

OFFICE OF THE HEARING EXAMINER

CITY OF TACOMA

REPORT AND RECOMMENDATION

TO THE CITY COUNCIL

PETITIONER: 1402 TACOMA LLC

FILE NO.: HEX2021-004 (124.1422)

SUMMARY OF REQUEST

The Real Property Services division (“RPS”) of the City of Tacoma (“City”) Public Works Department received a petition from 1402 TACOMA LLC, a Washington limited liability company, (referred to herein as the “Petitioner” or “1402 Tacoma”), requesting the vacation of a five-foot wide strip of the air rights over a westerly portion of Tacoma Avenue South, lying southerly of South 14th Street.

EXAMINER

The vacation petition is hereby recommended for approval, subject to the conditions set forth herein 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 via Zoom on February 18, 2021.¹ Troy Stevens, a Senior Real Estate Specialist with RPS, represented the City. Paul Del Vecchio appeared as the property owner’s representative. Testimony was taken; exhibits were reviewed and admitted.

¹ Due to National, State of Washington (“State”) and City Proclamations of Emergency caused by the COVID-19 virus, the City closed the Tacoma Municipal Building to the public until further notice on or around March 17, 2020. As a result, the public hearing in this matter was conducted virtually using Zoom teleconferencing with both internet visual and audio access, as well as separate telephonic (only) access via call in number on Zoom.

FINDINGS, CONCLUSIONS, AND RECOMMENDATION:

FINDINGS:

1. 1402 Tacoma has petitioned for the vacation of a five-foot wide strip of the air rights over a westerly portion of Tacoma Avenue South, lying southerly of South 14th Street (the “Vacation Area”) to facilitate design options for a residential apartment building that is proposed to consist of 171 units. *Stevens Testimony; Del Vecchio Testimony; Ex. C-1, Ex. C-2.*

2. The Report provides the following legal description for the Vacation Area:

The westerly 5.00 feet of that portion of Tacoma Avenue South lying adjacent to the following: Lots 1 through 5, inclusive, and the north half of Lot 6, Block 1412, Map of New Tacoma, W.T., according to plat filed for record February 3, 1875 in the Office of the County Auditor; and lying between the elevations of 245.63 and 330.63 feet at the northeast corner and between 244.93 and 329.93 feet at the southeast corner. *Ex. C-1, Ex. C-4.*

3. The air rights vacation would not affect any existing right-of-way use, being solely a vacation of air rights along one side of the proposed apartment building. The vacation would allow outcrops or other design features on the proposed building that would extend over existing sidewalks and provide some weather cover. *Stevens Testimony, Del Vecchio Testimony; Ex. C-1.*

4. The City acquired the Tacoma Avenue right-of-way by dedication in the Map of New Tacoma, W.T., according to plat filed for record February 3, 1875 in the Office of the Pierce County Auditor. *Ex. C-1.*

5. Tacoma Avenue South is a 100-foot wide, mostly level, street right-of-way, with a 67-foot wide asphalt road in the center. The remaining right-of-way includes sidewalk, curb and gutter, and is relatively level. There is parallel parking on the west side of the right-of-way and angled parking on the east side. Approving the vacation would not affect any existing parking. *Id.*

6. The proposed vacation is a public benefit because it facilitates the potential for additional taxable square footage to the building to be built on the property, thereby potentially increasing the City’s revenues. The vacation will also enable a less monolithic building façade and provide weather covering over pedestrians. *Id.*

7. City staff has determined that the Vacation Area is not contemplated or needed for future public use as right-of-way. 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.

8. 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 conditions were incorporated into the Report and were referenced in City testimony at the hearing. These conditions, where appropriate, have been incorporated in this Report and Recommendation at Conclusion 8 below. None of the

governmental agencies, City departments/divisions, and utility providers objected to the requested vacation, provided that their concerns were addressed through the requested conditions being imposed. *Stevens Testimony; Exs. C-5 ~ C-14.*

9. The Petitioner did not indicate any objection to the City's requested conditions of approval.
10. Notice of the Public Hearing was posted at the following locations on January 13, 2021:
 - a. A yellow public notice sign was posted 38 feet west of the southwesterly corner of South 14th Street and Tacoma Avenue South.
 - b. A yellow public notice sign was posted 146 feet south of the southwesterly corner of South 14th Street and Tacoma Avenue South.

Public hearing notices were posted or published on January 14, 2021, as follows:

- c. A public notice memo was placed into the glass display case located on the first floor of the 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>.
- c. Public Notice was advertised in the Daily Index newspaper.
- d. Public Notice was mailed to all property owners of record within 300 feet of the Vacation Area.
- e. Public Notice was advertised on Municipal Television Channel 12. *Stevens Testimony; Ex. C-1.*

11. Several members of the public appeared at the hearing but chose not to testify and instead posed questions through the chat function of the Zoom meeting. Most were present out of interest regarding the multi-family project intended to follow on the heels of the vacation.

12. RPS' Report, which is entered into the record as Exhibit C-1, accurately describes the proposed air rights vacation, general and specific facts about the surrounding site and the Vacation Area, and lists applicable statutes/regulations. 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. Any finding above, which may be more properly deemed or considered a conclusion, is hereby adopted as such.

CONCLUSIONS OF LAW:

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

4. Petitions for the vacation of public right-of-way must be consistent 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.*²

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

6. Findings entered herein, based upon the preponderance of evidence in the hearing record, support a conclusion that the requested vacation of air rights conforms to the criteria for the vacation of right-of-way set forth at Conclusion 4 above, provided the conditions recommended below are imposed and met. No potential for landlocking an abutting owner exists from granting the petition, nor is there any need for, or public purpose served by retaining the Vacation Area as right-of-way. The Vacation

² For consistency, outline numbering of the criteria is kept the same as in the original TMC text.

Area plays no appreciable role in the “[s]treet pattern or circulation of the immediate area or the community as a whole.” Public benefit accrues through the potential for increased tax revenue, and an improved façade aesthetic for the resulting building, with the added bonus of potential rain protection.

7. “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.”³

8. Given the foregoing, the Hearing Examiner recommends that the requested street vacation be approved subject to the following conditions:

A. SPECIAL CONDITION:

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 rights-of-way. *TMC 9.22.010*.

B. ADVISORY CONSIDERATION:

RPS/IN-LIEU

Any LID estimates or other in-lieu amounts referenced in the RPS Report are advisory comments only, and are not included here as a condition of approval; they can be voluntarily paid as part of the vacation process, or they may be required at the time of any subsequent development of the Vacation Area and the abutting property to which it will attach. Such fees are subject to increase until paid.

C. USUAL CONDITIONS/COMMENTS:

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

³ *Puget Sound Alumni of Kappa Sigma v. Seattle*, 70 Wn.2d 222, 238-239, 422 P.2d 799, 808-809 (1967).

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.

9. Accordingly, the petition is recommended for approval, subject to the compensation condition set forth in Conclusion 8 above.

10. 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 the condition set forth in Conclusion 8 above.

DATED this 23rd day of February, 2021.



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*