



City of Tacoma
Hearing Examiner

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 April 1, 2019, at Tacoma, WA.

Louisa Legg

April 1, 2019

FIRST CLASS & ELECTRONIC MAIL DELIVERY

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Re: HEX2019-004 Street Vacation Petition No. 124.1393
Petitioner: Lentz Properties LLC

Dear Parties:

Please find enclosed a copy of Hearing Examiner's Findings of Fact, Conclusions of Law, and Recommendation to the Tacoma City Council entered on April 1, 2019, as the result of a public hearing held on March 21, 2019.

Sincerely,

Louisa Legg
Louisa Legg
Office Administrator

Enclosure/Attachment (1): Findings, Conclusions, Recommendation

Transmitted via Electronic Mail Delivery

Kyle Lentz, Present, Neptune Seafood, Inc. (Kyle@neptuneseafood.us)

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OFFICE OF THE HEARING EXAMINER

CITY OF TACOMA

REPORT AND RECOMMENDATION

TO THE CITY COUNCIL

PETITIONER: LENTZ PROPERTIES LLC

FILE NO: HEX2019-004 (124.1393)

SUMMARY OF REQUEST:

The Real Property Services division (“RPS”) of the City of Tacoma (“City”) Public Works Department received a petition to vacate a portion of East K Street, together with an adjoining alleyway segment, lying between East 25th Street and East 26th Street, westerly of East L Street. If vacated, the right-of-way area will attach to seven abutting parcels.

RECOMMENDATION OF THE HEARING EXAMINER:

The vacation petition is hereby recommended for approval, subject to conditions and one special consideration, as set forth below.

PUBLIC HEARING:

After reviewing RPS’ Preliminary Report (the “Report”—Exhibit 1), and examining available information on file with the petition, the Hearing Examiner conducted a public hearing on the petition on March 21, 2019. Ronda Cornforth of RPS represented the City. Attorney William T. Lynn of Gordon, Thomas, Honeywell, Malanca, Peterson, Daheim LLP, and Kyle Lentz represented the Petitioner. Testimony was taken, exhibits were admitted, and the record closed at the conclusion of the hearing.

ORIGINAL

FINDINGS, CONCLUSIONS, AND RECOMMENDATION:

FINDINGS:

1. Lentz Properties LLC, a Washington limited liability company (the “Petitioner”), submitted a petition for the vacation of public right-of-way (“ROW”) that abuts the Petitioner’s real property located at 1121 East 21st Street in Tacoma. The petition, dated “11/12/2018” (the “Petition”) was initially signed in support by all owners of real property that abut the requested vacation area, specifically, Sound Transit (formally the Central Puget Sound Regional Transit Authority), Neptune Capital LLC¹, and AA Wright LLC. *See the Petition.*²

2. The City’s Report generally describes the area petitioned for vacation (the “Vacation Area”) as that portion of East K Street, and adjoining alley lying between East 25th Street and East 26th Street, lying westerly of East L Street. The Report legally describes the Vacation Area as follows:

All that portion of East K Street, lying south of Blocks 7534 and 7536 and between and abutting Blocks 7633 and 7635, being north of East 26th Street and alley between and abutting Blocks 7536 and 7635, all of the Tacoma Land Company’s First Addition to Tacoma, W.T., according to the Plat thereof filed for record July 7, 1884, in the office of the Auditor of Pierce County, Washington.

Together with that portion of alley between and abutting Blocks 7536 and 7635 lying west of East “L” Street, as shown on Tacoma Land Company’s Seventh Addition to the City of Tacoma, according to the Plat thereof filed for record August 12, 1891, in the Office of the Auditor of Pierce County, Washington.

All situate in the City of Tacoma, County of Pierce, State of Washington; within the Northwest Quarter of the Northwest Quarter of Section 10, Township 20 North, Range 03 East of the Willamette Meridian.

Cornforth Testimony; Exhibits 1~7.

3. Neither the East K Street portion of the Vacation Area, nor the alley portion have been improved with street infrastructure. Both are fully vegetated and graded, and are accessed solely for the purpose of installation, inspection and maintenance of wastewater infrastructure which is present in both areas. East K Street, between East 25th Street and East 26th Street, is bisected by Sound Transit railroad ROW and does not provide a through passageway. The alley, subject to this vacation petition, also makes no physical connection to, or through, neighboring city ROW and is dead-ended now by construction of a retaining wall at East L Street and a

¹ Neptune Capital LLC appears to be affiliated with Petitioner Lentz Properties LLC in that Kyle Lentz is a “governor” for both entities.

² The Petition was not submitted as an Exhibit by any party; nonetheless, as the document initiating the process that led to the hearing and this Recommendation, it is part of the overall record.

somewhat significant grade separation (East L Street being elevated at this location). *Cornforth Testimony, Lynn Testimony; Exhibits 1~7.*

4. The nearest portions of what was East K Street and the alley within this block, lying northerly and westerly of the Vacation Area, were previously vacated in 1889 and 1907 by City of Tacoma Ordinances No. 271 and No. 3153, respectively, leaving the Vacation Area itself as essentially remnant ROW. *Cornforth Testimony, Lynn Testimony; Exhibit 1, Exhibits 8 and 9.*

5. The Petitioner intends to absorb its segment of ROW into its adjacent property for future expansion/development potential and to have the ability to deter escalating transient activities in the area. *Lynn Testimony; Cornforth Testimony; Exhibit 1.*

6. East K Street (platted at 80 feet in width) and the alley (platted at 20 feet in width) were both dedicated to the public by Plat filings on July 1884 and August 1891 of Map of the Tacoma Land Company's First Addition to Tacoma, W.T. and Tacoma Land Company's Seventh Addition to the City of Tacoma, respectively, as both were filed with the Pierce County Auditor. *Cornforth Testimony; Exhibits 4~7.*

7. RPS circulated the Petition for review by interested governmental agencies, City departments/divisions, and utility providers. With the exception of Sound Transit, these reviewers' comments and concerns have been addressed, or are being addressed through the conditions recommended for imposition herein. Chief among City department concerns, the City's Environmental Services department reported that it has wastewater assets in the Vacation Area that will need protecting through the reservation of an easement. *Cornforth Testimony; Exhibit 1, Exhibit 11, Exhibit 12, Exhibit 13.*

8. No members of the public appeared at the hearing in opposition to the petitioned-for vacation. As mentioned above, Sound Transit initially supported the vacation petition by signing the joinder of abutting property owners. Apparently, this support was only given because Sound Transit had not communicated the vacation request widely enough internally, and that initial support notwithstanding, on January 28, 2019, Sound Transit emailed the Petitioner (with cc to the City) essentially rescinding its support for the vacation. As its reason for the rescission, Sound Transit stated that its Tacoma Dome Link Extension ("TDLE") project team was considering two alternatives for the TDLE project (among four total) that may seek to incorporate the Vacation Area in railroad ROW, but that it was uncertain what alignment (of the four) would ultimately be used. In follow up to this email, Sound Transit forwarded a letter dated March 13, 2019, stating its opposition to the proposed ROW vacation request due to the as yet unresolved uncertainty of the alignment of the TDLE project. The City presented this letter (Exhibit 13) on Sound Transit's behalf at the hearing. *Cornforth Testimony, Lynn Testimony; Exhibits 12~14.*

9. City staff appears to be taking no position on Sound Transit's late-in-the-game opposition, instead choosing to simply advance the Petition for review and recommendation (by the Hearing Examiner) and City Council action. *Cornforth Testimony.* In Sound Transit's absence at hearing, Petitioner's legal counsel, testified that Sound Transit had informed the Petitioner that the two (out of four) potential routes for the TDLE project that might use the Vacation Area as railroad ROW were

Sound Transit's least favored routes and the least likely to actually be used due to topographic and other challenges. *Lynn Testimony*. In addition, Lynn testified that the Petitioner was aware of, and had even discussed with Sound Transit the potential risks of vacating the Vacation Area prior to Sound Transit making its final decision on the TDLE alignment.³ Cornforth testified that the Vacation Area is not subject to any right-of-use or other agreement with Sound Transit that presently gives Sound Transit the right to use the Vacation Area as railroad ROW.

10. Although one hundred percent (100%) of the abutting property owners initially signed the Petition in favor, that number is now down to seventy-five percent (75%) of the abutting owners due to Sound Transit's positional change. The City testified that it considered the requirement set forth in Revised Code of Washington ("RCW") 35.79.010 that "the petition [] [must be] signed by the owners of more than two-thirds of the property abutting upon the part of such street or alley sought to be vacated,.." to be satisfied. *Cornforth Testimony; Exhibits 12 and 13*.

11. No property abutting the Vacation Area becomes landlocked by the proposed vacation, nor will any access be substantially impaired if this vacation is granted since the Vacation Area is not currently being used for any traditional ROW traversal or access purposes. The City testified that it has no need of the Vacation Area having anything to do with present or future City ROW use aside from the preservation of Environmental Services' wastewater facilities by easement. Whether Sound Transit will ultimately decide on a route for the TDLE project that uses the Vacation Area remains to be seen. Whether the City is obligated to deny the Petition, maintaining the Vacation Area as street ROW, on the chance that Sound Transit decides to use the Vacation Area for railroad ROW will be addressed below in the Conclusions section. *Cornforth Testimony, Lynn Testimony; Exhibit 1, Exhibit 10*.

12. 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. *Cornforth Testimony; Exhibit 1, Exhibit 10*.

13. RPS' Report, which is entered into the record as Exhibit 1, accurately describes the proposed vacation, general and specific facts about the site 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.

14. Public hearing notices were posted on February 20, 2019. A yellow public notice sign was posted at the subject ROW of East K Street at East 26th Street, and one yellow public notice sign was affixed to the existing fencing at the entrance of 1121 East 26th Street, along the alley at East L Street. Also on or around this same date, a public notice memo for the March 21, 2019 hearing was placed into the glass display case in the Tacoma Municipal Building next to the Finance Department. In addition, the Public Notice Memo was advertised on the City of Tacoma web site and in the Tacoma Daily Index, as well as on Municipal Television Channel 12. Lastly, Public Notice was mailed to all parties of record within 300 feet of the vacation request. *Cornforth Testimony; Exhibit 1*.

³ See also *Exhibit 13*.

15. No other written opposition to the proposed vacation was received in this case besides the Sound Transit email and letter. RPS' initial analysis appeared to lead to a recommendation that the requested vacation should be approved, but RPS' position at hearing became somewhat more ambivalent. *Cornforth Testimony; Exhibit 1.*

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

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. The petitioning requirements of RCW 35.79.010~.020 have been met here in spite of Sound Transit's objection to the Petition. Four distinct entities own real property that abuts the Vacation Area. *FoF 1.* Three of those four (75%) still want the Petition to proceed. *Id., FoF 7 through 10.* Those three owners⁴ own five of the seven parcels (71%) that abut the Vacation Area.⁵ Sound Transit's late objection is insufficient to defeat consideration of the Petition.⁶

4. Petitions for the vacation of public ROW 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 Petitioner Lentz Properties LLC, Neptune Capital LLC, and AA Wright LLC.

⁵ The Examiner acknowledges that another interpretation of the "two-thirds" requirement in RCW 35.79.010 is possible. As set forth in Conclusion 3, the two-thirds requirement is met when considering both number of owners (75%) and those owners in relation to the number of parcels abutting the Vacation Area (71%). The possible third interpretation, would require a calculation of the ownership of lineal frontage along the Vacation Area. None of the group that presented evidence at the hearing (the Petitioner, the City, and Sound Transit) championed this approach, nor was any evidence presented that would allow the Examiner to make a lineal frontage calculation. Given that, the Examiner adopts the City's approach of three out of four abutting owners meeting the "two-thirds" requirement.

⁶ *See RCW 35.79.020* ("[i]f fifty percent of the abutting property owners file written objection to the proposed vacation with the clerk, prior to the time of hearing, the city shall be prohibited from proceeding with the [vacation]").

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.*⁷

5. The Petitioner must demonstrate, by a preponderance of the evidence, that its vacation petition meets the foregoing criteria. *See TMC 1.23.070.* In this case, the Petitioner relied in part on the testimony and evidence of the City, but also supplied its own reasoning and testimony at the hearing, and during the application process.⁸

6. Findings entered herein, based upon substantial evidence in the hearing record, support a conclusion that the requested street vacation easily conforms to criteria 1 through 3, and 5 and 6 above for the vacation of street ROW set forth at Conclusion 4 above, provided the conditions recommended below are imposed and met. Given the City's present lack of use of the Vacation Area for any cognizable ROW purpose, the petitioned-for vacation will have no material effect on the street pattern or circulation of traffic, nor will it affect the City's ROW needs or goals. In light of the foregoing, the City appears to have no qualms about ceding the Vacation Area to the underlying fee owners of the property, unencumbering their respective parcels from the existing public ROW interest. No potential for landlocking an abutting owner exists from granting the petition, and 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 back to the property tax rolls and presumably through the subsequent development of the area in conformance with City goals and policies.

7. The fourth criterion 4 from Conclusion 4 above requires the City⁹ to consider whether "The petitioned-for right-of-way is [] contemplated or needed for future public use." The answer to this consideration for the City's part is "no," there is no future public need for the Vacation Area. *FoF 11.* Sound Transit would answer that question with "maybe." Sound Transit presented no authority that would require the City to hold the Vacation Area as ROW until Sound Transit concludes its assessment process in the TDLE project and finally decides on a route. The Examiner is not aware of any such authority either. The Vacation Area was dedicated as, and remains, street ROW not railroad ROW.¹⁰

⁷ For consistency, outline numbering of the criteria is kept the same as in the original TMC text.

⁸ *See Exhibit 10.*

⁹ Which process includes City staff, the Hearing Examiner in the hearing and recommendation process, and ultimately the City Council as the legislative decision maker.

¹⁰ Historically, our courts have made certain distinctions between municipal street ROW and railroad ROW, e.g., *Ray v. King County*, 120 Wn. App. 564, 86 P.3d 183 (2004); *Kershaw Sunnyside v. Interurban Lines*, 156 Wn.2d 253, 126 P.3d 16 (2006); *Roeder Co. v. Burlington N.*, 105 Wn.2d 567, 716 P.2d 855 (1986), although these historic distinctions appear to be becoming less pronounced over time, e.g., *Kiely v. Graves*, 173 Wn.2d 926, 271 P.3d 226 (2012).

Even if vacated, Sound Transit will retain ownership of its abutting parcels, as augmented/unencumbered by the vacation. Sound Transit also has the power of eminent domain (condemnation) to acquire property in achieving its mission of providing transportation facilities to the public.¹¹

8. “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.”¹² In other words, the City Council can vacate the Vacation Area over Sound Transit’s objection. In all likelihood,¹³ given the facts presented, approving the vacation will have minimal to no adverse impacts to Sound Transit. In any event, Sound Transit presented no information about how it would be impacted by the vacation, but rather simply stated that the Vacation “area has the potential to be needed for the TDLE project.”¹⁴

9. Given the foregoing, the Hearing Examiner recommends that the requested street vacation be approved subject to the following conditions and one special consideration:

A. SPECIAL CONDITIONS:

1. PAYMENT OF FEES

Prior to finalizing the vacation, the City should be compensated in an amount equal to the full appraised value of the Vacation Area.¹⁵ Nothing prohibits the abutting property owners from determining among themselves how this compensation will be paid. 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 areas. *TMC 9.22.010*.

2. UTILITY EASEMENT RESERVATION

As part of the Ordinance finalizing the vacation, an easement for City utilities should be retained with a legal description adequate to allow the City (Environmental Services) to access, operate, maintain, replace, and etc. its wastewater assets within or that cross the Vacation Area.

¹¹ *RCW 81.112.080*.

¹² *Puget Sound Alumni of Kappa Sigma v. Seattle*, 70 Wn.2d 222, 238-239, 422 P.2d 799, 808-809 (1967).

¹³ Because the alignments for the TDLE project that might use the Vacation Area as railroad ROW are the least likely for Sound Transit to actually use. *FoF 9*.

¹⁴ *Exhibit 13*.

¹⁵ RCW 35.79.030 indicates that compensation for the vacation comes from “[t]he owners of property abutting upon the street or alley, or part thereof so vacated,…” TMC 9.22.090 indicates that such compensation come from the “petitioner” or “petitioners.” Cornforth acknowledged at the hearing that Sound Transit may be reluctant to pay for its pro-rated share of the Vacation Area’s value given its objection to the vacation.

B. SPECIAL CONSIDERATION:

SOUND TRANSIT--TDLE

Although nothing requires the City to wait on Sound Transit's decision regarding the TDLE alignment, the City Council could condition finalizing the vacation on Sound Transit's decision on the TDLE alignment. Sound Transit currently predicts that decision being made in July of 2019.¹⁶ In many ways, waiting to finalize the vacation until the end of July 2019 makes sense and may avoid some difficulties and provide the Petitioner greater certainty in any event. A four month intervening period between first and second reading of a street vacation Ordinance is not that unusual even without special circumstances.

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 Public Works Engineering, Planning and Development Services, Tacoma Fire, Tacoma Police, Solid Waste, Comcast Communications, CenturyLink, Pierce Transit, Puget Sound Energy, Tacoma Water, Click! Network, and/or Tacoma Power.

¹⁶ Exhibit 13.

2. The Connection Charge In-Lieu-of-Assessment (In-Lieu-of-Assessment Charge[s]) estimates provided by the City's Public Works in Exhibit 1 are advisory comments only, and payment thereof is not a condition to this vacation. They can be voluntarily paid at time of compensation for the Vacation Area. If not, the In-Lieu-of-Assessment Charge(s) 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 should be granted, 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 6 above.

DATED this 1st day of April, 2019.



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*