

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

April 19, 2017

Tacoma City Council
City of Tacoma
747 Market Street
Tacoma, WA 98402

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RE: Notice of Appeal – HEX 2016-037 (Vacation Petition No. 124.1371)
Petitioner: Puyallup Tribe of Indians
Appellant: David Smith

This Notice of Appeal is filed on behalf of David Smith, the owner of adjacent property immediately and directly affected by the proposed vacation (Appellant). This appeal is based upon the following allegations and is filed under Chapter 1.70 of the Tacoma Municipal Code (TMC).

1. Standing. Mr. Smith is directly affected by the proposed vacation in that the vacation would eliminate all of his and the public's rights to use the existing alley, and the vacation would leave a small segment of alley adjoining the Smith property that would be isolated and disconnected from any other public property. The vacation would create a public island, useless to Mr. Smith and to any other member of the public and accessible only through Mr. Smith's property.

Mr. Smith's property was corner commercial property and previously had three direct accesses: East R Street, 29th Street, and the alley, which connected to both Portland Avenue and East R Street. As a result of the proposed vacation and a previous relocation of East R Street, Mr. Smith's property would only have one access to 29th Street. Access to Mr. Smith's property is unreasonably and unfairly impaired by the proposed vacation.

2. Alleged Errors. Overall, the Appellant alleges that the Examiner erred in finding that the access to Appellant's property will not be substantially impaired. In finding that the vacation standards were met, the Hearing Examiner relied upon an easement yet to be granted by the Tribe or, the Bureau of Indian Affairs (BIA), which holds the Tribe's land in trust and must approve any easement. As set forth in more detail below, the easement in

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)

question cannot be granted so as to be “permanent, usable [and] non-revocable” as required by the decision. Even if the easement were granted it would not provide meaningful access to the Smith property because of other limitations.

The Appellant alleges the following specific errors:

A. Finding of Fact 8 is erroneous because there was no evidence as to the amount of tax revenues generated for the public’s benefit by a Tribal casino or that such revenues depend upon this vacation.

B. Finding of Fact 9 is not supported by substantial evidence. There is a general public purpose served by the alley as access for utility providers, garbage collection, fire access and the like.

C. Finding of Fact 10 is erroneous in that it fails to note that the isolated segment of the alley that would not be vacated also provides no access to East R Street because of the previous relocation of that street by actions of the City and WSDOT. This finding is also erroneous in that it finds the proposed (but not yet granted) easement would provide an alternative access to the Smith property. The testimony established that the benefit of the easement (even if it could be granted) was significantly limited because of the small frontage of the Smith property on East 29th Street. The testimony established that an easement driveway might not even be allowed because of its proximity to the only permissible location for the primary driveway into the Smith property. In any event, two parallel driveways a few feet apart do not mitigate for the lost access and so access is substantially impaired.

D. Finding of Fact 12 is erroneous for several reasons. First, the easement would not provide a meaningful alternate access point from East 29th Street for the reasons set forth above. Second, Finding of Fact 12 should have taken into account the impact of the proposed vacation in conjunction with other actions taken previously by the City. In the past, Mr. Smith’s property had access onto two public streets (East 29th and East R Streets) and to an alley that connected to both East R Street and Portland Avenue. As a result of the proposed vacation action in conjunction with the relocation of East R Street, Mr. Smith’s property access would be limited to two parallel driveways (within a few feet of each other and potentially not both allowed), to the same street. Moreover, Mr. Smith would be left with a small segment of public alley right-of-way, completely landlocked from any other public access. Nowhere in the record is there any indication that either the City’s Real Property Services Department or Hearing Examiner considered the consequences of having a completely landlocked alley segment adjoining the Smith property.

E. Finding of Fact 16 is erroneous because it asserts that the Real Property Services Preliminary Report is accurate when it is not for the reasons set forth elsewhere in this Appeal.

F. The Appellant assigns error to Conclusion of Law 4, which concludes the proposal meets the criteria for approval of the street vacation. An easement as described by the Hearing Examiner would leave Mr. Smith's property with substantially impaired access. The conclusions about "significant economic growth" and tax revenues are not supported by evidence in the record.

G. Conclusion of Law 6 is erroneous because, contrary to its usual practices, the City did not require the easement to be subject to the approval of the benefitted party. Unchallenged testimony at the hearing established that the City's practice has been to require that an easement benefitting a party who would otherwise be harmed by the vacation be made subject to that party's approval. This Conclusion is also contrary to evidence provided by Mr. Smith to the Hearing Examiner that BIA regulations and the Tribe's Constitution limit the term of any potential easement and limit the ability to assign it to another party. Perhaps most importantly, the Hearing Examiner does not address in any respect the fact that an easement, even if granted, would render that portion of Mr. Smith's property (the easement) subject to the Tribe's regulatory jurisdiction and taxing authority. In other words, an important part of Mr. Smith's development rights would be subject to completely different jurisdiction than the bulk of his property. That fact alone is enough to make Mr. Smith's access rights "substantially impaired."

H. The Appellant incorporates the arguments set forth in its letter dated March 20, 2017, a copy of which is attached to this Notice of Appeal.

3. Legal Grounds for Relief. As set forth above, the Appellant alleges that the Hearing Examiner's recommendation erroneously interprets the law including the determination of substantial impairment and that the Hearing Examiner failed to consider the legal consequences of the BIA rules that make the grant of a practical easement impossible. As to the Findings of Fact to which error is assigned above, the Appellant alleges that the recommendation is not supported by substantial evidence. Finally, the Appellant alleges that the recommendation is a clearly erroneous application of the law to the facts for the reasons set forth above.

4. Request for Relief. The Appellant requests that the vacation be denied by the City Council for the reasons set forth above.

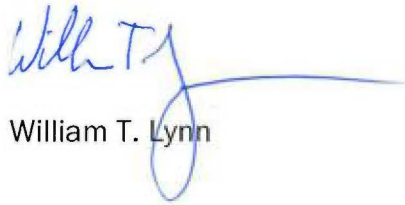
Gordon Thomas Honeywell^{LLP}

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If anything further is necessary to perfect this Appeal, please notify the undersigned immediately.

Respectfully submitted,

A handwritten signature in blue ink, appearing to read "WTL", with a long horizontal flourish extending to the right and a large loop at the end.

William T. Lynn

WTL:lb

Enclosure

cc: David Smith
Jeff Capell
Rob Hunter