



City of Tacoma
Hearing Examiner

January 30, 2014

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

To the Parties,

Enclosed please find enclosed a copy of the Tacoma Hearing Examiner's Report and Recommendation to the Tacoma City Council concerning the above referenced matter as the result of a public hearing held before the Hearing Examiner on January 16, 2014.

Sincerely,

Louisa Legg
Legal Assistant

Attachment (1)
Enclosure (1)

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 January 30, 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
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 Sulley, 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 (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,
STE 525, Los Angeles CA 90013
James Steel, 3213 North 22nd Street, Tacoma WA 98406
Joan Halley, 3724 North 29th Street, Tacoma, WA 98407
John Ackley, 2801 North Proctor, Tacoma, WA 98407
Juli Anne Cooke Gibson, 4416 North 28th Street, Tacoma, WA 98407
Peter Sproule, 4211 North 26th Street, Tacoma, WA 98407
Roy Cupler, 3731 North 28th Street, Tacoma, WA 98407
John Trueman 611 North Carr Street, Tacoma, WA 98407
Robert L. Schuler, 4612 North 13th Street, Tacoma, WA 98047
Reggie Frederick, 3806 North 26th Street, Tacoma, WA 98407
Samantha Soju, 3405 North 29th Street, Tacoma, WA 98407
Carol Pruitt, 1814 North Puget Sound, Tacoma, WA 98406
Steve Callson, 3805 North 15th Street, Tacoma, WA 98406
Tom Eqnew, 3724 North 29th Street, Tacoma, WA 98407
Denis Graver, 3729 North 28th Street, Tacoma, WA 98407
Carrie Cupler 3731 North 28th Street, Tacoma, WA 98407
Brenda Dietz, 4121 North 29th Street, Tacoma, WA 98407
CenturyLink, Attn: R. Jeff Lawrey, 1208 NE 64th Street Rm 401, Seattle, WA 98115
Judith Chelotti, 4211 North 26th Street, Tacoma, WA 98407
Denis Duggan, 4008 North 24th Street, Tacoma, WA 98406



OFFICE OF THE HEARING EXAMINER

CITY OF TACOMA

REPORT AND RECOMMENDATION

TO THE CITY COUNCIL

PETITIONER: 28 Proctor Holdings, LLC

FILE NO: HEX 2013-051 (124.1337)

SUMMARY OF REQUEST:

A petition to vacate a portion of the alleyway air rights west of Proctor Street between North 27th and North 28th Streets, for the development of a mixed use building.

RECOMMENDATION OF THE HEARING EXAMINER:

The request is hereby recommended for approval, subject to conditions.

PUBLIC HEARING:

After reviewing the report of the Department of Public Works (DPW), Real Property Services Division, and examining available information on file with the petition, the Hearing Examiner conducted a public hearing on the petition on January 16, 2014. At the conclusion of the hearing, the Hearing Examiner left the hearing record open until January 23, 2014, for the limited purpose of allowing a clarification of Tacoma Fire's comments regarding recommended conditions of approval for the proposed vacation request. The clarification was necessary to assure that the evaluation was conducted with a full understanding that the structure spanning the alley would include habitable space and not be a standard sky bridge.

ORIGINAL

FINDINGS, CONCLUSIONS, AND RECOMMENDATION:

FINDINGS:

1. The petitioner, 28 Proctor Holdings, LLC (hereinafter "28 Proctor"), is requesting to vacate the air rights over a portion of the alley west of Proctor Street between North 27th and North 28th Streets. The area sought to be vacated is more particularly described below:

That portion of the air rights being a minimum of 16.50 feet above the finished grade of the alley, lying east of a line 110.00 feet west of and being parallel to the monumented centerline of Proctor Street, lying between Blocks 21 and 22 of the plat of Lawrence Addition to Tacoma, recorded in Volume 3 of plats, page 40, records of Pierce County, Washington and between those portions of vacated Proctor Street as vacated by the City of Tacoma Ordinances 13316 and 10191;

The above described portion lying within the Southwest quarter of Section 25, Township 21 North, Range 2 East, W.M.

The petition has been joined by all owners of property abutting the rights of way proposed for vacation. *Stevens Testimony.*

2. 28 Proctor is developing a mixed use building on the west side of Proctor Street between its intersections with North 27th and North 28th Streets. The building would contain commercial space on the first level with residential apartment units above. The structure would include over 140 apartments and associated parking. The proposed design for the complex includes a part of the building extending over the alley between North 27th and North 28th Streets. The extended area would contain portions of eight dwelling units and other features including interior access to the parking structure for residents. In order to utilize this design, 28 Proctor is seeking to vacate the air rights, 16.5 feet above grade and higher, along the portion of the alley that would be occupied by the extension. *Gould Testimony.*

3. The alleyway air rights west of Proctor Street between North 27th and North 28th Streets were dedicated in Lawrence Addition to Tacoma, W.T., according to the plat recorded in Volume 3 of Plats, Page 40, Pierce County, Washington. The alley was extended an additional 10 feet to the east when the west 10 feet of Proctor Street was vacated July 17, 1929, under Ordinance No. 10191 (south of alley) and March 3, 1946, under Ordinance No. 13316 (north of alley). *Ex. II.*

4. The alley in question is currently level, graveled, and has a concrete driveway approach. It is bordered by a parking lot on the south and local businesses to the north. The alley rises slightly before it slopes down to the west approaching Madison Street. The westerly portion of the alley is bordered by residential homes and a Century Link facility. *Ex. II.* Mason Middle School is located to the north of the project site across North 28th Street.

5. The alley would remain fully open for public use if the air rights are vacated. The alley would be paved and the surface would be wider than the existing alleyway. Traffic using the alley would not be altered by the existence of a structure above the alley. The plans call for the building to be located over 20 feet above the alley grade and the structure would not impede normal use by vehicles and/or pedestrians. 28 Proctor maintains that the public will benefit from the enhanced condition of the alley, which will eliminate dust from the existing gravel surface and expand the traveled area. *Gould Testimony.*

6. The proposed vacation of air rights has been reviewed by a number of governmental agencies and utility providers. None of the entities opposed the air rights vacation, however, several of the agencies and utilities have recommended conditions or made advisory comments addressing retention of easements, provisions for future utilities, fire access, and building code restrictions.¹ *Exs. 3 through 7, 10 through 13, and 19.*

7. 28 Proctor concurs in the conditions recommended by the governmental agencies and utility providers and plans to underground utilities currently on poles in the alley. *Gould Testimony.*

8. A number of persons appeared at the hearing to testify regarding the project or sent written comments for the record. Some of the speakers supported the proposed development but many of the citizens were strongly opposed to the project. The majority of the public comments were directed to the overall development of the property and the anticipated impacts such a project would have on the neighborhood, rather than focusing specifically on the merits of vacating the air rights over the alley. A number of people who live in the immediate neighborhood strenuously objected to the large size of the proposed development. They think the project is out of scale with the existing structures in the area and will change the very attractive character that drew them to the neighborhood. *Halley Testimony; Cupler Testimony; Egnew Testimony.* Members of the public expressed serious concerns about the impact the project would have on traffic in the vicinity. Neighbors contend the addition of over 140 dwelling units to this small area would increase traffic congestion and aggravate existing parking problems. *Ackley Testimony; Sproule Testimony; Sonju Testimony.* The traffic concerns brought forward addressed impacts from the overall development of the project, rather than to changes that would occur strictly as a result of the alley air rights vacation.

Some residents of the district were concerned about density and the sheer number of additional people the project would add to the neighborhood. *Sproule Testimony; Gruver Testimony.* Others pointed to increased impacts that might result from renting to more temporary apartment residents rather than creating homes or condominiums for owners with more of an investment in the neighborhood. *Cupler Testimony; Sonju Testimony.*

Some neighbors emphasized that the benefits of the street vacation would be realized by the developers and not the public. They contended that benefits mentioned by the project proponent such as creation of a unified project and the provision of safe access to the parking garage would benefit the

¹ Century Link initially opposed the street vacation in its January 7, 2014, written comment letter and required a 12-foot easement running the length of the area to be vacated. However, on January 14, 2014, after a second review of the requested vacation, Century Link submitted its conditional support. *Exs. 10 and 13.*

project and its owners rather than the public. Similarly, the creation of living space over the alley would be an advantage to the project proponents and not the public. *Schuler Testimony; Cupler Testimony.*

9. Other neighbors and members of the public expressed support for the project and the opportunity it would provide for people, particularly senior citizens, to enjoy a walking lifestyle in a desirable neighborhood. *Cooke Gibson Testimony.* It was pointed out that the air rights would not determine whether the project moves forward and that it would be a more desirable design if the air rights were obtained. *Trueman Testimony.* The project's positive impact on the economic vitality of the district was also raised. *Callson Testimony.*

10. 28 Proctor asserts that the project will benefit the public by providing housing and commercial development in the Proctor Street area. The issue of whether the proposal, as a whole, will benefit or harm the neighborhood is not before the Hearing Examiner for resolution. The scope of the proceeding is limited to the impacts and benefits of the air rights vacation. Evaluating the public benefit of vacating the air rights alone, the evidence demonstrates that the vacation would create a public benefit. The vacation would permit the unneeded air rights over a public right-of-way to be used, thereby rendering them subject to property tax assessment. *Stevens Testimony; Gould Testimony; Ex. 17.* In addition, the public would benefit from the improvement of the alley to a paved surface with a wider driving surface. Undergrounding the existing utilities in the alley would benefit the public by increasing the safety and reliability of the utility service. The vacation of air rights would benefit the public by allowing for a more aesthetically pleasing design of the mixed use building. The air rights vacation would result in a greater setback from the street and variety in design for the dwelling units on the northeast and northwest corners of the building.² The air rights vacation impacts only a portion of eight of the 140-plus units proposed in the project. *Gould Testimony.* The project would be able to proceed with the same number of units irrespective of the air rights vacation. If the air rights are not vacated, the units would simply be placed closer to the street. *Dewald Testimony; Ex. 17.*

11. Since the air rights vacation would not affect the public's right to travel on the subject alley, the vacation of such air rights, alone, would not adversely affect the street pattern and traffic circulation in the area. Further, the air rights above the alley are not contemplated for future public use. Provided necessary measures are implemented to protect or relocate existing utilities that would be impacted by the air rights vacation, the public need would not be adversely affected by vacation of the air rights. *Ex. 11.*

12. No abutting property or nearby property would become landlocked or have its access substantially impaired as a result of the vacation of the subject air rights because the alley will remain fully open for vehicle use. *Stevens Testimony.*

13. The proposed vacation neither abuts, nor is proximate to a body of water and, thus, the provisions of RCW 35.79.035 are not implicated. *Ex. 17.*

² The term "public benefit" as used in the street vacation context is construed broadly and may include the enrichment of the local economy, the facilitating of the providing goods and services to the community, and increasing property tax revenues. *Banchemo v. City Council of Seattle*, 2 Wn. App. 519, 524, 468 P.2d 724 (1970).

14. Pursuant to WAC 197-11-800(2)(h), 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)*.

15. The DPW's Preliminary Report, as entered into this record as Exhibit 11, accurately describes the proposed project, general and specific facts about the site and area, and applicable codes. The report is incorporated herein by reference as though fully set forth.

16. All property owners of record and adjacent to the proposed vacation were notified of the January 16, 2014, hearing at least 30 days prior to the hearing, as required by *Tacoma Municipal Code (TMC)* 9.22.060 and all required posting of notices for the hearing have been accomplished. In this case notice was extended beyond the legal minimum to include property owners within 1,000 feet of the site. *Stevens Testimony*.

17. Any conclusion hereinafter stated which may be deemed to be a finding herein is hereby adopted as such.

CONCLUSIONS:

1. The Hearing Examiner has jurisdiction over the parties and subject matter in this proceeding. *See TMC* 1.23.050.A.5 and 9.22.

2. Proceedings involved in the consideration of petitions for the vacation of public rights-of-way are quasi judicial in nature. *State v. City of Spokane*, 70 Wn.2d 207, 442 P.2d 790 (1967).

3. Petitions for the vacation of public right-of-way are reviewed for consistency with the following criteria:

1. The vacation will provide a public benefit, and/or will be for public purpose.
2. That the right-of-way vacation shall not adversely affect the street pattern or circulation of the immediate area or the community as a whole.
3. That the public need shall not be adversely affected.
4. That the right-of-way is not contemplated or needed for future public use.
5. That no abutting owner becomes land-locked or his access will not be substantially impaired; i.e., there must be an alternative mode of ingress and egress, even if less convenient.

6. That the vacation of right-of-way shall not be in violation of *RCW 35.79.035*.

TMC 9.22.070.

4. The petitioner must demonstrate by a preponderance of the evidence that its vacation request conforms to the foregoing criteria. *See TMC 1.23.070*.

5. Findings entered herein, based upon substantial evidence in the hearing record, support a conclusion that the requested air rights vacation conforms to the criteria for the vacation of street rights-of-way provided the conditions recommended herein are imposed. The main criterion in question in this case is whether the proposed air rights vacation will provide a public benefit. While the merits and impacts of the development project, as a whole, are the subject of varied opinions, the evidence showed that the air rights vacation component would result in a public benefit. The air rights vacation is the sole element of the project being evaluated in this proceeding. The upgrade to the alley surface, the undergrounding of utilities, returning property to the tax rolls, and the design enhancements resulting from the air rights vacation will provide a public benefit under *TMC 9.22.070*. The remaining requirements for a street vacation approval are also present. The alley will remain fully open for travel and no adverse effects to the street pattern or circulation in the area or community will occur. The public has no anticipated need for use of the air rights over this alley. The public need in the alley related to utility provision is protected by the required utility undergrounding. No potential for landlocking an abutting owner exists and the provisions of *RCW 35.79.035* governing areas close to bodies of water do not apply.

6. Accordingly, the requested air rights vacation should be approved subject to the following conditions:

A. SPECIAL CONDITIONS:

1. Payment of Fees

28 Proctor shall compensate the City in an amount equal to the full appraised value of the area vacated. 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*

2. Planning and Development Services (PDS)

The walkway shall be no less than 16.5 feet above grade pursuant to *TMC 2.02.210, Section 3202.3.3*.

3. Tacoma Fire Department

- a. The building (sky bridge) constructed over public right of way shall be constructed on non-combustible materials (such as steel, concrete).³
- b. The interior of the sky bridge shall be equipped with an automatic fire sprinkler system in accordance with NFPA 13.
- c. The underside of the sky bridge shall be equipped with an automatic fire sprinkler system in accordance with NFPA 13.
- d. The minimum vertical clearance with absolutely no obstructions shall be 13-feet 6-inches.

4. Environmental Services (ES)

- a. The minimum vertical clearance, with absolutely no obstructions, shall be 13-feet 6-inches.
 - 1) A minimum of 16 vertical feet from grade shall be required to access and maintain the existing wastewater main and appurtenances located in the alley.

5. Tacoma Power

- a. Vacation of the alleyway air rights shall be dependent on the existing overhead power lines being converted to underground. The developer is aware of these requirements and shall be responsible for all associated costs.
- b. If the developer wishes to proceed before it pays for and executes the overhead to underground conversion then we will need to maintain the air rights over the entire area. If it wishes to proceed then Tacoma Power will need to make it contingent on the lines being converted or maintaining an easement over the entire area.

6. ES/Solid Waste Management

- a. Solid Waste Management currently utilizes this alley for the collection of solid waste/recycle containers. Relocating containers to the curb shall not be an option.

³ The hearing record was held open for clarification by the Tacoma Fire Department. Clarification was received indicating that the Department's comments were made with full understanding that habitable space would be included above the alley.
Ex. 19.

- b. The 16.5 feet alley clearance will not be a problem, however no containers shall be located directly underneath the building extension.

7. CenturyLink

A 12-foot wide easement the length of the vacated area shall be granted for underground and aerial facilities. Any relocation will be done at 28 Proctor's expense.

B. USUAL CONDITIONS:

1. THE RECOMMENDATION SET FORTH HEREIN IS BASED UPON REPRESENTATIONS MADE AND EXHIBITS, INCLUDING DEVELOPMENT PLANS AND PROPOSALS, SUBMITTED AT THE HEARING CONDUCTED BY THE HEARING EXAMINER. ANY SUBSTANTIAL CHANGE(S) OR DEVIATION(S) IN SUCH DEVELOPMENT PLANS, PROPOSALS, OR CONDITIONS OF APPROVAL IMPOSED SHALL BE SUBJECT TO THE APPROVAL OF THE HEARING EXAMINER AND MAY REQUIRE FURTHER AND ADDITIONAL HEARINGS.
2. THE AUTHORIZATION GRANTED 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 APPROVALS GRANTED AND IS A CONTINUING REQUIREMENT OF SUCH APPROVALS. BY ACCEPTING THIS/THESE APPROVALS, THE PETITIONER REPRESENTS THAT THE DEVELOPMENT AND ACTIVITIES ALLOWED WILL COMPLY WITH SUCH LAWS, REGULATIONS, AND ORDINANCES. IF, DURING THE TERM OF THE APPROVAL GRANTED, THE DEVELOPMENT AND ACTIVITIES PERMITTED DO NOT COMPLY WITH SUCH LAWS, REGULATIONS, OR ORDINANCES, THE PETITIONER AGREES TO PROMPTLY BRING SUCH DEVELOPMENT OR ACTIVITIES INTO COMPLIANCE.

7. Accordingly, the vacation petition should be granted, subject to the conditions set forth in Conclusion 6 above.

8. Any finding hereinbefore stated which may be deemed to be a conclusion herein is hereby adopted as such.

RECOMMENDATION:

The vacation request is hereby recommended for approval, subject to conditions contained in Conclusion 6 above.

DATED this 30th day of January, 2014.



PHYLLIS K. MACLEOD, Hearing Examiner

FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND RECOMMENDATION

ORIGINAL

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 entered 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 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 shall 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*.

GENERAL PROCEDURES FOR APPEAL:

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

Notice - No Fee (7/11/00)

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