

# Memo

March 6, 2024

To:	Sound Transit Executive Committee
Through:	Goran Sparrman, Interim Chief Executive Officer
From:	Moises Gutierrez, Chief System Quality Officer
Subject:	Regarding TAG Recommendation #5: Strengthen and enforce an agency betterment policy

## Executive Summary

### Problem statement

Sound Transit's existing policies related to how project scope and betterments are defined are not clear and are not consistently applied by project teams. The result is that project elements that should be treated as betterments are instead incorporated as part of core project scope.

This lack of policy clarity and application leads to differing interpretations regarding elements that should or should not be part of the core project scope, and it occurs in the context of regulatory processes that vests authority in jurisdictions and provides Sound Transit limited recourse outside of judicial or quasi-judicial processes. Furthermore, escalation paths to resolve disputes associated with project definition and betterment issues are not well defined and there is a general hesitation to escalate issues, especially to the Board.

### Desired outcomes

- Provide greater clarity of what the Sound Transit project scope is within Sound Transit and with jurisdiction partners and project stakeholders.
- Enable project delivery teams to focus on delivering the core transit project scope.
- Reduce external risk factors that contribute to project cost increases and schedule delay.

### Proposed approach

- Update and consolidate existing policies to clearly address the issues identified by the TAG and the gaps identified by staff.
- Create clearer escalation paths and escalate issues more quickly, including to the Board.
- Socialize and strengthen Sound Transit standards and program guidance.

### Proposed schedule

- March 2024: Board engagement on betterments to inform policy development.
- April 2024: recommend policy update for Board adoption.
- Q2-Q3 2024: policy implementation plan with ongoing Board engagement.

### Board support needed

- Robust engagement in policy development and implementation.
- Support for enforcing an updated policy and ensuring that Sound Transit staff and the Board are accountable to it.

## Introduction

“The Technical Advisory Group recommends that ST establish or strengthen and adhere to the betterments policy that limits ST expenditures to the cost of essential transportation improvements in accordance with ST3 based on design standards established by the agency, along with any mitigation measures required as a result of formal environmental review. Any betterments requested by a local jurisdiction that exceed ST’s standards should be wholly or largely the responsibility of the local jurisdiction.” (Technical Advisory Group, Report to the Sound Transit Board: Improving the Speed of Project Delivery, pg. 14)

The purpose of this memo is to summarize existing Sound Transit policies related to scope control of and betterments for Sound Transit capital projects, to describe the current state related to the underlying issue identified by the TAG, to identify gaps as experienced by Sound Transit staff, and to articulate opportunities to address issues and gaps as per the TAG’s recommendation. At this time, staff do not recommend that Sound Transit pursue self-permitting authority. Staff will develop and present proposed improvements and refinements to existing permitting and essential public facility authority to improve the speed of project delivery.

## Existing Sound Transit Policies

Sound Transit has four existing policies related to implementing improvements that fall outside the core high-capacity transit investment.

The primary policy is the **Scope Control Policy (R2009-24)**. The Scope Control Policy establishes a framework by which Sound Transit may incorporate elements identified by a third party to expand or enhance the core high-capacity transit investment beyond its defined scope and mitigation at any phase of the project. The Scope Control Policy includes sections related to a project’s initial scope, project development, mitigation, baseline scope, and betterments.

The Scope Control Policy defines betterments as “project elements that were not clearly: 1) included in the initial project scope, 2) necessary in the normal course of completing the initial project scope, 3) included in the project definition, or 4) among the mitigation measures indicated in the final environmental documentation for a project.”

The Scope Control Policy establishes that Sound Transit will make every effort to integrate requested betterments into a project such that the requesting party reimburses Sound Transit; that the work to deliver the betterment does not impact project scope, schedule, or budget; and that the betterment leads to higher transit ridership and greater project-level cost effectiveness.

If the party requesting a betterment declines financial responsibility, the policy states that Sound Transit will review whether it has a legal obligation to provide the betterment and/or whether to initiate a mediation process to resolve the issue.

In addition to the Scope Control Policy, there are two additional policies from early in Sound Transit’s history. The first is the **Reimbursement Policy (M2002-22)**, which specifies the

conditions under which Sound Transit staff would seek reimbursement from partner agencies. The second is **Policies to Guide Permitting Activities of Sound Transit Staff (M2002-48)**, which created Board-adopted guidelines for staff in interactions throughout the permitting process. It further states that staff will elevate schedule and permitting issues and request Board intervention to keep projects on schedule and budget. Neither of these policies are functionally in effect insofar as they carry specific weight in the implementation of high-capacity transit investments.

Finally, the **Procurement, Agreements, and Delegated Authority Policy (R2023-30)** identifies the CEO's authority to increase the total authorized amount for system expansion contracts to include betterments when the requesting entity fully funds the betterment work, the betterment is within the scope of the contract, no individual contract modification for the betterment exceeds \$5,000,000 (excluding taxes), and the incorporation of the betterment has no adverse impact on Sound Transit project work.

## Current State

Betterments are outcomes insofar as they are specific capital elements that are added to a Sound Transit capital project via Board action (above a certain cost threshold) and delivered by Sound Transit. They emerge during project development, final design, permitting, and even construction; are specifically defined and negotiated between Sound Transit, Sound Transit's contractor, and third parties; and must be approved by the Board if they are above a certain cost threshold (previously this was \$500,000 but going forward will be \$5,000,000 with the adoption of an updated delegated authority policy (R2023-30)).

Staff understand the TAG's recommendation regarding betterments to not necessarily be how betterments are supposed to be identified, negotiated, paid for, and implemented, but rather that project elements that should be treated as betterments are instead incorporated as part of the scope of the high-capacity transit project. Further, the protracted and at times adversarial process to resolve the status of these items can delay project schedules and increase project costs (both because of the should-be betterment and the schedule impact resulting from their incorporation into the overall scope).

The TAG report recognizes that authorities having jurisdiction (AHJs) use the entitlement and permitting process to require improvements beyond the core project scope and sometimes beyond what appears to be reasonable. As the permitting process takes place through the final design and construction phases, the specific issues that arise from more detailed designs submitted for permit cannot always be known at the time of environmental review or even at the Project Baseline milestone. In these circumstances, Sound Transit project teams find themselves in a position where if permit design information does not include an AHJ's desired element, submittals may not be accepted. If left unresolved, these items can lead to delays.

When necessary, Sound Transit challenges development regulations and permit conditions that are unreasonable or would preclude development to the appropriate state administrative hearings board or superior court, depending on the type of permit or requirement. Litigation is inherently adversarial, time consuming, costly, can be politically damaging, and does not ensure a favorable

outcome for Sound Transit. As a matter of approach – not policy – Sound Transit has typically pursued negotiations with AHJs before pursuing legal relief.

## Gaps

Sound Transit staff have identified the following gaps related to the TAG’s recommendation related to betterments and scope control.

### **Project scope definition and decision-making, and inconsistent interpretation of the Scope Control Policy.**

The Scope Control Policy is predicated on there being a clear and broadly understood definition of the core high-capacity transit project scope – both within Sound Transit and with third parties. Per that policy, the mitigations identified through formal environmental review and Board-adopted Project to be Built and Project Baseline milestones are the principal sources for the formal definition of the core project. Mitigation measures may be broadly defined, and project definition at the Project to be Built and Project Baseline milestones are often too high level and therefore too open to interpretation, particularly as the final design and construction phases proceed.

In practice, project teams have autonomy in interpreting the application of the Scope Control Policy, and different teams may interpret it differently depending on the AHJ request. However, project teams lack clear direction on when requests should be approved or denied. As such, the application of the Scope Control Policy is inconsistent across project teams and may contribute to third parties pushing betterment requests into the permitting process. Clear criteria and parameters for considering scope increases and a clear process for documenting betterment decisions and/or escalating decisions have not been consistently implemented.

### **Escalation paths.**

Existing Sound Transit partnering agreements identify general escalation paths when there are disagreements around betterment requests. But these agreements do not specifically define when betterment requests or when differing interpretations of what constitutes a betterment between Sound Transit and AHJs should be escalated, to whom, and at what point Board members should be asked to help resolve them. Likewise, project agreements also include escalation paths that may not provide clear guidance of how and when to engage in escalation. Escalation can also adversely impact the working relationship between Sound Transit project and the jurisdiction staff when both parties believe they are advocating for the correct outcome and when political pressure, outside of the normal jurisdictional processes, is exerted on the issue one way or the other. This creates a hesitancy to escalate until all project-level avenues are exhausted or negotiations have reached a deadlock.

### **Station design standards, jurisdictional standards and code requirements, and passenger access.**

Sound Transit has made considerable progress to develop and apply clear design and station standards. These standards streamline design and help to make our design process and standards clear when working with other jurisdictions. The standards can also provide a clearer

expectation of what Sound Transit intends to provide with its facilities and what would be considered a betterment.

Each jurisdiction's codes define minimum requirements. Code requirements come into play during the entitlement process permitting plan development, at the time of permit issuance, and after construction when Sound Transit needs to close out permits (in the form of re-work to meet new or different standards). Often the interpretation of what constitutes essential transit improvements leads to disagreements between Sound Transit and AHJs about "must have" vs. "want to have" requirements. In multiple cases, AHJs have changed their code to force Sound Transit to expand its scope and provide elements that exceed the project scope or the previous understandings of code requirements. In other cases, there is disagreement where a jurisdiction views the issue as a requirement based upon the administration and interpretation of their codes or standards and not as a betterment, while Sound Transit disagrees with such an interpretation and refers to it as a betterment. The code, however, provides jurisdictions with the authority to interpret the codes. By law, AHJs are granted deference in interpreting their own codes and the burden is on Sound Transit to provide otherwise.

The TAG has suggested that Sound Transit use its standards to deny additional requests, but the standards identify a minimum, not maximum treatment. Local development codes may still require elements beyond Sound Transit's design standards.

### **Project delivery methods.**

Design-build and other alternate delivery methods mean that environmental review, Project to be Built, and Project Baseline milestones may occur well in advance of substantial design progress. City codes commonly require 60% design for land use approvals and close to 90% for building permits. Since design-build uses a fast-track approach where design and construction are done in parallel, not sequentially, some AHJs find themselves in unfamiliar scenarios where they are asked to permit work earlier in design than they are used to. When jurisdictions are uncertain of what project design elements will ultimately look like and they have a partnering role in review of ongoing design development, it can make reaching code and entitlement concurrence difficult until the project is farther along in design. This process can lead to requests for changes or potential betterments much later in the process, putting project schedules in peril when there are disagreements on scope or interpretation of code requirements.

### **Opportunities**

Sound Transit staff have identified the following opportunities to address the TAG's recommendation related to betterments and scope control.

### **Consolidate and strengthen existing policies related to scope control and betterments.**

The three policies that functionally relate to the topics of scope control and betterments date from 2002 and 2009. A focused update of the Scope Control Policy to address gaps identified above and opportunities identified below will directly address the TAG's recommendation and support project teams in delivering capital projects as quickly and as affordably as possible.

The following table identifies the subject matter and anticipated content that an update to the Scope Control Policy will cover, some of which are further articulated below.

Policy topic	Anticipated content
Essential public facility	Emphasize Sound Transit investments as essential public facilities that implement regional plans and policies.
Clearer project definition throughout project development	Stronger direction on how Sound Transit defines project scope to meet minimum standards for operational and passenger success.
Sound Transit standards and requirements	Identification of Sound Transit capital project and program resources that establish minimum standards and requirements to achieve project scope and support operational and passenger success.
Clearer betterment definition	Stronger direction on how Sound Transit defines betterments and how/when to approve or deny betterment requests.
Regulatory processes	Clearer articulation of Sound Transit orientation to the regulatory processes that may result in scope increases through different interpretations of standards and requirements.
Dispute resolution	Strengthened and shortened escalation paths for Sound Transit staff to address disputes with AHJs, including and especially to the Board.

**Create clearer boundaries for project definition and increase specificity for project definition at every project development milestone.**

The issues identified by the TAG are ultimately about a lack of clarity and understanding of what constitutes Sound Transit’s definition of essential transit improvements associated with a high-capacity transit project. An update of the Scope Control Policy can establish clearer boundaries, which will support project teams as they execute on the delivery of projects, and with third parties as they support project implementation. Further, greater specificity can be provided at appropriate project development milestones (e.g., completion of environmental review, selecting the project to be built, and baselining the project’s scope, schedule, and budget) to create greater understanding within Sound Transit and with project stakeholders.

**Create clearer escalation paths and escalate issues more quickly.**

Even with the clearest of policy language in service of creating bright lines between what is part of a Sound Transit project and what isn’t, there will continue to be shades of grey and differences in interpretation. And while project teams should be empowered to resolve differences in

interpretation at the lowest level, they should also be prepared to quickly escalate issues that need senior staff or even Board involvement. An updated Scope Control Policy can better articulate the conditions in which staff should escalate issues around scope control and betterments.

**Socialize and strengthen Sound Transit standards and program guidance.**

Since the passage of ST3, Sound Transit staff have created and updated a variety of tools, resources, and guidance documents to facilitate project development and to speed project delivery. These include resources like the System Expansion Implementation Plan (which articulates multiple approaches in support of a shared understanding and expectations of project scope), the Station Experience Design Guidelines (which establish standards and requirements in support of passenger experience consistency, design efficiency, and supportive station environments), the Requirements Manual (which replaces and updates the Design Criteria Manual), and many others that are intended to support consistent implementation of programmatic activities across discrete projects and which may often intersect with the scope control and betterments topic (e.g., administration of ST3 station access allowance funding). Ensuring there is broad awareness – internally, externally, and with the Board – and being intentional and accountable to their application will also help mitigate and minimize the issues identified by the TAG.

DRAFT

# Memo

## Next Steps

The following table identifies Sound Transit staff's current proposed schedule for advancing a response to the TAG's recommendation related to strengthening and enforcing an agency betterment policy.

Timeframe	Activities
Week of 3/4	<ul style="list-style-type: none"><li>• Distribute memo to full Board</li><li>• Brief Executive Committee on memo contents and update to Scope Control Policy (3/7)</li></ul>
Week of 3/11	<ul style="list-style-type: none"><li>• Brief System Expansion Committee on memo contents and update to Scope Control Policy (3/14)</li><li>• Brief Board leadership on input received in March Executive Committee and System Expansion Committee (3/15)</li></ul>
Week of 3/18	<ul style="list-style-type: none"><li>• Progress policy update per Board member feedback at Executive and System Expansion Committee meetings</li><li>• Brief TAG</li></ul>
Week of 3/25	<ul style="list-style-type: none"><li>• Provide full Board status update on Scope Control Policy update (3/28)</li></ul>
Week of 4/1	<ul style="list-style-type: none"><li>• Seek do pass recommendation from Executive Committee on Scope Control Policy update (4/4)</li></ul>
Week of 4/8	<ul style="list-style-type: none"><li>• Brief System Expansion Committee (4/11)</li><li>• Accept potential amendments from Board members</li></ul>
Week of 4/15	<ul style="list-style-type: none"><li>• Brief TAG</li><li>• Accept potential amendments from Board members</li></ul>
Week of 4/22	<ul style="list-style-type: none"><li>• Board action to update Scope Control Policy (4/25)</li></ul>
May-September 2024	<ul style="list-style-type: none"><li>• Develop a policy implementation plan to demonstrate how updated policy direction will be carried forward through project development and delivery.</li><li>• Continue Board and TAG engagement at appropriate times to demonstrate progress and to course correct.</li></ul>



## Appendix: Examples

The following are brief examples of circumstances that illustrate the dynamics around scope control, betterments, and AHJ requests/requirements that can slow project delivery or add to project and life cycle cost.

1. Disagreements between Sound Transit and a jurisdiction related to street right-of-way widths, utility upgrades related to future property development (but not Sound Transit's project needs), and asphalt vs. concrete streets are a permitting risk. This risk has the potential to add more than \$2 million in project costs as well as ongoing life cycle costs to Sound Transit for stormwater infrastructure that would the jurisdiction has stated would not be allowed in public ROW and would not be maintained by the jurisdiction requiring it.
2. A jurisdiction adopted an ordinance without consulting Sound Transit that required parking structures to have underground levels to reduce the size and bulk above grade, regardless of site conditions (e.g., water table). It included a 30' height limitation and covered pedestrian walkways. Glazing or screening was required, which would trigger mechanical ventilation. Ramps could not be viewable from outside the structure, forcing ramps to the center of the structure, potentially increasing costs. A percentage of the ground floor was required to be active use.
3. While not entirely about scope control or betterments, Sound Transit has incorporated passenger restrooms into stations to resolve permitting issues. Incorporating restrooms that were not originally planned has discrete capital project budget and schedule impacts, but also adds life cycle costs in the form of ongoing operations, maintenance, and security functions brought on by passenger restrooms. The lack of an agency policy on restrooms meant project teams did not have a compelling and defensible argument against these AHJ requirements and speaks to the importance of clear station standards and requirements to help address and resolve these kinds of disagreements.