



City of Tacoma  
Hearing Examiner

July 16, 2015

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**Re: File No. HEX2015-015 (Street Vacation Petition File No. 124.1349)**  
**Petitioner: BNSF Railway Company**

To the Parties,

In regard to the above referenced matter please find enclosed a copy of the Tacoma Hearing Examiner's (HEX) Report and Recommendation to the Tacoma City Council that is being reissued to include additional information regarding compensation.

Sincerely,

Louisa Legg  
Office Administrator

Enclosure (1) – Reissued HEX Report and Recommendation  
Attachment (1) – Exhibit 11

cc: See Transmittal List (page 2)

**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 July 16, 2015, at Tacoma, WA.

July 16, 2015

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HEX 2015-015 (124.1349 – BNSF Railway Company)

Transmitted via Inter-office Mail Delivery

Pierce County Assessor-Treasurer

Transmitted via First Class Mail Delivery

Su Dowie, Foss Waterway Development Authority, 535 Dock Street, #204, Tacoma, WA 98402

Transmitted via Electronic Mail Delivery

Marilynn M. Danby SR/WA, Senior Real Estate Representative, Puget Sound Energy  
Clerk's Office, City of Tacoma (Nicole Emery)

Legal (Jeff Capell)

Tacoma Power (Dolores Stegman)

Tacoma Fire Department (Chris Seaman, P.E.)

Solid Waste Management, City of Tacoma (Richard Coyne)

Tacoma Water, Water Distribution (Tony Lindgren)

Public Works Engineering/L.I.D., City of Tacoma (Sue Simpson)

Environmental Services Department, City of Tacoma (Merita Trohimovich-Pollard)

Planning and Development Services Department, City of Tacoma (Lisa Spadoni)

Planning and Development Services Department, City of Tacoma (Jana Magoon)

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:** BNSF Railway Company

**FILE NO.:** HEX 2015-015 (124.1349)

**SUMMARY OF REQUEST:**

Real Property Services is presenting a City initiated petition to vacate that portion of South 22<sup>nd</sup> Street lying between the Easterly margin of Interstate 705 and the Westerly margin of Dock Street, as depicted on the map attached as Exhibit 2 to the Department of Public Work, Real Property Services Division's Report. BNSF Railway Company (BNSF) will hold title to the vacated area. The vacation of this property is necessary to facilitate full closure of the rail crossing at this location, as negotiated in the Exchange Agreement between the City of Tacoma and BNSF Railway Company dated April 17, 2014.

**RECOMMENDATION OF THE HEARING EXAMINER:**

The request is hereby recommended for approval, subject to conditions. The initially issued recommendation was modified to reflect information received after the hearing clarifying the compensation associated with the street vacation.<sup>1</sup>

**PUBLIC HEARING:**

After reviewing the report of the Department of Public Works (DPW), Real Property Services Division and examining available information on file with the petition, the Hearing Examiner conducted a public hearing on the petition on July 9, 2015. Immediately after the hearing, the Hearing Examiner conducted a site visit on July 9, 2015.

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<sup>1</sup> See Ex. 11.

**ORIGINAL**



## **FINDINGS, CONCLUSIONS, AND RECOMMENDATION:**

### **FINDINGS:**

1. Petitioner BNSF through the City of Tacoma is requesting the vacation of that portion of South 22<sup>nd</sup> Street lying between the Easterly margin of Interstate 705 and the Westerly margin of Dock Street.<sup>2</sup> The area to be vacated is more particularly described below:

All that portion of South 22nd Street lying between the Easterly margin of Interstate 705 and the westerly margin of Dock Street, within the Northeast Quarter of the Northwest Quarter of Section 09, Township 20 North, Range 3 East, W.M., within the City of Tacoma, County of Pierce, State of Washington.

2. The vacation of this area is necessary to facilitate full closure of the rail crossing as negotiated in the Exchange Agreement between the City of Tacoma and BNSF Railway Company dated April 17, 2014. The Exchange Agreement encompasses plans for the larger area, including construction of a portion of the Prairie Line Trail. *Cornforth Testimony; Ex. 3.*

3. The City of Tacoma acquired the right-of-way proposed to be vacated by plat filing of Map of the Tacoma Land Company's Second Addition to Tacoma, W.T. as recorded in Volume 1 of Plats at Page 88, records of Pierce County, Washington. *Cornforth Testimony; Ex. 4.*

On March 5, 2013, by Resolution No. 38638, the City Council authorized execution of an Exchange Agreement between the City of Tacoma and BNSF, which was entered into on April 17, 2014. The Exchange Agreement states in part: "In connection with certain development objectives of the City and BNSF, the City desires to obtain certain easements related to the BNSF property from BNSF, and BNSF desires for the City to close the portion of 'A' Street." Within the Agreement, BNSF agreed to grant the City various easements needed for projects such as the Prairie Line Trail and Pedestrian Crossing Improvements at "A" Street and "D" Street, and the City agreed to vacate portions of "A" Street for private use by BNSF. BNSF intends to permanently close the railway crossing to traffic as a safety measure. *Cornforth Testimony; Ball Testimony. Ex. 5.*

4. South 22<sup>nd</sup> Street is 80 feet wide and is improved only with asphalt and concrete between four railroad tracks. There is currently no curb, gutter or sidewalk for pedestrian travel. South 22<sup>nd</sup> Street is uncontrolled at its intersection with Dock Street with the exception of existing railroad gate arms. South 22<sup>nd</sup> Street has been effectively closed to vehicular traffic, by the placement of ecology blocks, since September of 2009. *Cornforth Testimony; Ex. 1.*

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<sup>2</sup> Testimony at hearing indicated that South 22<sup>nd</sup> Street is also commonly known as "A" Street.

5. The City's Traffic Engineering Division raised no objection to the vacation of this street right-of-way as it will not adversely affect the street pattern or traffic circulation in the area or in the wider community. *Cornforth Testimony; Ex. 1.*

6. The public would benefit from the proposed street right-of-way vacation because it would strengthen and support a safe city with healthy residents. *Cornforth Testimony; Ex. 1.* The closure of the South 22<sup>nd</sup> Street crossing will eliminate the opportunity for a vehicular or pedestrian accident at a four track, at-grade crossing located on a curve with limited site distance in both directions. The closure will also improve track maintenance, eliminate maintenance and federally required testing of the traffic safety devices, do away with train delays caused by damaged traffic safety devices; and reduce train whistles in the downtown area. *Ball Testimony; Ex. 10.*

7. The area to be vacated has not been used for traffic circulation in the last six years and there is no evidence the area proposed for vacation would be needed for future public use as a right-of-way. *Cornforth Testimony; Ex. 1.*

8. No abutting property or nearby property would become landlocked or have its access substantially impaired as a result of the proposed vacation of the subject portion of street right-of-way. *Cornforth Testimony; Ex. 1.*

9. The portion of street right-of-way proposed for vacation does not abut a body of water and, thus, the provisions of RCW 35.79.035 are not implicated. *Cornforth Testimony; Ex. 1.*

10. No member of the public appeared at the hearing to speak concerning the vacation proposal. Su Dowie, Executive Director of the Foss Waterway Development Authority, testified in support of the proposed vacation. She raised a question regarding how the street vacation would relate to future plans to construct a pedestrian overpass in the area. The City and BNSF indicated that the vacation would not preclude the pedestrian overpass and that the pedestrian overpass project is contemplated by the Exchange Agreement entered into between the City and BNSF. *Dowie Testimony; Ball Testimony; Cornforth Testimony; Ex. 3.*

11. The proposed street vacation has been reviewed by a number of governmental agencies and utility providers. None of the reviewers object to the vacation petition, however, some based their position on the inclusion of conditions including reserving or granting utility easements. *Cornforth Testimony; Exs. 1, 6 through 9.*

12. In accordance with the Exchange Agreement between the City of Tacoma and BNSF Railway Company, dated April 17, 2014, the City has received just compensation for the South 22<sup>nd</sup> Street vacation action in the form of mutual and offsetting public benefits by acceptance of various easement interests obtained through the Agreement. As such no additional compensation to the City is required as part of this action. *Ex. 11.*

13. 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.*



14. The DPW Preliminary Report, as entered into this record as Exhibit 1, accurately describes the proposed project, general and specific facts about the site and area, and applicable codes. The report is incorporated herein by reference as though fully set forth.

15. All property owners of record adjacent to the proposed vacation were notified of the June 3, 2015, hearing at least 30 days prior to the hearing, as required by *Tacoma Municipal Code (TMC)* 9.22.060 and all required posting of notices for the hearing have been accomplished. *Cornforth Testimony; Ex. 1.*

16. Any conclusion hereinafter stated which may be deemed to be properly considered 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 TMC 1.23.050.A.5 and TMC 9.22.*

2. Proceedings that involve consideration of petitions for the vacation of public rights-of-way are quasi-judicial in nature. *State v. City of Spokane, 70 Wn.2d 207, 442 P.2d 790 (1967).* The petitioner must demonstrate by a preponderance of the evidence that its vacation request conforms to the governing criteria. *See TMC 1.23.070.*

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 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.
6. That the vacation of right-of-way shall not be in violation of *RCW* 35.79.035.

*TMC 9.22.070.*

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

4. Findings entered herein, based upon substantial evidence in the hearing record, support a conclusion that the requested street vacation conforms to the TMC's criteria for the vacation of street rights-of-way, provided the conditions recommended herein are imposed. A public benefit would be recognized through permanent closure of the railway crossing at this location. The crossing configuration is not safe and presents a risk of vehicular and pedestrian accidents. The roadway was removed from the traffic circulation pattern in 2009. The area to be vacated is not needed for other public purposes, so long as conditions are attached retaining utility easement rights. Abutting landowners will not become landlocked as a result of the project. The Exchange Agreement between BNSF and the City, of which this vacation is a part, will result in significant benefits to the citizens of Tacoma, including construction of a key portion of the Prairie Line Trail. The evidence supports the conclusion that the criteria for approval of a street vacation have been established.

5. Accordingly, the requested street right-of-way vacation should be approved subject to the following conditions:

**A. SPECIAL CONDITIONS:**

1. PAYMENT OF FEES

Compensation for this street vacation has been provided in the form of mutual and offsetting public benefits received through the easement interests obtained as part of the Exchange Agreement between the City of Tacoma and BNSF Railway Company dated April 17, 2014.

2. TACOMA POWER & CLICK! NETWORK

Tacoma Power and Click! Network have no objection; however, an easement shall be reserved for their existing infrastructure.

3. TACOMA WATER

Tacoma Water has no objection; however, an easement shall be reserved for the existing infrastructure.

4. PUGET SOUND ENERGY

Puget Sound Energy has no objection; however, BNSF shall grant a separate easement to be executed and recorded concurrently with the vacation Ordinance.

**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 AUTHORIZATION GRANTED 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 APPROVALS GRANTED AND IS A CONTINUING REQUIREMENT OF SUCH APPROVALS. BY ACCEPTING THIS/THESE 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 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. PUBLIC WORKS/L.I.D.

LID has no objection; however, the property has not been assessed for sanitary sewer and would be re-evaluated upon development to determine if any In-Lieu Assessments would be applicable.

6. Based upon the facts and the governing law, the vacation petition should be granted, subject to conditions set forth in Conclusion 5 above.

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



**RECOMMENDATION:**

The vacation request is hereby recommended for approval, subject to the conditions contained in Conclusion 5.

**DATED** this 16<sup>th</sup> day of July, 2015.<sup>3</sup>

  
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**PHYLLIS K. MACLEOD, Hearing Examiner**

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<sup>3</sup> The recommendation, originally issued on July 14, 2015, is being reissued with modifications after receipt of further information regarding compensation.

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

**ORIGINAL**  
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## 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**

## Legg, Louisa

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**From:** Cornforth, Ronda  
**Sent:** Wednesday, July 15, 2015 8:25 AM  
**To:** Legg, Louisa; Carrara, Deborah  
**Subject:** Memorandum of Correction to Report and Recommendations HEX 2015-015  
**Attachments:** Memorandum of Correction to Report and Recommendations HEX 2015-015.doc

Please accept the attached as my formal request for amendment and/or removal of Section 5.A.1 of the Examiner's findings.

Thank you.

***R. J. Cornforth***

City of Tacoma, Public Works  
Real Property Services  
747 Market Street, Ste. 737  
Tacoma, WA 98402-7941  
(253) 591-5052 / Fax (253) 594-7941  
[rcornfor@cityoftacoma.org](mailto:rcornfor@cityoftacoma.org)

*We are made wise not by the recollection of our past, but by the responsibility for our future.*

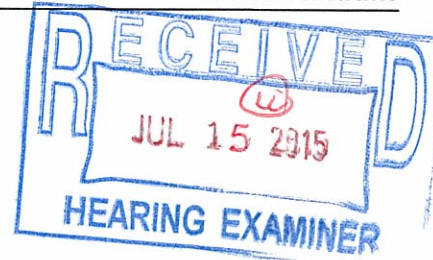
**ORIGINAL**

**EX.11**





**TO:** Phyllis Macleod, Hearing Examiner  
**FROM:** Ronda Cornforth, Sr. Real Estate Specialist  
**SUBJECT:** **BNSF Street Vacation Petition 124.1349**  
**Memorandum of minor correction to Report & Recommendations**  
**DATE:** July 15, 2015



Real Property Services requests amendment and/or removal of Section 5.A.1: Payment of Fees of the Report and Recommendations dated July 14, 2015 referenced as HEX 2015-015 (124.1349).

In accordance with the Exchange Agreement by and between the City of Tacoma and BNSF Railway Company, dated April 17, 2014, the City has received just compensation for the South 22<sup>nd</sup> Street vacation action in the form of mutual and offsetting public benefits by acceptance of various easement interests obtained. As such no additional compensation is required under this action.

Please accept this memorandum to amend and/or remove Section 5.A.1 of the Report and Recommendations dated July 14, 2015 of HEX 2015-015 (124.1349).

**ORIGINAL**

**EX.11**