make and enter findings of fact and conclusions from the record that support the decision, said findings and conclusions shall set forth and demonstrate the manner in which the decision ... is consistent with, carries out, and helps implement applicable state laws and regulations and the regulations, policies, objectives, and goals of the interim comprehensive plan, the development code, and other official laws, policies, and objectives of the City of Sammamish, and that the recommendation or decision will not be unreasonably incompatible with or detrimental to affected properties and the general public.

The review criteria for a Type 2 SSDP are set forth at SMC 25.08.020(2): "The director may grant a substantial development permit only when the development proposed is consistent with the policies and procedures of Chapter 90.58 RCW, the provisions of Chapter 173-27 WAC, and [the SMP]."

Subsection 90.58.140(2)(b) RCW provides that "A permit shall be granted: ... (b) After adoption or approval, as appropriate, by [Ecology] of an applicable master program, only when the development proposed is consistent with the applicable master program and this chapter."

WAC 173-27-150(1) provides that "A substantial development permit shall be granted only when the development proposed is consistent with: (a) The policies and procedures of the act; (b) The provisions of this regulation; and (c) The applicable master program adopted or approved for the area."

HEARING EXAMINER DECISION

RE: SSDP2014-00171 (ELST South Sammamish Segment A Appeals)

February 8, 2016

Page 36 of 46

Vested Rights

Sammamish has enacted a vested rights provision.

Applications for Type 1, 2, 3 and 4 land use decisions, except those that seek variance from or exception to land use regulations and substantive and procedural SEPA decisions shall be considered under the zoning and other land use control ordinances in effect on the date a complete application is filed meeting all the requirements of this chapter. The department's issuance of a notice of complete application as provided in this chapter, or the failure of the department to provide such a notice as provided in this chapter, shall cause an application to be conclusively deemed to be vested as provided herein.

[SMC 20.05.070(1)] Therefore, the Type 2 application involved in this appeal is vested to the development regulations as they existed on July 31, 2014.

Standard of Review

The standard of review is preponderance of the evidence. The appellant has the burden of proof. [RoP 316(a)]

Scope of Consideration

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

CONCLUSIONS OF LAW

A. General

- A.1. The Examiner is guided in determining the extent of permit conditioning allowed on an EPF proposal by the Court of Appeals' holding in *City of Des Moines v. Puget Sound Regional Council* (*Des Moines*), 188 Wn. App. 836, 988 P.2d 27 (1999). To paraphrase *Des Moines*, King County "will have to comply with [Sammamish's] reasonable permitting and mitigation requirements. The fact that these requirements may make the [Master Plan Trail] more costly does not relieve [King County] of these obligations." [*Des Moines* at 843, paraphrased]

At this juncture the Examiner concludes that it is unnecessary to determine whether or not the ELST is an EPF.

- A.2. Aside from the Examiner's own analysis, the Examiner accords considerable deference, absent clear error, to the professional opinions and interpretation of regulations rendered by the agencies charged with administering them. [*Mall, Inc. v. Seattle*, 108 Wn.2d 369, 739 P.2d 668 (1987)]
- A.3. An appellant cannot meet its required burden of proof simply by presenting argument (unless, of course, an issue presents nothing but a legal question).

HEARING EXAMINER DECISION

RE: SSDP2014-00171 (ELST South Sammamish Segment A Appeals)

February 8, 2016

Page 37 of 46

- A.4. There is no condition on the SSDP that expressly adopts a particular set of plans as the SSDP plan set. Even though this was not an appeal issue, the Examiner believes that every permit should clearly identify the plan(s) which are being approved. Therefore, the Examiner will add a condition (a new Condition 1) which will specify that Exhibit 4 (the 95% Review Submittal plans, the most recent plan set in the record) is the approved plan set. This new condition will also facilitate recording some of the settlements between King County and the City.
- A.5. Any Finding of Fact deemed to be a Conclusion of Law is hereby adopted as such.
- B. Owners Appeal Issue 4.2.3
- B.1. Owners have presented no evidence to refute the original delineations or the subsequent re-delineations of wetlands along the east side of the ELST. That there may be ditches within those wetlands does not render them not wetlands. The delineations were affirmed through the Interim Trail and Master Plan Trail EIS processes. The USACE has recently confirmed that those ditches are regulated waters of the United States. The wetlands in Segment A are regulated wetlands.
- B.2. A code interpretation is not a code amendment. “[D]eference is accorded an agency’s interpretation only if (1) the particular agency is charged with the administration and enforcement of the statute, (2) the statute is ambiguous, and (3) the statute falls within the agency’s special expertise.” [*Bostain v. Food Exp., Inc.*, 159 Wn.2d 700, 716, 153 P.3d 846 (2007)] “[A]n agency interpretation that conflicts with a statute is given no deference.” [*Nelson v. Appleway Chevrolet, Inc.*, 160 Wn.2d 173, 184, 157 P.3d 847 (2007)] An agency interpretation or agency policy cannot work to effectively “amend” an ordinance or apply it in a manner that clearly exceeds its intended scope. [*Mall, Inc. v. City of Seattle*, 108 Wn.2d 369, 378, 739 P.2d 668 (1987)] The person challenging an agency’s interpretation bears the burden of proving that the interpretation is erroneous. [*City of Bellevue v. East Bellevue Community Mun. Corp.*, 119 Wn. App. 405, 413, 81 P.3d 148 (2003)]
- B.3. The Department’s 2010 Code Interpretation of former SMC 21A.50.290(1)(a) did not amend the SMC. The SMC then (and now) defined “street” in such a way that the term included shared use paths. The ELST is a shared use path. Therefore, the buffer truncation provision applied with or without the Code Interpretation.
- B.4. Nothing in state law or regulations requires a municipality to obtain Ecology approval of every code interpretation it renders in the context of implementing the SMA. The law requires Ecology approval of SMP amendments, but since an interpretation which does not amend the local SMP/code is not an amendment, Ecology approval is not required.
- B.5. The wetland buffer truncation provision of former 21A.50.290(1)(a) applies to the ELST. The record in this case contains absolutely no evidence that the area west of the ELST, which is developed as landscaped areas, parking areas, roads, etc., provides any biological, hydrological, or geological support to the wetlands upslope and across the ELST. Truncation is appropriate.

HEARING EXAMINER DECISION

RE: SSDP2014-00171 (ELST South Sammamish Segment A Appeals)

February 8, 2016

Page 38 of 46

- B.6. Owners have failed to meet their required burden on this issue; their appeal as to this issue must be denied.
- C. Owners Appeal Issue 4.2.4U
- C.1. There is no evidence in the record that upgrading the ELST from the Interim Trail to the Master Plan Trail will appreciably increase storm water flows to downstream properties. Applicable regulations, especially the 2009 KCSWDM, require that drainage be discharged where it historically and naturally has gone. King County's plans do just that: The plans do not direct water to places where it hasn't historically gone and the project will not measurably increase flows.
- C.2. King County has no obligation to correct existing drainage problems unless it will exacerbate them. The evidence demonstrates rather convincingly that flow rate increases will be well less than the threshold established by the 2009 KCSWDM that would require action under the 2009 KCSWDM.
- C.3. Owners have failed to meet their required burden on this issue; their appeal as to this issue must be denied.
- D. County Appeal Issue II.a (Condition 2)
- D.1. There is no evidence in the record that upgrading the ELST from the Interim Trail to the Master Plan Trail will appreciably increase storm water flows on Driveways 1 and 2. Applicable regulations, especially the 2009 KCSWDM, require that drainage be discharged where it historically and naturally has gone. King County's plans do just that: The plans do not direct water to places where it hasn't historically gone and the project will not measurably increase flows.
- D.2. King County has no obligation to correct existing drainage problems unless it will exacerbate them. The evidence demonstrates rather convincingly that flow rate increases will be well less than the threshold established by the 2009 KCSWDM that would require action under the 2009 KCSWDM.
- D.3. The evidence does convincingly show that un- or under-controlled storm water runoff exists in the vicinity of Driveways 1 and 2. But the evidence equally convincingly shows that the source of that existing problem runoff is the Parkway and points east, not the ELST. King County cannot be required to solve that problem since it neither created it nor will exacerbate it.
- D.4. The sentence in Condition 2 dealing with Driveways 1 and 2 must be stricken.
- D.5. The sentence in Condition 2 which indicates that King County may be required as a condition of this SSDP to participate with the City in "a larger drainage improvement in that area" must also be stricken. A comprehensive improvement program to correct existing drainage problems may well be very beneficial and desirable, but the question here is Can the City force King County's participation by imposing a condition on this SSDP? The Examiner concludes that it cannot, simply because there

HEARING EXAMINER DECISION

RE: SSDP2014-00171 (ELST South Sammamish Segment A Appeals)

February 8, 2016

Page 39 of 46

is no “rational nexus” between such a condition and the documented impacts from the proposed project.

E. County Appeal Issue II.b (Condition 3)

E.1. The record contains no legitimate justification for Condition 3. The evidence does convincingly show that un- or under-controlled storm water runoff exists in the vicinity of Station 218+45. But the evidence equally convincingly shows that the source of that existing problem is points east, not the ELST. King County cannot be required to solve that problem since it neither created it nor will exacerbate it.

E.2. Even if the condition were warranted because of the existence of a rational nexus between project impacts and the problem, the requirement to “coordinate with neighboring properties” would be inappropriate. The permitting authority for an SSDP is the City, not the neighbors. The City cannot delegate its permit authority to neighbors, nor can it create a condition which effectively grants to neighbors a veto power over the project. The City must determine if the project complies with applicable regulatory requirements. If it does, then it must approve it; if it doesn’t, then it must deny it.

E.3. There is no acceptable justification in the record for Condition 3. The condition must be stricken.

F. County Appeal Issue II.c (Condition 4)

F.1. King County and the City have resolved this appeal issue. Exhibit 35 documents that resolution. The Examiner finds the resolution to be consistent with the SMP. Condition 4 can be stricken if a clause is added to new Condition 1 specifying that Exhibits 35A – 35C supersede corresponding sheets in Exhibit 4.

G. County Appeal Issue II.d (Condition 5)

G.1. King County, the City, and LS 4257 have resolved this appeal issue. Exhibit 20 documents that resolution. The Examiner finds the resolution to be consistent with the SMP. Condition 5 can be replaced with a condition requiring compliance with the Joint Stipulation contained in Exhibit 20.

H. County Appeal Issue II.e (Condition 6)

H.1. The question of what traffic control devices should be installed where at the ELST/206th Avenue SE crossing is, in all probability, beyond the scope of the Transportation regulations within the SMP. (See SMC 25.07.100.) But it is a component of the project and public safety is at issue. The Examiner concludes that public safety is an inherent consideration in any permit, including SSDPs: The City should not be in the position of approving a permit for something that it knows will be unsafe.

H.2. The situation at the ELST/206th Avenue SE crossing is difficult for all parties. The notion, which King County and its witnesses seemed to be urging on the Examiner at times, that any of the guidance documents listed in Finding of Fact H.13, above, provide a mandatory, definitive answer to

HEARING EXAMINER DECISION

RE: SSDP2014-00171 (ELST South Sammamish Segment A Appeals)

February 8, 2016

Page 40 of 46

the question of which should have right of way priority is simply not true. Those guidance documents all list numerous considerations and end up saying that engineering judgment must be employed.

The corollary notion, also urged on the Examiner at times, that relative volume and speed always dictate where crossing priority will lie is equally not true. The guidance documents tell us that there are many considerations in determining priority, of which volume and speed are but two.

- H.3. The evidence indicates that YIELD control, either for the ELST or for 206th Avenue SE, will not work because adequate approaching sight distance triangles are not present for any of the four movement directions: Inadequate distances and/or vegetation and masonry monuments block the extensive areas that would be required were either approach to be regulated by YIELD signs.
- H.4. If the ELST is STOP sign controlled, northbound bicyclists have inadequate departure sight distance both to their left (west) and to their right (east) to make a safe crossing after stopping. Vegetation and the subdivision monument signs block adequate sight distance to the west for northbound cyclists. The Parkway is less far from the ELST than the required sight distance to the east. With respect to the latter, a bicyclist could well look east, see no vehicle on 206th Avenue SE, start across the street, and be struck by a vehicle that had turned in from the Parkway. It seems unreasonable to expect a bicyclist to see through the shrubs along the Parkway to the north or look over his/her shoulder to the south to see if a car is preparing for a right turn or a left turn into 206th Avenue SE.
- H.5. On the other hand, if 206th Avenue SE is STOP sign controlled, entering vehicles will have less than required stopping sight distance after entering the street to stop before crossing the ELST: The ELST is only 52 – 65 feet from the edge of the Parkway and stopping sight distance is 80 feet for an automobile traveling at 15 mph. It is not at all unreasonable to expect that motorists entering 206th Avenue SE from the Parkway could be travelling at around 15 mph, especially those who made a left turn into 206th Avenue SE.
- H.6. The Examiner finds speed differential to be essentially moot. Design speed for bicycles approaching an intersection is supposed to be 12 mph, the County's trail speed limit is 15 mph, and it is not unreasonable to expect that motorists both inbound from the Parkway and outbound to the Parkway on 206th Avenue SE could be traveling at around 15 mph.
- H.7. Volume as a factor does not seem to be as straight forward as King County would suggest. The record has no evidence of current volumes on the Interim Trail, no evidence of seasonal variation in trail use, and no evidence of daily temporal variation in trail use. Basically, the Examiner is expected to simply accept without questioning that numbers generated at some time in the past on other trails in King County's system are representative of what will be experienced here – and with little, if any, supporting data for the numbers that were presented.

HEARING EXAMINER DECISION

RE: SSDP2014-00171 (ELST South Sammamish Segment A Appeals)

February 8, 2016

Page 41 of 46

It is true that the 15 residences west of the ELST served by 206th Avenue SE probably generate only 150 ADT of which 15 trips would occur during the peak hour of traffic on the street system. But there is a suggestion in the record that the peak weekday hour on the ELST is likely not to be the same as the peak traffic hour on the street system.

- H.8. Respect for traffic control devices seems to be a foggy consideration as well. It would seem to be rather likely that motorists on 206th Avenue SE would not see any traffic on the ELST at least as frequently as ELST bikers would not see any traffic on 206th Avenue SE. Either could become frustrated obeying a STOP sign that didn't seem to serve any useful purpose, and thus begin to disrespect it.

One aspect of this element struck the Examiner rather profoundly: According to the guidance manuals, bicyclists are apparently notoriously poor at obeying STOP signs. They apparently slow down as they approach a STOP sign, (hopefully) look both ways, and then shoot through the intersection without stopping. It seems a shame that choice of traffic control devices must be based, at least in part, on the premise that bicyclists will ignore the ones they don't like.

- H.9. The decision on crossing priority requires the exercise of engineering judgment according to all of the guidance manuals cited by both parties to this dispute. The Examiner would have far preferred that the engineers had exercised that judgment and come to an agreement to serve the safety of everyone. (Ample opportunity for such a convergence of opinion existed in the hearing schedule.)

But since the engineers have not reached such an agreement, it falls to the Examiner to make the decision for them.³⁶ In doing so, the Examiner has been guided by the factors discussed above, with safety being the overriding consideration.

- H.10. The Examiner will approve the traffic control plan for the ELST/206th Avenue SE crossing as proposed by King County. The primary factor in this decision is the lack of departure sight distance for bicyclists stopped at the crossing. Without adequate departure sight distance bicyclists will be very vulnerable to being hit in the intersection by vehicles on 206th Avenue SE. If there were adequate departure sight distance, the Examiner would have reached the opposite decision: Bicyclists will always lose in a collision with a motor vehicle and they would be safest if they stopped at the street and crossed only when no on-coming traffic was visible. But providing adequate departure sight distance does not seem to be possible.

The Examiner's major worry with this decision is the potential lack of stopping sight distance for inbound vehicles from the Parkway. The Examiner expects that the trail warning signs now on 206th Avenue SE will not be appropriate if the street is STOP sign controlled. The Examiner hopes that one or more appropriate warning signs ("Stop Ahead", etc.) can be installed on the westbound

³⁶ Revisions to SSDPs are provided for by the SMP. [SMC 25.08.140] If King County's engineers and the City Engineer can agree on a different, safer resolution to the 206th Avenue SE crossing priority issue, a revision could be processed.

HEARING EXAMINER DECISION

RE: SSDP2014-00171 (ELST South Sammamish Segment A Appeals)

February 8, 2016

Page 42 of 46

approach to the ELST so that drivers entering 206th Avenue SE from the Parkway will be aware of the need to stop a very short distance ahead.

H.11. The Examiner declines to become involved in the question of who has legal authority to place traffic control devices at the ELST/206th Avenue SE crossing, primarily because this is a property rights issue which the Examiner has indicated is beyond the scope of his jurisdiction. (Exhibit 9028, pp. 7 and 8) If King County and the City wish to adjudicate that issue, they will have to do so in a different forum.

H.12. Condition 6 will be stricken.

I. County Appeal Issue II.f (Condition 7)

I.1. King County and the City have resolved this appeal issue. Exhibit 35 documents that resolution. The Examiner finds the resolution to be consistent with the SMP. Condition 7 can be stricken if a clause is added to new Condition 1 specifying that Exhibits 35A – 35C supersede corresponding sheets in Exhibit 4.

J. County Appeal Issue II.g (Condition 8)

J.1. King County and the City have resolved this appeal issue. Exhibit 35 documents that resolution. The Examiner finds the resolution to be consistent with the SMP. Condition 8 should be modified to read as set forth in Exhibit 35.

K. County Appeal Issue II.h (Condition 10)

K.1. King County and the City have resolved this appeal issue. Exhibit 19 documents that resolution. The Examiner finds the resolution to be consistent with the SMP. Condition 10 can be stricken.

L. County Appeal Issue II.i (Condition 14)

L.1. If interpreted reasonably, Condition 14 is not measurably different from the mitigation plantings survival rate expected by King County for persons who are required to provide mitigation as a requirement of a King County-issued permit. Condition 14 does not require an applicant to guarantee that no mitigation plantings will die during the first year after planting. Interpreted reasonably, it requires replacement at a 1:1 ratio of mitigation plantings that die during the first year.

L.2. King County cannot complain about being required to comply with essentially the same standard it expects of persons who obtain permits from it.

L.3. King County has not met its burden. King County's appeal of Condition 14 will be denied. But, to the extent that the wording of Condition 14 may be unclear or potentially misleading, the Examiner will provide some clarity.

M. County Appeal Issue II.j (Condition 17)

HEARING EXAMINER DECISION

RE: SSDP2014-00171 (ELST South Sammamish Segment A Appeals)

February 8, 2016

Page 43 of 46

M.1. King County and the City have resolved this appeal issue. Exhibit 34 documents that resolution. The Examiner finds the resolution to be consistent with the SMP. Condition 17 can be stricken.

N. County Appeal Issue II.k (Federal preemption)

N.1. The Examiner declines to delve into the question of Federal preemption.

DECISION

Based upon the preceding Findings of Fact and Conclusions of Law, and the testimony and evidence submitted at the open record hearing, the Examiner:

- A. **ACCEPTS WITHDRAWAL** of LS 4257's appeal based upon the Joint Stipulation;
- B. **DENIES** the Owners' appeal; and
- C. **GRANTS IN PART** King County's appeal as set forth above.
- D. The SSDP conditions of approval are revised to read as set forth below:
 - 1. Exhibit 4 shall be the approved plan set for the subject SSDP; PROVIDED, that Exhibits 35A – 35C for clearing/grubbing limits and tree retention between approximately Stations 216+50 – 220+50 and Stations 259+25 – 260+75 shall supersede plan sheets within Exhibit 4 covering the same topics; and PROVIDED FURTHER, that Exhibits 20A and 20B with respect to improvements in the vicinity of Station 224+00 shall supersede plan sheets within Exhibit 4 covering the same topics.
 - 2. The Applicant shall comply with all city, county, state, and federal rules and regulations in effect on September 14, 2014, the vesting date of the subject application, including any necessary permits from applicable state or federal agencies.
 - 3. The Applicant shall comply with the Joint Stipulation (Exhibit 20, including 20A – 20C) unless events outside of their control make it impossible to construct the improvements to the drainage system depicted in Exhibit 20B.
 - 4. A Grading Permit (KC File GRDE14-0052) must be approved prior to commencing project construction. Grading plans showing the proposed trail widening and paving and associated site improvements, including required landscaping, restoration and mitigation plantings, shall be in substantial conformance with the 95% Review Submittal Plans prepared by Parametrix, received April 24, 2015. All construction shall be in compliance with the approved stormwater manual.
 - 5. Significant trees shown on the approved plans as being “save” or “monitor” within the clearing limits require a separate tree removal permit authorization from the City prior to removal. Obtaining a

HEARING EXAMINER DECISION

RE: SSDP2014-00171 (ELST South Sammamish Segment A Appeals)

February 8, 2016

Page 44 of 46

permit may entail providing an arborist report. The City will provide a decision on a tree removal permit application within 24 hours, excluding weekends and holidays, of receipt by the City of a County application and, if required by the City, a County supplied arborist's report on the tree(s) that are the subject of the application.

6. This Shoreline Substantial Development Permit shall include all mitigation measures listed in the East Lake Sammamish Master Plan Trail Record of Decision, Pages 8 - 13 (Exhibit 5).
7. Fences over 6 feet tall and retaining walls exceeding 42 inches in height will require structural review through the grading permit or a separate building permit.
8. Consistent with SMC 25.04.040 (2), interpretive educational sign(s) regarding shoreline ecological values and function shall be placed along the corridor where appropriate as an educational tool for protection of the natural resources along the trail.
9. Restoration and compensatory mitigation shall be completed substantially as shown on the Mitigation Plans found on the Landscape Plan sheets (Exhibit 2) and described in the Final Critical Areas Study (Exhibit 6), both by Parametrix.

An as-built report shall be completed by a qualified professional to document completion of proposed mitigation and restoration work. The as-built report must be supplied to the City. After the City inspects and approves as-built conditions, a required 5-year maintenance and monitoring period will begin. During the 5-year maintenance and monitoring period, a monitoring report shall be prepared by a qualified professional and supplied for City review by October 31st of each monitoring year.

10. In addition to mitigation performance standards described in the critical area mitigation plans, all shrubs and trees installed in mitigation planting areas shall meet a 100% survival standard one year following City acceptance of as-built mitigation plans or be replaced on a 1:1 basis. All shrubs and trees installed in mitigation planting areas shall meet an 80% survival standard during mitigation monitoring years 2 through 5 or be replaced on a 0.8:1 basis. Planting shall occur as needed to meet these standards in any mitigation monitoring year these standards are not met.
11. Mitigation and landscape plans supplied with the site development application shall depict installation of, or other methods to provide, temporary irrigation that provides a minimum of 1-inch of water per week to installed mitigation and landscape plantings from July 1st through September 30th during the first two years following plant installation in these areas. The source and layout of the temporary irrigation system shall be depicted on as-built plans. If water trucks are to be utilized, this shall be specifically described.
12. As part of the site development plan approval in order to protect water quality in Lake Sammamish, a condition will be added to the grading permit as follows: *Fertilizer used in planting areas shall be*

HEARING EXAMINER DECISION

RE: SSDP2014-00171 (ELST South Sammamish Segment A Appeals)

February 8, 2016

Page 45 of 46

minimized and any fertilizer used shall not contain phosphorous and shall be utilized consistent with the product's timing and quantity specifications. No herbicide shall be used for weed control unless specifically authorized by the City of Sammamish.

13. Due to the project location in a CARA, a condition will be applied to the Site Development/Grading Permit that fill material shall not contain concentrations of contaminants that exceed cleanup standards for soil as specified in the Model Toxics Control Act (MTCA). An imported fill source statement is required if more than 100 cubic yards of fill will be imported to the site. The City may require analytical results to demonstrate that fill materials do not exceed cleanup standards.
14. Per WAC 173-27-090, construction shall be commenced on the proposed trail widening and paving, and associated improvements, within two years of the effective date of a shoreline permit. Authorization to conduct development activities shall terminate five years after the effective date of this permit. The City may authorize a single extension for a period not to exceed one year based on reasonable factors, if a request for extension has been filed before the expiration date and notice of the proposed extension is given to parties of record and the City.

Decision issued February 8, 2016.

\s\ John E. Galt (Signed original in official file)

John E. Galt

Hearing Examiner

HEARING PARTICIPANTS ³⁷

Barbara Flemming, unsworn counsel
Kim Adams Pratt, unsworn counsel
Tom Hornish, unsworn counsel ³⁸
Gina Auld
Yammie Ho
Craig Buitrago
Frank Overton
Andrew Zagars
Reid Brockway
John Tremble
Robin Randels
Shelly Bowman

Devon Shannon, unsworn counsel
David Linehan, unsworn counsel
Erin Stines, unsworn counsel
Jenny Bailey
Paul Fendt
Colin Worsley
Mona Davis
Kathy Curry
Jan Bird
William Schultheiss
Jim Berry

³⁷ The official Parties of Record register is maintained by the City's Hearing Clerk.

³⁸ Mr. Hornish also testified as a sworn witness.

HEARING EXAMINER DECISION

RE: SSDP2014-00171 (ELST South Sammamish Segment A Appeals)

February 8, 2016

Page 46 of 46

NOTICE of RIGHT of RECONSIDERATION

This Decision is final subject to the right of any party of record to file with the Examiner (in care of the City of Sammamish, ATTN: Lita Hachey, 801 228th Avenue SE, Sammamish, WA 98075) a written request for reconsideration within 10 calendar days following the issuance of this Decision in accordance with the procedures of SMC 20.10.260 and Hearing Examiner Rule of Procedure 504. Any request for reconsideration shall specify the error which forms the basis of the request. See SMC 20.10.260 and Hearing Examiner Rule of Procedure 504 for additional information and requirements regarding reconsideration.

A request for reconsideration is not a prerequisite to judicial review of this Decision. [SMC 20.10.260(3)]

NOTICE of RIGHT of APPEAL

This Decision is final and conclusive after conclusion of the reconsideration period or process, as applicable, subject to the right of review before the State Shorelines Hearings Board in accordance with the procedures of Chapter 90.58 RCW, the Shoreline Management Act of 1971. See SMC 20.35.080, Chapter 90.58 RCW, and Washington Administrative Code regulations adopted pursuant thereto for further guidance regarding Hearings Board appeal procedures.

The following statement is provided pursuant to RCW 36.70B.130: "Affected property owners may request a change in valuation for property tax purposes notwithstanding any program of revaluation."
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EXHIBIT 4

**SHORELINES HEARINGS BOARD
STATE OF WASHINGTON**

SAMMAMISH HOMEOWNERS;
HERBERT and ELYNNE MOORE; and
PHILIP BRADBURY

SHB No. 15-012c

Petitioners,
v.

FINDINGS OF FACT, CONCLUSIONS OF
LAW AND ORDER

CITY OF SAMMAMISH and CITY OF
SAMMAMISH DEPARTMENT OF
COMMUNITY DEVELOPMENT,

Respondents.

KING COUNTY DEPARTMENT OF
NATURAL RESOURCES AND PARKS

Petitioner,
v.

CITY OF SAMMAMISH,

Respondent.

SAMMAMISH HOMEOWNERS;
HERBERT and ELYNNE MOORE; and
PHILIP BRADBURY

Petitioners,
v.

CITY OF SAMMAMISH; CITY OF
SAMMAMISH DEPARTMENT OF
COMMUNITY DEVELOPMENT; KING
COUNTY; KING COUNTY
DEPARTMENT OF NATURAL
RESOURCES AND PARKS; and LAKE
SAMMAMISH 4257 LLC,

Respondents.

FINDINGS OF FACT, CONCLUSIONS
OF LAW AND ORDER
SHB No. 15-012c

1 CITY OF SAMMAMISH and CITY OF
2 SAMMAMISH DEPARTMENT OF
COMMUNITY DEVELOPMENT

3 Petitioners,

4 v.

5 KING COUNTY DEPARTMENT OF
6 NATURAL RESOURCES AND PARKS;
7 SAMMAMISH HOMEOWNERS;
8 HERBERT and ELYNNE MOORE; and
9 PHILIP BRADBURY; WASHINGTON
STATE DEPARTMENT OF ECOLOGY,

Respondents.

10 These consolidated appeals involve challenges to a shoreline substantial development
11 permit (SSDP) granted to the applicant King County (County) for the redevelopment of the East
12 Lake Sammamish Trail (ELST) in the City of Sammamish (City). The County challenges
13 Conditions 2, 3, and 6 of the approved SSDP. Homeowners Herbert and Elynne Moore, Philip
14 Bradbury, and the Sammamish Homeowners (SHO) challenge alleged misapplications of
15 wetland regulations to the SSDP.

16 The Shorelines Hearings Board (Board) considering this matter was comprised of Kay M.
17 Brown, Presiding, Robert Gelder and Grant Beck.¹ Senior Deputy Prosecuting Attorneys
18 Barbara Flemming and Devon Shannon represented the County. Attorneys Kim Adams Pratt
19 and David A. Linehan, Kenyon Disend, PLLC, represented the City. George E. Toskey, the
20
21

¹A three-member panel is hearing this case pursuant to RCW 90.58.185.

1 President of Sammamish Homeowners (SHO) represented SHO. Herbert Moore and Philip
2 Bradbury represented themselves.²

3 The Board received the sworn testimony of witnesses, exhibits, and written closing
4 arguments on behalf of the parties. The Board also viewed the site of the Project authorized by the
5 SSDP. Having fully considered this record, the Board enters the following:

6 **FINDINGS OF FACT**

7 **The Project**

8 1.

9 The County, who is the landowner³ and applicant in this case, is undertaking the full
10 build out of the ELST which extends from Gilman Boulevard in Issaquah to Bear Creek in
11 Redmond. The existing interim trail runs along the eastern shore of Lake Sammamish and is
12 located in a King County right-of-way which was formerly the Burlington Northern Santa Fe
(BNSF) railroad corridor. Ex. P-1(6), p. 000144.

13 2.

14 The redeveloped ELST, when completed, is intended to create a paved 10.33 mile
15 regional multi-user trail and non-motorized alternative transportation corridor. The ELST is part
16 of the expanding Regional Trails System that now comprises 300 miles of alternative
17 transportation corridors. Ex. P-1(6), pp. 000145-146.

18

²Collectively, SHO and the other homeowner petitioners will be referred to as the Homeowners.

19 ³ The Board ruled, on summary judgment, that it does not have jurisdiction over real property claims. *Sammamish*
20 *Homeowners v. City of Sammamish*, SHB No. 15-012c. p. 10 (Order Granting Partial Summary Judgment to King
21 County, May 18, 2016)(Summary Judgment Order). The Board also concluded on summary judgment that the
County had met the requirements for a complete application for an SSDP for the Project. *Id.*, pp. 11-13. As a result,
Issue 5, pertaining to the County's application material concerning ownership of the Property, was dismissed. *Id.*,
13. Disputes with some of the Homeowners regarding the County's ownership of the Project property have been the
subject of adjudication in United States District Court, Western District of Washington. *See Hornish v. King*
County, Case No. C15-284-MJP.

1 3.

2 The ELST has been⁴ and will be constructed in several segments. The segment at issue
3 here is referred to as the South Sammamish Segment A (Segment A), and is approximately 1.25
4 miles long. It extends from the City of Sammamish's south boundary near SE 43rd Way to SE
5 33rd Street. Ex. P-1(6), p. 000144.

6 4.

7 The interim trail at Segment A is a gravel trail generally eight to ten feet wide which runs
8 roughly north to south.⁵ It is bounded by residential properties on the west and East Lake
9 Sammamish Parkway (Parkway) on the east. Eight driveways cross the trail in this area. Ex. P-
10 1, p. 000004. Lake Sammamish is approximately 0.25 miles west (downstream) of the trail. P-4,
11 p. 000009. Lake Sammamish is classified as a Shoreline of Statewide Significance. Because
12 parts of the Project are located within 200 feet of Lake Sammamish, the Project is subject to
13 shoreline jurisdiction. Zagars Testimony. The Project area includes five wetlands and five
14 streams. Ex. P-1(6), p. 000146.

15 5.

16 The Project involves the build-out of Segment A. The County proposes to widen the
17 interim trail in most areas to 12 feet of pavement bounded by two-foot-wide gravel shoulders and
18 a one-foot clear zone. Ex. P-1(6), p 000144. The Project will include earthwork, drainage
19 improvements related to the trail, retaining walls and other site improvements, landscaping and
20 fencing, and access and traffic control (bollards, striping, signage, etc.). Adjacent to recreational

21 ⁴ Several segments have already been completed. Ex. P-1(6), p. 000144.

⁵ For simplicity in this decision, the trail will be presumed to run north-south, with Lake Sammamish to the west and the Parkway to the east.

properties or where there is an edge hazard, a four-foot-tall, black-coated chain link fence will discourage trespass and prevent falls. Adjacent to critical areas, a split-rail fence will discourage people and pets from access. Ex. P-1, pp. 000002 and 000004. The Project will disturb approximately 6.6 acres and will result in approximately 2.5 additional acres of impervious surface. Ex. P-4, pp. 000009 and 000010.

Drainage

6.

The Project is in the East Lake Sammamish Basin, which is in the Upper Sammamish River Drainage in the Cedar/Sammamish Watershed. Streams in the East Lake Sammamish Basin generally originate in wetlands located on the Sammamish Plateau (Plateau), and drain west through steep ravines to Lake Sammamish. This Basin is subdivided into several subbasins, one of which is the Monohon Subbasin. The Project is located in the Monohon Subbasin. Much of the Monohon Subbasin drains directly to Lake Sammamish. Ex. P-1(6), p. 000154.

7.

In the past, naturally occurring drainage in the Project area consisted of multiple small discharges draining to Lake Sammamish. This natural drainage was disrupted by two linear developments, the railroad and the Parkway, which intercepted the multiple drainages. Several culverts had to be installed to carry the water from the east side of the Parkway and railroad to the west. Residential property owners along Lake Sammamish developed their own drainage systems to transport the water through their properties to the Lake. The result is a piece meal collection of different drainage systems. Fendt Testimony.

1 8.

2 The Project area receives runoff from the Plateau. The interim trail has a drainage system
3 consisting of culverts and ditches. Existing ditches and wetlands convey runoff to the streams,
4 which flow east to west beneath the interim trail to Lake Sammamish. Ex. P-4, p. 000010;
5 Buitrago Testimony. The trail is considered to be non-pollution generating. Overton Testimony;
6 See Ex. R-10, p. 14.

7 9.

8 At trail station 218 + 50 in the Project area, a 24-inch culvert drains water under the
9 existing trail westward, daylights briefly, and then drains into a 16-inch culvert which carries the
10 water under Shore Lane.⁶ Ex. P-4, pp. 000034 and 000038. The 24-inch culvert, which is within
11 the Project footprint, has been analyzed for conveyance capacity, and is adequately sized to
12 handle the 100-year storm event. The 16-inch culvert, which is off of the Project footprint, was
13 also analyzed. It is slightly undersized for conveyance of even a 25-year design storm. Ex. P-4,
14 p. 000043. From the 16-inch culvert, the water drains into an open channel on private property
15 and discharges into Lake Sammamish. Ex. P-4, pp. 000034 and 000038; Zagars Testimony;
16 Buitrago Testimony.

17 10.

18 There are well-documented stormwater drainage problems in the residential areas
19 adjacent to the Project. Drainage problems are caused by water running down from the Plateau
20 and collecting at the Parkway. The Parkway is crowned, so that water from the east side of the

21 _____
⁶ Shore Lane is a paved residential access road that runs parallel to the Parkway on the west side of the interim trail, between the trail and the houses on Lake Sammamish. Ex. P-12, p. 000001.

1 Parkway runs in a drainage ditch down that side of the Parkway. Water from the west side of the
2 Parkway is directed along the edge of the Parkway by a guard rail and concrete gutter. When the
3 water reaches two residential driveways, identified as Driveways 1 and 2, the water sheet flows
4 across these driveways to East Lake Sammamish Shore Lane SE (Shore Lane). Ex. P-12; Fendt
5 Testimony; Buitrago Testimony.

6 11.

7 The redeveloped trail, like the interim trail, will cross Driveways 1 and 2. Driveways 1
8 and 2 do not have any water collection system. Ex. P-4, p. 000038; Buitrago Testimony. The
9 Project as proposed will reshape parts of the driveways so that cars, crossing the trail on the
10 driveways, will have a smoother crossing. The planned work includes a slight steepening of the
11 driveways on the uphill and downhill side of the trail. There will be no increase of impervious
12 surface on the driveways, nor will the work have any effect on the drainage of the driveways.
13 The Project will not direct trail runoff towards the driveways, nor contribute to additional flows
14 to the driveways. Ex. P-4, p. 000044; Buitrago Testimony; Fendt Testimony.

15 12.

16 Paul Fendt, Geological Engineer and Senior Consultant for Parametrix⁷, specifically
17 addressed the question of whether the slight steepening of the driveways would increase the
18 velocity of the water flow on the driveways. Mr. Fendt utilized a formula that takes into account
19 the amount of rain, the roughness of the surface, and the slope for Driveways 1 and 2. He noted
20 that the driveways will start and end at the same elevation before and after the Project work, and
21

⁷ Parametrix is an engineering consulting firm working for the County on the Project. Ex. P-1, p. 000001.

1 that the Project will not add any impervious surface to the driveways. Based on his calculations,
2 he concluded that the velocity of the sheet flow would not increase due to the slight steepening
3 of the slope. Ex. P-31; Fendt Testimony. The City did not offer any evidence to refute Mr.
4 Fendt's analysis.

5 13.

6 Mr. Moore, an appellant in this case and a property owner at 4299 East Lake Sammamish
7 Shore Lane SE, has made multiple complaints to the City in the past about flooding of the garage
8 and basement of his home during heavy rain events. Mr. Bolger, at 4275 East Lake Sammamish
9 Shore Lane SE, has made similar complaints. Both describe the problem as stormwater running
10 from the east side of the Parkway, across the Parkway, down the driveways, and then down
11 Shore Lane. Ex. P-4, pp. 000042 and 000044.

12 14.

13 The Homeowners also express concerns about the lack of capacity of the 16-inch culvert
14 off of the Project site that receives water from the 24-inch culvert that is part of the interim trail
15 conveyance system. Ex. P-4, pp. 000042 and 000043. In November of 2014, a complaint was
16 made by Eva VanderHoeven, the property owner at 4923 East Lake Sammamish Shore Lane SE.
17 The VanderHoeven property contains a stream which receives water from the 16-inch culvert
18 and discharges it to Lake Sammamish. In November of 2014, stormwater surcharged the 16-inch
19 culvert and overflowed, causing heavy flows in the stream. Ex. P-4, pp. 000042, 000099-115.

15.

As part of the Project proposal, the County submitted a report entitled “East Lake Sammamish Master Plan Trail, South Sammamish Segment A, Technical Information Report (TIR). Ex. P-4. The report was prepared by Craig Buitrago, Parametrix Civil Engineer, and reviewed by Jenny Bailey, Parametrix Project Manager. Ex. P-4, p. 000003. The report provides stormwater design documentation for the Project. The report was submitted in draft stage in July and December of 2014, and was finalized in May 2015. Exs. R-6, P-4; Buitrago Testimony.

16.

The TIR is an almost 400-page document containing 10 sections and six appendices. Ex. P-4. It presents a complete analysis of applicable stormwater requirements set out in the 2009 King County Surface Water Design Manual (Manual) and documents the Project’s compliance with these requirements.⁸ Because the Project involves disturbance of over an acre and an increase of greater than 2,000 square feet of new and replaced impervious surfaces a full drainage review was required pursuant to stormwater permitting requirements. Ex. P-4, p. 000029. The TIR divides the Project area into nine analysis areas called threshold discharge areas (TDAs). The primary focus of the stormwater issues in this case is TDA 1 and TDA 2. Fendt Testimony.

⁸ The Manual’s requirements have been incorporated into the City’s Shoreline Master Program (SMP). Zagars Testimony. See also, SMC 25.01.060(5).

17.

Mr. Buitrago testified that, based on his analysis, the Project meets all of the requirements of the Manual including compliance with the Manual's eight core and five special requirements. He points to Table 2-2 of the TIR which succinctly summarizes these requirements and how the Project complies with them. Ex. P-4, pp. 000029 and 000030. Mr. Fendt, who worked with Mr. Buitrago on the TIR, concurs that the Project complies with the applicable requirements of the Manual. Buitrago Testimony; Fendt Testimony.

18.

One requirement in particular, Core Requirement 3, was the subject of considerable testimony at the hearing. Ex. R-10, §1.2.3, p. 43. Core Requirement 3 addresses flow control. It requires all proposed projects, including redevelopment projects, to provide onsite flow control facilities or flow control BMPs or both to mitigate the impacts of stormwater runoff generated from additional impervious services. *Id.* An exception is provided for a TDA which will not generate more than an increase of 0.1 cubic feet per second (cfs) in flow from the historic site conditions for the 100-year peak flow. Ex. R-10, p. 51; Buitrago Testimony.

19.

The City challenges the Project's compliance with Core Requirement 3 for TDA 1. In Mr. Buitrago's opinion, the Project complies with Core Requirement 3 for TDA 1 because it meets the criteria for the exception. Based on Mr. Buitrago's calculations, the increase in 100-year peak flow from the historic site conditions is 0.117 cfs. Mr. Buitrago testified that based on the conventions in the applicable version of the Manual, this number is rounded to the tenth

1 place because the standard (not more than 0.1 cfs) is provided to the tenth place in the Manual.
2 Therefore the raw data number becomes 0.1 cfs and the Project qualifies for the exception from
3 Core Requirement 3. Exs. P-4, pp. 000052, 000117-119; R-10, p. 51; Buitrago Testimony.

4 20.

5 Andrew Zagars, City Engineer, has not performed his own stormwater analysis and does
6 not dispute Mr. Buitrago's data and calculations. However, Mr. Zagars disagrees with Mr.
7 Buitrago's conclusion that the Project complies with Core Requirement 3. In Mr. Zagars'
8 opinion, the raw data shows an increase of 0.117 cfs, which is greater than 0.1. Zagars
9 Testimony. The Board finds Mr. Buitrago's testimony more persuasive on this point because he
10 was the engineer that prepared the stormwater analysis, applied the Manual, and made the
11 calculations. Therefore, the Board finds that Mr. Buitrago's interpretation of the Manual
12 convention on rounding is correct, and that the Project complies with Core Requirement 3 of the
13 Manual.

14 21.

15 Another Core Requirement in contention is Core Requirement 2. Core requirement 2
16 requires analysis of the potential offsite drainage and water quality impacts associated with
17 development of the Project site and appropriate mitigation of those impacts. Ex. R-10, p. 32.
18 The Manual states that:

19 A proposed Project must not significantly aggravate existing drainage problems or
20 create new problems as a result of developing the site. This manual does not
21 require development proposals to fix or otherwise reduce the severity of existing
downstream drainage problems, although doing so may be an acceptable
mitigation.

1 Ex. R-10, p. 37; Buitrago Testimony.

2 22.

3 The Manual defines downstream drainage problems as conveyance system nuisance
4 problems or severe erosion or flooding problems. Ex. R-10, p. 34. In the TIR, the County chose
5 to categorize the problems experienced by the neighbors as conveyance system nuisance
6 problems. Ex. P-4, pp. 000042-44; Buitrago Testimony. Mr. Buitrago explained that he chose
7 this category because there was no threat to health or safety from the flooding described in the
8 complaints. Buitrago Testimony. The City Engineer disagreed. In his opinion, the problem
9 should have been labeled a severe flooding or erosion problem. Zagars Testimony.

10 23.

11 Under the Manual, whether a problem is defined as a “conveyance nuisance” or a
12 “severe” flooding or erosion problem, the same outcome is required: Additional mitigation must
13 be evaluated under Section 1.2.2.2 of the Manual under Drainage Problem-Specific Mitigation
14 Requirements. Ex. R-10, pp. 37-39. Section 1.2.2.2 requires satisfaction of one of six possible
15 mitigation requirements regardless of which category the problem is in. Mr. Buitrago testified
16 that the County has satisfied two of the six listed mitigation measures by (1) completing a Level
17 2 stormwater analysis establishing that the Project should not create or aggravate downstream
18 problems and (2) by establishing that the Project qualifies for an exception from Core
19 Requirement 3. Based on the evidence presented, the Board finds that the Project complies with
20 Core Requirement 2 of the Manual. Buitrago Testimony.

1 24.

2 Mr. Buitrago further testified that the trail right of way's contribution to the 100-year
3 peak flow rate in the area of the current drainage complaints is 0.34 cfs out of a total contributing
4 flow of 30.64 cfs. Of that 0.34 cfs, only 0.144 cfs of the 100-year peak flow, or less than half of
5 one percent of the total flow, comes from the trail development Project itself. Ex. P-4, p.
6 000043. The additional contribution to the 100-year peak flow, from the existing trail condition
7 to the redeveloped trail, will be 0.07 cfs. In Mr. Buitrago's opinion, this change in flow is
8 insignificant. Buitrago Testimony.

9 **Wetlands**

10 25.

11 Segment A also contains wetlands. The County utilized Parametrix to prepare a critical
12 areas study for the Project area. Ex. P-1(6), p. 000146. In the study, Parametrix delineated the
13 five wetlands in the Project area. *Id.*, pp. 000154-165. The wetlands range in size from .04 acre
14 to 0.4 acre, and are classified as either Category III or Category IV wetlands.⁹ *Id.*, p. 000158.
15 The standard buffer width for wetlands is set out in Sammamish Municipal Code (SMC)
16 21A.50.290(2). Ex. P-1(6), (Table 2), p. 000150. The buffer width for all five wetlands is 50
17 feet. *Id.*; Curry Testimony.

18 26.

19 The critical areas study states that:
20

21 ⁹ Wetlands are delineated according to the methods specified by the U.S. Army Corps of Engineers Wetlands
Delineation Manual. Ex. P-1(6), p. 000148. These methods comply with those adopted by Washington State
pursuant to WAC 173-22-035. *Id.*

1 [W]here a legally established and constructed street or the East Lake Sammamish
2 Trail transects a wetland buffer, the City of Sammamish may approve a
3 modification of the standard buffer width to the edge of the street or the East Lake
4 Sammamish Trail under certain conditions. . . .Based on City code interpretation
5 used for a separate Project, the East Lake Sammamish Trail is consistent with this
6 street definition.

7 Ex. P-1(6), pp. 000149 and 000150. The Parametrix Project manager, Jenny Bailey, testified that
8 although the critical area study references the buffer modification option, the buffer modification
9 was not applied to this Project. Instead, the full 50-foot buffers were applied to all of the
10 wetlands on the Project site. Ex. P-1(6), p. 000158; Bailey Testimony.

11 27.

12 The Project will have temporary impacts on wetlands, and both temporary and permanent
13 impacts on wetland buffers. Ex. P-1(6), p. 000166; Curry Testimony. The County made design
14 refinements to the Project to minimize impacts to wetlands buffers. Ex. P-1(6), p. 000168. In
15 spite of these efforts, approximately 0.28 acres of wetland buffer will be eliminated as a result of
16 trail widening and realignment. *Id.*, p. 000167. To mitigate for these impacts, the County will
17 provide compensatory mitigation at four sites in the ELST right-of-way which will include a
18 minimum of 0.28 acres of increased and enhanced wetland buffer, 0.26 acres of wetland buffer
19 enhancement, and 0.02 acres of wetland enhancement. Ex. P-1(6), p 000170; Curry Testimony.

20 **Traffic**

21 28.

22 206th Avenue is a no-outlet residential access street that serves 15 homes. The posted
23 speed limit is 25 miles per hour (mph) although the actual speed in and out of the neighborhood
24 is less than 15 mph. The number of average daily trips on 206th Avenue was initially estimated

1 at 180 trips. Ho Testimony. A trip count that was performed from May 10 to May 12, 2016,
2 confirmed that the actual average daily trips were less than estimated number. Ex. P-22; Ho
3 Testimony.

4 29.

5 The speed limit on the trail is 15 mph. The volume of trail use, once the ELST is fully
6 paved, is estimated to be 2,500-4,000 users per day based on data in the Final Environmental
7 Impact Statement. Ho Testimony. Additional data that was gathered and analyzed indicates that
8 bicycle and pedestrian volumes in the future will range from 2,236 users to 8,634 users on peak
9 weekend days. Ex. P-19, pp. 000011-12. The volume of use currently, and until paving of the
10 ELST is completed, is lower than this estimate. Chen Testimony.

11 30.

12 A key controversy between the City and County in this case involves the correct location
13 for a stop sign at the intersection of 206th Avenue and the ELST. There is an existing stop sign
14 at the intersection on the interim trail which stops trail traffic. There is no stop sign on 206th
15 Avenue stopping vehicle traffic. There is a crosswalk across 206th Avenue for trail users. Once
16 trail users enter the crosswalk, vehicles are required to stop by state law. Ho Testimony.

17 31.

18 The County's Project application proposed a change in the placement of the stop sign.
19 The County's proposal was to have the stop sign stop traffic on 206th Avenue instead of
20 stopping the trail traffic. Ex. P-1(2); Ho Testimony. The City, in response to the County's
21 application, imposed Condition 6 on the SSDP. Condition 6 requires that a condition be applied

1 to the site development/grading permit that relocates the stop sign on 206th Avenue back to its
2 current location. Ex. P-1, p. 000013.

3 32.

4 The Board heard extensive testimony from two traffic engineers regarding the placement
5 of the stop sign. Yammie Ho, Senior Civil Engineer with Parametrix, designed the Project
6 proposal. The County's proposed design assigns priority of use to the trail users by relocating
7 the stop sign to stop traffic on 206th Avenue instead of on the trail. In arriving at this design
8 proposal, Ms. Ho considered the regulations and standards set forth in the Manual on Uniform
9 Traffic Control Devices (MUTCD) (Ex. P-10), the American Association of State Highway and
10 Transportation Officials Guide for the Development of Bicycle Facilities (AASHTO Bicycle
11 Facilities) (Ex. P-13) and the Washington State Department Of Transportation (WSDOT) Design
12 Manual for Shared Use Paths (Ex. P-5). In determining the priority of assignment at the
13 intersection, she considered the relative speeds and volumes of trail and road users, and the
14 relative importance of the two facilities. Ex. P-10, pp. 000026-27. Applying these factors, and
15 using professional engineering judgment, she determined that the priority of use should be
16 assigned to the trail users. Exs. P-6; P-10, pp. 000009, 000026-28; Ho Testimony.

17 33.

18 The City Traffic Engineer, Steven Chen, disagrees with Ms. Ho's opinion. Also pursuant
19 to direction in MUTCD, Mr. Chen considered the accident history at the intersection at issue.
20 The stop sign has been in place on the ELST for over 10 years and there have been no reported
21 accidents. He also considered the limited stopping distance for cars turning off of 206th Avenue,

1 and sight distance triangles from the perspective of the trail users. Mr. Chen was not as
2 influenced by the estimated volume of trail use because it could be some time until the trail is
3 fully paved. He notes that the AASHTO Bicycle Facilities states that volumes on regional trails
4 often remain low until all segments of the trail are complete; that it can be appropriate to assign
5 priority to roadway traffic until volume increases; and that priority assignments should be
6 reviewed occasionally. Ex. P-13, p. 000034. Mr. Chen testified that it is standard procedure for
7 the City to evaluate changes in traffic patterns, and that assignment of priorities can be changed
8 in the future. His conclusion, using professional engineering judgment, is that the stop sign
9 should remain where it is and continue to stop trail users. Chen Testimony.

10 **Permitting process**

34.

11 The County submitted an application for an SSDP for the Project on July 31, 2014. Ex.
12 P-1(1). Approximately one year later, the City approved the County's application for an SSDP.
13 The City's decision, issued on July 7, 2015, included 19 conditions of approval. Ex. P-1, pp
14 000012-14. Three of these 19 conditions were challenged by the County and currently remain in
15 dispute. The disputed conditions are Condition 2 (pertaining to drainage from Driveways 1 and
16 2), Condition 3 (pertaining to the culvert located at station 218.5) and Condition 6 (pertaining to
17 the location of the stop sign at the intersection of 206th Avenue and the trail). In addition, the
18 Homeowners challenged the way wetland buffer regulations were applied to wetlands on the
19 Project.

35.

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

Based upon the foregoing Findings of Fact, the Board enters the following:

CONCLUSIONS OF LAW

1.

The Board has jurisdiction over the parties and the subject matter in this case pursuant to RCW 90.58.180. The Board considers the scope and standard of review of the appealed action de novo, unless otherwise required by law. WAC 461-08-500(1). The Petitioners, as the parties challenging the approved permit, have the burden of proof. WAC 461-08-500(3).

2.

The County and the Homeowners appealed the City's approval of the SSDP to the Board. The pre-hearing order entered in this case identified eight issues:

1. Whether, under the City of Sammamish Municipal Code (SMC), the City's Hearing Examiner has jurisdiction to hear challenges to Shoreline Substantial Development Permits?
2. Whether Condition No. 2 of the Shoreline Substantial Development Permit No. SSDP2014-00171 (SSDP) regarding drainage improvements is consistent with the requirements of the Shoreline Management Act ("SMA") Ch. 90.58 RCW; Washington Administrative Code ("WAC") Ch. 173-27; the Sammamish Shoreline Master Program ("SSMP"); Title 25 of the SMC, and other applicable storm water regulations?
3. Whether Condition No. 3 of the SSDP requiring further analysis and information regarding stormwater capacity and flood control measures is consistent with the SMA, WAC Ch. 173-27; SSMP; and other applicable storm water regulations?
4. Whether Condition No. 6 in the SSDP requiring King County to relocate a stop sign so that trail users stop rather than traffic on the public roadway is consistent with the SMA, WAC Ch. 173-27; SSMP; and other applicable transportation regulations?
5. Whether the City erred in processing the application for the SSDP because of insufficient evidence of King County's property ownership?

- 1 6. Does the decision to grant the SSDP improperly consider abutting ditches to be
2 wetlands, or if they are wetlands, misapply wetland buffer regulation to re-align
the ELST, in violation of the SMA, the SSMP and/or the SMC?
- 3 7. Did the City improperly apply wetland regulations in establishing the proposed
4 ELST alignment and/or determining appropriate mitigation for impacts to
5 wetlands and their accompanying buffers by applying regulations, including a
6 wetland exemption in SMC 21A.50.290(1)(a), that was not adopted as part of the
SMP in effect at the time of the filing of the County's SSDP application and/or
that are otherwise inapplicable here?
- 7 8. Is the City entitled to any deference in interpreting its SMO, including relying
8 upon its own formal code interpretations of a critical areas ordinance thereof,
including *Citizens for Rational Shoreline Planning v. Whatcom Cty*, 172 Wn. 2d
384(2011)?

9
10 3.

11 The County filed a motion for partial summary judgment on Issues 1 and 5, which was
12 granted by the Board. *See* Summary Judgment Order. These consolidated appeals then
13 proceeded to a three-day evidentiary hearing on the remaining issues (Issues 2 through 4, and 6
14 through 8). Issue 8 was withdrawn by the Homeowners in their closing argument.
15 Homeowners' closing statement, p. 3. The remaining issues, Issues 2 through 4, and Issues 6
16 and 7, are addressed by this order.

17 **A. Drainage (Issues 2 and 3)**

18 4.

19 Issues 2 and 3 involve the County's challenge to conditions imposed by the City on the
20 SSDP. WAC 173-27-150(2) sets out the standard for a local government's authority to condition
21 shoreline substantial development permits. It states:

(2) Local government may attach conditions to the approval of permits as necessary to assure consistency of the Project with the [Shoreline Management Act] and the local master program.

WAC 173-27-150(2).

The Board, in a 1982 decision, held that conditions on a shoreline substantial development permit must be reasonable. *Green v. City of Bremerton*, SHB No. 81-37, COL IV (May 26, 1982)(Citing *Weyerhaeuser Co. v. King Co.*, SHB No. 155, as affirmed on review in *Weyerhaeuser v. King County*, 91 Wn. 2d 721 (1979)).

5.

The County does not dispute that the City has the authority to impose conditions on the SSDP. County's prehearing brief, p. 4. It argues, however, that for a condition to be reasonable, it must address some impact that is a result of the proposed development, and the condition must be roughly proportional to the impact sought to be mitigated. The City does not dispute that a condition must address an impact that is a result of the proposed development. The City states in its briefing that the goal of both of the conditions challenged here is to mitigate for aggravation of existing problems caused by the proposal. City's prehearing brief, p. 2 (citing Mr. Zagars' Testimony). The City also states that it is the applicant's duty to mitigate impacts of its Project. *Id.*, p. 4. The Board concludes that for either Conditions 2 or 3 to be valid, they must address impacts from the Project.

6.

The challenged portion¹⁰ of Condition 2 states:

¹⁰ The County is not challenging the first two sentences and the last sentence of the condition. Overton Testimony.

1 As part of the grading permit review, drainage from driveway #1 and driveway #
2 shall be substantially captured and managed. As part of a larger drainage
improvement in that area, additionally improvement may be required if deemed
appropriate by the City.

3 Ex. P-1, p. 000012.

4 7.

5 Here, the weight of the evidence does not support the conclusion that the Project will
6 have any impact on the existing drainage problem on Driveways 1 and 2. The Project will not
7 increase the impervious surface on the driveways, nor will it direct trail runoff toward the
8 driveways or contribute to additional flows to the driveways. While the work will result in a
9 slight steepening of the slope of the driveways above and below the trail, the analysis performed
10 by the County's experts establishes that this slight change will not increase the velocity of
11 surface water flow over the driveways. The City did not offer any analysis of its own to refute
12 the County's evidence.

13 8.

14 The Board concludes that the challenged portion of Condition 2 is not necessary to
15 address impacts from the Project on Driveways 1 and 2, because there is no evidence that the
16 Project will impact the drainage on the driveways. Therefore the Board concludes Condition 2 is
17 not reasonable and not consistent with the City's authority in WAC 173-27-150(2).

18 9.

19 Condition 3 states:

20 Prior to Site Development Plan approval and issuance of a grading permit by the
21 City, the culvert located at station 218.5 shall be further analyzed by the County.
Additional information/studies shall be submitted to the City to detail culvert

1 stormwater capacity, fish passage potential, and the stormwater outfall location.
2 The applicant shall coordinate with the City and neighboring properties owners on
3 culvert replacement and other needed work for improved fish passage, where
4 appropriate,¹¹ and any needed flood control measures on this stream (located
5 between stations 218 and 219). Plans submitted for the site development/grading
6 permit shall reflect the successful outcome of this coordination effort.

7 Ex. P-1, pp. 000012 and 000013.

8 10.

9 The City bases imposition of Condition 3 on the fact that the Project will contribute
10 stormwater, albeit in a very small amount, to an offsite culvert which already lacks sufficient
11 capacity to handle a 25-year storm event. The City contends that Condition 3 is necessary to
12 meet the requirements of the Manual, which have been incorporated into the SMP. The City also
13 argues that Condition 3 is necessary to meet the policies of the Shoreline Management Act
14 (SMA) and the policies and regulations of the SMP.

15 11.

16 The Board has found that the Project is consistent with the Manual, without the need for
17 additional flow control, because the Project qualifies for the exception in Core Requirement 3 for
18 a TDA which will not generate more than an increase of 0.1 cfs in flow from the historic site
19 conditions for the 100-year peak flow. *See Supra*, Finding of Fact 20. Therefore, the Board
20 concludes that consistency with the Manual is not a basis for imposition of Condition 3.

21 12.

The City also cites to SMA policies and SMP policies and regulations as a basis for
Condition 3. The SMA policy which the City relies on states that “Permitted uses in the

¹¹ The City has agreed that information provided by the County regarding fish passage satisfies the fish passage requirement in Condition 3 without further information or additional construction from the County. City’s prehearing brief, p. 7, fn. 5.

1 shorelines of the state shall be designed and conducted in a manner to minimize, insofar as
2 practical, any resultant damage to the ecology and environment of the shoreline area and any
3 interference with the public's use of the water.” RCW 90.58.020. The City acknowledges that
4 the Project supports another policy goal under the SMA: the public’s access to the shoreline
5 (improvement of a public trail along Lake Sammamish). *Id.* The City argues, however, that the
6 SMA prioritizes protection of the resources and ecology of the shoreline over increasing public
7 access to the shorelines. RCW 90.58.020.

8 13.

9 The City also cites several policy sections in its SMP. These policy statements distill into
10 a single theme: shoreline development should not result in a net loss of ecological or shoreline
11 function.¹² See SMC 25.01.050(6)(b), 25.03.020(7), 25.04.010 (2)(b) and (d). The policies
12 further clarify that regulations of the SMP must require development to avoid, minimize and
13 mitigate damage to the ecology and environment so that shoreline ecological functions and
14 processes are protected. SMC 25.04.010(2)(c).¹³

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16
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18
19 ¹² See SMC 25.02.010(58) for the City’s definition of “no net loss”.

20 ¹³ The Board has held in past decisions that the goals, policies, and objectives contained in local shoreline master
21 programs cannot be applied in a regulatory fashion to a shoreline permit, separate and apart from the shoreline
master program regulations. *Richter v. City of Des Moines*, SHB No. 10-013, p. 7 (Order on Partial Summary
Judgment, Dec. 7, 2010)(Citing *Concerned Neighbors for East Bay Drive v. City of Olympia*, SHB No. 08-036
(2009)(COL 9). However, the goals, policies and objectives, which are a part of the SMP are still statements of law,
and can and should be used when interpreting and applying the development regulations to a particular permit
decision. *Id.*

14.

The SMP regulation which implements this policy direction requires development projects to mitigate environmental impacts “not otherwise avoided or mitigated by compliance with this program and other applicable regulations.” SMC 25.06.020(1) & (7).

15.

The City argues that Condition 3 is necessary to achieve consistency with SMC 25.06.020(1) and (7). It contends that this regulation requires that the addition of any flow, no matter how small, to an otherwise deficient off Project drainage culvert, must be mitigated. The City argues that the County failed to consider ways to mitigate for the flow because this analysis was not required by the Manual. The County’s response to this argument is that by complying with the Manual it is complying with “other regulations” and therefore avoiding impacts consistent with SMP 25.06.020 (1) & (7).

16.

The Board concludes that the weight of the evidence establishes that Condition 3 is not necessary to achieve consistency with the SMA and SMP. While a de minimis increase in water volume through the already deficient off-site culvert will occur as a result of the Project (additional flow of less than half of one percent of the total flow, or 0.07 cfs), there was no evidence presented that this increase would cause any environmental impact. By establishing that the increased flow was so low that it qualified for an exemption from the Manual flow control requirements, the County met its burden to demonstrate that the increase would not cause environmental impacts requiring mitigation.

17.

The Manual itself is designed to minimize impacts from storm water runoff. R-10, p. 8.

The authors of the Manual state:

As development of the County's landscape occurs and changes the quantity and quality of surface and storm water runoff, great care must [be] taken to minimize the impacts of these changes to natural resources, public safety, and property. This necessitates the provision of surface and storm water management systems that not only mitigate such impacts but must comply with the County's National Pollutant Discharge Elimination System (NPDES) General Municipal Stormwater Permit issued by the Washington State Department of Ecology pursuant to the Clean Water Act.

This manual contains the requirements and standards for designing such surface and storm water management systems in King County.

It is reasonable to assume that by exempting this level of flow increase from flow requirements, the authors of the Manual concluded that the level would not have an environmental impact. This is consistent with Mr. Buitrago's testimony that the amount of the increase was insignificant. In response to this showing by the County, the City did not present any evidence establishing that there would be environmental impacts from the de minimis increase in flow.

18.

In light of the lack of evidence of environmental impact from the Project, Condition 3 is unreasonable. Condition 3 requires the County to step in and solve a complicated preexisting issue regarding stormwater drainage problems on private property in order to be allowed to proceed with a Project that will have no established impact on the existing drainage problems. While the Board sympathizes with the private landowners that are struggling with drainage

1 problems, the Board concludes this condition is not reasonable under the circumstances. The
2 Board strikes Condition 3 in its entirety¹⁴.

3 **Stop sign (Issue 4)**

19.

4 Condition 6 of the SSDP states:

5 A condition will be applied to the site development/grading permit that the stop
6 sign on 206th Avenue SE (station 239 +00) shall be relocated to have trail users
7 stop and not control traffic on the public roadway.

8 Ex. P-1, p. 000013. The County objects to this condition on the basis that its design engineer
9 believes that stopping trail traffic is inconsistent with traffic standards and regulations.

20.

10 Condition 6 is an unusual condition to be placed on an SSDP. It arose out of an unusual
11 application submittal: the County applicant proposed a change in the location of an existing stop
12 sign in its application for an SSDP. Generally SSDP applications do not provide final
13 engineering detail in their applications. This level of specificity is generally reserved for
14 building permit applications rather than environmental applications such as shoreline permits.
15 See *i.e. Iddings v. Mason Co.*, SHB No. 08-031, FF 10 (June 22, 2009)(Finding that “[f]inal
16 engineering detail is not provided on the proposal drawing because that level of specificity is
17 typically provided in connection with building permit applications rather than environmental
18 permits, such as a shoreline permit.”). Certainly, it is a rare situation where, as the City describes
19

20 ¹⁴ An additional basis for striking the first two sentences of Condition 3 is that the requested analysis has already
21 been completed. The County’s analysis is set out in the TIR, Ex. P-4, p. 000043, and was testified to by Mr.
Buitrago at the hearing. The completed analysis establishes that the 24-inch culvert on the Project site is adequate to
meet conveyance for the 100-year design flood, but that the 16-inch culvert off of the Project site is slightly
undersized for even conveyance of the 25-year design storm. No evidence was offered challenging this analysis,
and the Board concludes the analysis that was done satisfies the first two sentences of Condition 3.

1 it, “the SSDP application propose[s] an unauthorized change in the current traffic control.”

2 City’s prehearing brief, p. 16.¹⁵

3 21.

4 At the hearing, the City moved to dismiss Issue 4, which is the County’s challenge to
5 Condition 6, as beyond the jurisdiction of the Board. The City argues that the Board does not
6 have jurisdiction to review the City engineer’s determinations regarding placement of stop signs
7 on City streets. The Board agrees with the City that it does not have jurisdiction over the City
8 engineer’s decisions on developer’s application for right of way permits. These permit decisions
9 are subject to a different appeal process entirely, ultimately proceeding to Superior Court under
10 the Land Use Petition Act.

11 22.

12 The Board does, however, have jurisdiction to determine whether a condition placed on
13 an SSDP complies with the review criteria for SSDPs, as set out in WAC 173-27-150(2). That
14 criteria, as previously discussed herein, is whether the condition is necessary to assure
15 consistency of the Project with the SMA and the SMP. The Board has jurisdiction to review
16 Condition 6 on this basis. The City’s motion to dismiss Issue 4 for lack of jurisdiction is denied.

17 23.

18 Issue 4 challenges whether Condition 6 is necessary to assure that the permit is consistent
19 with the SMA, WAC Ch. 173-27, the SMP, and other applicable transportation regulations.
20 None of the cited shoreline laws, the SMA, WAC Ch. 173-27, or the SMP, contain specific

21

¹⁵ The City notes that developer’s plans for placement of traffic signs are an issue that typically arises when a developer applies for a right of way permit to install signage. City’s closing brief, p. 8, fn. 2.

1 mention of traffic regulations or traffic safety in the shorelines. The most the parties point to is
2 one of the SMP's general goals which references "the safe movement of people and goods in the
3 shoreline" (SMC 25.03.070(1)) and the definition of public interest, which includes protecting
4 the health and safety of the public from a shoreline use or development (SMC 25.02.010(68).
5 The SMP does contain a short section on transportation regulations, but this section is clearly
6 aimed at addressing the environmental impacts from transportation uses in the shoreline. *See*
7 SMC 25.07.100. An extensive system of traffic standards and regulations exist, however,
8 separate and apart from shoreline regulation. *See i.e.* Ch. 46 RCW (Motor Vehicles), Ch. 47
9 RCW (Public Highways and Transportation), WAC Ch. 308 (Department of Licensing) and
10 WAC Ch. 468 (Department of Transportation). Application of these standards and regulations
11 are not within this Board's expertise, or its jurisdiction.

12 24.

13 The Board concludes that a condition pertaining to the placement of a stop sign on this
14 proposal is not necessary to achieve consistency with the SMA, or the provisions of the SMP,
15 because neither law contains requirements pertaining to traffic regulation or placement of traffic
16 control devices. Therefore, the Board strikes Condition 6.

17 25.

18 In doing so, the Board is not opining on the proper placement of the stop sign pursuant to
19 traffic regulations and standards. Instead, the Board leaves this issue to be addressed in other
20
21

1 more appropriate permits (right of way permits, development permits, grading permits) and their
2 subsequent review, if necessary, in the proper forum.¹⁶

3 **Homeowners issues (Issues 6 and 7)**

26.

4 Issues 6 and 7 pertain to the Homeowners' contentions that: (1) the wetland delineations
5 on the site are incorrect and (2) that buffer modifications were improperly applied pursuant to
6 SMC 21A.50.290.

27.

8 The testimony and exhibits presented at the hearing established that a professional
9 wetland delineation had been completed for the site and five wetlands were identified; that a 50-
10 foot buffer was required for all of the wetlands; that 0.28 acres of wetland buffer will be
11 eliminated as a result of trail widening and realignment; and that the county has provided
12 compensatory mitigation for these impacts. Findings of Fact 25, 26 and 27, *Supra*.

28.

14 The Homeowners presented no expert testimony which called into question the validity
15 of the wetland delineation, and therefore the Board concludes that the Homeowners have failed
16 to meet their burden of proof on Issue 6.

29.

18 Issue 7 reflects the Homeowners' mistaken belief that the County relied on SMC
19 21A.50.290 to support a buffer modification on this Project. This belief was at least partially
20

21 ¹⁶ In the interests of efficient government, the Board encourages the City and County to make every effort to come to some agreement on this issue without resort to further litigation.

1 based on the confusing statement in the final critical areas study which references the buffer
2 modification option in the “Methodology” section. See Ex. P-1(6), p. 000149. The unrefuted
3 testimony of Jenny Bailey, Consultant Project Manager at Parametrix, establishes that the buffer
4 modification was not used. Therefore, there is no need for the Board to address whether or not
5 use of the buffer modification in this situation would have been appropriate. The Board
6 concludes that the Homeowners have failed to meet their burden of proof on Issue 7.

7 30.

8 The remainder of the Homeowners’ presentation at the hearing and in their closing
9 argument raises new issues not stated in the prehearing order. For example, the Homeowners
10 closing brief raises the issue of whether the width of the redeveloped path is consistent with or
11 required by the AASHTO Bicycle Facilities, and whether the Trail Corridor Development
12 Standards set out in the City’s development code, SMP 21A.30.210, are met. The Board will not
13 address issues not identified in the prehearing order and raised for the first time at hearing. See
14 WAC 461-08-460 (“The issues stated in the prehearing order shall control the subsequent course
15 of the proceedings, unless modified for good cause by subsequent order.”).

16 31.

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

19 Having so found and concluded, the Board enters the following:
20
21

1 **ORDER**

2 The City's Motion to Dismiss Issue 4 is HEREBY DENIED.

3 King County's Shoreline Substantial Development Permit No. 2014-00171 is HEREBY
4 AFFIRMED, with the following modifications:

- 5 1. The third and fourth sentences of Condition 2 are stricken.
6 2. Condition 3 is stricken.
7 3. Condition 6 is stricken.

8 ORDERED this 14th day of September, 2016.
9

10 **SHORELINES HEARINGS BOARD**

11
12 KAY M. BROWN, Presiding

13
14 *See Concurrence*
15 GRANT BECK, Member

16
17 ROBERT GELDER, Member
18
19
20
21

EXHIBIT 5

THE HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

KING COUNTY,

Plaintiff,

v.

CITY OF SAMMAMISH,

Defendant.

No. 2:17-cv-00921-JCC

**DECLARATION OF KEVIN BROWN
IN SUPPORT OF PLAINTIFF KING
COUNTY'S MOTION FOR
PRELIMINARY INJUNCTION**

I, Kevin Brown, declare and state the following:

1. I am over eighteen years of age. I am employed by King County as the Director of the Parks and Recreation Division of the Department of Natural Resources and Parks ("Parks Division"). As the Parks Division Director, I am responsible for managing the division and implementing park policies. I have personal knowledge of the facts contained in this declaration and am otherwise competent to testify to the matters in this declaration.

2. The King County Department of Natural Resources and Parks works in support of sustainable and livable communities and a clean and healthy natural environment. Our mission is to foster environmental stewardship and strengthen communities by providing regional parks, protecting the region's water, air, land and natural habitats, and reducing, safely disposing of and creating resources from wastewater and solid waste.

DECLARATION OF KEVIN BROWN IN SUPPORT OF
PLAINTIFF KING COUNTY'S MOTION FOR PRELIMINARY
INJUNCTION- 1

No. 2:17-cv-00921-JCC

Daniel T. Satterberg, Prosecuting Attorney
CIVIL DIVISION, Litigation Section
900 King County Administration Building
500 Fourth Avenue
Seattle, Washington 98104
(206) (296-8820 Fax (206) 296-8819

1 3. In early 1997, the BNSF railroad conveyed its ownership interest in the rail
 2 corridor that runs along the eastern shore of Lake Sammamish ("Corridor") to The Land
 3 Conservancy ("TLC") by Quit Claim deed. On June 11, 1997, TLC initiated railbanking under
 4 the federal Trails Act by petitioning the Surface Transportation Board ("STB"). The petition
 5 included King County's Statement of Willingness to Assume Financial Responsibility as the
 6 interim trail sponsor. *See The Land Conservancy of Seattle & King Cty.- Abandonment*
 7 *Exemption-in King Cty., WA*, No. AB-6 (SUB 380X), 1998 WL 638432, at *1 (Sept. 16, 1998).
 8 On September 16, 1998, the STB issued its Notice of Interim Trail Use ("NITU") in order to
 9 facilitate railbanking and interim use of the Corridor as a recreational trail under the Trails Act.
 10 *Id.* In accord with the NITU, King County and TLC reached an agreement where King County
 11 would serve as the trail sponsor. As part of this arrangement, in September 1998, King County
 12 acquired all of TLC's ownership interests in the portions of the Corridor. Thus, King County
 13 currently acts as the trail sponsor and holds all property interests formerly held by BNSF and
 14 TLC.

15 4. The Corridor is a King County park. After taking ownership of the Corridor and
 16 becoming the Trail Sponsor, King County removed the rails and constructed an interim, gravel
 17 surface trail along the length of the Corridor, which is known as the East Lake Sammamish
 18 Trail ("ELST"). The interim gravel trails was opened in 2006 so that the public could utilize the
 19 ELST corridor while the County underwent a comprehensive master planning and
 20 environmental review process for the paved trail. This process was completed in 2010.

21 5. Since 2010, the County has been constructing the ELST in segments. The first
 22 three segments have been completed, and the fourth segment – South Segment A – is currently
 23 in construction. The County has submitted its permit applications for the final segment, known
 24 as South Segment B. South Sammamish Segments A and B are located in the middle of the
 25 eleven (11) mile trail within the boundaries of the City of Sammamish ("City"). The

1 completion of both A and B of the ELST are a high priority for King County's regional trail
2 system.

3 6. In constructing the ELST within the Corridor, the Parks Division has numerous
4 responsibilities. First and foremost, in accord with the federal Trails Act, we are constructing a
5 regional trail on the Corridor as an alternative transportation facility and for recreational use.
6 In managing the Corridor, we are also responsible under the Trails Act for preserving the
7 Corridor for possible reactivation by a *bona fide* freight rail operator. Although King County
8 has designed the ELST with the intention of minimizing impacts to adjacent homeowners,
9 including avoiding impacts on existing structures, buildings and access roads, the Corridor is
10 public land available for appropriate public uses.

11 7. As explained in King County's Record of Decision for the ELST: "The need for
12 the [ELST] is driven by several factors including: (1) the regional need for alternative
13 transportation corridors between major business centers, (2) the need for nonmotorized
14 recreational trails to support a growing population, and (3) the need to make connections among
15 other existing and planned trails. The trail would provide an option for commuters on local
16 roadways and provide another link between business centers. The continuing increase in
17 population has put pressure on existing recreational facilities in the area. A trail is needed that
18 will accommodate the full range of potential trail users, such as walkers, runners, wheelchair
19 users, bicyclists, and in-line skaters."

20 8. King County is mandated to provide safe facilities that will not pose a risk to the
21 health of our residents. In designing and constructing the ELST, we follow all applicable safety
22 standards and retain professional engineers to ensure proper design. During the shorelines
23 substantial development permit process for South Segment A, the City attempted to force the
24 County to adopt an unsafe intersection design at the 206th Avenue SE intersection. At that
25 location, the County's design required the road users rather than the trail users to stop. As a

1 condition of the shoreline permit, the City required the County to change the orientation of the
2 stop signs so that trail users rather than roads users would be required to stop, thereby granting
3 motor vehicles the right of way. At these points, the trail forms a crosswalk over the City
4 roadway and priority should be with pedestrians and cyclists. After consulting with its
5 engineers and consultants, King County believes that such an intersection is unsafe given the
6 relevant design factors that are applicable to the ELST at those intersections. Specifically, the
7 City's current proposal to orient stop signs toward trail users at the 206th Avenue SE and the SE
8 33rd Street intersections ("Intersections") represent an unsafe design that would endanger trail
9 users.

10 9. In my capacity as park's director, I am ultimately responsible for determining
11 whether the ELST South Segment A can be reopened following the completion of construction
12 activities. The Intersection designs that are being required by the City of Sammamish, which
13 orient stop signs towards the trail users, impose an unacceptable risk of injury to the public. I
14 cannot reopen South Segment A if the City's proposed stop sign orientation stands. Because the
15 City's design at the Intersections would create a hazard to trail users, King County will not be
16 unable to open a trail to public use with this design.

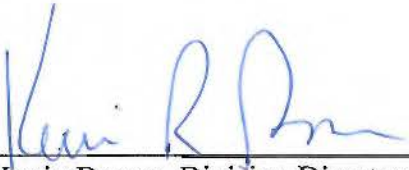
17 10. Attached as **Exhibit 1** is a true and correct copy of a letter from myself to the
18 City of Sammamish City Manager regarding the Right of Way permit, dated May 23, 2017.

19 11. The City of Sammamish responded with a letter threatening a stop work order.
20 A true and correct copy of this letter, dated June 9, 2017, is attached as **Exhibit 2**.

21 12. I responded with King County's position, and a true and correct copy of this
22 letter, dated June 14, 2017, is attached as **Exhibit 3**.

23 I declare under penalty of perjury of the laws of the United States and the State of
24 Washington that the foregoing is true and correct.
25

1 DATED this 26th day of June, 2017.

2 
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4 Kevin Brown, Division Director

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DECLARATION OF KEVIN BROWN IN SUPPORT OF
PLAINTIFF KING COUNTY'S MOTION FOR PRELIMINARY
INJUNCTION- 5

No. 2:17-cv-00921-JCC

Daniel T. Satterberg, Prosecuting Attorney
CIVIL DIVISION, Litigation Section
900 King County Administration Building
500 Fourth Avenue
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(206) (296-8820 Fax (206) 296-8819

CERTIFICATE OF SERVICE

I hereby certify that on June 26, 2017, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

David A. Linehan
Michael R. Kenyon
Kim Adams Pratt
Kenyon Disend, PLLC
11 Front Sreet South
Issaquah, WA 98027-3820
David@KenyonDisend.com
Mike@KenyonDisend.com
David@KenyonDisend.com
***Attorneys for Defendant
City of Sammamish***

DATED: June 26, 2017

s/ David I. Freeburg
David I. Freeburg

DECLARATION OF KEVIN BROWN IN SUPPORT OF
PLAINTIFF KING COUNTY'S MOTION FOR PRELIMINARY
INJUNCTION- 6

No. 2:17-cv-00921-JCC

Daniel T. Satterberg, Prosecuting Attorney
CIVIL DIVISION, Litigation Section
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EXHIBIT 1



King County

Parks and Recreation Division

Department of Natural Resources and Parks

King Street Center, KSC-NR-0700

201 South Jackson Street

Seattle, WA 98104-3855

206-477-4527 Fax 206-588-8011

TTY Relay: 711

May 23, 2017

Lyman Howard
City Manager
City of Sammamish
801 228th Avenue SE
Sammamish, WA 98075

Sent via US Mail and email to lhoward@sammamish.us

RE: East Lake Sammamish Trail South Segment A, Clearing and Grading Permit Number CG2016-03488 – Right of Way Permit conditions

Dear Lyman:

I am writing you to follow up on my conversation with Jesse Bon last week with regard to the above referenced right-of-way (ROW) permit conditions. I explained the situation with Jesse and let her know that I would be sending you a letter this week outlining the County's position.

There are two City streets - 206th Avenue SE and SE 33rd – that cross over the East Lake Sammamish Trail (ELST) corridor in the South Segment A. Two of the clearing and grading permit conditions address ROW permits.¹ One condition requires approval for any modification, relocation or installation of a traffic control device affecting the ROW, and the other requires approval before any work is done in the ROW.

¹ **Condition 1, bullet 12:** The modification, relocation, or installation of a traffic control device affecting the City Right of Way (ROW) or other work connecting to the ROW (e.g. curb returns and ramps) requires approval of a ROW permit prior to placement of any such device or improvement.....to clarify when a ROW permit is necessary, details depicting stop signs and other improvements must be removed from or noted accordingly within the plan set (such as the stop signs on sheets PS3 at Station 239) and applied for under a separate ROW permit. Revised plans where these items have been removed from or noted accordingly within the plan set shall be provided to and approved by the City prior to the Grading preconstruction meeting.

Condition 1, bullet 21: No work in the ROW is approved under this permit. A separate ROW permit is required for installation of any work in the ROW, including installation of any erosion control measures.

Lyman Howard
May 23, 2017
Page 2

These conditions do not refer to any particular intersections or make findings or assumptions about what property is within the City's ROW. Rather, these conditions refer generally to the City's ROW and require a permit for any work within the ROW.

On January 24, 2017, representatives of the City and County met to discuss the ROW permit requirement with reference to the intersection at 206th Avenue SE. At that time, the City representatives stated that they wished to research the property issue and would get back to the County as soon as they had additional information. Since we are currently in construction and the County's contractors need to work on these two intersections within a matter of weeks, the County applied for right of way permits while the County and City were evaluating this property issue to avoid any project delays.²

The City located documents related to the development at 206th SE and recently provided these to the County. We have had the opportunity to review these documents and have concluded that the City does not have any property interest in the 206th SE intersection. In addition, the County has located and reviewed property documents related to the SE 33rd intersection and has concluded that the City has limited crossing rights that are subject to the County's rights.

After reviewing the relevant documents, the County's position is that these ROW permit requirements do not apply to these two crossings because they are not within the City's right-of-way. As a result, we are withdrawing our ROW permit applications and are proceeding with work in the two intersections. Below is a summary of the property issue and a summary of the County's design decisions with reference to applicable safety standards and relevant data.

1. The ROW permit condition does not apply to the 206th SE intersection because City has no property interest or right to control this portion of the corridor

Since ROW permits are only required when work within the City's ROW is contemplated, a threshold issue here is whether any part of this project is located within the City's right of way. It goes without saying that the City does not have authority to require a ROW permit for activities on property owned or controlled by the County.

The County purchased the ELST corridor from Burlington Northern Sante Fe (BNSF) railroad in 1998 and acquired all of the railroad's property interests including that portion of the corridor crossed by 206th SE. We have reviewed the documents that you provided related to the development of the property on 206th Avenue SE and our own documents and have found no

² On May 4, 2017, the County submitted the ROW permit applications. These applications included the following statements to preserve the County's position on ownership and control of the ELST corridor: "By making this permit application, King County does not waive, and intends to fully preserve, all rights King County possesses to the Corridor, including its ownership and control of the Corridor at issue in this permit application as well as other portions of the Corridor. King County does not concede that any permit is required from the City to undertake work or modify traffic control in the area of the Corridor at issue. Nor does King County agree that the City has any power to impose conditions on the County as part of any process to review or issue such permit."

Lyman Howard

May 23, 2017

Page 3

record that the City has any ownership interests or right to control any part of the ESLT corridor³ at 206th SE. Unless and until the City provides the County with proof of ownership, easement or other property interest in the ELST that grants the City the right or authority to control the intersection, and makes a portion of the ELST part of the City's right-of-way, it is clear that these conditions do not apply to these crossings. Even if these conditions specifically addressed the 206th SE intersection, the City does not have the authority to require a ROW permit because it lacks the property interest to do so.

2. The ROW permit condition does not apply to the SE 33rd intersection because the City has limited property rights in the crossing of the ELST corridor

Again, the ROW conditions apply only to the City's rights-of-way. Although SE 33rd crosses the ELST corridor, that portion of the street does not constitute a City right-of-way because the railroad retained all rights to use the property for railroad purposes and the granted only a limited right to cross the corridor.

In 1972, BNSF granted an easement to King County for public road purposes for the SE 33rd crossing. A copy of the easement is attached as Exhibit 1. Section I of the easement reserves all rights to use the property for railroad purposes not inconsistent with the easement:

The Railroad Company, for itself and its successors and assigns, reserves all rights to use the property herein before described for any and all purposes whatsoever not inconsistent with the easement hereby granted, including, but not limited to the right to construct, maintain, repair, renew, reconstruct, replace and operate present tracks and future tracks, communication, signal and electric power lines, utilities and other types of facilities on said property when deemed necessary or expedient to the Railroad Company. Rights reserved shall be so exercised as not to damage or interfere with the highway as above defined.

The ELST corridor is railbanked under the Trails Act and is subject to the exclusive jurisdiction of the Surface Transportation Board (STB). The act of railbanking preserved all of the property and ownership rights formerly held by the railroad and they were passed on to the County. In addition, the railbanking process added the right to construct and operate a trail within the railroad corridor. Because of the railbanking, the County now possesses the right to "exclusive use and possession of the area on, above, and below the surface of the [ELST] Corridor." Exhibit 2, *Hornish et al v. King County, Order on Cross-Motion for Summary Judgment*, at 8. The railroad granted limited easement rights for the SE 33rd road crossing but specifically retained control over the property in order to permit railroad related activities which now includes trail activities. Since the limited road easement was granted *subject to* the railroad's activities, the railroad's purposes predominate in the area of the crossing.

³ It appears that obtaining an easement or similar property interest from the railroad was a condition of the development at 206th SE. However, Parks personnel have not seen any record that this transaction was completed or that the railroad conveyed a property interest at the 206th SE location.

Lyman Howard
 May 23, 2017
 Page 4

As a result, this permit condition does not apply to this intersection. The City does not have the right to control the intersection and has no authority to require a ROW permit for the SE 33rd crossing because the easement granted by the railroad reserved the right to continue to use the property for “any and all” railroad purposes which now includes the trail.

3. The County’s intersection designs are safe and comply with safety standards

Safety is the County’s number one priority. Notwithstanding the property issue, this project has been designed to meet the highest safety standards. Included with the permit applications are project plans showing traffic control devices that give priority of assignment to the ELST rather than the street crossings and requires road users to stop for the trail. This is the safest design for these two roadway-trail intersections and is in compliance with all applicable standards including the Manual on Uniform Traffic Control Devices, 2009 edition (MUTCD), the American Association of State Highway and Transportation Officials Guide for the Development of Bicycle Facilities, 2012 (AASHTO), and the WSDOT Design Manual, July 2012.

Attached as Exhibit 3 is the November 7, 2014, memorandum that summarizes the professional judgment and rationale for the assignment of priority at these intersections provided by the ELST design engineer. In addition, the County sought the opinion and expertise of a nationally recognized expert in bicycle and pedestrian facilities and one of the authors of AASHTO, William Schultheiss, P.E. of Toole Design Group. Mr. Schultheiss concurred with the engineering judgment of the design engineer and concluded that the ELST should be given priority over the two city streets. Mr. Schultheiss recommends either yield or stop control for 206th SE or an uncontrolled crossing for both approaches. Attached as Exhibit 4 is William Schultheiss’ January 26, 2016, memorandum which references the applicable provisions of the MUTCD and AASHTO.

The MUTCD has been adopted as the applicable standard in Washington State.⁴ The MUTCD lists three considerations for determining priority at a shared use path⁵/roadway intersection:

- A. Relative speeds of shared-use path and roadway users;
- B. Relative volumes of shared-use path and roadway traffic; and
- C. Relative importance of shared-use path and roadway.

(MUTCD, 2009 Edition, Section 9B.03).

When these considerations are applied to the intersections at SE 33rd and 206th SE, the ELST clearly has priority. While the relative speeds of the path and roadway users is approximately the

⁴ WAC 468-95-010 General. The 2009 Edition of the *Manual on Uniform Traffic Control Devices for Streets and Highways (MUTCD)*, published by the Federal Highway Administration and approved by the Federal Highway Administrator as the national standard for all highways open to public travel, was duly adopted by the Washington state secretary of transportation.

⁵ The ELST is defined as a shared use paths meaning a paths designed for both transportation and recreation purposes used by pedestrians, bicyclists, skaters, equestrians and other users. WSDOT Design Manual, M 22-01.99, July, 2012.

Lyman Howard
 May 23, 2017
 Page 5

same, the ELST has much greater volumes and relative importance than either SE 33rd or 206th SE. As noted in Exhibit 3, SE 33rd Street provides access for 46 homes, generating 552 trips per day, and 206th SE provides access for 15 homes, generating 180 trips per day. The ELST's estimated volume is far higher. Original design estimates ranged from 2500 to 4000 per day on peak days. More recent data show higher estimated volumes.

In order to make more informed design decisions about the ELST, in 2016 the County asked bicycle facilities expert William Schultheiss to estimate trail volumes on the ELST using the most current methodology. Mr. Schultheiss conducted an analysis using the "Direct Demand Model" recommended by the National Cooperative Highway Research Program's Report 770, a multi-year research effort that developed improved methods for estimating bicycling and walking for planning and project purposes. This model is the most widely used tool to predict bicycle and pedestrian volumes on a new facility. This method gathers data from trail counters, considers surrounding land use characteristics and analyses trail characteristics such as elevation gain and connectivity and provides estimates well into the future. Attached as Exhibit 5 is the East Lake Sammamish Demand Analyses, dated May 19, 2016. This analysis estimated bicycle volumes on the ELST ranging from 2,735 in 2020 to 5,526 in 2035 on peak weekend days. In addition, this analysis estimated a higher number if you combine bicycle and pedestrian uses – 4,273 in 2020 and 8,634 in 2035. All of the available data is clear that trail volumes will far exceed volumes on 206th SE and SE 33rd. Therefore, the second of the MUTCD consideration for determining priority weigh heavily in favor of the ELST.

With respect to the third consideration, the ELST clearly has greater relative importance than the two low volume streets. The ELST is not a local trail. Rather, the ELST is a part of the King County regional trail system, one of the nation's most extensive multi-use networks with more than 175 miles of trails for recreation and non-motorized mobility and commuting. The regional trail system connects communities from Bothell to Auburn and Seattle to the Cascades. The County plans to expand the regional trail system to 300 miles of trail. The ELST provides access to recreation, employment, and retail centers in Redmond, Sammamish, and Issaquah, and connects to the entire regional trail system.

In contrast, 206th SE and SE 33rd are both minor dead end streets and are classified as such under the City's Street Classification map. There is no doubt that the ELST has greater relative importance than these two streets.

AASHTO specifically addresses priority of assignment at roadway/shared use path intersections. The principles of assigning priority to the higher volume/higher speed approach also applies to shared use paths – roadway intersections and user volumes should be considered in intersection design because "user volume on popular paths sometimes exceed traffic volumes on minor crossed streets." AASHTO, page 5-33. AASHTO recommends a stop or yield sign on the roadway where the volume is far greater on the path. AASHTO, page 5-33.

AASHTO also addresses the common misconception that placing stop signs to control high volume pathways improves safety:

Lyman Howard
May 23, 2017
Page 6

A common misconception is that the routine installation of stop control for the pathway is an effective treatment for preventing crashes at path-roadway intersections. Poor bicyclist compliance with "STOP" signs at a path-roadway intersections is well documented.

AASHTO, page 5-34. Attempting to stop control a high volume shared use path for a low volume street violates the important traffic control principle that designers should provide the least amount of restriction that is effective. As Mr. Schultheiss explains: "The proliferation of stop signs on paths has led to a lack of compliance by path users in many communities and may actually diminish safety if ignored when truly needed." Exhibit 4 at 2.

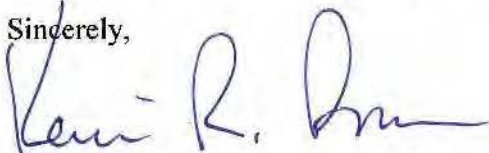
With respect to these two intersections, installing stop signs to stop path users will not improve safety or prevent accidents. In fact, it will result in a false sense of safety or control on the part of the trail and roadway user that may result in additional accidents or conflicts. The County's design appropriately gives priority of assignment to the trail users which will result in a safety facility for all trail users and vehicles crossing the trail.

Conclusion

Now that the property and ownership issues have been resolved, we are withdrawing our ROW permit applications and moving forward with construction of the ELST South Segment A. As the ownership issue has been clarified, this permit condition does not apply. If you have any questions or need further clarification of this issue, please do not hesitate to contact me.

I am looking forward to hearing from the City with regard to this issue.

Sincerely,



Kevin Brown
Division Director

Attachments

cc: Jessi Bon, Deputy City Manager, City of Sammamish
Lindsey Ozbolt, Associate Planner, City of Sammamish
Haim Strasbourger, Development Review Engineer, City of Sammamish
Jenny Bailey, Senior Planner, Parametrix
Gina Auld, Capital Projects Manager, Parks and Recreation Division, Department of Natural Resources and Parks (DNRP)
Frank Overton, Capital Projects Managing Supervisor, Parks and Recreation Division, DNRP
Monica Leers, Capital Planning and Land Management Section Manager, Parks and Recreation Division, DNRP

N.R. & E. W.M. KING CO. N.W. DIVISION

EASEMENT

7210200676

The Grantor, BURLINGTON NORTHERN INC., a Delaware corporation, hereinafter called Railway Company, for and in consideration of TWO HUNDRED FIFTY AND NO/100 DOLLARS (\$250.00), to it paid, and the agreements herein contained, does hereby grant to KING COUNTY, a political subdivision of the State of Washington, hereinafter called County, an easement for public-road purposes only, including a grade crossing upon and across the Railway's right of way and tracks, upon the following described premises situated in King County, State of Washington:

That area located on the Railway's Kenmore to North Bend line at Railway Survey Station 778 +29.4, Mile Post 14+3924.4, in the Government Lot 1, Section 8, Township 24 North, Range 6 East, W.M. near Monahan, Washington, as shown in GREEN color on Exhibit "A" dated January 17, 1972, attached hereto and by this reference made a part hereof.

This easement is made subject to and upon the following express conditions:

I

The Railway Company, for itself and its successors and assigns, reserves all rights to use the property hereinbefore described for any and all purposes whatsoever not inconsistent with the easement hereby granted, including, but not limited to, the right to construct, maintain, repair, renew, reconstruct, replace and operate present tracks and future tracks, communication, signal and electric power lines, utilities and other types of facilities on said property when deemed necessary or expedient to the Railway Company. Rights reserved shall be so exercised as not to damage or interfere with the highway as above defined. This easement is subject to all existing interests of third parties in said property of any kind or nature whatsoever and any and all extensions or renewals thereof.

II

The County agrees to provide, at its sole cost and expense, adequate drainage of the Railway Company's property in connection with construction and maintenance of said highway structure, also agrees to reimburse the Railway Company for any and all expense incurred by it by reason of any failure of the County to provide such drainage.

III

This easement is granted pursuant to the terms of the construction agreement entered into between the parties dated

June 8, 1972.

Page (1)

Post-It® Fax Note	7671	Date	8/1/03
To	ROW	From	SHARAD
Co/Dept		Co.	
Phone #		Phone #	
Fax #		Fax #	

IV

In the event that said property shall at any time cease to be used by the public as street or highway grade crossing, or shall by operation of law or otherwise become vacated or abandoned, the easement herein granted shall immediately cease and terminate without notice of other proceedings on the part of the Railway Company, and the County, its successors or assigns, shall reconvey immediately said property to the Railway Company.

IN WITNESS WHEREOF, the parties hereto have executed this agreement in duplicate this 27th day of June, 1972.

COUNTY OF KING

BURLINGTON NORTHERN INC.

By [Signature]
Title
King County Executive
Attest: [Signature]
Title
Manager, Property & Purchasing

By [Signature]
Vice President
Attest: [Signature]
Secretary

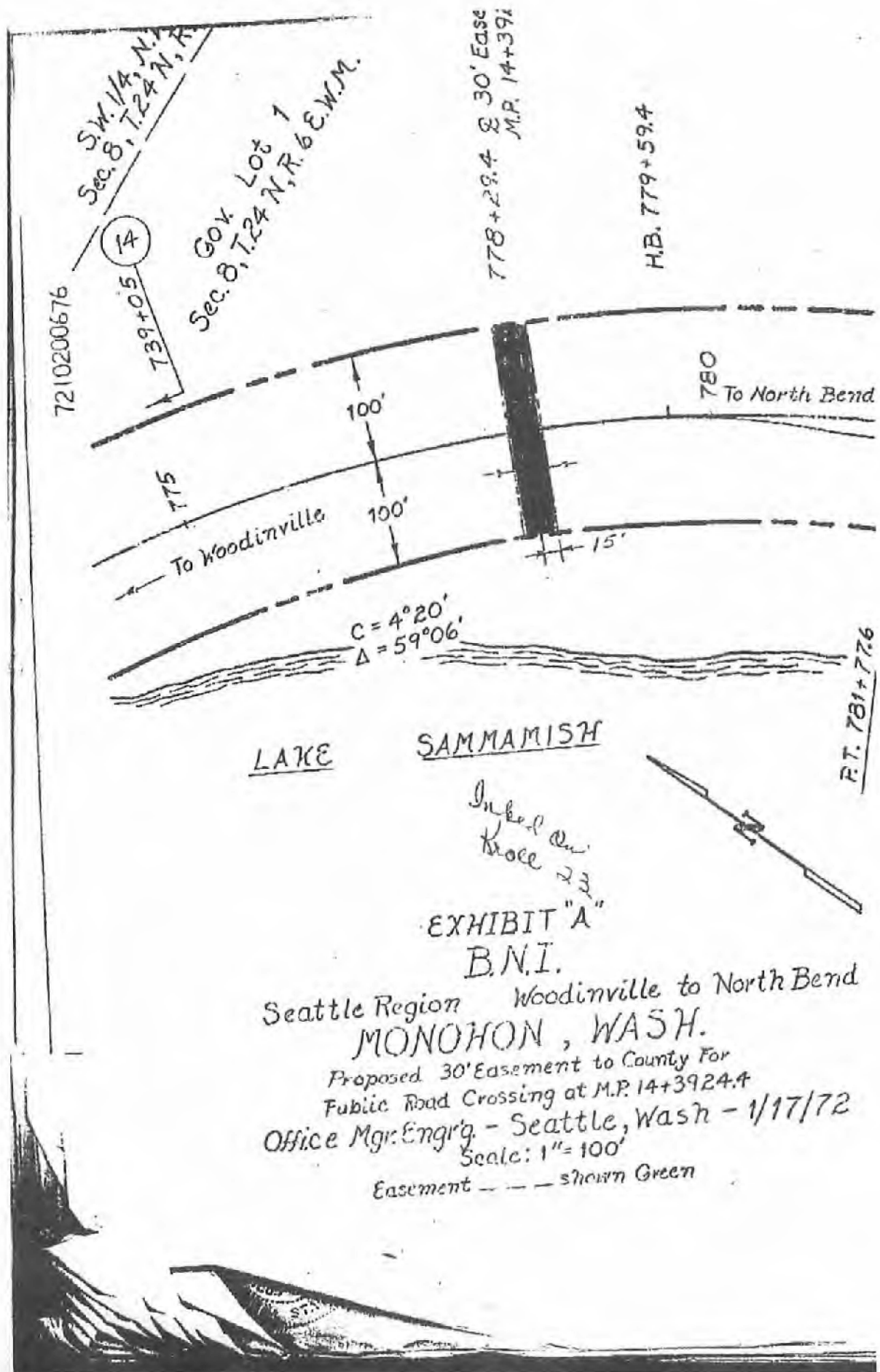
STATE OF MINNESOTA }
County of Ramsey } ss

On this 27th day of June, 1972, before me, the undersigned, a Notary Public in and for the State of Minnesota, duly commissioned and sworn, personally appeared G. F. DEFIEL and R. M. O'KEELY to me known to be the Vice President and Secretary, respectively of Burlington Northern Inc., the corporation that executed the foregoing instrument, and acknowledged the said instrument to be the free and voluntary act and deed of said corporation, for the uses and purposes therein mentioned, and on oath stated that they were authorized to execute the said instrument, and that the seal affixed is the corporate seal of said corporation.

WITNESS MY HAND AND OFFICIAL SEAL hereto affixed the day and year first above written.

LYLE V. PRATICH
NOTARY PUBLIC - MINNESOTA
RAMSEY COUNTY
My Comm. Expires Jan. 13, 1973

[Signature]
Notary Public in and for the State of Minnesota
residing at St. Paul
My Commission expires Jan. 13, 1973



UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

THOMAS E. HORNISH AND
SUZANNE J. HORNISH JOINT LIVING
TRUST, et al.,

Plaintiffs,

v.

KING COUNTY,

Defendant.

CASE NO. C15-284-MJP

ORDER ON CROSS-MOTIONS FOR
SUMMARY JUDGMENT

The above-entitled Court, having received and reviewed:

1. Defendant King County's Motion for Summary Judgment (Dkt. No. 46), Plaintiffs' Response (Dkt. No. 54), and Defendant's Reply (Dkt. No. 56);
2. Plaintiffs' Motion for Summary Judgment (Dkt. No. 55), Defendant's Response (Dkt. No. 61), and Plaintiffs' Reply (Dkt. No. 62);

all attached exhibits and declarations, and relevant portions of the record, and having heard oral argument, rules as follows:

1 IT IS ORDERED that Plaintiffs' motion for summary judgment is DENIED.

2 IT IS FURTHER ORDERED that Defendant's motion for summary judgment is
3 GRANTED; Plaintiff's claims are ordered DISMISSED with prejudice.

4
5 **Background**

6 At issue in this lawsuit is a strip of land formerly utilized as a railroad corridor in King
7 County, Washington ("the Corridor"). The Corridor was created in the late 1800s by the Seattle,
8 Lake Shore & Eastern Railway Company (the "SLS&E") through a combination of federal land
9 grants, homesteader deeds and adverse possession, resulting in a strip of property comprised of
10 both easements and fees simple. See Beres v. United States, 104 Fed. Cl. 408, 412 (2012).

11 The Hornish property is adjacent to land acquired by SLS&E through a quit claim deed in
12 1887 ("the Hilchkanum Deed"). (Decl. of Nunnenkamp, Ex. E.) When Hilchkanum sold the
13 remainder of his property, he excluded the Corridor from the property description. (Id., Ex. F.)
14 There are no original deeds for the portions of the Corridor adjacent to the remaining Plaintiffs.
15 The property surrounding the Corridor in these areas was owned by the Northern Pacific
16 Railroad by means of an 1864 land grant. (Id., Ex. G.) In 1889, Northern Pacific conveyed the
17 land surrounding the Corridor to Mr. Middleton (without mentioning the Corridor; id. at Ex. H);
18 Defendant claims that tax assessment rolls from 1895, however, exclude the 100 foot Corridor
19 from Middleton's property. In the 1909 Pierce County probate action following Middleton's
20 death, the Corridor was expressly excluded. (Decl. of Hackett, Ex. C. at 4, 8.)

21 SLS&E eventually became part of Burlington Northern & Santa Fe ("BNSF"). In 1997,
22 BNSF conveyed its interest in the Corridor to The Land Conservancy ("TLC") via quit claim
23 deed. (Decl. of Nunnenkamp, Ex. I.) Later that year, TLC petitioned the Surface Transportation
24 Board ("STB") to abandon the use of the Corridor for rail service and King County declared its

intention to assume financial responsibility for the area as an “interim trail sponsor,” a process created by the Trails Act known as “railbanking.” See 16 U.S.C. § 1247(d).

On September 16, 1998, STB issued a Notice of Interim Trail Use (“NITU”). The Land Conservancy of Seattle and King County – Abandonment Exemption – in King County, WA, No. AB-6 (SUB 380X), 1998 WL 638432, at *1 (Sept. 16, 1998). As part of TLC’s arrangement with the County to take over as trail sponsor, the County was granted all TLC’s ownership interest in the Corridor, which was memorialized by a Quitclaim Deed recorded in King County. (Decl. of Nunnenkamp, Ex. J.) The County then constructed a soft surface public trail and is in the process of constructing a paved trail the length of the Corridor. (Mtn., at 4.)

Discussion

Hornish Plaintiffs’ property

The County presents federal and state authority supporting its position that it owns a fee interest in this part of the Corridor. In King County v. Rasmussen, 299 F.3d 1077, 1087 (9th Cir. 2002), the Ninth Circuit Court of Appeals found that “Hilchkanum intended to convey a fee simple interest in the strip of land described;” the “strip of land” being a 100-foot corridor granted to SLS&E (which interest was later conveyed to the County). Two years later, the state court reached a similar conclusion (citing the reasoning in Rasmussen with approval) in Ray v. King County, 120 Wn.App. 564, 589 (2004).

Plaintiffs cite two cases as well. First, Brown v. State, 130 Wn.2d 430 (1996), which laid out a series of factors to be considered when determining whether an easement or fee was intended to be conveyed in a railroad right of way. Second, Kershaw Sunnyside Ranches, Inc. v. Interurban Lines, 156 Wn.2d 253 (2006) which held that “whether by quitclaim or warranty deed, language establishing that a conveyance is for right of way or railroad purposes presumptively conveys an easement...” Id. at 269.

1 The Court remains unpersuaded that Plaintiffs' authority stands for the proposition they
 2 assert (that the Hilchkanum Deed conveyed an easement). First of all, the Washington Supreme
 3 Court in Kershaw qualified their holding as follows: "[W]hen the granting document uses the
 4 term 'right of way' as a limitation or to define the purpose of the grant, it operates to 'clearly and
 5 expressly limit[] or qualify[y] the interest conveyed.'" Id. at 265 (citation omitted). The
 6 Hilchkanum Deed does not use the phrase "right of way" to describe or limit the purpose of the
 7 grant, an impression which is bolstered by the habendum language in the conveyance indicating
 8 that SLS&E is "[t]o have and to hold the said premises with the appurtenances unto the said
 9 party of the second part and its successors and assigns forever." (Decl. of Nunnenkamp, Ex. E at
 10 2.) There are no conditions of use imposed on the grant. Had the Hilchkanums intended to limit
 11 the purpose of the grant, presumably they would not have assigned it unconditionally and forever
 12 to their grantee.

13 Second of all, even if the Court were to follow Kershaw to the point of entertaining the
 14 presumption that an easement was conveyed, the courts in Rasmussen and Ray went through the
 15 same analysis of the Brown factors that the Washington Supreme Court did in Kershaw and
 16 concluded that the grant intended to convey an interest in fee simple; i.e., the presumption was
 17 successfully rebutted. Plaintiffs have given us no reason to overturn that ruling. Indeed, neither
 18 Rasmussen nor Ray were overturned in the wake of Kershaw, and Rasmussen remains
 19 controlling precedent for this district.

20 Mention must be made (as both sides do) of Beres v. United States, 104 Fed. Cl. 408
 21 (Fed.Cl. 2012), in which the Federal Claims Court examined the Hilchkanum Deed in the light of
 22 Kershaw and came to the exact opposite conclusion as the Ninth Circuit in Rasmussen; i.e., that
 23 the Deed conveyed an easement, not a fee interest. Id. at 430-31. The Federal Claims Court
 24

1 conducted an exhaustive analysis of the Deed and the case law concerning the proper
 2 interpretation of such conveyances. In the final analysis, the most that can be said is that
 3 reasonable jurists disagreed: the Ninth Circuit arrived at one conclusion and the Federal Claims
 4 Court arrived at another. This Court is bound by Ninth Circuit ruling, and on that basis finds that
 5 the County owns the portion of the Corridor abutting the Hornish Plaintiffs' property in fee
 6 simple. The County's summary judgment motion in that regard is GRANTED.

7
 8 The remaining Plaintiffs

9 Nature of the railroad easements and the Trails Act

10 The County seeks the authority to exercise all the rights in the Corridor that the railroads
 11 had. Plaintiffs interpose two interrelated arguments that they should not be allowed to do so.

12 Plaintiffs' first argument is that the Trails Act preserves the right of the railroad to
 13 reactivate its easement *for future purposes only*; another way Plaintiffs phrase this is by arguing
 14 that railbanking is not a "current railroad purpose" and that railbanking extinguishes the railroad
 15 easement. This is relevant to the County's argument that it has the power to exercise all the
 16 rights the railroad had under its railroad easement.

17 The weight of authority favors Defendant's position that railbanking does not extinguish,
 18 suspend or otherwise operate as an abandonment of the railroad easement. The Supreme Court
 19 has held that "interim use of a railroad right-of-way for trail use, when the route itself maintains
 20 intact for future railroad purposes, shall not constitute an abandonment of such rights-of-way for
 21 railroad purposes." Presault v. Interstate Commerce Commission, 494 U.S. 1, 8-9 (1990)
 22 (quoting H.R. Rep. No. 98-28 at 8-9 (1983)).

23 Nor does the language of the Trails Act lend itself to Plaintiffs' interpretation.
 24

[I]n furtherance of the national policy to preserve established railroad rights-of-way for future reactivation of rail service... in the case of interim use of any established railroad rights-of-way pursuant to donation, transfer, lease, sale, or otherwise in a manner consistent with this chapter... *such interim use shall not be treated, for the purposes of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad purposes.*

16 U.S.C. § 1247(d)(emphasis supplied). As U.S. District Judge Coughenour of this district has pointed out in a similar case, (1) “preserve” means “[t]o keep in its original or existing state: ... to maintain or keep alive” (Oxford English Dictionary, 3d ed.) and (2) the statute says “preserve... *for* future reactivation,” not “preserve *upon* future reactivation.” Kaseburg v. Port of Seattle, 2015 WL 4508790 at *3-4 (W.D. Wash. July 24, 2015).

For their second argument on this point, Plaintiffs cite to a 1986 Washington case which held that the change in use (from rails to trails) of a railroad right-of-way constituted abandonment of the railroad easement. Lawson v. State of Washington, 107 Wn.2d 444, 452 (1986). But Lawson is not a case involving the federal Trails Act and thus that court was not guided (or constrained) by the language in the Trails Act indicating exactly the opposite. Plaintiffs also quote the language of the Federal Circuit court in a later Presault case (Presault v. United States, 100 F.3d 1525, 1554 (1996); “Presault II”) that railbanking is not a “current railroad purpose” and in fact constitutes abandonment of such purpose. What Plaintiffs fail to point out is that the language is from a concurring opinion and has no precedential power.

The County takes its “no abandonment, no extinguishment” argument one step further and maintains that, by virtue of its quitclaim deeds from BNSF, it acquired all of BNSF’s property interests in the Corridor. Decl. of Nunnenkamp, Ex’s I and J. Judge Coughenour’s Kaseburg order sides with the County on this issue, finding that “the Trails Act preserves railroad easements and [] a trail sponsor may own and exercise the rights inherent to the railroad

1 easement.” 2015 WL 4508790 at *4. The Kaseburg court found support for this holding in State
 2 v. Presault (63 Vt. 38, 42 (1994)) (“The fact that the defendants’ excavation activities do not
 3 present a threat to the bicycle and pedestrian path is irrelevant because these activities impinge
 4 on the original railroad easement.”) and a Federal Claims case which held that “a trail sponsor
 5 must have the same control over the entire right-of-way corridor that would be held by a
 6 railroad...” Illig v. United States, 56 Fed.Cl. 619, 631 (2003).

7
 8 Secondarily, the County cites the “incidental use” doctrine, which “states that a railroad
 9 may use its easement to conduct not only railroad-related activities, but also any other incidental
 10 activities that are not inconsistent and do not interfere with the operation of the railroad.”
 11 Kershaw Sunnyside Ranches, Inc. v. Yakima Interurban Lines Assoc., 121 Wn.App. 714, 731
 12 (2004), *reversed on other grounds*, 156 Wn.2d 253, 274 (2006)(citation omitted). Railroads are
 13 public highways under Washington law and, “[i]n Washington, the owners of public highway
 14 easements retain exclusive control over uses incidental to their easements.” Kaseburg, 2015 WL
 15 6449305 at *8 (W.D. Wash., Oct. 23, 2015)(citation omitted).

16 As part of its claimed right to “incidental uses,” the County seeks confirmation of its
 17 subsurface and aerial rights pursuant to its interest in the Corridor. It claims these as co-
 18 extensive with the “railroad easement” rights it asserts were acquired in the quitclaim deed from
 19 TLC. There is evidence in Kaseburg that “BNSF regraded parts of the corridor, built trestles
 20 over water, dug culverts, and built signaling equipment overhead ([C14-0784JCC] Dkt. No. 126
 21 at 2-5.)” Id. at *7. The Court takes judicial notice of those “incidental uses” exercised under the
 22 railroad’s easement powers prior to conveying the Corridor, and adopts the finding in Kaseburg:
 23
 24

Because the scope of trail easements under the Trails Act is coextensive with railroad easements, Illig, 58 Fed.Cl. At (sic) 63, the Court now holds that the Corridor Easements provide exclusive subsurface, surface, and aerial rights in the corridor for railroad and trail purposes.”

Id.

It is the finding of this Court that the railroad easement survives, that the County’s rights are coextensive with the railroad’s and that it “is entitled to the exclusive use and possession of the area on, above, and below the surface of the Corridor for railroad purposes and incidental uses permitted by Washington law, including use as a recreational trail.” (Mtn., at 1.)

The Court finds further support for this ruling in the language of the Trails Act itself: “[I]n furtherance of the national policy to preserve established railroad rights-of-way for future reactivation of rail service...” (16 U.S.C. § 1247(d).) The County would be unable to “preserve establish railroad rights-of-way for future reactivation of rail service” if it could not employ and protect the full range of rights which the railroad possessed in the Corridor (and which it may yet possess again). Summary judgment will be granted in favor of the County on this issue.

Width of the Corridor

Preliminarily, the Court disposes of the undisputed matters concerning this particular issue:

1. Although the County seeks a declaration that the Corridor is 100 feet wide, it acknowledges that BNSF entered into “prior property transactions” (specifically, with the Morels, Menezes and Vanderwendes Plaintiffs) which decrease the size of the Corridor in certain parcels (50 feet adjacent to the Morels, 75 feet adjacent to the Menezes and Vanderwendes; see Decl. of Nunnenkamp, ¶¶ 21, 23-24).

2. There are no original deeds delineating the nature of the property interest originally acquired by SLS&E/BNSF and conveyed to TLC and the County. This means that the property rights which the County seeks to establish must be analyzed as those emerging from an easement by prescription (as opposed to an easement arising from claim of title).

There is a marked distinction between the extent of an easement acquired under a claim of right and the scope of one acquired under color of title. When one seeks to acquire an easement by prescription under a claim of right, user and possession govern the extent of the easement acquired. It is established only to the extent necessary to accomplish the purpose for which the easement is claimed.

Northwest Cities Gas Co. v. Western Fuel Co., 17 Wn.2d 482, 135 P.2d 867 (1943).

On the other hand, however, where one's occupancy or adverse use is under color of title that is a matter of public record, possession or user of a portion is regarded as coextensive with the entire tract described in the instrument under which possession is claimed. Omaha & Republican Valley R. v. Rickards, 38 Neb. 847, 57 N.W. 739 (1894).

Yakima Valley Canal Co. v. Walker, 76 Wn.2d 90, 94 (1969)

In keeping with the finding that the County possesses an interest and property rights coextensive with the railroad easement, Defendant's rights pursuant to a prescriptive easement would be those necessary for the operation of a railroad, and the boundaries of the Corridor would be the amount of property (up to 100 feet) required to accomplish that. The County presents ample evidence that railroad operations require boundaries that extend further than simply the width of the railroad tracks (Def Mtn at 20-22), including declarations from railroad personnel that a 100 foot wide corridor is required

- As a "safety buffer to ensure minimum setbacks between freight trains and residential development, to prevent nearby construction and development activities that could undermine the stability of the steep slopes above and below the tracks, and to provide

access for maintenance activities, such as tie replacement, that require significant clearance on one or both sides of the track.” (Decl. of Nuorala, ¶ 8, Decl. of Hackett, Ex. J.)

- To provide space between each of the rails, side clearance, drainage of the slope, a drainage ditch, and access for maintenance and emergencies (such as derailments). (Decl. of Sullivan, ¶¶ 4-5, 8-9.)

The only Plaintiffs who bring forward any evidence that the 100 foot Corridor does not represent the extent necessary for railroad operations are the Morels, who present proof that at one point the house which originally stood on their property (from 1920-2000) was within the right of way now claimed by the County, as well as walkways and trees planted well within the Corridor. (Decl. of Morel, Ex. B.)

The Morel evidence does not suffice to create a disputed issue of material fact. First, the “extent of the right is fixed and determined by the user in which it originated” (NW Cities Gas Co. v. Western Fuel Co., 17 Wn.2d 482 486 (1943)(citation omitted)), in this case by the SLS&E in the 1890s. The Morels do not hold themselves out to be experts in railroad operations, do not rebut what Defendant’s railroad experts say about the extent necessary for operations and do not create a disputed issue of material fact. Furthermore, the County has conceded that the Corridor narrows to 50 feet abutting the Morels’ property line (a transaction in which the quitclaim deed acknowledged that the Morels were purchasing “a portion of BNSF’s 100.0 foot wide Snoqualmie Line right of way;” Quitclaim Deed, Decl. of Nunnenkamp, Ex. O) and the Morels’ current house is outside that 50 foot strip.

None of the other Plaintiffs provide similar evidence of encroachments upon the Corridor, but even had they done so the above analysis would apply. Plaintiffs' inability to provide any expert testimony rebutting Defendant's evidence of the necessity of a 100 foot wide corridor for railroad operations entitles the County to summary judgment on this issue.

RCW 7.28.070

BNSF executed a quitclaim deed to TLC in 1997 that included a complete description of the 100 foot-wide Corridor (with the exceptions noted above). (Decl. of Nunnenkamp, Ex. I.) The following year, TLC conveyed that same property (with the identical legal description) to King County. (*Id.*, Ex. J.) Both deeds were recorded. Since assuming title to the property, the County has paid all fees and taxes on the Corridor, including fees for surface water management, noxious weed control, and conservation futures. Decl. of Sweany, ¶ 3.¹

RCW 7.28.070 provides:

Every person in actual, open and notorious possession of lands or tenements under claim and color or title, made in good faith, and who shall for seven successive years continue in possession, and shall also during said time pay all taxes legally assessed on such lands or tenements, shall be held and adjudged to be the legal owner of said lands or tenements, to the extent and according to the purport of his or her paper title.

In addition to holding the Corridor "under claim or color of title" since the 1998 quitclaim deed and paying taxes on the property since that time, the County has been in "open and notorious" possession of the Corridor by recording the deed, appearing as trail sponsor in public

¹ The Morels claim to have paid taxes on the Corridor. (See Pltf Response, Ex. B., Dkt. No. 54-2 at 4-5, 10.) Their claims about their 1971 taxes (which actually appear to include portions of the Corridor) are irrelevant as they predate the County's acquisition of the property in 1998. Their assertions regarding their "Current Property Taxes" (p. 10) appear to indicate that, although they did not pay taxes based on a property line that includes the Corridor, their property's assessed value was based in part on improvements which encroach upon the Corridor. This is not the same thing as paying taxes on the Corridor and does not refute the County's claim to have done so since the 1998 conveyance.

proceedings before the STB, removing the old railroad tracks, installing a soft-surface trail and requiring adjacent landowners to apply for permits for crossings or other encroachments on the Corridor. (Decl. of Nunnenkamp, ¶¶ 2-11, 18.)

The Washington Supreme Court has held that color of title exists when a deed “sufficiently describes the property in question and purports to convey it to the [movants].” Scramlin v. Warner, 69 Wn.2d 6, 8 (1966). By recording the deed, the titleholder “dispenses with the need for other proof of a hostile or adverse claim... color of title itself establishes those elements.” Fies v. Storey, 21 Wn.App. 413, 422 (1978). Finally,

[W]here one’s occupancy or adverse use[] is under color of title that is a matter of public record possession or use[] of a portion is regarded as coextensive with the entire tract described in the instrument under which possession is claimed.

Yakima Valley Canal Co. v. Walker, 76 Wn.2d 90, 94 (1969).

Plaintiffs make no substantive response to this argument, interposing instead an argument that they had “inadequate notice” (under FRCP 8(a)) that Defendant intended to assert claims that the Corridor was 100 feet wide or that the County claimed title by virtue of adverse possession. It is not a persuasive argument. Defendant’s counterclaims included allegations that “Plaintiffs... have interfered with King County’s property rights in the ELSRC by erecting and maintaining various unauthorized improvements that impede King County’s access to its property, its exclusive control, and prevent public enjoyment” (Answer, Dkt. No. 32, Counterclaim ¶ 3) and that “[u]nder RCW 7.28, title to any disputed portions of the corridor should be quieted in King County.” (Id. at ¶ 4.) The Court finds it difficult to believe that, in a dispute about property lines, a party was not on notice that the actual size of the property was going to be an issue.

Plaintiffs also claim that “King County’s request for summary judgment on the width issue... attempts to circumvent this Court’s prior order remanding the issue to the Washington State court.” (Pltf Response at 12.) Again, this fails to persuade. First, this Court did not remand “the width issue” to the Washington State court, but remanded the Neighbors v. King County case (C15-1358MJP) on Plaintiffs’ motion. At no time have Plaintiffs moved to have this case stayed or remanded on the basis of that decision and they will not be allowed to cherry-pick an issue while proceeding forward with the remainder of this case. Either this case (and all its issues) is properly before this court or it is not. Additionally, the Hornish Plaintiffs are not a party to the Neighbors case, so their claims can only be adjudicated in this proceeding.

Standing under the centerline presumption doctrine

This is the resumption of an argument the Court addressed in June 2015. (Dkt. No. 19, Order re: Motion to Dismiss for Lack of Standing.) Roeder County v. Burlington Northern, 105 Wn.2d 567 (1986) is the Washington case which established the “centerline presumption” doctrine:

Generally then, the conveyance of land which is bounded by a railroad right of way will give the grantee title to the center line of the right of way if the grantor owns so far, unless the grantor has expressly reserved the fee to the right of way, or the grantor’s intention to not convey the fee is clear.

Id. at 576. However, the Washington Supreme Court set two restrictions on the presumption.

The first restriction states:

When, however, a deed refers to the right of way as a boundary but also gives a metes and bounds description of the abutting property, the presumption of abutting landowners taking to the center of the right of way is rebutted. A metes and bounds description in a deed to property that abuts a right of way is evidence of the grantor’s intent to withhold any interest in the abutting right of way, and such a description rebuts the presumption that the grantee takes title to the center of the right of way.

1 Id. at 577. The Court’s previous ruling (that Plaintiffs’ deeds contained metes and bounds
2 descriptions that used the railroad right of way as a boundary) is the law of the case.

3 The second restriction concerns chain of title:

4 The presumption that the grantor intended to convey title to the center of the right of way
5 is inapplicable where the adjoining landowner presents no evidence of having received
6 his or her property from the owner of the right of way. A property owner receives no
interest in a railroad right of way simply through ownership of abutting land.

7 Id. at 578. Plaintiffs also claim they have established chain of title back to the original grantor.
8 First, their failure to establish the first prong of the centerline presumption test renders their
9 proof in this regard moot. Second, they do not succeed in establishing the chain of title --
10 Defendant presents evidence that in the probate of the original grantor (Middleton), the Corridor
11 was specifically excluded. (Decl. of Hackett, Ex. C at 4, 8.) It is, at the very least, a disputed
12 issue of material fact but (as mentioned) the Court is not convinced that proof one way or the
13 other would be determinative of the issue.

14 In rebuttal, Plaintiffs file a declaration from an “expert witness,” a civil engineer with
15 purported expertise in “identifying source deeds that Railroads used in acquiring specific
16 property and determining what rights were conveyed to the Railroad.” (Decl. of Rall, Dkt. No.
17 54-4, ¶ 1.) The expert makes no mention of having examined the Middleton probate document
18 which excludes the Corridor. More critically, Plaintiffs offer no authority supporting their right
19 to offer expert testimony on the legal interpretation of a deed. On the contrary, “expert
20 testimony [regarding] the interpretation of a contract [is] an ultimate question of law upon which
21 the opinion of an expert may not be given.” PMI Mortgage Ins. Co. v. Amer. Int’l Specialty
22 Line Ins. Co., 291 Fed.Appx. 40, 41 (9th Cir. 2008). The Court has not considered the expert’s
23 opinion in reaching its conclusion on this issue.

1 Ultimately, the Court finds the issue of the centerline presumption to be non-
 2 determinative of the issues presented by this case. In the first place, it is only a presumption and
 3 a ruling one way or the other would not foreclose the losing party from presenting evidence to
 4 rebut the presumption. Secondly (and more to the point), the Court's rulings on the other issues
 5 presented establish the parties' respective rights to a degree which renders the centerline
 6 presumption doctrine inapplicable.

7 Conclusion

8
 9 The Court GRANTS summary judgment to King County on the following issues:

- 10 1. "Railbanking" under the Trails Act preserved all rights formerly held by the railroad
 11 easement owners.
- 12 2. King County holds all of BNSF's property rights (besides the trail rights created by the
 13 Trails Act); i.e., King County holds a "railroad easement" and a "trails easement."
- 14 3. As holders of a "railroad easement," the County has subsurface, surface and aerial rights
 15 in the Corridor to extent permitted by Washington law.
- 16 4. The County owns the portion of the Corridor adjacent to the Hornish property in fee.
- 17 5. Except where narrowed by prior transactions, the County owns a 100 foot-wide easement
 18 adjacent to Plaintiffs' property.
- 19 6. Even if the County had not acquired the 100 foot Corridor from BNSF, it acquired the
 20 same through the operation of RCW 7.28.070.
- 21 7. Plaintiffs lack standing under the centerline presumption doctrine to challenge the
 22 County's property rights.
- 23
- 24

1 The above rulings necessarily operate to DENY Plaintiffs' motion for summary
2 judgment.

3 From the Court's reading of Plaintiffs' amended complaint, this ruling resolves the issues
4 raised by their litigation. If there are issues remaining to be decided, the parties are invited to
5 bring them to the Court's attention. If not, Defendant is directed to submit a judgment reflecting
6 the outcome of these dispositive motions and terminating the lawsuit.
7

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9 The clerk is ordered to provide copies of this order to all counsel.

10 Dated this 20th day of April, 2016.
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14 Marsha J. Pechman
United States District Judge
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TECHNICAL MEMORANDUM

DATE: November 7, 2014
TO: Gina Auld
FROM: Yammie Ho
SUBJECT: Priority Assignment for Trail Crossings
CC: Jenny Bailey
PROJECT NUMBER: 554-1521-075
PROJECT NAME: East Lake Sammamish Master Plan Trail- South Sammamish Segment A

The purpose of this memorandum is to summarize how priority and traffic control measures were assigned for the East Lake Sammamish Trail intersections with 206th Avenue SE and SE 33rd Street. It is my understanding that City of Sammamish staff will review these recommendations in conjunction with the City's permitting authority.

East Lake Sammamish Trail is considered a high priority corridor because it is a regionally significant trail. The volume of trail users could match counts taken on the Burke-Gilman Trail and Sammamish River Trail, ranging from 2,500 to 4,000 trail users per day. By comparison, using the latest GIS information and aerial photos, 15 homes use 206th Avenue SE for access and 46 homes use SE 33rd Street for access. Based on Institute of Transportation Engineers Trip Generation Manual 9th Edition, 2012 (land use code 210-Single Family Detached Housing), 12 daily trips will be generated per each single family home. This equates to 180 trips per day and 552 trips per day, respectively for the two local roads. This potential volume of trail use greatly exceeds the daily vehicular volumes that would be generated by the residences that use these roads for access. As a result, the trail is given priority over the local roads at both intersections.

This assignment of priority means trail users would not have to stop or yield at these intersections. Instead, vehicles yield where sight distances are adequate and vehicles stop where sight distances are limited. This is consistent with the American Association of State Highway and Transportation Officials (AASHTO) Guide for the Development of Bicycle Facilities, which recommends to "follow the principle of providing the least amount of restriction that is effective." Installing unwarranted or unrealistically restrictive controls on path approaches in an attempt to "protect" path users can result in path users disregarding the signs and other traffic control devices at the intersection. This can lead to a loss of respect for traffic control at more critical locations.

Based on this priority assignment, sight distance triangles are drawn on the site specific plans to check if adequate sight distance triangles can be achieved.

- For 206th Street SE, the adequate sight distance triangles for drivers to yield cannot be achieved unless substantial removals of existing vegetation would be implemented. It is recommended that vehicles stop rather than yield. There is 52 feet between East Lake Sammamish Parkway and the trail, enough space to accommodate a queue of two cars or one car with a boat trailer.
- For SE 33rd Street, the adequate sight distance triangles for drivers to yield can be achieved. However, with the development of a future parking lot on the northeast corner of the crossing, the sight line for

yield control on the driver's approach might not be maintained due to the future restroom building. It is recommended that vehicles stop rather than yield. There is 78 feet between East Lake Sammamish Parkway and the trail, enough space to accommodate a queue of four cars or one car and one car with a boat trailer.

For the City's reference, I have attached documents providing additional details about the assignment of priority and sight distance triangles. Please let me know if you have any questions.

EAST LAKE SAMMAMISH MASTER PLAN TRAIL SIGHT DISTANCE TRIANGLE MEMORANDUM

March 2014

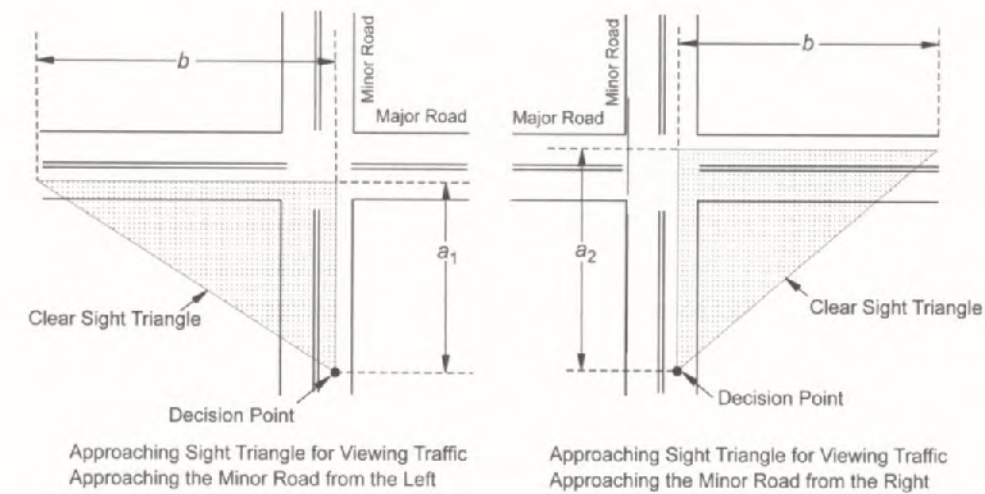
Intersection sight distances and traffic control measures are important design considerations for the 11-mile East Lake Sammamish Trail, which intersects over 60 roads and driveways. The purpose of this document is to summarize how sight distances were evaluated and traffic control assigned for the East Lake Sammamish Trail.

Priority is assigned to the trail. As a result, sight triangles for the East Lake Sammamish Trail are calculated from the perspective of the intersecting vehicle. Vehicle sight distances were sourced from the American Association of State Highway and Transportation Officials (AASHTO) *A Policy on Geometric Design of Highways and Streets, 2011* (Green Book). Figure 1 provides an illustration of sight triangles taken from the AASHTO Green Book.

In these schematics, the trail is considered the major road and the intersecting driveway the minor road. As shown by these figures, the sight distance triangles are larger where vehicles yield rather than stop. When constraints like topography, the angle of the crossing, and the presence of other features such as retaining walls present challenges for providing recommended sight distance triangles, a more restrictive control on the minor road (in this case, the driveway) is considered. At many intersections along the corridor, stop control is assigned to the minor road because of these constraints.

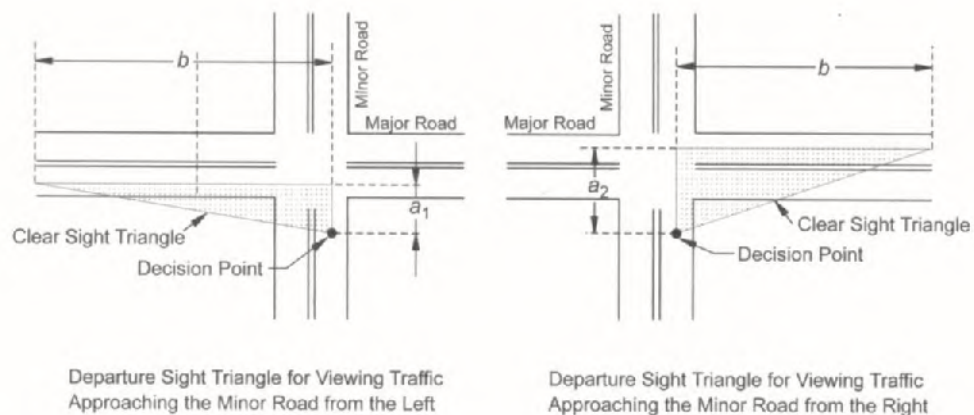
Procedures to determine the dimensions of sight distances at intersections are presented as Cases A through F in the AASHTO Green Book. Sight distances for a facility with a slower design speed could be calculated using the figures accompanying the *Intersection Control Case* presented in the AASHTO Green Book and formulas. This methodology was used for calculating sight triangles at the intersection of East Lake Sammamish Trail with driveways. The design speeds used for calculations are 15 mph for a minor roadway/driveway and 20 mph for trail. The trail will be signed for 15 mph speed limit, but it was designed for 20 mph to improve safety on the trail.

Figure 1. Intersection Sight Triangles



Approach Sight Triangles (Uncontrolled or Yield-Controlled)

– A –



Departure Sight Triangles (Stop-Controlled)

– B –

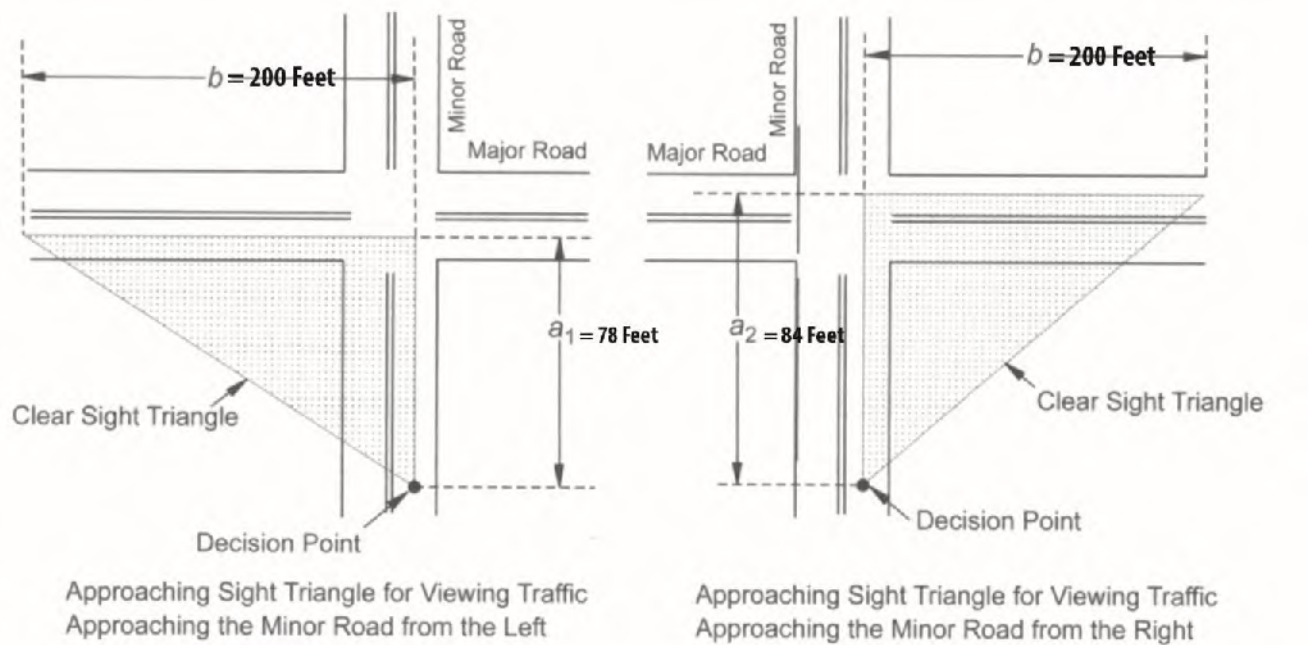
Where Drivers Yield

Based on the design speeds, a sight distance triangle of 75 feet (measured along the driveway) by 200 feet (measured along the trail) is required. When applying this triangle to a site specific situation, the width of traveled lanes of the major road (in this case, the trail) is considered for each intersection.

For the sight line looking to the left, as shown in Figure 2 (left) below, the smaller side of the triangle along the driveway is measured 75 feet from the edge of the intersecting traveled way (edge of the asphalt for the trail). This line is extended to the center of the travel lane of the trail coming from the left. For East Lake Sammamish Trail, that distance would be 3 feet. The total length of this smallest side of the triangle would be 78 feet ($a_1 = 78$ feet $\leftarrow$ trail is 12-foot-wide, trail lane is 6-foot-wide, half of 6 feet is 3 feet, thus $75+3=78$). Then the triangle extends 200 feet along the centerline of the travel lane of the trail ($b=200$ feet).

For the sight line looking to the right, as shown in Figure 2 (right) below, the smaller side of the triangle along the driveway is also measured 75 feet from the edge of the intersecting traveled way. This line is then extended to the center of the travel lane of the trail coming from the right. For this project, that distance would be 9 feet ($a_2 = 84$ feet $\leftarrow$ trail is 12-foot-wide, trail lane is 6-foot-wide, one and half of trail lane is 9 feet, thus $75 \text{ feet} + 9 \text{ feet} = 84 \text{ feet}$). The triangle also extends 200 feet along the centerline of the travel lane of the trail ($b=200$ feet).

Figure 2. Intersection Sight Triangles for Yield Control



Approach Sight Triangles (Uncontrolled or Yield-Controlled)

— A —

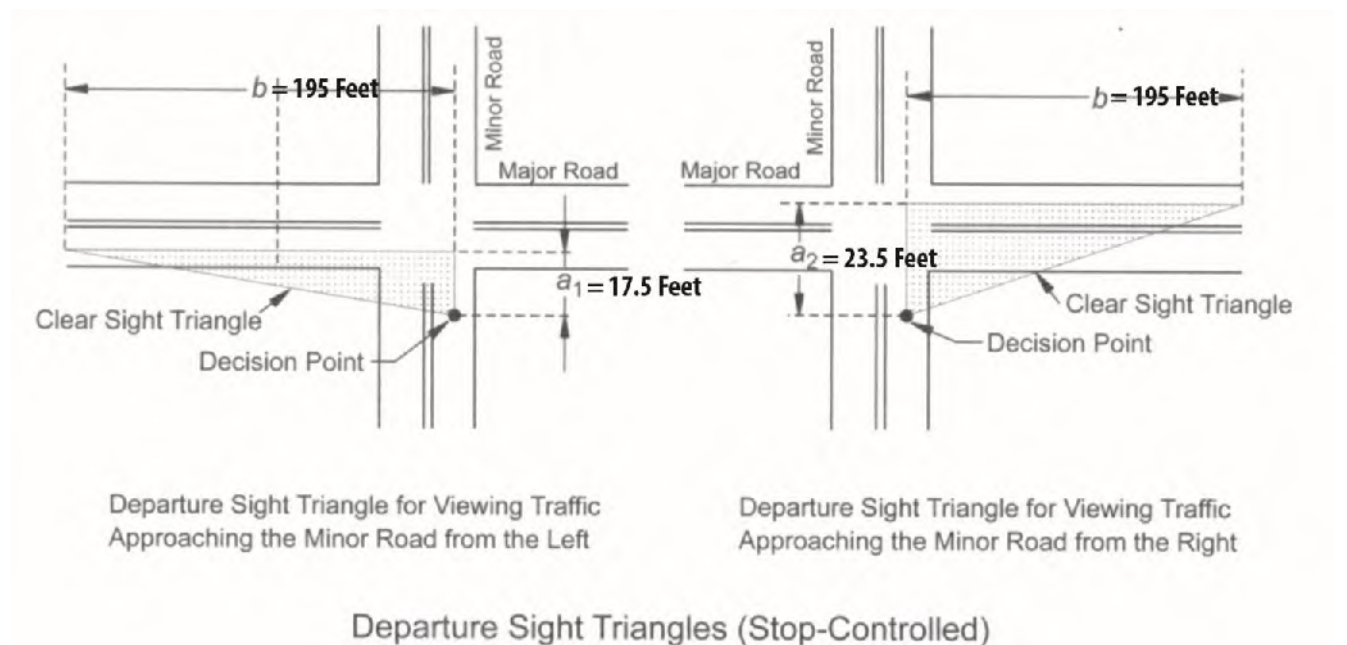
Where Drivers Stop

Based on the design speeds, a sight distance triangle of 14.5 feet (measured along the driveway) by 195 feet (measured along the trail) is required. When applying this triangle to a site specific situation, the width of traveled lanes of the major road (in this case, the trail) is considered for each intersection.

For the sight line looking to the left, as shown in Figure 3 (left) below, the smaller side of the triangle along the driveway is measured 14.5 feet from the edge of the intersecting traveled way (such as a road or trail). This line is extended to the center of the travel lane of the trail coming from the left. For East Lake Sammamish Trail, that distance would be 3 feet. The total length of this smallest side of the triangle would be 17.5 feet ($a_1 = 17.5$ feet $\leftarrow$ trail is 12-foot-wide, trail lane is 6-foot-wide, half of 6 feet is 3 feet, thus 14.5 feet+3 feet=17.5 feet). Then the triangle extends 195 feet along the center of the travel lane of the trail ($b=195$ feet).

For the sight line looking to the right, as shown in Figure 3 (right) below, the smaller side of the triangle along the driveway is measured 14.5 feet from the edge of the intersecting traveled way. The line is extended to the center of the travel lane of the trail coming from the right. For this project, that distance would be 9 feet. The total length of this smallest side of the triangle would be 23.5 feet ($a_2 = 23.5$ feet $\leftarrow$ trail is 12-foot-wide, trail lane is 6-foot-wide, one and half of trail lane is 9 feet, thus 14.5 feet+9 feet=23.5 feet). Then the triangle extends 195 feet along the center of the travel lane of the trail ($b=195$ feet).

Figure 3. Intersection Sight Triangles for Stop Control



– B –



Memorandum

To: Barbara Flemming, Senior Deputy Prosecuting Attorney

From: Bill Schultheiss, P.E. (WA. P.E. #46108)

Date: January 26, 2016

Re: East Lake Sammamish Trail Best Practice Discussion for assignment of right-of-way at crossings and a review of Engineers report for crossing at 206th Avenue SE

King County has asked Toole Design Group (TDG) to evaluate the assignment of right-of-way approach for a proposed shared use path (named the East Lake Sammamish Trail) as currently designed. As a key segment of the King County regional shared use path network (similar to the Burke Gilman Trail and I-90 Trail) it can reasonably be anticipated the trail will often be very busy and serve a wide range of users, including bicyclists, walkers, joggers, skaters and persons using wheelchairs. Preliminary estimates project upwards of 300 people per hour to use the trail on Saturdays and Sundays throughout the summer months. King County is interested in constructing a trail and applying traffic control devices that meet current design standards and best practices, anticipates growing use, and can handle projected future demands while providing a safe operating environment for all trail users. The trail construction is funded with a combination of Local, State, and Federal funding.

This memorandum describes requirements and best practices for right-of-way assignment at trail/roadway crossings and reviews a proposed crossing design at 206th Avenue SE. There are two primary categories of trail crossings. The first type of crossing is where the trail crosses at least one street at an intersection of two or more streets (a sidepath crossing). The second type of trail/roadway crossing is where a trail crosses one street or one path (a mid-block crossing, typically at least 30 to 50 feet from another intersection).

Considerations of Applicable Laws

Under Washington State Law, bicyclists are provided the rights as pedestrians within crosswalks, regardless of whether the crosswalk is marked or unmarked (RCW 46.61.235). Bicyclists are also considered operators of vehicles when riding a bicycle upon a roadway (RCW 46.61.755).

Traffic Control Principles

In general, right-of-way should always be assigned to the higher volume facility to ensure users respect the traffic control device. The Manual on Uniform Traffic Control Devices (MUTCD) standards and guidance are developed in accordance with these core principles from Section 1A.02:

- A. Fulfill a need;
- B. Command attention;
- C. Convey a clear, simple meaning;
- ★ D. Command respect from road users; and
- E. Give adequate time for proper response.

Of critical importance is the concept the traffic control device must command respect from road users or it will fail to provide the safety benefits intended. Research has proven the application of traffic controls which do not command the respect of the user will not be adhered to creating unsafe conditions and excessive burdens on law enforcement.

Determining Priority Assignment

The following is taken directly from the AASHTO Bike Guide and provides guidance for subsequent recommendations. The term intersection includes intersections with streets, and other paths. Likewise the term “roadway” in this context could apply to other intersecting paths. Driveways are a special circumstance where the path should generally always be assigned the right-of-way with restrictive control applied to the driveway. An exception would be a high volume, commercial driveway that functions more similarly to a street.

In conventional roadway intersection design, right of way is assigned to the higher volume and/or higher speed approach. In the case of a path–roadway intersection, user volumes on the path should be considered. While in many cases roadways will have greater volumes, user volumes on popular paths sometimes exceed traffic volumes on minor crossed streets. In such situations, total user delay may be minimized if roadway traffic yields to path traffic, and given bicyclists’ reluctance to lose momentum, such an operating pattern often develops spontaneously. In such situations, “YIELD” or “STOP” control is more appropriately applied on the roadway approaches (page 5-33).

Further, the Guide recommends the application of the least control necessary to maintain user respect for the traffic control and to improve safety.

Application of intersection controls (“YIELD” signs, “STOP” signs, or traffic signals) should follow the principle of providing the least amount of restriction that is effective. Installing unwarranted or unrealistically restrictive controls on path approaches in an attempt to “protect” path users can result in path users disregarding the signs and other traffic control devices at the intersection. This can lead to a loss of respect for traffic control at more critical locations.

A common misconception is that the routine installation of stop control for the pathway is an effective treatment for preventing crashes at path–roadway intersections. Poor bicyclist compliance with “STOP” signs at path–roadway intersections is well documented. Bicyclists tend to operate as though there are “YIELD” signs at these locations: they slow down as they approach the intersection, look for oncoming traffic, and proceed with the crossing if it is safe to do so. “YIELD” control (either for vehicular traffic on the roadway or for users on the pathway) can therefore be an effective solution at some mid-block crossings, as it encourages caution without being overly restrictive.

Intersection controls often stop path users, even when stopping might be unnecessary or inappropriate. The proliferation of stop signs on paths has led to a lack of compliance by path users in many communities and may actually diminish safety if ignored where truly needed. Therefore, the least restrictive control that is effective should be used (MUTCD 2009, Sec. 2B.06). For example, the 2009 MUTCD recommends that “STOP signs should not be used where YIELD signs would be acceptable” (MUTCD 2009, Sec. 9B.03). This was proven in a local study of the Burke Gilman Trail where stop signs were posted for trail users instead of being applied to the lower volume streets and driveways the trail crossed. The lack of traffic on the cross streets and driveways breeds disrespect for the stop sign by bicyclists degrading compliance to almost zero – the study documented fewer than three percent of bicyclists complied with the stop signs (May 16, 2005

Transpo Memo to King County). This is why when priority is assigned, the least restrictive control that is appropriate should be placed on the lower priority approaches.

The following, which is taken directly from the 2009 MUTCD, provides direction on when it is appropriate to assign right-of-way to a shared use path:

“When placement of STOP or YIELD signs is considered, priority at a shared use path and roadway intersection should be assigned with consideration of the following:

- Relative speeds of shared use path and roadway users,
- Relative volumes of shared use path and roadway traffic, and
- Relative importance of shared use path and roadway.

Speed should not be the sole factor used to determine priority, as it is sometimes appropriate to give priority to a high volume shared use path crossing a low volume street, or to a regional shared use path crossing a minor collector street.” (MUTCD 2009, Sec. 9B.03)

Once priority has been assigned, the least restrictive control that is appropriate should be placed on the lower priority approaches. STOP signs should not be used where YIELD signs would be acceptable. The acceptability of YIELD signs depends primarily on sight distance, which should be evaluated through an engineering study using standard engineering practices for such a study. Appropriate warning signs and markings should be placed on the trail and roadway.

Assessment of Proposed Traffic Control Design at 206th Avenue SE

The design engineer (Parametrix) projects peak hour traffic as being approximately 10 motor vehicle crossings per hour onto 206th Avenue SE and approximately 400 trail users per hour (50% bicyclists) on the Trail. 206th Avenue SE is a local, dead-end street. The East Lake Sammamish Trail is a regionally significant trail that is equivalent to an arterial roadway in transportation importance for bicycling. Typical traffic control options at a trail crossing for these conditions would include:

- An uncontrolled crossing for both approaches
- Yield control applied to 206th Avenue SE
- Stop control applied to 206th Avenue SE

These treatments may also be supplemented by:

- marked crosswalk (currently present)
- trail warning signs (W11-15) (currently present in form of separate W11-1 and W11-2 signs)
- raised trail crossing

The decision for which type of control is based on the available sight distance which has been evaluated by the design engineer. The construction of the developments “gateway” features including the walls, signs, fences and some trees obstruct the view between approaching trail users and crossing motorists who are approaching from the south (from the residences). Recommendations for removing the sight distance obstructions were provided. If these objects can be removed, an uncontrolled (both approaches) or yield control (applied to 206th Avenue SE) is recommended. If they cannot be removed, stop control should be provided to 206th Avenue SE.



Memorandum

To: Barbara Flemming, Senior Deputy Prosecuting Attorney

From: Bill Schultheiss, P.E. (WA. P.E. #46108)

Rebecca Sanders, PhD, Lisa Erns

Date: May 19, 2016

Re: East Lake Sammamish Trail Demand Analyses

King County has asked Toole Design Group (TDG) to estimate bicycle volumes on the East Lake Sammamish Trail, a significant link in the King County Trail network. The King County trail network is an important component of the overall transportation network, connecting major population and employment centers via safe, comfortable off-street facilities. In addition to transportation, the benefits of trail facilities include increasing public health and wellness and boosting the economy.

The East Lake Sammamish Trail (ELST) will be a key part of King County's regional trail network, shown in Figure 1. The ELST runs along the east side of Lake Sammamish for approximately 11 miles, connecting Issaquah and Redmond through Sammamish. Both Issaquah and Redmond's comprehensive plans call for concentrating growth and development in mixed use centers and offering multiple options for transportation. The ELST will directly connect these cities via a flat, paved, high quality trail that provides a safe and comfortable alternative to riding on roadways. The ELST will provide transportation and recreational opportunities for residents in Sammamish, Issaquah, Redmond, and the surrounding region. In addition to connecting the adjacent communities, the trail will be a vital link in the 44-mile regional trail corridor, linking Puget Sound to east King County and the Cascade Foothills.

The demand analysis presented in this document aims to provide the project team with a means to inform the overall design of the trail, including width as well as traffic control measures that will ensure a safe user experience.



Figure 1 - King County Regional Trail System

Direct Demand Model

In the past few years, the quality of data available for bicycling on trails in King County has increased. Several permanent trail counters were installed by the Seattle Department of Transportation (SDOT) in 2014, and the Washington Department of Transportation (WSDOT) installed permanent counters in several locations approximately a year ago. The additional data allows for the use of a more sophisticated trail estimate methodology than was previously available. The National Cooperative Highway Research Program's (NCHRP) Report 770¹, Estimating Bicycling and Walking for Planning and Project Development: A Guidebook, was consulted to select the best method for this analysis. NCHRP Report 770 is the result of a multi-year research effort that developed improved methods for estimating bicycling and walking for planning and project development purposes. Some of the methods only account for commute trips, so a direct demand model, which accounts for all trip purposes (including recreational use), was chosen for this analysis. This model is one of the most widely used tools to predict bicycle and pedestrian volumes. This process uses characteristics of the built environment and existing trail counts to provide an estimate of volumes on a new facility. The direct demand model only takes into account bicycle volumes. Pedestrian volumes are factored into the estimate via a mode split analysis based on similar trails.

The direct demand model recommended in NCHRP Report 770 follows this six-step process to estimate trail volumes:

1. Gather data from seven existing, permanent trail counters.
2. Create a "catchment area" around the permanent trail counters.
3. Summarize land use characteristics within the catchment area.
4. Analyze trail characteristics, such as elevation gain and connectivity.
5. Explore models including factors gathered in steps 3 and 4 to determine which factors influence trail usage.
6. Apply factors discovered in step 5 to surrounding land use and trail characteristics of the proposed East Lake Sammamish Trail.
7. Estimate pedestrian/bicycle mode split and apply pedestrian adjustment to calculate total trail volumes.

The following sections explain how estimated trail volumes were developed following this process.

1. Bicycle Counts

The first step in a direct demand model is to gather existing bicycle volumes. The Seattle Department of Transportation has 12 permanent bicycle counters that gather bicycle volumes continuously. This data is available from the City's website summarized by hour. We selected only off-street, paved trail count locations, similar to the proposed East Lake Sammamish trail. An entire year of data from 2014 was selected to include in the analysis from these counters:

- Elliott Bay Trail at Myrtle Edwards Park
- Burke-Gilman Trail at NE 70th
- Mountains to Sound Trail west of the I-90 Bridge
- Chief Sealth trail at S Thistle St

¹ Transportation Research Board, NCHRP Report 770, "Estimating Bicycling and Walking for Planning and Project Development: A Guidebook," Research sponsored by the American Association of State Highway and Transportation Officials (AASHTO) in cooperation with the Federal highway Administration, Final Report, 2014

The Washington Department of Transportation (WSDOT) has also begun installing permanent counters along trails. WSDOT counters used in this analysis were:

- I-90 trail at SE 34th St
- SR 520 trail at NE 24th St
- Sammamish River trail at Redmond City Hall

Two of the WSDOT counters have been running for at least a year, allowing us to select a year's worth of data from May 1, 2015, to April 30, 2016, with the exception of the Sammamish River Trail, which did not have data points for May or June. Using the Federal Highway Administration's Traffic Monitoring Guide methodology outlined in Chapter 4, "Traffic Monitoring for Non-Motorized Traffic," the missing May and June volumes were extrapolated to complete the Sammamish River Trail data set.

King County also provided data from two recently installed counters along the East Lake Sammamish Trail. Location #1 is on the East Lake Sammamish Trail just south of the intersection with the Marymoor Connector Trail in Redmond, and location #2 is on the East Lake Sammamish Trail just north of the intersection with the Issaquah-Preston Trail in Issaquah. These counters provide continuous data in the same manner as the SDOT and WSDOT counters. They were installed in the spring of 2016, thus data is only available from April 8- April 20, 2016. Annual counts were extrapolated from this two week period following the procedures from the Federal Highway Administration's Traffic Monitoring Guide methodology.

The goal of this analysis is to identify the volumes of trail traffic on the ELST at different times of the year, week, and day. To represent the spectrum of volumes expected, six volume metrics were pulled from each counter: annual, peak weekday, peak weekend, average weekday, average weekend, and peak hour. **Since the counts provided by King County were only from the month of April, the peak weekday, peak weekend, and peak hour volumes pulled from the April data are likely slightly lower than actual peak volumes the trail will experience in summer months.** The trail counts provided and national research show that bicycle usage rises in the summer months, resulting in actual peak volumes occurring between May and August which can correspond up to 12% of the annual trail traffic volumes. April data for these two count locations was also used to calculate average weekday and average weekend day volumes. The average data should be very similar to actual averages, as April is a typical month for bicycle ridership.

2. Catchment Area

In order to gather land use characteristics in areas near the trail, a catchment buffer was created. A GIS software analysis tool was used to find all areas of a trail within a 2 mile distance from each trail with a bicycle counter. A 2-mile proximity buffer around the trail was selected based on research which shows bicyclists will go up to a total of 3 miles out of their way to access high quality/low stress bicycle facilities (including bike lanes, bicycle boulevards, low traffic streets, and multi-use paths).² The actual built road and trail network was used to determine the catchment areas which results in the buffer's irregular shapes. Once on the trail, we assumed that a bicyclist would stay on the trail for 2-4 miles.

A future potential counter location was created on the ELST, near 190th PI SE, that is used for trail volume estimates. The catchment area process was then applied to that location. All nine resulting catchment areas are shown in Figure 2.

² Jennifer Dill and John Gliebe, "Understanding and measuring bicycling behavior: a focus on travel time and route choice," Final report OTREC-RR-08-03 prepared for Oregon Transportation Research and Education Consortium (OTREC), December 2008.

The result of this process is a catchment area around each counter location for people who have easy access to the trail, either by bicycle or a short car drive. Some trail users will likely drive or bicycle more than two miles to a trail access point, thus the catchment areas shown are likely conservative estimates that will have the effect of reducing potential trail volume. These users will be more influenced by the quality of the trail, such as connectivity, elevation gain, and other factors described in Section 4.

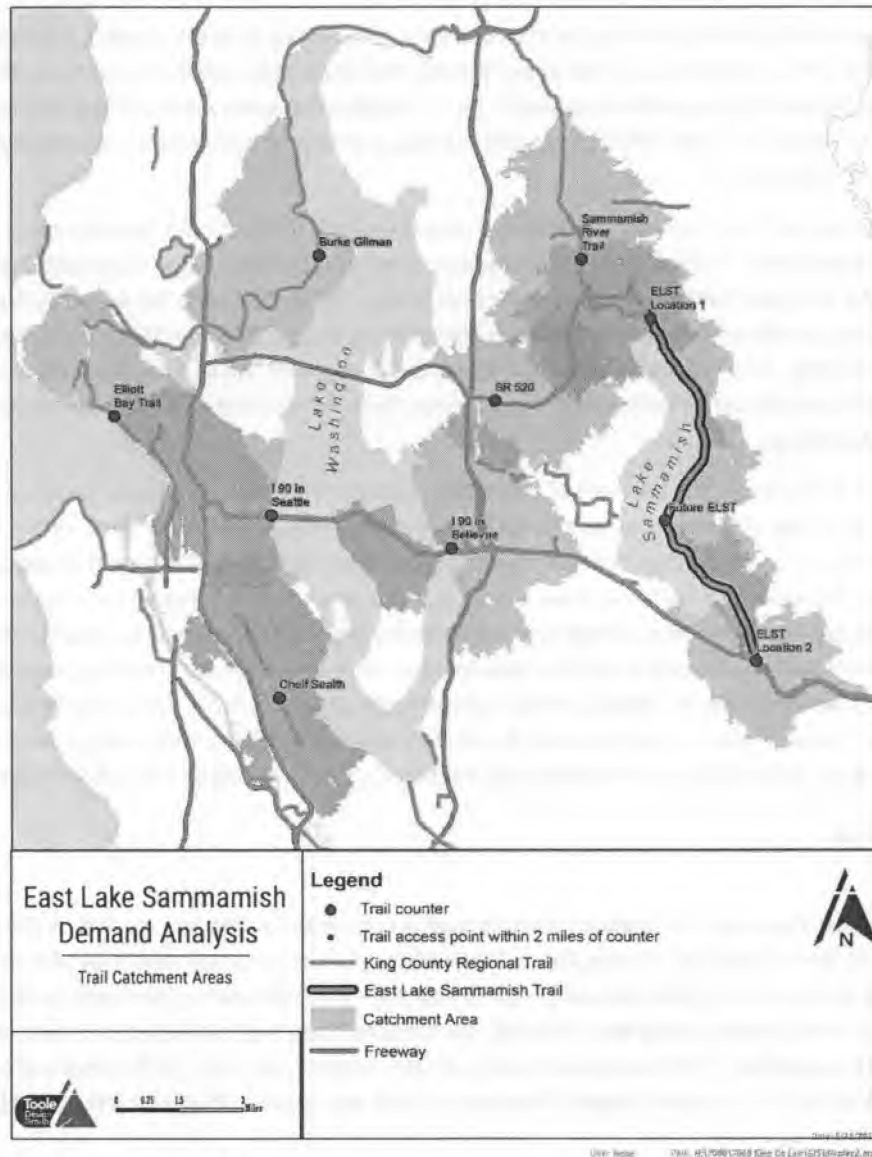


Figure 2: Catchment Areas

3. Land Use Information

The NCHRP Report 770 lists several factors that may influence bicycle use, including population and employment densities, land use mix, facility characteristics, transit availability, and major generators. These factors, along with other readily available factors, were gathered and represent existing conditions and data as provided from the King County data sets. All factors represent current conditions. The following describes each factor considered in this process:

Transit Access

Transit access was calculated by the sum of number of bus trips available per week at each stop in the catchment area, using King County data from the General Transit Feed Specification.

Population

Block groups that intersect the catchment area were selected, and the population calculated. Data is the 2015 estimate from the Office of Financial Management, tabulated by block group. Population density was calculated by dividing the 2015 population by the total land area of the selected block groups.

Employment

Employment values are from the Puget Sound Regional Council, tabulated by census tract. Census tracts that intersect the catchment area were selected, and employment values summed. Employment density was calculated by dividing the total employment by the total land area of the selected census tracts.

Street Network

A connected street network can be a factor in influencing bicycle rates. The number of intersections was summed in each catchment area.

Access Area

The total square mileage of each catchment area was calculated. A larger catchment area means that the trail is easier to access.

College Enrollment

Colleges are major activity generators for a region. The King County "schsite_point" layer was used to find colleges and universities within each catchment area, and each school's website was used to estimate enrollment.

4. Trail Characteristics

In addition to surrounding land use, characteristics of the trail or facility itself influence bicycle ridership. The trails selected for analysis all have similar characteristics to the future East Lake Sammamish Trail, but there are a few differences that were explored.

Connectivity

Trail connectivity may drive trail use, as bicyclists on longer rides may prefer a connected trail network. Multiple factors were explored as a way to measure connectivity.

Total mileage of King County Regional Trails in the catchment area

King County has a robust regional trail network. Most of the network is off-road, paved trails. However, on-street connections were included in this factor as a measure of connectivity.

Connected miles of paved, off-street trails

Some bicyclists may prefer to ride their entire route along paved, off-street trails. The total connected miles of paved, off-street trail was summed for each trail location.

Paved off-street trail extension past the catchment area

An additional measure of trail connectivity was also explored in the model; the trail was considered not extended if it did not connect to any other paved trails on either end of the catchment area (such as the Chief Sealth), semi-connected if the trail connected on one end of the catchment area (SR 520 Trail) and very connected if it connected on both ends (Burke Gilman, Sammamish River).

Elevation

Most trails in the King County Trail network have little to no elevation gain. A few, however, have a significant amount of elevation change, which may impact trail usage. Elevation gain was calculated using bicycle directions on Google Maps, divided by the distance of the trail within the catchment area to calculate average elevation gain/mile. The Chief Sealth, 520, and I-90 trails had the most elevation change; the Burke-Gilman, Elliott Bay, and Sammamish River trails had little to no elevation change. The East Lake Sammamish trail will also have little to no elevation change.

Freeway

The 520 and I-90 trails run directly adjacent to a freeway. Noise and stress level of freeway trails may deter some riders. Trails near a freeway were coded as a value of one, and non-freeway trails were given a value of zero.

5. Exploratory Models

The direct demand model attempts to explain observed levels of bicycle activity on facilities as related to surrounding land uses or facility characteristics. Because the explanatory variables act simultaneously to influence demand, we need a way to control for their influence in order to understand how important one variable is in comparison to another. We do this through regression analysis, which allows us to mathematically estimate the influence of each variable compared to all of the other variables. Additionally, we can use the regression outputs to determine how significant each relationship is—that is, how likely it is that the observed relationship is due to a real relationship as opposed to chance. The regression analysis compared estimated demand on the East Lake Sammamish Trail to segments of the larger King County trail system. The first step of a regression analysis is exploratory regression, which entails producing many different models to find out which variables best predict volumes.

During the exploratory phase, we discovered that the Chief Sealth trail had many characteristics that were not typical of the rest of the network. The trail is unconnected and hilly, which was accounted for by the elevation and network connectivity factors. However, the Chief Sealth trail also has a parallel roadway option, which could divert significant traffic from the trail. Due to this factor, the Chief Sealth trail was determined an outlier and removed from the analysis.

After running various models to determine the best fit, the following variables were found to have the highest influence on trail ridership.

- Population density
- College enrollment
- Miles of trail in the catchment area
- Connections to shared-use paths once the trail leaves the catchment area
- Intersection density
- Network length

However, many of these variables are highly correlated³, and therefore cannot coexist in a model without causing problems. For example, population density is highly correlated with both college enrollment and intersection density,

³ We used a correlation value cut-off of 0.6.

meaning that there is enough similarity between population density and the other two variables that the model is unable to attribute accurate values to either intersection density or college enrollment when population density is also included. Additionally, we can assume that when a model includes intersection density or college enrollment, some portion of the explanatory value of those variables is due to population density. However, in both cases, there is something else that made those variables a better fit for the model than just population density. Modeling is as much an art as a science in this way.

Another important aspect of modeling is having enough data points to be able to say something with confidence. Although King County is on the forefront of collecting bicycle volume data, there were only 8 robust data points to work with. While the models we present here are significantly better than not knowing any information at all (i.e., the "null model"), additional count locations would have allowed us to produce a more robust model.

6. Application of Predictive Model

After testing several models in the exploratory phase, final models were selected based on a combination of the highest R squared value (a measure of how much of the variation in bicycle volumes can be explained by the model), the statistical significance of the variables (a measure of how likely it is that the observed relationship is real and not just by chance), and minimal multicollinearity (as explained in Section 5, a correlation value of 0.6 was the cut-off for inclusion in the model). A separate model was built for each volume estimate: annual, peak hour, average weekday, average weekend day, peak weekday, and peak weekend day. Because the models are different, the annual volumes do not automatically match up with the average weekday and average weekend day volumes.

The following regression equations use 2015 and 2016 conditions, meaning that the resulting volumes are an estimate of what trail usage would be if the trail were built today.

Each variable in the model is a land use or trail characteristic described in steps 3 and 4.

Annual

This model estimates the annual trail volume. The model indicates that intersection density, ability to easily access the trail, college enrollment, and network mileage influences the annual volume. Note that this and all other models presented here were based on eight data points. The resulting annual volumes are much lower than expected from the calculation of average weekend and weekday volumes separately, but this is not unexpected, given that each model has some percentage of error, as noted by the R-squared values.

The annual model had an R-squared value of 0.7538, suggesting that the significant variables predict approximately 75% of the variation in annual trail counts from the eight data locations. The model produced the following equation, which can be applied to the ELST fictional point to predict its annual volume:

$$= \exp(9.710414 + 0.0005635 * \text{intersection density} + 0.1153764 * \text{access area} + 0.000024 * \text{college enrollment} + 0.0062116 * \text{network mileage})$$

Poisson (count) models are easier to interpret if we turn the coefficients above into incidence rate ratios (IRRs), which explain the expected change in annual counts due to the effect of each variable, holding all other variables constant in the model. This model produces the following IRRs:

- Intersection density – for a one-unit increase in intersection density, annual counts would be expected to change by a factor of 1.0006 (increase by 0.06%)
- Access Area – for a one-unit increase in square mileage of access area, annual counts would be expected to change by 1.12 (increase by 12%)

- College enrollment – for a one-student increase in college enrollment, annual counts would be expected to just barely change (increase by 0.002%)
- Network mileage – for a one-mile increase in network mileage, annual counts would be expected to change by 1.0062 (increase by 0.62%)
- Constant – This represents the value when all other variables in the model are evaluated at zero. In this case, the expected annual volume when all other variables are zero would be 16,488.

When the equation was applied to the data, the model predicted an annual volume of 57,945.

Peak Weekday

This model estimates the peak weekday volume of the trail. This model indicates that ability to easily access the trail, college enrollment, and connections to other paved trails influence the peak weekday volume. The peak weekday model had an R-squared value of 0.9103, suggesting that the significant variables predict approximately 91% of the variation in peak weekday trail counts from the eight data locations. The model produced the following equation, which can be applied to the ELST fictional point to predict its peak weekday volume:

$$= \exp(3.559199 + 0.0009682 * \text{intersection density} + 0.1436083 * \text{access area} + 0.4158266 * \text{paved, off-street trail connections} + 0.0000247 * \text{college enrollment})$$

The peak weekday model produced the following IRRs:

- Intersection density – for a one-unit increase in intersection density, peak weekday counts would be expected to change by a factor of 1.0010 (increase by 0.1%)
- Access Area – for a one-unit increase in square mileage of access area, peak weekday volumes would be expected to change by 1.15 (increase by 15%)
- College enrollment – for a one-student increase in college enrollment, peak weekday volumes would be expected to just barely change (increase by 0.002%)
- Network connections – for each additional connection beyond the catchment area to a paved, off-street trail, peak weekday volumes could be expected to change by 1.52 (increase by 52%)
- Constant – This represents the value when all other variables in the model are evaluated at zero. In this case, the expected peak weekday volumes when all other variables are zero would be 35.

When the equation was applied to the data, the model predicted a peak weekday volume of 269.

Peak Weekend

This model estimates the peak weekend volume of the trail. The model indicates that population density, miles of trail, and connections to other paved trails significantly influence the peak weekend volume. The peak weekend model had an R-squared value of 0.6767, suggesting that the significant variables predict approximately 68% of the variation in peak weekend trail counts from the eight data locations. The model produced the following equation, which can be applied to the ELST fictional point to predict its peak weekend volume:

$$= \exp(5.397286 + 0.0000332 * \text{population density} + 0.0250577 * \text{total mileage of King County Regional Trails in the catchment area} + 1.014041 * \text{paved, off-street trail connections})$$

The peak weekend model produced the following IRRs:

- Population density – for a one-unit increase in population density, peak weekend counts would be expected to change by a factor of 1.0010 (increase by 0.1%)
- Miles of regional trail—for each additional mile of trail in the catchment area, peak weekend volumes could be expected to change by 1.025 (2.5%)
- Network connections – for each additional connection beyond the catchment area to a paved, off-street trail, peak weekend volumes could be expected to change by 2.75 (increase by 175%)
- Constant – This represents the value when all other variables in the model are evaluated at zero. In this case, the expected peak weekend volumes when all other variables are zero would be 221.

When the equation was applied to the data, the model predicted a peak weekend volume of 2,236.

Peak Hour

This model estimates the peak hour volume of the trail. This model indicates that total mileage of King County Regional Trails in the catchment area, college enrollment and trail connections influence the peak hour volume. The peak hour model had an R-squared value of 0.7505, suggesting that the significant variables predict approximately 75% of the variation in peak hour trail counts from the eight data locations. The model produced the following equation, which can be applied to the ELST fictional point to predict its peak hour volume:

$$= \exp(3.801138 + 0.037278 * \text{total mileage of King County Regional Trails in the catchment area} + 0.0000225 * \text{college enrollment} + 0.6865772 * \text{paved, off-street trail connections})$$

The peak hour model produces the following IRRs:

- Miles of regional trail—for each additional mile of trail in the catchment area, peak hour volumes could be expected to change by 1.038 (3.8%)
- Network connections – for each additional connection beyond the catchment area to a paved, off-street trail, peak hour volumes could be expected to change by 1.99 (increase by 99%)
- College enrollment – for a one-student increase in college enrollment, peak hour volumes would be expected to just barely change (increase by 0.002%)
- Constant – This represents the value when all other variables in the model are evaluated at zero. In this case, the expected peak hour volumes when all other variables are zero would be 45.

When the equation was applied to the data, the model predicted a peak hour volume of 233.

Average Weekday

This model estimates the average weekday volume of the trail. This model indicates that college enrollment, intersection density, and access area influence the average weekday volume. The average weekday model had an R-squared value of 0.7946, suggesting that the significant variables predict approximately 79% of the variation in average weekday trail counts from the eight data locations. The model produced the following equation, which can be applied to the ELST fictional point to predict its average weekday volume:

$$= \exp(3.745707 + 0.0000255 * \text{college enrollment} + 0.000946 * \text{intersection density} + 0.1115804 * \text{access area})$$

The average weekday model produces the following IRRs:

- College enrollment – for a one-student increase in college enrollment, average weekday volumes would be expected to just barely change (increase by 0.002%)
- Intersection density – for a one-unit increase in intersection density, average weekday counts would be expected to change by a factor of 1.00095 (increase by 0.1%)
- Access Area – for a one-unit increase in square mileage of access area, average weekday volumes would be expected to change by 1.12 (increase by 12%)
- Constant – This represents the value when all other variables in the model are evaluated at zero. In this case, the expected average weekday volumes when all other variables are zero would be 42.

When the equation was applied to the data, the model predicted an average weekday volume of 113.

Average Weekend Day

This model estimates the average weekend day volume of the trail. The only variable that was found to be statistically significant for the average weekend day volume model was college enrollment. Relatedly, this model had an R-squared value of 0.3705, suggesting that the significant variable only predicts approximately 37% of the variation in average weekend day trail counts from the eight data locations. This model suggests that there is a similar base average weekend day volume for the entire trail system, and high college enrollment increases the base. This model produced the following equation, which can be applied to the ELST fictional point to predict its peak weekday volume:

$$= \exp(6.293539 + 0.000022 * \text{college enrollment})$$

The average weekend day model produces the following IRRs:

- College enrollment – for a one-student increase in college enrollment, average weekend day volumes would be expected to just barely change (increase by 0.002%).
- Constant – This represents the value when all other variables in the model are evaluated at zero. In this case, the expected average weekend day volumes when all other variables are zero would be 541.

When the equation was applied to the data, the model predicted an average weekend day volume of 541.

East Lake Sammamish Volumes

Applying these equations to the factors to the East Lake Sammamish Trail, the resulting volumes are:

Table 1: Estimated trail volumes on the East Lake Sammamish Trail

Annual	Peak Hour	Average Weekday	Average Weekend Day	Peak Weekday	Peak Weekend Day
57945	233	113	541	269	2236

Figure 3 and Figure 4 on pages 13 and 14 show the estimated average weekday and weekend day volumes in comparison to other regional trails.

Future Bicycle Use Estimate

Using the estimates calculated in the direct demand model, we can assume that trail ridership will increase along with population increase in the area. Population forecasts for the area are readily available from the Puget Sound Regional Council. Using data from the Regional Macroeconomic forecast and using 2015 as a base year for comparison, we can calculate the percentage of growth for 5, 10, and 20 years in the future.

Table 2: Expected population change in 5, 10, and 20 years

Year	Expected Percent Population Change (from 2015)
2020	6%
2025	10%
2035	19%

Assuming a linear relationship between expected population growth and trail ridership, the estimated future trail bicyclist volumes are shown in Table 3.

Table 3: Estimated future trail bicycle volumes with static bicycling rates

Year	Annual	Peak Hour	Average Weekday	Average Weekend Day	Peak Weekday	Peak Weekend Day
2015	57945	233	113	541	269	2,236
2020	61422	247	120	573	285	2,370
2025	63740	256	124	595	296	2,460
2035	68955	277	134	644	320	2,661

These volumes assume that the rate of bicycling in the region will remain the same. It is very likely that actual numbers will be much higher, due to the network effect of a completed trail network, as well as increased bicycling rates as Issaquah and Redmond grow denser and encourage land use mixes in their urban growth centers. According to the online Census Explorer, King County's bicycling commute rate has grown from 0.9% in 2000 to 1.5% in 2013, a growth of approximately 0.04% per year. If this growth continues at a linear rate, in addition to the population growth, the future volumes of bicyclists estimated on the East Lake Sammamish Trail are:

Table 4: Estimated future trail bicycle volumes with increasing bicycling rates

Year	Annual	Peak Hour	Average Weekday	Average Weekend Day	Peak Weekday	Peak Weekend Day
2015*	57945	233	113	541	269	2,236
2020	70871	285	138	662	329	2,735
2025	93158	375	182	870	432	3,595
2035	143213	576	279	1337	665	5,526

*A bicycling rate of 1.5% was assumed for 2015.

Again, these numbers may be underestimated because the Census and American Community Survey only ask about commuting habits, and do not take into account any growth in recreational or non-commute bicycling.

Future Bicycle and Pedestrian Use Estimate

The model above only considers bicycle volumes. To estimate trail use including pedestrians, a mode split factor was applied. The mode-split factor was determined by calculating how many users of the trail system, on average, are bicyclists. All trail counts from step 1 which included both pedestrian and bicyclists counts were assessed to identify an average mode split for trails in this region. The average trail mix consisted of 64% bicyclists with 36% pedestrians, thus the mode split factor of 0.64. Applying this factor to Table 3 calculates expected total trail usage with static bicycling rates.

Table 5: Estimated future trail volumes (bicycle and pedestrian) with static bicycling rates

Year	Annual	Peak Hour	Average Weekday	Average Weekend Day	Peak Weekday	Peak Weekend Day
2015	90539	364	177	845	420	3,494
2020	95972	386	188	895	445	3,703
2025	99594	400	194	930	463	3,844
2035	107742	433	209	1,006	500	4,158

If we assume that the level of pedestrian activity will grow in conjunction with increased bicycling activity, we can apply the mode split factor to Table 4 and calculate expected total trail usage with increasing bicycle and pedestrian activity.

Table 6: Estimated future trail volumes (bicycle and pedestrian) with increasing bicycling rates

Year	Annual	Peak Hour	Average Weekday	Average Weekend Day	Peak Weekday	Peak Weekend Day
2015*	90539	364	177	845	420	3,494
2020	110736	445	216	1,034	514	4,273
2025	145559	586	284	1,359	675	5,617
2035	223770	900	436	2,089	1,039	8,634

*A bicycling rate of 1.5% was assumed for 2015.

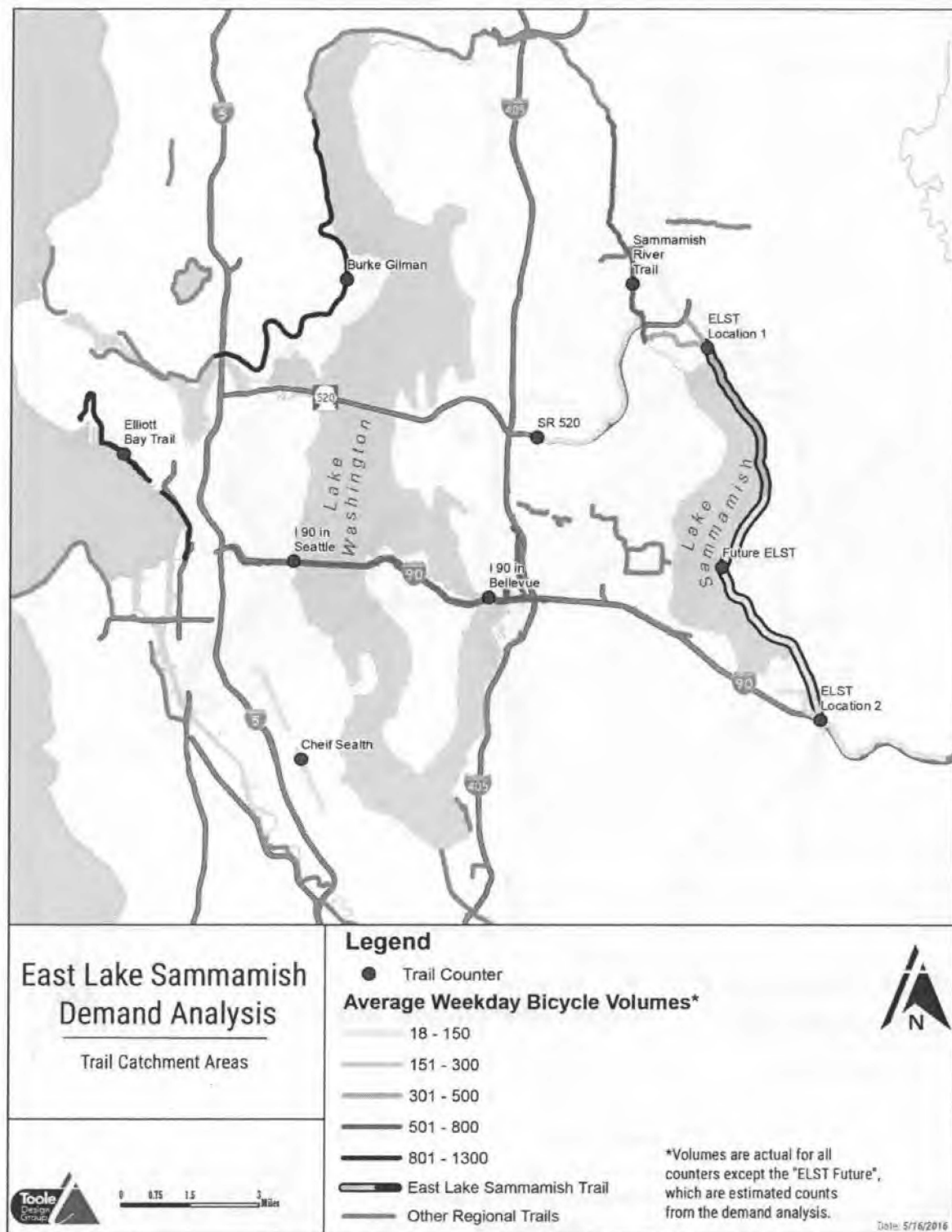


Figure 3: Estimated Average Weekday Bicycle Volumes

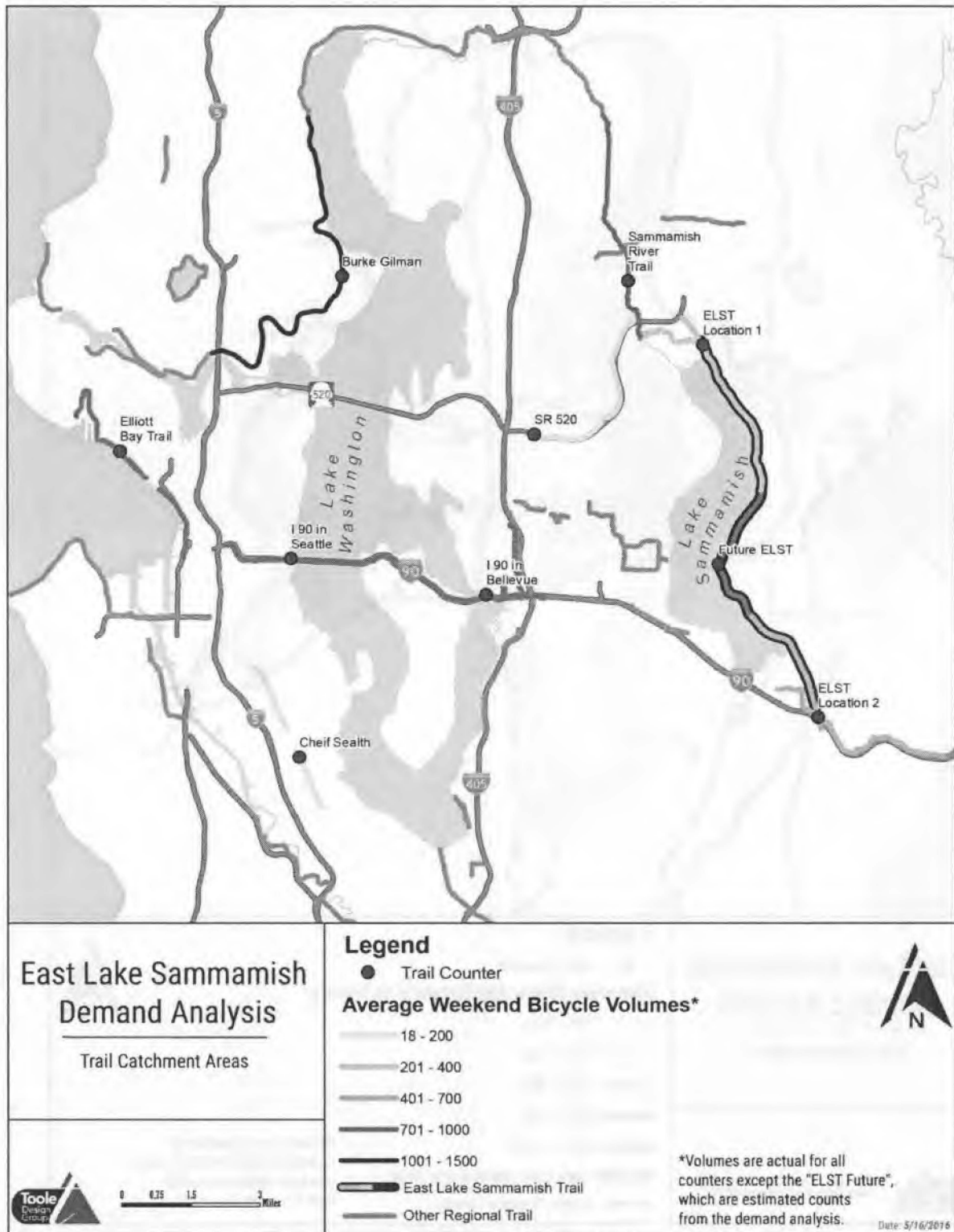


Figure 4: Estimated Average Weekend Bicycle Volumes

Conclusion

The East Lake Sammamish trail will become a critical transportation facility for residents and employees in East King County. As part of the King County Regional trail system, the trail will provide a safe, pleasant non-motorized transportation and recreation option for the entire region. The estimates of volumes of bicyclists that will use this trail are similar to other regional trails, with peak volumes near those of the I-90 trail and the Elliott Bay trail. **Peak hourly volumes should be anticipated to be above 300 users per hour when the trail is complete and grow towards 900 users per hour in the future. As part of the regional trail network, the trail should be designed to anticipate growing use and be able to handle projected future demands while providing a safe operating environment for all users.**

Similar to other transportation projects, it is recommended the 20 year demand projections be considered when planning for the design of a trail facility. Given the anticipated opening day and 20 year volumes, a minimum trail width of at least 12 feet is needed to meet both AASHTO and WSDOT guidelines, as well as King County guidelines for regional trails.⁴ Anything less than 12 feet will compromise safety and the ability to meet projected demand and will likely lead to conflicts between pedestrians and bicyclists during peak periods of travel.

⁴ King County trail guidelines recommend a trail width of at least 12 feet where volumes are anticipated to be greater than 2,000 users a day on peak days (as in the context of estimated user volumes on the ELST).

EXHIBIT 2



801 – 228th Avenue SE • Sammamish, WA 98075 • Phone: 425-295-0500 • Fax: 425-295-0600 • web: www.sammamish.us

June 9, 2017

Kevin Brown
Director
Parks and Recreation Division
King Street Center
201 S. Jackson St., Ste. 700
Seattle, WA 98104-3855

Re: East Lake Sammamish Trail Segment 2A — Right-of-Way Permits:
Letter from Kevin Brown dated May 23, 2017

Dear Kevin:

I am writing in response to your letter dated May 23, 2017, regarding right-of-way permits required for certain work by King County on Segment 2A of the East Lake Sammamish Trail (ELST).

Your letter is just the latest of several recent examples where you have directly and materially contradicted in writing earlier statements you or your subordinates have made to the City regarding the ELST. After months of permit review, you now claim that right-of-way (ROW) permits are not needed for King County's work in the two intersections where the ELST crosses 206th Avenue SE and SE 33rd Street, both of which are City of Sammamish public streets. You base this assertion on your claim that the City owns no ROW at either 206th Avenue SE or SE 33rd Street, even though just two weeks earlier, on May 8, 2017, Deputy Prosecuting Attorney Barb Flemming had a telephone conversation with David Linehan (Assistant City Attorney) in which she correctly took the opposite position.

In their May 8 phone conversation, Ms. Flemming and Mr. Linehan discussed the County's *own* archival records showing how the County acquired ROW over 206th Avenue SE by purchasing a public road easement from the Burlington Northern Railroad in 1992, and how the City later obtained ownership of that ROW from the County when the City was incorporated in 1999. At the time of Ms. Flemming's and Mr. Linehan's May 8 phone conversation, the recorded easement for 206th Avenue SE had not yet been located, but Ms. Flemming admitted that the County had certainly intended to acquire the public road easement from the Railroad when it approved the Alexanders on the Lake plat and, moreover, if there were any shortcomings in the documentation, that she (or others on the County's staff) may be willing to ask the King County Council to grant a ROW easement to the City.

In any event, Ms. Flemming understandably expressed that the County would proceed as planned to seek ROW permits at both 206th Avenue SE and SE 33rd Street, because the ROW permits are required under the conditions of approval of the Clearing & Grading (C&G) permit

Kevin Brown
June 9, 2017
Page 2

for Segment 2A (CG2016-03488). The County *did not appeal*¹ the C&G permit or any of its conditions.

After the May 8 conversation, the City obtained the recorded easement granted in 1992 to the County by the Railroad. The easement is recorded under King County recording number 199206301491, and it clearly quitclaims to the County “an EASEMENT for the construction, maintenance, replacement and removal of 206th Avenue Southeast [for] ... street purposes.” (Caps in original.) A copy of the recorded easement is enclosed for your records.

Under state law, this street easement became City right-of-way upon incorporation in 1999, just like every other inch of right-of-way in existence at the time of the City’s incorporation. It is difficult to understand how King County was unable or unwilling to locate this document from its own records, and why you now deny that the City owns this ROW despite your attorney’s statements to the contrary, and despite being provided other ample documentation demonstrating the existence of this ROW.

The C&G permit for Segment 2A clearly requires a ROW permit for the proposed activities at 206th Avenue SE and SE 33rd Street. As expected, the County applied for the required ROW permit on May 5, 2017, and the City was in the process of reviewing the County’s permit application when your letter arrived stating that you were withdrawing the pending ROW permit application because you deemed it unnecessary. Given that you have expressly withdrawn the County’s required ROW permit application, the County will now need to submit a new permit application before any work in the 206th Avenue SE or SE 33rd Street ROW will be authorized.

As a reminder, the County also had proposed to do work within the East Lake Sammamish Parkway ROW under the now-withdrawn ROW permit. Since you have withdrawn the permit, work in the Parkway will also be barred unless and until the County submits, and the City approves, a new ROW permit application covering such work.

Moreover, without the required ROW permit, the County will likely be in violation of the conditions of approval of the C&G permit for Segment 2A, as explained below. Because of your actions, the City is forced to consider suspending the C&G permit and instituting proceedings to revoke it under SMC Sections 21A.115.040 and .050.

¹ In fact, Ms. Flemming stated that if the City would not approve the ROW permits based on the original plan set provided with the County’s application, the County would simply revise the drawings per City instructions and remove an adjacent entrance monument to improve sightlines for trail users. Ms. Flemming then inquired about possible alternative traffic control configurations at 206th Avenue SE and whether the City would approve plans featuring such alternatives.

Kevin Brown
June 9, 2017
Page 3

I. THE CITY ACQUIRED ROW FROM KING COUNTY AT
BOTH 206TH AVENUE SE AND AT SE 33RD STREET

Kevin, you argue that SE 33rd Street and 206th Avenue SE are not City ROW, and therefore King County does not need a ROW permit to do work in these areas. There are multiple problems with this assertion.

You claim that the 206th Avenue SE easement does not exist despite Ms. Flemming having been provided documents from the King County Archives for the Alexanders on the Lake plat evidencing the easement — documents which included:

- Correspondence from the King County Real Property Division to former King County Executive Tim Hill, dated April 23, 1992, specifically referencing the County's acquisition of a "public right of way crossing" from the Railroad at 206th Avenue SE, and asking Hill to sign and accept the easement on behalf of King County; and
- A \$3,000 check request from the County's Real Property Division, payable to the Railroad, dated May 5, 1992, for a "Roadway Easement" located at 206th Avenue SE.

While the City would have expected your department to have a copy of this easement, the City has now obtained a copy from the Railroad, which shows it was recorded with the King County Recorder's Office in 1992 — approximately eight years before the Railroad quit-claimed the corridor to the Land Conservancy (which later sold it to King County).

With respect to SE 33rd Street, your letter admits the existence of an easement granted by Burlington Northern Railroad to the County for "public-road purposes only." As shown on its face, it was granted in 1972 for payment of \$3,000, and there is no dispute that this easement transferred to the City upon incorporation by operation of state law.

A ROW permit is required under Sammamish Municipal Code Section 14.30.010 prior to construction being done within the City's ROW. Both SE 33rd Street and 206th Avenue SE are ROW as that term is defined in the City's interim public works standards (IPWS 10.020) and SMC Section 14.30.015(5) to which the C&G permit for Segment 2A vested.

'Right-of-way' means all public streets and property granted or reserved for, or dedicated to, public use for street purposes, together with public property granted or reserved for, or dedicated to, public use for walkways, sidewalks, bikeways and horse trails, whether improved or unimproved, including the air rights, sub-surface rights and easements related thereto. IPWS 10.020.

'Right-of-way' or 'ROW' means and includes streets, avenues, ways, boulevards, drives, places, alleys, sidewalks, landscape (parking) strips, squares, triangles, easements and other rights-of-way open to the use of the public, including the space above or beneath the surface of same. This definition specifically does not

Kevin Brown
 June 9, 2017
 Page 4

include streets, alleys, ways, landscape strips, sidewalks, easements, etc., which have not been deeded, dedicated, or otherwise permanently appropriated to the City for public use. SMC 14.30.015(5).

The plain language of the easements themselves also supports the assertion that they conveyed ROW easements: The SE 33rd Street easement says it is for public road purposes, and the 206th Avenue SE easement is explicitly to be used for a street. Also, both easements were granted to the County, not a private party, and the County itself labeled both as “public” on the approved plans for the C&G permit for Segment 2A.

The City clearly owns ROW for street purposes at both SE 33rd Street and 206th Avenue SE.

II. RAILS-TO-TRAILS AND RESERVED RIGHTS

Citing to Judge Pechman’s April 20, 2016, Order in the Hornish v. King County case, you contend that the Federal Rails to Trails Act grants the County trail rights in the street crossings at SE 33rd Street and 206th Avenue SE that override the City’s interest in its ROW. I agree with you that the County obtained whatever rights the Railroad had at the time it quit-claimed the corridor. But, you have ignored the property rights that the Railroad conveyed away *before* rail-banking. Judge Pechman’s Order does not say that rail-banking resurrects rights that the Railroad had conveyed away prior to rail-banking. Rather, Judge Pechman’s Order correctly provides only that the County has the same control over the corridor that the Railroad had when it quit-claimed the corridor. Order at 7. The Railroad of course had no control over rights that it had already conveyed to others.

In the case of SE 33rd Street, the railroad conveyed “an easement for public-road purposes” to the County more than twenty-seven years before rail-banking. In the case of 206th Avenue SE, the railroad conveyed an easement for a public street approximately eight years before rail-banking. I hope you would agree that the Railroad could not have conveyed to The Land Conservancy (and thus to the County) more than the rights it had at the time of the quit-claim deed.

Your letter goes on to say that even if easements exist at 206th Avenue SE or SE 33rd Street, they are insufficient to give the City control over the ROW because the Railroad reserved rights in the easements, and those reservations somehow supersede the City’s rights. You are misreading the scope of those reserved rights and how they may be exercised by the County (as the Railroad’s successor in title).

In the easement for SE 33rd Street the railroad made what appears at first glance to be a very broad reservation: “[A]ll rights to use the property for any and all purposes.” This seemingly broad reservation is restricted, however, in that the grantor’s use cannot be “**inconsistent with**” the public road easement, and it must be exercised so as to not “**damage or interfere with the highway**” described in the “public-road” easement. (Emphasis added.) The

Kevin Brown
 June 9, 2017
 Page 5

improvements proposed by the County in the SE 33rd Street ROW — and the construction of those improvements — “damage or interfere” with the City’s public road easement. With an approved ROW permit (appropriately conditioned), the County’s proposed improvements and construction activity would not improperly damage or interfere with the SE 33rd Street ROW. But, without approved permit conditions, the County’s construction activities and ongoing presence of the improvements will improperly interfere with the SE 33rd Street ROW. As such, it is incorrect to assert that the County’s residual or reserved rights in the corridor somehow entitle it to unconstrained use of, or interference with, the City’s “public-road” ROW located at SE 33rd Street.

In the easement for 206th Avenue SE, the Railroad reserved a right to use the easement area for “any and all purposes, not inconsistent with the use thereof for purposes” [sic]. Despite there being a word missing between “for” and “purposes,” the clear intent was to say, “not inconsistent with the use thereof for **street** purposes,” as that is the very purpose described a few lines above in the document. This intent is in accord with case law providing that the owner of the property over which a road easement passes (e.g., King County) may protect its ownership interests in the underlying property, so long as its actions “do not unreasonably interfere with the dominant owner’s use” of the road easement. *See, e.g., Rupert v. Gunter*, 31 Wn. App. 27, 29, 640 P.2d 36 (1982). *See also Beebe v. Swerda*, 58 Wn. App. 375, 384, 793 P.2d 442 (1990) (the owner of the servient property is entitled to use it “for any purpose that does not interfere with the proper enjoyment of the easement”). Like the easement at SE 33rd Street, the County’s inherited rights from the Railroad do not entitle the County to make unconstrained use of the public road at 206th Avenue SE. Rather, such use must not be inconsistent with the original intention of the parties, the nature of the property, and the manner in which it has been used and occupied by the City (and the citizens of Sammamish) — specifically, as a road.

The County’s proposed placement of a stop sign impeding vehicular traffic on 206th Avenue SE constitutes an improper degree of “interference” with the intended use of the road easement as granted by the Railroad. The intent of the easement was to allow the public to use 206th Avenue SE as a City street and for the City to regulate the public’s use of that street. The County’s unilateral placement of a stop sign would impose a limitation or interference that exceeds what the grantor and grantee of the easement originally intended, and in a manner inconsistent with how the street has been used and occupied for decades. Similarly, the County’s proposed construction activities at 206th Avenue SE constitute an unlawful interference with the City’s road easements, unless properly conditioned through an approved ROW permit.

III. CLEARING & GRADING PERMIT VIOLATIONS

The C&G permit for Segment 2A expressly states that it does not constitute approval of the County’s proposed ROW work, and that such work requires approval through a separate ROW permit. Even if you were correcting that the City does not actually own ROW at SE 33rd Street and 206th Avenue SE, or that the City’s interests in the ROW are somehow superseded by the

Kevin Brown
June 9, 2017
Page 6

County's reserved rights, a C&G permit is an undisputed requirement for the County to construct its proposed improvements for Segment 2A within the Sammamish city limits.

The City issued the C&G permit for Segment 2A, and the County declined to appeal any permit conditions of the C&G permit. Accordingly, without a valid ROW permit, the following is a partial list of C&G permit modifications the County will need to proceed to complete Segment 2A:

- Eliminate all work within 206th Avenue SE and SE 33rd Street. By withdrawing the ROW permit you have left the County unable to meet conditions in the C&G permit. The discussions among County and City Staff upon submission of the C&G permit in 2016 were clear: The County's proposed work in the SE 33rd Street and 206th Avenue SE ROWs required a subsequently issued ROW permit. And, indeed, the County's plans submitted with the C&G permit for Segment 2A represented both streets as public, and the County then applied for the required ROW permit. It is disingenuous, at best, for you to now assert that work within SE 33rd Street and 206th Avenue SE was approved in the C&G permit. If the County genuinely disputed the City's right to demand a ROW permit, it should have, and could have, raised it months ago by appealing the C&G permit conditions.
- Revise Plan Sheet DP7. The approved plan set at page DP7 has a portion of the ROW work (SE 33rd Street and East Lake Sammamish Parkway) delineated and provides: "THIS WORK IS NOT APPROVED UNDER CLEARING AND GRADING PERMIT. SIDEWALK, CURB RETURN AND DRAINAGE SHALL BE PERMITTED, REVIEWED AND APPROVED UNDER A SEPARATE CITY OF SAMMAMISH RIGHT-OF-WAY PERMIT." This language unambiguously demonstrates that the C&G permit did not approve this particular work in City ROW. The County must address how it will meet the City's requirements for this work.
- Revise Plan Sheet PS3. Plan sheet PS3 was changed by hand by Steve Leniszewski with the County's engineer, Yammie Ho, standing next to him at City Hall. The approved C&G permit plans show the stop sign controlling traffic on the ELST, not the City street. PS3 specifically provides at General Note 3: "A SEPARATE RIGHT-OF-WAY PERMIT IS REQUIRED PRIOR TO INSTALLATION OF SIGNS." Your stated intention with respect to stop signs at the 206th Avenue SE intersection would violate the current C&G permit.² Installation of traffic signs that vary from those that existed prior to construction is not allowed under the C&G permit, and PS3 must be revised to show traffic signs outside of the City's sixty-foot ROW and completely within the trail corridor.
- Revise Plan sheet PS9. The County does not take the position that East Lake Sammamish Parkway is not public ROW, yet you have now formally withdrawn the only permit application that would have allowed the County to work in the Parkway. The County must address how it will meet the City's requirements for this work.

² See also Letter to Gina Auld from David Pyle, dated October 24, 2016, regarding CG2016-03488.

Kevin Brown
 June 9, 2017
 Page 7

Your decision to withdraw the ROW permit applications for Segment 2A, has left the City with little choice but to consider invoking its code enforcement authority under SMC Sections 21A.115.040(2)(c) and 21A.115.050. If the County intends to work in City ROW without the required ROW permit, the City will post a stop-work order under SMC Section 23.70.010. The Director of Community Development is authorized under SMC 21A.115.050(1) to suspend any permit for violation of the conditions of approval and to initiate proceedings to revoke the permit for noncompliance. Additionally, the City may issue a stop-work order if unauthorized construction activity is observed in City ROWs. While the City is eager to see the proposed ELST Segment 2A improvements come to fruition for the benefit of the community, we have an equal obligation to ensure that it is constructed in compliance with our Municipal Code and the conditions imposed through the permitting process.

Unfortunately, your withdrawal of necessary permits has now caused delay in your department's own project. And, even if you revert to Ms. Flemming's earlier position, the County must now apply for, and the City must first issue, new ROW permits before the County may lawfully proceed with any ELST construction activities within 206th Avenue SE, SE 33rd Street, or the Parkway.

IV. STOP SIGN ON 206TH AVENUE SE – SAFETY CONCERNS

Finally, your letter includes engineering analysis that was not previously submitted to the City as part of the permit review for the County's Segment 2A C&G permit or the ROW permit. Your after-the-fact letter to me is not an appropriate mechanism for the County to now argue about permit conditions that the County itself declined to appeal. Given the County's knowing decision not to appeal, those conditions are now binding and not subject to further judicial review.

For its own reasons, the County chose not to submit these engineering issues during the C&G permit review and ROW permit review processes. Indeed, the County asked the City for expedited review of the C&G permit for Segment 2A because of the amount of time that had passed during the County's consecutive appeals to the Hearing Examiner and Shorelines Hearings Board (SHB) of the Shoreline Substantial Development Permit (SSDP) for Segment 2A. The City accommodated the County's request, but it now appears that the County either intentionally left out vital information so the permitting process would be expedited, or has decided to materially change its position on the permit conditions after failing to appeal them when imposed.

Although the engineering analysis of traffic controls at 206th Avenue SE is somewhat tangential to the thrust of your letter, I would be remiss if I did not point out that this topic was the subject of extensive testimony, argument, and documentary evidence submitted to the SHB and during the earlier Hearing Examiner proceedings in connection with the Segment 2A SSDP appeals. The City's traffic engineer, Steven Chen, explained at length during his direct

Kevin Brown
 June 9, 2017
 Page 8

testimony to the Board why the stop sign currently placed on the ELST could not safely be switched to stop vehicular traffic on 206th Avenue SE, as the County's engineers have proposed. And, the County's design engineer admitted on cross-examination that she failed to consider key factors for assigning priority and placement of stop signs when analyzing the intersection of the ELST with 206th Avenue SE. See also, e.g., the following exhibits and testimony from the SHB appeal hearing:

- Ex. R-13.1, R-13.2
- Ex. R-14.1, R-14.2, R-14.3, R-14.4
- Ex. R-15.1, R-15.2, R-15.3, R-15.4, R-15.5
- Ex. R-16.1, R-16.2, R-16.3, R-16.4, R-16.5
- Ex. R-21 (Accident History Report)
- Ex. R-23
- Ex. P-6
- Ex. P-8
- Ex. P-9, p. 0008
- Ex. P-10, pp. 00016, 00028
- Ex. P-13, P.00034
- Ex. P-18, p. 0003
- Ex. P-22, pp. 0001, 0005
- Ex. P-24
- Ex. P-25
- Ex. P-26
- Ex. P-27, p. 00013
- Testimony of Yammie Ho
- Testimony of Steven Chen
- City Public Works Standards 15.050 Table II & Table IV, 15.070, 15.160
-

The testimony and documentary evidence support keeping the stop sign where it currently exists, and against moving it to where the County proposes. Also remember that during the SHB appeal hearing, Mr. Chen testified that the City would, in the future, periodically review and assess the volume of traffic on the ELST and consider whether future observed conditions warrant moving the stop sign to control vehicles on 206th Avenue SE, rather than stopping trail users.

I hope you can sense from this response that my Staff and I are disheartened, to put it mildly, by the constantly shifting positions and combative posture assumed by the County. What should be a relationship based on cooperation and mutual trust has been damaged by your repeated vacillations and frequently oppositional attitude. The City has worked diligently to be transparent, communicative, and cooperative with County personnel in reviewing and processing the required permits for this complex project. We have devoted countless Staff hours to make the process as efficient and expeditious as possible. Actions like those taken in your letter are

Kevin Brown
June 9, 2017
Page 9

contrary to the spirit with which the City has approached this process, and do nothing but engender mistrust and hinder progress toward a goal we both desire — the successful completion of the ELST.

My understanding is that County construction crews anticipate commencing work in the 206th Avenue SE and SE 33rd Street intersections as early as next week. Without approved ROW permits, such work is not authorized. If work begins in the ROW without permits, a variety of enforcement actions will be taken. I hope that the County will reconsider, and reject, the positions asserted in your letter so that progress can continue in a timely manner. I look forward to your response.

Sincerely,



Lyman Howard
City Manager

LH/me

Enclosures

cc: Christie True, Director, Dept. of Natural Resources and Parks
Fred Jarrett, Senior Deputy County Executive

EXHIBIT 3



King County

Parks and Recreation Division

Department of Natural Resources and Parks

King Street Center, KSC-NR-0700

201 South Jackson Street

Seattle, WA 98104-3855

206-477-4527 Fax 206-588-8011

TTY Relay: 711

June 14, 2017

Lyman Howard
City Manager
City of Sammamish
801 228th Ave. SE
Sammamish WA 98075

Sent via US Mail and email to: lhoward@sammamish.us

Dear Mr. Howard:

I am writing in response to your June 9, 2017, letter addressing the requirement of the clearing and grading permit to obtain a right of way (ROW) permit for work in the City ROW. As I outlined in my May 23, 2017, letter, King County's ("the County") position is that this permit requirement does not apply to work being performed where the East Lake Sammamish Trail (ELST) intersects 206th Avenue SE and SE 33rd Street (together "intersections"). Now that we all have copies of the property records, we believe it is clear that the City of Sammamish ("City") does not have authority to require a right-of-way permit or otherwise mandate control signage at these intersections because the City's rights are limited by the plain language of the crossing easements themselves. King County is mandated under the federal Trails Act to complete a regional trail within the East Lake Sammamish Trail Corridor ("Corridor"). The City's actions with regard to ELST construction – including its efforts to assert authority over the intersections and require control signage that is both unsafe and unlawful are incompatible with both federal and state law.

The Need for a Right-of Way Permit. Your June 9, 2017, letter does not recognize the substantial rights reserved by the railroad when it granted a limited crossing easement over the Corridor for each intersection. We are both in agreement that King County, through operation of the Trails Act, now stands in the shoes of the railroad and that the underlying railroad property right includes trail usage. Although the railroad could not use the reserved

Lyman Howard
June 14, 2017
Page 2

rights clause to eliminate the 206th or 33rd street crossings altogether, the broad reservation makes railroad (and trail) uses within the right-of-way area superior to road uses.

Due to the broad reserved rights clauses in the limited crossing easements for both intersections, we believe the City does not have authority to regulate these ELST crossings or require a permit. First and foremost, the railroad reserved a broad “*right* to construct, maintain, repair, renew, reconstruct” facilities within the limited easement areas. There is no provision requiring a “permit,” which is inherently at odds with the concept of a “right.” Local municipalities generally have little to no regulatory authority over railroad corridors and crossings. The limited easement which the City holds does not grant the City authority to regulate or permit crossings.

Second, the suggestion in your letter that it is somehow “inconsistent with” the City’s limited crossing easements to make cars stop before traversing the ELST is not correct. A simple rule governs all railroad corridors: cars stop for trains, not *vice versa*. The limited easement was written with this operational reality in mind. When the railroad had active operations in the Corridor, the train did not stop for cars and there is nothing in the City’s limited crossing easements that would now grant cars pre-eminence over trail users.

The City Cannot Regulate the ELST in a Manner that Thwarts Congressional Intent to Build a Trail. Limits on the City’s authority to regulate the ELST Corridor due to federal preemption were made clear in *Friends of the E. Lake Sammamish Trail v. City of Sammamish*, 361 F. Supp. 2d 1260, 1274 (W.D. Wash. 2005) (Holding that the City’s regulation “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.”). Throughout the process of developing the ELST, the City has unnecessarily and unreasonably burdened King County’s efforts to complete the trail.

With regard to the intersections, the County submitted a design for the 206th Avenue SE and SE 33rd Street intersections that provided the high-volume ELST with priority over minor roadways that serve only a handful of homes. The County supported this design with expert opinions and analysis explaining how this design is consistent with the applicable safety standards. The testimony before the Hearings Examiner and the Shoreline’s Hearing Board demonstrated the public safety hazard of giving cars the right of way over pedestrians and bikes.

The City’s current effort to grant cars the effective right of way by requiring trail users to stop and yield to car traffic is inconsistent with these safety standards and would result in an unsafe condition for motorists and trail users. In essence, the City’s direction to place stop signs only for trail users, but not for cars, forces trail users to dash across the road in the face

Lyman Howard
June 14, 2017
Page 3

of oncoming motorized vehicle traffic. This is not safe and would preclude King County from re-opening Segment A of the trail.

The City's insistence on prioritizing cars over trail users plainly violates applicable Washington statutes. In order to maintain a continuous trail, the ELST runs through crosswalks where it traverses 206th and 33rd streets. Under RCW 46.61.235, bicycles and pedestrians have the right of way over vehicles:

The operator of an approaching vehicle *shall stop and remain stopped* to allow a pedestrian or bicycle to cross the roadway within an unmarked or marked crosswalk when the pedestrian or bicycle is upon or within one lane of the half of the roadway upon which the vehicle is traveling or onto which it is turning.

The City's effort to reverse the right of way to favor cars over trail users violates this statute and exceeds the City's lawful authority. In fact, a stop sign is not an appropriate traffic control device for pedestrians. *See* RCW 46.61.230, .060 (requiring "walk" and "don't walk" signs to change intersection priority).

Parks staff have repeatedly reached out to the City in an effort to resolve this matter and avoid expensive project delays. Unfortunately, these efforts have not been successful and we are now at an impasse. Because you indicate that the City is determined not only to issue a stop work order, but also to suspend or revoke the clearing and grading permit, King County has no choice but to take legal action.

Attached you will find a complaint that has been filed against the City before the United States District Court for the Western District of Washington. We are hopeful that the City will reconsider its position in this matter. A trail intersection that protects the lives of cyclists and pedestrians should be a higher priority than inconveniencing a few cars by forcing them to stop prior to crossing a public trail.

Unless the City issues a stop work order, King County will be proceeding with its plans to pave Segment A of the trail this week (if the weather allows it), and subsequently, to install stamped concrete across the intersections. Should the City respond to this work by red tagging the project and attempting to suspend or revoke the clearing and grading permit, we will have no choice but to amend the complaint to hold the City liable for all resulting damages.

We believe that the paving, concrete and other ELST work should proceed while our disagreement is being resolved by the court. The pavement and concrete work at the intersections will be constructed in the same manner regardless of the ultimate orientation of the stop sign or other control signs. A red tag would only cause unnecessary delay and

Lyman Howard
June 14, 2017
Page 4

increased expense in actual construction when our dispute is over the largely unrelated subject of intersection controls and which of us has the right to make that decision. In order to speed public use of the trail, construction should continue while both sides present their arguments to court.

King County looks forward to completing this important public project in a timely and cost effective manner for the benefit of all King County citizens. I hope that we can quickly put this matter behind us.

Sincerely,

A handwritten signature in blue ink, appearing to read "Kevin R. Brown". The signature is fluid and cursive, with the first name "Kevin" being the most prominent.

Kevin Brown
Division Director

Attachment

cc: Christie True, Director, Department of Natural Resources and Parks

EXHIBIT 6

THE HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

KING COUNTY,

Plaintiffs,

v.

CITY OF SAMMAMISH,

Defendant.

No. 2:17-cv-00921-JCC

**DECLARATION OF YAMMIE HO IN
SUPPORT OF PLAINTIFF KING
COUNTY'S MOTION FOR
PRELIMINARY INJUNCTION**

Yammie Ho states and declares as follows:

1. I am a Senior Engineer at Parametrix. I am the design engineer and engineer of record for the East Lake Sammamish Trail (ELST) and have been involved in the project since 2001. I am over eighteen years of age, competent to testify and submit this declaration based upon personal knowledge. My resume is attached as **Exhibit 1**.

2. Parametrix was retained by King County to develop the master plan, design the interim and permanent trail and provide construction management services for the ELST. As part of the work undertaken by Parametrix, I have examined priority and traffic control measures for the ELST intersections with 206th Avenue SE and SE 33rd Street. This analysis included determining traffic volumes for the ELST users and vehicles, assessing the relative priority of the ELST and the roadways, and traffic studies to gauge speed. Through this work we helped ensure that King County

1 selected the safest possible designs for the Intersections, complying with all applicable standards
 2 including the MUTCD, AASHTO, and WSDOT DM. These standards provide principles on areas
 3 including, but not limited to, shared-use design, reported crash experience, sight distances, approach
 4 angles, and speed factors. My November 7, 2014 Technical Memorandum regarding many of these
 5 issues is attached as **Exhibit 2**.

6 3. Using GIS information and aerial photos, I determined that 15 homes use 206th
 7 Avenue SE for access and 46 homes use SE 33rd Street for access. The homeowners that use SE
 8 33rd Street also have two alternative access points. Based on Institute of Transportation Engineers
 9 Trip Generation Manual 9th Edition (2012), 12 daily trips will be generated per each single family
 10 home. This equates to 180 trips per day and 552 trips per day, respectively for the two local roads.

11 4. In response to concerns raised by the City, I conducted additional analysis to
 12 determine daily volumes and vehicle speeds on 206th SE. As part of this analysis, I collected data
 13 on inbound and outbound daily volumes for the 206th Avenue SE intersection by both PM peak
 14 turning movement counts and by 72-hour tube counts. In addition, I confirmed the turning speeds
 15 for inbound and outbound traffic from the East Lake Sammamish Parkway. The traffic count
 16 confirmed that the average daily trips was less than the estimated 180 trips. The speed analysis
 17 confirmed that the majority of southbound traffic on 206th Avenue SE travels at speeds less than 15
 18 mph. My May 20, 2016 Memorandum regarding these issues is attached as **Exhibit 3**.

19 5. The volume of ELST users greatly exceeds expected car volume at these two local
 20 roads. In order to gather more data on expected volumes for the ELST, the County hired the Toole
 21 Design Group to provide estimates of expected trail volumes based on the most current
 22 methodology. This analysis determined that the expected volume of trail users for the paved ELST
 23 is over 3400 per day, and this expected volume will rise to over 5,600 by 2025. The ELST is part
 24 of a regional trail network that provides access to recreation, employment and retail centers in the
 25

1 Cities of Redmond, Sammamish and Issaquah. The trail completes a link in the King County
2 regional trails system.

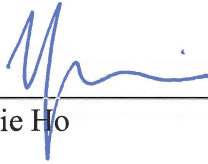
3 6. The two local roads are classified as minor dead end streets, as indicated on the City's
4 Street Classification Map.

5 7. The City of Sammamish has argued that a stop sign must face the ELST users because
6 cars will not have sufficient space to stop after they turn from East Lake Sammamish Parkway. This
7 claim is unsupported, as shown in the Parametrix Technical Memorandum Dated November 7, 2014.
8 Several cars will be able to stop at both intersections given the distance between the ELST and East
9 Lake Sammamish Parkway. A less restrictive control, such as a yield sign (which is preferred under
10 the MUTCD), is not possible at the 206th Avenue SE crossing because of sight line concerns created
11 by a monument near the crossing and the grade of the roadway. For SE 33rd Street, the development
12 of a future parking lot and restroom on the northeast corner of the crossing may cut the sight line for
13 yield control on the driver's approach.

14 8. In my professional engineering judgment, it would be unsafe if the 206th Avenue SE
15 crossing, or the SE 33rd Street crossing, were controlled by a stop sign facing the ELST users instead
16 of the car traffic.

17 I declare under penalty of perjury under the laws of the state of Washington that the foregoing
18 is true and correct.

19 DATED this 26th day of June, 2017, at Seattle, Washington.

20
21
22 
Yammie Ho

CERTIFICATE OF SERVICE

I hereby certify that on June 26, 2017, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

David A. Linehan
Michael R. Kenyon
Kim Adams Pratt
Kenyon Disend, PLLC
11 Front Sreet South
Issaquah, WA 98027-3820
David@KenyonDisend.com
Mike@KenyonDisend.com
David@KenyonDisend.com
***Attorneys for Defendant
City of Sammamish***

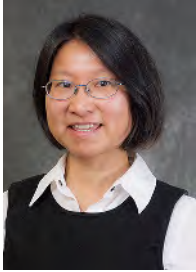
DATED: June 26, 2017

s/ David I. Freeburg
David I. Freeburg

DECLARATION OF YAMMIE HO IN SUPPORT OF
PLAINTIFF KING COUNTY'S MOTION FOR
PRELIMINARY INJUNCTION – Page 4
No. 2:17-cv-00921-JCC

Daniel T. Satterberg, Prosecuting Attorney
CIVIL DIVISION, Litigation Section
900 King County Administration Building
500 Fourth Avenue
Seattle, Washington 98104
(206) (296-8820 Fax (206) 296-8819

EXHIBIT 1



YAMMIE HO, PE

Yammie has worked as a lead design engineer for projects that involve intersection widening, sidewalk, non-motorized trails, transit centers, drainage, right-of-way acquisition, railroad crossing, utility coordination, state route corridor study and EIS, municipal park, and wetland and stream impact mitigation. She is familiar with federal funded projects' requirements and was responsible for construction administration services and coordination with WSDOT Local Program, including all documentations as required by the certified local agency. She had completed seven trail PSE and construction projects in the last five years. She is currently active in non-motorized trail design projects, including preparation of plans, specifications, and cost estimate, right-of-way acquisition, and construction services. Her relevant projects include North Creek Non-Motorized Trail, the East Lake Sammamish Trail through the Cities of Redmond, Sammamish and Issaquah, the Bear and Evans Creek Trail and Greenway, Marymoor Park Connector Trail, Lakeview Trail and Lake to Sound Trail project.

19 YEARS
EXPERIENCE

17 YEARS WITH
PARAMETRIX

BS, CIVIL
ENGINEERING, 1998

PROFESSIONAL
ENGINEER - CIVIL,
WA

Certifications

Bachelor of Applied Science – University of British Columbia

Registered Professional Engineer in WA– Civil

Memberships

Washington State Department of Licensing – Professional Engineer

American Public Works Association – Washington Chapter

Relevant Training

2012 AASHTO Guide for the Development of Bicycle Facilities – City of Seattle

Department of Transportation and Washington State ITE

Public Works Construction Project Management – UW Engineering Professional Programs

EXHIBIT 2

TECHNICAL MEMORANDUM

DATE: November 7, 2014
TO: Gina Auld
FROM: Yammie Ho
SUBJECT: Priority Assignment for Trail Crossings
CC: Jenny Bailey
PROJECT NUMBER: 554-1521-075
PROJECT NAME: East Lake Sammamish Master Plan Trail- South Sammamish Segment A

The purpose of this memorandum is to summarize how priority and traffic control measures were assigned for the East Lake Sammamish Trail intersections with 206th Avenue SE and SE 33rd Street. It is my understanding that City of Sammamish staff will review these recommendations in conjunction with the City's permitting authority.

East Lake Sammamish Trail is considered a high priority corridor because it is a regionally significant trail. The volume of trail users could match counts taken on the Burke-Gilman Trail and Sammamish River Trail, ranging from 2,500 to 4,000 trail users per day. By comparison, using the latest GIS information and aerial photos, 15 homes use 206th Avenue SE for access and 46 homes use SE 33rd Street for access. Based on Institute of Transportation Engineers Trip Generation Manual 9th Edition, 2012 (land use code 210-Single Family Detached Housing), 12 daily trips will be generated per each single family home. This equates to 180 trips per day and 552 trips per day, respectively for the two local roads. This potential volume of trail use greatly exceeds the daily vehicular volumes that would be generated by the residences that use these roads for access. As a result, the trail is given priority over the local roads at both intersections.

This assignment of priority means trail users would not have to stop or yield at these intersections. Instead, vehicles yield where sight distances are adequate and vehicles stop where sight distances are limited. This is consistent with the American Association of State Highway and Transportation Officials (AASHTO) Guide for the Development of Bicycle Facilities, which recommends to "follow the principle of providing the least amount of restriction that is effective." Installing unwarranted or unrealistically restrictive controls on path approaches in an attempt to "protect" path users can result in path users disregarding the signs and other traffic control devices at the intersection. This can lead to a loss of respect for traffic control at more critical locations.

Based on this priority assignment, sight distance triangles are drawn on the site specific plans to check if adequate sight distance triangles can be achieved.

- For 206th Street SE, the adequate sight distance triangles for drivers to yield cannot be achieved unless substantial removals of existing vegetation would be implemented. It is recommended that vehicles stop rather than yield. There is 52 feet between East Lake Sammamish Parkway and the trail, enough space to accommodate a queue of two cars or one car with a boat trailer.
- For SE 33rd Street, the adequate sight distance triangles for drivers to yield can be achieved. However, with the development of a future parking lot on the northeast corner of the crossing, the sight line for

yield control on the driver's approach might not be maintained due to the future restroom building. It is recommended that vehicles stop rather than yield. There is 78 feet between East Lake Sammamish Parkway and the trail, enough space to accommodate a queue of four cars or one car and one car with a boat trailer.

For the City's reference, I have attached documents providing additional details about the assignment of priority and sight distance triangles. Please let me know if you have any questions.

EAST LAKE SAMMAMISH MASTER PLAN TRAIL SIGHT DISTANCE TRIANGLE MEMORANDUM

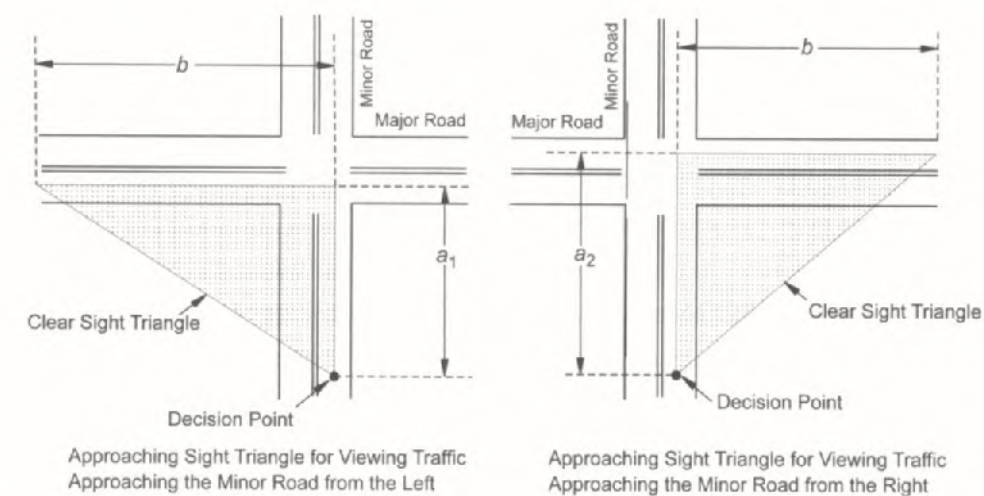
March 2014

Intersection sight distances and traffic control measures are important design considerations for the 11-mile East Lake Sammamish Trail, which intersects over 60 roads and driveways. The purpose of this document is to summarize how sight distances were evaluated and traffic control assigned for the East Lake Sammamish Trail.

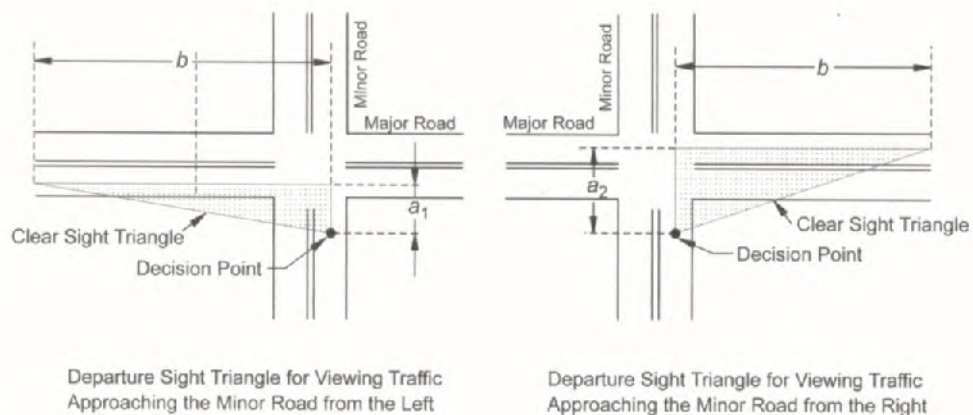
Priority is assigned to the trail. As a result, sight triangles for the East Lake Sammamish Trail are calculated from the perspective of the intersecting vehicle. Vehicle sight distances were sourced from the American Association of State Highway and Transportation Officials (AASHTO) *A Policy on Geometric Design of Highways and Streets, 2011* (Green Book). Figure 1 provides an illustration of sight triangles taken from the AASHTO Green Book.

In these schematics, the trail is considered the major road and the intersecting driveway the minor road. As shown by these figures, the sight distance triangles are larger where vehicles yield rather than stop. When constraints like topography, the angle of the crossing, and the presence of other features such as retaining walls present challenges for providing recommended sight distance triangles, a more restrictive control on the minor road (in this case, the driveway) is considered. At many intersections along the corridor, stop control is assigned to the minor road because of these constraints.

Procedures to determine the dimensions of sight distances at intersections are presented as Cases A through F in the AASHTO Green Book. Sight distances for a facility with a slower design speed could be calculated using the figures accompanying the *Intersection Control Case* presented in the AASHTO Green Book and formulas. This methodology was used for calculating sight triangles at the intersection of East Lake Sammamish Trail with driveways. The design speeds used for calculations are 15 mph for a minor roadway/driveway and 20 mph for trail. The trail will be signed for 15 mph speed limit, but it was designed for 20 mph to improve safety on the trail.

Figure 1. Intersection Sight Triangles**Approach Sight Triangles (Uncontrolled or Yield-Controlled)**

- A -

**Departure Sight Triangles (Stop-Controlled)**

- B -

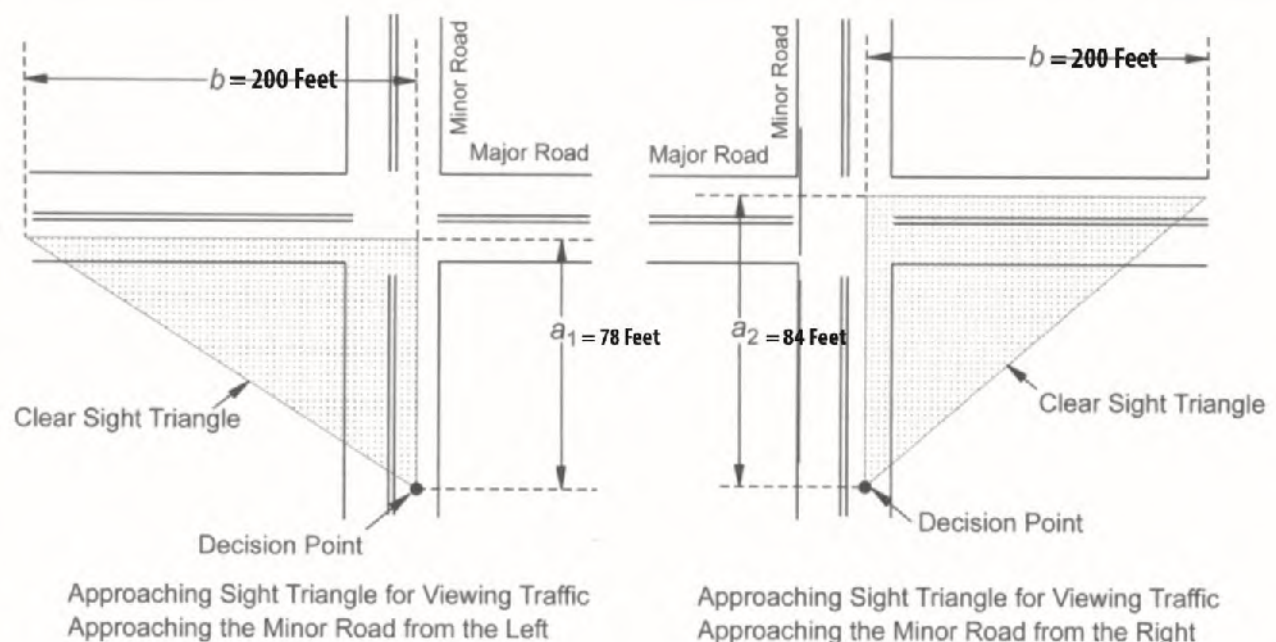
Where Drivers Yield

Based on the design speeds, a sight distance triangle of 75 feet (measured along the driveway) by 200 feet (measured along the trail) is required. When applying this triangle to a site specific situation, the width of traveled lanes of the major road (in this case, the trail) is considered for each intersection.

For the sight line looking to the left, as shown in Figure 2 (left) below, the smaller side of the triangle along the driveway is measured 75 feet from the edge of the intersecting traveled way (edge of the asphalt for the trail). This line is extended to the center of the travel lane of the trail coming from the left. For East Lake Sammamish Trail, that distance would be 3 feet. The total length of this smallest side of the triangle would be 78 feet ($a_1 = 78$ feet $\leftarrow$ trail is 12-foot-wide, trail lane is 6-foot-wide, half of 6 feet is 3 feet, thus $75+3=78$). Then the triangle extends 200 feet along the centerline of the travel lane of the trail ($b=200$ feet).

For the sight line looking to the right, as shown in Figure 2 (right) below, the smaller side of the triangle along the driveway is also measured 75 feet from the edge of the intersecting traveled way. This line is then extended to the center of the travel lane of the trail coming from the right. For this project, that distance would be 9 feet ($a_2 = 84$ feet $\leftarrow$ trail is 12-foot-wide, trail lane is 6-foot-wide, one and half of trail lane is 9 feet, thus $75\text{ feet}+9\text{ feet}=84\text{ feet}$). The triangle also extends 200 feet along the centerline of the travel lane of the trail ($b=200$ feet).

Figure 2. Intersection Sight Triangles for Yield Control



Approach Sight Triangles (Uncontrolled or Yield-Controlled)

— A —

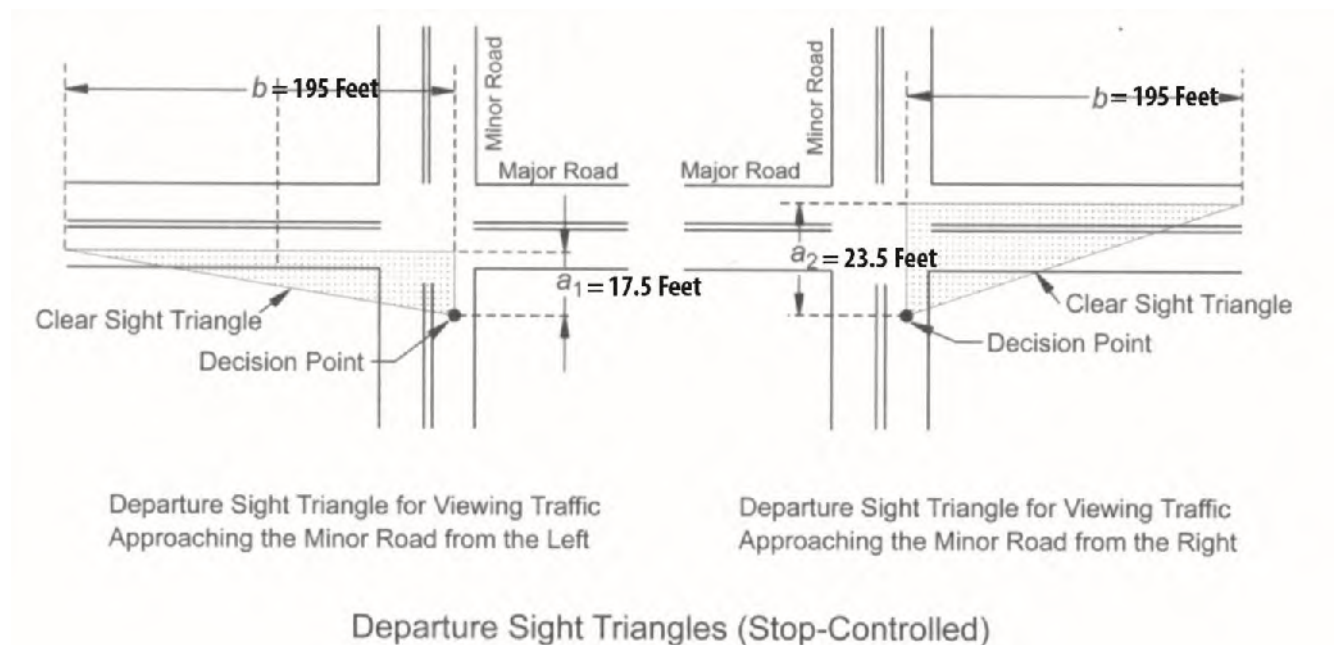
Where Drivers Stop

Based on the design speeds, a sight distance triangle of 14.5 feet (measured along the driveway) by 195 feet (measured along the trail) is required. When applying this triangle to a site specific situation, the width of traveled lanes of the major road (in this case, the trail) is considered for each intersection.

For the sight line looking to the left, as shown in Figure 3 (left) below, the smaller side of the triangle along the driveway is measured 14.5 feet from the edge of the intersecting traveled way (such as a road or trail). This line is extended to the center of the travel lane of the trail coming from the left. For East Lake Sammamish Trail, that distance would be 3 feet. The total length of this smallest side of the triangle would be 17.5 feet ($a_1 = 17.5$ feet $\leftarrow$ trail is 12-foot-wide, trail lane is 6-foot-wide, half of 6 feet is 3 feet, thus 14.5 feet+3 feet=17.5 feet). Then the triangle extends 195 feet along the center of the travel lane of the trail ($b=195$ feet).

For the sight line looking to the right, as shown in Figure 3 (right) below, the smaller side of the triangle along the driveway is measured 14.5 feet from the edge of the intersecting traveled way. The line is extended to the center of the travel lane of the trail coming from the right. For this project, that distance would be 9 feet. The total length of this smallest side of the triangle would be 23.5 feet ($a_2 = 23.5$ feet $\leftarrow$ trail is 12-foot-wide, trail lane is 6-foot-wide, one and half of trail lane is 9 feet, thus 14.5 feet+9 feet=23.5 feet). Then the triangle extends 195 feet along the center of the travel lane of the trail ($b=195$ feet).

Figure 3. Intersection Sight Triangles for Stop Control



– B –

EXHIBIT 3

MEMORANDUM

DATE: May 20, 2016
TO: Barbara Flemming
FROM: Yammie Ho
SUBJECT: 206th Avenue SE Intersection Count & Speed Data
CC: Gina Auld & Jenny Bailey
PROJECT NUMBER: 554-1521-075
PROJECT NAME: East Lake Sammamish Master Plan Trail - South Sammamish Segment A

Purpose:

- Confirm the inbound and outbound daily volumes for 206th Avenue SE by PM Peak turning movement counts and 72-hr tube counts.
- Confirm turning speeds for southbound right-turn traffic and northbound left-turn traffic at 206th Avenue SE/East Lake Sammamish Parkway intersection.

Findings:

- Traffic counts and speed data were collected on the dates from May 10 to May 12, 2016, by Innovative Data Acquisitions LLC (IDAX). Traffic counts were collected between 4 – 6 pm on May 12. Speed data was collected for 72 hours.
- Two-hour PM peak hour counts on May 12, 2016 indicate that total of 14 cars (9 cars for southbound direction and 5 cars for northbound direction) were turning in and out of 206th Avenue SE.
- The 72-hr tube from May 10 to May 12, 2016 indicates an average of 172 total daily trips turning in and out of 206th Avenue SE.
- Vehicle speeds data collected on 206th Avenue SE, just south of the existing stop sign (Tube location #3), indicates that 85th percentile speed for southbound traffic into 206th is 14.4 mph and mean (average) speed is 11.4 mph. The 85th percentile speed is defined as “the most frequently used measure of the operating speeds associated with a particular location or geometric feature”, per AASHTO 2011 Policy on Geometric Design of Highways and Streets (Section 2.3.6 Page 2-54).

Conclusions:

- Past analysis during design assumed the following:
 - The average daily trips for 206th Avenue SE was estimated to be 180 trips. The traffic count confirms that the average daily trips is less than the estimated 180 trips.
 - For stopping sight distance analysis, the design speed used for turning movements is 15 mph. The speed data confirms that the majority of southbound traffic on 206th travels at speeds less than 15 mph.

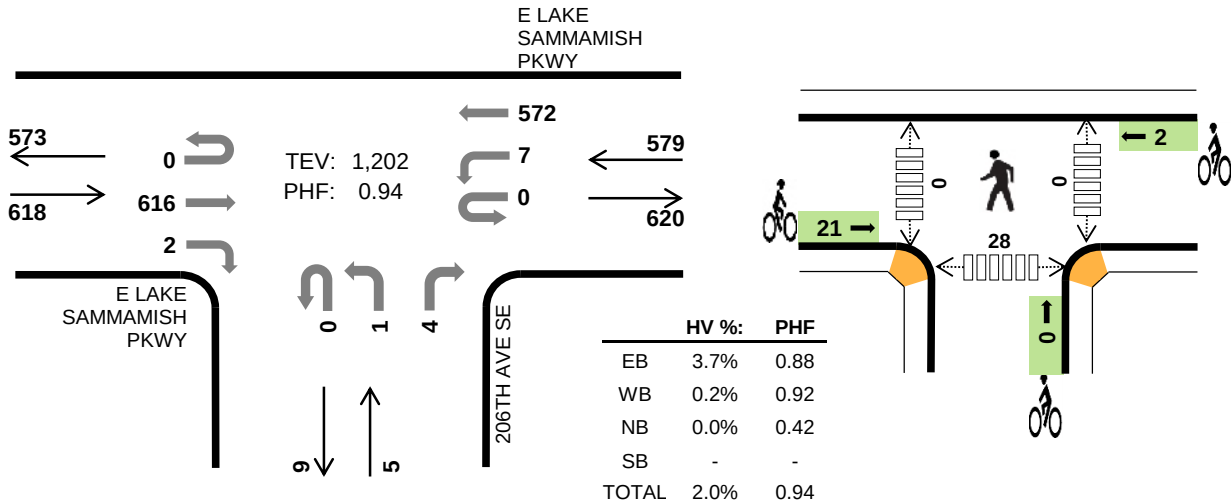
Attachments: Peak-hour turning movement count, 72-hr tube counts, vehicle speed report summary & tube location map.

206TH AVE SE E LAKE SAMMAMISH PKWY



Peak Hour

Date: Thu, May 12, 2016
Count Period: 4:00 PM to 6:00 PM
Peak Hour: 4:15 PM to 5:15 PM



Two-Hour Count Summaries

Interval Start	E LAKE SAMMAMISH PKWY				E LAKE SAMMAMISH PKWY				206TH AVE SE				0				15-min Total	Rolling One Hour
	Eastbound				Westbound				Northbound				Southbound					
	UT	LT	TH	RT	UT	LT	TH	RT	UT	LT	TH	RT	UT	LT	TH	RT		
4:00 PM	0	0	147	0	0	1	113	0	0	0	0	0	0	0	0	0	261	0
4:15 PM	0	0	175	0	0	3	137	0	0	1	0	2	0	0	0	0	318	0
4:30 PM	0	0	154	1	0	2	132	0	0	0	0	0	0	0	0	0	289	0
4:45 PM	0	0	142	1	0	1	156	0	0	0	0	1	0	0	0	0	301	1,169
5:00 PM	0	0	145	0	0	1	147	0	0	0	0	1	0	0	0	0	294	1,202
5:15 PM	0	0	127	0	0	1	155	0	0	1	0	1	0	0	0	0	285	1,169
5:30 PM	0	0	103	0	0	0	175	0	0	0	0	0	0	0	0	0	278	1,158
5:45 PM	0	0	132	1	0	4	127	0	0	0	0	3	0	0	0	0	267	1,124
Count Total	0	0	1,125	3	0	13	1,142	0	0	2	0	8	0	0	0	0	2,293	0
Peak Hour	0	0	616	2	0	7	572	0	0	1	0	4	0	0	0	0	1,202	0

Note: Two-hour count summary volumes include heavy vehicles but exclude bicycles in overall count.

Interval Start	Heavy Vehicle Totals					Bicycles					Pedestrians (Crossing Leg)				
	EB	WB	NB	SB	Total	EB	WB	NB	SB	Total	East	West	North	South	Total
4:00 PM	5	0	0	0	5	0	0	0	0	0	0	0	0	7	7
4:15 PM	6	0	0	0	6	12	0	0	0	12	0	0	0	8	8
4:30 PM	4	0	0	0	4	3	0	0	0	3	0	0	0	5	5
4:45 PM	8	0	0	0	8	3	0	0	0	3	0	0	0	9	9
5:00 PM	5	1	0	0	6	3	2	0	0	5	0	0	0	6	6
5:15 PM	1	1	0	0	2	2	0	0	0	2	0	0	0	6	6
5:30 PM	1	3	0	0	4	2	0	0	0	2	0	0	0	13	13
5:45 PM	3	3	0	0	6	1	0	0	0	1	0	0	0	12	12
Count Total	33	8	0	0	41	26	2	0	0	28	0	0	0	66	66
Peak Hr	23	1	0	0	24	21	2	0	0	23	0	0	0	28	28



Location: 206TH AVE SE S/O E LAKE SAMMAMISH PKWY
 Date Range: 5/10/2016 - 5/16/2016
 Site Code: 03

Time	Tuesday			Wednesday			Thursday			Friday			Saturday			Sunday			Monday			Mid-Week Average		
	5/10/2016			5/11/2016			5/12/2016			5/13/2016			5/14/2016			5/15/2016			5/16/2016					
	NB	SB	Total	NB	SB	Total	NB	SB	Total	NB	SB	Total	NB	SB	Total	NB	SB	Total	NB	SB	Total	NB	SB	Total
12:00 AM	0	0	0	0	0	0	0	0	0	-	-	-	-	-	-	-	-	-	-	-	-	0	0	0
1:00 AM	0	0	0	0	0	0	0	0	0	-	-	-	-	-	-	-	-	-	-	-	-	0	0	0
2:00 AM	0	0	0	0	1	1	0	0	0	-	-	-	-	-	-	-	-	-	-	-	-	0	0	0
3:00 AM	1	1	2	1	1	2	1	2	3	-	-	-	-	-	-	-	-	-	-	-	-	1	1	2
4:00 AM	0	0	0	0	0	0	1	0	1	-	-	-	-	-	-	-	-	-	-	-	-	0	0	0
5:00 AM	1	0	1	1	0	1	0	1	1	-	-	-	-	-	-	-	-	-	-	-	-	1	0	1
6:00 AM	7	4	11	7	1	8	5	3	8	-	-	-	-	-	-	-	-	-	-	-	-	6	3	9
7:00 AM	6	2	8	6	3	9	9	3	12	-	-	-	-	-	-	-	-	-	-	-	-	7	3	10
8:00 AM	8	2	10	6	3	9	5	3	8	-	-	-	-	-	-	-	-	-	-	-	-	6	3	9
9:00 AM	6	4	10	6	5	11	9	6	15	-	-	-	-	-	-	-	-	-	-	-	-	7	5	12
10:00 AM	6	3	9	3	2	5	4	2	6	-	-	-	-	-	-	-	-	-	-	-	-	4	2	7
11:00 AM	9	5	14	3	2	5	5	21	26	-	-	-	-	-	-	-	-	-	-	-	-	6	9	15
12:00 PM	3	7	10	3	5	8	5	6	11	-	-	-	-	-	-	-	-	-	-	-	-	4	6	10
1:00 PM	2	7	9	4	5	9	6	5	11	-	-	-	-	-	-	-	-	-	-	-	-	4	6	10
2:00 PM	8	8	16	4	6	10	19	9	28	-	-	-	-	-	-	-	-	-	-	-	-	10	8	18
3:00 PM	4	6	10	6	9	15	10	8	18	-	-	-	-	-	-	-	-	-	-	-	-	7	8	14
4:00 PM	2	5	7	4	3	7	4	9	13	-	-	-	-	-	-	-	-	-	-	-	-	3	6	9
5:00 PM	4	7	11	3	5	8	7	8	15	-	-	-	-	-	-	-	-	-	-	-	-	5	7	11
6:00 PM	6	9	15	3	2	5	1	8	9	-	-	-	-	-	-	-	-	-	-	-	-	3	6	10
7:00 PM	5	6	11	5	4	9	5	2	7	-	-	-	-	-	-	-	-	-	-	-	-	5	4	9
8:00 PM	4	1	5	3	9	12	0	4	4	-	-	-	-	-	-	-	-	-	-	-	-	2	5	7
9:00 PM	7	5	12	3	3	6	0	4	4	-	-	-	-	-	-	-	-	-	-	-	-	3	4	7
10:00 PM	0	0	0	0	3	3	1	0	1	-	-	-	-	-	-	-	-	-	-	-	-	0	1	1
11:00 PM	0	1	1	0	1	1	0	0	0	-	-	-	-	-	-	-	-	-	-	-	-	0	1	1
Total	89	83	172	71	73	144	97	104	201	-	-	-	-	-	-	-	-	-	-	-	-	86	87	172
Percent	52%	48%	-	49%	51%	-	48%	52%	-	-	-	-	-	-	-	-	-	-	-	-	-	50%	50%	-

1. Mid-week average includes data between Tuesday and Thursday.



Vehicle Speed Report Summary

Location: 206TH AVE SE S/O E LAKE SAMMAMISH PKWY

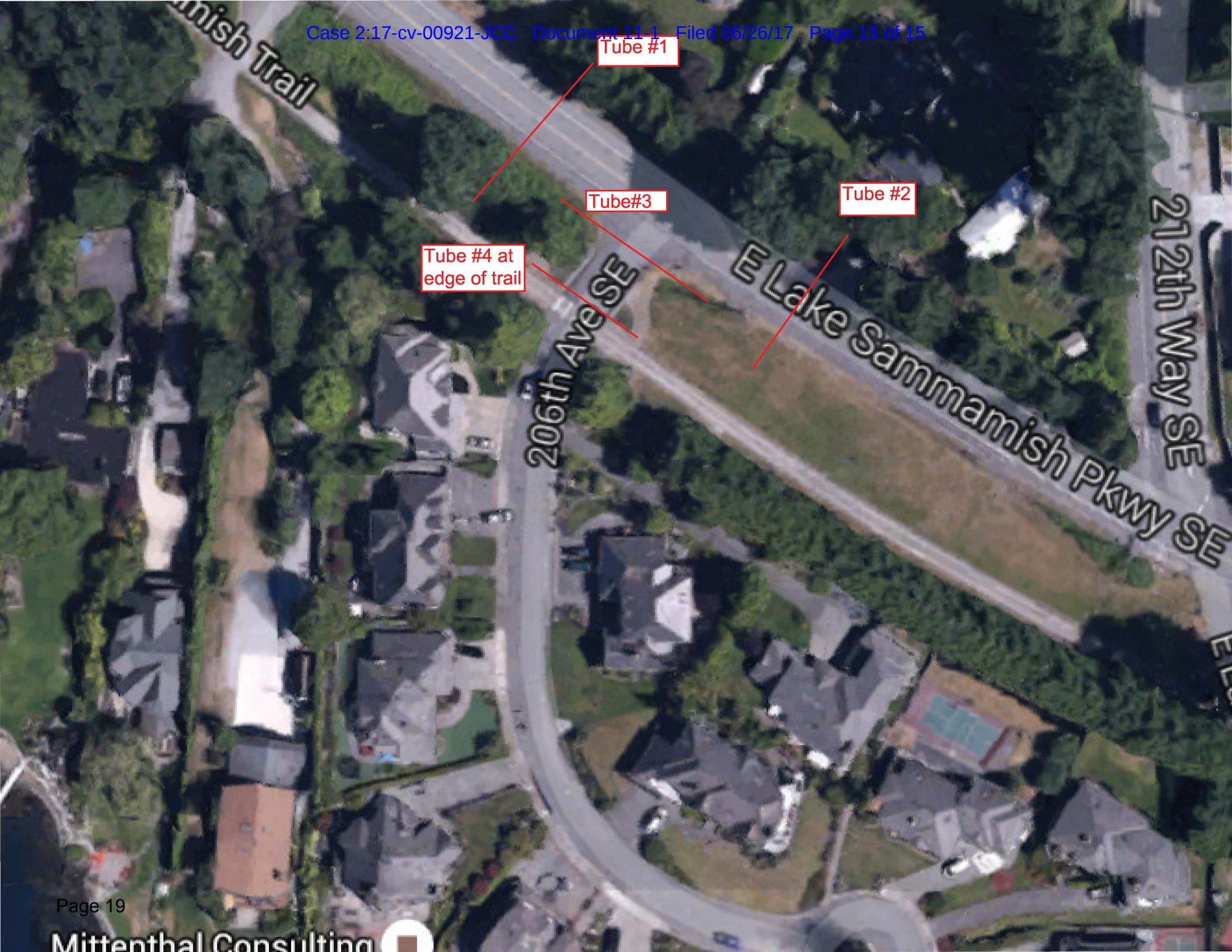
Count Direction: Northbound / Southbound

Date Range: 5/10/2016 to 5/12/2016

Site Code: 03

	Speed Range (mph)																	Total
	0 - 10	10 - 15	15 - 20	20 - 25	25 - 30	30 - 35	35 - 40	40 - 45	45 - 50	50 - 55	55 - 60	60 - 65	65 - 70	70 - 75	75 - 80	80 - 85	85 +	Volume
Study Total																		
Northbound	130	126	1	0	0	0	0	0	0	0	0	0	0	0	0	0	0	257
Percent	50.6%	49.0%	0.4%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100%
Southbound	88	151	21	0	0	0	0	0	0	0	0	0	0	0	0	0	0	260
Percent	33.8%	58.1%	8.1%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100%
Total	218	277	22	0	0	0	0	0	0	0	0	0	0	0	0	0	0	517
Percent	42.2%	53.6%	4.3%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	0.0%	100%

Total Study Percentile Speed Summary				Total Study Speed Statistics			
Northbound				Northbound			
50th Percentile (Median)	9.8	mph		Mean (Average) Speed	9.7	mph	
85th Percentile	11.6	mph		10 mph Pace	3.8 - 13.8	mph	
95th Percentile	12.8	mph		Percent in Pace	99.2	%	
Southbound				Southbound			
50th Percentile (Median)	11.1	mph		Mean (Average) Speed	11.4	mph	
85th Percentile	14.4	mph		10 mph Pace	6.9 - 16.9	mph	
95th Percentile	16.0	mph		Percent in Pace	93.5	%	



Tube #1

Tube#3

Tube #2

Tube #4 at
edge of trail

206th Ave SE

E Lake Sammamish Pkwy SE

212th Way SE

EXHIBIT 7

FHWA-WA-EIS-06-01-F

EAST LAKE SAMMAMISH MASTER PLAN TRAIL

King County, Washington

FINAL ENVIRONMENTAL IMPACT STATEMENT (EIS)

Submitted pursuant to the National Environmental Policy Act 42 U.S.C. 4332(2)(c), 49 U.S.C. 303, 49 U.S.C. 1651 Sec. 4(f), 16 U.S.C. 470 Sec. 106, and the Washington State Environmental Policy Act RCW 43.21c.

Submitted by

U.S. Department of Transportation, Federal Highway Administration, Washington Division
Washington State Department of Transportation
King County Facilities Management Division

04/19/2010
Date of Approval

Daniel M. Mathis
Daniel M. Mathis
Division Administrator, Washington Division
Federal Highway Administration

4/19/10
Date of Approval

Kathleen Davis
Kathleen Davis, Director
Highways & Local Programs
Washington State Department of Transportation

4/13/10
Date of Approval

Kathy Brown
Kathy Brown, Director
King County Facilities Management Division

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King Street Center
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Abstract

The Federal Highway Administration proposes to develop a pedestrian/equestrian trail along approximately 11 miles of former Burlington Northern Santa Fe (BNSF) railroad corridor on the east side of Lake Sammamish. The trail would extend from Gilman Boulevard in the City of Issaquah north to the Bear Creek Trail in the City of Redmond. Portions of the railroad corridor have already been developed into an Interim Use Trail, which has been evaluated in previous environmental documents. This Final Environmental Impact Statement (EIS) evaluates alternatives for developing the existing Interim Use Trail into a permanent, Master Plan Trail. This document addresses the potential social, economic, and environmental impacts associated with the proposal.

Comments on the Draft EIS were due by December 19, 2006, and sent to Gina Auld, King County Facilities Management Division at the address above. This Final EIS includes the comments received on the Draft EIS and responses to those comments (see Chapter 11).

1.2 Need for the Project

The need for the Master Plan Trail is driven by three factors including: (1) the regional need for alternative transportation corridors between major business centers, (2) the need for non-motorized recreational trails to support a growing multi-use population, and (3) the need to make connections between other existing trails in the regional trails system. These needs are discussed below.

1.2.1 Need for Alternative Transportation Corridors

Population growth to the east of Lake Sammamish has resulted in the development of new retail, commercial, and office centers at both the north and south ends of the project area. However, north-south linkages between these centers are constrained by both the natural and built environment. Traffic congestion has increased substantially in recent years on East Lake Sammamish Parkway and connecting arterial streets in Issaquah, Sammamish, and Redmond. Several intersections adjacent to the trail corridor experience high levels of traffic congestion, especially during peak periods. Approximately 2,000 to 4,000 users are anticipated to use the proposed East Lake Sammamish Master Plan Trail on a peak day, based on user counts from the nearby Sammamish River Trail. Daily recreational use is expected to be lower during inclement weather and shortened daylight hours. However, commuter use is expected to remain fairly constant throughout the year. An alternative transportation corridor is needed to provide a commute option to the local roadways. A survey conducted in May 2005 on the Burke-Gilman/Sammamish River Trail, another well-used trail in King County, indicated that 33 percent of trail users were commuters (Moritz, 2005).

1.2.2 Need for Non-Motorized Recreational Trails

The increase in population has put pressure on existing recreational facilities in the area. Furthermore, the existence of other trails and parks in the area attracts many recreational users and heightens demand for additional facilities suitable for walkers, runners, wheelchair users, bicyclists, in-line skaters, and equestrians of all ages and skill levels. Demand for passive recreational opportunities and access to Lake Sammamish from existing publicly owned property is also increasing. A trail is needed to accommodate the expected range of users in a safe manner.

1.2.3 Need to Provide Links in the Regional Trails System

The Master Plan Trail would also provide critical links in the regional trails system (Figure 1-1 (pg 1-2)). Local trail connections are shown on Figures 3.7-1 (pg 3.7-3) and 3.7-2 (pg 3.7-4) in Section 3.7, Recreation.

Lake Sammamish State Park, at the south end of Lake Sammamish adjacent to Issaquah city limits, is a major recreation destination, and formal and informal paths connect with the proposed trail corridor in this area. The East Plateau Connector Trail begins about 0.25 mile east of the proposed trail corridor along SE 43rd Way. Portions of the East Plateau Connector Trail are yet to be completed. King County is working with Lake Sammamish State Park, the City of Issaquah, and private parties to complete the missing links. Once completed, the East Plateau Connector Trail would provide a connection between the Master Plan Trail and the East Plateau Regional Trail.

Also at the south end, the Master Plan Trail would connect with both the planned and developed local trail system within the City of Issaquah, including the Pickering Trail and the Rainier Multiple Use Trail, which provides a connection with the Issaquah-Preston Regional Trail, the Preston-Snoqualmie Trail, and

3.7 Recreation

This chapter describes existing park and trail resources in the project vicinity and evaluates potential impacts of the project alternatives. Potential impacts to existing recreational uses, the regional and local trail supply, and recreational demand are discussed for each action alternative and the No Action Alternative. Potential impacts related to trail safety are also discussed. Mitigation measures are identified.

3.7.1 Studies and Coordination

Information was compiled from King County, state, and local government sources, geographic information systems (GIS), and field visits. The evaluation included trails, developed parks, and potential park and open space areas (although some of these land uses may not have been specifically designated as a park or recreation facility by the local jurisdiction). Relevant plans, policies, and regulations are discussed for all jurisdictions that would be crossed by the proposed trail.

3.7.2 Affected Environment

3.7.2.1 Current Use of Project Corridor

The project corridor is currently designated as the Interim Use Trail. The Interim Use Trail allows public pedestrian and bicycle use of the railbanked corridor until such time that planning for and implementation of the long-term, permanent trail can be completed. The trail is completed and open to the public.

3.7.2.2 Regional Trail System

King County owns and manages many local and regional trails. At present, there are over 175 miles of improved multi-purpose trails and over 300 planned miles of regional trails (King County, 2004). An additional nearly 70 miles of right of way, which are within public domain awaiting improvement, will connect to existing trails in the region and create a continuous network of non-motorized transportation corridors. Connections to the regional trail system are described in Chapter 1 and illustrated in Figure 1-1 (pg 1-2).

Of the existing trails within the King County trails system, the Burke-Gilman and Sammamish River Trails are perhaps the most well-known and most highly used paved trails. User counts and surveys have been conducted for these trails every five years from 1980 to 2005. Use of these trails has increased over the years since the trails opened. The most notable increases have occurred as the undeveloped gap between the Burke-Gilman and Sammamish River Trails was developed for use in two phases between 1985 and 1993. For this study, the two trails were treated as a single unit for data collection and evaluation purposes.

Weekend cyclists on the Burke-Gilman and Sammamish River Trails make up approximately 72 percent of the users, while pedestrians make up approximately 25 percent (Moritz, 2005). Use is primarily recreational on weekends. Bicyclists average between 11 and 18 miles per trip and pedestrians average between 4 and 5 miles per trip (King County, 2004). The number of trail users passing data collection locations on a Saturday in May 2005 was 9163; an increase of 861 trail users since the 2000 survey. The number of trail users passing data collection locations on Tuesdays in May 2005 was 8010; an increase of 1,249 trail users since the 2000 survey (Moritz, 2005).

3.7.2.3 Existing Parks, Recreational Areas, and Open Space in Project Vicinity

Figures 3.7-1 (pg 3.7-3) and 3.7-2 (pg 3.7-4) illustrate the existing parks, recreational areas, and open space in the vicinity of the proposed East Lake Sammamish Master Plan Trail.

Issaquah Segment

Lake Sammamish State Park is located at the southern portion of the corridor. This park contains approximately 519 acres and 6,858 feet of waterfront. The park provides many recreational amenities and opportunities such as swimming and picnicking. The park contains restroom facilities, a 2,300-space day-use parking lot, and a 250 boat-trailer parking area at the boat launch, which is adjacent to the project corridor. Peak usage typically occurs on weekends during summer months. Usage is weather-related; on a sunny summer weekend day the boat launch parking area is at or near 100 percent capacity between 8:30 and 9:00 a.m. and remains filled until approximately 6:00 to 7:00 p.m. (Oakley, personal communication, 2003).

Washington State Parks has begun a facilities development plan for Lake Sammamish State Park. Several development scenarios include changes to the boat launch area of the park, which is near the project corridor (WSP&RC, 2004). Consideration and adoption of a final concept plan by the Washington State Parks and Recreation Commission is expected in 2005 with further planning and environmental review to follow (Herzog, personal communication, 2004).

Sammamish Cove Park is a 20.65-acre park located adjacent to the southwest boundary of Lake Sammamish State Park. This King County park is reserved as open space/wildlife habitat with no plans for future facilities.

City of Issaquah parks in the vicinity of the proposed trail include Pickering Farm (a multi-purpose facility) and Emily Darst Park (undeveloped open space). In addition, Pickering Trail is an 8-foot-wide asphalt trail connecting to the Interim Use Trail south of the footbridge over Issaquah Creek. The Pickering Trail connects to the City of Issaquah's Sammamish Trail on the north, which provides walking and bicycle access to Lake Sammamish State Park. Other local trails providing connections with the Interim Use Trail include the Rainier Trail, extending from the southern terminus of the Interim Use Trail (at Gilman Boulevard) along the former railroad corridor, and providing a connection with the Highpoint/Issaquah-Preston Regional Trail to the east. The Maple-Juniper Trail, an east-west trail connection to Issaquah's historic Olde Town, is located within 0.25 mile of the Interim Use Trail.

Sammamish Segment

Recreational facilities in the vicinity of the Sammamish segment are public parks and parkland, some of which are still in the early development stage. The City of Sammamish and the City of Redmond both own undeveloped parkland along the Lake Sammamish shoreline. Future options for these properties include the establishment of the East Lake Sammamish Waterfront Park. This new park would be located just south of NE 49th Place and would utilize a portion of the county-owned trail corridor. The park is envisioned as an open space waterfront access park and may be implemented through a partnership between the Redmond, Sammamish, and King County jurisdictions (Gorremans, personal communication, 2003).

Of the existing trails within the King County trails system, the Burke-Gilman and Sammamish River Trails are the most highly used multi-use paved trails. Surveys performed for these trails as reported in *Summary Report, Burke-Gilman/Sammamish River Trails, User Counts and Survey Results* (Moritz, 1995) and in a 2000 survey show the most common accidents on these trails are falls and riding into a fixed object (Moritz, 2003). Respondents of the 2000 survey ranked inattentive walkers and intersections as the top perceived safety problems along the trails, followed by speeding cyclists and failure to warn. There were no reported crashes or injury involving equestrian use (Moritz, 2003).

It is usually not desirable to mix horseriding and bicycle traffic on the same shared use path. A bridle trail separate from the shared use path is recommended (AASHTO, 1999). While phone interviews with local equestrian groups revealed few trail user conflicts on area trails, certain conflicts can occur. The conflicts typically mentioned as the biggest concern are conflicts with motorized users, high-speed bikes, and dogs off leash (Burlingame, personal communication, 2004; Kagen, personal communication, 2004; Willman, personal communication, 2004). Also, areas where line of sight or narrowness of the trail inhibits passing a horse or provides an opportunity to startle a horse (e.g., a bike traveling down a narrow trail at a high speed, with no escape route for either the bicyclist or the equestrian) were mentioned as areas of concern. A typical horse has an average tread width of 12 to 24 inches (distance between hind legs as measured from the outside of the shoe). Where there is adequate line of sight distance, a minimum 3- to 4-foot shoulder, or a 2-foot shoulder with a low vegetated buffer is considered adequate to accommodate equestrians in a single line for the range of tread widths (Barnfather, personal communication, 2004).

For high-volume trails, King County strives to provide separated modes of use to the greatest extent possible to promote safety and a positive trail experience. When trails generate volumes of over 2,000 users per day, or are estimated to do so, King County recommends a paved surface at least as wide as that recommended in the current guidelines in the *Guide for the Development of Bicycle Facilities* (AASHTO, 1999) for shared-use trails, and a separated pedestrian facility to the greatest extent possible along the length of the trail (King County, 2004). AASHTO guidelines recommend a 12-foot-wide paved surface trail with minimum 2-foot shoulders and 1-foot clear zones for multi-use and shared-use trails (AASHTO, 1999). Since these guidelines were published, a number of communities and advocate groups have called for a paved surface of 14 feet, or separating uses by separating facilities.

3.7.3 Direct Impacts to Existing Recreational Uses

3.7.3.1 Corridor Alternative

Construction Impacts

Impacts to Existing Recreational Uses. Recreational users along the Interim Use Trail would be impacted by trail closures during the construction period. Due to the length of the trail, construction sequencing and timing, and the multiple jurisdictions affected by the Master Plan Trail, the trail would likely be constructed in sections or segments (see Chapter 2). The segment of the Interim Use Trail under construction would be closed off through the use of removable traffic barricades and signs. Closure for construction would typically last for two to three months if 1 or 2 miles of the Master Plan Trail were completed at a time. Trail users would be rerouted or would be notified that sections of the trail would be closed during construction.

Impacts would occur during construction if roadways or paths providing access to community beaches and recreational facilities were disrupted, or if fugitive dust, odors from paving operations, noise, or construction light and glare affect existing recreational facilities. Residents along the corridor would

likely experience some disruption to recreational activities within their yards and on their boat docks. Construction equipment would move down the trail within the corridor and would create a potential hazard for people and animals crossing or using the corridor. However, because of the short duration of construction at any given location, no substantial impacts are expected.

Operation Impacts

Impacts to Existing Recreational Uses. Although the proposed trail would not physically infringe upon other recreational facilities, existing recreational activities of adjacent property owners may be disrupted because the presence of trail users may be distracting to some people. Passive recreation such as sitting on decks may be disturbed by the passage of trail users. Activities of adjacent property owners that could injure or be a nuisance to trail users (e.g., playing catch across the trail) would be inhibited because those participating in the activity would need to remain alert to the presence of trail users. Some activities would be curtailed or prevented by the presence of security fencing that would create a barrier between the trail and Lake Sammamish (see Section 3.9, Visual Quality and Aesthetics). The presence of trail users would disturb some people more than others; this concern has been voiced by homeowners along the project corridor.

King County is anticipating trail use to be similar to current use along the Burke-Gilman / Sammamish River Trail. This estimate is based on the similarities between the trails (e.g., location along a water body, location between highly populated municipalities, and the high population base of the area adjacent to the proposed trail). Based on King County's user counts and surveys, the County anticipates the Master Plan Trail would attract up to 2,500 users a day during peak weekdays and up to 4,000 users a day during peak weekend days. The majority of users are expected to be bicyclists (approximately 70 percent of total use) and walkers with a smaller percentage of joggers, in-line skaters, and wheelchair users. Until additional connections with other trails that carry equestrian use are established, equestrian use along the Master Plan Trail is not anticipated to exceed 3 percent of total use (Eksten, personal communication, 2003). Equestrian linkages are primarily in the Redmond segment, which suggests that equestrian use may be higher along the northern segment of the proposed trail. Equestrian use is proposed for the Redmond segment only.

With the proposed restroom facilities and parking, trail use is anticipated to be more or less uniform along the approximately 11-mile length of the trail. Parking and restroom facilities would be available at several locations along the corridor (see Figures 2-1A (pg 2-5), 2-1B (pg 2-6), and 2-1C (pg 2-7)). Existing parking facilities at Marymoor Park and along NE 65th Street would be available. The proposed parking facilities would be located between NE 70th and NE 65th Streets (44 parallel parking spaces), north of Inglewood Hill Road (20 spaces), and at SE 33rd Street (30 spaces). Restrooms would be located north of Inglewood Hill Road, and at SE 33rd Street, approximately 3 to 3.5 miles apart. The distance between restroom locations is consistent with other existing trails in the region. Parking and restroom facilities would be designed to be accessible by disabled persons.

Natural access points at the southerly and northerly end of the corridor include Lake Sammamish State Park and Marymoor Park, respectively. Potential use of parking areas by trail users at these parks could reduce available parking for park users, especially on busy summer weekends when parking capacity would be met. Trail users would likely use park facilities such as parking, restrooms, and garbage receptacles. An increase in use of restroom facilities and garbage receptacles might require more frequent cleaning and increased garbage hauling from these parks.

The day-use parking lot at Lake Sammamish State Park includes approximately 2,300 regular parking spaces and is connected to the project corridor by approximately 0.5 mile of paths through the park. A fee is currently charged for the day-use parking area. Use of this parking area for the trail would require

State Parks' approval. The boat launch area is located adjacent to the project corridor and includes 250 boat/trailer parking spaces. The boat-launch area parking is frequently used to capacity by boaters on spring/summer weekend days and would not be available to trail users. Existing parallel parking along NE 65th Street may help to reduce the parking pressure on Marymoor Park (refer to Section 3.11, Transportation, for further discussion of parking). Because parking is currently in high demand and at or over capacity during times of peak usage at both Lake Sammamish State Park and Marymoor Park, additional signage and parking enforcement by park officials would likely be needed to manage the parking (refer to Section 3.11, Transportation, for further discussion of parking).

The impacts of potential illegal parking on neighborhoods and communities (not recreational resources) are discussed in Section 3.11, Transportation.

In cases where existing trails leading from East Lake Sammamish Parkway to private beaches, private beach clubs, or community beaches cross over the Interim Use Trail, King County would work with beach clubs and community groups during detailed design to assess the requirements for pedestrian access across the trail.

Consistency with Recreation Plans. Under the Corridor Alternative, the proposed ~~Master Plan Trail~~ would provide access to local and regional recreation opportunities consistent with local Comprehensive Plans (see Section 3.6, Land Use and Shorelines). As the population of Issaquah, Sammamish, Redmond, and the surrounding area continues to grow, demand for trails is expected to increase. The Corridor Alternative is compatible with the intent of regional and local plans, and would improve the physical connection between parks.

Trail User Conflicts and Safety Issues. By design, multi-use trails accommodate a variety of trail users. Trail user conflicts can result in disruption and negative effects on trail user experiences, as well as potential safety issues. User conflicts occur when there is competition or perceived incompatibility of use by different types of users. Types of conflicts include speed of travel and safety issues, such as hikers or horses being startled by bikers. Accidents that occur on multi-use trails result from such factors as reckless and irresponsible behavior, poor user preparation or judgment, and unsafe trail conditions (Moore et al., 1992; Moore, 1994). The potential for conflicts between trail users and vehicles is evaluated in Section 3.11, Transportation.

One of the main complaints of residents living next to the Burke-Gilman Trail is the speed of bicyclists on the multi-use trail (City of Seattle, 1987; Conklin, 1998). Similar to the Burke-Gilman Trail, the East Lake Sammamish Master Plan Trail would be open to all forms of non-motorized transportation (including equestrians). The range of user speeds is quite broad, sometimes contributing to accidents between users, as on the Burke-Gilman Trail. The 2000 Burke-Gilman/Sammamish River Trail Survey indicated that 295 (or 11.4 percent) of the 2,585 bike users who responded to the survey had experienced a bicycle accident within the previous 12 months of the survey year. Similar concerns and complaints have been recorded for other rail-trails in the United States (Craig and Wake, 1993; Moore et al., 1992).

Because the proposed trail would be a multi-use facility (for walkers, joggers, bicyclists, (and equestrians in the Redmond segment only)), the paved surface proposed for the ~~Master Plan Trail~~ Corridor Alternative would benefit some users and hinder others. According to the *Guide for the Development of Bicycle Facilities* (AASHTO, 1999), hard pavement surfaces provide a higher level of service and require less maintenance than crushed aggregate surfaces. However, with a hard pavement surface bicyclists' speeds are reportedly higher, creating potential user conflicts and safety problems.

To help minimize some of the potential conflicts, the Corridor Alternative would be developed to provide the greatest amount of separation between trail users based on current King County guidelines (King

through the work zones. Construction activities would be temporary and would be minimized through proper traffic control, signage, and homeowner notification. Construction at driveway and road crossings would typically last from one to two weeks per crossing.

3. Along Roadways – During construction, the roadway shoulder would be closed, construction fencing and traffic control devices would be placed, and in some situations, the adjacent roadway may be temporarily restriped. Along with the traffic control devices, flaggers would be situated to direct oncoming traffic through and around the work zone. For the Corridor Alternative, this type of construction activity would only occur in a few locations (less than 300 feet in length along the roadway).

To reduce construction time and cost, efforts would be made to coordinate both design elements and construction schedules with city, county, and state sponsored projects in the vicinity. Refer to Section 3.11.4, Cumulative Impacts, for additional information about these projects.

Operation Impacts

Traffic Volumes

Daily trail user volumes are expected to range from 2,500 users on a peak weekday to 4,000 users on a peak weekend day, based on user counts from the Sammamish River Trail (Moritz, 1995). Trail usage on the East Lake Sammamish Trail is expected to be similar to usage on the Burke-Gilman/Sammamish River Trail since both trails are major continuous regional trails.

Data from the Sheridan Beach area of the Burke-Gilman/Sammamish River Trails were obtained to estimate the increase in vehicular traffic generated from the proposed Master Plan Trail. Approximately 23 percent of those trail users drove to the trail from outside the immediate area in the years 1995 and 2000 (Moritz, 1995; Moritz, 2004). Assuming a similar percentage of East Lake Sammamish Trail users would drive to the trail, the Corridor Alternative would generate an estimated 575 one-way daily vehicle trips on a weekday during the summer and 920 one-way daily vehicle trips on a summer weekend day. Trail usage during summer months was used for the impact analysis since the number of users is typically the highest during warm dry weather.

Based on studies conducted for the Burke-Gilman/Sammamish River Trails in the years 1995 and 2000, weekday trail usage is generally highest during the AM and PM commute periods, with approximately 16 percent of the total daily volume occurring during the trail peak hour (6 to 7 p.m.) on a typical weekday. Weekend peak volumes typically occur during the midday hours and taper off in the evening; approximately 11 percent of the total daily volume occurred during the peak hour (12 to 1 p.m.) on a typical weekend day.

Assuming that these patterns would also be true for the East Lake Sammamish Trail, approximately 90 one-way vehicle trips would be expected during the weekday PM peak hour, and approximately 105 one-way vehicle trips would be expected during the weekend peak hour. These trips, which would be spread out over the entire length of East Lake Sammamish Parkway, would have a negligible effect on traffic along the project corridor but could affect ease of turning at intersections near existing and proposed parking facilities.

parallel parking. Trail users could access 16 parking spots via one-way vehicular access from Gilman Boulevard to the new connector road.

The combination of existing and new parking facilities would provide sufficient parking supply to accommodate the peak parking demand generated from the proposed trail on most days. However, potential use of parking areas at Marymoor Park could reduce available parking for park users, especially on busy summer weekends when parking capacity at these sites would be met. Approximately 5 to 10 days out of the year, Marymoor Park hosts large events that may discourage trail users from parking on-site. In addition, higher parking fees and limited space may further discourage trail users from parking onsite.

There is some potential for parking impacts near businesses in Issaquah because limited parking is currently available for trail users near the south terminus of the trail. If shared parking agreements are established, additional parking supply could be available for weekend use at the existing Microsoft campus (approximately 1,000 parking spaces) and Issaquah District Court (80 parking spaces). These agreements would be pursued during the design and permitting phase of the project.

With Washington State Parks approval, additional parking may also be available at Lake Sammamish State Park. Lake Sammamish State Park has approximately 2,300 regular parking spaces near the picnic/swimming area available for general public use (located approximately 1 mile west of the proposed trail on the north side of SE 56th Street), and 250 boat-trailer parking spaces (located just west of the proposed trail and south of SE 43rd Way). Users are charged a permit fee for parking at Lake Sammamish State Park. The boat-trailer parking area is frequently at capacity on spring and summer weekend days and would not be available for trail users. Washington State Parks approval for use of the 2,300 regular parking spaces by trail users would be pursued during the design and permitting phase of the project.

Trail users would be discouraged from parking on the shoulders of East Lake Sammamish Parkway because there are few public access points to the trail, and parking on the Parkway would encourage illegal access in some areas. There is some potential for illegal parking activity as trail users could attempt to access the trail via driveways. However, public parking is currently prohibited along driveways near the proposed Master Plan Trail Corridor Alternative alignment. ~~However, there is some potential for illegal parking activity as trail users could attempt to access the trail via these driveways.~~

Interim Use Trail Crossings

The project would increase the potential for conflicts between trail users and vehicles at intersections with roadways and driveways, compared to the existing Interim Use Trail. This is because of the increased trail use and the likelihood that some trail users would travel at higher speeds on a paved surface than they do on the existing gravel surface. Due to the close proximity of the alignment to residential driveways and East Lake Sammamish Parkway in many locations, in the absence of appropriate mitigation measures, sight distance would be limited for vehicles as well as for pedestrians and bicycles using the trail.

Sight distance is a principal consideration for roadway and path intersection design. Stopping sight distance, which is the distance required for a vehicle or bicycle to react to the unexpected, is most important at intersection locations where stop or yield signs would not be present. Based on the *Guide for the Development of Bicycle Facilities* (AASHTO, 1999), a 125-foot minimum stopping sight distance would be required for a bicycle traveling at a design speed of 20 mph (posted speed limit would be 15 mph). For vehicles traveling at 20 mph, 115 feet of stopping sight distance would also be required, based on *A Policy on Geometric Design of Highways and Streets* (AASHTO, 2001).

The Washington State Department of Transportation (WSDOT) *Design Manual* (2006) also provides a method for determining the minimum required sight distance for motor vehicles approaching intersections. Based on WSDOT's methodology, drivers of vehicles approaching from a distance 10 feet away from a trail crossing should be able to see a trail user traveling at 20 mph approaching from a distance 250 feet away from the trail crossing. These sight distance criteria would apply in locations where vehicles would be required to yield to trail users. If sight distances do not meet these criteria, motor vehicles would be required to stop. The operator of an approaching vehicle would stop and remain stopped to allow a pedestrian or bicycle to cross the roadway within an unmarked or marked crosswalk when the pedestrian or bicycle is upon or within one lane of the half of the roadway upon which the vehicle is traveling or onto which it is turning (RCW 46.61.235(1)).

At locations where the roadway is given the right of way and trail users are required to stop, sufficient crossing maneuver sight distance should be provided. Crossing sight distance is the distance required for a pedestrian or bicyclist to make a safe crossing maneuver after coming to a complete stop. Based on *Trail Intersection Design Guidelines* (North Carolina Highway Safety Research Center, 1996), a crossing sight distance of approximately 341 feet would be required for pedestrians crossing a 16-foot roadway with oncoming vehicular traffic traveling at 30 mph. A crossing sight distance of approximately 295 feet would be required for bicyclists crossing under similar conditions. Due to the sharp turns, steep grades, and narrow widths of some residential driveways and the close proximity of homes to the project corridor, vehicles approaching most of the East Lake Sammamish Trail intersections would be traveling at considerably lower speeds. Therefore, pedestrian and bicycle crossing sight distance requirements would be expected to be lower for the ~~Master Plan Trail~~ Corridor Alternative.

Sight distance observations were conducted along the entire length of the project corridor to identify the locations along the Build Alternative alignments where sight distance concerns exist. Sight distance deficiencies were identified in the field based on information provided in the published guidelines mentioned above. The Trail Intersections Appendix (Appendix G) lists all impacted driveways and roadways, and identifies the locations where sight distance concerns exist.

Based on the surveys, sight distance limitations exist at approximately 39 of the estimated 52 total driveway crossings. Without improvements, there is a greater potential for accidents to occur at intersections with sight distance deficiencies. The Corridor Alternative includes the installation of informational and regulatory signs for trail users and road-based vehicles.

In locations where trail users would have the right of way, yield signs for vehicles would be placed at crossings without major sight distance concerns. Stop signs would be required for vehicles at crossings where sight distance deficiencies exist. Vegetation management would also be required in many locations to maintain adequate sight distances. In locations where vehicles have the right of way, trail users would be required to stop.

Trail signing plans were developed to be consistent with the most recent version of the Manual of Uniform Traffic Control Devices. Figures 2-12 through 2-17 (pgs 2-32 through 2-38) (in Chapter 2) show seven trail signing plans that would be implemented for improving vehicular and non-motorized safety, depending on available sight distance and traffic volumes at each crossing location. In most cases, trail signing plans are similar to existing conditions for the No Action and Continuation of the Interim Use Trail Alternatives. The trail signing plans, corresponding locations along the Corridor Alternative, and potential impacts associated with each crossing type are summarized in Table 3.11-10.

Table 3.11-10. Potential Impacts Associated with Different Trail Crossing Types – Corridor Alternative

CROSSING TYPE	CORRESPONDING LOCATIONS	TRAFFIC CONTROL/SIGNING PLANS	POTENTIAL IMPACTS
Type 1 – High-Volume Street/Driveway Crossing (signals located in close proximity)	SE 51st Street SE 56th Street <u>SR 520</u> NE 65th Street ^a	Trail users directed to signalized crosswalk	Trail users may attempt to cross midblock with traffic volumes the main deterrent.
Type 2 – Low-Volume Street/Driveway Crossings	SE 62nd Street Lk. Samm. State Park Driveway SE 33rd Street NE 70th Street	Stop signs for trail users ^c	Minimal potential for safety impacts if clearly signed and if trail users obey signs.
Type 3 – Residential Driveway Crossings with Limited Sight Distance (>30 feet from Parallel Roadway Intersection)	Up to 41 Residential Driveways ^b	Stop signs for vehicles ^c , warning signs for trail users	Minimal potential for impacts if clearly signed, including advance warnings, and if vehicles obey signs.
Type 4 – Residential Driveway Crossings with Adequate Sight Distance (>30 feet from Parallel Roadway Intersection)	Up to 22 Residential Driveways ^b	Yield signs for vehicles ^c , warning signs for trail users	Minimal potential for safety impacts if clearly signed and if vehicles obey signs.
Type 5 – Residential Driveway Within 30 feet of Parallel Intersection with East Lake Sammamish Parkway	Not applicable for Corridor Alternative	Stop signs for trail users	See Table 3.11-11 for the East A Alternative.
Type 6 – Multiple Crossings of a Residential Driveway	Not applicable for Corridor Alternative	Appropriate signage at each crossing ^c .	Queuing between crossings for higher-volume driveways.
Type 7 – Frequent Residential Driveways (Distance between Crossings <200 feet)	Up to 10 Residential Driveways ^b	Frequent Driveways Ahead notice for trail users	Minimal potential for safety impacts if clearly signed

^a At NE 65th Street, the alternative of providing a safe crossing at the location of the Interim Use Trail crossing (i.e., the former railbed) would be considered during detailed design and permitting. Under this scenario, trail users would be required to stop (i.e., Type 2 crossing).

^b The totals shown assume that several of the 52 driveway locations could be grouped under more than one crossing type category.

^c Crossings will be designed so that vehicles can safely stop or yield. These include locations where steep grades currently exist.

As shown in Table 3.11-10, the potential for safety impacts would be minimized through clear signing. For Type 1 crossings, some trail users may attempt to cross midblock. As shown in Figure 2-12 (pg 2-32), barriers would be placed at trail intersections and signs would be placed to direct trail users to signalized crosswalks. The entire length of the Corridor Alternative alignment would be separated from East Lake Sammamish Parkway, minimizing potential conflicts between trail users and vehicles that result from proximity. (The potential for conflicts due to proximity are discussed in evaluating the impacts of the East A Alternative.)

EXHIBIT 8

THE HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

KING COUNTY,

Plaintiffs,

v.

CITY OF SAMMAMISH,

Defendant.

No. 2:17-cv-00921-JCC

**DECLARATION OF BILL
SCHULTHEISS IN SUPPORT OF
PLAINTIFF KING COUNTY'S
MOTION FOR PRELIMINARY
INJUNCTION**

Bill Schultheiss states and declares as follows:

1. I am the Vice President of and a Principal Engineer at Toole Design Group (TDG). I am also one of the primary authors of the 2012 edition of the American Association of State Highway and Transportation Officials (AASHTO) Guide for the Development of Bicycle Facilities (AASHTO Bike Guide). Since January 2005, I have served on the National Committee for Uniform Traffic Control Devices. This organization proposes content and advises the Federal Highway Administration (FHWA) regarding traffic control devices and practices that are incorporated in the Manual on Uniform Traffic Control Devices (MUTCD). I am over eighteen years of age, competent to testify and submit this declaration based upon personal knowledge. My resume is attached as **Exhibit 1.**

1 2. King County asked TDG to evaluate the proposed design for the intersection of the
2 East Lake Sammamish Trail (ELST) and 206th Avenue SE to determine compliance with applicable
3 safety standards and guidelines. My January 26, 2016 memorandum providing my opinions on these
4 topics is attached as **Exhibit 2**. King County also asked TDG to study estimated bicycle volumes
5 on the ELST using the most current methodology available. My May 19, 2016 memorandum on
6 this topic is attached as **Exhibit 3**.

7 3. When evaluating whether the ELST or a roadway that crosses ELST gets priority –
8 or put another way, which gets the right-of-way – there are a number of considerations that must be
9 taken into account. The standards and guidelines for determining right-of-way are outlined in traffic
10 control principles as set forth in the MUTCD and the AASHTO Bike Guide and applicable state
11 laws.

12 4. Under RCW 46.61.235, bicyclists are provided the same rights as pedestrians in
13 crosswalks, whether they are marked or unmarked. Pedestrians and bicyclists have the right-of-way
14 in crosswalks, whether marked or unmarked, if they are within the crosswalk as motorists approach.

15 5. Under traffic control principles, the right-of-way should ordinarily be assigned to the
16 higher volume facility. This is to ensure that any traffic control device implemented commands
17 respect from the road user. The ELST is projected to have a volume of up to 300 - 400 users (150 -
18 200 bicyclists) per hour during peak periods. and SE 206th is expected to have a volume of 10 motor
19 vehicles per hour during peak periods. Under these circumstances, if a stop sign were posted facing
20 the ELST users and there were only a few cars on the cross street, the lack of traffic on the cross
21 street will result in the vast majority of bicyclists ignoring the stop sign. This behavior was
22 confirmed in a study of the Burke Gilman Trail, and was discuss in my January 26, 2016
23 memorandum providing my opinions on these topics is attached as **Exhibit 2**. This behavior results
24 in an unsafe intersection and increases the likelihood of accidents and injuries. A loss of respect for
25

1 traffic control devices would also increase the likelihood of accidents and injuries elsewhere along
2 the ELST.

3 6. The City of Sammamish has argued that a stop sign must face the ELST users because
4 a) cars present a significant danger to pedestrians and bicyclists, b) all streets and driveways have a
5 higher priority than all trails (shared use paths) in the transportation system, c) motorists will not
6 have sufficient space to stop after they turn from East Lake Sammamish Parkway. This claim is
7 unsupported, as shown in the Parametrix Technical Memorandum Dated November 7, 2014, which
8 I reviewed as part of my work. Under the MUTCD standards, roads do not automatically have a
9 higher priority than shared use paths. AASHTO at 5-33. The ELST is a significant component of
10 the regional transportation system, whereas the street is effectively a cul-de-sac driveway serving 15
11 homes. The distance between the ELST and East Lake Sammamish Parkway is sufficient to allow
12 turning motorist from the Parkway time to recognize trail users at the crossing and to stop in
13 accordance with RCW 46.61.235.

14 7. In my professional engineering judgment, the City's proposed intersection design is
15 unsafe and not consistent with applicable safety standards.

16
17 I declare under penalty of perjury under the laws of the United States that the foregoing is
18 true and correct.

19 DATED this 26 day of June, 2017.

20
21 

22 Bill Schultheiss
23
24
25

CERTIFICATE OF SERVICE

I hereby certify that on June 26, 2017, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to the following:

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DATED: June 26, 2017

s/ David I. Freeburg
David I. Freeburg

DECLARATION OF BILL SCHULTHEISS IN SUPPORT OF
PLAINTIFF KING COUNTY'S MOTION FOR
PRELIMINARY INJUNCTION – Page 4
No. 2:17-cv-00921-JCC

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EXHIBIT 1

William Schultheiss, P.E.

Principal Engineer



Bill Schultheiss has a broad civil engineering background relating to many facets of engineering planning, design, and construction administration. Bill serves as lead technical engineer or principal-in-charge for all of Toole Design Group's (TDG) Complete Streets and sustainable safety projects. He has personally overseen and designed the retrofit of over 250 miles of urban streets to improve their multimodal capacity and safety in support of community livability, economic, safety, and mobility goals. Retrofits have incorporated road diets, lane narrowing, bike lanes, cycle tracks, medians, improved sidewalks, turn lanes, transit stop improvements, and various traffic calming treatments. Bill regularly negotiates the interpretation of guidelines and research with public agency professionals for retrofit projects to build support for Complete Streets treatments. Bill frequently leads public meetings, stakeholder workshops, and charrettes to educate and build support for his client's planning and design efforts.

Selected Project Experience

- **Capital City Bikeway and Jackson Street Reconstruction**, Saint Paul, MN
As Principal-in-Charge, Bill oversaw the redesign of Jackson Street and the development of the separated bike lanes that comprise the Capital City Bikeway. Project responsibilities included providing technical assistance to resolve project challenges, such as protected intersection design, ADA design, conflict management, and conformance to federal and state guidelines. Bill led design review meetings with City Staff to build support for design treatments. Bill also provided peer review at each deliverable stage of the project. The project is currently under construction.
- **North Lynn Street Esplanade**, Arlington, VA
As Senior Engineer, Bill established a conceptual design to improve pedestrian and bicyclist safety along North Lynn Street at intersections with limited access roadway ramps. The design modified curb lines, widened sidewalks, adjusted traffic operations at intersections, and improved sight lines and signage to increase pedestrian safety at two key intersections with a history of crashes. Throughout the development of construction documents, Bill provided final design oversight and at key points supported the development of successful design exception requests to the Virginia State Department of Transportation.
- **2017 AASHTO Guide for the Development of Bicycle Facilities**, Washington, DC
Under contract with the National Cooperative Highway Research Program (NCHRP), Bill is serving as the Principal Investigator for the 2017 edition of the Guide. He is responsible for coordination with the panel and stakeholders, team management, content development, and quality control. The project includes extensive literature review and best practice research. Anticipated updates to the Guide will include guidance for choosing bicycle facilities to accommodate all ages and abilities, guidance for working in constrained corridors, separated bike lane design, bicycle signal operation, bicycle boulevards, intersection operations, and bicycle share station placement, as well as an overhaul of the guide's organization and graphics. The project will be completed in 2018.

Professional Highlights

- Toole Design Group: 2003-Present
- Earth Tech, Inc: 1999-2002
- SEA Consultants: 1998-1999
- Anderson Nichols & Co. Inc.: 1996-98

Education/Certification

- Bachelor of Science, Civil Engineering, Northeastern University: 1998
- Professional Engineer: AZ, CO, DC, FL, GA, IL, KY, MA, MD, MN, MO, NC, OH, SC, TN, TX, VA, WA, WI

Instructor

- AASHTO Bicycle and Pedestrian Guide Training
- NACTO Urban Street and Bikeway Guide Certified Instructor
- National Center for Safe Routes to School Certified Instructor
- Complete Streets
- History of North American Roadway Design Practices
- Sustainable Safety/Vision Zero
- Traffic Calming

Appointments/Affiliations

- National Committee on Uniform Traffic Control Devices-Bicycle Subcommittee and Pedestrian Taskforce
- Institute of Traffic Engineers
- Association of Pedestrian and Bicycle Professionals

Other Transportation Projects

- **MassDOT Separated Bike Lane Design Guide**, Boston, MA
Bill served as a technical author for the 2015 *Separated Bike Lane Planning and Design Guide*. Bill performed a comprehensive review of guidance, research, and best practices from international and North American resources to identify strategies for retrofitting existing streets to include separated bike lanes. Bill developed language and graphics to support planning, geometric, operations, maintenance, and safety content in the guide for street level, sidewalk level, and intermediate level separated bike lanes. Design criteria was proposed for separation strategies, sight line requirements, driveway crossings, pedestrian crossings, ramp design, intersection design, drainage, surface materials, and signal phasing approaches.
- **Maryland Avenue Corridor Design**, Washington, DC
As Project Manager, and lead design engineer, Bill has developed conceptual design alternatives to improve multimodal safety of the roadway. The alternatives provided options for multi-leg intersection geometric improvements, green street drainage improvements, and a potential road diet. The preferred design selected was the road diet option which adds left turn lanes, reconfigures intersections, relocates bus stops, and adds bicycle lanes. The project is in now in final design by another consultant.
- **On-Call Bikeway Design**, Boston, MA
Bill serves as senior engineer for the development of conceptual and final designs for over 100 miles of bike lanes in addition to 19 cycle tracks including Boylston Street, Malcolm X Boulevard, Summer Street, and the perimeter roadways of the Public Gardens. Bill assists with the development of concept drawings, design memorandums, and meetings with the agency staff and the public. He provides Quality Assurance/Quality Control (QA/QC) review of all construction drawings. The designs required assessments of left and right side placement, one-way versus two-way operation, political feasibility, parking, driveway and intersection conflicts, transit and pedestrian interactions, and analysis of bicyclist safety.
- **Complete Streets Guide**, Boston, MA
Bill was responsible for developing the City of Boston's new minimum lane width policy based upon current research and best practices. Bill led discussions with City Staff and oversaw the development of key aspects of the guide including Accessible Pedestrian Signal guidance, signal timing considerations, curb ramp design, and bicycle facility design.
- **Westlake Cycle Track**, Seattle, WA
Bill served as technical advisor for the design and evaluation of protected bike lane alternatives along the Westlake Corridor in South Lake Union. He was the technical resource for the design team overseeing development of design criteria, alignment concepts, multimodal safety assessment, and intersection design. Bill played a leading role explaining the project at public meetings and key agency review meetings leading presentations and answering questions.

Other Representative Projects

Specific Projects (2011-2016)

- Seattle Vision Zero, Seattle, WA
- Boston Vision Zero, Boston, WA
- Denver Vision Zero, Denver, WA
- C Street Corridor Study, Washington, DC
- Protected Bike Lane Training, Portland OR
- 14th Street Protected Bike Lane Design, Denver, CO
- Governor's Island Shared Use Path Safety Assessment, New York City, NY
- Brighton Boulevard Conceptual Design, Denver, CO
- Achieving Multimodal Networks, Applying Design Flexibility & Reducing Conflicts Report, FHWA

EXHIBIT 2



Memorandum

To: Barbara Flemming, Senior Deputy Prosecuting Attorney

From: Bill Schultheiss, P.E. (WA. P.E. #46108)

Date: January 26, 2016

Re: East Lake Sammamish Trail Best Practice Discussion for assignment of right-of-way at crossings and a review of Engineers report for crossing at 206th Avenue SE

King County has asked Toole Design Group (TDG) to evaluate the assignment of right-of-way approach for a proposed shared use path (named the East Lake Sammamish Trail) as currently designed. As a key segment of the King County regional shared use path network (similar to the Burke Gilman Trail and I-90 Trail) it can reasonably be anticipated the trail will often be very busy and serve a wide range of users, including bicyclists, walkers, joggers, skaters and persons using wheelchairs. Preliminary estimates project upwards of 300 people per hour to use the trail on Saturdays and Sundays throughout the summer months. King County is interested in constructing a trail and applying traffic control devices that meet current design standards and best practices, anticipates growing use, and can handle projected future demands while providing a safe operating environment for all trail users. The trail construction is funded with a combination of Local, State, and Federal funding.

This memorandum describes requirements and best practices for right-of-way assignment at trail/roadway crossings and reviews a proposed crossing design at 206th Avenue SE. There are two primary categories of trail crossings. The first type of crossing is where the trail crosses at least one street at an intersection of two or more streets (a sidepath crossing). The second type of trail/roadway crossing is where a trail crosses one street or one path (a mid-block crossing, typically at least 30 to 50 feet from another intersection).

Considerations of Applicable Laws

Under Washington State Law, bicyclists are provided the rights as pedestrians within crosswalks, regardless of whether the crosswalk is marked or unmarked (RCW 46.61.235). Bicyclists are also considered operators of vehicles when riding a bicycle upon a roadway (RCW 46.61.755).

Traffic Control Principles

In general, right-of-way should always be assigned to the higher volume facility to ensure users respect the traffic control device. The Manual on Uniform Traffic Control Devices (MUTCD) standards and guidance are developed in accordance with these core principles from Section 1A.02:

- A. Fulfill a need;
- B. Command attention;
- C. Convey a clear, simple meaning;
- ☒ D. Command respect from road users; and
- E. Give adequate time for proper response.

Of critical importance is the concept the traffic control device must command respect from road users or it will fail to provide the safety benefits intended. Research has proven the application of traffic controls which do not command the respect of the user will not be adhered to creating unsafe conditions and excessive burdens on law enforcement.

Determining Priority Assignment

The following is taken directly from the AASHTO Bike Guide and provides guidance for subsequent recommendations. The term intersection includes intersections with streets, and other paths. Likewise the term "roadway" in this context could apply to other intersecting paths. Driveways are a special circumstance where the path should generally always be assigned the right-of-way with restrictive control applied to the driveway. An exception would be a high volume, commercial driveway that functions more similarly to a street.

In conventional roadway intersection design, right of way is assigned to the higher volume and/or higher speed approach. In the case of a path–roadway intersection, user volumes on the path should be considered. While in many cases roadways will have greater volumes, user volumes on popular paths sometimes exceed traffic volumes on minor crossed streets. In such situations, total user delay may be minimized if roadway traffic yields to path traffic, and given bicyclists' reluctance to lose momentum, such an operating pattern often develops spontaneously. In such situations, "YIELD" or "STOP" control is more appropriately applied on the roadway approaches (page 5-33).

Further, the Guide recommends the application of the least control necessary to maintain user respect for the traffic control and to improve safety.

Application of intersection controls ("YIELD" signs, "STOP" signs, or traffic signals) should follow the principle of providing the least amount of restriction that is effective. Installing unwarranted or unrealistically restrictive controls on path approaches in an attempt to "protect" path users can result in path users disregarding the signs and other traffic control devices at the intersection. This can lead to a loss of respect for traffic control at more critical locations.

A common misconception is that the routine installation of stop control for the pathway is an effective treatment for preventing crashes at path–roadway intersections. Poor bicyclist compliance with "STOP" signs at path–roadway intersections is well documented. Bicyclists tend to operate as though there are "YIELD" signs at these locations: they slow down as they approach the intersection, look for oncoming traffic, and proceed with the crossing if it is safe to do so. "YIELD" control (either for vehicular traffic on the roadway or for users on the pathway) can therefore be an effective solution at some mid-block crossings, as it encourages caution without being overly restrictive.

Intersection controls often stop path users, even when stopping might be unnecessary or inappropriate. The proliferation of stop signs on paths has led to a lack of compliance by path users in many communities and may actually diminish safety if ignored where truly needed. Therefore, the least restrictive control that is effective should be used (MUTCD 2009, Sec. 2B.06). For example, the 2009 MUTCD recommends that "STOP signs should not be used where YIELD signs would be acceptable" (MUTCD 2009, Sec. 9B.03). This was proven in a local study of the Burke Gilman Trail where stop signs were posted for trail users instead of being applied to the lower volume streets and driveways the trail crossed. The lack of traffic on the cross streets and driveways breeds disrespect for the stop sign by bicyclists degrading compliance to almost zero – the study documented fewer than three percent of bicyclists complied with the stop signs (May 16, 2005

Transpo Memo to King County). This is why when priority is assigned, the least restrictive control that is appropriate should be placed on the lower priority approaches.

The following, which is taken directly from the 2009 MUTCD, provides direction on when it is appropriate to assign right-of-way to a shared use path:

“When placement of STOP or YIELD signs is considered, priority at a shared use path and roadway intersection should be assigned with consideration of the following:

- Relative speeds of shared use path and roadway users,
- Relative volumes of shared use path and roadway traffic, and
- Relative importance of shared use path and roadway.

Speed should not be the sole factor used to determine priority, as it is sometimes appropriate to give priority to a high volume shared use path crossing a low volume street, or to a regional shared use path crossing a minor collector street.” (MUTCD 2009, Sec. 9B.03)

Once priority has been assigned, the least restrictive control that is appropriate should be placed on the lower priority approaches. STOP signs should not be used where YIELD signs would be acceptable. The acceptability of YIELD signs depends primarily on sight distance, which should be evaluated through an engineering study using standard engineering practices for such a study. Appropriate warning signs and markings should be placed on the trail and roadway.

Assessment of Proposed Traffic Control Design at 206th Avenue SE

The design engineer (Parametrix) projects peak hour traffic as being approximately 10 motor vehicle crossings per hour onto 206th Avenue SE and approximately 400 trail users per hour (50% bicyclists) on the Trail. 206th Avenue SE is a local, dead-end street. The East Lake Sammamish Trail is a regionally significant trail that is equivalent to an arterial roadway in transportation importance for bicycling. Typical traffic control options at a trail crossing for these conditions would include:

- An uncontrolled crossing for both approaches
- Yield control applied to 206th Avenue SE
- Stop control applied to 206th Avenue SE

These treatments may also be supplemented by:

- marked crosswalk (currently present)
- trail warning signs (W11-15) (currently present in form of separate W11-1 and W11-2 signs)
- raised trail crossing

The decision for which type of control is based on the available sight distance which has been evaluated by the design engineer. The construction of the developments “gateway” features including the walls, signs, fences and some trees obstruct the view between approaching trail users and crossing motorists who are approaching from the south (from the residences). Recommendations for removing the sight distance obstructions were provided. If these objects can be removed, an uncontrolled (both approaches) or yield control (applied to 206th Avenue SE) is recommended. If they cannot be removed, stop control should be provided to 206th Avenue SE.

EXHIBIT 3



Memorandum

To: Barbara Flemming, Senior Deputy Prosecuting Attorney

From: Bill Schultheiss, P.E. (WA. P.E. #46108)
Rebecca Sanders, PhD, Lisa Enns

Date: May 19, 2016

Re: East Lake Sammamish Trail Demand Analyses

King County has asked Toole Design Group (TDG) to estimate bicycle volumes on the East Lake Sammamish Trail, a significant link in the King County Trail network. The King County trail network is an important component of the overall transportation network, connecting major population and employment centers via safe, comfortable off-street facilities. In addition to transportation, the benefits of trail facilities include increasing public health and wellness and boosting the economy.

The East Lake Sammamish Trail (ELST) will be a key part of King County's regional trail network, shown in Figure 1. The ELST runs along the east side of Lake Sammamish for approximately 11 miles, connecting Issaquah and Redmond through Sammamish. Both Issaquah and Redmond's comprehensive plans call for concentrating growth and development in mixed use centers and offering multiple options for transportation. The ELST will directly connect these cities via a flat, paved, high quality trail that provides a safe and comfortable alternative to riding on roadways. The ELST will provide transportation and recreational opportunities for residents in Sammamish, Issaquah, Redmond, and the surrounding region. In addition to connecting the adjacent communities, the trail will be a vital link in the 44-mile regional trail corridor, linking Puget Sound to east King County and the Cascade Foothills.

The demand analysis presented in this document aims to provide the project team with a means to inform the overall design of the trail, including width as well as traffic control measures that will ensure a safe user experience.



Figure 1 - King County Regional Trail System

Direct Demand Model

In the past few years, the quality of data available for bicycling on trails in King County has increased. Several permanent trail counters were installed by the Seattle Department of Transportation (SDOT) in 2014, and the Washington Department of Transportation (WSDOT) installed permanent counters in several locations approximately a year ago. The additional data allows for the use of a more sophisticated trail estimate methodology than was previously available. The National Cooperative Highway Research Program's (NCHRP) Report 770¹, Estimating Bicycling and Walking for Planning and Project Development: A Guidebook, was consulted to select the best method for this analysis. NCHRP Report 770 is the result of a multi-year research effort that developed improved methods for estimating bicycling and walking for planning and project development purposes. Some of the methods only account for commute trips, so a direct demand model, which accounts for all trip purposes (including recreational use), was chosen for this analysis. This model is one of the most widely used tools to predict bicycle and pedestrian volumes. This process uses characteristics of the built environment and existing trail counts to provide an estimate of volumes on a new facility. The direct demand model only takes into account bicycle volumes. Pedestrian volumes are factored into the estimate via a mode split analysis based on similar trails.

The direct demand model recommended in NCHRP Report 770 follows this six-step process to estimate trail volumes:

1. Gather data from seven existing, permanent trail counters.
2. Create a "catchment area" around the permanent trail counters.
3. Summarize land use characteristics within the catchment area.
4. Analyze trail characteristics, such as elevation gain and connectivity.
5. Explore models including factors gathered in steps 3 and 4 to determine which factors influence trail usage.
6. Apply factors discovered in step 5 to surrounding land use and trail characteristics of the proposed East Lake Sammamish Trail.
7. Estimate pedestrian/bicycle mode split and apply pedestrian adjustment to calculate total trail volumes.

The following sections explain how estimated trail volumes were developed following this process.

1. Bicycle Counts

The first step in a direct demand model is to gather existing bicycle volumes. The Seattle Department of Transportation has 12 permanent bicycle counters that gather bicycle volumes continuously. This data is available from the City's website summarized by hour. We selected only off-street, paved trail count locations, similar to the proposed East Lake Sammamish trail. An entire year of data from 2014 was selected to include in the analysis from these counters:

- Elliott Bay Trail at Myrtle Edwards Park
- Burke-Gilman Trail at NE 70th
- Mountains to Sound Trail west of the I-90 Bridge
- Chief Sealth trail at S Thistle St

¹ Transportation Research Board, NCHRP Report 770, "Estimating Bicycling and Walking for Planning and Project Development: A Guidebook," Research sponsored by the American Association of State Highway and Transportation Officials (AASHTO) in cooperation with the Federal highway Administration, Final Report, 2014

The Washington Department of Transportation (WSDOT) has also begun installing permanent counters along trails. WSDOT counters used in this analysis were:

- I-90 trail at SE 34th St
- SR 520 trail at NE 24th St
- Sammamish River trail at Redmond City Hall

Two of the WSDOT counters have been running for at least a year, allowing us to select a year's worth of data from May 1, 2015, to April 30, 2016, with the exception of the Sammamish River Trail, which did not have data points for May or June. Using the Federal Highway Administration's Traffic Monitoring Guide methodology outlined in Chapter 4, "Traffic Monitoring for Non-Motorized Traffic," the missing May and June volumes were extrapolated to complete the Sammamish River Trail data set.

King County also provided data from two recently installed counters along the East Lake Sammamish Trail. Location #1 is on the East Lake Sammamish Trail just south of the intersection with the Marymoor Connector Trail in Redmond, and location #2 is on the East Lake Sammamish Trail just north of the intersection with the Issaquah-Preston Trail in Issaquah. These counters provide continuous data in the same manner as the SDOT and WSDOT counters. They were installed in the spring of 2016, thus data is only available from April 8- April 20, 2016. Annual counts were extrapolated from this two week period following the procedures from the Federal Highway Administration's Traffic Monitoring Guide methodology.

The goal of this analysis is to identify the volumes of trail traffic on the ELST at different times of the year, week, and day. To represent the spectrum of volumes expected, six volume metrics were pulled from each counter: annual, peak weekday, peak weekend, average weekday, average weekend, and peak hour. **Since the counts provided by King County were only from the month of April, the peak weekday, peak weekend, and peak hour volumes pulled from the April data are likely slightly lower than actual peak volumes the trail will experience in summer months.** The trail counts provided and national research show that bicycle usage rises in the summer months, resulting in actual peak volumes occurring between May and August which can correspond up to 12% of the annual trail traffic volumes. April data for these two count locations was also used to calculate average weekday and average weekend day volumes. The average data should be very similar to actual averages, as April is a typical month for bicycle ridership.

2. Catchment Area

In order to gather land use characteristics in areas near the trail, a catchment buffer was created. A GIS software analysis tool was used to find all areas of a trail within a 2 mile distance from each trail with a bicycle counter. A 2-mile proximity buffer around the trail was selected based on research which shows bicyclists will go up to a total of 3 miles out of their way to access high quality/low stress bicycle facilities (including bike lanes, bicycle boulevards, low traffic streets, and multi-use paths).² The actual built road and trail network was used to determine the catchment areas which results in the buffer's irregular shapes. Once on the trail, we assumed that a bicyclist would stay on the trail for 2-4 miles.

A future potential counter location was created on the ELST, near 190th PI SE, that is used for trail volume estimates. The catchment area process was then applied to that location. All nine resulting catchment areas are shown in Figure 2.

² Jennifer Dill and John Gliebe, "Understanding and measuring bicycling behavior: a focus on travel time and route choice," Final report OTREC-RR-08-03 prepared for Oregon Transportation Research and Education Consortium (OTREC), December 2008.

The result of this process is a catchment area around each counter location for people who have easy access to the trail, either by bicycle or a short car drive. Some trail users will likely drive or bicycle more than two miles to a trail access point, thus the catchment areas shown are likely conservative estimates that will have the effect of reducing potential trail volume. These users will be more influenced by the quality of the trail, such as connectivity, elevation gain, and other factors described in Section 4.

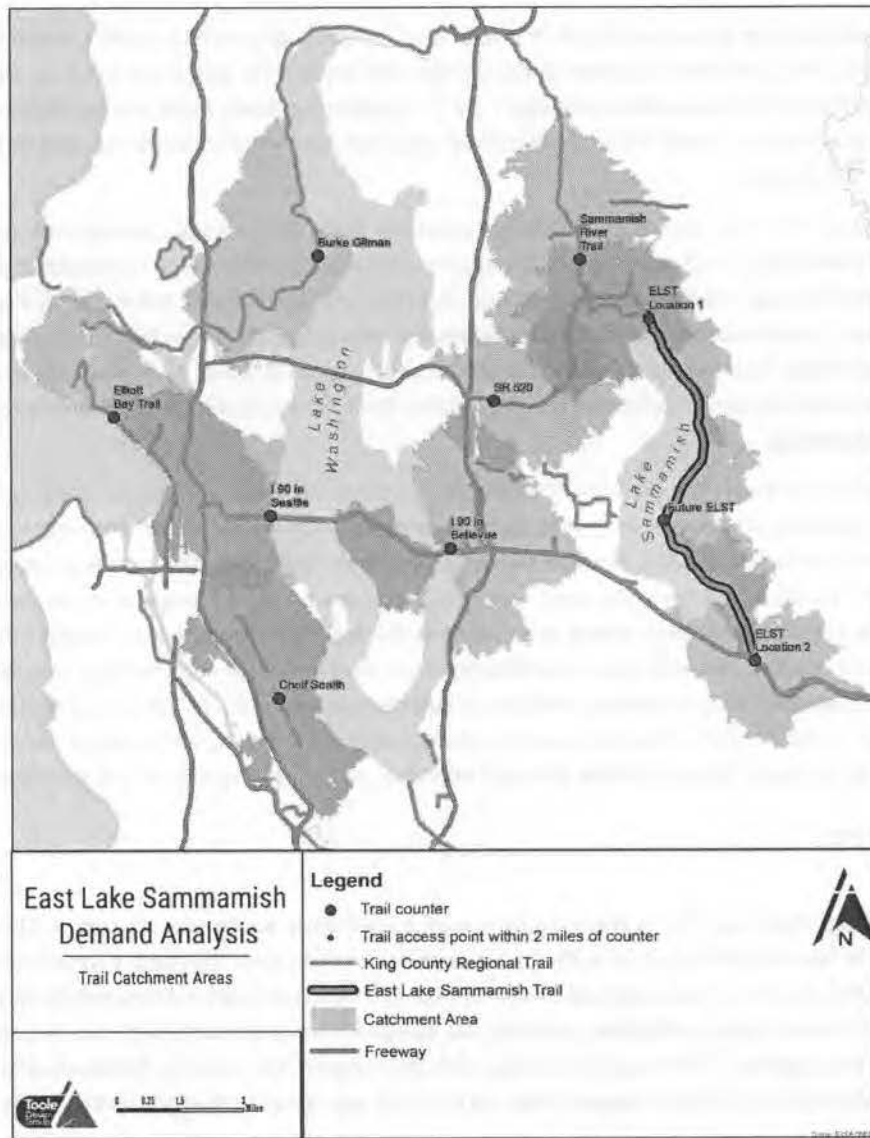


Figure 2: Catchment Areas

3. Land Use Information

The NCHRP Report 770 lists several factors that may influence bicycle use, including population and employment densities, land use mix, facility characteristics, transit availability, and major generators. These factors, along with other readily available factors, were gathered and represent existing conditions and data as provided from the King County data sets. All factors represent current conditions. The following describes each factor considered in this process:

Transit Access

Transit access was calculated by the sum of number of bus trips available per week at each stop in the catchment area, using King County data from the General Transit Feed Specification.

Population

Block groups that intersect the catchment area were selected, and the population calculated. Data is the 2015 estimate from the Office of Financial Management, tabulated by block group. Population density was calculated by dividing the 2015 population by the total land area of the selected block groups.

Employment

Employment values are from the Puget Sound Regional Council, tabulated by census tract. Census tracts that intersect the catchment area were selected, and employment values summed. Employment density was calculated by dividing the total employment by the total land area of the selected census tracts.

Street Network

A connected street network can be a factor in influencing bicycle rates. The number of intersections was summed in each catchment area.

Access Area

The total square mileage of each catchment area was calculated. A larger catchment area means that the trail is easier to access.

College Enrollment

Colleges are major activity generators for a region. The King County "schsite_point" layer was used to find colleges and universities within each catchment area, and each school's website was used to estimate enrollment.

4. Trail Characteristics

In addition to surrounding land use, characteristics of the trail or facility itself influence bicycle ridership. The trails selected for analysis all have similar characteristics to the future East Lake Sammamish Trail, but there are a few differences that were explored.

Connectivity

Trail connectivity may drive trail use, as bicyclists on longer rides may prefer a connected trail network. Multiple factors were explored as a way to measure connectivity.

Total mileage of King County Regional Trails in the catchment area

King County has a robust regional trail network. Most of the network is off-road, paved trails. However, on-street connections were included in this factor as a measure of connectivity.

Connected miles of paved, off-street trails

Some bicyclists may prefer to ride their entire route along paved, off-street trails. The total connected miles of paved, off-street trail was summed for each trail location.

Paved off-street trail extension past the catchment area

An additional measure of trail connectivity was also explored in the model; the trail was considered not extended if it did not connect to any other paved trails on either end of the catchment area (such as the Chief Sealth), semi-connected if the trail connected on one end of the catchment area (SR 520 Trail) and very connected if it connected on both ends (Burke Gilman, Sammamish River).

Elevation

Most trails in the King County Trail network have little to no elevation gain. A few, however, have a significant amount of elevation change, which may impact trail usage. Elevation gain was calculated using bicycle directions on Google Maps, divided by the distance of the trail within the catchment area to calculate average elevation gain/mile. The Chief Sealth, 520, and I-90 trails had the most elevation change; the Burke-Gilman, Elliott Bay, and Sammamish River trails had little to no elevation change. The East Lake Sammamish trail will also have little to no elevation change.

Freeway

The 520 and I-90 trails run directly adjacent to a freeway. Noise and stress level of freeway trails may deter some riders. Trails near a freeway were coded as a value of one, and non-freeway trails were given a value of zero.

5. Exploratory Models

The direct demand model attempts to explain observed levels of bicycle activity on facilities as related to surrounding land uses or facility characteristics. Because the explanatory variables act simultaneously to influence demand, we need a way to control for their influence in order to understand how important one variable is in comparison to another. We do this through regression analysis, which allows us to mathematically estimate the influence of each variable compared to all of the other variables. Additionally, we can use the regression outputs to determine how significant each relationship is—that is, how likely it is that the observed relationship is due to a real relationship as opposed to chance. The regression analysis compared estimated demand on the East Lake Sammamish Trail to segments of the larger King County trail system. The first step of a regression analysis is exploratory regression, which entails producing many different models to find out which variables best predict volumes.

During the exploratory phase, we discovered that the Chief Sealth trail had many characteristics that were not typical of the rest of the network. The trail is unconnected and hilly, which was accounted for by the elevation and network connectivity factors. However, the Chief Sealth trail also has a parallel roadway option, which could divert significant traffic from the trail. Due to this factor, the Chief Sealth trail was determined an outlier and removed from the analysis.

After running various models to determine the best fit, the following variables were found to have the highest influence on trail ridership.

- Population density
- College enrollment
- Miles of trail in the catchment area
- Connections to shared-use paths once the trail leaves the catchment area
- Intersection density
- Network length

However, many of these variables are highly correlated³, and therefore cannot coexist in a model without causing problems. For example, population density is highly correlated with both college enrollment and intersection density,

³ We used a correlation value cut-off of 0.6.

meaning that there is enough similarity between population density and the other two variables that the model is unable to attribute accurate values to either intersection density or college enrollment when population density is also included. Additionally, we can assume that when a model includes intersection density or college enrollment, some portion of the explanatory value of those variables is due to population density. However, in both cases, there is something else that made those variables a better fit for the model than just population density. Modeling is as much an art as a science in this way.

Another important aspect of modeling is having enough data points to be able to say something with confidence. Although King County is on the forefront of collecting bicycle volume data, there were only 8 robust data points to work with. While the models we present here are significantly better than not knowing any information at all (i.e., the “null model”), additional count locations would have allowed us to produce a more robust model.

6. Application of Predictive Model

After testing several models in the exploratory phase, final models were selected based on a combination of the highest R squared value (a measure of how much of the variation in bicycle volumes can be explained by the model), the statistical significance of the variables (a measure of how likely it is that the observed relationship is real and not just by chance), and minimal multicollinearity (as explained in Section 5, a correlation value of 0.6 was the cut-off for inclusion in the model). A separate model was built for each volume estimate: annual, peak hour, average weekday, average weekend day, peak weekday, and peak weekend day. Because the models are different, the annual volumes do not automatically match up with the average weekday and average weekend day volumes.

The following regression equations use 2015 and 2016 conditions, meaning that the resulting volumes are an estimate of what trail usage would be if the trail were built today.

Each variable in the model is a land use or trail characteristic described in steps 3 and 4.

Annual

This model estimates the annual trail volume. The model indicates that intersection density, ability to easily access the trail, college enrollment, and network mileage influences the annual volume. Note that this and all other models presented here were based on eight data points. The resulting annual volumes are much lower than expected from the calculation of average weekend and weekday volumes separately, but this is not unexpected, given that each model has some percentage of error, as noted by the R-squared values.

The annual model had an R-squared value of 0.7538, suggesting that the significant variables predict approximately 75% of the variation in annual trail counts from the eight data locations. The model produced the following equation, which can be applied to the ELST fictional point to predict its annual volume:

$$= \exp(9.710414 + 0.0005635 * \text{intersection density} + 0.1153764 * \text{access area} + 0.000024 * \text{college enrollment} + 0.0062116 * \text{network mileage})$$

Poisson (count) models are easier to interpret if we turn the coefficients above into incidence rate ratios (IRRs), which explain the expected change in annual counts due to the effect of each variable, holding all other variables constant in the model. This model produces the following IRRs:

- Intersection density – for a one-unit increase in intersection density, annual counts would be expected to change by a factor of 1.0006 (increase by 0.06%)
- Access Area – for a one-unit increase in square mileage of access area, annual counts would be expected to change by 1.12 (increase by 12%)

- College enrollment – for a one-student increase in college enrollment, annual counts would be expected to just barely change (increase by 0.002%)
- Network mileage – for a one-mile increase in network mileage, annual counts would be expected to change by 1.0062 (increase by 0.62%)
- Constant – This represents the value when all other variables in the model are evaluated at zero. In this case, the expected annual volume when all other variables are zero would be 16,488.

When the equation was applied to the data, the model predicted an annual volume of 57,945.

Peak Weekday

This model estimates the peak weekday volume of the trail. This model indicates that ability to easily access the trail, college enrollment, and connections to other paved trails influence the peak weekday volume. The peak weekday model had an R-squared value of 0.9103, suggesting that the significant variables predict approximately 91% of the variation in peak weekday trail counts from the eight data locations. The model produced the following equation, which can be applied to the ELST fictional point to predict its peak weekday volume:

$$= \exp(3.559199 + 0.0009682 * \text{intersection density} + 0.1436083 * \text{access area} + 0.4158266 * \text{paved, off-street trail connections} + 0.0000247 * \text{college enrollment})$$

The peak weekday model produced the following IRRs:

- Intersection density – for a one-unit increase in intersection density, peak weekday counts would be expected to change by a factor of 1.0010 (increase by 0.1%)
- Access Area – for a one-unit increase in square mileage of access area, peak weekday volumes would be expected to change by 1.15 (increase by 15%)
- College enrollment – for a one-student increase in college enrollment, peak weekday volumes would be expected to just barely change (increase by 0.002%)
- Network connections – for each additional connection beyond the catchment area to a paved, off-street trail, peak weekday volumes could be expected to change by 1.52 (increase by 52%)
- Constant – This represents the value when all other variables in the model are evaluated at zero. In this case, the expected peak weekday volumes when all other variables are zero would be 35.

When the equation was applied to the data, the model predicted a peak weekday volume of 269.

Peak Weekend

This model estimates the peak weekend volume of the trail. The model indicates that population density, miles of trail, and connections to other paved trails significantly influence the peak weekend volume. The peak weekend model had an R-squared value of 0.6767, suggesting that the significant variables predict approximately 68% of the variation in peak weekend trail counts from the eight data locations. The model produced the following equation, which can be applied to the ELST fictional point to predict its peak weekend volume:

$$= \exp(5.397286 + 0.0000332 * \text{population density} + 0.0250577 * \text{total mileage of King County Regional Trails in the catchment area} + 1.014041 * \text{paved, off-street trail connections})$$

The peak weekend model produced the following IRRs:

- Population density – for a one-unit increase in population density, peak weekend counts would be expected to change by a factor of 1.0010 (increase by 0.1%)
- Miles of regional trail—for each additional mile of trail in the catchment area, peak weekend volumes could be expected to change by 1.025 (2.5%)
- Network connections – for each additional connection beyond the catchment area to a paved, off-street trail, peak weekend volumes could be expected to change by 2.75 (increase by 175%)
- Constant – This represents the value when all other variables in the model are evaluated at zero. In this case, the expected peak weekend volumes when all other variables are zero would be 221.

When the equation was applied to the data, the model predicted a peak weekend volume of 2,236.

Peak Hour

This model estimates the peak hour volume of the trail. This model indicates that total mileage of King County Regional Trails in the catchment area, college enrollment and trail connections influence the peak hour volume. The peak hour model had an R-squared value of 0.7505, suggesting that the significant variables predict approximately 75% of the variation in peak hour trail counts from the eight data locations. The model produced the following equation, which can be applied to the ELST fictional point to predict its peak hour volume:

$$= \exp(3.801138 + 0.037278 * \text{total mileage of King County Regional Trails in the catchment area} + 0.0000225 * \text{college enrollment} + 0.6865772 * \text{paved, off-street trail connections})$$

The peak hour model produces the following IRRs:

- Miles of regional trail—for each additional mile of trail in the catchment area, peak hour volumes could be expected to change by 1.038 (3.8%)
- Network connections – for each additional connection beyond the catchment area to a paved, off-street trail, peak hour volumes could be expected to change by 1.99 (increase by 99%)
- College enrollment – for a one-student increase in college enrollment, peak hour volumes would be expected to just barely change (increase by 0.002%)
- Constant – This represents the value when all other variables in the model are evaluated at zero. In this case, the expected peak hour volumes when all other variables are zero would be 45.

When the equation was applied to the data, the model predicted a peak hour volume of 233.

Average Weekday

This model estimates the average weekday volume of the trail. This model indicates that college enrollment, intersection density, and access area influence the average weekday volume. The average weekday model had an R-squared value of 0.7946, suggesting that the significant variables predict approximately 79% of the variation in average weekday trail counts from the eight data locations. The model produced the following equation, which can be applied to the ELST fictional point to predict its average weekday volume:

$$= \exp(3.745707 + 0.0000255 * \text{college enrollment} + 0.000946 * \text{intersection density} + 0.1115804 * \text{access area})$$

The average weekday model produces the following IRRs:

- College enrollment – for a one-student increase in college enrollment, average weekday volumes would be expected to just barely change (increase by 0.002%)
- Intersection density – for a one-unit increase in intersection density, average weekday counts would be expected to change by a factor of 1.00095 (increase by 0.1%)
- Access Area – for a one-unit increase in square mileage of access area, average weekday volumes would be expected to change by 1.12 (increase by 12%)
- Constant – This represents the value when all other variables in the model are evaluated at zero. In this case, the expected average weekday volumes when all other variables are zero would be 42.

When the equation was applied to the data, the model predicted an average weekday volume of 113.

Average Weekend Day

This model estimates the average weekend day volume of the trail. The only variable that was found to be statistically significant for the average weekend day volume model was college enrollment. Relatedly, this model had an R-squared value of 0.3705, suggesting that the significant variable only predicts approximately 37% of the variation in average weekend day trail counts from the eight data locations. This model suggests that there is a similar base average weekend day volume for the entire trail system, and high college enrollment increases the base. This model produced the following equation, which can be applied to the ELST fictional point to predict its peak weekday volume:

$$= \exp(6.293539 + 0.000022 * \text{college enrollment})$$

The average weekend day model produces the following IRRs:

- College enrollment – for a one-student increase in college enrollment, average weekend day volumes would be expected to just barely change (increase by 0.002%).
- Constant – This represents the value when all other variables in the model are evaluated at zero. In this case, the expected average weekend day volumes when all other variables are zero would be 541.

When the equation was applied to the data, the model predicted an average weekend day volume of 541.

East Lake Sammamish Volumes

Applying these equations to the factors to the East Lake Sammamish Trail, the resulting volumes are:

Table 1: Estimated trail volumes on the East Lake Sammamish Trail

Annual	Peak Hour	Average Weekday	Average Weekend Day	Peak Weekday	Peak Weekend Day
57945	233	113	541	269	2236

Figure 3 and Figure 4 on pages 13 and 14 show the estimated average weekday and weekend day volumes in comparison to other regional trails.

Future Bicycle Use Estimate

Using the estimates calculated in the direct demand model, we can assume that trail ridership will increase along with population increase in the area. Population forecasts for the area are readily available from the Puget Sound Regional Council. Using data from the Regional Macroeconomic forecast and using 2015 as a base year for comparison, we can calculate the percentage of growth for 5, 10, and 20 years in the future.

Table 2: Expected population change in 5, 10, and 20 years

Year	Expected Percent Population Change (from 2015)
2020	6%
2025	10%
2035	19%

Assuming a linear relationship between expected population growth and trail ridership, the estimated future trail bicyclist volumes are shown in Table 3.

Table 3: Estimated future trail bicycle volumes with static bicycling rates

Year	Annual	Peak Hour	Average Weekday	Average Weekend Day	Peak Weekday	Peak Weekend Day
2015	57945	233	113	541	269	2,236
2020	61422	247	120	573	285	2,370
2025	63740	256	124	595	296	2,460
2035	68955	277	134	644	320	2,661

These volumes assume that the rate of bicycling in the region will remain the same. It is very likely that actual numbers will be much higher, due to the network effect of a completed trail network, as well as increased bicycling rates as Issaquah and Redmond grow denser and encourage land use mixes in their urban growth centers. According to the online Census Explorer, King County's bicycling commute rate has grown from 0.9% in 2000 to 1.5% in 2013, a growth of approximately 0.04% per year. If this growth continues at a linear rate, in addition to the population growth, the future volumes of bicyclists estimated on the East Lake Sammamish Trail are:

Table 4: Estimated future trail bicycle volumes with increasing bicycling rates

Year	Annual	Peak Hour	Average Weekday	Average Weekend Day	Peak Weekday	Peak Weekend Day
2015*	57945	233	113	541	269	2,236
2020	70871	285	138	662	329	2,735
2025	93158	375	182	870	432	3,595
2035	143213	576	279	1337	665	5,526

*A bicycling rate of 1.5% was assumed for 2015.

Again, these numbers may be underestimated because the Census and American Community Survey only ask about commuting habits, and do not take into account any growth in recreational or non-commute bicycling.

Future Bicycle and Pedestrian Use Estimate

The model above only considers bicycle volumes. To estimate trail use including pedestrians, a mode split factor was applied. The mode-split factor was determined by calculating how many users of the trail system, on average, are bicyclists. All trail counts from step 1 which included both pedestrian and bicyclists counts were assessed to identify an average mode split for trails in this region. The average trail mix consisted of 64% bicyclists with 36% pedestrians, thus the mode split factor of 0.64. Applying this factor to Table 3 calculates expected total trail usage with static bicycling rates.

Table 5: Estimated future trail volumes (bicycle and pedestrian) with static bicycling rates

Year	Annual	Peak Hour	Average Weekday	Average Weekend Day	Peak Weekday	Peak Weekend Day
2015	90539	364	177	845	420	3,494
2020	95972	386	188	895	445	3,703
2025	99594	400	194	930	463	3,844
2035	107742	433	209	1,006	500	4,158

If we assume that the level of pedestrian activity will grow in conjunction with increased bicycling activity, we can apply the mode split factor to Table 4 and calculate expected total trail usage with increasing bicycle and pedestrian activity.

Table 6: Estimated future trail volumes (bicycle and pedestrian) with increasing bicycling rates

Year	Annual	Peak Hour	Average Weekday	Average Weekend Day	Peak Weekday	Peak Weekend Day
2015*	90539	364	177	845	420	3,494
2020	110736	445	216	1,034	514	4,273
2025	145559	586	284	1,359	675	5,617
2035	223770	900	436	2,089	1,039	8,634

*A bicycling rate of 1.5% was assumed for 2015.

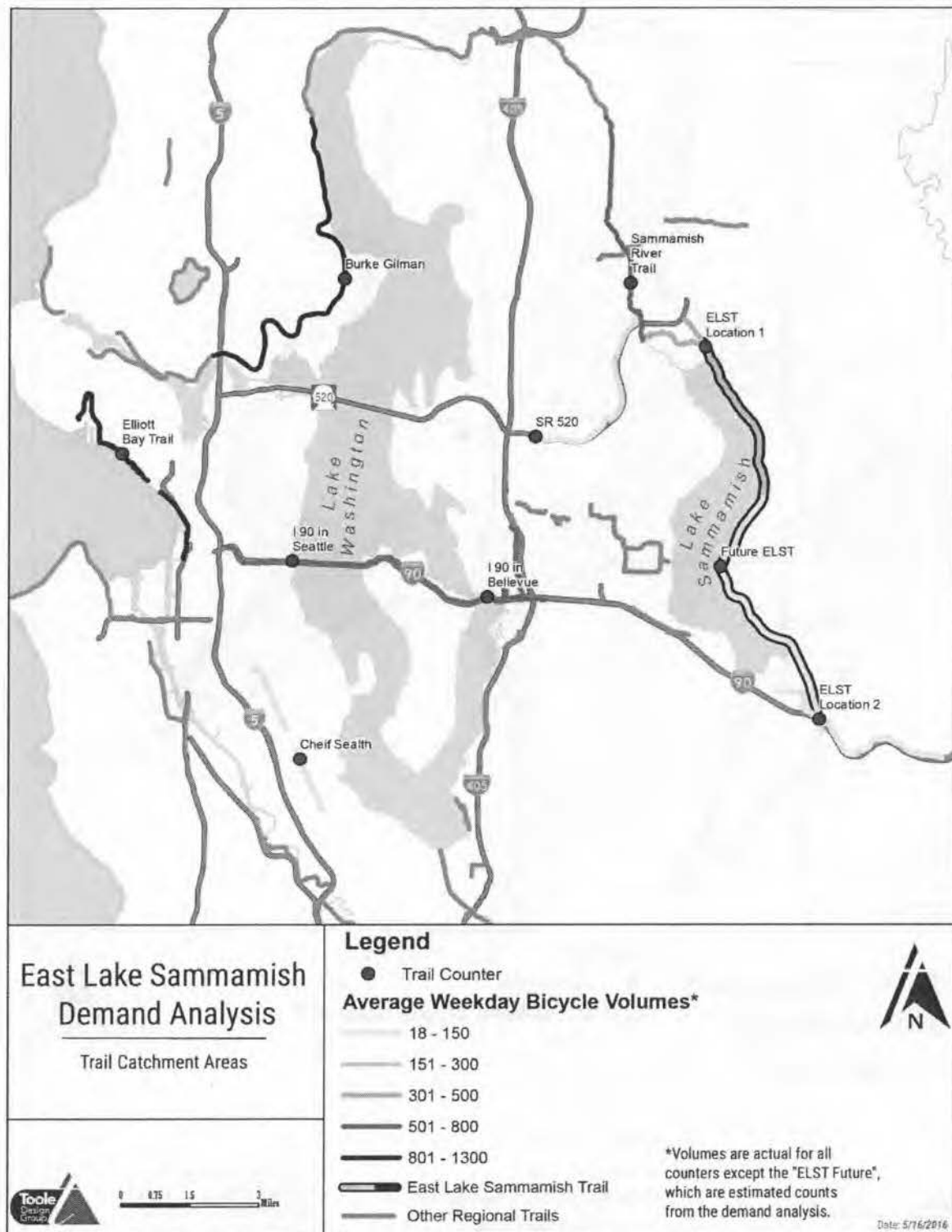


Figure 3: Estimated Average Weekday Bicycle Volumes

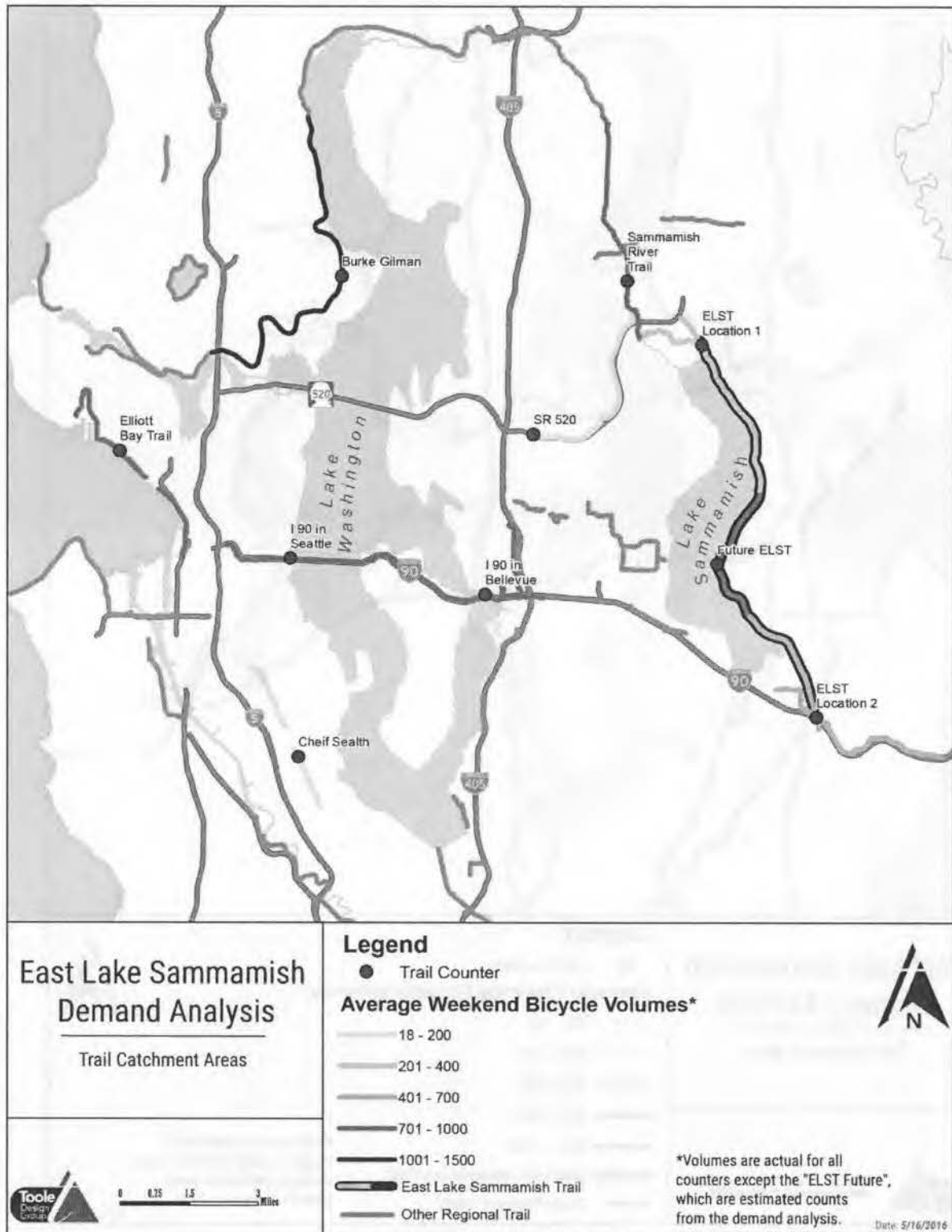


Figure 4: Estimated Average Weekend Bicycle Volumes

Conclusion

The East Lake Sammamish trail will become a critical transportation facility for residents and employees in East King County. As part of the King County Regional trail system, the trail will provide a safe, pleasant non-motorized transportation and recreation option for the entire region. The estimates of volumes of bicyclists that will use this trail are similar to other regional trails, with peak volumes near those of the I-90 trail and the Elliott Bay trail. **Peak hourly volumes should be anticipated to be above 300 users per hour when the trail is complete and grow towards 900 users per hour in the future. As part of the regional trail network, the trail should be designed to anticipate growing use and be able to handle projected future demands while providing a safe operating environment for all users.**

Similar to other transportation projects, it is recommended the 20 year demand projections be considered when planning for the design of a trail facility. Given the anticipated opening day and 20 year volumes, a minimum trail width of at least 12 feet is needed to meet both AASHTO and WSDOT guidelines, as well as King County guidelines for regional trails.⁴ Anything less than 12 feet will compromise safety and the ability to meet projected demand and will likely lead to conflicts between pedestrians and bicyclists during peak periods of travel.

⁴ King County trail guidelines recommend a trail width of at least 12 feet where volumes are anticipated to be greater than 2,000 users a day on peak days (as in the context of estimated user volumes on the ELST).

EXHIBIT 9

THE HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

KING COUNTY,

Plaintiff,

v.

CITY OF SAMMAMISH,

Defendant.

CASE NO. C17-0921-JCC

ORDER GRANTING KING
COUNTY'S MOTION FOR
PRELIMINARY INJUNCTION

This matter comes before the Court on Plaintiff King County's motion for a preliminary injunction (Dkt. No. 7). Having thoroughly considered the parties' briefing and the relevant record, the Court finds oral argument unnecessary and hereby GRANTS the motion for the reasons explained herein.

I. BACKGROUND

This case arises out of a dispute over the placement of four stop signs at two intersections within a regional public trail. Trail construction disputes have been before this Court and the Western District of Washington several times. *See, e.g., Friends of the E. Lake Sammamish Trail v. City of Sammamish*, 361 F. Supp. 2d 1260 (W.D. Wash. 2005) (Coughenour, J.); *Hornish v. King Cty.*, 182 F. Supp. 3d 1124 (W.D. Wash. 2016) (Pechman, J.).

On October 22, 1898, the Northern Pacific Railway Company granted the property in dispute (the Corridor) to the Seattle and International Railway Company, a Burlington Northern

1 & Santa Fe Railway Company (BNSF) predecessor. (Dkt. No. 9-1 at 8.) BNSF then conveyed its
 2 interest in the Corridor to The Land Conservancy. *Hornish*, 182 F. Supp. 3d at 1226.¹
 3 Ultimately, on September 18, 1998, King County acquired the Corridor along the eastern shore
 4 of Lake Sammamish. *Id.* at 1127. King County declared its intention to assume financial
 5 responsibility for the area as an interim trail sponsor, a process created by the National Trails
 6 System Act known as “railbanking.” *Id.*; see 16 U.S.C. § 1247(d). King County was granted all
 7 of The Land Conservancy’s ownership interests in the Corridor. *Hornish*, 182 F. Supp. 3d at
 8 1226.

9 Since acquisition, King County has been constructing a regional trail, the East Lake
 10 Sammamish Trail (ELST). *Id.* The ELST is a King County park that will provide a multi-use
 11 recreational trail and non-motorized transportation corridor to residents throughout the region.
 12 (Dkt. No. 15 at ¶ 3.) King County is currently attempting to construct a permanent trail along
 13 South Segment A. (*Id.* at ¶ 4.) Prior to this most recent dispute with Defendant City of
 14 Sammamish, South Segment A was expected to reopen in late July or early August of 2017. (*Id.*
 15 at ¶ 16.) In short, the parties disagree over the placement of stop signs at two intersections, 206th
 16 Avenue SE and SE 33rd Street, within South Segment A. King County believes the stop signs
 17 should face the oncoming cars, while the City believes the signs should face the pedestrians and
 18 bikers on the ELST. (See Dkt. No. 14 at ¶ 8.)

19 On May 4, 2017, King County submitted Right of Way (ROW) permits to the City for its
 20 preferred intersection designs. (Dkt. No. 15-1 at 2.) King County included a disclaimer that the
 21 applications were not a waiver of its ownership and control over the Corridor and it did not
 22 “concede that any permit [was] required from the City to undertake work or modify traffic
 23 control.” (*Id.* at 5.) On May 23, 2017, King County withdrew its applications for the ROW

24 ¹ The parties have not provided the Court with these conveyance documents and instead cite to
 25 *Hornish* to support these facts. While the Court and the parties do not dispute the specific factual
 26 findings cited in the *Hornish* decision, the parties should have resubmitted the evidence
 submitted in the previous disputes.

permits. (Dkt. No. 15 at ¶ 13.) King County had determined that the City's property interest in the intersections was subject to the superior rights of the railroads, which King County had been conveyed. (*See id.*; Dkt. No. 9-1 at 15, 22.) On June 9, 2017, City Manager Lynn Howard sent a letter to King County and threatened to revoke the construction permits, which had already been granted for construction in South Segment A, if King County did not submit new ROW permits for the intersections at issue. (Dkt. No. 14-1 at 52.)

On June 14, 2017, King County filed this action to resolve the issue. (Dkt. No. 1.) On June 16, 2017, the City issued a stop work order for all remaining construction on South Segment A. (Dkt. No. 15-1 at 7.) Later that same day, the City clarified that King County was only required to stop work at the intersections in dispute. (Dkt. No. 8-1 at 62.) King County estimates the remaining construction will take at least 30 to 45 days to complete after the stop work order is lifted. (Dkt. No. 15 at ¶ 16.) Moreover, the entirety of South Segment A cannot be reopened until the construction is completed at the two intersections. (*Id.* at ¶ 4.)

King County now asks the Court to enter a preliminary injunction that would find (1) the stop work order is preempted by federal law; (2) the City has no authority to regulate the ELST's intersections; (3) the City is demanding intersections designs with unsafe placement; and (4) the City's preferred intersection design violates Washington law. (*See* Dkt. No. 7-1.)

II. DISCUSSION

A. Legal Standard

Pursuant to Federal Rule of Civil Procedure 65(a), a party seeking a preliminary injunction must show (1) a likelihood of success on the merits, (2) a likelihood of suffering irreparable harm in the absence of preliminary relief, (3) that the balance of hardship tips in her favor, and (4) that a preliminary injunction is in the public interest. *Winter v. Natural Resources Def. Council, Inc.*, 555 U.S. 7, 20 (2008); *see also L.A. Unified Sch. Dist. v. U.S. Dist. Ct.*, 650 F.2d 1004, 1008 (9th Cir. 1981). Issuance of a preliminary injunction is "an

extraordinary remedy never awarded as of right.” *Garcia v. Google, Inc.*, 786 F.3d 733, 740 (9th Cir. 2015) (citing *Winter*, 55 U.S. at 24).

B. Likelihood of Success on the Merits

King County argues it is likely to succeed on the merits because the National Trails System Act Amendments of 1983 (Trails Act) and the Interstate Commerce Commission Termination Act (ICCTA) preempt the City’s actions and the City has no authority to regulate the intersections. (Dkt. No. 7 at 11–16.) King County also argues the City’s design is dangerous and contrary to engineering judgment, design standards, and Washington Law. (*Id.* at 16–20.) A showing of likelihood of success on the merits to a certain degree is not required; rather, this factor is considered along with the overall analysis of a balance of hardship. *William Inglis & Sons Baking Co. v. ITT Continental Baking Co., Inc.*, 525 F.2d 86, 88 (9th Cir. 1975). Where the potential harm to a plaintiff is “sufficiently serious,” it is “only necessary that there be a fair chance of success on the merits.” *Id.*

Preemption is a corollary of the Supremacy Clause of the United States Constitution, and in general, provides that any municipal or state law that is inconsistent with federal law is without effect. Of the three preemption types, explicit, field, and conflict preemption, this case only concerns the latter. Conflict preemption applies where a state law “stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress.” *Young v. Coloma-Agaran*, 340 F.3d 1053, 1056 (9th Cir. 2003). It can exist “even when Congress has chosen to include an express preemption clause in a statute.” *Nathan Kimmel, Inc. v. DowElanco*, 275 F.3d 1199, 1204 (9th Cir. 2002).

As this Court previously held in *Friends of the East Lake Sammamish Trail*, it is without question that federal regulation of railroads is both pervasive and comprehensive. 361 F. Supp. 2d at 1273 (citing *Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co.*, 450 U.S. 311, 318 (1981)). There are two relevant federal statutes in the context of railbanking: the Trails Act and the ICCTA. Under the Trails Act, the Corridor in which King County has an ownership interest

1 remains a federally-regulated railroad corridor designated for interim use as a recreational trail.
 2 See 16 U.S.C. § 1247(d). It is clear that railbanked corridors, like the one at issue here, remain
 3 part of the national rail transportation system subject to the jurisdiction of the Surface Transit
 4 Board (STB), pursuant to the ICCTA. See 49 U.S.C. § 10501(b); *Friends of the E. Lake*
 5 *Sammamish Trail*, 316 F. Supp. 2d at 1273–74. Therefore, like any active railroad line, state and
 6 local attempts to control a railbanked corridor are preempted by the ICCTA.² State and local
 7 governments have limited powers to regulate these corridors, including “the right to impose
 8 zoning and safety regulations on the trails so long as those regulations do not interfere with . . .
 9 the train manager’s right and ability to maintain the right-of-way as a recreational trail.” *Blendu*
 10 *v. F. of Weiser River Trail, Inc.*, 1999 WL 33944266, at *6 (D. Idaho June 10, 1999); see *Friends*
 11 *of E. Lake Sammamish Trail*, 316 F. Supp. 2d at 1274 (“Plaintiffs argue that these [city]
 12 regulations [on recreation trails] apply only to the extent that they do not frustrate development
 13 of the trail on the railbanked right of way. This Court agrees.”).

14 However, the touchstone of this dispute is whether the City has the right to impose
 15 zoning and safety regulations at all. If the City does not have this authority, then preemption is
 16 not an issue because there would be no conflict between federal and municipal law. It is well
 17 established that a railroad easement grants the easement holder “exclusive control of all the land
 18 within the lines of its roadway.” *Grand Trunk R. Co. v. Richardson*, 91 U.S. 454, 455 (1875); see
 19 *also Hanson Indus., Inc. v. Cty. of Spokane*, 58 P.3d 910, 914 (Wash. Ct. App. 2002) (A railroad
 20 right-of-way “is an easement with the substantiality of a fee and the attributes of a fee, perpetuity
 21 and exclusive use and possession.”). The trail easements created by the Trails Act are just as
 22 exclusive as the coexisting railroad easements. See *Illig v. United States*, 58 Fed. Cl. 619, 631

23 ² The City seems to fundamentally misunderstand this point. The City tries to argue that King
 24 County’s powers to regulate the railbanked Corridor are not the same as a railroad’s powers to
 25 regulate a railway. (Dkt. No. 19 at 2, 11.) The Trails Act makes it abundantly clear that
 26 railbanked corridors are regulated the same as a railway would be. See 16 U.S.C. § 1247(d).
 Moreover, the City itself concedes that King County holds the property interests of the previous
 railroad owner. (Dkt. No. 19 at 11.) The Court will not entertain this argument any further.

(2003) (“We therefore conclude that the Trails Act imposed a new easement across plaintiffs’ properties which retained essentially the same characteristics as the original easement, both in its location and exclusivity.”). Therefore, whoever holds the Corridor easements is granted the exclusive use, possession, and control of the Corridor, unless there is a superior property right.

Here, the Railroad’s crossing easements reserve the right to use the property “for *any and all purposes whatsoever* . . . including but not limited to the right to construct, maintain, repair, renew, reconstruct, replace, and operate . . . facilities” of its choice. (Dkt. No. 9-1 at 22) (emphasis added); (see Dkt. No. 9-1 at 15.) There is no dispute that these rights now belong to King County. See *Hornish*, 182 F. Supp. 3d at 1130 (citing *Kaseburg v. Port of Seattle*, 2015 WL 6449305, at *7 (W.D. Wash. 2015) (Coughenour, J.)); (Dkt. No. 19 at 11) (“The City does not dispute that the County, pursuant to the national Trails System Act, 12 U.S.C. § 1247(d), holds the property interests of the former Burlington Northern Railroad on an interim basis.”). Moreover, the City does not cite any authority that it has superior property rights to King County’s easement. The City merely argues that the Sammamish Municipal Code requires all parties to obtain a right-of-way permit before starting construction on City streets. (Dkt. No. 19 at 14.) However, the intersections are part of an easement that is exclusively controlled by King County. (Dkt. No. 9-1 at 15, 22.) Therefore, King County has shown a substantial likelihood of success on the claim that the City does not have the authority to regulate the intersections at issue.³

Because the City likely does not have authority, the Court need not address King County’s other arguments. The other arguments—federal preemption and the competing designs—are based on the premise that the City has limited authority to regulate activities at the

³ The City argues that King County’s complaint does not seek this kind of relief. (Dkt. No. 19 at 18.) However, the complaint was amended after the City’s response, and a quiet title claim was added. (See Dkt. No. 18 at ¶¶ 64–68.)

1 intersections. At this time, King County has shown a likelihood of success on its claim that King
2 County does not have authority to regulate the intersections.

3 //

4 **C. Likelihood of Irreparable Harm**

5 To obtain a preliminary injunction, King County “must establish that irreparable harm is
6 likely, not just possible.” *All. for the Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131 (9th Cir.
7 2011). The Ninth Circuit has found that loss of recreational opportunities is a form of irreparable
8 harm. *Id.* at 1135. Here, King County argues it has the right to pursue redress for the injuries of
9 its residents under the doctrine of third-party standing. (Dkt. No. 7 at 20 n.17.) The Court agrees.
10 *See Washington v. Trump*, 1151, 1160 (9th Cir. 2017). If the stop work order is not lifted, the
11 delay in construction will cause at least a month-long delay in use of the trail for many residents
12 of King County. The Court concludes that this is a small irreparable injury, but injury
13 nonetheless.

14 **D. Balance of Hardship and the Public Interest**

15 Next, the Court assesses whether the balance of equities tips in King County’s favor and
16 if the injunction is in the public interest. *Winter*, 555 U.S. at 20. As is the case here, “[w]hen the
17 government is a party, these last two factors merge.” *Drakes Bay Oyster Co. v. Jewell*, 747 F.3d
18 1073, 1092 (9th Cir. 2014). The balance of hardship tips sharply in favor of King County. The
19 construction of four stop signs at two intersections imposes no hardship on the City. As King
20 County points out, the only hardship the City could suffer is having to move the stop signs
21 several feet. This is a trivial hardship in comparison to the delay in construction and ultimate
22 opening of South Segment A that King County would suffer. The Court concludes King County
23 has shown the balance of equities tips in its favor. Additionally, it is in the public interest to enter
24 this preliminary injunction. The trail’s completion will benefit the public, especially residents of
25 King County and the City.

1 Therefore, King County's motion for a preliminary injunction is GRANTED because all
2 of the requirements have been met.

3 //

4 //

5 **III. CONCLUSION**

6 For the foregoing reasons, King County's motion for a preliminary injunction (Dkt. No.
7 7) is GRANTED. King County has demonstrated a likelihood of success on the merits of its
8 argument that the City has no authority to regulate the ELST's intersections with 206th Avenue
9 SE and SE 33rd Street because King County's property rights are superior to any limited crossing
10 rights held by the City. Additionally, King County has demonstrated irreparable harm will be
11 suffered, the balance of hardships weighs in King County's favor, and the preliminary injunction
12 is in the public interest.

13 Effective immediately:

- 14 1. King County is authorized to resume construction of South Segment A, including
15 pavement and construction of the intersections with 206th Avenue SE and SE 33rd
16 Street; and
17 2. The City shall not take any additional actions to impede or delay King County's
18 construction of the ELST, including attempts to require stop signs oriented towards
19 trail users at the intersections with 206th Avenue SE and SE 33rd Street.

20 DATED this 8th day of August 2017.

21
22
23 

24 John C. Coughenour
25 UNITED STATES DISTRICT JUDGE
26

EXHIBIT 10

No. 17-35642

**IN THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

KING COUNTY,

Plaintiff-Appellee,

v.

CITY OF SAMMAMISH,

Defendant-Appellant.

On Appeal from the United States District Court
for the Western District of Washington
No. 2:17-cv-00921
Hon. John C. Coughenour

DEFENDANT-APPELLANT'S OPENING BRIEF

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TABLE OF CONTENTS

	Page
TABLE OF AUTHORITIES	v
JURISDICTIONAL STATEMENT	1
ISSUES PRESENTED.....	2
STATUTORY AUTHORITIES	3
STATEMENT OF THE CASE.....	3
I. FACTUAL BACKGROUND	3
A. Creation And Location Of The Trail	3
B. The County’s Plans To Redevelop The ELST	4
C. Permitting History Of The Redeveloped Trail	5
D. The Stop Sign Dispute	6
E. The County Was Informed Of The Requirement To Obtain A City Right-Of-Way Permit Before Doing Construction In The Intersections.....	8
F. The County Applies For A Right-Of-Way Permit For The Intersections, And Then Suddenly Withdraws Its Application	9
G. City Regulations Pertaining To Use Of Public Rights-Of-Way.....	11
H. The City’s Preferred Traffic Controls At The Intersections Are A Safer Alternative Than The County’s Proposal	13

I.	The County Has Previously Admitted That The City Has “Ultimate” Regulatory Authority At The Intersections	14
II.	PROCEDURAL HISTORY	15
A.	The County Files Suit Seeking A Declaratory Judgment Of Federal Preemption	15
B.	The County Moves For Preliminary Injunction	16
C.	The District Court Grants A Preliminary Injunction; The City Appeals To The Ninth Circuit And Seeks Clarification From The District Court	18
	SUMMARY OF THE ARGUMENT	20
	ARGUMENT	23
I.	STANDARD OF REVIEW	23
II.	THE DISTRICT COURT DID NOT APPLY THE CORRECT LEGAL STANDARD IN EVALUATING THE MERITS OF THE COUNTY'S CLAIM OF FEDERAL PREEMPTION.....	24
A.	The District Court Incorrectly Identified The Issue On Which The County Was Required To Show A Likelihood Of Success On The Merits	24
1.	By Erroneously Framing The Issue As One Of Property Rights Rather Than Preemption Of Regulatory Authority, The District Court Sidestepped The Controlling Precedents.....	25
2.	The Controlling Precedents Do Not Support The County's Claim Of Federal Preemption	27
3.	The County Encouraged The District Court's Errors By Wildly Overstating The Scope Of	

	Federal Preemption And The Impact Of City Regulations On The ELST.....	32
4.	The City's Authority To Apply Local Safety And Construction Standards To The ELST Does Not Depend On Whether The City's Property Interests Are Superior To The County's	35
B.	Even If Property Rights Were The Crucial Issue, The District Court Misapplied The Law Of Easements	38
C.	The District Court's Conclusion That The City Likely Has No Regulatory Authority At The Intersections Would Lead To Absurd Results	43
III.	THE DISTRICT COURT ABUSED ITS DESCRETION IN FINDING THAT THE COUNTY WAS LIKELY TO SUFFER IRREPARABLE HARM.....	44
A.	By Its Own Admission, The Only Harm The County Would Have Sustained Without A Preliminary Injunction Was Additional Cost Due To Alleged Construction Delays.....	44
B.	The County May Not Rely On Alleged Harms That Would Purportedly Be Sustained By The General Public Or Trail Users (Many Of Whom Are Also City Residents).....	49
1.	The City's Approved Intersection Designs Were Not Unsafe, And The District Court Made No Findings That They Were.....	49
2.	Any Delay In Re-Opening Public Access To The Trail Would Have Been Caused By The County, Not The City.....	50

3.	The County Lacks Standing To Assert Purported Harms To Trail Users.....	52
IV.	THE DISTRICT COURT ABUSED ITS DISCRETION IN FINDING THAT THE BALANCE OF EQUITIES AND PUBLIC INTEREST FACTORS SUPPORTED A PRELIMINARY INJUNCTION.....	53
A.	It Is Inequitable To Permit The County To Contradict Its Prior Statements On City Regulatory Authority	53
B.	The County's Alleged Harm Was Entirely Self-Inflicted And Therefore Should Not Figure In The Balancing Of Hardships	54
C.	The District Court Erroneously Minimized The Harm To The City From Granting A Preliminary Injunction	55
D.	The Crux Of The Dispute Is Merely A Disagreement Of Engineering Judgment, Which Is At Best A Neutral Factor In Considering The Public Interest	56
	CONCLUSION	57
	STATEMENT OF RELATED CASES	
	CERTIFICATE OF COMPLIANCE	
	CERTIFICATE OF SERVICE	
	ADDENDUM	

TABLE OF AUTHORITIES

	Page(s)
Cases	
<i>Associated Press v. Otter</i> , 682 F.3d 821, 823–24 (9th Cir. 2012).....	23, 24
<i>Beebe v. Swerda</i> , 58 Wn. App. 375, 384, 793 P.2d 442 (1990)	41
<i>Blendu v. Friends of Weiser River Trail, Inc.</i> , 1999 WL 33944266 (D. Idaho 1999).....	31, 34, 35
<i>Central Kansas Railway, LLC—Abandonment Exemption</i> , S.T.B. Dkt. No. AB-406, 2001 WL 489991 (May 8, 2001)	27
<i>Chevron U.S.A., Inc. v. Nat. Res. Defense Council, Inc.</i> , 467 U.S. 837, 844, 104 S. Ct. 2778 (1984)	30
<i>Disney Enters., Inc. v. VidAngel, Inc.</i> , 224 F. Supp. 3d 957, 977 (C.D. Cal. 2016).....	47
<i>Friends of the E. Lake Sammamish Trail v. City of Sammamish</i> , 361 F. Supp. 2d 1260, 1274 (W.D. Wash. 2005).....	31, 34, 35
<i>Georgia Great Southern Division, South Carolina Central Railroad Co., Inc.—Abandonment and Discontinuance Exemption</i> , S.T.B. Dkt. No. AB-389, 2003 WL 21132515 (May 16, 2003)	29
<i>Hanson Indus., Inc. v. Cty. of Spokane</i> , 58 P.3d 910, 914 (Wash. Ct. App. 2002)	35
<i>Hornish v. King Cty.</i> , 182 F. Supp. 3d 1124 (W.D. Wash. 2016).....	41
<i>Idaho Northern & Pacific Railroad Co.—Abandonment and Discontinuance Exemption</i> , 3 S.T.B. 50, 1998 WL 146208 (1998).....	27, 28, 30, 32, 33, 46

<i>Idaho Rivers United v. U.S. Army Corps of Eng’rs</i> , 156 F. Supp. 3d 1252, 1265 (W.D. Wash. 2015).....	47
<i>Illig v. United States</i> , 58 Fed. Cl. 619, 631 (2003)	36, 38, 42
<i>Iowa Southern R.R. Co.—Exemption—Abandonment</i> , 5 I.C.C.2d 496, 505 (1989).....	27
<i>Los Angeles Mem’l Coliseum Comm’n v. NFL</i> , 634 F.2d 1197, 1202 (9th Cir. 1980).....	44, 46
<i>Mazurek v. Armstrong</i> , 520 U.S. 968, 972, 117 S. Ct. 1865 (1997).....	23, 45
<i>McClellan v. I-Flow Corp.</i> , 776 F.3d 1035, 1039 (9th Cir. 1985).....	26
<i>Oakland Trib., Inc. v. Chron. Pub. Co.</i> , 762 F.2d 1374, 1377 (9th Cir. 1985).....	47
<i>Pimentel v. Dreyfus</i> , 5670 F.3d 1096, 1105 (9th Cir. 2012).....	24, 38, 45
<i>Rupert v. Gunter</i> , 31 Wn. App. 27, 29, 640 P.2d 36 (1982)	41
<i>Sampson v. Murray</i> , 415 U.S. 61, 90, 94 S. Ct. 937, 952 (1974).....	45
<i>Trevarton v. South Dakota</i> , 817 F.3d 1081, 1086 (8th Cir. 2016).....	30
<i>United States v. Mead Corp.</i> , 533 U.S. 218, 227–28, 121 S. Ct. 2164 (2001).....	30
<i>Winter v. Nat. Res. Def. Council, Inc.</i> , 555 U.S. 7, 20, 129 S. Ct. 365 (2008).....	23

Statutes

16 U.S.C. § 1247(d).....	4
28 U.S.C. § 1292(a)(1)	2
28 U.S.C. § 1331.....	1, 15
28 U.S.C. § 1367.....	16
28 U.S.C. § 2201.....	1, 15
42 U.S.C. § 1983.....	1
49 U.S.C. § 10501(b).....	15, 24, 30
RCW 35A.11.020	31
RCW 36.70A.200(5)	15
RCW 64.04.050	40
RCW 81.53.060.....	17

Other Authorities - Sammamish Municipal Code

SMC 14.01.010.....	12
SMC 14.30.010.....	12
SMC 14.30.080.....	12
SMC 16.15.050–.070.....	6
SMC 20.05.020.....	9
SMC 23.70.010.....	11, 12
SMC 25.08.020.....	5

JURISDICTIONAL STATEMENT

District Court Jurisdiction: Defendant-Appellant City of Sammamish (“City”) disputes that the District Court has jurisdiction to hear the claims brought against it by Plaintiff-Appellee King County (“County”). The City, in fact, has filed a motion asking the District Court to dismiss the case for lack of subject-matter jurisdiction because the County’s claims for declaratory relief under 28 U.S.C. § 2201 do not give rise to a federal question under 28 U.S.C. § 1331.¹

But after the City filed its motion to dismiss, the County attempted to salvage a basis for federal jurisdiction by filing an Amended Complaint that added Equal Protection and Due Process claims under the United States Constitution, a damages claim under 42 U.S.C. § 1983, and a “quiet title” action under the General

¹ Specifically, the County is seeking a declaratory judgment: (1) that the Interstate Commerce Commission Termination Act, 49 U.S.C. § 10501(b), preempts the City’s efforts to apply its local development regulations and standards to the County’s construction of a recreational trail in a defunct railroad corridor; and (2) that the City’s regulatory actions vis-à-vis the County’s proposed trail violate the Washington state Growth Management Act. The County alleges that the District Court has federal-question jurisdiction under 28 U.S.C. § 1331 to hear the first claim, and supplemental jurisdiction under 28 U.S.C. § 1367 to hear the second. The City moved to dismiss the action for lack of federal subject-matter jurisdiction because, under long-settled Supreme Court and Ninth Circuit precedent, the assertion of federal preemption as a *defense* to enforcement of state and local regulations does not present a federal question, even when postured as an affirmative claim under the Declaratory Judgment Act. And without federal question jurisdiction to hear the first claim, there can be no supplemental jurisdiction to hear the second.

Railroad Right of Way Act of 1875—all of which are meritless. The District Court, at the City’s request, deferred ruling on the City’s motion to dismiss for lack of federal subject-matter jurisdiction pending an anticipated dispositive motion from the City on these newly added federal claims. However, the District Court then granted a preliminary injunction against the City on August 8, 2017, before its jurisdictional objections were fully resolved, thus necessitating this appeal before entry of final judgment. The City filed its notice of appeal on August 11, 2017.

Appellate Court Jurisdiction: This appeal is from a District Court order granting a preliminary injunction that (a) allowed the County to resume construction of a recreational trail without permits at two locations where the trail intersects with two City streets, and (b) prohibits the City from taking future actions to impede or delay the County’s work at these intersections. The Court has jurisdiction over this preliminary injunction appeal pursuant to 28 U.S.C. § 1292(a)(1).

ISSUES PRESENTED

- I. Whether the District Court applied an erroneous legal standard in finding that the County was likely to prevail on the merits of its claims, and therefore that a preliminary injunction should be granted.

- II. Whether the District Court erred in finding that the County was likely to suffer immediate and irreparable harm if a preliminary injunction were not granted.
- III. Whether the District Court erred in finding that the balance-of-the-equities and public-interest factors tipped sharply in favor of granting a preliminary injunction against the City.

STATUTORY AUTHORITIES

All pertinent statutory authorities and municipal code provisions appear in the Addendum to this brief.

STATEMENT OF THE CASE

I. FACTUAL BACKGROUND.

A. Creation And Location Of The Trail.

The East Lake Sammamish Trail (“ELST”) is an approximately 11-mile-long recreational trail that runs along the eastern shore of Lake Sammamish, 7.2 miles of which lie within the City. ER II: 34, 222. The ELST lies within what was originally a railroad corridor operated by the Burlington Northern & Santa Fe Railroad (“BNSF”) and its various predecessor entities. ER II: 223.

The County’s development of the ELST into a recreational trail was made possible beginning in 1997 when BNSF conveyed its ownership interests in the inactive railroad corridor to The Land Conservancy (“TLC”) by quitclaim deed.

ER II: 224. In September 1998, the federal Surface Transportation Board (“STB”), which has jurisdiction over railroad rates, services, abandonments, and restructurings, issued an order “railbanking” the corridor under the National Trails System Act Amendments of 1985 (“Trails Act”), 16 U.S.C. § 1247(d), thereby authorizing interim use of the corridor as a recreational trail. *Id.* TLC then conveyed the corridor to the County by quitclaim deed. *Id.*

The Trails Act authorizes railroads to transfer financial and managerial responsibilities for railroad corridors to a “sponsor” entity—often a state or local government agency—which agrees to use and maintain the corridor on an interim basis as a recreational trail. ER II: 224. By “railbanking” a railroad corridor in this way, the railroad avoids the abandonment or extinguishment of its easements and other property interests that would otherwise occur under state law doctrines regarding discontinuation or nonuse of easements. ER II: 224. Railbanking the corridor for interim trail use under the Trails Act can effectively preserve the railroad corridor intact in the event that the railroad (or another entity) later decides to resume rail service. ER II: 224.

B. The County’s Plans To Redevelop The ELST.

As the approved operator of an interim trail in the ELST corridor, the County constructed a soft-surface trail in 2006 but is now in the process of redeveloping the

ELST into a paved shared-use path and non-motorized transportation facility connecting to other trails in the County's regional trail network. ER II: 222.

In designing and constructing its planned improvements to the ELST, the County has divided the ELST into five segments. ER II: 34. Paving of three of these segments (the Issaquah, Redmond, and North Sammamish segments) is now complete. *Id.* Two segments—South Segment A and South Segment B—have not been completed. South Segment A is currently under construction. South Segment B is currently in the first stage of the land-use permitting process under City of Sammamish shoreline development regulations. ER II: 79.

C. Permitting History Of The Redeveloped Trail.

This lawsuit concerns South Segment A of the ELST. The City issued a shoreline substantial development permit (“SSDP”) to the County for South Segment A in July 2015. ER II: 33. The SSDP is a land-use permit required under the Washington state Shoreline Management Act² before development in the shoreline jurisdiction (within 200 feet of the ordinary high-water mark of Lake Sammamish) may occur. *See* Sammamish Municipal Code (“SMC”) 25.08.020. The SSDP approved the County's plans for the general alignment and design of the

² Shoreline Management Act of 1971, Ch. 90.58 RCW.

improvements to South Segment A, subject to various conditions to mitigate shoreline and related impacts. ER II: 33.

Having issued the SSDP land-use permit, the City also required the County to obtain a construction permit known as a clearing and grading permit (“C&G permit”) before construction on South Segment A could begin. ER II: 79. This C&G permit (a common form of permit that regulates and imposes conditions on excavation and construction activity within the City) was issued in October 2016 as permit No. CG2016-03488. *Id.* See SMC 16.15.050–.070. The County began construction under the C&G permit to pave and widen South Segment A on December 19, 2016. ER: II 223.

D. The Stop Sign Dispute.

During the course of permit review for South Segment A, including both the SSDP and the C&G permit, a dispute arose between the County and the City regarding roadway priority and traffic controls at the intersection of the ELST with two City streets: 206th Avenue SE and SE 33rd Street (collectively, the “Intersections”). ER II: 228. The existing traffic controls at these Intersections consist of stop signs directed toward bicyclists on the trail as they approach the cross streets. ER II: 79. There are no traffic controls on vehicles at the Intersections. City records show zero accidents have occurred at the Intersections with the current traffic

control configurations in place (*i.e.*, with stop signs controlling trail users rather than motor vehicles). *Id.*

In brief, the County's design engineers insist that the ELST will eventually have higher traffic volumes than the cross streets, and therefore should be assigned priority over the cross streets. ER II: 148–149. The County proposes to put stop signs on 206th Avenue SE and SE 33rd Street immediately, so that vehicles on the streets must stop for cyclists and pedestrians on the trail. ER II: 81, 140. After engineering review, the City, however, concluded that safety concerns dictate that priority be assigned to the public streets, and that the traffic controls should remain in the same place they have been for years, such that ELST users must yield for cars traveling on 206th Avenue SE and SE 33rd Street. ER II: 72, 81, 161–162.

These safety issues arise in large part from the fact that the ELST Intersections are located in close proximity to the East Lake Sammamish Parkway, a major north-south thoroughfare in the City. Simply put, there is inadequate distance for vehicles turning off of the Parkway to come to a stop before reaching the ELST, thus making the County's proposed stop signs functionally useless, and there is insufficient sight distance for trail users to see and react to vehicles traveling on 206th Avenue SE. ER II: 81. Using safety-based criteria to resolve this dilemma, the City determined that the County's proposal to change the traffic controls at the Intersections is unsafe. But the County, which relies primarily on a comparison of expected traffic volumes on

the ELST versus the cross streets, believes that the City's engineered traffic controls at the Intersections are not safe. Compare ER II: 148–150 to ER II: 161–162.

E. The County Was Informed Of The Requirement To Obtain A City Right-Of-Way Permit Before Doing Construction In The Intersections.

The C&G permit, No. CG2016-03488, did not approve any work to be done by the County in the Intersections or other City rights-of-way. ER II: 79. Indeed, the C&G permit clearly instructed that no work could be performed in the Intersections unless and until the County first applied for and obtained a separate right-of-way use permit issued under the SMC:

The modification, relocation, or installation of a traffic control device affecting City Right of Way (ROW) or other work connecting the ROW (e.g., curb returns and ramps) requires approval of a ROW permit prior to placement of any such device or improvement. . . . [T]o clarify when a ROW permit is necessary, details depicting stops and other improvements must be removed from or noted accordingly with the [C&G permit] plan set . . . and applied for under separate ROW permit.

ER II: 79, 87. Further, Condition 1, bullet 21 of the C&G permit No. CG2016-03488 states:

No work in the ROW is approved under this permit. A separate ROW permit is required for installation of any work in the ROW, including installation of any erosion control measures.

ER II: 79, 88.

Similar notations are shown on the approved construction plans for the SE 33rd Street intersection. ER II: 80. The approved plans specifically reference SE 33rd

Street as right-of-way, providing that “THIS WORK IS NOT APPROVED UNDER CLEARING AND GRADING PERMIT. SIDEWALK, CURB RETURN AND DRAINAGE SHALL BE PERMITTED, REVIEWED AND APPROVED UNDER A SEPARATE CITY OF SAMMAMISH RIGHT-OF-WAY PERMIT.” ER II: 98.

The C&G permit was issued to the County in October 2016. The County never indicated anywhere on its C&G permit documents that it did not consider 206th Avenue SE or SE 33rd Street to be City right-of-way. ER II: 80. Rather, Gina Auld, King County Parks Capital Projects Manager, and Frank Overton, King County Parks Capital Projects Managing Supervisor, represented to City staff that the County needed the City to “rush” approval of the C&G permit, or else the County was in danger of losing federal grant funding for the ELST project. ER II: 80. City staff accommodated this request, issuing the C&G permit on October 28, 2016—a mere 24 days after the application was filed. *Id.* The County did not file an appeal of the conditions imposed by the City in the C&G permit, which means those permit conditions, including the obligation to obtain a right-of-way permit, are now final and unappealable. *Id.* See SMC 20.05.020.

F. The County Applies For A Right-Of-Way Permit For The Intersections, And Then Suddenly Withdraws Its Application.

On May 5, 2017, pursuant to the conditions imposed by the City on the C&G permit, the County applied for a right-of-way permit for its proposed work at the Intersections (“ROW permit application”). ER II: 81. Among other things, the

County's ROW permit application sought to relocate the stop signs at the Intersections to control motor vehicles rather than trail users. The County provided no engineering analysis or other authority with the permit application to justify placement of the stop signs in the proposed new locations. *Id.*

The City was in the process of completing its review of the ROW permit application when the County suddenly withdrew its application on May 23, 2017, claiming that the City does not have any property interests at 206th Avenue SE, has only limited property rights at SE 33rd Street, and that the County has superior rights derived from the former railroad. ER II: 81, 145–148.

Prior to withdrawal of the application by the County, the City expected to approve the ROW permit application with only minor technical modifications, except for the location of the stop signs at the Intersections. ER II: 81. Had the City been able to issue the ROW permit, construction on South Segment A could have proceeded on the County's planned schedule, including all work to be performed at the Intersections. *Id.* The County would also have been free to appeal the stop sign condition to the City's hearing examiner without slowing construction. *Id.* But the County instead chose to provoke a confrontation by denying that the City even owned public right-of-way or had authority to regulate construction in the Intersections.

When the County withdrew its ROW permit application, the City sent a response explaining that “the C&G permit clearly requires a ROW permit for the proposed activities at 206th Avenue SE and SE 33rd Street.” ER II: 156. The City warned that it would issue a stop-work order if the County maintained its newly adopted position that it did not need any permits from the City to excavate, re-grade, re-pave, and re-mark a City street, and was immune from any City regulatory oversight of such activity: “If the County intends to work in City ROW without the required ROW permit, the City will post a stop-work order under SMC 23.70.010.” ER II: 161.

On June 16, 2017, the County was observed doing work within the 206th Avenue SE intersection, and as a result, the City served a stop-work order at the construction site on the same day. ER II: 83. The stop-work order allowed the County to continue all other construction on South Segment A, but prohibited work in the Intersections. ER II: 185. As part of the same process for City code enforcement, a Notice & Order to Abate was also served for the violation. ER II: 83. A photograph attached to the Notice & Order shows the unauthorized work in the right-of-way that violated the C&G permit and City code. ER II: 190.

G. City Regulations Pertaining To Use Of Public Rights-Of-Way.

The City’s right-of-way is a critical capital facility, with maintenance and repair of existing right-of-way accounting for \$23.8 million of the City’s budget. ER

II: 77–78. To protect these significant public assets, the City has adopted a system of right-of-way use permits to control and ensure that right-of-way uses are consistent with the public health, safety, and welfare of the community, and that harm or public nuisance is averted. ER II: 77. The SMC makes it unlawful for anyone to perform construction, maintenance, or other such uses of the public right-of-way without a right-of-way permit issued by the City. ER II: 77; *see* SMC 14.30.010.

A ROW permit is not a rubber-stamp authorization; it assures substantive safety and design regulations are adhered to in City streets. The SMC incorporates Public Works Standards that provide minimum engineering criteria and specifications for work in the right-of-way. ER II: 77. Right-of-way permit applications are reviewed by the City for compliance with the Public Works Standards, SMC, and other applicable regulations. *Id.* And, as with other permits, the burden is on a right-of-way permit applicant to prove it meets the requirements for issuance of the permit. *Id.* *See generally* SMC 14.01.010. Failure to comply with the permit “may result in stop work orders, removal of work (at developer’s expense) or other penalties as established by ordinance.” *Id.* *See* SMC 14.30.080, 23.70.010. The District Court’s Order on Preliminary Injunction, which is the subject of this appeal, authorized the County to construct improvements in the Intersections without regard for these regulations—regulations that the City Council duly adopted to protect the health, safety, and welfare of the community. ER I: 12.

H. The City's Preferred Traffic Controls At The Intersections Are A Safer Alternative Than The County's Proposal.

The County defends its conduct here by, among other things, claiming that the stop signs at the Intersections must be re-oriented toward cars on the cross streets and that any other configuration is so dangerous as to preclude the County from re-opening South Segment A after construction is complete. ER II: 141. The County relies on its projections of vast increases in the anticipated volume of trail users that will occur once the trail is fully paved from end to end. ER II: 148–149.

Contrary to the exaggerated claims presented in the County's motion for preliminary injunction, placing traffic signs to control trail users and assigning priority to vehicles on the public streets that cross regional trails is not unusual or per se unsafe. In fact, this configuration (yield sign on trail users; no controls on street traffic) is exactly what Mr. Charles Alexander, an independent transportation engineering expert, recommends as the safest intersection design option at 206th Avenue SE and the ELST, at least over the near term.³ ER II: 72–75. Mr. Alexander believes that over the long term, if volumes on the ELST rise as forecasted, then other intersection design options may need to be re-evaluated, just as the City's traffic engineer has maintained from the beginning. ER II: 75–76. *See also* ER II:

³ An assessment of the SE 33rd Street intersection with the ELST using similar safety criteria is necessary, as well. ER II: 76.

49–50. But at least for the near term, Mr. Alexander has concluded that the County’s proposed changes to the stop signs pose more serious safety concerns than leaving the stop signs in their original locations. ER II: 72–75.

I. The County Has Previously Admitted That The City Has “Ultimate” Regulatory Authority At The Intersections.

In June 2016, during an appeal hearing before the Washington state Shorelines Hearings Board concerning the shoreline substantial development permit for South Segment A, the Board considered the issue of the City’s authority to regulate traffic controls at the intersection of the ELST with 206th Avenue SE. King County Director of Parks and Recreation, Mr. Kevin Brown, admitted under oath as follows:

Q: But is it the County’s position that the City has the ultimate authority to decide whether to place a stop sign on 206th?

A: It is, yes. It’s my opinion that the City has the ultimate authority to provide an engineered stop controlled intersection at this location.

ER II: 45. It was not until May 2017, while the ROW permit application was pending, that the County suddenly changed its tune and declared that the City had no authority to regulate the Intersections. ER II: 146, 150.

II. PROCEDURAL HISTORY.

A. The County Files Suit Seeking A Declaratory Judgment Of Federal Preemption.

The County filed this action on June 14, 2017. ER II: 220. The County's Complaint seeks relief in the form of a declaratory judgment, pursuant to 28 U.S.C. § 2201. Specifically, the County requests a judicial declaration that the City's efforts to enforce its local regulations at the Intersections—indeed, that all state and local attempts to regulate or control a railbanked trail corridor—are preempted by the ICCTA, pursuant to 49 U.S.C. § 10501(b). ER II: 225, 231. According to the County, its request for relief is grounded in the “doctrine of ‘conflict preemption’” because the City's actions in requiring a right-of-way permit before allowing the County to rebuild City streets and relocate traffic controls purportedly constitute an “obstacle to the accomplishment of Congressional intent to facilitate construction of a recreational Trail.” ER II: 231. In the County's view, it now stands in the shoes of the former BNSF railroad, and therefore the STB has exclusive regulatory authority over the railbanked corridor. The County asserts that the District Court has jurisdiction to hear this claim under 28 U.S.C. §§ 2201 and 1331, contending that the preemptive scope of the ICCTA presents a substantial federal question.

In addition to its claim of federal preemption, the County also contends that the City's actions violate Washington state law, including the Growth Management Act, 36.70A.200(5), by purportedly impeding the design and precluding the safe

development and re-opening of the ELST, which the County characterizes as an “essential public facility.” ER II: 221, 231. The County demands a declaratory judgment on this count, as well, and argues that supplemental jurisdiction is available under 28 U.S.C. § 1367. ER II: 221.

B. The County Moves For Preliminary Injunction.

Following the City’s issuance of the stop-work order, the County filed a motion for preliminary injunction on June 26, 2017. The County’s motion sought an injunction finding that (1) the stop-work order was preempted by federal law; (2) the City has no regulatory authority to regulate the Intersections on the ELST; (3) the City is demanding intersection designs with unsafe placement of traffic controls; and (4) the City’s preferred intersection design violates Washington law. ER I: 7. The City filed its opposition to the motion on July 17, 2017, together with numerous declarations and documentary exhibits in support. ER II: 237–238.

Among other declarations, and in addition to the legal arguments presented below, the City offered the sworn testimony of Mr. Kevin Jeffers, P.E., a highly experienced Rail Engineer with nearly two decades of experience in designing forty-one highway-railroad grade crossings in sixteen different counties across the state of Washington. Mr. Jeffers explained that the County’s ownership and operation of the ELST corridor as a rails-to-trails project does not make the County the equivalent of a railroad under state or federal laws. ER II: 104–105. Under regulations issued by

the Washington Utilities and Transportation Commission (“UTC”), which has jurisdiction to regulate railroads in Washington state, the ELST does not meet the definition of a “railroad,” nor does the County meet the definition of a “railroad company.” ER II: 105–106. No crossings related to the ELST appear in the UTC’s official inventory of all public railroad crossings in this state, and the County is not identified by the UTC as a railroad. ER II: 106.

The County is not a railroad operator. But if the County were regulated as a railroad operator proposing to change traffic controls at a railroad grade crossing, it would first have to file a petition with the UTC, provide notice to the public and the municipality in which the crossing is situated, and participate in a public hearing before the UTC on the proposed alterations. 81.53.060. The County has done none of these things with respect to the Intersections—further indicating that the County is not a railroad operator and the ELST is not a railroad. ER II: 106. Moreover, a railroad wishing to alter crossings would be required to go through a National Environmental Policy Act (“NEPA”) review, and to include the Federal Railroad Administration (“FRA”) as a party. ER II: 107. Here, nothing in the record demonstrates that the County notified the FRA of its planned improvements at the Intersections—again indicating that the County does not view itself as a railroad operator, and that its use of the ELST for a recreational trail is not a railroad use. ER II: 108.

C. The District Court Grants A Preliminary Injunction; The City Appeals To The Ninth Circuit And Seeks Clarification From The District Court.

Without providing an opportunity for oral argument, the District Court appears to have disregarded virtually all of the evidence presented by the City and granted the County's motion for preliminary injunction on August 8, 2017. The District Court's order enjoined the City as follows:

Effective immediately:

1. King County is authorized to resume construction of South Segment A, including pavement and construction of the intersections with 206th Avenue SE and SE 33rd Street; and
2. The City shall not take any additional actions to impede or delay King County's construction of the ELST, including attempts to require stop signs oriented towards trail users at the intersections with 206th Avenue SE and SE 33rd Street.

ER I: 12.

The City filed its notice of appeal from this preliminary injunction order on August 11, 2017. ER II: 26–27.

After entry of the injunction, and after filing this appeal, the City asked the District Court to clarify (or potentially reconsider) the scope of paragraph 2 of the injunction, and particularly the first clause of that paragraph. ER II: 20. The City explained that, if read literally, the District Court's injunction would preclude the City from enforcing the terms of the C&G permit not related to the Intersections and from continuing to process pending shoreline permits for two County projects related

to the redevelopment of South Segment B—permits that the County has never challenged the City’s authority to require. Such a broad injunction would effectively preclude the City from fulfilling its obligations under Washington state law and the City’s municipal code to administer and enforce the state Shoreline Management Act. ER II: 22.

Three days after the City filed its motion to clarify, the District Court entered a minute order stating that the language of paragraph 2 of the preliminary injunction order:

. . . was adopted from the County’s proposed order . . . in an attempt to fully and precisely address the relief the County sought. The Court did not intend this language to expand its ruling beyond the relief sought by the County and the issues discussed and resolved in the order.

ER I: 3. But rather than clarifying the intended scope of its injunction, the District Court instead “recommend[ed] that the parties consult among themselves to reach a reasonable and cooperative resolution.” ER I: 3–4.

Gravely uncertain as to whether its ongoing regulatory processes on South Segment B were violating the District Court’s order, the City conferred with the County to try to narrow the worrisome scope of paragraph 2 of the preliminary injunction. Following discussions with the County, on August 31, 2017, the City and County submitted a stipulation

and agreed order to the District Court proposing to revise paragraph 2 of the preliminary injunction as follows:

2. The City shall not take any additional actions to impede or delay King County's construction of the intersections at 206th Avenue SE and SE 33rd Street, including any attempts to orient stop signs toward trail users.

ER II: 16.

By minute order dated September 1, 2017, the District Court struck the problematic sentence of paragraph 2 of its original preliminary injunction order and replaced it with the parties' proposed revision. ER I: 1–2. This revision expressly preserved the City's right to appeal the injunction. *Id.* In all other respects, the District Court's original preliminary injunction order remains unchanged. *Id.* The City filed an amended notice of appeal on September 19, 2017, extending the original notice to encompass this revision to the District Court's preliminary injunction order. ER II: 13.

SUMMARY OF THE ARGUMENT

The District Court granted a preliminary injunction allowing the County to immediately dig up, re-grade, and re-pave two City streets and alter adjacent traffic control devices that have been in place for over a decade—all without any of the oversight that City officials routinely apply to work performed in its public rights-of-way. The District Court granted this extraordinary preliminary injunction—which did anything *but* preserve the status quo pending final judgment—based on

an erroneous assessment of the County's likelihood of succeeding on the merits of its claims. Indeed, the District Court incorrectly identified the nature of the claim on which the County was required to demonstrate a likelihood of success.

The County's pleadings explicitly frame the core dispute in this case as one of federal preemption of local land-use and development regulations. Thus, the question presented to the District Court at the preliminary injunction stage was whether the County was likely to succeed in demonstrating that federal law (and specifically, the ICCTA) preempts the City's efforts to apply its development regulations and public works standards to the County's construction of the ELST in a railbanked trail corridor.

Yet the District Court disregarded the federal Surface Transportation Board's own, long-standing views (which have been affirmed by the federal courts) regarding the preemptive scope of the ICCTA. Rather than evaluating the question of whether the City's regulatory authority over its own streets and intersections survives the preemption clause of the ICCTA, the Court instead analyzed the dispute as one of comparative property rights—finding the County had a “superior” claim to use of the railbanked corridor. As a matter of basic property law relating to easements, the District Court's finding on this issue was erroneous. But the District Court's more fundamental error was in viewing this

dispute as a question of *property rights* rather than as a question of the City's *regulatory authority* over a federally railbanked trail corridor.

Indeed, the City has never disputed that the County owns whatever property rights it obtained from the predecessor railroad, and that such rights generally entitle the County to construct, maintain, and improve the trail corridor. Rather, the City seeks to affirm its ability to *regulate* the County's use of, and construction activities in, City streets—in the same manner it does with all other developers working within the City. Federal laws regulating railroad operations do not preclude application of municipal development regulations to the design and operation of a recreational trail simply because the trail is located in an inactive railroad corridor.

Aside from its application of incorrect legal standards on the question of “likelihood of success,” the District Court disregarded precedent clearly establishing that (i) the mere possibility of additional construction costs and (ii) the County's threatened refusal to delay re-opening the ELST does not constitute the kinds of “irreparable harm” necessary to support a preliminary injunction. Delay damages, if found to be appropriate, could easily be included in a final judgment on the merits of the County's claims. Moreover, the evidence was clear that any harm to trail users from threatened delays in re-opening the redeveloped trail

would have been entirely the result of the County's own actions, not the result of any actions by the City.

Lastly, the District Court abused its discretion in finding that the balance of the equities and the public interest weigh in favor of granting the preliminary injunction requested by the County. The injunction was granted in error and should be vacated immediately.

ARGUMENT

I. STANDARD OF REVIEW.

A party seeking a preliminary injunction has the burden to establish four elements: (1) that it is likely to succeed on the merits of its claim; (2) that it is likely to suffer irreparable harm in the absence of preliminary relief; (3) that the balance of equities tips in its favor; and (4) that an injunction is in the public interest. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20, 129 S. Ct. 365 (2008). “[A] preliminary injunction is an extraordinary and drastic remedy, one that should not be granted unless the movant, *by a clear showing*, carries the burden of persuasion.” *Mazurek v. Armstrong*, 520 U.S. 968, 972, 117 S. Ct. 1865, (1997) (emphasis in original).

The Ninth Circuit reviews a trial court's decision to grant a preliminary injunction for abuse of discretion. *Associated Press v. Otter*, 682 F.3d 821, 823–24 (9th Cir. 2012). In deciding whether the trial court abused its discretion, the

Court of Appeals employs a two-part test: First, the Court conducts a de novo review of whether the trial court identified the correct legal rule to apply to the relief requested; and second, the Court determines whether the trial court's application of the correct legal rule was illogical, implausible, or without support in inferences that may be drawn from facts in the record. *Id.* A decision based on an erroneous legal standard or a clearly erroneous finding of fact amounts to an abuse of discretion. *Pimentel v. Dreyfus*, 670 F.3d 1096, 1105 (9th Cir. 2012).

II. THE DISTRICT COURT DID NOT APPLY THE CORRECT LEGAL STANDARD IN EVALUATING THE MERITS OF THE COUNTY'S CLAIM OF FEDERAL PREEMPTION.

A. The District Court Incorrectly Identified The Issue On Which The County Was Required To Show A Likelihood Of Success On The Merits.

To support its request for a preliminary injunction, the County argued that the Interstate Commerce Commission Termination Act ("ICCTA"), 49 U.S.C. § 10501(b), gives the STB exclusive jurisdiction to regulate the construction and operation of interim trail facilities in railbanked trail corridors, and that the ICCTA and Trails Act together preempt all state and local regulations that might interfere with development of such trails.

The District Court abused its discretion because it applied an incorrect legal standard in evaluating the County's likelihood of success on the merits of this claim. *Associated Press*, 682 F.3d at 823–24; *Pimentel*, 670 F.3d at 1105 (a

decision based on an erroneous legal standard is an abuse of discretion). Indeed, the District Court misidentified the claim on which the County was required to demonstrate a likelihood of success.

1. By Erroneously Framing The Issue As One Of Property Rights Rather Than Preemption Of Regulatory Authority, The District Court Sidestepped The Controlling Precedents.

Rather than analyzing whether the County was likely to succeed in demonstrating that City regulatory authority is preempted by federal law, the District Court erroneously reframed the existence of the City's regulatory authority as a question of property rights. This fundamental error meant that the District Court failed to address or apply the controlling legal authorities.

The District Court began its Order by correctly identifying and framing the legal issues for which the County's likelihood of success must be shown. It stated:

King County argues it is likely to succeed on the merits because the National Trails System Act Amendments of 1985 (Trails Act) and the Interstate Commerce Commission Termination Act (ICCTA) **preempt the City's actions** and the City has no authority to regulate the intersections.

ER I: 8 (emphasis added).

The District Court also properly identified the question as one of “conflict preemption”—that is, whether the City's regulatory enforcement actions conflict with federal law such that compliance with both is impossible, or whether local regulations stand as an obstacle to the fulfillment of Congressional intent. *Id.*; see

McClellan v. I-Flow Corp., 776 F.3d 1035, 1039 (9th Cir. 2015). Indeed, that is exactly how the County framed the preemption claim in its Complaint and Amended Complaint. ER II: 231–232, 123. So far, so good.

The District Court then proceeded to analyze the scope of ICCTA preemption as specifically applicable to railbanked trail corridors—*i.e.*, those former railroad corridors that have been converted to “interim trail use” under the Trails Act. This was the correct legal issue to analyze for likelihood of success on the merits, but it was at this point where the District Court’s analysis began to go astray.

The District Court’s Order says that “like any active railroad line, state and local attempts to control a railbanked corridor are preempted by the ICCTA.” ER I: 9. Notably, the District Court gives no citation for this proposition. Nor, indeed, could it provide such a citation, because this proposition is directly contradicted by a long line of STB decisions interpreting the scope of the ICCTA’s preemption clause. As the STB’s own decisions make clear, the preemption arguments that the County advanced to explain why the City’s permitting requirements and Public Works Standards may not lawfully be applied to the County’s construction activity on the ELST are meritless and do not support a preliminary injunction.

2. The Controlling Precedents Do Not Support The County's Claim Of Federal Preemption.

For example, in *Idaho Northern & Pacific Railroad Co.—Abandonment and Discontinuance Exemption*, 3 S.T.B. 50, 1998 WL 146208 (1998), the STB clearly articulated the limits of its jurisdiction over railroad corridors after they have been converted to interim recreational trails under the Trails Act:

Federal preemption does not extend to the legitimate exercise of police power by states and localities. . . . [A] trail use must comply with State and local land use plans, zoning ordinances, and public health and safety legislation. . . . Indeed, the State and local agencies in the area are attuned to the specific interests and needs of their communities. . . . Nothing in our Trails Act rules or procedures is intended to usurp the right of state, regional and local entities to impose appropriate safety, land use, and zoning regulations on recreational trails.

Id. at *7 (emphases added) (quoting *Iowa Southern R.R. Co.—Exemption—Abandonment*, 5 I.C.C.2d 496, 505 (1989)). Given this clear language, it would surely come as a surprise to the STB to learn that all trail construction activities within the ELST are exclusively within the regulatory purview of the STB. Indeed, the STB itself instructs that it is the job of local government agencies, not federal agencies, to regulate trail operators to ensure that they do not use the trail right-of-way in a manner that constitutes a public nuisance. *See id.*

The authority of local agencies to regulate matters of public health and safety and to insist on compliance with local land-use and development regulations has been reaffirmed in many subsequent decisions of the STB. In *Central Kansas*

Railway, LLC—Abandonment Exemption, S.T.B. Dkt. No. AB-406, 2001 WL 489991 (May 8, 2001), a group of adjacent property owners that were opposed to the trail asked the STB to revoke the trail sponsor’s interim use authority on the grounds that the trail sponsor had not met numerous obligations under Kansas state law, including the obligation to control noxious weeds and litter, to post signs regarding safety, to maintain adequate fencing, to maintain culverts, bridges, and roadway intersections, and to submit an initial project plan to county authorities. The STB affirmed the holding of *Idaho Northern & Pacific Railroad, supra*, that “trail sponsors may not use a right-of-way in such a manner as to present a public nuisance under state and local laws.” *Id.* at *4. The STB further recognized that it was in no position to determine the requirements of local law, deferring instead “to authorities of the State of Kansas the responsibility to interpret and enforce any state or local requirements applicable to this particular trail.” *Id.*⁴

Under the holdings of these STB decisions, it was simply not tenable for the District Court to conclude that the ICCTA preempts local regulation of

⁴ In fact, the STB stated that it would be willing to consider revoking the sponsor’s interim trail use authority over the railroad corridor if the Kansas state courts were to determine that the sponsor had failed to manage the trail in a lawful manner. *Id.*

construction of the ELST, and that the City has no authority to enforce compliance with local street-design standards and public right-of-way permitting rules.⁵

In yet another on-point decision, the STB reminded the parties in *Georgia Great Southern*⁶ of its “ministerial role under the Trails Act,” and noted that its “*only responsibility* is to confirm that the trail sponsor agrees to assume full liability for the property during the interim trail use and to keep the property available for reactivation of rail service.” 2003 WL 21132515, at *4 (emphasis added). Refuting the County’s arguments in this case, the STB in *Georgia Great Southern* held that “**we are not authorized to regulate activities over the actual trail, and we have no involvement in the type, level, or condition of the trail that is used for a particular right-of-way.**” *Id.* (emphasis added).

⁵ The *Central Kansas Railway* decision states that the STB does “retain jurisdiction over the line throughout the period of the rail banking/interim trail use.” *Id.* at *5. But it is clear from the decision that such jurisdiction is not exclusive, but rather is retained for very limited purposes, such as determining whether the trail sponsor is living up to its Trails Act duties to pay taxes, assume financial liability for the trail, and ensure that sufficient right-of-way is preserved to permit rail service to be restored in the future. Another limited purpose for STB jurisdiction would be to approve or deny applications to transfer trail sponsorship from one entity to another. See 49 CFR 1152.29(f). By contrast, enforcement of local development and nuisance regulations as applicable to the trail and trail sponsor is left up to local and state authorities. *Central Kansas Railway*, 2001 WL 489991, at *4.

⁶ *Georgia Great Southern Division, South Carolina Central Railroad Co., Inc.—Abandonment and Discontinuance Exemption*, S.T.B. Dkt. No. AB-389, 2003 WL 21132515 (May 16, 2003) (hereafter, “*Georgia Great Southern*”).

Despite these on-point decisions from the STB, the District Court stated:

“The Trails Act makes it abundantly clear that *railbanked corridors are regulated the same as a railway would be.*” ER I: 9 (emphasis added). Again, the District Court is simply wrong on this point, as the STB cases cited above make abundantly clear. The STB has no interest in how an interim trail in a railbanked corridor is constructed or operated, so long as the trail sponsor preserves and maintains a contiguous corridor that can be restored to active rail service in the future if need ever arises. *Supra*, n.6; see *Idaho & N. Pac. R.R. Co.*, 1998 WL 146208 at *7. As the federal agency tasked with regulating rail services and common carrier operations under the ICCTA, the STB is entitled to deference in determining the scope of its regulatory jurisdiction. *United States v. Mead Corp.*, 533 U.S. 218, 227–28, 121 S. Ct. 2164 (2001) (“[w]e have long recognized that considerable weight should be accorded to an executive department's construction of a statutory scheme it is entrusted to administer . . .”) (citing *Chevron U.S.A., Inc. v. Nat. Res. Defense Council, Inc.*, 467 U.S. 837, 844, 104 S. Ct. 2778 (1984)).

Local regulatory authority over interim trails has also been affirmed by the federal courts. See *Trevarton v. South Dakota*, 817 F.3d 1081, 1086 (8th Cir. 2016) (“As the STB has itself recognized, its exclusive jurisdiction under 49 U.S.C. § 10501(b) ‘is limited to remedies with respect to rail *regulation*—not state and federal law generally.’”) (quoting *Saratoga & N. Creek Ry.*, S.T.B. Dkt. No.

FD 35631, 2012 WL 4840014, *3 (Oct. 9, 2012)). Indeed, the District Court itself had previously affirmed the rights of municipalities to “impose appropriate safety, land use, and zoning regulations on recreational trails” in railbanked corridors, so long as they don’t entirely frustrate the trail sponsor’s ability to construct the trail. *See Friends of the E. Lake Sammamish Trail v. City of Sammamish*, 361 F. Supp. 2d 1260, 1274 (W.D. Wash. 2005) (applying a conflict-preemption analysis); *see also Blendu v. Friends of Weiser River Trail, Inc.*, 1999 WL 33944266 (D. Idaho 1999) (“The STB ... clearly indicated its intention to cede back to the states and local governments the right to impose zoning and safety regulations on trails so long as those regulations do not interfere with ... the railroad’s right to convert the corridor back into a railway”).

Here, the SMC requires everyone—including public agencies like the County—to obtain a right-of-way permit before doing excavation, grading, or other construction work in City streets. ER II: 77–78. The SMC also requires that work on or in City streets comply with minimum engineering and design standards. ER II: 78. These regulations and standards are a matter of public health, safety, and welfare, as well as a means of averting public nuisance or harm. ER II: 77–78. They are a lawful exercise of police power and have no effects on present or future railroad operations. 35A.11.020; ER II: 107. Nor do these SMC provisions

preclude or frustrate the County's ability to develop (or in this case improve) the ELST. As such, there is no basis for finding federal preemption.⁷

3. The County Encouraged The District Court's Errors By Wildly Overstating The Scope Of Federal Preemption And The Impact Of City Regulations On The ELST.

The County's assertion that it is under a Congressional duty to widen and pave the ELST into a commuter corridor, rather than maintain it in its current condition, is also meritless. As the STB itself has noted, trail sponsors have no duty to re-develop the trail in the way the County proposes. *See, e.g., Idaho N. & Pac. R.R. Co.*, 3 S.T.B. 50, 1998 WL 146208, *7 (1998) (rejecting the argument that the proposed trail sponsor was "under an affirmative duty to develop a trail for advanced recreational use"). Indeed, **"The Trails Act does not require the trail to be 'developed' in any particular way."** *Id.* (emphasis added). Moreover, King County's argument that the STB has exclusive jurisdiction to determine how the trail is built and operated is nonsense: "There can be differing types of levels of use, and the [STB] **has never become involved in determining the type or level of trail** for a specific right-of-way." *Id.* (emphasis added).

⁷ Far from making a "clear showing" that it is likely to prevail, the County does not even raise "serious questions" of preemption of the City's authority to enforce local right-of-way regulations on interim trail sponsors. *See Alliance for Wild Rockies v. Cottrell*, 632 F.3d 1127, 1131–34 (2011) (explaining "serious questions" formulation of preliminary injunction standard).

Rather than preempting local regulation of trail construction processes and permitting requirements, the STB's jurisdiction over railbanked corridors is limited to ensuring that the trail sponsor (here, the County) fulfills its statutory obligation under the Trails Act to preserve the ability of a future railroad operator to reactivate rail service in the railbanked corridor. As the STB has noted:

Our chief concern, once a trail condition has been imposed, is that the statutory rail banking condition not be compromised, and that nothing occur that would preclude a railroad's right to reassert control over the right-of-way at some future time to revive active rail service.

Idaho & N. Pac. R.R. Co., 1998 WL 146208 at *7. In essence, the County, as interim trail sponsor, is required to preserve the corridor intact, and ensure that no new property interests or encumbrances arise that would reduce the suitability or availability of the corridor to be returned to railroad operations.

There is absolutely no reason to believe that requiring the County to obtain a right-of-way permit from the City before doing grading and construction work in the Intersections would somehow render it impossible (or more difficult) to reactive rail service in the future. *Id.* (petitioner failed to allege that sponsor's financial condition would make it impossible to reinstitute rail service in the corridor). Nor is there any reason to believe that requiring traffic control signs to be oriented in particular directions at the Intersections—*while the corridor is being used as a pedestrian and bicycle path*—would prevent a railroad from later re-activating rail service (and installing whatever new safety devices are required for safe rail operations). The

City's decision to condition approval of construction or right-of-way permits on the placement of traffic signs at certain locations is a matter of public safety, and imposing such conditions on ELST construction is for local, not federal, agencies to decide. *Id.* at *8 (noting the STB has only "limited Trails Act authority," and holding that imposing public safety conditions would go beyond that authority).

Having at first misapprehended the preemptive scope of the ICCTA and the STB authorities addressing preemption as applied to trails built in railbanked corridors, the District Court appeared as though it may correct course when it noted that state and local governments retain limited regulatory authority over railbanked corridors, including "the right to impose zoning and safety regulations on the trails so long as those regulations do not interfere with the . . . right and ability to maintain the right-of-way as a recreational trail." ER I: 9 (citing *Blendu and Friends*).

This acknowledgment of state and local government regulatory authority over recreational trails built in railbanked corridors should have been the end of the matter. The District Court should have concluded right then and there that the County was unlikely to succeed on its claim that the ICCTA preempts the City's ability to apply its Public Works Standards and local development regulations to ensure safe operation of the ELST where it intersects with City streets. Such local

regulatory authority is clearly preserved under the STB and federal court precedents discussed above.

4. The City's Authority To Apply Local Safety And Construction Standards To The ELST Does Not Depend On Whether The City's Property Interests Are Superior To The County's.

After first acknowledging the possibility of local regulation, the District Court's likelihood-of-success analysis then went drastically off course by abruptly reframing the issue as one of property rights, rather than regulatory authority. The reason for this sudden shift in legal footing is unclear; the District Court simply stated without further explanation that "the touchstone of this dispute is whether the City has the right to impose zoning and safety regulations at all." ER I: 9. The District Court made this remarkable statement having just acknowledged the *Blendu* and *Friends* decisions, which affirmed that such regulatory authority exists. The District Court then surprisingly concluded that "preemption is not an issue" because the original railroad interest was an easement that granted the railroad operator "'exclusive control of all the land within the lines of its roadway.'" *Id.*

In support of this doctrinal non sequitur, the District Court cited *Hanson Indus., Inc. v. Cty. of Spokane*, 58 P.3d 910, 914 (Wash. Ct. App. 2002), for the proposition that a railroad right-of-way "is an easement with the substantiality of a fee and the attributes of a fee, perpetuity and exclusive use and possession." Continuing with this sudden shift to a focus on property rights and the "fee simple"

nature of the railroad easement, the District Court noted that “[t]he trail easements created by the Trails Act are just as exclusive as the coexisting railroad easements.” *Id.* (citing *Illig v. United States*, 58 Fed. Cl. 619, 631 (2003)).

“Therefore,” the District Court continued, “whoever holds the Corridor easement is granted the exclusive use, possession, and control of the Corridor, unless there is a superior property right.” ER I: 10. The District Court then noted the lack of dispute that the easement rights to the corridor formerly held by the railroad “now belong to King County,” and further stated that the City did not offer “any authority that it has superior property rights to King County’s easement.” *Id.* As such, the District Court concluded that the City could not require the County to obtain a right-of-way permit for work in the Intersections because “the intersections are part of an easement that is exclusively controlled by King County.” *Id.*

The District Court’s puzzling shift from analyzing federal preemption to comparing the City and County’s “property rights” was highlighted when it then held that it “need not address King County’s other arguments. The other arguments—federal preemption and the competing designs—are based on the premise that the City has limited authority to regulate activities at the intersections.” ER I: 10–11. In the District Court’s view, the City had no such authority because the County’s easement purportedly gave the County “exclusive

control” of the corridor, and the City had not demonstrated “superior” property rights.

This property-rights theory was clearly the linchpin of the District Court’s analysis of the County’s likelihood of success on the merits:

King County has demonstrated a likelihood of success on the merits of its argument that the City has no authority to regulate the ELST’s intersections with 206th Avenue SE and SE 33rd Street *because King County’s property rights are superior* to any limited crossing rights held by the City.”

ER I: 12 (emphasis added). This is fundamentally the wrong legal standard for whether the City may regulate the County’s use of City streets and the construction activities conducted there. The District Court’s analysis of the County’s and City’s property rights is irrelevant to the issue of federal preemption of local regulations, yet the District Court treats it as dispositive. The City has never disputed that the County acquired whatever rights the railroad had in the corridor, and that those rights entitle the County to construct, maintain, and operate a recreational trail. But the relevant issue is not ownership. The City need not own or obtain easements over a property in order to regulate how the owner uses that property and what can be built on it. City regulations apply to all property within City limits, regardless of who owns the property. A property owner who wants to subdivide and construct homes on a multi-acre tract cannot evade local development and safety regulations merely by proving that she, and not the City, is

the owner of the property. Property within the city limits is subject to local land-use, zoning, and safety regulations, and the County's trail corridor is no exception.

The District Court abused its discretion by transmuting the question of the City's authority to require the County to obtain a right-of-way permit into a wholly different (and irrelevant) question of property ownership and control. *See Pimentel v. Dreyfus*, 670 F.3d 1096, 1105 (9th Cir. 2012) (a decision based on an erroneous legal standard amounts to an abuse of discretion). The County pleaded a claim for a declaratory judgment that the City's regulatory authority is preempted by the ICCTA and Trails Act. ER II: 123, 231–232. In light of clear federal precedents holding that these federal statutes do not preempt local land-use, zoning, and safety regulations as applied to trail corridors, the County had no likelihood of successfully establishing the merits of such a claim, and the District Court should have denied the County's request for a preliminary injunction on that basis alone.

B. Even If Property Rights Were The Crucial Issue, The District Court Misapplied The Law Of Easements.

Even if the County's preemption claim turned on a comparison of the City's and County's relative property rights at the Intersections, the County still should not prevail on the merits. The District Court, citing the *Illig* decision for the proposition that "whoever holds the Corridor easement is granted the exclusive use, possession, and control of the Corridor, unless there is a superior property right," (ER I: 10), erroneously concluded that the County's property rights were "exclusive" and

“superior” to the City’s, *id.* Not only is this missing the key point of the County’s preemption claim, it is a fundamental misapprehension of the law of easements.

The railroad held (and, by virtue of a quitclaim deed, the County now holds) certain property rights in the corridor. The County’s rights derive from the rights of its predecessor in interest, BNSF. Regardless of whether one categorizes BNSF’s rights in the railroad corridor as an easement, a fee simple, or an easement “having the attributes of a fee,” BNSF granted the City two easements for public streets to be built across the railroad corridor at SE 33rd Street and at 206th Avenue SE, and did so long before the corridor was railbanked and sold to the County.⁸

In the case of SE 33rd Street, BNSF conveyed to the City “an easement for public-road purposes” more than twenty-seven years before railbanking. ER II: 151–153. And in the case of 206th Avenue SE, BNSF conveyed to the City “an EASEMENT for the construction, maintenance, replacement and removal of 206th Avenue SE, hereinafter called street,” approximately eight years before railbanking. ER II: 174–179. When the County acquired the railroad corridor in 1999 by

⁸ As a matter of fact, BNSF originally granted the easements to the County prior to the City’s incorporation in 1999. See ER II: 151–153, 174–179. The ELST corridor was, at that time, in an unincorporated area of King County. But by operation of state law, those easements were transferred to the City upon its incorporation. See RCW 35.02.130. These facts are not in dispute, but are noted here in the interest of historical accuracy.

quitclaim deed, it could not have purchased more rights than BNSF owned.

64.04.050. The County thus acquired the ELST corridor subject to these two public road easements in favor of the City.

In both of these easements, BNSF reserved certain rights, but these reservations clearly prohibit the railroad (and thus the County) from interfering with the intended uses of the easements. At SE 33rd Street, the railroad reserved to itself:

. . . all rights to use the property . . . for any and all purposes whatsoever **not inconsistent with the easement herein granted** . . . Rights reserved shall be so **exercised as not to damage or interfere with the highway as above defined**.

ER II: 151 (emphasis added). And at 206th Avenue SE, the railroad similarly reserved to itself:

. . . the right to construct, maintain, use, operate, relocate, reconstruct and renew such tracks and facilities as it may . . . desire . . . including the right and privilege to use the land for any and all purposes **not inconsistent with the use thereof for [street⁹] purposes**.

ER II: 174 (emphasis added).

As a matter of Washington state property law, the public street easements granted by the railroad to the City made the City the holder of the *dominant* estate,

⁹ The word “street” is omitted from this sentence in the easement, with “**” in its place. But the intent is clear that “street” was the intended word, as evidenced by the use of the term “street purposes” elsewhere in the document (*e.g.*, in paragraph 3).

and the railroad the holder of the *servient* estate. *MKKI, Inc.*, 135 Wn. App. 647, 655, 145 P.3d 411 (2006). Because the County acquired whatever interests BNSF had in the corridor, the County is now the *servient* estate owner, and the City remains the *dominant* estate owner at the Intersections. The County therefore may not use the trail corridor for any purpose that interferes with the City's use and enjoyment of the easement for public road purposes. *See, e.g., Beebe v. Swerda*, 58 Wn. App. 375, 384, 793 P.2d 442 (1990); *Rupert v. Gunter*, 31 Wn. App. 27, 29, 640 P.2d 36 (1982).

The clear intent of the easements was to allow the public to use 206th Avenue SE and SE 33rd Street as public rights-of-way, and for the City, as holder of the easements, to control and regulate the public's use of those rights-of-way. The County's unilateral changes to the stop signs and unsupervised construction work in the Intersections constitutes interference with the easements in a manner not intended by the grantor and grantee, and restricts the public's use of the easements in a manner that is inconsistent with how these public rights-of-way have been used for decades.

The District Court was mistaken when it found that "the intersections are part of an easement that is exclusively controlled by King County." ER I: 10. Unlike the plaintiffs in *Hornish v. King Cty.*, 182 F. Supp. 3d 1124 (W.D. Wash. 2016) (Pechman, J.), which the District Court apparently relied on for certain factual information, ER I: 6, the City is the owner of the *dominant* estate, not the County as

the trail sponsor. The District Court focused on the word “exclusive” as used in *Illig* to describe the nature of the railroad/trail easement, but ignored that the railroad (and, hence, the County as the trail sponsor) gave away some of its “exclusive” rights to the City by granting easements for public street purposes. There is no longer “exclusive” use, possession, or control at the Intersections, as the railroad (and now the County) bound itself not to interfere with use of the crossings for public right-of-way. Digging up, re-grading, and re-paving the Intersection, and installing new traffic control devices to control vehicles on these public streets is clearly an “interference” with the City’s use of these crossings as public right-of-way.¹⁰

Given the above facts, all of which were in the preliminary injunction record,¹¹ the District Court was simply incorrect, as a matter of Washington property law, to conclude that the County holds “superior” property rights to those of the City at the Intersections. And it was an abuse of discretion for the District Court to grant a preliminary injunction on the basis of this erroneous understanding of Washington law and its application to the City easements in question. The preliminary injunction

¹⁰ With an approved right-of-way permit, the County’s proposed improvements and construction activity at the Intersections would not improperly damage or interfere with City’s easements, as any interference would be specifically authorized, coordinated with, and regulated by the City.

¹¹ ER II: 158–159.

allowing unfettered interference by the County with the City's use of the public rights-of-way at the Intersections should be vacated immediately.

C. The District Court's Conclusion That The City Likely Has No Regulatory Authority At The Intersections Would Lead To Absurd Results.

If the City is precluded from applying its local development and safety regulations to the County's reconstruction of the Intersections (under the District Court's "exclusive property rights" theory), the County would arguably be free to build or install all manner of structures or obstacles in the public right-of-way. The County could claim the right to convert the Intersections into a parking lot for trail users because the County, under the District Court's order, has been found to have "exclusive use, possession, and control" of the corridor. Or it could decide to install crossing gates that raise and lower across 206th Avenue SE and SE 33rd Street to prevent cars from traversing the Intersections, on the theory that no less-extreme measures could guarantee the safety of trail users, and therefore that crossing gates are a pre-condition to the County's willingness to re-open the improved trail.

Indeed, the County surely must know that the District Court's conclusions and rationale underlying the preliminary injunction are erroneous. After all, the County has sought and is continuing to seek shoreline substantial development permits and construction permits from the City for all three segments of the ELST that lie within City limits, even though the City has no property rights whatsoever along the vast

majority of the eleven-mile stretch of the ELST, other than the two easements held by the City at 206th Avenue SE and SE 33rd Street. How anomalous it would be for the City to have no regulatory power whatsoever at the Intersections where it clearly holds recorded easements for public street crossings, and yet exercise significant regulatory authority over the remaining 7.2 miles of corridor within the City limits where it holds no property rights. That is precisely the absurd result reached by the District Court's Order.

Under the District Court's property-rights analysis, the County Parks and Recreation Department winds up with more power than the railroad ever had. Indeed, its use of the trail corridor would effectively be unregulated. The preliminary injunction should be vacated and the City's regulatory authority at these Intersections should be reaffirmed.

III. THE DISTRICT COURT ABUSED ITS DISCRETION IN FINDING THAT THE COUNTY WAS LIKELY TO SUFFER IRREPARABLE HARM.

The basis of preliminary injunctive relief is irreparable harm and the inadequacy of legal remedies. *Los Angeles Mem'l Coliseum Comm'n v. NFL*, 634 F.2d 1197, 1202 (9th Cir. 1980). It is well established that monetary injury is not normally considered irreparable. *See id.* (rejecting "lost revenues" as a form of irreparable harm sufficient to justify an injunction). This is so because money damages are an adequate legal remedy to compensate for economic harm sustained

in the absence of a preliminary injunction. *See id.* As explained by the United States Supreme Court:

The key word in this consideration is irreparable. Mere injuries, however substantial, in terms of money, time and energy necessarily expended are not enough. The possibility that adequate compensatory or other corrective relief will be available at a later date . . . weighs heavily against a claim of irreparable harm

Sampson v. Murray, 415 U.S. 61, 90, 94 S. Ct. 937, 952 (1974) (alterations omitted).

As explained below, the County did not, and could not, make a “clear showing” that it was likely to suffer irreparable harm if no injunction were issued. *See Mazurek v. Armstrong*, 520 U.S. 968, 972, 117 S. Ct. 1865 (1997) (movant must make “a clear showing” of its right to an injunction). The District Court’s finding to the contrary was clearly erroneous and therefore an abuse of discretion. *Pimentel v. Dreyfus*, 670 F.3d 1096, 1105 (9th Cir. 2012) (a decision based on a clearly erroneous finding of fact amounts to an abuse of discretion).

A. By Its Own Admission, The Only Harm The County Would Have Sustained Without A Preliminary Injunction Was Additional Cost Due To Alleged Construction Delays.

If no preliminary injunction had been granted enjoining the City’s stop-work order and allowing the County to proceed with construction at the Intersections, the *only* harm that would have befallen the County (as opposed to the public at-large) is

the potential for increased cost due to construction delay. The County's Director of Parks and Recreation admitted as much in his letter to the City on the day he filed this lawsuit. ER II: 167–168 (“A red tag [stop-work order] would only cause unnecessary delay and increased expense in actual construction when our dispute is over the largely unrelated subject of intersection controls and which of us has the right to make that decision.”).

This is not irreparable harm. *See Los Angeles Mem'l Coliseum Comm'n*, 634 F.2d at 1201 (reversing preliminary injunction as an abuse of discretion “because there was no showing of irreparable injury” resulting from lost revenues). To the extent the District Court relied on increased costs and construction delays to support entry of the preliminary injunction, it abused its discretion.

Moreover, the notion that a delay in completing these particular improvements (widening, paving, and Intersection modifications) on South Segment A constitutes a form of irreparable harm is refuted by the STB itself. As the STB has repeatedly acknowledged, “the Trails Act does not require the trail to be developed in any particular way. . . . Moreover, there is no time limit for how quickly a trail must be developed to its intended level of use.” *Idaho N. & Pac. R.R. Co.*, 3 S.T.B. 50, 1998 WL 146208, *7 (April 1, 1998) (citing prior administrative decisions).

Further refuting the County's allegation of likely irreparable harm is the fact that the County knew about the City's requirement to obtain a right-of-way permit since at least October 2016, when the City issued the C&G permit for South Segment A. The C&G permit explicitly stated among its conditions of approval that no work in the right-of-way was authorized and that a separate right-of-way permit would be required for any work in the Intersections. ER II: 79. And the County knew that the City's traffic engineer would not approve a relocation of the stop signs at 206th Avenue SE since at least as early as June 2016, when Mr. Chen testified before the state Shorelines Hearings Board regarding the County's proposal. See ER II: 48–50. Yet the County did not appeal the conditions of approval in the C&G permit, and, in fact, the County proceeded to apply for the required right-of-way permit on May 5, 2017. ER II: 80–81.

Despite being on notice for many months, it was not until June 26, 2017, that the County sought a preliminary injunction against enforcement of the City's right-of-way regulations and Public Works Standards. ER II: 237. Courts routinely hold that “long delay before seeking a preliminary injunction implies a lack of urgency and irreparable harm.” *Disney Enters., Inc. v. VidAngel, Inc.*, 224 F. Supp. 3d 957, 977 (C.D. Cal. 2016) (citing *Oakland Trib., Inc. v. Chron. Pub. Co.*, 762 F.2d 1374, 1377 (9th Cir. 1985)). See also *Idaho Rivers United v. U.S. Army Corps of Eng'rs*, 156 F. Supp. 3d 1252, 1265 (W.D. Wash. 2015) (rejecting argument of

irreparable harm where the movants failed to challenge the underlying regulatory decision that resulted in the alleged harm).

Nothing in the record supports the County's claim that the City was trying to delay construction. As noted, the City complied with the County's request to "rush" approval of the C&G permit because the County was concerned it might lose federal funding. ER II: 80. Any delay in construction of South Segment A would have been entirely the fault of the County, which made the last-minute decision to withdraw its permit application and claim federal preemption of local right-of-way regulations. The City would have promptly issued the right-of-way permit if the County had simply not withdrawn its application. ER II: 81. There was no reason for the County to fear that its construction activity at the Intersections would have been affected by the City's processing of a right-of-way permit. The District Court made a finding of likelihood of irreparable harm despite lack of evidence—let alone the required "clear showing"—to support the County's claim. The issuance of a preliminary injunction was therefore an abuse of discretion.¹²

¹² Because the County's allegation of "irreparable harm" is so weak, the "serious questions" formulation of the preliminary injunction standard does not apply. *Cottrell*, 632 at 1134-35 ("serious questions" going to the merits of a dispute may support granting a preliminary injunction only when the balance of harms or

B. The County May Not Rely On Alleged Harm That Would Purportedly Be Sustained By The General Public Or Trail Users (Many Of Whom Are Also City Residents).

Unable to demonstrate irreparable harm to *itself*, the County argued instead that *potential trail users* would be harmed if no injunction were granted. The County's theory—which the District Court erroneously adopted—was that it would be unable to re-open the trail due to safety risks if it were forced to accept the City's demands that the stop signs be oriented toward trail users rather than motor vehicles at the 206th Avenue SE and SE 33rd Street intersections. The County argued that trail users (or the public in general) would be irreparably harmed by this delay in regaining access to the trail. There are three glaring problems with this argument.

1. The City's Approved Intersection Designs Were Not Unsafe, And The District Court Made No Findings That They Were.

First, the County's argument assumes that the pre-existing intersection designs are unsafe—a fact that is hotly disputed and one on which the District Court made no findings and reached no conclusions (and rightly so).

Moreover, the County's projected increase in trail-user volumes (which it relies on to justify re-orienting the stop signs toward cars on the streets) is not

hardships tips sharply toward the movant and there is a likelihood of irreparable injury).

expected to materialize until the entire eleven-mile length of the trail has been completely re-paved. ER II: 60–61. The final segment of the trail (South Segment B) remains in the initial permitting phase, with construction unable to begin until the shoreline permit hearing (and potential appeals process) has concluded and construction permits are reviewed and approved. *Id.* It is undisputed that this construction work will not be completed for years. Therefore, the County’s purported safety concerns at these intersections will not materialize, if at all, until far into the future—certainly not the kind of time frame normally associated with immediate, irreparable harm adequate to justify an extraordinary remedy like a preliminary injunction, especially one that radically alters the status quo.

2. Any Delay In Re-Opening Public Access To The Trail Would Have Been Caused By The County, Not The City.

The second reason the County cannot show a likelihood of irreparable harm to the public or trail users is that any delay in re-opening South Segment A of the ELST would have been entirely the result of the County’s own actions. The City took no actions to delay the completion of South Segment A. The undisputed evidence presented in opposition to the motion for preliminary injunction was that the County applied for the required right-of-way permit on May 5, 2017, and that the City was likely to issue the necessary right-of-way permit to the County within a matter of days, with only minor technical changes, to allow the County’s construction work at the Intersections to proceed as planned. It was the County who then unilaterally

withdrew its pending right-of-way permit applications on May 23, 2017, claiming that it didn't need permission from the City to excavate, re-grade, and re-pave City streets, and that requiring the County to obtain a right-of-way permit before performing such work in City streets would be thwarting the will of Congress under the Trails Act. *See* ER II: 146–147, 165–166.

All the County had to do to avoid this claimed construction delay was to let the City finish processing and issuing the right-of-way permit, and then construction could have proceeded on schedule. It is true that the right-of-way permit issued by the City would have required the stop signs at the Intersections to remain facing trail users, just as they had been for over a decade. ER II: 81, 99. But this permit condition posed no risk of immediate and irreparable harm in the form of delaying public access. Construction could have proceeded as planned at the Intersections, and the County would have been free to re-open the trail as soon as construction was completed. The County also would have been free to challenge the stop-sign restriction administratively to the City's hearings examiner. *Id.*

But it was the impetuous response of the County, in withdrawing the pending right-of-way permit and performing construction work in the 206th Avenue SE right-of-way, that caused the City to issue a stop-work order for construction at the Intersections. ER II: 82–83. And it was King County Parks and Recreation Director Kevin Brown, not the City, who threatened that the County would refuse to re-open

South Segment A if the stop signs at the Intersections were not immediately relocated to the County's liking. ER II: 166–167. As noted, the increased trail-user volumes that the County claims necessitates a reversal of the stop-sign placements will not materialize for years, if ever. ER II: 60–61.

The District Court ignored these undisputed facts and thereby abused its discretion in finding, without any supporting evidence, that the City's actions were threatening potential trail users (or the general public) with delay in re-opening the trail. ER I: 11. It was, instead, the unilateral threat of King County Parks and Recreation Director Brown that risked delaying the public's access to South Segment A of the ELST. No injunction against the City was necessary to avoid this threatened harm to the public.

3. The County Lacks Standing to Assert Purported Harms to Trail Users.

The District Court decided, without analysis, that the County has standing to assert the recreational interest of the general public (or at least the ones that use the ELST) in regaining access to South Segment A. *Id.* But the District Court failed to consider that the general public *includes residents of the City of Sammamish*. On what legal basis may the County speak in court for the citizens of Sammamish on the matter of trail design and traffic safety on their City's streets? Indeed, if any third party had legal standing to assert the interests of Sammamish residents in ensuring that City streets and the trail are properly designed and constructed, it would be the

City, not the County. The District Court's order implicitly assumes that the County has a superior right to assert these interests, yet no authority is cited for this proposition. In any event, the "irreparable harm" that purportedly would have been sustained *by the public* as a result of County-threatened delays in re-opening South Segment A is not a valid basis for the County to seek a preliminary injunction against the City, and it was an abuse of discretion for the District Court to grant a preliminary injunction on that basis.

IV. THE DISTRICT COURT ABUSED ITS DISCRETION IN FINDING THAT THE BALANCE OF EQUITIES AND PUBLIC INTEREST FACTORS SUPPORTED A PRELIMINARY INJUNCTION.

A. It Is Inequitable To Permit The County To Contradict Its Prior Statements On City Regulatory Authority.

The County previously represented in state administrative proceedings regarding the stop signs that the City had the "ultimate authority" to determine traffic control placements at the Intersections. In June 2016, during an appeal hearing before the Washington state Shorelines Hearings Board ("SHB"), King County's Director of Parks and Recreation, Kevin Brown, admitted under oath as follows:

- Q: But is it the County's position that the City has the ultimate authority to decide whether to place a stop sign on 206th?
- A: It is, yes. It's my opinion that the City has the ultimate authority to provide an engineered stop controlled intersection at this location.

ER II: 62. The City relied on that representation to the SHB, and on the County's good faith that it would accept this regulatory condition when the C&G permit was not appealed in October 2016. It would be inequitable to allow the County to manufacture the need for extraordinary relief by changing its position now.¹³

B. The County's Alleged Harm Was Entirely Self-Inflicted And Therefore Should Not Figure In The Balancing Of Hardships.

The County asserted that without an injunction allowing it to re-orient the stop signs, it would refuse to re-open South Segment A, and that the public would therefore be deprived of the use of this valuable amenity. But if the County deprived the public of access to the ELST, the blame would lie entirely at the County's feet. And to the extent the County relies on alleged harm from delayed construction at the Intersections due to the stop-work order issued by the City in June, that, too, was a self-inflicted wound resulting from the County's last-minute withdrawal of its own pending right-of-way permit application. Neither type of self-imposed "harm" should have been included in the District Court's balancing of hardships.

¹³ The SHB ultimately decided that the placement of traffic controls was not a shoreline issue within its limited jurisdiction and that such permit decisions are subject to a different appeal process culminating in state-court review under Washington's Land Use Petition Act. Chapter 36.70C RCW. ER II: 41, 56.

C. The District Court Erroneously Minimized The Harms To The City From Granting A Preliminary Injunction.

The District Court erroneously concluded that the countervailing harms to the City resulting from entry of a preliminary injunction were “trivial.” ER I: 11. This conclusion is contrary to the well-developed evidence in the record demonstrating the importance of the City’s streets as a public asset, and the obligation of the City to provide its residents (and, indeed, all users of the City’s streets) safe and reliable roads on which to travel. The City’s Public Works Director, Steve Leniszewski, submitted a detailed declaration explaining the significance of the City’s Public Works Standards, and why they are so critical to maintaining the integrity of the City’s streets. He further explained how the City’s right-of-way permitting process is essential to ensure that these important City assets are properly maintained and that developers who perform construction work in City streets (such as the intersections in question here) do so in the least disruptive way possible for City residents and other users of the street network. ER II: 77–78.

The preliminary injunction granted by the District Court gives the County *carte blanche* to dig up, re-grade, and re-pave two City streets, without a right-of-way permit—indeed, with no oversight whatsoever by any qualified local, state, or federal officials. It allows the County to proceed without regard to approved surface materials or connections to existing street infrastructure, without standards

for durability or support, without an approved traffic control plan to minimize disruptions to residents or other users of these streets, and without any kind of erosion-control or other measures routinely required by the City to protect nearby environmental features. The District Court ignored all of this harm, finding that the only harm to the City from granting an injunction would be the “trivial hardship” of “having to move the stop signs several feet.” ER I: 11. Basing a preliminary injunction on this incomplete and erroneous view of the competing harms was an abuse of discretion.

D. The Crux Of The Dispute Is Merely A Disagreement Of Engineering Judgment, Which Is At Best A Neutral Factor In Considering The Public Interest.

Despite the County’s unfounded, cynical accusations, the City is a trail supporter. The City’s primary concern, however, has always been with public safety and welfare. ER II: 78. The parties have simply reached differing engineering judgments regarding the appropriate traffic controls to place at the Intersections. ER II: 72–76. A disagreement among traffic engineers does not justify a federal case, and it certainly does not justify the issuance of a preliminary injunction favoring one engineering design over another. The substitution of time-tested traffic control devices based on nothing more than the say-so of the County’s outside consultant with no oversight by the City, the state, or the federal

government should not be decided on the limited record of a preliminary injunction motion.

Even beyond the mere question of stop-sign placement at the Intersections, the broader issue—and the one that the District Court overlooked—is the City’s right to prevent unregulated demolition and reconstruction of its streets. The public interest is undermined, not advanced, by enjoining the City from applying its public safety and construction standards to the ELST as it crosses City streets.

Although it is certainly true that the public has no “interest” in an unsafe intersection design, this factor cannot be weighted toward either the City or the County without determining which design is safer. If anything, the District Court should have concluded that this factor tips more toward the City because there is an unblemished track record of zero accidents at the Intersections for more than a decade during which these stop signs were oriented toward trail users. ER II: 79. The burden of proof for purpose of a final judgment (let alone a preliminary injunction) must lie with the County to establish that its design is safer. At best, this factor is a draw because it is the subject of competing opinions by traffic engineering experts. It cannot support issuance of a preliminary injunction.

CONCLUSION

For the foregoing reasons, the Court of Appeals should vacate the preliminary injunction with immediate effect and remand to the District Court for

resolution of the jurisdictional questions raised by the City (following briefing on any related dispositive motions).

Date: October 10, 2017.

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STATEMENT OF RELATED CASES

Pursuant to Ninth Circuit Rule 28-2.6(d), appellant City of Sammamish discloses that the present appeal involves the same construction project (*i.e.*, improvements to the East Lake Sammamish Trail) that underlies the dispute in *Thomas E. Hornish and Suzanne J. Hornish Joint Living Trust v. King County*, Appeal No. 16-35486 (“*Hornish* appeal”), currently pending in this Court. The *Hornish* appeal involves a quiet-title action brought by private homeowners adjacent to the trail, by which they asked the District Court to determine the width and scope of King County’s property rights in the former railroad corridor. The present appeal, by contrast, concerns the City’s authority to apply local development regulations to the County’s construction activity in City rights-of-way, and whether such regulation is preempted by federal law. Because the two appeals arise out of different District Court cases, and because of significant differences in the issues raised by the two appeals, the City does not believe the *Hornish* appeal fits within any of the categories of “related cases” under Rule

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28–2.6(a) through (c), but nonetheless identifies it here in case the Court views it as “involving the same transaction or event,” pursuant to Rule 28–2.6(d).

Date: October 10, 2017.

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CERTIFICATE OF COMPLIANCE

Pursuant to Fed. R. App. P. 32(g), I certify that:

This brief complies with the length limitation of Ninth Circuit Rule 32-1(a) because this brief contains 13,968 words, excluding the parts of the brief exempted by Fed. R. App. P. 32(f).

This brief complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type style requirements of Fed. R. App. P. 32(a)(6) because this brief has been prepared in a proportionately spaced typeface using Word 2013 Times New Roman 14-point font.

Date: October 10, 2017

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court for the United States Court of Appeals for the Ninth Circuit by using the appellate CM/ECF system on October 10, 2017.

I certify that all participants in the case are registered CM/ECF users and that service will be accomplished by the appellate CM/ECF system.

Date: October 10, 2017.

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**ADDENDUM
TABLE OF CONTENTS**

United States Code (“U.S.C.”)

16 U.S.C. § 1247(d)	A-3
28 U.S.C. § 1292(a)(1).....	A-3
28 U.S.C. §1331.....	A-4
28 U.S.C. § 1367.....	A-4
28 U.S.C. § 2201.....	A-5
42 U.S.C. § 1983.....	A-5
49 U.S.C. § 10501(b)	A-6

Revised Code of Washington (“RCW”)

RCW § 35A.11.020	A-6
RCW § 36.70A.200(5).....	A-7
RCW § 64.04.050	A-7
RCW § 81.53.060	A-8

Sammamish Municipal Code (“SMC”)

SMC 14.30.010	A-9
SMC 14.30.080	A-10
SMC 16.15.050-.070.....	A-10
SMC 20.05.020	A-17

SMC 23.70.010	A-20
SMC 25.08.020	A-20

16 U.S.C. § 1247(d)

...

(d) Interim use of railroad rights-of-way

The Secretary of Transportation, the Chairman of the Surface Transportation Board, and the Secretary of the Interior, in administering the Railroad Revitalization and Regulatory Reform Act of 1976 [45 U.S.C. 801 et seq.], shall encourage State and local agencies and private interests to establish appropriate trails using the provisions of such programs. Consistent with the purposes of that Act, and in furtherance of the national policy to preserve established railroad rights-of-way for future reactivation of rail service, to protect rail transportation corridors, and to encourage energy efficient transportation use, in the case of interim use of any established railroad rights-of-way pursuant to donation, transfer, lease, sale, or otherwise in a manner consistent with this chapter, if such interim use is subject to restoration or reconstruction for railroad purposes, such interim use shall not be treated, for purposes of any law or rule of law, as an abandonment of the use of such rights-of-way for railroad purposes. If a State, political subdivision, or qualified private organization is prepared to assume full responsibility for management of such rights-of-way and for any legal liability arising out of such transfer or use, and for the payment of any and all taxes that may be levied or assessed against such rights-of-way, then the Board shall impose such terms and conditions as a requirement of any transfer or conveyance for interim use in a manner consistent with this chapter, and shall not permit abandonment or discontinuance inconsistent or disruptive of such use.

(e) Designation and marking of trails; approval of Secretary of the Interior
Such trails may be designated and suitably marked as parts of the nationwide system of trails by the States, their political subdivisions, or other appropriate administering agencies with the approval of the Secretary of the Interior.

28 U.S.C. § 1292(a)(1)

(a) Except as provided in subsections (c) and (d) of this section, the courts of appeals shall have jurisdiction of appeals from:

(1) Interlocutory orders of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District Court of the Virgin Islands, or of the judges thereof, granting, continuing, modifying, refusing or dissolving injunctions, or refusing to dissolve or modify injunctions, except where a direct review may be had in the Supreme Court;

...

28 U.S.C. § 1331

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1367

(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties.

(b) In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.

(c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if—

- (1) the claim raises a novel or complex issue of State law,
- (2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,
- (3) the district court has dismissed all claims over which it has original jurisdiction, or
- (4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

(d) The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.

(e) As used in this section, the term “State” includes the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

28 U.S.C. § 2201

(a) In a case of actual controversy within its jurisdiction, except with respect to Federal taxes other than actions brought under section 7428 of the Internal Revenue Code of 1986, a proceeding under section 505 or 1146 of title 11, or in any civil action involving an antidumping or countervailing duty proceeding regarding a class or kind of merchandise of a free trade area country (as defined in section 516A(f)(10) of the Tariff Act of 1930), as determined by the administering authority, any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

(b) For limitations on actions brought with respect to drug patents see section 505 or 512 of the Federal Food, Drug, and Cosmetic Act, or section 351 of the Public Health Service Act.

42 U.S.C. § 1983

Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer’s judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any

Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

49 U.S.C. § 10501(b)

...

(b) The jurisdiction of the Board over—
(1) transportation by rail carriers, and the remedies provided in this part with respect to rates, classifications, rules (including car service, interchange, and other operating rules), practices, routes, services, and facilities of such carriers; and
(2) the construction, acquisition, operation, abandonment, or discontinuance of spur, industrial, team, switching, or side tracks, or facilities, even if the tracks are located, or intended to be located, entirely in one State,
is exclusive. Except as otherwise provided in this part, the remedies provided under this part with respect to regulation of rail transportation are exclusive and preempt the remedies provided under Federal or State law.

...

RCW 35A.11.020

Powers vested in legislative bodies of noncharter and charter code cities.
The legislative body of each code city shall have power to organize and regulate its internal affairs within the provisions of this title and its charter, if any; and to define the functions, powers, and duties of its officers and employees; within the limitations imposed by vested rights, to fix the compensation and working conditions of such officers and employees and establish and maintain civil service, or merit systems, retirement and pension systems not in conflict with the provisions of this title or of existing charter provisions until changed by the people: PROVIDED, That nothing in this section or in this title shall permit any city, whether a code city or otherwise, to enact any provisions establishing or respecting a merit system or system of civil service for firefighters and police officers which does not substantially accomplish the same purpose as provided by general law in chapter 41.08 RCW for firefighters and chapter 41.12 RCW for police officers now or as hereafter amended, or enact any provision establishing or respecting a pension or retirement system for firefighters or police officers which provides different pensions or retirement benefits than are provided by general law for such classes.

Such body may adopt and enforce ordinances of all kinds relating to and regulating its local or municipal affairs and appropriate to the good government of the city, and may impose penalties of fine not exceeding five thousand dollars or imprisonment for any term not exceeding one year, or both, for the violation of such ordinances, constituting a misdemeanor or gross misdemeanor as provided

therein. However, the punishment for any criminal ordinance shall be the same as the punishment provided in state law for the same crime. Such a body alternatively may provide that violation of such ordinances constitutes a civil violation subject to monetary penalty, but no act which is a state crime may be made a civil violation.

The legislative body of each code city shall have all powers possible for a city or town to have under the Constitution of this state, and not specifically denied to code cities by law. By way of illustration and not in limitation, such powers may be exercised in regard to the acquisition, sale, ownership, improvement, maintenance, protection, restoration, regulation, use, leasing, disposition, vacation, abandonment or beautification of public ways, real property of all kinds, waterways, structures, or any other improvement or use of real or personal property, in regard to all aspects of collective bargaining as provided for and subject to the provisions of chapter 41.56 RCW, as now or hereafter amended, and in the rendering of local social, cultural, recreational, educational, governmental, or corporate services, including operating and supplying of utilities and municipal services commonly or conveniently rendered by cities or towns.

In addition and not in limitation, the legislative body of each code city shall have any authority ever given to any class of municipality or to all municipalities of this state before or after the enactment of this title, such authority to be exercised in the manner provided, if any, by the granting statute, when not in conflict with this title. Within constitutional limitations, legislative bodies of code cities shall have within their territorial limits all powers of taxation for local purposes except those which are expressly preempted by the state as provided in RCW 66.08.120, * 82.36.440, 48.14.020, and 48.14.080.

RCW 36.70A.200(5)

Siting of essential public facilities—Limitation on liability.

...

(5) No local comprehensive plan or development regulation may preclude the siting of essential public facilities.

...

RCW 64.04.050

Quitclaim deed—Form and effect.

Quitclaim deeds may be in substance in the following form:

The grantor (here insert the name or names and place of residence), for and in consideration of (here insert consideration) conveys and quitclaims to (here insert grantee's name or names) all interest in the following described real estate (here insert description), situated in the county of, state of Washington. Dated this day of, (year)

Every deed in substance in the above form, when otherwise duly executed, shall be deemed and held a good and sufficient conveyance, release and quitclaim to the grantee, his or her heirs and assigns in fee of all the then existing legal and equitable rights of the grantor in the premises therein described, but shall not extend to the after acquired title unless words are added expressing such intention.

RCW 81.53.060

Petition for alteration of crossing—Closure of grade crossing without hearing.

The mayor and city council, or other governing body of any city or town, or the legislative authority of any county within which there exists any under-crossing, over-crossing, or grade crossing, or where any street or highway is proposed to be located or established across any railroad, or any railroad company whose road is crossed by any highway, may file with the commission their or its petition in writing, alleging that the public safety requires the establishment of an under-crossing or over-crossing, or an alteration in the method and manner of an existing crossing and its approaches, or in the style and nature of construction of an existing over-crossing, under-crossing, or grade crossing, or a change in the location of an existing highway or crossing, the closing or discontinuance of an existing highway crossing, and the diversion of travel thereon to another highway or crossing, or if not practicable, to change the crossing from grade or to close and discontinue the crossing, the opening of an additional crossing for the partial diversion of travel, and praying that this relief may be ordered. If the existing or proposed crossing is on a state road, highway, or parkway, the petition may be filed by the secretary of transportation or the state parks and recreation commission. If the existing crossing is adjacent to a project funded in part or in full by the state of Washington and managed by the department of transportation, and closure of the crossing is part of the project, the petition may be filed by the secretary of transportation or the secretary's designee, or if the petition is filed by another entity, the secretary of transportation or the secretary's designee shall intervene as a party in any hearing at which the closure of the crossing is contested. If the department of transportation is not a lead agency under chapter 43.21C RCW, a lead agency shall also intervene as a party in any hearing at which the closure of the crossing is contested. Upon the petition being filed, the commission shall fix a time and place for hearing the petition and shall give not less than twenty days' notice to the petitioner, the

railroad company, and the municipality or county in which the crossing is situated. If the highway involved is a state highway or parkway, or if the crossing is adjacent to a project funded in part or in full by the state of Washington and managed by the department of transportation and closure of the crossing is part of the project, like notice shall be given to the secretary of transportation or the state parks and recreation commission. If the change petitioned for requires that private lands, property, or property rights be taken, damaged, or injuriously affected to open up a new route for the highway, or requires that any portion of any existing highway be vacated and abandoned, twenty days' notice of the hearing shall be given to the owner or owners of the private lands, property, and property rights which it is necessary to take, damage, or injuriously affect, and to the owner or owners of the private lands, property, or property rights that will be affected by the proposed vacation and abandonment of the existing highway. The commission shall also cause notice of the hearing to be published once in a newspaper of general circulation in the community where the crossing is situated, which publication shall appear at least two days before the date of hearing. At the time and place fixed in the notice, all persons and parties interested are entitled to be heard and introduce evidence. In the case of a petition for closure of a grade crossing the commission may order the grade crossing closed without hearing where: (1) Notice of the filing of the petition is posted at, or as near as practical to, the crossing; (2) notice of the filing of the petition is published once in a newspaper of general circulation in the community or area where the crossing is situated, which publication shall appear within the same week that the notice referred to in subsection (1) of this section is posted; and (3) no objections are received by the commission within twenty days from the date of the publication of the notice.

Sammamish Municipal Code (“SMC”)

14.30.010 Purpose – Permit required.

The purpose of this chapter is to establish minimum rules and regulations for controlling and enforcing right-of-way uses to assure that proposed uses are consistent with the public health, safety, and welfare of the community, and that harm or nuisance which may result from a proposed right-of-way use is prevented.

It shall be unlawful for anyone to make private use of any public right-of-way without a right-of-way use permit issued by the City, or to use any public right-of-way without complying with all provisions of a permit issued by the City. (Ord. O2010-285 § 1 (Att. A))

14.30.080 Enforcement.

The City engineer is authorized to enforce or seek enforcement of the provisions of this chapter, and ordinances and resolutions codified in it, and any rules and regulations promulgated thereunder pursuant to the enforcement and penalty provisions of SMC Title 23. (Ord. O2010-285 § 1 (Att. A))

...

16.15.050 Clearing and grading permit required – Exceptions.

No person shall do any clearing or grading without first having obtained a clearing and grading permit from the director except for the following:

(1) An on-site excavation or fill for basements and footings of a building, retaining wall, parking lot, or other structure authorized by a valid building permit. This shall not exempt any fill made with the material from such excavation nor exempt any excavation having an unsupported height greater than five feet after the completion of such structure;

(2) Maintenance of existing driveways or private access roads within their existing road prisms; provided, that the performance and restoration requirements of this chapter are met and best management practices are utilized to protect water quality;

(3) Any grading within a publicly owned road right-of-way, provided this does not include clearing or grading that expands further into a critical area or buffer;

(4) Clearing or grading by a public agency for the following routine maintenance activities:

(a) Roadside ditch cleaning, provided the ditch does not contain salmonids;

(b) Pavement maintenance;

(c) Normal grading of gravel shoulders;

(d) Maintenance of culverts;

(e) Maintenance of flood control or other approved surface water management facilities;

- (f) Routine clearing within road right-of-way;
- (5) Cemetery graves; provided, that this exception does not apply except for routine maintenance if the clearing or grading is within a critical area as regulated in Chapter 21A.50 SMC;
- (6) Minor stream restoration projects for fish habitat enhancement by a public agency, utility, or tribe as set out in Chapter 21A.50 SMC;
- (7) Any clearing or grading that has been approved by the director as part of a commercial site development permit and for which a financial guarantee has been posted;
- (8) The following activities are exempt from the clearing requirements of this chapter and no permit shall be required:
 - (a) Normal and routine maintenance of existing lawns and landscaping, including up to 50 cubic yards of top soil, mulch, or bark materials added to existing landscaped areas subject to the limitations in critical areas and their buffers as set out in Chapter 21A.50 SMC;
 - (b) Emergency tree removal to prevent imminent danger or hazard to persons or property;
 - (c) Normal and routine horticultural activities associated with commercial orchards, nurseries, or Christmas tree farms subject to the limitations on the use of pesticides in critical areas as set out in Chapter 21A.50 SMC. This does not include clearing or grading in order to develop or expand such activities;
 - (d) Normal and routine maintenance of existing public park properties and private and public golf courses. This does not include clearing or grading in order to develop or expand such activities in critical areas;
 - (e) Removal of noxious weeds from steep slope hazard areas and the buffers of streams and wetlands subject to the limitations on such removal and the use of pesticides in critical areas as set out in Chapter 21A.50 SMC;
 - (f) Pruning and limbing of vegetation for maintenance of above-ground electrical and telecommunication facilities; provided, that the clearing is consistent

with the electric, natural gas, cable communication and telephone utility exemption in critical areas as regulated in Chapter 21A.50 SMC;

(9) The cutting and removal of any coniferous tree of less than eight inches DBH or any deciduous tree of less than 12 inches DBH when not located within a critical area or buffer;

(10) The pruning, limbing, and general maintenance of trees outside of environmentally critical areas and buffers, consistent with the requirements of Chapter 21A.35 SMC;

(11) The pruning, limbing, and general maintenance of trees in buffers or that are otherwise required to be retained pursuant to Chapter 21A.50 SMC;

(12) An excavation that is less than two feet in depth or does not create a cut slope greater than five feet in height and steeper than one unit vertical in two units horizontal (66.7 percent slope), that does not exceed 50 cubic yards on any one lot and does not obstruct a drainage course, excluding work in critical areas and their buffers;

(13) A fill less than one foot in depth and placed on natural terrain with a slope flatter than one unit vertical in five units horizontal (20 percent slope), or less than three feet in depth, not intended to support structures, that does not exceed 50 cubic yards on any one lot and does not obstruct a drainage course, excluding work in critical areas and their buffers;

(14) Normal routine maintenance of existing single-family drainage systems, including but not limited to excavation to replace existing pipes, catch basins and infiltration trenches, that does not exceed 50 cubic yards on any one lot and does not obstruct a drainage course, excluding work in critical areas and their buffers; and

(15) Installation of sanitary septic systems with King County health district approval and inspection. (Ord. O2009-249 § 1; Ord. O2005-193 § 2, 2005; Ord. O2005-175 § 1; Ord. O2004-149 § 2; Ord. O2003-132 § 2)

16.15.060 Applications – Complete applications.

(1) For the purposes of determining the application of time periods and procedures adopted by this chapter, applications for permits authorized by this chapter shall be

considered complete as of the date of submittal upon determination by the department that the materials submitted contain the following:

(a) For clearing and grading permits:

(i) A legal description of the property;

(ii) A 1:1,000 scale vicinity map with a north arrow;

(iii) Grading plans including:

(A) Horizontal and vertical scale;

(B) Size and location of existing improvements within 50 feet of the project, indicating which improvements will remain and which improvements will be removed;

(C) Existing and proposed contours at maximum five-foot intervals, and extending for 100 feet beyond the project edge;

(D) At least two cross-sections, one in each direction, showing existing and proposed contours and horizontal and vertical scales; and

(E) Temporary and permanent erosion-sediment control facilities;

(iv) The following plans must be stamped and signed by a registered civil engineer, licensed to practice in the state of Washington:

(A) Permanent drainage facilities;

(B) Structures to be built or construction proposed in landslide hazard areas; and

(C) Proposed construction or placement of a structure.

(b) A completed environmental checklist, if required by Chapter 20.15 SMC, State Environmental Policy Act Procedures.

(c) Satisfaction of all requirements for grading permits under SMC 16.15.070.

(2) Applications found to contain material errors shall not be deemed complete until such material errors are corrected.

(3) The director may waive specific submittal requirements determined to be unnecessary for review of an application. (Ord. O2003-132 § 2)

16.15.070 Permit requirements.

Except as exempted in SMC 16.15.050, no person shall do any clearing or grading without first obtaining a clearing and grading permit from the director. A separate permit shall be required for each site and may cover both excavations and fills.

(1) Application. To obtain a permit, the applicant shall first file an application therefor in writing on a form furnished for that purpose. The director shall prescribe the form by which application is made. No application shall be accepted unless it is completed consistent with the requirements of this chapter and the permit process and procedures chapter of SMC Title 20. In addition to the requirements of SMC 20.05.040 every application shall:

(a) Identify and describe the work to be covered by the permit for which application is made;

(b) Describe the land on which the proposed work is to be done, by lot, block, tract, and house and street address, or similar description that will readily identify and definitely locate the proposed site;

(c) Identify and describe those critical areas as defined in Chapter 21A.50 SMC on or adjacent to the site;

(d) Indicate the estimated quantities of work involved;

(e) Identify any clearing restrictions contained in SMC 16.15.120, wildlife habitat corridors pursuant to Chapter 21A.30 SMC, critical drainage areas established by administrative rule or property-specific development standards pursuant to SMC 21A.50.225;

(f) Be accompanied by plans and specifications as required in subsections (2) and (3) of this section;

(g) Designate who the applicant is, on a form prescribed by the department, except that the application may be accepted and reviewed without meeting this

requirement when a public agency or public or private utility is applying for a permit for property on which the agency or utility does not own an easement or right-of-way and the following three requirements are met:

(i) The name of the agency or public or private utility is shown on the application as the applicant;

(ii) The agency or public or private utility includes in the complete application an affidavit declaring that notice of the pending application has been given to all owners of property to which the application applies, on a form provided by the department; and

(iii) The form designating the applicant is submitted to the department prior to permit issuance; and

(h) Give such other information as may be required by the director.

(2) Plans and Specifications. When required by the director, each application for a grading permit shall be accompanied by six sets of plans and specifications and other supporting data as may be required. The plans and specifications shall be prepared and signed by a civil engineer or landscape architect registered to practice in the state of Washington when required by the director; provided, the director may require additional studies prepared by a qualified soils specialist. If the plans and specifications are returned as a result of permit denial or any other reason, they shall be returned to the applicant.

(3) Information on Plans and in Specifications. Plans shall be drawn to an engineer's scale upon substantial paper or cloth and shall be of sufficient clarity to indicate the nature and extent of the work proposed and show in detail that the plans will conform to the provisions of this chapter and all other relevant laws, rules, regulations, and standards. The first sheet of each set of plans shall give the location of the work and the name and address of the owner and the name of the person by whom the plans were prepared. The plans shall include the following minimum information:

(a) General vicinity of the proposed site;

(b) Property limits and accurate contours of existing ground and details of terrain and area drainage;

(c) Limiting dimensions, elevations, or finished contours to be achieved by the grading, proposed drainage channels, and related construction;

(d) Location of all proposed cleared areas;

(e) Location of any open space tracts or conservation easements if required pursuant to:

(i) SMC 16.15.120;

(ii) Chapter 21A.30 SMC;

(iii) Critical drainage area; or

(iv) Property-specific development standards pursuant to Chapter 21A.85 SMC;

(f) Calculations of the total proposed area cleared on site as a percentage of the total site area;

(g) Detailed plans of all surface and subsurface drainage devices, walls, cribbing, dams, berms, settling ponds, and other protective devices to be constructed with or as a part of the proposed work, together with the maps showing the drainage area and the estimated runoff of the area served by any drains;

(h) A determination of whether drainage review applies to the project pursuant to Chapter 9.04 KCC as adopted by Chapter 15.05 SMC, and, if applicable, all drainage plans and documentation consistent with King County surface water design manual requirements;

(i) Location of any buildings or structures on the property where the work is to be performed and the location of any buildings or structures on land of adjacent owners that are within 50 feet of the property or that may be affected by the proposed grading operations;

(j) Other information as may be required by the director; and

(k) If the clearing or grading is proposed to take place in or adjacent to a sensitive area as regulated in Chapter 21A.50 SMC, provide information as required by that chapter.

(4) Granting of Permits.

(a) The director shall determine if the proposed grading will adversely affect the character of the site for present lawful uses or with the future development of the site and adjacent properties for building or other purposes as indicated by the interim comprehensive plan, the shoreline master program, and the development code.

(b) After an application has been filed and reviewed, the director shall also ascertain whether such grading work complies with the other provisions of this chapter. If the application and plans so comply, or if they are corrected or amended so as to comply, the director may issue to the applicant a grading permit. A grading permit shall be valid for the number of days stated in the permit but in no case shall the period be more than two years; provided, that when operating conditions have been met, the permit may be renewed every two years, or less if a shorter approval and/or renewal period is specified by the director.

(c) No grading permit shall be issued until approved by federal, state, and local agencies having jurisdiction by laws or regulations.

(d) Upon approval of the application and issuance of the grading permit, no work shall be done that is not provided for in the permit. The director is authorized to inspect the premises at any reasonable time to determine if the work is in accordance with the permit application and plans.

(e) The permits from the director shall be required regardless of any permits issued by any other department of City government or any other governmental agency who may be interested in certain aspects of the proposed work. Where work for which a permit is required by this chapter is started or proceeded with prior to obtaining the permit, the violator shall be subject to such civil penalties as provided in Chapter 23.40 SMC. However, the payment of such civil penalties shall not relieve any persons from fully complying with the requirements of this chapter in the execution of the work nor from any other penalties prescribed thereon. (Ord. O2009-249 § 1; Ord. O2003-132 § 2)

...

20.05.020 Classifications of land use decision processes.

(1) Land use permit decisions are classified into four types, based on the amount of discretion associated with each decision. Procedures for the four different types are

distinguished according to who makes the decision, whether public notice is required, whether a public hearing is required before a decision is made, and whether administrative appeals are provided. The types of land use decisions are listed in Exhibit A of this section.

(a) Type 1 decisions are made by the director (director) of the department of community development (department). Type 1 decisions are non-appealable administrative decisions that require the exercise of little or no administrative discretion. For Type 1 decisions for which the department has issued a SEPA threshold determination, the issuance of any subsequent permits shall not occur until any allowed administrative appeal of the SEPA threshold determination is decided.

(b) Type 2 decisions are made by the director, or his or her designee. Type 2 decisions are discretionary decisions that are subject to administrative appeal in accordance with applicable provisions of law or ordinance.

(c) Type 3 decisions are quasi-judicial decisions made by the hearing examiner following an open record hearing. Type 3 decisions may be appealed to superior court.

(d) Type 4 decisions are quasi-judicial decisions made by the hearing examiner. Type 4 decisions may be appealed to the State Shoreline Hearings Board.

(2) Except as provided in SMC 20.15.130(1)(f) or unless otherwise agreed to by the applicant, all Type 2, 3 and 4 decisions included in consolidated permit applications that would require more than one type of land use decision process may be processed and decided together, including any administrative appeals, using the highest numbered land use decision type applicable to the project application.

(3) Certain development proposals are subject to additional procedural requirements beyond the standard procedures established in this chapter.

(4) Land use permits that are categorically exempt from review under the State Environmental Policy Act (SEPA) will not require a threshold determination (determination of nonsignificance (DNS) or determination of significance (DS)). For all other projects, the SEPA review procedures codified in Chapter 20.15 SMC are supplemental to the procedures set forth in this chapter.

Exhibit A

LAND USE DECISION TYPE

Type 1	Decision by director, no administrative appeal	Building; clearing and grading; boundary line adjustment; temporary use; TDR sending site certification; right-of-way; road variance except those rendered in conjunction with a subdivision
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		or short plat decision ¹ ; variance from the requirements of Chapter 9.04 KCC as adopted by SMC Title 13; shoreline exemption; approval of a conversion harvest plan; temporary homeless encampment permit ²
Type 2	Decision by director appealable to hearing examiner, no further administrative appeal	Short plat; road variance decisions rendered in conjunction with a short plat decision; zoning variance; conditional use permit; procedural and substantive SEPA decision; site development permit; approval of residential density incentives; reuse of public schools; reasonable use exceptions under SMC 21A.50.070(2); preliminary determinations under SMC 20.05.030(3); critical areas exceptions and decisions to require studies or to approve, condition or deny a development proposal based on the requirements of Chapter 21A.50 SMC; binding site plan; unified zone development plan under Chapter 21B.95 SMC ³
Type 3	Recommendation by director, hearing and decision by hearing examiner appealable to superior court	Preliminary plat; plat alterations; preliminary plat revisions; plat vacations; zone reclassifications ⁴ ; urban planned development; special use
Type 4	Recommendation by director, hearing and decision by hearing examiner appealable to the State Shoreline Hearings Board	Shoreline variances; shoreline substantial development permits (SSDPs); shoreline conditional use permits

1 The road variance process is administered by the City engineer pursuant to the City's street standards as set forth in the public works standards.

2 Subject to the notice requirements of SMC 21A.70.195(4).

3 Subject also to the procedural requirements of SMC 20.05.037 and Chapter 21B.95 SMC.

4 Approvals that are consistent with the interim comprehensive plan may be considered by the examiner at any time. Zone reclassifications that are not consistent with the interim comprehensive plan require a site-specific land use map amendment and the City council's hearing and consideration will be scheduled with the amendment to the interim comprehensive plan pursuant to SMC 24.25.040 and 24.25.050.

23.70.010 Stop work orders.

(1) Authorization. Whenever a violation of this title threatens the health or safety of the public or materially impairs the director's ability to secure compliance with the Sammamish Municipal Code, the director may issue a stop work order specifying the violation and prohibiting any work or other activity at the site. A stop work order shall be served consistent with Chapter 23.90 SMC. Issuance of a notice and order is not a condition precedent to the issuance of a stop work order.

(2) Effect. Work or activity may not resume unless specifically authorized in advance by the director. Any violation of a stop work order is hereby declared to be a nuisance and the director is authorized to enjoin or abate such nuisance by any legal or equitable means available. The costs, specifically including reasonable attorney and expert witness fees, for the injunction or abatement, shall be recovered by the City from the person responsible for the code violation in the manner provided by law. Failure to comply with the terms of a stop work order subjects the person responsible for the code violation to civil penalties and costs as set forth in this title.

(3) Appeal. A stop work order may be appealed according to the procedures prescribed by this title and Chapter 20.10 SMC. Failure to appeal the stop work order within the applicable time limits renders the stop work order a final determination that the civil code violation occurred and that work was properly ordered to cease. (Ord. O2011-302 §2 (Att. A))

25.08.020 Permits – Substantial development.

(1) Substantial development as defined by RCW 90.58.030 shall not be undertaken by any person on the shorelines of the state without first obtaining a substantial development permit from the director, unless the use or development is specifically identified as exempt from a substantial development permit per Chapter 90.58 RCW or by Chapter 173-27 WAC.

(2) The director may grant a substantial development permit only when the development proposed is consistent with the policies and procedures of Chapter 90.58 RCW, the provisions of Chapter 173-27 WAC, and this program. (Ord. O2011-308 § 1 (Att. A))

EXHIBIT 11

THE HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

KING COUNTY,

Plaintiff,

v.

CITY OF SAMMAMISH,

Defendant.

No. 2:17-cv-00921-JCC

**STIPULATION AND PROPOSED
REVISION TO PRELIMINARY
INJUNCTION**

STIPULATION

Pursuant to the Court's August 21, 2017 Minute Order (Dkt. 41), the parties have consulted among themselves and propose to amend Sentence III-2 on page 8 of the Preliminary Injunction Order of August 8, 2017 (Dkt. 36) with the following language:

“The City shall not take any additional actions to impede or delay King County’s construction of the intersections at 206th Avenue SE and SE 33rd Street, including any attempts to orient stop signs toward trail users.”

By participating in this process and agreeing on proposed revised language, the parties agree that the City of Sammamish is not waiving its right to appeal the preliminary injunction as so revised.

ORDER

After considering this stipulation, IT IS HEREBY ORDERED THAT Sentence III-2 in the Conclusion section of the Preliminary Injunction Order on page 8 (Dkt. 36) is hereby stricken, and replaced with the following language:

“2. The City shall not take any additional actions to impede or delay King County’s construction of the intersections at 206th Avenue SE and SE 33rd Street, including any attempts to orient stop signs toward trail users.”

The Court’s Preliminary Injunction Order remains the same in all other respects. Further, per the parties’ stipulation, the City retains the right to appeal the preliminary injunction as revised herein.

DONE IN OPEN COURT this ____ day of _____, 2017.

The Honorable John C. Coughenour
UNITED STATES DISTRICT JUDGE

Agreed to and Presented by:

Plaintiff King County,
through their attorneys,

DANIEL T. SATTERBERG
King County Prosecuting Attorney

By: s/ David J. Hackett
DAVID J. HACKETT, WSBA #21236
Senior Deputy Prosecuting Attorney

By: s/ Emily J. Harris
EMILY J. HARRIS, WSBA #35763
DAVID I. FREEBURG, WSBA #48935
MALLORY L.B. SATRE, WSBA #50194
Special Deputy Prosecuting Attorneys

Defendant City of Sammamish,
through their attorneys,

Kenyon Disend, PLLC

By: s/ Michael R. Kenyon
MICHAEL R. KENYON, WSBA #15802

By: s/ Kim Adams Pratt
KIM ADAMS PRATT, WSBA #19798

By: s/ David A. Linehan
DAVID A. LINEHAN, WSBA #34281

CERTIFICATE OF SERVICE

I hereby certify that on August 31, 2017, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will send notification of such filing to all counsel of record.

DATED this 31st day of August, 2017.

s/ Kris Bridgman
Kris Bridgman, Paralegal
King County Prosecuting Attorney's Office

THE HONORABLE JOHN C. COUGHENOUR

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

KING COUNTY,

Plaintiff,

v.

CITY OF SAMMAMISH,

Defendant.

CASE NO. C17-0921-JCC

MINUTE ORDER

The following Minute Order is made by direction of the Court, the Honorable John C. Coughenour, United States District Judge:

This matter comes before the Court on the parties' stipulation and proposed revision to the preliminary injunction order of August 8, 2017 (Dkt. No. 42). After considering this stipulation, IT IS HEARBY ORDERED that Sentence III-2 in the Conclusion section of the Preliminary Injunction Order on page 8 (Dkt. No. 36) is hereby stricken and replaced with the following language:

"2. The City shall not take any additional actions to impede or delay King County's construction of the intersections at 206th Avenue SE and SE 33rd Street, including any attempts to orient stop signs toward trail users."

The Court's Preliminary Injunction Order remains the same in all other respects. Further, per the parties' stipulation, the City retains the right to appeal the preliminary injunction as revised

1 herein.

2 The Court also DIRECTS the Clerk of Court to strike the noting date of September 8,
3 2017 for the motion for clarification (Dkt. No. 41).

4 DATED this 1st day of September 2017.

5 William M. McCool
6 Clerk of Court

7 s/Paula McNabb
8 Deputy Clerk