

March 16, 2015

VIA U.S. MAIL AND E-MAIL

Harriet Spanel, Chair
Recreation and Conservation Funding Board
Kaleen Cottingham, Director
Recreation and Conservation Office (RCO)
P.O. Box 40917
Olympia, WA 98504-0917

Re: Conversion Request: City of Bellevue, Mercer Slough Phase 1, #73-026A and
Mercer Slough #78-513A

Dear Chair Spanel, Director Cottingham, and members of the Board:

This firm represents the Central Puget Sound Regional Transit Authority ("Sound Transit"). Sound Transit is a party to the above-referenced proposal by the City of Bellevue (the "City") to convert portions of two parcels within the Mercer Slough Nature Park (the "Conversion") for the purpose of constructing Sound Transit's East Link Extension light rail project (the "Project").

As you may know, Sound Transit's Project has been litigated extensively in administrative and judicial appeals by numerous parties, including several parties who now oppose the Conversion in this proceeding before the Board. Consequently, Sound Transit retained Van Ness Feldman in anticipation of potential litigation regarding the Conversion. Although RCO staff is doing an excellent job in providing you with the factual information you have requested to answer your questions, this letter provides additional information regarding the legal framework surrounding the Board's decision and the application of the Conversion approval criteria to the record before the Board. It also provides copies of key documents regarding the environmental review and prior litigation regarding the Project to ensure that the record before the Board is complete.

For the reasons summarized in this letter and detailed in the Supplemental Information prepared by the City of Bellevue and Sound Transit, Sound Transit respectfully requests that the Board approve the Conversion.

1. Overview of approval criteria for the Conversion

When reviewing conversion requests, the Board considers the following key factors:

- All practical alternatives to the conversion have been evaluated and rejected on a sound basis;
- A new development will serve as a replacement which is of at least equal fair market value and of reasonably equivalent recreation usefulness and location; and
- The public has had opportunities for participation in the process.¹

As explained below, the information provided to the Board demonstrates that each of these criteria has been met.

2. All practical alternatives to the Conversion have been evaluated and rejected on a sound basis.

- a. The EIS and the Section 4(f) analysis provided a “sound basis” for rejecting alternatives to the Conversion.

Through almost eight years of study and public process, Sound Transit and other agencies conducted an extensive evaluation of reasonable and practicable alternatives to the Conversion in its Environmental Impact Statement (EIS) for the Project, including avoidance, under the National Environmental Policy Act (NEPA), the State Environmental Policy Act (SEPA), and Section 4(f) of the Department of Transportation Act. Sound Transit’s alternatives analysis was reviewed and approved by multiple federal, state, and local agencies with expertise in transportation, environmental, and open space issues, and RCO was consulted in 2009-2010 as part of this process.² Sound Transit’s analysis conducted precisely the type of evaluation that is required for conversions of Board-funded acquisitions. The analysis evaluated all reasonable, prudent and feasible alternatives to the Conversion and rejected all of those alternatives, including alternatives that opponents of the Conversion now advocate to the Board.

Sound Transit’s alternatives analysis is summarized in Section 2 of the Supplemental Information provided to the Board. Enclosed with this letter are CDs of the Final EIS and 2013 SEPA Addendum for the Project. In addition, Section 3 of the Supplemental Information addresses specific questions regarding Sound Transit’s alternatives analysis raised by Board members and commenters during the meeting on October 30, 2014. These materials clearly

¹ See WAC 286-40-060. See also Washington State Recreation and Conservation Office, Manual 7, Long-Term Obligations (February 1, 2014), pp. 10-14. As explained in the Briefing Memo prepared by Myra Barker, the Conversion also meets the other basic requirements for conversions, including administration by the same political jurisdiction (the City of Bellevue), satisfaction of needs in an adopted plan (the City of Bellevue Parks and Recreation Comprehensive Plan), and meeting funding eligibility requirements. See Briefing Memo dated October 2014, p. 6.

² RCO staff was contacted in September and October 2009 to identify Section 6(f) resources in the East Link study area, including the Mercer Slough Nature Park, and Project staff met with RCO staff and staff from the National Park Service in April 2010 to discuss these resources. See East Link Project Final EIS, Appendix D Section 4(f)/6(f) Supplemental Evaluation, p. D-75.

show that all practical alternatives were evaluated and rejected on a “sound basis,” as required by the Conversion criteria.

- b. The record of appeals upholding the EIS and Sound Transit’s alternatives analysis reinforces the “sound basis” for rejecting alternatives.

In 2011, the Final EIS for the Project was appealed to Sound Transit’s Hearing Examiner under the SEPA by Will Knedlik, who recently presented testimony in opposition to the Conversion at the Board’s October 2014 meeting.³ Similarly, in 2012, the EIS was appealed to federal district court under NEPA by two groups – Building a Better Bellevue and Friends of Enatai – whose members have opposed the Conversion in this Board proceeding. As discussed below, those members now ask the Board to reconsider the same arguments regarding Project alternatives that were rejected in the 2012 NEPA appeal.

The 2012 NEPA appeal specifically affirmed the analysis of alternatives in the EIS. Thus, the “sound basis” for Sound Transit’s alternatives analysis includes not only the extensive documentation contained in the EIS and the Section 4(f) analysis, but also the record showing that these analyses were scrutinized and upheld in federal court. In particular, in the NEPA appeal, Federal District Court Judge John Coughenour issued a detailed order in 2013 (Attachment 1) upholding the alternatives analysis. In his order, Judge Coughenour rejected the very same arguments that opponents of the Conversion raise in this proceeding before the Board, including arguments about the “tunnel” alternative and the B7R alternative. Judge Coughenour also upheld the agencies’ conclusions under Section 4(f) that there were no prudent and feasible alternatives that would avoid all recreational resources, including the Mercer Slough Nature Park, and that the EIS identified all reasonable measures to cause the least overall harm to those resources.

The parties to the 2011 SEPA appeal and the 2012 NEPA appeal have exhausted all of their appeal options, and no further opportunities exist to challenge Sound Transit’s alternatives analysis under NEPA, SEPA, or Section 4(f).⁴

- c. The Board should not conduct a new alternatives analysis.

It bears emphasis that it is not the Board’s job to conduct a new, independent analysis of alternatives to the Conversion. Rather, the Board’s role is limited to reviewing Sound Transit’s analysis and determining whether that analysis evaluated and rejected all practical alternatives “on a sound basis.”⁵ This “sound basis” standard applied by the Board is the same as the “arbitrary and capricious” standard applied by courts, which asks whether a decision was made

³ After a multi-day hearing, the Hearing Examiner denied the SEPA appeal and upheld the EIS. Mr. Knedlik appealed the Hearing Examiner’s decision to the King County Superior Court, which dismissed his appeal.

⁴ Under the doctrine of collateral estoppel, parties who raised issues in the 2011 SEPA appeal and the 2012 NEPA appeal would be barred from attempting to re-litigate the same issues in a subsequent proceeding. See, e.g., *Citizens for Safety & Environment v. Washington State Dep’t of Transportation*, 124 Wn. App. 1020, Not Reported in P.3d (2004), 2004 WL 2651499 at * 5 (holding that re-litigation of EIS issues under NEPA was barred because “the EIS traffic impact analysis was challenged, fully litigated, and found adequate by a federal court on the same grounds and utilizing the same standards applicable in state court under SEPA”).

⁵ WAC 286-40-060(2)(a).

“without consideration and in disregard of the facts.”⁶ As the courts have explained, even if individual Board members were to disagree with particular aspects of Sound Transit’s analysis, that would not mean that the analysis is “arbitrary or without a sound basis.”⁷ Because the record before the Board conclusively demonstrates that the analysis was not made “in disregard of the facts,” it cannot be considered to be “arbitrary and capricious” or lacking a “sound basis.” Indeed, as explained above, Judge Coughenour already determined that Sound Transit’s analysis was not arbitrary or capricious. The Board should similarly conclude that the analysis rested on a sound basis.

This deferential approach is particularly appropriate for the Board’s review of the parcel acquired using funding from the Land and Water Conservation Fund (LWCF). Court cases discussing the proposed conversion of LWCF properties have made it clear that state and federal approval of conversions does not require reviewing agencies to conduct an independent analysis of alternatives. For example, in a case involving a challenge to a National Park Service (NPS) decision regarding conversion of a LWCF property, a federal district court explained that the NPS was not required to undertake an independent analysis of alternatives:

While the NPS will only consider the conversion request if the request meets a list of several requirements, including that “[a]ll practical alternatives to the proposed conversion have been evaluated,” 36 C.F.R. § 59.3, the regulations do not require the NPS to undertake an independent evaluation of all practical alternatives to the proposed conversion. Rather, the only NPS mandate is to ensure that the state has done this analysis prior to the submission of a conversion. Thus, plaintiffs seek to measure NPS’s obligations under a standard far more expansive than the limited one that actually applies to the NPS.⁸

The opponents of the Conversion in this proceeding similarly ask the Board to conduct a more in-depth analysis of alternatives than is legally required under the Board’s regulations or would be appropriate given the Board’s expertise and resources. The opponents’ position is a thinly-veiled attempt to use the Conversion process to revisit Project alignment alternatives, like the B7R alternative, that were previously rejected on a sound basis. The Board should reject the opponents’ request for a “do-over” of the eight-year alternatives analysis that was conducted by Sound Transit, approved by multiple agencies with jurisdiction, and upheld after close scrutiny by the courts.

⁶ *Carlson v. City of Bellevue*, 73 Wn. 2d 41, 49, 435 P.2d 957, 959 (1968).

⁷ *Id.* at 49-50 (upholding zoning decision by Bellevue City Council and noting that, even though reasonable minds could differ about the wisdom of the City Council’s decision, that “does not mean that the city council’s decision is arbitrary or without a sound basis. It means, simply, that its decision, because of conflicting local views, was a difficult one to make-not that it was a capricious one.”).

⁸ *Save Our Parks v. Kempthorne*, No. 06 CIV.6859 NRB, 2006 WL 3378703, at *12 (S.D.N.Y. Nov. 15, 2006) (rejecting challenge to alternatives analysis and noting that “[a]n entire chapter of the FEIS evaluates the feasibility of all alternatives suggested by the plaintiffs”). While the Board’s conversion criteria add the concept of a “sound basis” to the regulatory criteria applied by NPS, the addition of that phrase does not substantially change the nature of the Board’s review compared to the role of NPS. As explained above, at most, the “sound basis” language authorizes the Board to review the Conversion under the “arbitrary and capricious” standard.

d. Cost is an appropriate consideration in evaluating alternatives.

In conducting its review of Sound Transit's alternatives analysis, the Board should be aware that cost was one factor that Sound Transit was required to consider and, in fact, did consider in comparing alternatives to the Conversion. While Sound Transit did not reject any alternatives solely on economic grounds, cost was considered among many other factors, and it is appropriate for Sound Transit to consider the relative cost of various alternatives under NEPA and Section 4(f). For example, federal NEPA guidance states that "reasonable alternatives" under NEPA "include those that are practical or feasible from the technical and economic standpoint and using common sense."⁹ Similarly, under federal regulations implementing Section 4(f), agencies are required to consider factors such as "construction, maintenance, or operational costs" in evaluating whether an alternative is "prudent," and must consider "[s]ubstantial differences in costs among the alternatives" in evaluating whether an alternative causes the "least overall harm."¹⁰

Cost considerations are also relevant to the Board's decision in this proceeding. Nothing in the Board's conversion criteria suggests that cost cannot be considered, and any such interpretation of the Board's rules would be untenable, particularly for major, multi-billion dollar undertakings like the Project. Agencies like Sound Transit have a fiduciary obligation to consider costs in comparing alternative alignments, and federal regulations under NEPA and Section 4(f) reflect this common-sense need to consider economic factors. The Board's conversion criteria should similarly be interpreted to allow reasonable consideration of cost in evaluating alternatives.

e. The alleged environmental impacts of the Project are not a basis for denying the Conversion.

Several public comments opposing the Conversion suggest that the Board should deny the Conversion based on the alleged environmental impacts of the Project on the Mercer Slough Nature Park, including areas outside the proposed Conversion area. These issues are irrelevant to the Board's review of the Conversion in this proceeding. None of the Board's conversion criteria suggest that a conversion may be denied simply because a project that necessitates a conversion proposal will have environmental impacts, whether inside the area proposed for conversion or elsewhere. While the relative impacts of various alternatives are relevant to the question of whether Sound Transit evaluated and rejected alternatives on a "sound basis," project impacts are not, by themselves, a basis for denying the Conversion.

As explained below, the public has had numerous opportunities to raise issues related to Project impacts through the almost eight year NEPA and SEPA environmental review process. Bellevue's Conversion request before the Board, however, is not the proper forum for continued debate over issues related to environmental impacts from the Project.

⁹ CEQ, *Forty Most Asked Questions Concerning CEQ's National Environmental Policy Act Regulations*, 46 Fed. Reg. 18,026 (March 23, 1981) (hereafter referred to as "*Forty Most Asked Questions*"), Question 2a (emphasis added).

¹⁰ 23 C.F.R. §§ 774.17, 774.3 (emphasis added).

Nevertheless, in Section 3 of the Supplemental Information, Sound Transit has provided responses to questions regarding various Project impacts, including visual impacts, hydrologic impacts, impacts to significant trees, wetlands and wetland buffers, wildlife impacts, park access, and construction impacts. As noted above, we have also provided the Board with a complete electronic copy of the Final EIS and 2013 SEPA Addendum, which discuss Project impacts in great detail.

3. A new development will serve as a replacement which is of at least equal fair market value and of reasonably equivalent recreation usefulness and location.

This criterion has clearly been met. As a purely economic matter, it is undisputed that the fair market value of the replacement property exceeds the value of the converted property by \$138,120.¹¹ Further, the record shows that the proposed new development on the replacement property will have greater recreation usefulness and location than the existing development on the properties proposed for conversion.

The following sections provide a brief comparison between the recreation usefulness and location of the parcels proposed for conversion and the new development proposed on the replacement property. A more detailed comparison was provided by the City of Bellevue in its response to public comments on the Conversion (Attachment 2).

a. Parcels proposed for conversion.

Usefulness. The parcels proposed for conversion, which encompass approximately one acre, have limited recreation usefulness. The north parcel is vegetated open space, with wetland buffer and a small area of wetland, and does not contain trails providing access for the public or any other recreational facilities. The south parcel includes vegetation, wetland buffer, a small area of wetland, and a rental house. The only recreational feature on the south parcel is a short trail segment that will be detoured during construction and replaced with a new boardwalk trail segment. No other recreational facilities within the conversion areas will be impacted.

Location. Both parcels are located adjacent to a congested arterial, Bellevue Way SE, and the park's Periphery Trail sidewalk. The south parcel provides access to the park, but this access will be moved and consolidated at the Winters House as part of the Project mitigation. In addition, as discussed below, the replacement property will provide additional access and connectivity where none currently exists.

¹¹ One commenter suggested that the appraisal prepared for the Conversion is deficient because it failed to account for "the value loss to the remainder of the site(s) that will be realized from visual blight, noise, loss of significant trees, wetlands loss and public access resulting from the approval of this conversion." See E-mail from Geoffrey J. Bidwell to Camron Parker dated October 12, 2014. Sound Transit disagrees with this characterization of project impacts, but in any event, any such "loss" would be irrelevant to the question of whether the new development is of at least equal fair market value to the property proposed for conversion. The regulation cited by Mr. Bidwell addressing partial conversions, 36 C.F.R. § 59.3(b)(5), applies to other aspects of the conversion review process by the National Park Service (NPS), and does not apply to NPS' review of appraisals. Appraisal requirements are found in a different subsection of the regulation: 36 C.F.R. § 59.3(b)(2). It is undisputed that the appraisal for the Conversion meets all requirements found in that subsection of the regulation.

b. New development on replacement property.

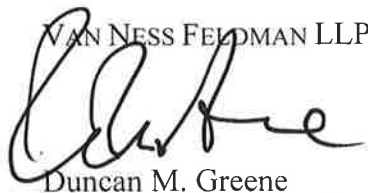
Usefulness. By comparison, the six-acre replacement property is reasonably equivalent to the one-acre conversion parcels, and the proposed replacement property will provide greater recreation usefulness than the conversion parcels. The general characteristics of the replacement property are similar to those of the conversion parcels, including undeveloped open space consisting of wetlands, wetland buffers, and natural vegetation. Moreover, the replacement property consists of a much larger undisturbed natural area than the conversion parcels and will better serve the park's core functions. This is particularly true when the Board considers not only the replacement property but the new development proposed on the property, which includes the construction of a new interior trail to connect the Mercer Slough Environmental Education Center to the rest of the Mercer Slough Nature Park. The City also plans to add a sidewalk, where none exists, along the edge of the replacement property that fronts 118th Avenue SE.

Location. The location of the replacement property is far superior to the conversion parcels. The replacement property serves a key "missing link" that will provide recreational as well as environmental benefits by connecting two publicly-owned sections of the park. The bulk of the replacement property is located further away from Bellevue Way SE and other busy roadways, providing a more immersive recreational experience for trail users.

4. The public has had extensive opportunities for participation in the process.

It is undisputed that the public has had extensive opportunities to participate in the conversion process. As explained in the Supplemental Information, even before the Conversion was formally requested, Sound Transit's alternatives analysis provided numerous opportunities for public comment and other forms of participation, including opportunities for multiple appeals to neutral decision makers. A summary of the opportunities for public involvement in the alternatives and project development process is provided in Section 2 of the Supplemental Information. In addition, the public has had ample opportunity to participate in this Conversion proceeding before the Board, including two meetings in 2014 and the upcoming meeting in April 2015.

Very truly yours,

VAN NESS FELDMAN LLP

Duncan M. Greene

DMG/aka
Enclosures

cc: Perry Weinberg, Sound Transit (w/o encl.)
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