



City of Tacoma
Hearing Examiner

November 27, 2017

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Re: Vacation Petitions Nos. 124.1382, 124.1383, and 124.1384
Petitioner: Puyallup Tribe of Indians

Dear Parties,

With regard to the above referenced vacation petition matters, please find enclosed copies of the Hearing Examiner's Reports and Recommendations to the Tacoma City Council entered on November 27, 2017, as the result of public hearings held on November 8 and 16, 2017.

Sincerely,

Louisa Legg
Office Administrator

Enclosures (3): Reports & Recommendations

cc: Transmitted via Electronic Mail Delivery
Pierce County Assessor-Treasurer (Darci Brandvold)
Comcast (Aaron Cantrell)
Puget Sound Energy (Marilynn Danby)
Tacoma Clerk's Office (Nicole Emery)
Legal (Steve Victor)
Tacoma Public Utilities, Real Estate Services (Gregory Muller)
Tacoma Water, Water Distribution (Jesse Angel)
Tacoma Power/T&D Electrical Services (Jeffrey Rusler, P.E.)
Tacoma Fire Department (Chris Seaman, P.E.)
Environmental Services (Larry Criswell, C.E.)
Public Works/LID, City of Tacoma (Sue Simpson)
Planning and Development Services Department, City of Tacoma (Jana Magoon/Lisa Spadoni)
Planning and Development Services Department, City of Tacoma (Lihuang Wung)

OFFICE OF THE HEARING EXAMINER

CITY OF TACOMA

REPORT AND RECOMMENDATION

TO THE CITY COUNCIL

PETITIONER: Puyallup Tribe of Indians

FILE NO: HEX 2017-031 (124.1383)

SUMMARY OF REQUEST:

A petition from the Puyallup Tribe of Indians to vacate that portion of the East R Street air rights, beginning at a minimum vertical distance of 24.5 feet from the finished street grade, between East 29th Street and East 30th Street, abutting and adjacent to tribal property, in connection with the Emerald Queen Casino relocation project.

RECOMMENDATION OF THE HEARING EXAMINER:

The request is hereby recommended for approval, subject to conditions.

PUBLIC HEARING:

After reviewing the report of the Department of Public Works, Real Property Services Division ("RPS") and examining available information on file with the petition, the Hearing Examiner conducted a public hearing on the petition on November 8, 2017.

ORIGINAL

FINDINGS, CONCLUSIONS, AND RECOMMENDATION:

FINDINGS:

1. The Petitioner, the Puyallup Tribe of Indians, a federally recognized Indian Tribe (hereinafter the “Tribe”), is requesting the vacation of that certain portion of the East R Street air rights, beginning at a minimum vertical distance of 24.5 feet from the finished street grade, between East 29th Street and East 30th Street. The area sought to be vacated is more particularly described as:

That portion of the Southwest Quarter of the Northeast Quarter of Section 10, Township 20 North, Range 03 East of the Willamette Meridian, more particularly described as follows:

That portion of East ‘R’ Street air rights lying southerly of the south margin of East 29th Street extended between the Northeast corner of Block 7946 of the Indian Addition to the City of Tacoma, according to the Plat thereof filed on May 1, 1896 in Book 7 of Plats at pages 30 and 31, records of Pierce County, Washington, and the Northwest corner of Block 7950 of said plat and lying northerly of the north margin of East 30th Street extended between the Southeast corner of Block 8045 and the Southwest corner of Block 8049, both of said plat, beginning at a minimum vertical distance of 24.5 feet above as measured perpendicular to the finished street grade.

All situate in the City of Tacoma, County of Pierce, State of Washington.

Ex. 1; Cornforth Testimony.

2. The Federal Government, through its Bureau of Indian Affairs, and the Puyallup Tribe of Indians own all abutting real property. The vacation petition has been joined by these parties as the owners of all real property abutting the portion of air rights proposed to be vacated. *Cornforth Testimony.*

3. With regard to physical land characteristics, the right-of-way area is fully improved with concrete curb, gutter and sidewalk. The surrounding site is currently under major construction. This segment of roadway will ultimately be redesigned, replaced and/or restored to current City standards for full buildout, and the street right-of-way area will remain passable to vehicular traffic. *Ex. 1; Cornforth Testimony, Hunter Testimony.*

4. The City of Tacoma acquired this right-of-way, and the attendant air rights proposed for vacation, by Plat filing of the Indian Addition to the City of Tacoma as filed of record in Volume 7, at Pages 30-31, records of Pierce County, Washington. *Exs. 4 and 5; Cornforth Testimony.*

5. The requested air rights vacation has been reviewed by outside quasi-governmental agencies, City departments/divisions, and utility providers. The reviewing agencies have indicated no

objection to the proposed vacation of air rights, provided that the conditions in section 6 below are imposed. *Exs. 6 and 7; Cornforth Testimony.* The Petitioner concurs in the conditions recommended by RPS and agrees to comply with the same. *Hunter Testimony.*

6. No one appeared at the hearing in opposition to the Tribe's petition to vacate air rights over the subject area. Members/representatives of the Tribe appeared on its behalf and testified in person and through written submissions. *Exs. 9 through 12; Hunter Testimony.* Written submissions were received from Robert L. Hunter, Jr., legal counsel for the Tribe, Frank Wright, the General Manager of the Emerald Queen Casino, Julie Hamilton, the Tribe's Chief Financial Officer, and Matt Wadhvani, Assistant CFO for the Tribe, and these submissions were made part of the record. *Exs. 9 through 12.*

7. The public would benefit from the proposed air rights vacation to the extent that it will facilitate commercial uses of the adjoining lands, it will facilitate economic and employment viability to the community, and it will facilitate other, related economic development, while still leaving the street level right-of-way passable to traffic. *Exs. 1 and 9 through 12; Hunter Testimony, Cornforth Testimony.*

8. The air rights that are the subject of this vacation request are not contemplated for future public use, and vacation of the air space would not adversely affect the public need. *Ex. 1; Cornforth Testimony.*

9. No abutting property or nearby property would become landlocked or have its access substantially impaired as a result of the vacation of the requested air rights. *Ex. 1; Hunter Testimony, Cornforth Testimony.*

10. The proposed air space vacation neither abuts, nor is proximate to a body of water and, therefore, the provisions of RCW 35.79.035 are not implicated. *Ex. 1; Hunter Testimony, Cornforth Testimony.*

11. Pursuant to *WAC 197-11-800(2)(h)*, the vacation of streets or roads is exempt from the threshold determination and Environmental Impact Statement requirements of RCW 43.21.C, the *State Environmental Policy Act (SEPA)*.

12. RPS' Preliminary Report, as amended (*Ex. 1a.*), is entered into this record as Exhibits 1 and 1a (the "Report"). The Report accurately describes the requested vacation and project proposed to follow the vacation, general and specific facts about the site and area, and applicable codes. The Report is incorporated herein by reference as though fully set forth.

13. On October 5, 2017, a yellow public notice sign was placed at the southeasterly corner of East 29th Street and East R Street; and at the northwesterly corner of East 30th Street at East R Street. Subsequently, on October 6, 2017, the public notice for the November 8, 2017, hearing was mailed to all parties of record within 1,000 feet of the requested vacation area and advertised in the Daily Index newspaper. A public notice memo was placed into the glass display case located on the First Floor of the Tacoma Municipal Building next to the City's Finance Department. A public notice memo was advertised on both the City of Tacoma web site at address: <http://www.cityoftacoma.org/notices> and on Municipal Television Channel 12.

14. Any conclusion hereinafter stated which may be deemed to be a finding herein is hereby adopted as such.

CONCLUSIONS:

1. The Hearing Examiner has jurisdiction over the parties and subject matter in this proceeding. *See Tacoma Municipal Code ("TMC") 1.23.050.A.5 and TMC 9.22.*

2. The Hearing Examiner's role in street vacation proceedings is quasi-judicial in nature, leading to a legislative determination by the City Council when enacted by ordinance. *State ex rel. Myhre v. City of Spokane*, 70 Wn.2d 207, 218, 442 P.2d 790 (1967).

3. Petitions for the vacation of public right-of-way are reviewed for consistency with the following criteria:

1. That the vacation will provide a public benefit, and/or will be for public purpose;
2. That the right-of-way vacation shall not adversely affect the street pattern or circulation of the immediate area or the community as a whole;
3. That the public need shall not be adversely affected;
4. That the right-of-way is not contemplated or needed for future public use;
5. That no abutting owner becomes landlocked or his access will not be substantially impaired; i.e., there must be an alternative mode of ingress and egress, even if less convenient; and
6. That the vacation of right-of-way shall not be in violation of RCW 35.79.035.

TMC 9.22.070.

4. The petitioner must demonstrate by a preponderance of the evidence that its vacation request conforms to the foregoing criteria. *See TMC 1.23.070.*

5. Findings entered herein, based upon substantial evidence in the hearing record, support a conclusion that the requested air rights vacation conforms to the criteria for the vacation of street rights-of-way, provided the conditions recommended herein are imposed. The public would experience benefits from the economic development that the requested vacation will facilitate. The requested air rights vacation would not impair traffic circulation, landlock any abutting owner, or adversely affect the public need.

6. Accordingly, the requested air rights vacation should be approved subject to the following conditions:

A. SPECIAL CONDITIONS:

1. PAYMENT OF FEES

The petitioner shall compensate the City in an amount equal to the full appraised value of the area and rights vacated. One-half of the revenue received shall be devoted to the acquisition, improvement and maintenance of public open space land and one-half may be devoted to transportation projects and/or management and maintenance of other City owned lands and unimproved rights-of-way. RPS will commence its efforts to get the vacation area appraised based on this recommendation that the vacation proceed. *TMC 9.22.010.*

2. TACOMA POWER

Tacoma Power has no objection to this petition; however, Second Reading of the Ordinance shall be conditioned upon either the completion of Work Order Number 16-0040 which includes the formal and proper relocation and undergrounding of Tacoma Power infrastructure thru the new East 30th Street connector road, or in the alternative, the Tribe and the City may reach agreement on separating certain elements of the work currently encompassed in Work Order Number 16-0040 into a separate work order, in order to be able to move to Second Reading sooner.

B. USUAL CONDITIONS:

1. The recommendation set forth herein is based upon representations made and exhibits, including development plans and proposals, submitted at the hearing conducted by the Hearing Examiner. Any substantial change(s) or deviation(s) in such development plans, proposals, or conditions of approval imposed shall be subject to the approval of the Hearing Examiner and may require further and additional hearings.
2. The recommendation made herein is subject to all applicable federal, state, and local laws, regulations, and ordinances. Compliance with such laws, regulations, and ordinances is a condition precedent to any approvals that result herefrom and is a continuing requirement of such approvals. By accepting any resulting approvals, the Petitioner represents that the development and activities allowed will comply with such laws, regulations, and ordinances. If, during the term of the approval(s) granted, the development and activities permitted do not comply with

such laws, regulations, or ordinances, the Petitioner agrees to promptly bring such development or activities into compliance.

C. ADVISORY COMMENTS:

1. TACOMA WATER

Tacoma Water has no objection to this petition; however, Tacoma Water does have underground facilities within the right-of-way area from which the air rights are requested to be vacated. Tacoma Water must continue to have access to these facilities in spite of the vacation being granted.

2. COMCAST

Comcast has no objection to this petition; however, Comcast has infrastructure attached to Tacoma Power poles within the area of vacation anticipated to be relocated with Tacoma Power facilities to the East 30th Street connector road under Work Order 16-0040. Execution of third party easement is required in the event relocation is not completed prior.

7. Accordingly, the vacation petition should be granted, subject to conditions set forth in Conclusion 6 above.

8. Any finding hereinbefore stated which may be deemed to be a conclusion herein is hereby adopted as such.

RECOMMENDATION:

The vacation request is hereby recommended for approval, subject to conditions contained in Conclusion 6, above

DATED this 27th day of November, 2017.



JEFF H. CAPELL, Hearing Examiner

NOTICE

RECONSIDERATION/APPEAL OF EXAMINER'S RECOMMENDATION

RECONSIDERATION:

Any aggrieved person or entity having standing under the ordinance governing the matter, or as otherwise provided by law, may file a motion with the office of the Hearing Examiner requesting reconsideration of a decision/recommendation entered by the Examiner. A motion for reconsideration must be in writing and must set forth the alleged errors of procedure, fact, or law and must be filed in the Office of the Hearing Examiner within 14 calendar days of the issuance of the Examiner's decision/recommendation, not counting the day of issuance of the decision/recommendation. If the last day for filing the motion for reconsideration falls on a weekend day or a holiday the last day for filing shall be the next working day. The requirements set forth herein regarding the time limits for filing of motions for reconsideration and contents of such motions are jurisdictional. Accordingly, motions for reconsideration that are not timely filed with the Office of the Hearing Examiner or do not set forth the alleged errors shall be dismissed by the Examiner. It shall be within the sole discretion of the Examiner to determine whether an opportunity shall be given to other parties for response to a motion for reconsideration. The Examiner, after a review of the matter, shall take such further action as he/she deems appropriate, which may include the issuance of a revised decision/recommendation. (*Tacoma Municipal Code 1.23.140*)

APPEALS TO CITY COUNCIL OF EXAMINER'S RECOMMENDATION:

Within 14 days of the issuance of the Hearing Examiner's final recommendation, any aggrieved person or entity having standing under the ordinance governing such application and feeling that the recommendation of the Examiner is based on errors of procedure, fact or law shall have the right to appeal the recommendation of the Examiner by filing written notice of appeal with the City Clerk, stating the reasons the Examiner's recommendation was in error.

Appeals shall be reviewed and acted upon by the City Council in accordance with TMC 1.70.

GENERAL PROCEDURES FOR APPEAL:

The Official Code of the City of Tacoma contains certain procedures for appeal, and while not listing all of these procedures here, you should be aware of the following items which are essential to your appeal. Any answers to questions on the proper procedure for appeal may be found in the City Code sections heretofore cited:

1. The written request for review shall also state where the Examiner's findings or conclusions were in error.
2. Any person who desires a copy of the electronic recording must pay the cost of reproducing the tapes. If a person desires a written transcript, he or she shall arrange for transcription and pay the cost thereof.

Notice - No Fee (7/11/00)

**FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND RECOMMENDATION**