

OFFICE OF THE HEARING EXAMINER

CITY OF TACOMA

REPORT AND RECOMMENDATION

TO THE CITY COUNCIL

PETITIONERS: DEAN PAULSON, LLC **FILE NO:** HEX2020-024 (124.1414)

SUMMARY OF REQUEST

The Real Property Services division (“RPS”) of the City of Tacoma (“City”) Public Works Department received a petition to vacate a dead-end portion of South 74th Street, lying between the westerly boundary of South Hosmer Street and the easterly boundary line of the South 72nd Street Interchange to Interstate Highway 5 (“I-5”), as depicted in Exhibits C-2 and C-3 of the hearing record. The vacated area of right-of-way will be incorporated into the abutting two parcels for enhanced access with greater control, and possible future business expansion.

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 C-1), and examining available information on file with the petition, the Hearing Examiner conducted a public hearing on the petition on September 10, 2020.¹ Teague Pasco of RPS represented the City. The Petitioner Dean Paulson appeared *pro se* with his commercial real estate broker Timothy Johnson. Testimony was taken, exhibits were admitted, and the record closed at the conclusion of the hearing.

¹ The hearing was conducted using internet conferencing technology over Zoom due to the current closure of City facilities for in-person gatherings.

FINDINGS, CONCLUSIONS, AND RECOMMENDATION:

FINDINGS:

1. Petitioner DEAN PAULSON, LLC, a Washington limited liability company (the “Petitioner”),² submitted a petition requesting the vacation of a dead-end portion of South 74th Street, lying between the westerly boundary of South Hosmer Street and the easterly boundary line of the South 72nd Street Interchange to I-5 (the “Vacation Area” as legally described below). The Vacation Area will be incorporated into the abutting two parcels for enhanced access with greater control (i.e., no public right-of-way use) with the possibility of future business expansion. *Paulson Testimony; Ex. C-1~Ex. C-3*.

2. The City’s Report provides the following metes and bounds legal description for the Vacation Area:

That portion of South 74th Street as conveyed to the City of Tacoma by Deed recorded November 29, 1962, under Auditor’s Fee No. 1989469, records of Pierce County, more particularly described as follows:

Commencing at the intersection of the easterly line of the South 72nd Street Interchange as described in Fee No. 1690005, with the south line of Tract 17, Map of Wapato Lake Views, according to Plat recorded in Book 2 of Plats at Page 129, records of Pierce County Auditor;

Thence southwesterly along said easterly line to an intersection with the north line of South 74th Street as described in said Deed No. 1989469, being 240 feet south and parallel with said south line of Tract 17, said intersection being the True Point of Beginning;

Thence east along said north line a distance of 241 feet more or less to the line described in Pierce County Superior Court Cause No. 301351, recorded under recording number 8103180217, records of Pierce County Auditor, specifically, at Highway’s Engineer Station (hereinafter referred to as HES) SH 4+81.78 on the SH Line Survey of SR5 and 42 feet distant northwesterly, when measured radially from said SH Line as depicted in drawings entitled SR-5 Tacoma Freeway: South City Limits to Pacific Avenue Right-of-Way, dated January 1957, on file in the office of the Director of Transportation, Olympia, Washington;

Thence southwesterly, parallel with and 42 feet northwesterly of said SH Line to intersect the south line of South 74th Street per said Deed No. 1989469, at HES SH 5+52.49;

² The property owner abutting the Vacation Area on the south side, PARAM TACOMA LLC, is essentially a co-applicant here, but has left the hearing legwork to DEAN PAULSON, LLC. *See Ex. C-1 and FoF 3 below.*

Thence west along said south line a distance of 236 feet more or less to the easterly line of said South 72nd Street Interchange as described in Fee No. 1690005;

Thence northeasterly along said easterly line a distance of 62.5 feet more or less to the Point of Beginning.

Being within the Northwest Quarter of the Southwest Quarter of Section 29, Township 20 North, Range 03 East of the W.M., all situate in the City of Tacoma, County of Pierce, State of Washington.

(Containing ±14,384 SF or approximately 0.33 Ac.). *Ex. C-1.*

3. The two abutting property owners both signed the petition for vacation. The Petitioner owns the parcel abutting the north boundary of the Vacation Area having the street address of 7310 South Hosmer Street. PARAM TACOMA LLC, also a Washington limited liability company, owns the real property abutting the south boundary of the Vacation Area, having the street address of 7414 South Hosmer Street. *Ex. C-1~Ex. C-3.*

4. The City acquired the Vacation Area by Quit Claim Deed, from Hokold, Inc. dated October 30, 1962, as recorded in Pierce County Auditor's File No. 1989469. Prior to construction of the current alignment of South 72nd Street to I-5 in the early 1980s, the west end of the Vacation Area connected to a previous alignment of South Hosmer Street extending to the south. When the interchange was constructed, the Vacation Area was left as a dead-end. The new alignment of South Hosmer Street continues south on its east side. *Ex. C-1~Ex. C-3, Ex. C-5, Ex. C-6.*

5. In this location, the South 74th Street is 60 feet in total width. It is an oblate rectangle in shape, extending westward from South Hosmer Street 241 feet on its northern boundary, and 236 feet on its southern boundary. The Vacation Area is developed with a 34-foot wide asphalt road in the center; the remaining right-of-way to the north and south of the asphalt road contains curbs, sidewalks, and planter strips. At the west dead-end point, there is a metal traffic barrier. The east end of the proposed Vacation Area abuts South Hosmer Street. The Vacation Area is level without significant sloping. *Ex. C-1~Ex. C-3.*

6. No abutting real property becomes landlocked by granting this vacation, nor will the vacation work any substantial impairment of access to abutting properties. *Id.*

7. The vacation is a public benefit because unencumbering the Vacation Area from the City's right-of-way interest will add taxable square footage to the Petitioner's real property with the potential for increased City revenue, and vacating will reduce the City's right-of-way maintenance expenditures. *Ex. C-1.*

8. 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. *Id.*

9. RPS circulated the petition for review by interested governmental agencies, City departments/divisions, and utility providers. These various agencies, departments and divisions provided

comments and recommended/requested conditions to RPS. These comments and requests were incorporated into the Report and referenced in City testimony at the hearing,³ and where appropriate, have been incorporated in this Report and Recommendation at Conclusion 9 below. *Ex. C-7~Ex.C-16.*

10. No members of the public appeared to testify at the hearing, and no written public comments were received.

11. RPS' Report, which is entered into the record as Exhibit C-1, accurately describes the proposed vacation, general and specific facts about the Subject Property 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.

12. Public hearing notices were posted/published at the various locations on the dates indicated below:

On August 6, 2020-

- a. A yellow public notice sign was placed at the southwest corner of the intersection of South 74th Street and South Hosmer Street.
- b. A yellow public notice sign was placed at the northeast corner of the intersection of South 74th Street and the South 72nd Street Interchange of I-5. *Ex. C-1, Ex. C-4.*

On August 7, 2020-

- c. A public notice memo was placed into the glass display case located on the first floor of the Tacoma Municipal Building next to the Finance Department.
- d. A public notice memo was advertised on the City of Tacoma web site at address: <http://www.cityoftacoma.org/page.aspx?nid=596>.
- e. A public notice was advertised in the Daily Index newspaper.
- f. A public notice mailing was mailed to all parties of record within 300 feet of the Vacation Area.
- g. Public notice was advertised on Municipal Television Channel 12. *Ex. Id.*

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

³ Mostly through far too lengthy questioning from the Examiner.

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 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 43.21.C, the State Environmental Policy Act (SEPA).

4. "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."⁴

5. Petitions for the vacation of public right-of-way must be consistent with the following criteria:⁵

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. The Petitioner must demonstrate, by a preponderance of the evidence, that its vacation petition meets the foregoing criteria. *See TMC 1.23.070.*

⁴ *Puget Sound Alumni of Kappa Sigma v. Seattle, 70 Wn.2d 222, 238-239, 422 P.2d 799, 808-809 (1967).*

⁵ For consistency, outline numbering of the criteria is kept the same as in the original TMC text.

7. 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 right-of-way set forth at Conclusion 5 above, provided the conditions recommended below are imposed and met. No potential for landlocking an abutting owner exists from granting the petition as the Vacation Area will continue to be used for access by the two abutting property owners. The Vacation Area is not currently used as a significant part of the City's right-of-way system (other than for emergency vehicle access and solid waste pickup, as addressed further below), nor does the City perceive any future use of the Vacation Area for public right-of-way purposes. 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 into property tax valuations for the Petitioners' abutting real property, and by facilitating the Petitioners' present and potentially future business operations while reducing the City's maintenance obligations.

8. Dedicated public right-of-way can only be divested through the vacation process set forth at RCW 35.79. Real property owned in fee by a municipality is not properly divested through the vacation process.⁶ Here, the Vacation Area marginally passes as vacatable right-of-way under *Kiely v. Graves* given its length and 60-foot width, together with the circumstances under which it was conveyed (i.e., the construction of the I-5 interchange). *Ex. C-6*.

9. 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 Petitioners 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 rights-of-way. *TMC 9.22.010*

2. TACOMA PUBLIC UTILITIES

Tacoma Public Utilities has no objection to the vacation, but requires the following easement rights:

Tacoma Power: Requests an easement over the east 15' of the Vacation Area for existing power facilities.

⁶ *Kiely v. Graves*, 173 Wn.2d 926, 271 P.3d 226 (2012). There was some discussion at the hearing regarding whether a surplus sale of the Vacation Area would have been a more appropriate path given that it was conveyed by a quit claim deed expressly conveying "all interest of the party of the first part in and to the following described real property..." without any reference to the conveyance being only for right-of-way purposes.

Tacoma Water: Requests an easement over the east 100' of the Vacation Area for existing water facilities, including, without limitation, an existing hydrant.

3. TACOMA FIRE

Tacoma Fire has requested that the easement to be retained by the City provide for emergency vehicle access across the entire Vacation Area, as well as expressly providing access to the existing fire hydrant.

4. TACOMA SOLID WASTE

Tacoma Solid Waste has requested that easement rights be reserved for access across the Vacation Area to provide pick up services to the adjacent parcels.

B. THIRD PARTY CONSIDERATION:

COMCAST

Comcast has indicated that it has underground facilities located in the Vacation Area crossing north to south along South Hosmer Street. As a result, Comcast has requested an easement to protect Comcast's facilities in place.

C. USUAL CONDITIONS:

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.

D. ADVISORY NOTES:

1. Other than the conditions/concerns already expressly set forth herein, no objection or additional comment was received from the governmental agencies, City departments/divisions, and utility providers to whom the City circulated this petition.
2. There is an outstanding Connection Charge In-Lieu-of-Assessment estimated at \$4,906.44 provided by the City's Public Works Department in Exhibit C-14 that is referenced now as an advisory comment only. Payment thereof is not a condition to this vacation. The charges *can* be voluntarily paid at time of compensation for the Vacation Area. If not, the In-Lieu-of-Assessment Charge(s) will remain outstanding and will be required to be paid in conjunction with any future permitting on, or development of the Vacation Area, and may be subject to increase with the passage of time.

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

11. 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 9 above.

DATED this 16th day of September, 2020.



JEFF H. CAPELL, 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*