



City of Tacoma  
Hearing Examiner

November 18, 2019

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**Re: HEX2019-025 Street Vacation Petition No. 124.1398**  
**Petitioners: John and Miyon Kautz**

Dear Parties:

In regard to the above referenced matter, please find a copy of the Hearing Examiner's Findings, Conclusions, and Recommendation to the City Council entered on November 18, 2019.

Sincerely,

Louisa Legg  
Office Administrator

Enclosure/Attachment (1): Findings/Concs/Recommendation

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**OFFICE OF THE HEARING EXAMINER**

**CITY OF TACOMA**

**REPORT AND RECOMMENDATION**

**TO THE CITY COUNCIL**

**PETITIONERS:** JOHN AND MIYON KAUTZ

**FILE NO:** HEX2019-025 (124.1398)

**SUMMARY OF REQUEST**

The Real Property Services division (“RPS”) of the City of Tacoma (“City”) Public Works Department received a petition to vacate the west 14 feet of North Pine Street lying between the southerly line of North 29<sup>th</sup> Street and the eastern extension of the northerly line of the North 28<sup>th</sup> Street alley (the “Vacation Area,” as described in more detail below). The petition’s stated purpose is to incorporate the Vacation Area into the Petitioners’ adjacent real property to facilitate subdividing the property into an additional parcel for development.

**RECOMMENDATION OF THE HEARING EXAMINER**

The vacation petition is hereby recommended for approval, subject to the conditions set forth below.

**PUBLIC HEARING:**

After reviewing RPS’ amended Preliminary Report (the “Report”—collectively comprised of Ex. C-1 and Ex. C-13), and examining available information on file with the petition, the Hearing Examiner conducted a public hearing on the petition on November 7, 2019. Teague Pasco of RPS represented the City and presented testimony. Jennifer Kammerzell, a principal engineer with the City’s Public Works Department, Shannon Brenner, a City environmental specialist with Planning and Development Services, and Chris Seamen, a senior principal engineer with the City Fire Department all testified as part of the City’s presentation.

The Petitioners appeared *pro se* and also testified.

**ORIGINAL**

Members of the public who testified at the hearing are as follows:

Chris Dolph of 2902 North 30<sup>th</sup> Street,  
Saul Farber of 2909 North 28<sup>th</sup> Street,  
Michael Johnson of 2905 North 28<sup>th</sup> Street, and  
Tim Thompson of 2901 North 29<sup>th</sup> Street.

Additional public comment was received and reviewed in writing. The record closed at the conclusion of the hearing. The Hearing Examiner conducted a site visit the day after the hearing on November 8, 2019.

**FINDINGS, CONCLUSIONS, AND RECOMMENDATION:**

**FINDINGS:**

1. John and Miyon Kautz (the “Petitioners”), submitted a petition requesting the vacation of a segment of public right-of-way (“ROW”) consisting of the west 14 feet of North Pine Street, lying between the southerly line of North 29<sup>th</sup> Street and the eastern extension of the northerly line of the North 28<sup>th</sup> Street alley (the “Vacation Area”). The Petitioners are the sole abutting property owner to the Vacation Area according to current county records. *Pasco Testimony; Ex. C-1~Ex. C-3.*

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

A portion of the Southeast Quarter of the Southwest Quarter of Section 30, Township 21 North, Range 3 East, Willamette Meridian, Pierce County, Washington, more particularly described as follows:

The Westerly 14 feet of North Pine Street abutting Lot 1, Block 49 of Supplementary Map of Tacoma, Washington Territory, according to the plat thereof recorded in Volume 1 of Plats, page 11, records of Pierce County, Washington, lying between the southerly line of North 29th Street and the eastern extension of the northerly line of said Block 49 Alley.

Situate in the City of Tacoma, County of Pierce, State of Washington. *Ex. C-1.*

3. The Petitioners stated purpose for this request is to be able use the Vacation Area as a side yard addition to their real property (2905 North 30<sup>th</sup> Street, Tax Parcel No. 8945001050) which may potentially enable them to subdivide their augmented property parcel to create an additional buildable lot. *Pasco Testimony; Ex. C-1.*

4. The City of Tacoma acquired the street ROW proposed to be vacated by dedication in the Plat of the Supplementary Map of Tacoma W.T., filed for record on February 18, 1874 in Volume 1 of Plats, Page 11, records of Pierce County Auditor. *Pasco Testimony; Ex. C-1, Ex. C-3.*

5. Nearby, prior vacations of North Pine Street occurred in the two blocks immediately north of the Vacation Area. At the northernmost block, the entire 80-foot width of the North Pine Street ROW was vacated by Ordinance No. 11710, dated June 28, 1939. At the block just to the south, Ordinance No. 2210, dated July 15, 1980, vacated the west 25 feet and the east 22 feet of that portion of North Pine Street lying between Lot 7, Block 30 and Lot 12, Block 48, Supplementary Map of Tacoma, W.T. Ordinance No. 2210 removed 47-feet from the North Pine Street ROW width, leaving a width of 33-feet. *Pasco Testimony; Exs. C-13~C-16.*

6. The City classifies North Pine Street as a residential street. As dedicated, the section of North Pine Street that contains the Vacation Area is a sloping 80-foot wide ROW minimally improved with a graveled, alley-like, uneven surface.<sup>1</sup> It is somewhat capable of vehicle traversal<sup>2</sup> running approximately along the center of the full dedicated width of the ROW connecting North 29<sup>th</sup> Street with the alleyway lying between North 28<sup>th</sup> Street and North 29<sup>th</sup> Street. *Pasco Testimony, Johnson Testimony, Ex. C-1.*

7. RPS circulated the petition for review by potentially 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 referenced in City testimony at the hearing. These comments and requests, where appropriate, have now been incorporated in this Report and Recommendation at Conclusion 8 below. *Pasco Testimony; Ex. C-1, Exs. C-4~C-13, Ex. C-17, Ex. C-18.* In testimony, the Petitioners did not object to any of the City recommended conditions of approval.

8. Several members of the public submitted written comments and appeared at the hearing expressing their concerns regarding the impact the proposed vacation might have on access and the City's ability potentially to open and improve the ROW to City standards in the future. *Dolph Testimony, Farber Testimony, Thompson Testimony, Johnson Testimony; Exs. C-19~C-25, Ex. J-1.* The City testified that it has no plans to open and improve this section of the North Pine Street ROW to City standards because there is very little utility to be gained in the City's overall transportation network from this small section of ROW. *Kammerzell Testimony.* No one who offered comment, either opposing the vacation or at least expressing concerned about its effects, directly abuts the Vacation Area or that section of North Pine Street.<sup>3</sup> *Dolph Testimony, Farber Testimony, Thompson Testimony, Johnson Testimony; Exs. C-19~C-25, Ex. J-1.* The minimally improved, traversable area of this section of North Pine Street is not part of the Vacation Area. *Pasco Testimony; Ex. C-1, Ex. C-13.*

9. In its review, the City determined that the vacation would have some public benefit/purpose by adding the Vacation Area to the taxable portion of the Petitioners' property (thereby

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<sup>1</sup> It is unclear from the record how this section of North Pine Street ROW came to be minimally improved in its current condition. The improvements are not to City standards. *Kammerzell Testimony.* It does not appear that the City is maintaining this section of North Pine Street.

<sup>2</sup> It is, however, seriously uneven at present leaving it in a condition potentially hazardous to traversal by many types of vehicles. *Johnson Testimony.*

<sup>3</sup> In his e-mail dated November 4, 2019, Michael Johnson registered his objection to the present vacation petition claiming to be an abutting property owner for purposes of Revised Code of Washington ("RCW") 35.79.020. *See Exs. C-19 and C-20.* Although very near to the Vacation Area, Johnson's real property at 2905 North 28<sup>th</sup> Street does not actually abut the Vacation Area and therefore the percentage of objection provisions of RCW 35.79.020 do not come into play here.

increasing City revenue), and by facilitating the subdivision of the Petitioners' property for additional residential development given the current shortage of housing in and around the Tacoma area. *Pasco Testimony; Ex. C-1*. The Examiner concurs with, and adopts these City findings.

10. 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. *Pasco Testimony; Exs. C-1*.

11. RPS' Report, which is entered into the record as Exhibits C-1 and C-13, accurately describes the requested 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.

12. RPS posted public hearing notices on October 4, 2019, together with yellow public notice signs. The following summarize RPS' postings and publications of the notices:

- a. Placed yellow public notice sign at the southwest corner of the intersection of North Pine Street and North 29th Street,
- b. Placed yellow public notice sign at the east end of the North 28<sup>th</sup> Street Alley where it terminates and intersects with North Pine Street,
- c. Public notice memo placed into the glass display case located on the first floor of the Municipal building next to the Finance Department,
- d. Public notice memo advertised on the City of Tacoma web site at address: <http://www.cityoftacoma.org/page.aspx?nid=596>,
- e. Public Notice advertised in the Daily Index newspaper,
- f. Public Notice mailed to all owners of record within 300 feet of vacation request, and
- g. Public Notice advertised on Municipal Television Channel 12. *Pasco Testimony; Ex. C-1*.

13. 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), *Banchemo v. City Council of City of Seattle*, 2 Wn. App. 519, 523, 468 P.2d 724 (1970); *TMC 9.22.070*.

3. Pursuant to WAC 197-11-800(2)(i), the vacation of streets or roads is exempt from the threshold determination and Environmental Impact Statement requirements of RCW 43.21.C, the State Environmental Policy Act (SEPA).

4. 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. 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>4</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*. At the hearing, the Petitioners relied heavily on the City's presented information.

6. Findings entered herein, based upon substantial evidence in the hearing record, support a conclusion that the requested street vacation conforms to the criteria for the vacation of street ROW set forth at Conclusion 4 above. The vacation petition has been reviewed by City staff and outside quasi-governmental agencies that responded with recommended conditions of approval. *See FoF 7 above and Conclusion 8 below*. Public benefit is achieved through increased land value to the petitioners resulting in increased sales tax revenue and the potential for an increase to available housing.<sup>5</sup> *FoF 9*. This small section of North Pine Street is not currently part of "the street pattern or circulation of the immediate area or the community as a whole" in any meaningful way beyond being used minimally for secondary access to a few homes. That will not change due to the vacation. No properties become landlocked if the

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<sup>4</sup> For consistency, outline numbering of the criteria is kept the same as in the original TMC text.

<sup>5</sup> A finding of public purpose in street vacation proceedings does not present a burdensome standard. *See e.g., Banchemo*, 2 Wn. App. at 523-524 and the cases cited therein.

petition is granted. The provisions of RCW 35.79.035, governing areas close to bodies of water do not apply to this location.

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>6</sup>

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

**A. SPECIAL CONDITIONS:**

1. PAYMENT OF FEES

The Petitioners shall compensate the City in an amount equal to the full appraised value of the Vacation Area. One-half of the revenue received shall be devoted to the acquisition, improvement and maintenance of public open space land and one-half may be devoted to transportation projects and /or management and maintenance of other City owned lands and unimproved ROW. *TMC 9.22.010.*

2. CITY ENVIRONMENTAL SERVICES

Environmental Services has no objection to the vacation provided that a utility easement over the east five (5) feet of the Vacation Area must be established prior to finalizing the vacation for the maintenance and/or repair of City utility assets within the North Pine Street ROW adjacent and parallel to the Vacation Area.

3. TACOMA POWER

Tacoma Power has overhead lines running parallel with and adjacent to the Vacation Area and requests reservation of an easement over the easterly 5 feet of the Vacation Area. This will maintain ability to access the Tacoma Power infrastructure for on-going operations and maintenance, and maintain safety by avoiding conflicts with the conductors. Reservation of this easement is a recommended condition of approval.

4. CENTURY LINK

CenturyLink indicated that it has aerial facilities attached to Tacoma Power poles and maintains that its rights must be protected by means of an easement, or by relocation of its facilities at the Petitioners' expense. Resolution of this issue should take place before second reading of an ordinance finalizing the vacation.

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<sup>6</sup> *Puget Sound Alumni of Kappa Sigma v. Seattle*, 70 Wn.2d 222, 238-239, 422 P.2d 799, 808-809 (1967).

5. SOLID WASTE

The City's Solid Waste division of the Public Works Department has no objection to the vacation provided that an access easement, over the south 5 feet of the west 9 feet, and the south 15 feet of the east 5 feet, of the Vacation Area will be reserved from the vacation. This easement will be for use by Solid Waste vehicles and personnel. No fences or structures will be permitted within the easement area.

**B. 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/or City Council) 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 Petitioners 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.

**C. ADVISORY NOTE:**

RPS, on behalf of the City, recommended approval of the vacation; however, an in-lieu of assessment sewer charge of \$45.48 is due either at this time or at the time of any additional development of the Petitioners' property. If the Petitioners choose to wait on payment, the amount due may increase.

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

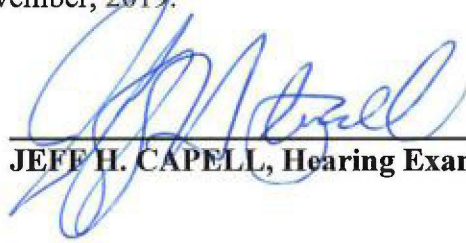
10. Any above stated conclusion, which may be more properly deemed or considered a finding, is hereby adopted as such.



**RECOMMENDATION:**

The present vacation petition is hereby recommended for approval, subject to conditions contained in Conclusion 8 above.

**DATED** this 18th day of November, 2019.



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**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**