

OFFICE OF THE HEARING EXAMINER

CITY OF TACOMA

REPORT AND RECOMMENDATION

TO THE CITY COUNCIL

PETITIONERS: Paul and Deidra Miller

FILE NO.: HEX2021-018 (SV No. 124.1416)

SUMMARY OF REQUEST:

The Real Property Services division (“RPS”) of the City of Tacoma (“City”) Public Works Department received a petition from Paul and Deidra Miller (hereinafter collectively referred to as the “Millers” or “Petitioners”), requesting a vacation of a portion of the North Narrows Drive right-of-way at North 26th Street. The vacation is billed as being to facilitate future residential development on abutting, undeveloped real property.

RECOMMENDATION:

The vacation petition is hereby recommended for approval, subject to the conditions set forth below.

PUBLIC HEARING:

After reviewing RPS’s Preliminary Report (the “Report”—Exhibit C-1), and examining available information on file with the petition, the Hearing Examiner conducted a public hearing on the petition via Zoom on July 22, 2021.¹ Troy Stevens, a Senior Real Estate Specialist with RPS, represented the City. The Petitioners were represented by Paul E. Miller who appeared *pro se* as the lone witness for the Petitioners. Testimony was taken, and exhibits were reviewed and admitted. After the hearing the record was left open for RPS to correct a typographical error and to update some of the documentary exhibits so that they would conform with late changes that were referenced in testimony regarding revision to the legal description of the Vacation Area (defined below). Because of overlapping absences of City personnel, the exhibits could not be finalized and the record could not be closed finally until August 10, 2021, at which date the City submitted an entire replacement battery of exhibits to account for the last minute change to the Vacation Area. By email submitted on August 23, 2021, the

¹ Due to National, State of Washington (“State”) and City Proclamations of Emergency caused by the COVID-19 virus, the City closed the Tacoma Municipal Building to the public until further notice on or around March 17, 2020. As a result, the public hearing in this matter was conducted virtually using Zoom teleconferencing with both internet visual and audio access, as well as separate telephonic (only) access via call in number on Zoom.

Petitioners indicated that they had no objection to this wholesale resubmission, and so this Report and Recommendation references the City's replacement exhibits.

FINDINGS, CONCLUSIONS, AND RECOMMENDATION:

FINDINGS:

1. The Millers have petitioned the City to vacate a portion of North Narrows Drive near its intersection with the North 26th Street right-of-way (the "Vacation Area"), to facilitate construction of a future residential development. *Stevens Testimony, Miller Testimony; Ex. C-1, Ex. C-2.*

2. RPS provided the following legal description for the Vacation Area:

THAT PORTION OF NARROWS DRIVE IN THE NORTHWEST QUARTER OF THE NORTHWEST QUARTER OF SECTION 35, TOWNSHIP 21 NORTH, RANGE 2 EAST OF THE WILLAMETTE MERIDIAN, DESCRIBED AS FOLLOWS: COMMENCING AT THE NORTHWEST CORNER OF SAID SECTION 35; THENCE SOUTH 87°51'49" EAST ALONG THE NORTH LINE THEREOF, A DISTANCE OF 408.58 FEET TO THE NORTHEASTERLY CORNER OF LOT 13, BLOCK E, MILLER'S SKYLINE TERRACE 2ND ADDITION, AS PER PLAT RECORD IN VOLUME 17 OF PLATS, PAGE 18, RECORDS OF PIERCE COUNTY AUDITOR; THENCE SOUTH 55°35'26" EAST ALONG THE NORTHEASTERLY LINE OF SAID LOT 13 AND ITS SOUTHERLY EXTENSION, A DISTANCE OF 126.61 FEET TO ITS INTERSECTION WITH THE SOUTHERLY LINE OF THAT VACATING PORTION OF NARROWS DRIVE BY ORDINANCE NUMBER 23199, RECORDED UNDER RECORDING NUMBER 8407090192, AND THE TRUE POINT OF BEGINNING; THENCE CONTINUING SOUTH 55°35'26" EAST ALONG SAID SOUTHERLY EXTENSION, A DISTANCE OF 111.72 FEET; THENCE SOUTH 03°12'27" WEST, A DISTANCE OF 25.02 FEET TO THE BEGINNING OF A CURVE RADIAL TO SAID LINE; THENCE WESTERLY A DISTANCE OF 230.83 FEET ALONG THE CURVE CONCAVE TO THE SOUTH, HAVING A RADIUS OF 1082.71 FEET AND A CENTRAL ANGLE OF 12°12'55", TO THE SOUTHERLY LINE OF THAT VACATING PORTION OF NARROWS DRIVE BY ORDINANCE NUMBER 23199; THENCE NORTH 59°10'28" EAST ALONG SAID SOUTHERLY LINE, A DISTANCE OF 71.51 FEET TO THE SOUTHERLY EXTENSION OF THE COMMON LOT LINE BETWEEN SAID LOTS 12 AND 13; THENCE NORTH 50°00'4 7" EAST, A DISTANCE OF 101.54 FEET TO THE POINT OF BEGINNING. CONTAINS 0.239 ACRES MORE OR LESS. *Ex. C-1, Ex. C-3.*

3. The Vacation Area, is not part of the City's inventory of improved, traversable right-of-way,² as it is currently unimproved and not open for any typical ROW surface use. It is an irregular

² Hereafter, "right-of-way" may be abbreviated as "ROW."

triangle-like shape and abuts the 100-foot wide Cushman transmission right-of-way at the northwest corner of North Narrows Drive and North 26th Street. It is mostly level, covered in grass, and has a partial vegetation barrier that acts like a fence. There is also a driveway on the North 26th Street side of the Vacation Area that is barricaded. *Stevens Testimony; Ex. C-1~ Ex. C-4.*

4. The City acquired the Vacation Area through County Treasurer's Deed, dated July 15, 1942, and recorded under Pierce County Recording number 1302845.³ The long rectangle to the northwest of the Vacation Area shown shaded in light red in Exhibit C-2 was previously vacated as ROW in 1984 by City of Tacoma Ordinance No. 23199, which was recorded under Pierce County recording number 8407090192. *Stevens Testimony; Ex. C-5, Ex. C-6.*

5. The proposed vacation provides some public benefit because it will add additional taxable square footage to the Petitioners' real property and the intended development, thereby potentially increasing City revenue. In addition, the vacation will facilitate adding housing stock to Tacoma's tight housing market. *Stevens Testimony, Miller Testimony; Ex. C-1.*

6. The City determined that the Vacation Area is not contemplated or needed for future public use as traversable ROW, and no abutting property will become landlocked by the vacation, nor will any access be substantially impaired by the vacation. The Vacation Area neither abuts, nor is proximate to a body of water and, therefore, the provisions of RCW 35.79.035 are not implicated. City and/or private utility facilities located in the Vacation Area can be adequately preserved/protected through the retention of easements. *Id.*

7. RPS circulated the petition for review by interested governmental agencies, City departments/divisions, and utility providers, both public and private. None of the foregoing objected to the requested vacation, provided that the conditions set forth herein below are met. *Stevens Testimony; Exs. C-7~C-17.*

8. Miller did not indicate any objection to the City's conditions of approval at the hearing or otherwise. Further, he testified that he had agreed to revisions to the Vacation Area during the City's review in order to meet certain City concerns on the way to arriving at the final legal description for the Vacation Area set forth above and also included in the record as Exhibit C-3.

9. Notices of the pending vacation and the attendant Public Hearing were posted/published as follows:

- a. A yellow public notice sign was posted at the westerly corner of the intersection of North 26th and Narrows Drive on June 17, 2021;
- b. A yellow public notice sign was also placed 237 feet westerly of the westerly corner of North 26th and Narrows Drive also on June 17, 2021;
- c. A public notice memo was placed in the glass display case located on the first floor of the Tacoma Municipal Building next to the Finance Department on June 18, 2021;

³ This deed is apparently also referred to as City of Tacoma deed number D-1421. *Stevens Testimony; Ex. C-1.*

- d. A public notice memo was advertised on the City of Tacoma web site on June 18, 2021, at internet address: <http://www.cityoftacoma.org/page.aspx?nid=596>;
- e. Public notice was advertised in the Daily Index newspaper on June 18, 2021;
- f. Public notice was mailed to all owners of record within 300 feet of the Vacation Area on June 18, 2021; and
- g. Public notice was advertised on Municipal Television Channel 12 on June 18, 2021. *Stevens Testimony; Ex. C-1.*

10. RPS’s Report, which is entered into the record as Exhibit C-1, accurately describes the proposed vacation, general and specific facts about the surrounding site and the Vacation Area, and lists applicable statutes/regulations, as well as specifics regarding the City’s requested easement reservation(s). The Report is incorporated herein by reference as though fully set forth. To the extent that any content of the Report is in conflict with this Report and Recommendation, the provisions of this Report and Recommendation shall control.

11. Any finding above, which may be more properly deemed or considered a conclusion, is hereby adopted as such.

CONCLUSIONS OF LAW:

1. The Hearing Examiner has jurisdiction over the parties and subject matter in this proceeding to conduct a hearing and make a recommendation to the City Council. *See Tacoma Municipal Code (“TMC”) 1.23.050.A.5, TMC 9.22.070, RCW 35.79.030.*

2. The Hearing Examiner’s role in street vacation proceedings is quasi-judicial in nature (making findings and conclusions based on evidence presented), leading to a legislative determination by the City Council that is enacted by ordinance. *State ex rel. Myhre v. City of Spokane, 70 Wn.2d 207, 218, 442 P.2d 790 (1967); TMC 9.22.070.*

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

4. Petitions for the vacation of public right-of-way must be consistent with the following criteria:

- 1. The vacation will provide a public benefit, and/or will be for a public purpose.
- 2. The [petitioned-for] right-of-way vacation shall not adversely affect the street pattern or circulation of the immediate area or the community as a whole.

3. The public need shall not be adversely affected.
4. The petitioned-for right-of-way is not contemplated or needed for future public use.
5. No abutting owner becomes landlocked or access will not be substantially impaired; i.e., there must be an alternative mode of ingress and egress, even if less convenient.
6. The petitioned-for vacation of right-of-way shall not be in violation of RCW 35.79.035. *TMC 9.22.070*.⁴

5. The Petitioners must demonstrate, by a preponderance of the evidence, that their requested vacation petition meets the foregoing criteria. All evidence in the hearing record is considered in determining whether this burden of proof has been met. *See TMC 1.23.070*.

6. Findings entered herein, based upon the preponderance of evidence in the hearing record, support a conclusion that the requested vacation conforms to the criteria for the vacation of ROW set forth at Conclusion 4 above, provided the conditions recommended below are imposed and met. No potential for landlocking an abutting owner exists from granting the petition, nor is there any need for, or public ROW purpose served by retaining the Vacation Area as ROW that cannot be served by retaining utility easements. The Vacation Area plays no appreciable role in the “[s]treet pattern or circulation of the immediate area or the community as a whole” at present as it is not being used for any above ground ROW purpose. Public benefit accrues through the potential for increased tax revenue, and the ultimate increase in available housing that the vacation will facilitate.

7. “RCW 35.79.010 gives the legislative authority [of a municipality] -- the city council -- sole discretion as to whether a petition to vacate shall be granted or denied.”⁵

8. Given the foregoing, the Hearing Examiner recommends that the requested street vacation 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 Vacation Area. 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 ROW areas. *TMC 9.22.010*.

⁴ For consistency, outline numbering of the criteria is kept the same as in the original TMC text.

⁵ *Puget Sound Alumni of Kappa Sigma v. Seattle*, 70 Wn.2d 222, 238-239, 422 P.2d 799, 808-809 (1967).

2. ENVIRONMENTAL SERVICES (ES)

An easement must be reserved in favor of the City in the vacation ordinance covering an 18" surface water main that is present in the Vacation Area.

4. TACOMA WATER

An easement must be reserved in favor of the City in the vacation ordinance over approximately the south 10 feet of the easterly 25 feet of the Vacation Area for City water infrastructure.

5. TACOMA POWER

An easement must be reserved in the vacation ordinance over that portion of the Vacation Area legally described by Tacoma Power in Exhibit C-9 for existing power facilities.

B. ADVISORY COMMENTS:

1. An In-Lieu amount of \$2,972.20 is due for sanitary sewer, however, that amount is not required to be paid as part of the vacation process unless the Petitioners so elect. If the Petitioners choose not to pay now, the obligation will remain outstanding and may increase over time.

2. After a late revision to the legal description of the Vacation Area to account for a minimum of 10 feet of clearance from a nearby signal mast arm pole and the private property line, Public Works' Traffic Division had no concerns regarding, or objection to the vacation.

C. USUAL CONDITIONS/COMMENTS:

1. The recommendation set forth herein is based upon representations made and exhibits, including any development representations, plans and proposals, submitted at the hearing conducted by the Hearing Examiner. Any material change(s) in any such development plans, proposals, or conditions of approval imposed may potentially be subject to the review of the Hearing Examiner and may require additional review and hearings.

2. The approval recommended 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 the recommendation herein made, and is a continuing requirement of any resulting approvals. By accepting any resulting approvals, the Petitioner represents that any development or other activities facilitated by the vacation will comply with such laws, regulations, and ordinances. If, during the term of any approval granted, any development or other activities permitted do not comply with such laws, regulations, or ordinances, the Petitioner agrees to promptly bring such development or activities into compliance.

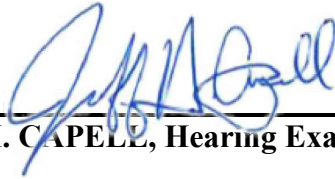
9. Accordingly, the petition is recommended for approval, subject to the conditions set forth in Conclusion 8 above.

10. Any above stated conclusion, which may be more properly deemed or considered a finding, is hereby adopted as such.

RECOMMENDATION:

The present vacation petition is hereby recommended for approval, subject to the conditions set forth in Conclusion 8 above.

DATED this 23rd day of August, 2021.



JEFF H. CAPELLE, 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 issued 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 that 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 may 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*