

William T. Lynn
Direct: (253) 620-6416
E-mail: blynn@gth-law.com

June 14, 2017

Mayor Marilyn Strickland and
Members of the Tacoma City Council
747 Market Street, 12th Floor
Tacoma, WA 98402

RE: David Smith Appeal, Street Vacation Petition No. 124.1371
(File No. HEX 20016-037)
Council Hearing June 20, 2017

Dear Mayor Strickland and Members of the City Council:

Introduction

David Smith owns commercial property at the intersection of what would have been two arterials, East R Street and East 29th. In addition to those two access points he has always had a third access to an alley right-of-way connecting to streets on both the north and south. As a result of the proposed alley vacation and other recent actions by the City and State, Mr. Smith's property would be left with a single access to 29th and a potential easement over Tribal land that would be:

- a. Potentially not usable at all because of City restrictions;
- b. Of limited benefit at best because it would parallel the primary driveway access and duplicate its function;
- c. Subject to Tribal regulation meaning that Mr. Smith's commercial property would be partially subject to City jurisdiction and partially subject to the Tribe's requirements;
- d. Subject to taxation by the Tribe; and
- e. Because of complex Bureau of Indian Affairs rules, potentially subject to a limited term, with limited assignability to future owners and banks, and with other limitations.

Reply to:
Tacoma Office
1201 Pacific Ave., Suite 2100 (253) 620-6500
Tacoma, WA 98402 (253) 620-6565 (fax)

Seattle Office
600 University, Suite 2100 (206) 676-7500
Seattle, WA 98101 (206) 676-7575 (fax)

The proposed vacation substantially impairs access to Mr. Smith's property and should be denied or remanded to the Hearing Examiner for consideration of alternatives.

Background

Mr. Smith's family has owned the property at what was the intersection of East 29th Street and East R Street for over 100 years. His property is commercially zoned and he plans to develop it with that use. The Tribe owns the balance of the property on the block and has discussed a variety of plans for that land with Mr. Smith. Until recently, the Tribe's announced plans were to use this property for a surface parking lot. Now, the Tribe has proposed to build a structured parking garage with a casino. Mr. Smith does not oppose this plan at all, but also does not want to see it further diminish his access rights, which have already been dramatically limited by other actions.

Mr. Smith's property has in the past had access on three of its sides: directly onto East 29th Street, (an arterial running east and west); directly onto East R Street, (running north and south); and onto an alley that would have connected both to Portland Avenue on the west and to East R Street on the east. (See Exhibit A to this letter).

In very recent years, the alignment of East R Street has been shifted so that it no longer abuts his property and no longer provides access. (Exhibit A and Exhibit B) As Mr. Smith noted in his testimony before the Hearing Examiner, this made the alley access even more important than it had been previously. In particular, the alley connection to Portland Avenue became critical because the East R Street realignment also meant the alley no longer would connect on its east end to East R Street.

And, alley access is particularly important to commercial uses, especially smaller ones that occupy a parcel like Mr. Smith's rather than a shopping center. Commercial uses require truck deliveries and that generally occurs in a rear entrance so conflicts with customers can be minimized. Trucks cannot be allowed to block the limited available parking. Garbage pickup also occurs in the back and that is where garbage and recycling receptacles are located. In the case of a restaurant, there are also food waste issues and those are, as a matter of course, a "back door" service.

To provide a "replacement" for Mr. Smith's lost alley to Portland Avenue, the Puyallup Tribe has proposed an easement over land not owned by the Tribe but rather the Bureau of Indian Affairs (BIA) in trust for the Tribe. The Hearing Examiner apparently accepted the testimony that vacation of the alley without a useful replacement could substantially impair Mr. Smith's access, making the vacation unlawful. As a result, she recommended a condition requiring the proposed replacement easement.

Mr. Smith's access would be substantially impaired by the proposed vacation even with this condition. The proposed easement is not an even remotely acceptable substitute because, as the City staff has admitted at the hearing, a driveway might not even be permitted at that location. The easement could exist on paper but not be buildable. Moreover, the extensive Federal regulatory process, and the fact that Mr. Smith's property would be subjected to Tribal taxation and land use regulations make this at best only a very poor alternative, one that will leave access impaired.

Argument

1. Vacation is an Extraordinary Remedy.

The Council has discretion and is not required to vacate rights-of-way. Many street vacations are simple matters. They involve unopened rights-of-way through areas where roads could never be built (like gulches), or through big blocks of property where there is an overall development plan (like a shopping center) and substitute accesses are provided to all portions as part of a cohesive plan. A vacation like this one though that involves a dramatic impact on the access to an otherwise fully developable property is an extraordinary action with impacts on one owner. The City is asked by the Tribe to take away an access right that, in this case, has been in place and relied upon for over 100 years. The property owner has paid taxes on the basis of a fully accessible commercial property for over 100 years. The Tribe now asks the City to take away some of those rights and to isolate Mr. Smith's property. In a way, this is more like the condemnation of property¹ than anything else.

In the past, this kind of issue has not been presented to the City, because the City has required 100% joinder in a vacation application by affected property owners. If all people along a street or alley agree it should be vacated, there is no "loss" of access. Here, the proposal gerrymanders the boundaries of the vacation. Technically, 100% of the property adjoining the segment of the alley to be vacated did sign on. However, the vacation leaves a tiny chunk of public alley property adjacent to the Smith property that literally connects to nothing. This is no different that vacating both ends of a street, leaving an unusable segment in the middle. It would be an inappropriate use of the City vacation power without full approval of the people affected. It is contrary to many years of City practice and, for that reason alone, should be denied.

¹ See, *TT Properties v. City of Tacoma*, 192 Wn. 2d 238 (2016), where the City recently paid damages for the loss of one access by a property owner as the result of Sound Transit actions.

2. Legal Requirements.

The proposed vacation also does not meet the legal requirements of state statute and City Code because it substantially impairs Mr. Smith's access. Both the state road vacation statute and the Tacoma Municipal Code require that no abutting owners' access will be substantially impaired. Citing recent case law involving a takings claim against the City of Tacoma, the (TT Properties case) the Hearing Examiner said that under some legal authority, the termination of the alley right-of-way and Mr. Smith's use of that would be considered a substantial impairment of his access. In order to avoid that, she recommended that the Council require the Tribe to provide an access easement for the benefit of Mr. Smith. As described below, this does not provide an alternative means of ingress and egress to the property and Mr. Smith's access remains impaired.

A. The Proposed Easement Still Leaves Access Impaired. Because of other City requirements, it is not clear that the proposed easement could ever be used. A property owner like Mr. Smith cannot put a driveway anywhere he wants. The City has driveway spacing requirements that take into account nearby accesses and other factors and those rules can restrict, limit, or in some cases deny the use of a particular location altogether.

The undisputed testimony at the hearing was that Mr. Smith's primary commercial driveway would already have to be shifted westerly on East 29th because of the need to separate that driveway from East R Street and the handicap ramp that has already been installed at that location. (Testimony of City Traffic Engineer Jennifer Kammerzell). In other words, because of City restrictions, Mr. Smith's primary driveway by code would be required to be located toward the proposed Tribal easement. So, under the best of circumstances, there would be two parallel driveways in close proximity, Mr. Smith's primary access, and the potential tribal easement access. The benefit of a nearby parallel access is doubtful.

In addition, Mr. Smith was told that the Tribe's main casino entrance onto East 29th Street would be located immediately west of his property, meaning that there would be a third major driveway proposed in a small area. This is problematic because of the City's spacing requirements. According to Ms. Kammerzell, there is a doubt as to whether or not Mr. Smith would even be permitted to use the easement. The following testimony was presented at the hearing:

Bill Lynn

Okay. Now would it also conceptually depend on what the tribe's plans for access were to its casino on the property immediately adjoining to the west?

- Jennifer Kammerzell Any development that's happening in the area or access ways that does affect what might be happening – what you might be allowed – or what he might be allowed to do on his property, yes.
- Bill Lynn So if the Tribe were proposing a major access to its property in proximity to this 20 foot easement in fact could have a bearing on which Mr. Smith would be permitted to use the 20 foot easement.
- Jennifer Kammerzell Permitted or there might be some limitations, yes.
- Bill Lynn Okay. So it could be restricted in some way that we haven't even talked about, right in, right out, something like that.
- Jennifer Kammerzell Correct, correct.
- Bill Lynn So is it fair to say that as you sit here today that you don't know how and under what circumstances Mr. Smith might be able to use the 20 foot easement.
- Jennifer Kammerzell Correct.

So, first and foremost it is not even clear that Mr. Smith would be able to have a driveway at the location proposed by the Tribe. The easement access that the Hearing Examiner found necessary to avoid substantial impairment may or may not even exist.

The whole idea of imposing an easement on an affected property owner like Mr. Smith is the exact opposite approach taken by the City in other vacation actions. Ronda Cornforth testified that in cases where easements are reserved for utilities over vacated rights-of-way, the terms of the easement grant are determined by the utility (grantee) rather than the right-of-way vacator (grantor). In this case, the grant of the easement is even more complicated and limiting. This is both because of the Tribe's own constitution, and because of the federal regulations that govern the approval of an easement by the BIA.

B. Tribal Constitution. We found two provisions in the Tribal Constitution (in the record) that relate to Tribal lands. Under Article VI, Section 1(c), the Tribal Council has authority:

To approve or veto any sale, disposition, lease or encumbrance of Tribal lands, interest in lands, or other Tribal assets which may be

authorized or executed by the Secretary of the Interior, the Commissioner of Indian Affairs, or any other official or agency of Government; Provided, that no Tribal land shall ever be sold, encumbered or leased for a period exceeding five years, except for governmental purposes.

The second provision is in Article IX, Section 2 and states:

The unalotted lands of the Puyallup Reservation, and all lands which may hereafter be acquired by the Puyallup Tribe or by the United States in trust for the Puyallup Indians, shall be held as Tribal lands, and no part of such land shall be mortgaged or sold.

Even apart from the regulation cited below, there are significant limits on the authority of the Tribal Council to “encumber” lands. We do not claim to be experts on the Tribe’s constitution but that is the point. Mr. Smith is being asked to lose his public alley access in exchange for a complex, uncertain and limited replacement. Mr. Smith should not have to hire experts in Tribal law to protect his rights.

C. Federal Regulations. Federal regulations establish an elaborate procedure and significant limitations on the ability of the BIA to grant rights-of-way over Indian lands. Those regulations are set forth at C.F.R. Part 169 and we submitted to the Examiner over 30 pages of those regulations that significantly complicate the Tribe’s proposal. Even the application for permission to survey the property (25 C.F.R. 169.4), and to make application for the right-of-way (25 C.F.R. 169.5), are complicated. In the application, the party requesting the easement must agree to do a variety of things that do not apply to Mr. Smith’s current rights to use the public alley access. There is also a requirement for Mr. Smith to pay fair market value consideration (25 C.F.R. 169.12) and a deposit to address potential damages caused to the underlying right-of-way (25 C.F.R. 169.14).

One of the most significant and concerning limitations is that at most, a right-of-way approved by the BIA has a lifespan of 50 years (25 C.F.R. 169.18). Who would buy commercial property, develop it, or finance it with such a limitation?

Of comparable concern is 25 C.F.R. 169.20, which states that the rights under a grant from the BIA can be terminated for several different reasons, one of which is simply non-use for a two-year period. Mr. Smith may well not develop his property for two years. His rights could be terminated before he even begins development of his property.

And, because the right-of-way is over land held in trust by the BIA, the easement land would be subject to the Tribe’s jurisdiction, subject to the Tribe’s taxing authority and its regulatory

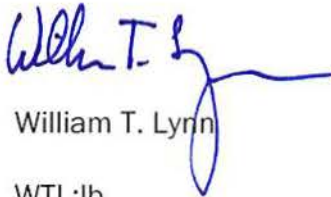
authority (25 C.F.R. 169.10). In other words, an important part of Mr. Smith's development rights would be subject to a completely different jurisdiction than the bulk of his property. He would be required to meet City Codes as to all of his land and to Tribal law as to his easement. This is by no means the equivalent of what he has with a public alley the Tribe proposes to vacate.

It is not even clear that an easement granted to Mr. Smith (if approved through all of the bureaucratic hoops) would be assignable to another property owner. C.F.R. 169.207 makes clear that, like almost everything else, is to be determined by the BIA.

Conclusion.

The City Council should decline the request to use its extraordinary power to further impair the access to Mr. Smith's property. Requiring that a Tacoma property owner be subject to Tribal jurisdiction and taxation, limiting his access and perhaps precluding a second access at all is not consistent with the legal requirement that Mr. Smith's access be unimpaired. The Council should decline the request for this alley vacation.

Very truly yours,

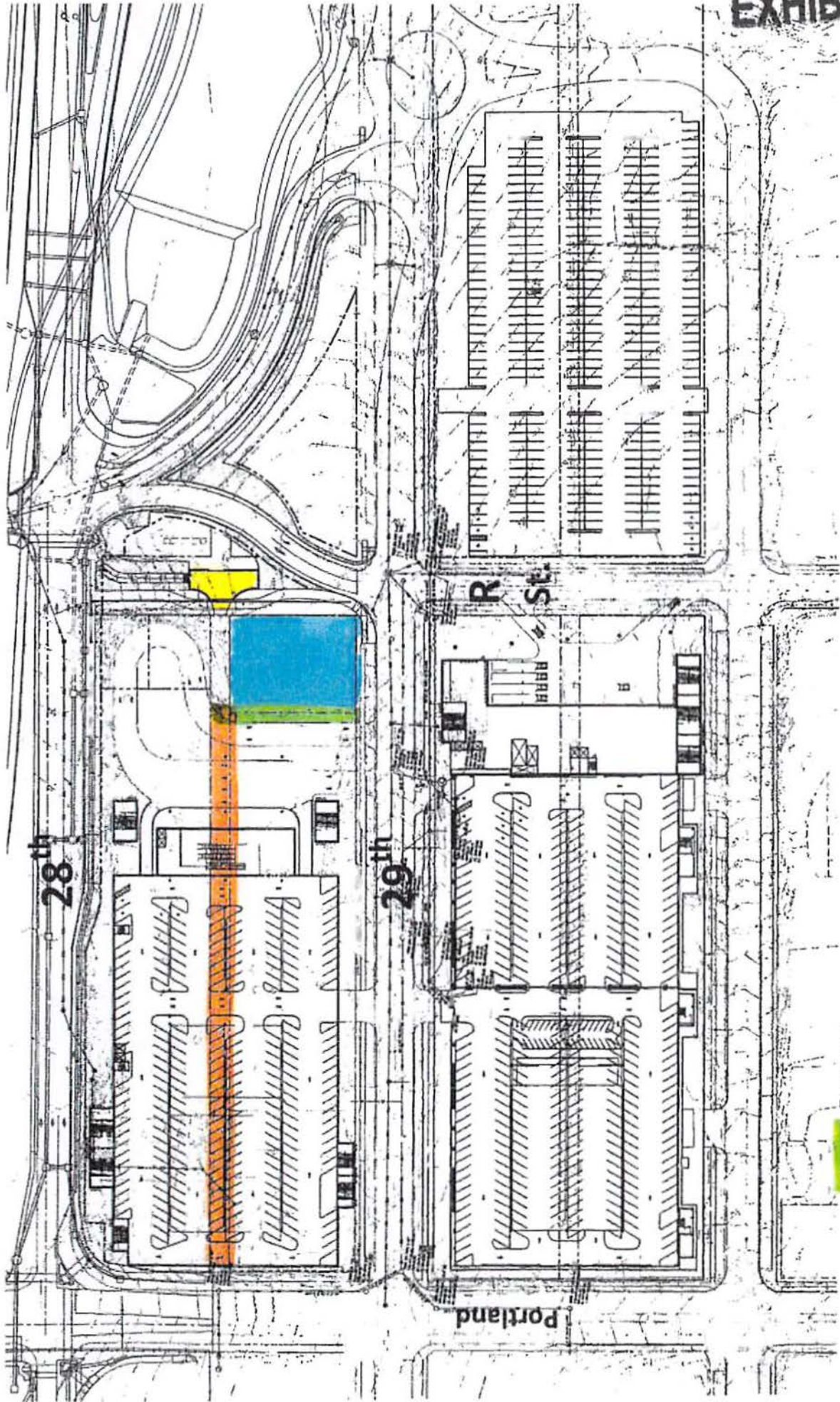
A handwritten signature in blue ink, appearing to read "William T. Lynn", with a long, sweeping horizontal line extending to the right.

William T. Lynn

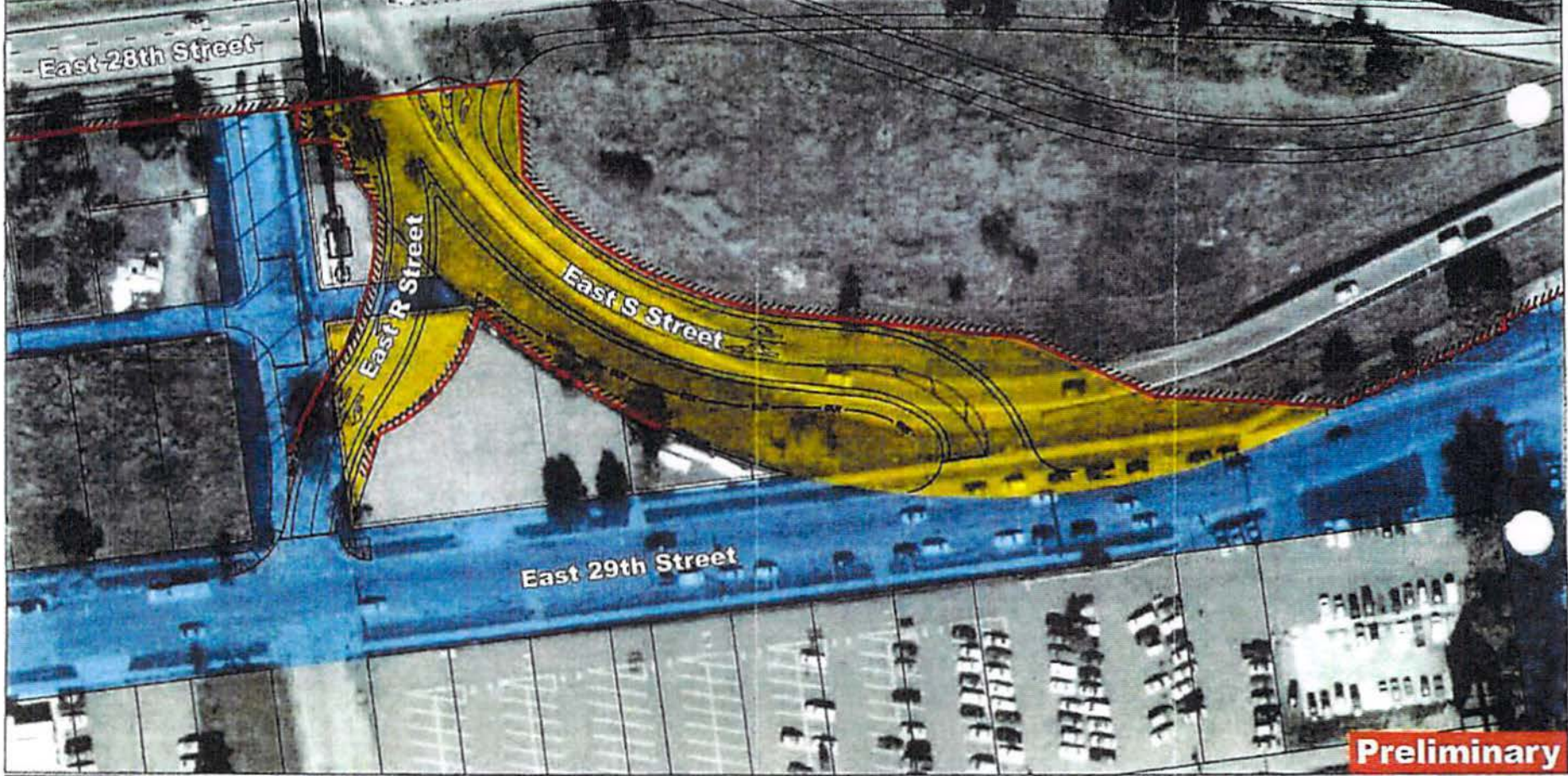
WTL:lb

cc: Client
Puyallup Tribe

EXHIBIT A



- Easement
- Alley
- Hammerhead
- Smith Property



Preliminary

Source: Aerial photos WSDOT (2010).
All other data from WSDOT & PTOI (2011).



Legend - Property Affected By R Street Construction

- City of Tacoma
- Turnback area

Legend - Line Styles

- Proposed WSDOT ROW and Limited Access
- Proposed WSDOT ROW
- Existing WSDOT ROW and Limited Access
- Existing Parcel Lines
- Proposed Edge of Excavation

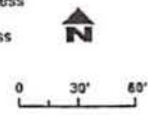


Figure 2
Post-Construction R Street ROW and Limited Access
Tacoma/Pierce County HOV Program

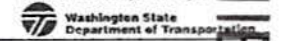


Exhibit 17

EXHIBIT B

This page intentionally left blank

The Tacoma City Council
Appeal from Hearing Examiner Recommendation
HEX-2016-037, Petition No. 124-1371

Appeal of David Smith

| Response of Puyallup Tribe of Indians
| to Notice of Appeal
|

INTRODUCTION

The Puyallup Tribe of Indians presents this Response opposing David Smith's appeal of the Hearing Examiner's Report and Recommendation in HEX-2016-037 (Petition No. 124-1371) on the Tribe's petition to vacate part of an alley. The Tribe respectfully requests that the City Council accept the Hearing Examiner's recommendation and approve the petition with the conditions the Examiner suggested.

That recommendation was made following a thorough hearing of the facts and analysis of the applicable legal standards. The Hearing Examiner concluded that the vacation satisfies each of the criteria required by the Tacoma Municipal Code for a petition to vacate:

- It will facilitate a major economic development project that will benefit the local neighborhood, the City, and the general public;
- It will not leave any property landlocked or with access substantially impaired; and
- It will not interfere with traffic flow or with any other public need or intended use.

The petition is supported by the City's specialists and experts having responsibility for evaluating vacation requests.

The vacation will benefit Mr. Smith, who owns undeveloped property near the portion of the alley to be vacated. His property fronts on and will continue to have direct access to East 29th Street after the vacation. Mr. Smith appeals the recommendation because he believes (incorrectly, as we will show in this Response) that there no longer will be a functioning alley adjacent to his property. While Mr. Smith's appeal may be heartfelt, it is without any factual or legal merit under the City's Municipal Code, the Revised Code of Washington, and long-standing judicial decisions in Washington dealing with the propriety of street vacations.

Although its petition satisfies the legal requirements for a vacation, the Tribe is ready, willing, and able to go the extra mile – beyond what is required by City and State laws – and fulfill each of the conditions recommended by the Hearing Examiner. These added steps more than address Mr. Smith's concerns; they assure not only that his property remains accessible, they in fact improve that access.

Because weighing the considerations before the City Council strongly supports vacating the portion of the alley at issue, the Tribe respectfully asks the City Council to accept the Hearing Examiner's recommendation and grant the Tribe's petition.

**DISCUSSION:
THE HEARING EXAMINER'S CONCLUSIONS
AND RECOMMENDATION ARE CORRECT**

Section 9.22.070(A) of the TMC¹ sets forth the six criteria on which a petition "to vacate a street or alley, or any part thereof" is to be judged. As the Hearing Examiner concluded, the Tribe's petition satisfies all of the applicable criteria. Mr. Smith's arguments in this appeal do not justify any departure from that recommendation.

¹ We will use the following acronyms in this Response:

- "TMC" for Tacoma Municipal Code;
- "FF" for Findings of Fact of the Hearing Examiner;
- "CL" for Conclusions of Law of the Hearing Examiner;
- "RPSR" for Real Property Services Report submitted to the Hearing Examiner by the City;
- "NoA" for Mr. Smith's Notice of Appeal;
- "BIA" for Bureau of Indian Affairs.

Sections 1 through 5 of this Response, below, address the relevant criteria under the TMC. We will discuss the facts and law that support the Tribe's Petition and point out the insufficiency of his arguments.²

Section 6 then describes the Tribe's implementation of the conditions recommended by the Hearing Examiner.

1. The vacation will provide a public benefit and be for a public purpose.

The Hearing Examiner definitively concluded that vacating the alley will provide a significant public benefit.

The Puyallup Tribe's proposed alley vacation will provide a public benefit by supporting a major development that will generate significant economic growth in the area. The project will create employment opportunities and promote visitors to the City. These activities will have direct and indirect benefits to the economy and tax revenues.

CL #4. The Findings of Fact support this conclusion, noting that the Tribe filed the petition to vacate as part of the project to relocate the Emerald Queen Casino. FF #2.

The casino relocation project is a large undertaking that will create jobs both during construction and during ongoing operation of the new facilities. The Puyallup Tribe is planning a high quality design that will be an amenity for the surrounding area. The venture will spur additional economic development in the City of Tacoma.

Vacation of the requested right-of-way will provide a public benefit by adding tax revenues from commercial uses. The project will also provide economic vitality and additional employment to the community and stimulate associated economic development.

FF ## 3, 8; CL #4.

The record supports these findings and conclusions in a number of ways. The testimony of Mr. Wright and Mr. Hunter spells out, among other things, the very large workforce and payroll of the casino, more than 2,000 employees and

² As the Hearing Examiner concluded, one of the TMC criteria is not applicable here because the alley to be vacated does not abut a body of water. TMC 9.22.070(A)(6); FF #13; CL #4; RPSR, §G, p.4.

\$100 million in annual payroll. Transcript, p. 19, 24, 29-30. The casino purchases hundreds of millions of dollars of goods and services each year, generating business opportunities in the community and beyond on a massive scale. Transcript, p. 24.

The testimony further documents the major expenditures for construction of the new facility and additional ongoing employment that operation of the facility will generate. The Tribe will spend over \$10 million for improvements in street and other elements of the infrastructure, again benefitting the entire community. Transcript, p. 29-30. The City's Property Services Report examined these issues and reached the same conclusion. RPSR §G, p. 4.

Public benefit justifying the vacation of a street may consist of the economic and business support which the community as a whole derives from the property owner who seeks the vacation. *Banchero v. City Council of Seattle*, 2 Wn. App. 519, 524, 468 P.2d 724 (1970). A direct benefit to a private party does not preclude a finding of a public benefit. *Ibid*.

The Washington Supreme Court has confirmed that entertainment facilities serve a public purpose in that they "provides jobs, recreation for citizens, and promotes economic development and tourism." *Clean v. State*, 130 Wn.2d 782, 796, 958 P.2d 1054 (1996).

The public purpose of the Tribe's project and the economic benefit to the community is thus well-documented in the record.

2. The vacation will not adversely affect the street pattern or circulation.

The law in Washington is clear: cities have "unquestioned" power to vacate streets and alleys, including the power to change the use of a street to better serve the public, and to vacate a street entirely when it is of such little public use that it is not worth the cost of maintaining it. *Young v. Nichols*, 152 Wash. 306, 308, 278 P. 159 (1929).

As the Hearing Examiner noted, there is no suggestion or concern that the vacation will affect traffic circulation. FF #6; CL #4. That conclusion is supported by submissions in the record by the City Engineer and by the Washington Department of Transportation. RPSR §G, p. 4. Mr. Smith's appeal does not contend otherwise.

3. The public need will not be adversely affected.

The Hearing Examiner concluded, as had the City, that the public need will not be adversely affected. FF #9; CL #4; RPSR §G, p. 4. Quite to the contrary, the Tribe's project of which the vacation is a part will bring about substantial improvements for the needs of Tacoma's east side. Again, Mr. Smith's appeal does not contend otherwise.

4. The alley is not contemplated or needed for future public use.

The Hearing Examiner further concluded, as had the City, that the alley is not needed for future public use. FF #9; CL #4; RPSR, §G, p.4. Only Mr. Smith claims such a need for future use of the alley, and his needs will be more than accommodated. In addition to his current access via 29th Street, which will not be disturbed, the conditions recommended by the Hearing Examiner, with which the Tribe concurs, will supplement his access. We address this factor in greater detail in section 5, below.

5. No affected landowner will be left landlocked or with access substantially impaired.

TMC 9.22.070(A)(5) directs the Hearing Examiner to examine whether an "abutting owner becomes landlocked or his access will ... be substantially impaired." Although he technically is not an abutting owner,³ his arguments are unpersuasive even if his situation is evaluated under that test.

Mr. Smith's property will not be landlocked because it will continue to enjoy direct access from 29th Street. FF #12; CL #5; RPSR §G, p. 4; see maps in the Record, Exhibits 2, 3, 6, & 7. In addition, as we describe in this section, the easement the Tribe is fully prepared to grant him, as recommended by the Hearing Examiner, will give him access to two additional sides of his property. Mr. Smith's access thus will not be substantially impaired under the consistent application of that term by Washington courts.

[A] landowner whose land becomes landlocked or whose access is substantially impaired as a result of a street vacation is said to sustain special injury If, however, the landowner still retains an alternate mode

³ Property abuts on a street when there is no intervening land between it and the street." *London v. Seattle*, 93 Wn.2d 657, 661, 611 P.2d 781 (1980). Exhibits 2, 3, 6, and 7 (p.5) show that Mr. Smith's property does not abut the portion of the alley to be vacated.

of egress from or ingress to his land, even if less convenient, generally speaking he is not deemed specially damaged. He has no legal right to prevent the vacation because no legal right of his has been invaded.

Hoskins v. City of Kirkland, 7 Wn. App. 957, 960-961, 503 P.2d 1117 (1972). In that case, the party challenging the vacation lost access to the only "improved" route into his property, and was left with an "unimproved" route over another street, or a route that crossed other land that he also owned. *Id.* at 959. The court determined that the property owner's access had not been substantially impaired given the continued ability to access the property. *Id.* at 962-63.

Union Elevator & Warehouse Co. v. Washington Dep't of Transportation, 96 Wn.App. 288, 980 P.2d 779 (1999), is another good illustration of the test for substantial impairment. The case involved a business that processed grain. It formerly had easy access to its facility for large grain trucks by means of an exit from a state highway then a simple turn into the company's property. *Id.* at 290. But a reconfiguration of the highway eliminated that exit, leaving trucks with a route that, according to one witness:

... requires truck drivers to negotiate a steep downhill grade, approach a 90 degree turn to the left, cross two sets of railroad tracks, make a 90 degree turn to the left, a 90 degree turn to the right, and proceed up a severely sloped driveway to reach the East Lind facility.

Id. at 296-297. The Court of Appeals concluded that the change might constitute substantial impairment, and sent the case back to the trial court for a determination of that issue. *Id.* at 297.

Another example is *Mackie v. Seattle*, 19 Wn. App. 464, 576 P.2d 414 (1978). There a business owner had the direct access to his facility eliminated by a city road project. Customers were then forced to go three blocks out of the way to reach his business. Many complained that they could not find his location, and the owner reported that he actually had to go out and meet customers and guide them in. *Id.* at 467. The Court of Appeals concluded, however, that "[t]he plaintiff and his customers still have access to the property" and as a result Mackie did not have standing to challenge the closure. *Id.* at 469-470.

Yet another useful illustration is *Capital Hill Methodist Church v. City of Seattle*, 52 Wn.2d 359, 324 P.2d 1113 (1958). The objecting parties sought to

prevent closure of an urban street, arguing that the closure would deprive them of "the most direct and convenient access to their respective properties." *Id.* at 366. The Court observed and then ruled that "the only practical effect the vacation has on the appellants' properties is the deflection of traffic one block ... This is too slight a consideration to be controlling in this case." *Ibid.*

These cases demonstrate that the alley vacation requested by the Tribe will not result in substantial impairment of Mr. Smith's access to his property. The virtually non-existent impact on his property is in sharp contrast to the disruptions created in *Hoskins*, *Mackie*, and *Union Elevator*. The interruptions and inconvenience caused in those cases is of far greater magnitude and is far more concrete than what Mr. Smith complains of here.

Mr. Smith's situation is instead on the same scale as the impact considered in *Capital Hill Methodist Church*, where the Court found no substantial impact. As in that case, the impact on Mr. Smith's access here falls far short of what is required to support a finding of substantial impairment.

The easement recommended by the Hearing Examiner will give direct access to two more sides of Mr. Smith's property. Running through the Tribe's property adjacent to the west side of Mr. Smith's property, it will connect with the remaining portion of the existing alley on the north side of his property. FF #10.

Access to his property will in fact be improved by the easement compared to his current situation with the existing alley that, in addition to being longer and poorly maintained, requires entry and exit onto Portland Avenue. This additional access is not required by the City Code or by state law in order to justify vacation of the alley. But the Tribe, living up to its name "S'Puyalupubsh," meaning the "generous and welcoming behavior to all people (friends and strangers) who enter our lands," will give its consent for Mr. Smith and his guests to use the Tribe's land to replace the vacated portion of the alley.

It is important to note that Mr. Smith recognizes an easement as the solution to his (perceived) problem. His counsel addressed the issue in the hearing.

So again, we're not opposed to the vacation. We're not even opposed to an easement as a substitute to assure Mr. Smith has a useable property

when he leaves this process. But, you know, we need to make sure it actually works and will actually function.

Transcript, p. 73; FF #11.

The Tribe is ready to move forward with the easement as soon as Mr. Smith decides whether to take part in the process. As the Hearing Examiner anticipated, obtaining the easement requires Mr. Smith's cooperation. CL #7(A)(7). All that is required of him is his signature on the application; the Tribe has prepared the paperwork to obtain BIA approval of the easement. That step has not yet gone forward, however, because his counsel indicates that Mr. Smith has not decided whether to seek the easement.

As the Hearing Examiner noted, her recommendation that the Tribe grant an easement to Mr. Smith may be extinguished.⁴ But if Mr. Smith decides that he wants the easement, the Tribe stands ready to move the process forward.

Mr. Smith complains, however, that both federal and Puyallup Tribal law put restrictions on the ability to grant the easement. The Tribe, however, has addressed the feature of Tribal law that causes his concern. (The Hearing Examiner's recommendation also urges that the issue be addressed.) The Tribe's Constitution does put a limit on the term of certain encumbrances, but that limitation does not apply when the encumbrance is for a governmental purpose.⁵ The Tribe will make explicit in a Tribal Council Resolution that this easement will be for governmental purposes and therefore not subject to any time limitation.

The Tribe has proposed that the easement be perpetual or for the longest term authorized by federal law. The BIA has provided in its own regulations that it will defer to a determination made by a tribe concerning the term of an encumbrance. 25 CFR § 169.201. In this situation, there is nothing in federal law that would stand in the way of approving the easement the Tribe is making

⁴ The Hearing Examiner provided, "If Mr. Smith chooses not to take reasonable steps necessary to effectuate the easement documentation, the requirement to provide an easement to Mr. Smith will be extinguished and the alley vacation could be finalized without the Puyallup Tribe providing said easement." CL #7(A)(7), p. 8.

⁵ Article VI, Section 1(c) authorizes the Tribal Council to create certain encumbrances, "Provided, That no Tribal lands shall ever be sold, encumbered, or leased for a period exceeding 5 years, **except for governmental purposes**(emphasis added)."

available here. We can get confirmation of the BIA's approval of the easement, including that feature, if and when Mr. Smith signs the application.

Another reason that Mr. Smith feels his access will be substantially impaired is that access to his property had already been reduced by the Washington Department of Transportation's re-routing "R" Street away from his property. That is perhaps unfortunate, but it is not an issue here because the Tribe's petition plays no role in that already-completed process. That is not a legitimate issue or consideration in this appeal. As noted above, one means of access is all that the law governing vacation petitions requires. The proposed easement will improve his situation, more than offsetting what he lost when "R" Street was re-routed. In any case, and whether or not he chooses to receive the easement, what was done to "R" Street is not an appropriate issue for this appeal.

Mr. Smith's property, in short, will neither be landlocked nor left with his access substantially impaired by approval of the Tribe's petition. The Tribe has thus satisfied the requirements of TMC 9.22.070(A)(5).

6. The Tribe is in the process of completing each of the conditions recommended in the Hearing Examiner's Report.

a. Payment of fees. The Tribe will pay to the City the amount of the appraised value of the area vacated when the City has completed that calculation.

b. Public Works Traffic Engineering. The Tribe has submitted to the City a revised and completed traffic study.

c. Environmental Services. With the City's oversight and presence on location, the Tribe has nearly completed the removal of the abandoned sewer main addressed in this recommended condition.

d. Tacoma Power. The Tribe is working with the City and TPU to move the utilities underground. In any case, the Tribe will preserve the easement for this utility as long as it is needed.

e. Century Link. The Tribe is working with the City and Century Link to have the company's utility line moved underground along with TPU's electrical line.

f. Utility Box. The Tribe is in the process of having the utility box moved onto the Tribe's land. That will be completed in the next four to six weeks.

g. Access Easement. As indicated earlier in this Response, the Tribe and the United States will make available, if Mr. Smith so chooses, an easement that has all of the features recommended by the Hearing Examiner, namely that it be "permanent or long-term, usable, non-revocable" and transferrable. CL #7(A)(7), p. 8.

Permanent or long-term. As indicated in section 5 of this Response, above, the easement will satisfy this requirement.

Usable. Mr. Smith complains that when vehicles come to the back of his property, the easement will require them to turn around in a confined area in order to leave. But that is true now and will remain so in the future, even if the alley were not vacated because WSDOT's project has terminated the outlet at R Street. Thus, with or without the vacation, vehicles will have to turn around to exit the alley. Without the easement, vehicles will have the additional disadvantage of driving both in and out by means of the length of the alley onto Portland Avenue. The proposed easement will both increase and improve access to the property.

Non-revocable. The easement will be non-revocable, as long as Mr. Smith complies with the terms of the easement and the requirements of the law. Those conditions do not put any unreasonable limit on his ability to retain the easement.

Transferrable. The easement will not limit Mr. Smith's ability to convey his rights thereunder if he conveys his property that the easement serves. As well, there will be no limitation on his right to allow his invitees to use the easement in order to access his property.

[Continued on page 11.]

CONCLUSION

The Tribe's petition satisfies the applicable requirements of the Tacoma Municipal Code and state law for vacation of a portion of the alley. The Hearing Examiner has recommended approval of the petition if seven conditions are met. The Tribe agrees with those conditions and is completing implementation of those steps. None of Mr. Smith's arguments justifies any departure from the recommendation. The Tribe respectfully requests the City Council's approval of its petition.

Dated this 14th day of June, 2017.

Respectfully submitted,

John Howard Bell

Robert L. Hunter, Jr.

John Howard Bell

Robert L. Hunter, Jr.

Attorneys for the Puyallup Tribe of
Indians

This page intentionally left blank