



City of Tacoma
Hearing Examiner

December 28, 2018

CERTIFICATION

On this day, I forwarded a true and accurate copy of the documents to which this certificate is affixed via United States Postal Service postage prepaid or via delivery through City of Tacoma Mail Services to the parties or attorneys of record herein.

I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED December 28, 2018, at Tacoma, WA.

Aundrea Meyers

FIRST CLASS MAIL DELIVERY & ELECTRONIC MAIL DELIVERY

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Re: HEX2018-030 (Street Vacation Petition No. 124.1391)
Petitioner: Pacific Harbor Landing LLC

Dear Parties:

Please find enclosed a copy of Hearing Examiner's Findings of Fact, Conclusions of Law, and Recommendation to the Tacoma City Council entered on December 28, 2018, as the result of a public hearing held on December 20, 2018.

Sincerely,

Aundrea Meyers

Aundrea Meyers
Office Assistant

Transmitted via Electronic Mail Delivery

NW Seaport Alliance/Christine Wolf (cwolf@nwseaportalliance.com); Foss Waterway Development Authority/Norm Gollub (ngollub@theafoss.com); State of Washington, Department of Ecology/Marv Coleman (mcol461@ecy.wa.gov); Pierce County Assessor-Treasurer, Commercial Dept./Darci Brandvold (dbrandv@co.pierce.wa.us); Tacoma City Attorney's Office/Steve Victor (svictor@ci.tacoma.wa.us); Tacoma City Clerk's Office/Nicole Emery (nemery@ci.tacoma.wa.us); Tacoma Water LID/Shelly Shaffer (sshaffer@ci.tacoma.wa.us); Click!/Regina Collier (rcollier@cityoftacoma.org); City of Tacoma (COT), Environmental Services (ES)/Rod Rossi (rrossi@ci.tacoma.wa.us); CenturyLink/Pamela Haines (pamela.haines@centurylink.com); COT, Public Works- LID/Ronda Cornforth (rcornforth@cityoftacoma.org); COT, Public Works- Traffic Engineering/Jennifer Kammerzell (jkammerzell@ci.tacoma.wa.us); U.S. Environmental Protection Agency/Kristine Koch (koch.kristine@epa.gov); COT, Center for Urban Waters/Mary Henley (mhenley@ci.tacoma.wa.us); Tacoma Fire Dept., Prevention Division/Chris Seaman, P.E. (cseaman@ci.tacoma.wa.us); COT, ES, Solid Waste/Lyle Hauenstein (lhauenstein@ci.tacoma.wa.us); COT, CEDD/Gloria Fletcher (gletcher@ci.tacoma.wa.us); Puget Sound Energy, Inc./Megan Holt SR/WA (megan.holt@pse.com); Comcast/Aaron R. Cantrell (aaron.cantrel@comcast.com); Tacoma Public Utilities/Gregory Muller (gmuller@ci.tacoma.wa.us)

OFFICE OF THE HEARING EXAMINER

CITY OF TACOMA

REPORT AND RECOMMENDATION

TO THE CITY COUNCIL

PETITIONER: PACIFIC HARBOR LANDING LLC **FILE NO:** HEX2018-030 (124.1391)

SUMMARY OF REQUEST:

The Real Property Services division (“RPS”) of the City of Tacoma (“City”) Public Works Department has received a petition to vacate that certain westerly portion of East D Street, lying south of East 18th Street primarily fronting the Johnny’s Dock restaurant property (the “Vacation Area”), to facilitate existing use as restaurant and marina parking and better position the Petitioner to make future improvements to its property. The Vacation Area is generally depicted in Exhibit 2 of the official hearing record.

RECOMMENDATION OF THE HEARING EXAMINER:

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

PUBLIC HEARING:

After reviewing RPS’ Preliminary Report (the “Report”—Exhibit 1), and examining available information on file with the petition, the Hearing Examiner conducted a public hearing on the petition on December 20, 2018. Troy Stevens of RPS represented the City. Attorney William T. Lynn of Gordon, Thomas, Honeywell, Malanca, Peterson & Daheim LLP, and Kenneth Rody represented the Petitioner. Testimony was taken, exhibits were admitted, and the record closed at the conclusion of the hearing.

ORIGINAL

FINDINGS, CONCLUSIONS, AND RECOMMENDATION:

FINDINGS:

1. Pacific Harbor Landing LLC, a Washington limited liability company (the "Petitioner"), has petitioned for the vacation of public right-of-way ("ROW") that abuts the Petitioner's real property at 1902 East D Street. The petitioned-for area is generally described as that certain westerly portion of East D Street, lying south of East 18th Street primarily fronting the real property known as Johnny's Dock restaurant (the "Vacation Area"). The Vacation Area is legally described as follows:

The WESTERLY 23.50 feet of THE FOLLOWING DESCRIBED portion of EAST "D" STREET:

COMMENCING AT THE NORTHWEST CORNER OF BLOCK 52, MAP OF TACOMA TIDELANDS AS SURVEYED AND PLATTED BY THE BOARD OF TIDELANDS APPRAISERS OF PIERCE COUNTY, AS PER MAP THEREOF FILED FOR RECORD SEPTEMBER 14, 1895, IN THE OFFICE OF THE COUNTY AUDITOR;

THENCE NORTH 82°38'31" EAST ALONG THE NORTH LINE OF SAID BLOCK 52, A DISTANCE OF 201.90 FEET TO THE WESTERLY MARGIN OF THE ABOVE DESCRIBED EAST "D" STREET AND THE TRUE POINT OF BEGINNING;

THENCE CONTINUING NORTH 82°38'31" EAST ALONG THE EXTENSION OF SAID NORTH LINE, A DISTANCE OF 103.29 FEET TO THE CENTERLINE OF THE ABOVE DESCRIBED EAST "D" STREET;

THENCE SOUTH 01°11'30" EAST ALONG SAID CENTERLINE, A DISTANCE OF 256.50 feet TO AN ANGLE POINT THEREOF;

THENCE SOUTH 07°23'37" EAST ALONG SAID CENTERLINE, A DISTANCE OF 80.52 feet to A LINE PARALLEL WITH AND 545.00 NORTH OF THE SOUTH LINE OF THE ABOVE DESCRIBED BLOCK 52;

THENCE SOUTH 82°39'35" WEST ALONG SAID PARALLEL LINE, A DISTANCE OF 100.00 FEET TO THE ABOVE DESCRIBED WESTERLY MARGIN OF EAST "D" STREET;

THENCE NORTH 07°23'37" WEST ALONG SAID WESTERLY MARGIN TO AN ANGLE POINT THEREOF;

THENCE NORTH 01°11'30" WEST ALONG SAID WESTERLY MARGIN, A DISTANCE OF 251.12 FEET TO THE POINT OF BEGINNING.
CONTAINING 0.268 ACRES, MORE OR LESS.

SITUATE IN THE CITY OF TACOMA, COUNTY OF PIERCE, STATE OF WASHINGTON.

Stevens Testimony, Lynn Testimony; Exs. 1~4.

2. The Vacation Area is generally rectangular in shape, and runs essentially along the entire frontage of Tax Parcel No. 8950001626. The Vacation Area is currently being used for parking, and not for more traditional ROW traversal, i.e. it is not part of the currently improved area used as East D Street. The parking use of the Vacation area goes back at least a decade. There is some landscaping present in the Vacation Area in addition to parking. *Stevens Testimony, Lynn Testimony, Rody Testimony; Ex. 1, Ex. 2.*

3. The Petitioner intends, at least initially, to continue using the Vacation Area for these presently existing uses. The Petitioner added that it does have plans for additional improvements/new development, but those plans are not yet certain. Part of the reason for its petition is that having the Vacation Area unencumbered by the City's ROW interest will allow the Petitioner to apply more easily for financing, and to have greater freedom from setback requirements when new development takes place. The Petitioner testified that any future development would be in compliance with the City of Tacoma's policies and goals for the area as expressed in the City's Comprehensive Plan and in its shoreline and other zoning regulations. *Rody Testimony, Lynn Testimony.*

4. The City acquired the East D Street ROW (previously known as Railroad Avenue), of which the Vacation Area is part, by plat filing in the Map of Tacoma Tidelands, filed in September, 1895, in the records of Pierce County, Washington. *Stevens Testimony; Ex. 1, Ex. 3.*

5. As dedicated, East D Street is a 200-foot wide ROW classified as a minor arterial that includes sidewalk curb and gutter. From the Johnny's Dock property, East D Street continues north to East 15th Street and St. Paul, serving the East Thea Foss peninsula, and continues southward to McKinley Avenue, which connects to south and east Tacoma. *Stevens Testimony; Ex. 1.*

6. Commercial trucks and the general public are known to parallel park along the East D Street ROW in the vicinity of the Vacation Area. East D Street is also a "protected street" having nearly equal use between long-distance vehicle trips and local access usage.¹ As such it serves a mix of commercial and heavy industrial uses. According to TMC 11.55.020, East D Street is also designated as a Heavy Haul corridor that authorizes the issuance of special permits for movement and operation of vehicles in excess of legal weight limits where the vehicle load is typically a sealed ocean-going container. *Id; see also Ex. 6.*

7. This vacation petition has been reviewed by a number of governmental agencies, City departments/divisions, and utility providers. Their comments and concerns have been addressed, or are being addressed through the conditions recommended for imposition herein. Several City departments/divisions, and one private utility provider reported that they have infrastructure in the

¹ See Tacoma Municipal Code ("TMC") 11.05.490.

Vacation Area that will need protecting through a reserved easement. *Stevens Testimony; Ex. 1, Exs. 7~19.*

8. No members of the public appeared at the hearing in opposition to the petitioned-for vacation. Christine Wolf, a senior transportation planner with the Port of Tacoma, did appear at the hearing and testified, not in opposition to the requested vacation, but rather expressing concerns regarding the design of East D Street, and the availability of parking commercial trucks. Most of the Port's concerns were focused on the east side of the street across from the Vacation Area.²

9. No abutting property becomes landlocked by the proposed vacation, nor will any access be substantially impaired if this vacation is granted since the Vacation Area is not currently being used for any traditional ROW traversal purposes,³ nor is it needed for future ROW use.⁴ *Stevens Testimony; Ex. 1, Ex. 2, Exs. 6~19.*

10. The petitioned-for vacation area neither abuts, nor is proximate to a body of water and, therefore, the provisions of RCW 35.79.035 are not implicated. *Stevens Testimony; Ex. 1, Ex. 2.*

11. 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* 43.21.C, the State Environmental Policy Act (*SEPA*), and so no environmental study was warranted.

12. RPS' Preliminary Report, which is entered into the record as Exhibit 1, accurately describes the proposed vacation, general and specific facts about the site and Vacation Area, and applicable codes. 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.

13. Public notices were given at least thirty (30) days prior to the hearing, as required by Tacoma Municipal Code ("TMC") 9.22.060. On or about November 14, 2018, yellow public notice signs were posted in the vicinity of the Vacation Area, at the southwest corner of the intersection of East 18th Street and East D Street, and another forty-five feet south of the southwest corner of the intersection of East 19th Street and East D Street. Also on or around this same date, a Public Notice Memo for the December 20, 2018 hearing was placed into the glass display case in the Tacoma Municipal Building outside the Finance Department. Additionally, the Public Notice Memo was advertised on the City of Tacoma web site and in the Tacoma Daily Index, as well as on Municipal Television Channel 12. Lastly, Public Notice was mailed to all owners of record within 1000 feet of the vacation request also on or around November 14, 2018. *Stevens Testimony; Ex. 1.*

² See also Exhibit 20, letter from Deidre Wilson, Senior Planning Manager, Port of Tacoma.

³ Arguably, parking can be considered a ROW use in some contexts.

⁴ The City's conclusions regarding traffic flow and transportation needs in the subject area appear to be heavily based on that certain "City of Tacoma East Thea Foss Waterway Transportation Corridor Study Executive Summary," dated July 2008, included in the record as Exhibit 6.

14. No written opposition to the proposed vacation was received in this case.⁵ RPS' analysis led to a recommendation that the requested vacation should be approved. *Stevens Testimony; Ex. 1.*

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

CONCLUSIONS:

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 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 that is 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. 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.*⁶

4. The Petitioner must demonstrate, by a preponderance of the evidence, that its vacation petition meets the foregoing criteria. *See TMC 1.23.070.* In this case, the Petitioner relied in part on the

⁵ Again, the Port of Tacoma submitted a letter expressing its concerns about street design and parking, but not opposing the requested vacation. *Ex. 20.*

⁶ For consistency, outline numbering of the criteria is kept the same as in the original TMC text.

testimony and evidence of the City, but also supplied its own reasoning and testimony at the hearing, and during the application process.⁷

5. Findings entered herein, based upon substantial evidence in the hearing record, support a conclusion that the requested street vacation conforms to the criteria for the vacation of street ROW set forth at CoL 3 above, provided the conditions recommended below are imposed and met. Given the present use of the Vacation Area, the petitioned-for vacation will have no material effect on the street pattern or circulation of traffic, nor will it affect the City's ROW needs or goals, and as such the Vacation Area may be ceded to the underlying fee owner of the property—the Petitioner—unencumbering its property from the existing public ROW interest. No potential for landlocking an abutting owner exists from granting the petition, and the provisions of RCW 35.79.035 governing areas close to bodies of water do not apply to this location. Finally, public benefit accrues through the vacation area being added back to the property tax rolls and presumably through the subsequent development of the area in conformance with City goals and policies.

6. In accordance with the above, the requested street 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 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 right-of-way areas.
TMC 9.22.010.

2. CITY OF TACOMA UTILITY EASEMENT—TACOMA WATER, ENVIRONMENTAL SERVICES, AND CLICK! NETWORK

None of the above captioned City of Tacoma departments/divisions objected to this petition; however, all three indicated that they have infrastructure located within the Vacation Area. All such infrastructure will need to be either relocated at the Petitioner's expense or protected through the City's reservation of an easement for utilities. Ideally, all City infrastructure would be protected in a single grant of easement calling out the reasonable area needed for the continued functioning, maintenance, repair, and/or even replacement of the facilities. Tacoma Water and Environmental Services provided some information regarding the location of their

⁷ See Exhibit 5.

particular City facilities.⁸ CLICK! Network has yet to identify the location of its infrastructure in the Vacation Area, but will need to do so prior to finalization of the requested vacation and easement reservation therein. Once the location of all City infrastructure is concluded, and if the City Council approves the vacation, the vacation ordinance can include a reasonable reservation of easement covering the location of the infrastructure, and that provides reasonable access to them as well.

3. CENTURY LINK

Century Link did not object to this petition; however, it has requested a 3rd party easement be granted to protect its existing telecommunication facilities within the Vacation Area. The City requested, on Century Link's behalf, that this easement be granted as a condition to the vacation being finalized. The Petitioner did not object, but requested that any easement be limited to the area reasonably necessary to protect Century Link's existing facilities. The Petitioner's request is reasonable, and therefore the Examiner recommends that once Century Link has located its facilities, an easement be granted that will give Century Link the reasonable access and reasonable functionality it needs for its existing facilities.

B. USUAL CONDITIONS:

1. The recommendation set forth herein is based upon representations made and exhibits, including any development 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.

⁸ See Exs. 7 and 9.

C. ADVISORY NOTES:

1. Other than the conditions/concerns already expressly set forth herein, no objection or additional comment was received from Public Works Traffic Engineering, Planning and Development Services, Environmental Services, Tacoma Fire, Tacoma Police, Comcast Communications, CenturyLink, Pierce Transit, Puget Sound Energy, Public Works LID, Tacoma Water, Click! Network, and/or Tacoma Power. The State Department of Ecology did weigh in regarding in-ground contamination in and around the area, but such information, although generally helpful, does not affect the vacation itself.
2. There is currently an in-lieu of assessment against the Petitioner's property for sanitary sewer outstanding in the amount of \$6,555.13 that can be paid at the time of the City Council's decision on this petition, but such payment at that time is not required. It will be required to be paid in conjunction with any future permitting on, or development of the Petitioner's real property, and may be subject to increase with the passage of time.

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

8. 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 conditions contained in Conclusion 6 above.

DATED this 28th day of December, 2018.



JEFF H. CAPELL, Hearing Examiner

ORIGINAL

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