

**OFFICE OF THE HEARING EXAMINER**

**CITY OF TACOMA**

**REPORT AND RECOMMENDATION**

**TO THE CITY COUNCIL**

**PETITIONERS:** FORTERRA HILLTOP EAST LLC & FORTERRA HILLTOP WEST LLC

**FILE NO.:** HEX2020-025 (124.1409)

**SUMMARY OF REQUEST**

The Real Property Services division (“RPS”) of the City of Tacoma (“City”) Public Works Department received a petition from FORTERRA HILLTOP EAST LLC and FORTERRA HILLTOP WEST LLC, both Washington limited liability companies, (referred to collectively herein as the “Petitioner” or “Forterra”), requesting the vacation of the alley right-of-way lying between South 11th and South 12th Streets, and Martin Luther King Jr. Way and South J Street, to facilitate a mixed use development consisting of affordable housing, and office and small business space.

**RECOMMENDATION OF THE HEARING EXAMINER**

The vacation petition is hereby recommended for approval, subject to the conditions set forth below. The Petitioner has requested a waiver of the usual vacation compensation which is also addressed below in Finding 7 and Conclusion 8.

**PUBLIC HEARING**

After reviewing RPS’s 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 11, 2021.<sup>1</sup> Troy Stevens, a Senior Real Estate Specialist with RPS, represented the City. Daniel S. Grausz appeared as the Petitioner’s main representative. Rebecca Wold Bouchey also offered testimony for the Petitioner. Testimony was taken under oath; exhibits were reviewed and admitted.

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<sup>1</sup> 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 OF FACT:**

1. Forterra submitted a petition requesting the vacation of the alley right-of-way lying between South 11th and South 12th Streets, and Martin Luther King Jr. Way and South J Street (the “Vacation Area”), to facilitate a mixed use development consisting of affordable housing, and office and small business space. The Petitioner entities are the sole owners abutting the Vacation Area (*Stevens Testimony; Grausz Testimony; Ex. C-1 ~ C-3.*

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

THAT PORTION OF THE SOUTHWEST QUARTER OF THE NORTHEAST QUARTER OF SECTION 05, TOWNSHIP 20 NORTH, RANGE 03 EAST OF THE WILLAMETTE MERIDIAN, PIERCE COUNTY, WASHINGTON, MORE PARTICULARLY DESCRIBED AS FOLLOWS:

THE EAST 4.91 FEET OF THE WEST 30 FEET OF THE 40 FOOT WIDE ALLEY SITUATED BETWEEN BLOCKS 1120 AND 1121, MAP OF NEW TACOMA, WASHINGTON TERRITORY, ACCORDING TO THE PLAT THEREOF RECORDED FEBRUARY 3, 1875, RECORDS OF PIERCE COUNTY AUDITOR;

TOGETHER WITH THE EAST 10 FEET OF ALLEY ABUTTING AS VACATED BY CITY OF TACOMA ORDINANCE NO. 2131 AND TOGETHER WITH THE WEST 19.09 FEET OF SAID BLOCK 1120, AS CONVEYED TO THE CITY OF TACOMA BY INSTRUMENT NUMBER 9812310546, RECORDS OF PIERCE COUNTY AUDITOR; SITUATE IN THE CITY OF TACOMA COUNTY OF PIERCE, STATE OF WASHINGTON;

(CONTAINING ±10,199 SQUARE FEET OR APPROXIMATELY 0.23 ACRES). *Ex. C-1 ~ C-4, Ex. C-6.*

3. The Petitioner seeks a release of the City’s right-of way interest in the Vacation Area to facilitate its planned mixed use development which will expand Tacoma’s affordable housing supply and contribute to the community’s available commercial/office space. Forterra purchased the abutting former Rite Aid drug store property over a year ago, and then more recently completed its assemblage by acquiring additional real property abutting the Vacation Area (Forterra has referred to the final piece as “the Cosmo property”). *Stevens Testimony; Grausz Testimony; Ex. C-1.*

4. The City acquired the Vacation Area as right-of-way in the Map of New Tacoma, W.T., according to the plat thereof filed February 3, 1875, records of Pierce County, Washington. *Ex. C-1, Ex. C-4.*

5. Portions of the originally dedicated alley were previously vacated under City of Tacoma Ordinance Nos. 2131 and 26317, in 1904 and 1998, respectively. The project that vacated the portion in 1998 under Ordinance No. 26317 included a dedication under City of Tacoma Deed No. D-6746, realigning the alley to its current configuration. *Stevens Testimony; Ex. C-1, Ex. C-5.*

6. At present, the Vacation Area is a 34-foot wide alley right-of-way between South 11th and South 12th Streets (Earnest S. Brazill), and Martin Luther King Jr. Way and South J Street. It is paved with an asphalt road surface and includes curb and gutter. It is mostly level, and when not gated on both ends, has provided access in a north and south direction through an existing paved parking lot that previously served the now closed Rite Aid drug store. It is not integral to the City's transportation needs, but does need to continue to serve as a utility corridor, unless and until existing facilities can be relocated as part of the Petitioner's development. *Stevens Testimony, Grausz Testimony; Ex. C-1. See also Conclusion 8 below.*

7. The Petitioner has requested that normal vacation compensation be waived for this petition based on the Petitioner's commitment to develop affordable housing in the Tacoma market. City staff support this request, provided that the Petitioner enters into a "Public Benefit Agreement" prior to finalizing the vacation. *Grausz Testimony, Bouchey Testimony, Stevens Testimony; Ex. C-7.*

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 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 imposition of the requested conditions. *Stevens Testimony; Exs. C-8 ~ C-16.*

9. The Petitioner testified that it has no objections to the City's requested conditions of approval, but added that the City's requests for easement reservations will likely be addressed sooner or later through relocation or replacement of facilities because the Petitioner does intend to build over the Vacation Area. *Grausz Testimony.*

10. The proposed vacation offers public benefit because it adds the Vacation Area to the taxable square footage of the abutting property thereby creating the potential for increased tax revenue. It also facilitates Forterra's intended development of affordable housing which is much needed in the Tacoma market at present. Additionally, the Petitioner plans to price a significant portion of its project's commercial space in a manner that will facilitate occupancy of local businesses within the heart of the Hilltop district. *Grausz Testimony, Bouchey Testimony, Stevens Testimony; Ex. C-7.*

11. The Vacation Area is not contemplated or necessary for the City's transportation system or 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. *Stevens Testimony; Bouchey Testimony; Ex. C-1, Ex. C-7.*

12. Notice of the Public Hearing was posted at the following locations on January 13, 2021:

- a. A yellow public notice sign was placed 136 feet west of the northwest corner of Earnest S. Brazill Street (South 12th Street) and South J Street.

- b. A yellow public notice sign was placed 136 feet west of the southwest corner of South 11th Street and South J Street.

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.*

13. No members of the public appeared at the hearing to testify nor were any written public comments received.

14. RPS's Report, which is entered into the record as Exhibit C-1, accurately describes the proposed 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.

15. 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).

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

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*.<sup>2</sup>

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 street vacation conforms to the criteria for the vacation of street 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 material need for, or public purpose served by retaining the Vacation Area as right-of-way. The Vacation Area plays no immutable 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 the increase to available affordable housing that will result.

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.”<sup>3</sup>

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

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

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

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

*The Examiner recommends that the foregoing be waived if the City and the Petitioner have entered into a mutually acceptable Public Benefits Agreement by the time of finalization of the vacation.*

2. ENVIRONMENTAL SERVICES (ES)

A City utility easement must be reserved in the vacation ordinance preserving the continued existence of several segments of 8-inch wastewater mains (and the ability to access, maintain, repair, replace, etc.) running through the Vacation Area, specifically segments 6253001, 6253010 and 6253024.

Alternatively, the wastewater system may be relocated out of the Vacation Area at the Petitioner's expense.

3. TACOMA POWER/CLICK!

In the reserved City easement, Tacoma Power/Click! must have the ability to maintain conduit running the length of the Vacation Area, with 5 additional feet on either side of the actual facilities, for a total of 10 feet in width in order to be able to access, maintain, repair, and replace the conduit.

4. COMCAST COMMUNICATION

Comcast has an aerial to UG conversion in the Vacation Area. As a result, Comcast will require a separate 3rd party easement be negotiated with the Petitioner prior to final reading of the street vacation.

5. LUMEN (CENTURY LINK) COMMUNICATION

Lumen requires a separate 3rd party easement be negotiated with the Petitioner prior to final reading of the street vacation for facilities it currently has in the Vacation Area.

NOTE: All facilities referenced above may be relocated at the Petitioner's expense in lieu of the referenced easements being retained. If facilities are relocated after finalization of the vacation, and easements have been retained, the Petitioner can request that the easements be relinquished if no longer needed due to the relocation.

**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. 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 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 conditions 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 conditions contained in Conclusion 8 above.

**DATED** this 17th day of February, 2021.

  
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**JEFF H. CAPELLE, Hearing Examiner**

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

## 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***