



City of Tacoma  
Hearing Examiner

March 5, 2014

H. Frank Crawford and Neal H. Luna  
Vandeberg Johnson & Gandara, LLP  
Attorneys at Law  
PO Box 1315  
Tacoma WA 98401-6377

Re: File No. HEX 2013-051 (Vacation No. 124.1337)  
Petitioner: 28 Proctor Holdings, LLC

Counselors,

Enclosed please find enclosed a copy of the Tacoma Hearing Examiner's Order on Reconsideration entered in the above referenced matter on March 5, 2014.

Sincerely,

Louisa Legg  
Legal Assistant

Enclosure (1) – Order on Reconsideration  
Attachments (3) – Transmittal List; Attachment A; Attachment B

cc: *See Attached Transmittal List*

**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 March 5, 2015, at Tacoma, WA.

Louisa Legg

**VIA ELECTRONIC MAIL DELIVERY:**

BCRA, Attn: Randall Gould and Kathryn Jerkavich, 2106 Pacific Avenue, STE 300, Tacoma, WA 98402  
Samantha and Eric Soju, 3405 North 29<sup>th</sup> Street, Tacoma, WA 98407  
Real Property Services, City of Tacoma (Troy Stevens)  
City Manager's Office, City of Tacoma (Julie Stoltman)  
Clerk's Office, City of Tacoma (Nicole Emery)  
Tacoma Fire Department (Ryan Erickson, P.E.)  
Environmental Services, Science & Engineering, City of Tacoma (Christina Garcia)  
Tacoma Power (Rick Van Allen)  
Solid Waste Management, City of Tacoma (Rick Coyne)  
PW Traffic Engineering, City of Tacoma (Jennifer Kammerzell)  
Planning and Development Services City of Tacoma  
(Craig Kuntz/Daniel Sully, P.E./Sue Coffman)  
Public Works Engineering, City of Tacoma (Sue Simpson)  
Legal Department, Civil Division, City of Tacoma  
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 (Philip Kao)  
Planning and Development Services Department, City of Tacoma (Lihuang Wung)

**VIA FIRST CLASS MAIL DELIVERY:**

BCRA, Attn: Randall Gould and Kathryn Jerkavich, 2106 Pacific Avenue, STE 300, Tacoma, WA 98402  
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28 Proctor Holdings, LLC, ATTN: Erling Kuester, P.O. Box 2214, Tacoma, WA 98401  
The Rush Companies, Christopher Dewald, VP of Development, 6622 Wollochet Dr. NW,  
Gig Harbor, WA 98335  
Rick Moses Development, ATTN: Rick Moses, The Bradbury Building, 304 South Broadway,  
STE 525, Los Angeles CA 90013  
James Steel, 3213 North 22<sup>nd</sup> Street, Tacoma WA 98406  
Joan Halley, 3724 North 29<sup>th</sup> Street, Tacoma, WA 98407  
John Ackley, 2801 North Proctor, Tacoma, WA 98407  
Juli Anne Cooke Gibson, 4416 North 28<sup>th</sup> Street, Tacoma, WA 98407  
Peter Sproule, 4211 North 26<sup>th</sup> Street, Tacoma, WA 98407  
Roy and Carrie Cupler, 3731 North 28<sup>th</sup> Street, Tacoma, WA 98407  
John Trueman 611 North Carr Street, Tacoma, WA 98407  
Robert L. Schuler, 4612 North 13<sup>th</sup> Street, Tacoma, WA 98047  
Reggie Frederick, 3806 North 26<sup>th</sup> Street, Tacoma, WA 98407  
Chris Dewald, 6622 Wollochet Drive NW, Gig Harbor WA 98335  
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Tom Eqnew, 3724 North 29<sup>th</sup> Street, Tacoma, WA 98407  
Denis Graver, 3729 North 28<sup>th</sup> Street, Tacoma, WA 98407  
Brenda Dietz, 4121 North 29<sup>th</sup> Street, Tacoma, WA 98407  
CenturyLink, Attn: R. Jeff Lawrey, 1208 NE 64<sup>th</sup> Street Rm 401, Seattle, WA 98115  
Judith Chelotti, 4211 North 26<sup>th</sup> Street, Tacoma, WA 98407  
Denis Duggan, 4008 North 24<sup>th</sup> Street, Tacoma, WA 98406



City of Tacoma  
Hearing Examiner

March 5, 2014

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Samantha and Eric Soju  
3405 North 29<sup>th</sup> Street  
Tacoma, WA 98407  
[samanthasonju@gmail.com](mailto:samanthasonju@gmail.com)

Re: File No. HEX 2013-051 (Vacation No. 124.1337)  
Petitioner: 28 Proctor Holdings, LLC

To the Parties,

Enclosed please find enclosed a copy of the Tacoma Hearing Examiner's Order on Reconsideration entered in the above referenced matter on March 5, 2014.

Sincerely,

Louisa Legg  
Legal Assistant

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cc: *See Attached Transmittal List*

**CERTIFICATION**

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I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.

DATED March 5, 2014, at Tacoma, WA.

Louisa Legg

**Transmittal List – File No. HEX 2013-051 (124.1337)**

**VIA ELECTRONIC MAIL DELIVERY:**

Clerk's Office, City of Tacoma (Nicole Emery)  
Tacoma Fire Department (Ryan Erickson, P.E.)  
Environmental Services, Science & Engineering, City of Tacoma (Christina Garcia)  
Tacoma Power (Rick Van Allen)  
Solid Waste Management, City of Tacoma (Rick Coyne)  
PW Traffic Engineering, City of Tacoma (Jennifer Kammerzell)  
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(Craig Kuntz/Daniel Sully, P.E./Sue Coffman)  
Public Works Engineering, City of Tacoma (Sue Simpson)  
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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)

**VIA FIRST CLASS MAIL DELIVERY:**

28 Proctor Holdings, LLC, ATTN: Erling Kuester, P.O. Box 2214, Tacoma, WA 98401  
The Rush Companies, Christopher Dewald, VP of Development, 6622 Wollochet Dr. NW,  
Gig Harbor, WA 98335  
Rick Moses Development, ATTN: Rick Moses, The Bradbury Building, 304 South Broadway,  
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Denis Duggan, 4008 North 24<sup>th</sup> Street, Tacoma, WA 98406

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**OFFICE OF THE HEARING EXAMINER**  
**CITY OF TACOMA**

**In the matter of:**

**Vacation No. 124.1337,  
28 Proctor Holdings, LLC,  
(A portion of alleyway air rights  
west of Proctor Street between North  
27<sup>th</sup> and North 28<sup>th</sup> Streets.)**

**HEX NO. 2013-051**

**ORDER ON RECONSIDERATION**

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The Proctor 28 Holdings, LLC's petition to vacate air rights over an alley in the Proctor Street District came on for a public hearing before the undersigned Hearing Examiner for the City of Tacoma, Washington, on January 16, 2014.<sup>1</sup> The vacated air space would be used for constructing occupied space spanning the alley and connecting two parts of a proposed mixed use development consisting of commercial uses at ground level and residential apartments above. The Hearing Examiner issued Findings of Fact, Conclusions of Law, and a Recommendation on January 30, 2014, recommending approval of the requested vacation of air rights over the alley. Samantha and Eric Sonju, residents in the Proctor neighborhood, brought a timely motion seeking reconsideration of the Hearing Examiner's Recommendation to the Tacoma City Council. *See Attachment A.* Petitioner 28 Proctor Holdings, LLC filed a response to the Motion for Reconsideration. The Hearing Examiner reviewed and considered all the material submitted

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<sup>1</sup> The evidentiary record was left open for one week to allow for clarifying comments from the Tacoma Fire Department.

**ORDER ON RECONSIDERATION**

**- 1 -**

**ORIGINAL**

City of Tacoma  
Office of the Hearing Examiner  
Tacoma Municipal Building  
747 Market Street, Room 720  
Tacoma, WA 98402-3768  
(253)591-5195 FAX (253)591-2003

1 on reconsideration and concludes that one condition should be added to the recommended  
2 approval in the case.

3 ANALYSIS

4 Reconsideration of a Hearing Examiner decision or recommendation is addressed in  
5 adopted Rules of Procedure:

6 (a) Any aggrieved individual or entity having standing under the  
7 ordinance governing the matter or as otherwise provided by law may  
8 file a written request for reconsideration within 14 calendar days of  
9 the issuance of the Examiner's recommendation. The request shall set  
10 forth the alleged errors of procedure, fact or law, and the Examiner  
11 may, after review of the record, take such further action as is deemed  
12 appropriate, which may include the issuance of a revised  
13 recommendation.

14 *City of Tacoma Office of the Hearing Examiner Rules of Procedure for Hearings §3.10(a).*

15 In the context of street and air rights vacations, the parties aggrieved by a decision are  
16 typically limited to the abutting property owners or property owners whose access will be  
17 substantially impaired by the vacation. *Capitol Hill Methodist Church of Seattle v. Seattle*, 52  
18 Wn.2d 359, 365, 324 P.2d 1113 (1958); *Taft v. Washington Mutual Savings Bank*, 127 Wash.  
19 503, 509, 221 P. 604 (1923) citing *Freeman v. Centralia*, 67 Wash. 142, 120 P. 886 (1912). The  
20 Sonjus have not claimed status as abutting property owners and have not demonstrated any harm  
21 specific to their property, separate and apart from the alleged harm to the general public in the  
neighborhood. As a result, the Sonjus may lack the interest necessary to bring a Motion for  
Reconsideration. The case authority in this state, however, is not entirely clear on whether a  
member of the general public, who otherwise lacks standing to challenge an ordinance vacating

1 rights, can move forward if the challenge is based on lack of public benefit. *Banchero v. City*  
2 *Council*, 2 Wn. App. 519, 468 P.2d 724 (1970). By analogy, a member of the public seeking  
3 reconsideration of a hearing examiner's recommendation, based upon lack of public benefit,  
4 may have similar standing to proceed. Based upon this uncertain state of the law, the Hearing  
5 Examiner will address the substance of the Sonjus' Motion for Reconsideration rather than  
6 dismissing it for lack of standing.

7 The Sonjus' Motion for Reconsideration asks the Hearing Examiner to revisit the  
8 conclusion contained in her Recommendation to the City Council that the proposed air rights  
9 vacation meets the public benefit criterion contained in Tacoma Municipal Code 9.22.070.A.1.  
10 The Hearing Examiner's Recommendation included several Findings of Fact addressing the issue  
11 of public benefit. The Sonjus dispute four discrete benefits outlined in the Recommendation.

12 Initially, the Sonjus contend that the proposed upgrade from the existing gravel alley to a  
13 fully paved surface is not properly considered a benefit of the air rights vacation because it would  
14 occur whether or not the air rights are vacated. They point to the fact that the paving is not  
15 specifically included as a condition of the vacation approval and suggest it is analogous to a  
16 developer proposing an amenity in a completely different neighborhood. The upgrade to the  
17 alley surface is an identifiable benefit to the public and is directly related to the physical  
18 construction of the project and to travel conditions in the alley. The benefit arising from the  
19 proposed upgrade will be realized by the neighborhood involved and not by residents of a remote  
20 location. The arguments relating to this topic were fully known to the parties at the time of the  
21 hearing and the concerns raised at the hearing were considered by the Hearing Examiner in the

1 original Recommendation. The Sonjus have not put forward any new legal authority  
2 substantiating a change in the earlier conclusion that the public would benefit from alley  
3 upgrades. Petitioner 28 Proctor Holdings, LLC has agreed to pave the alley as a condition of the  
4 air rights vacation. To formalize the Petitioner's representation, the alley paving should be  
5 included as an explicit condition of the air rights vacation. To that extent, the Sonjus' request for  
6 reconsideration is granted.

7 The second public benefit mentioned by the Sonjus' Motion for Reconsideration is the  
8 developer's plan to underground utility lines currently on poles in the alley. The Sonjus claim  
9 the utilities would have to be undergrounded whether or not the air rights are vacated. This  
10 assertion is made without the benefit of supporting evidence. The Petitioner maintains that the  
11 utilities would not need to be modified if two separate buildings were constructed, rather than the  
12 connected structure being requested as part of the air rights vacation. *Petitioner's Response to*  
13 *Motion for Reconsideration (Attachment B.)*. The evidentiary record supports the finding that the  
14 public would receive a benefit from undergrounding the utilities in this alley as a result of the air  
15 rights vacation and the requirement to place the utilities underground is a condition of the air  
16 rights vacation. The Sonjus' argument on reconsideration does not justify modifying the  
17 Recommendation's finding that the air rights vacation would lead to a public benefit based upon  
18 undergrounding utility lines.

19 The Sonjus further suggest that the benefit of returning property to the tax rolls lacks  
20 meaning because all vacations would have that effect.<sup>2</sup> However, court decisions in this state  
21

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<sup>2</sup> There are circumstances in which rights might be vacated to an owner/entity who is exempt from taxation. In those cases this type of benefit would not be realized.



1 have specifically recognized that returning property to the tax rolls is a public benefit of street  
2 vacations. *Banchero v. City Council*, 2 Wn. App. 519, 468 P. 2d 724(1970). No ground for  
3 reconsideration of the tax roll benefit has been established.

4 The final public benefit challenged by the Sonjus is the Hearing Examiner's conclusion  
5 that design enhancements to the building resulting from the air rights vacation would benefit the  
6 public. The Sonjus insist this element is totally subjective and argue that the conclusion the  
7 public would benefit from design enhancements was invalidly based on evidence from an  
8 interested party (the developer). While design issues, by their nature, include some element of  
9 subjectivity, the conclusion in this case was based upon objective statements and drawings  
10 addressing elements of the step-back design that would be implemented only if the air rights  
11 were vacated. The proposed building modulation and increased setback from the street present a  
12 clear benefit over more intrusive designs. The Sonjus have presented no evidence or analysis  
13 establishing that the proposed design enhancements would not be superior to an alternate design  
14 without such step-backs and modulation. Accordingly, reconsideration of this element of public  
15 benefit is not warranted.

16 While the Hearing Examiner reached a different conclusion than the Sonjus' desired  
17 result regarding the public benefit provided by this air rights vacation, it was done after full  
18 consideration of the testimony presented at hearing and the documentary evidence. The Motion  
19 for Reconsideration was obviously the product of careful thought and reasoned argument,  
20 however, nothing presented convinces the Hearing Examiner that the Recommendation regarding  
21 this air rights vacation request should be changed from approval to denial.

1 Based upon the foregoing analysis the Hearing Examiner enters the following:

2 **ORDER**

3 The Sonjus' Motion for Reconsideration is hereby granted in part. The requirement to  
4 pave the alley in question should be added as a formal condition of the air rights vacation. The  
5 Petitioner can meet this condition by construction of the paving or by providing assurance the  
6 paving will be installed through including the requirement as a development condition and/or  
7 posting a bond insuring its completion. In all other respects, the Motion for Reconsideration is  
8 hereby DENIED.

9 **DATED** this 5<sup>th</sup> day of March, 2014.

10 

11 **PHYLLIS K. MACLEOD, Hearing Examiner**

1 **APPEALS TO CITY COUNCIL OF EXAMINER'S RECOMMENDATION:**

2 Within 14 days of the issuance of the Hearing Examiner's final recommendation, any aggrieved  
3 person or entity having standing under the ordinance governing such application and feeling that  
4 the recommendation of the Examiner is based on errors of procedure, fact or law shall have the  
5 right to appeal the recommendation of the Examiner by filing written notice of appeal with the  
6 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.**

7 GENERAL PROCEDURES FOR APPEAL:

8 The Official Code of the City of Tacoma contains certain procedures for appeal, and while not  
9 listing all of these procedures here, you should be aware of the following items which are  
10 essential to your appeal. Any answers to questions on the proper procedure for appeal may be  
11 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.

**From:** S Sonju <samanthasonju@gmail.com>  
**Sent:** Thursday, February 13, 2014 11:35 PM  
**To:** Hearing Examiner  
**Subject:** Vacation Petition No. 124.1337 Motion for Reconsideration  
**Attachments:** Motion for Reconsideration.pdf

FEB 13 2014

Dear Hearing Examiner,

I would like to submit the attached motion for reconsideration regarding Vacation Petition No. 124.1337. Thank you for your consideration.

Best Regards,

Samantha Sonju

**ORIGINAL**  
**ATTACHMENT A**

Motion for Reconsideration

FEB 13 2014

February 13, 2014

Dear Ms. Macleod,

As nearby homeowners, frequent patrons of Proctor district businesses, and having provided testimony at the hearing in this matter, we present this motion for reconsideration of your recommendation that air rights be vacated to allow the construction of a sky bridge as part of the proposed "The Proctor" development. As stated in your recommendation, "[t]he scope of the proceeding is limited to the impacts and benefits of the air rights vacation." Our understanding is that the vacation is permitted if, in addition to satisfying other criteria, the purpose for which it is granted results in a benefit to the public. You have recommended the vacation of air rights here in order to construct a sky bridge, so the developers must be able to show that a benefit to the public results directly from the construction of the sky bridge. But the public benefits that you cite in your recommendation do not result from the sky bridge itself, are based on subjective judgment, or are otherwise flawed. We wholeheartedly appreciate the difficulty of the analysis that you were required to undertake but respectfully submit that it resulted in an incorrect recommendation to approve the air rights vacation.

First, "[t]he upgrade to the alley surface" is listed as a public benefit of the vacation of air rights. But the alleyway is not part of the sky bridge, of course, and air rights need not be vacated to allow the alley to be paved. Nor have the developers shown that paving the alleyway is necessary in order to properly construct a sky bridge. Paving the alleyway is not included as a requirement by any entity under the "Special Conditions" section of your recommendation. And the developers most certainly would pave the alleyway anyway if not granted the vacation of air rights. The benefit of paving the alleyway thus should not have been a part of the analysis of the benefits of the sky bridge. Consider, for instance, if the developers had proposed that, if granted the vacation of air rights, they would construct the sky bridge and build a public park somewhere in the Hilltop neighborhood. You certainly would not consider the park to be a benefit of the sky bridge. It would be wholly unrelated to the specific impact of the sky bridge on the public. Likewise, the public benefit of paving the

**ORIGINAL**

alleyway cannot properly be considered a benefit of constructing a sky bridge.

Second, "the undergrounding of utilities" (as required by Tacoma Power) is listed as a public benefit of the vacation of air rights being recommended. But the utilities will have to be put underground where the developers propose to build the sky bridge whether or not they actually build the sky bridge because the developers plan to build a 65-foot structure on either side of the alleyway. This structure will stand taller than the utilities currently in place. The undergrounding is truly a result of the construction of the 65-foot building, not of the sky bridge. At the very least, the developer should have been asked whether the utilities would be undergrounded even if they were not permitted to construct the proposed sky bridge.

Third, the recommendation finds that the vacation of air rights in order to construct a sky bridge would result in the public benefit of "returning property to the tax rolls." But the benefit of increased tax revenue would result from every vacation of air rights. This would render the public benefit requirement meaningless. The public benefit requirement is meant to act as a barrier to vacating air rights; the recommendation's analysis demolishes that barrier.

Fourth, the recommendation finds that "the design enhancements" resulting from the air rights vacation will provide a public benefit. This is no more than a subjective, aesthetic judgment. The analysis of the public benefit resulting from an air rights vacation should be objective. It is not objectively true that a reasonable person would conclude that a sky bridge is a publicly beneficial design enhancement. The recommendation appears to accept without question the developer's assertion that the sky bridge would result in a design enhancement and that there being no sky bridge would result in units being constructed closer to the street. These are conclusory, self-serving statements offered by a financially interested party and are not the proper basis for an unbiased recommendation. You certainly are aware that there is much opposition to the size of the overall project amongst Proctor residents and others who enjoy the Proctor District. The recommendation's discussion of the design enhancements related to the proposed sky bridge is not based on objective fact. It is based on opinion and should not be included in the analysis.

**ORIGINAL**

Thank you very much for addressing our questions related to the public benefits of the proposed air rights vacation outlined in your recommendation. We respectfully request that you grant our motion for reconsideration.

Yours truly,

Samantha and Eric Sonju

**ORIGINAL**

VANDEBERG JOHNSON & GANDARA, LLP FEB 28 2014  
ATTORNEYS AT LAW

DARREL B. ADDINGTON  
KERRY E. BRINK  
LUCY R. CLIFTHORNE  
WILLIAM A. COATS  
SHERRY DAVIES  
MARLO DeLANGE  
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W. ROGER JOHNSON  
ELVIN J. VANDEBERG  
RETIRED

REPLY TO TACOMA OFFICE

February 26, 2014

VIA HAND DELIVERY

Ms. Phyllis K. Macleod  
City of Tacoma  
747 Market Street, Room 720  
Tacoma, WA 98402-3768

Re: File No. HEX 2013-051 (Vacation Petition no. 124.1337)  
Petitioner: 28 Proctor Holdings, LLC

Dear Ms. Macleod:

**RESPONSE TO MOTION FOR RECONSIDERATION**

**INTRODUCTION**

We represent 28 Proctor Holdings, LLC and its successor, Proctor Investors LLC (collectively, "Petitioner"), in connection with its petition requesting the vacation of air rights over a portion of the alley that runs from east to west in the middle of the block located west of Proctor Street and east of North Madison Street between North 27<sup>th</sup> and North 28<sup>th</sup> Streets. Petitioner is the owner of the properties on both sides of that portion of the alley over which the air-rights are sought to be vacated. The purpose of the vacation is to permit a connection between the upper four stories of the two buildings proposed to be constructed by Petitioner, one on each side of the alley. The proposed buildings, if approved by the City, will provide a mixed use of retail and apartments together with a parking garage. The block on which the buildings will be constructed is located in the North 26<sup>th</sup> and Proctor NCX Neighborhood Commercial Mixed-Use District established by the City.

After a hearing on the petition for vacation the Hearing Examiner concluded that the requested vacation conforms to the City's criteria for vacation of street rights-of-way, including the criterion that the vacation should provide a public benefit or purpose. Samantha and Eric Sonju, who identify themselves as nearby homeowners, apparently disagree with the findings and conclusions of the Hearing Examiner because they filed a Motion for Reconsideration based upon their belief that the vacation would provide no public benefit whatsoever. We note that the Sonjus do not claim an interest in any properties abutting the Petitioner's properties or the alley in the block described above. Nor do they claim that access to their property will be impaired in any way by the proposed vacation or that there was any fraud associated with the vacation process.

ORIGINAL  
ATTACHMENT B



## APPLICABLE LAW

Most street vacations, because of their inherent nature, primarily benefit the parties whose properties abut the vacated street<sup>1</sup>. In the case of a street vacation when the City owns the underlying fee, the abutting property owners will receive that portion of the vacated street from its center line to their respective property boundaries. Following the vacation the abutting property owners may use the properties as they wish consistent with applicable zoning and covenants. The fact that private parties, as abutting property owners, become owners of the property being vacated to the exclusion of all others does not mean that the vacation lacks a public benefit. *Freeman v. Centralia*, 67 Wash. 142 (1912); *Banchero v. City Council*, 2 Wn. App. 519 (1970); and *Hoskins v. Kirkland*, 7 Wn. App. 957 (1972). In essence, street vacations generally provide a benefit for private parties, but courts have also held that, in addition, a vacation should contain “some element of public use” or benefit. *See Young v. Nichols*, 152 Wash. 306 (1929) and *Yarrow First Associates v. Clyde Hill*, 66 Wn.2d 371 (1965). In the context of street vacations Washington courts have interpreted “public use or benefit” very broadly. For example, public use or benefit may be found in the fact that the vacated street, by virtue of being transferred to private parties, will become subject to property taxes and/or that the vacated property will be used to support a business that contributes to the city’s economy, *Banchero, supra*; that the vacated street is no longer required for public use and the cost of maintaining it exceeds any public benefit, *Young, supra*; that the vacated street will be used to build a privately owned hospital serving the community, *London v. Seattle*, 93 Wn.2d 657 (1980); and that the vacated street will be used by a private railroad to build a depot which will be used by members of the community, *Freeman, supra*.<sup>2</sup>

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<sup>1</sup> In practice the procedure to be followed for a proposed vacation of air rights above a street or alley is the same as that for a proposed vacation of the street or alley. The law applicable to a vacation of air rights is the same as the law applicable to a vacation of a street or alley. *See Taft v. Washington Mutual Savings Bank*, 127 Wash. 503 (1923).

<sup>2</sup> *Young, supra*, and *Yarrow First Associates, supra*, have been cited as establishing that street vacation ordinances must have some element of public use or benefit. At least one commentator has stated that the cases also stand for the proposition that any member of the public may challenge a vacation ordinance when it is alleged to contain no public benefit. *See Washington Real Property Deskbook* at § 91.12(2)(c)(iii), *citing Banchero, supra*. Yet the plaintiffs in both *Young* and *Yarrow First Associates* were either abutting property owners or property owners whose access was substantially impaired, and neither decision held that any member of the public may challenge an ordinance on the basis that it did not include a public use or benefit. The overwhelming weight of authority is to the contrary, *i.e.*, only abutting property owners and property owners whose access is impaired by the vacation have standing to challenge the vacation ordinance. *See, State v. Wineberg*, 74 Wn.2d 372 (1968) and cases cited therein. In this matter the Sonjus are neither abutting property owners nor have they claimed that the vacation will impair access to their property.

## HEARING

The Tacoma Municipal Code delegates the duty of conducting hearings on petitions for street vacations to the Hearing Examiner, who is required to consider a proposed vacation in terms of the criteria set forth in TMC § 9.22.070. In this case the Hearing Examiner specifically concluded that the evidence presented at the hearing demonstrated that the vacation would create a public benefit. *Findings of Fact, Conclusions of Law, and Recommendation, Conclusion no. 5.* The Hearing Examiner made that conclusion after considering the evidence and making the following findings:

1. The City has no need for the air rights.
2. As a result of the vacation the air rights would become subject to property tax assessment.
3. The public would benefit from the widening and paving of the alley.
4. The elimination of utility poles in the alley and the removal and relocation of electrical, telephone and cable TV lines to an underground easement through the alley would benefit the public by increasing the safety and reliability of the utility service.
5. The vacation will permit a more aesthetically pleasing design of the mixed-used buildings proposed for the site, noting in particular that the vacation would permit a greater setback from the street and a variety in design for the upper story dwelling units contained in the buildings.

*Findings of Fact, Conclusions of Law, and Recommendations, Finding no. 10.*

Testimony at the hearing revealed that the electrical lines in the alley are currently located in the air rights subject to the vacation, and because of their location, they would have to be removed before any connection between buildings could be made. The Hearing Examiner made the conversion of the overhead lines to underground lines a condition of approval of the vacation. Because the removal and relocation of the utility lines will result in a disturbance of a portion of the unpaved alley surface, the Petitioner agreed to run the new underground utilities the entire length of the alley from Proctor Street to Madison Street and to pave the entire length and width of the one-block alley to City specifications.

There was also testimony at the hearing that the installation of a connection between the two buildings over the alley would help to avoid pedestrian-vehicle conflicts and would present a continuous building frontage, at least for the upper four floors (features that are specific purposes

of the regulations for mixed-use center districts (TMC § 13.06.300 A.7. and A.8). These features associated with Petitioner's ability to construct the connection between the two buildings could also be considered to be public benefits directly related to the vacation in addition to the features noted by the Hearing Examiner to be public benefits in *Finding no. 10* and *Conclusion no. 5*.

We submit that the evidence presented at the hearing supports the findings and conclusions of the Hearing Examiner that the vacation has several public benefits, any one of which, by itself, is sufficient under applicable law to establish a "public benefit" within the meaning of TMC 9.22.070 A.1.

### **RESPONSE TO ARGUMENTS OF MOTION FOR RECONSIDERATION**

Each of the four arguments contained in the Motion for Reconsideration disputes that the evidence presented at the hearing was sufficient to establish a public benefit and that the Hearing Examiner's findings and conclusions on that issue are erroneous. Yet in none of the arguments is there any discussion of what would constitute a public benefit under existing law.

The essence of the first two arguments is that neither the relocation of the utility lines nor the paving of the alley surface can be considered to be a public benefit, because those undertakings are somehow unrelated to the vacation. This argument also incorrectly states that the undergrounding of utilities and paving of the alley are more a result of constructing the buildings rather than a vacating of the air rights. Actually, the buildings, without the connection made possible by the air rights vacation, could be built without undergrounding the utilities or improving the alley. The reason for relocating the utilities underground, as mentioned at the hearing, is that the utility lines and poles currently occupy the space to be vacated and they cannot be allowed to remain in their present location, or even relocated to another above-ground position, if the connection between the two buildings is made. Also, as previously noted, relocation of the utilities underground will significantly disturb a portion of the surface of the alley, so Petitioner agreed at the outset to pave the entire length and width of the alley as a condition of approval of the vacation. To argue that the relocation of the utilities and paving of the alley are unrelated to the vacation is to ignore the facts.

The third argument advanced by the Motion for Reconsideration is that there can be no public benefit attributable to the fact that the vacated property will be returned to the tax rolls because in most cases the vacated property will become subject to taxation. Yet that is one of the precise public benefits approved by the court in *Banchero, supra*. To argue that subjecting the vacated property to property taxation is not a valid basis for a finding of public benefit is to ignore existing law.

The last argument against a public benefit contained in the Motion for Reconsideration is that the design enhancements to the project resulting from the vacation cannot be established by the evidence presented at the hearing, because whether or not design changes constitute enhancements, and therefore public benefits, requires the Hearing Examiner to make a subjective

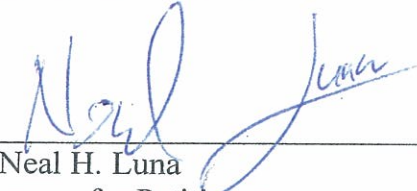
aesthetic judgment. This argument does not recognize how the land use process works – with (a) the City establishing the land use rules and regulations for projects to be constructed in mixed-use districts, (b) developers and contractors proposing plans for buildings designed to satisfy those land use rules and regulations, and (c) a Hearing Examiner making a determination of whether or not the plans actually comply with the regulations and/or further the intent of those regulations. In this case the Hearing Examiner after reviewing the evidence and hearing the testimony, concluded that enhancements to the buildings, consistent with the regulations for this mixed-use project, would be possible as a result of the vacation. To argue that the Hearing Examiner cannot make, or is not capable of making, a conclusion regarding enhancements and their public benefit is to ignore the manner in which land use determinations are made.

### CONCLUSION

Petitioner asks that the Motion for Reconsideration be denied.

Respectfully submitted,  
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HFC:ddm

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