

**OFFICE OF THE HEARING EXAMINER**

**CITY OF TACOMA**

**REPORT AND RECOMMENDATION**

**TO THE CITY COUNCIL**

**PETITIONER:** Cornus House LLC, a Washington limited liability company.

**FILE NO:** HEX2022-015 (124.1430)

**SUMMARY OF REQUEST:**

A petition by Cornus House LLC (“Petitioner”) to vacate a portion of Commerce Street, lying north of the Sound Transit right-of-way, for a private walkway.

**RECOMMENDATION OF THE HEARING EXAMINER:**

The vacation petition is hereby recommended for approval, subject to conditions, as set forth herein.

**PUBLIC HEARING:**

After reviewing Real Property Services’ Preliminary Report (the “Report”—Exhibit C-1), and examining available information on file with the petition, the Hearing Examiner conducted a public hearing on the petition on October 20, 2022.<sup>1</sup> Senior Real Estate Specialist, Troy Stevens, of Real Property Services (“RPS”) represented the City. Ben Maritz, the Petitioner’s manager, appeared on behalf of the Petitioner, Cornus House LLC.<sup>2</sup> Testimony was taken, exhibits were admitted, and the record closed at the conclusion of the hearing.

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<sup>1</sup> This hearing was conducted with in-person participation in the City Council Chambers, and also participation over Zoom at no cost to any participant with video, internet audio, and telephonic access. The Examiner and City staff were present in Chambers. The Petitioner’s representatives participated over Zoom. No members of the public joined in the hearing. The Examiner conducted a brief site visit after the hearing on October 25, 2022.

<sup>2</sup> Neither party representative called additional witnesses.

**FINDINGS, CONCLUSIONS, AND RECOMMENDATION:**

**FINDINGS:**

1. The Petitioner, Cornus House LLC, a Washington limited liability company (the “Petitioner”), has requested the vacation of a portion of the Commerce Street right-of-way, lying north of Sound Transit right-of-way (the “Vacation Area”) and south of South 25<sup>th</sup> Street. The Vacation Area is legally described as follows:

A PORTION OF 40 FOOT WIDE COMMERCE STREET, LYING SOUTH OF SOUTH 25TH STREET AND NORTH OF SOUTH TACOMA WAY;

MORE PARTICULARLY DESCRIBED AS FOLLOWS:

**BEGINNING** AT THE NORTHEASTERLY CORNER OF LOT 7, BLOCK 2505 OF THE TACOMA LAND COMPANY'S FIRST ADDITION TO TACOMA. W.T., AS PER MAP THEREOF FILED FOR RECORD JULY 7TH, 1884, IN PIERCE COUNTY, WASHINGTON;

THENCE NORTH 82°43'12" EAST ALONG THE EASTERLY EXTENSION OF THE NORTHERLY LINE OF SAID LOT 7, A DISTANCE OF 40.00 FEET TO THE EASTERLY MARGIN OF SAID COMMERCE STREET;

THENCE SOUTH 07°20'04" EAST ALONG SAID EASTERLY MARGIN, A DISTANCE OF 31.30 FEET TO THE BEGINNING OF A CURVE CONCAVE TO THE SOUTHEAST HAVING A RADIUS OF 1272.54 FEET AND A CENTRAL ANGLE OF 0°57'15" AND BEING SUBTENDED BY A CHORD WHICH BEARS SOUTH 63°21'50" WEST 21.19 FEET;

THENCE SOUTHWESTERLY ALONG SAID CURVE, A DISTANCE OF 21.19 FEET TO THE CENTERLINE OF SAID COMMERCE STREET;

THENCE SOUTH 07°20'04" EAST ALONG SAID CENTERLINE, A DISTANCE OF 0.04 FEET TO THE BEGINNING OF A CURVE CONCAVE TO THE SOUTHEAST HAVING A RADIUS OF 1171.28 FEET AND A CENTRAL ANGLE OF 1°02'40" AND BEING SUBTENDED BY A CHORD WHICH BEARS SOUTH 62°11 '28" WEST 21.35 FEET;

THENCE SOUTHWESTERLY ALONG SAID CURVE, A DISTANCE OF 21.35 FEET TO THE WESTERLY MARGIN OF SAID COMMERCE STREET;  
THENCE NORTH 07°20'04" WEST ALONG SAID WESTERLY MARGIN, A DISTANCE OF 45.85 FEET TO THE **POINT OF BEGINNING.**

CONTAINING 1,537 +/--SQUARE FEET OR 0.035 ACRES, MORE OR LESS.

SITUATE IN THE SOUTHEAST QUARTER OF THE NORTHWEST QUARTER OF SECTION 9, TOWNSHIP 20 NORTH, RANGE 3 EAST OF THE WILLAMETTE MERIDIAN, IN THE CITY OF TACOMA, COUNTY OF PIERCE, STATE OF WASHINGTON. *Exs. C-1~ C-3.*

2. The Petitioner plans on using the Vacation Area for a private walkway that will connect two parcels of real property owned by the Petitioner on opposing sides of the Vacation Area. The east-side parcel is intended to be developed with a 199-unit work-force housing project, while the other side is intended to be used for storage and staging. *Maritz Testimony; Ex. C-1; Ex. C-2.*

3. The Vacation Area lies just north of improved (with active tracks) Sound Transit right-of-way that effectively cut off Commerce Street southward at the location of the Vacation Area. It is approximately 62 feet southward of South 25th Street, and is 40 feet wide, unimproved, covered in grass, and sloped. A privately-placed, unauthorized black chain link fence currently encloses the Vacation Area and there is a gate to access it off Commerce Street. The fence will likely be removed if the vacation is approved. *Ex. C-1.*

4. The City of Tacoma acquired the Commerce Street right-of-way by dedication in the map of Tacoma Land Company's First Addition to Tacoma, W.T., filed of record July 7, 1884, in the Office of the County Auditor. *Ex. C-1, Ex. C-3.*

5. The requested vacation has been reviewed by outside quasi-governmental agencies, City departments/divisions, and utility providers. Aside from Sound Transit, the reviewing agencies indicated that they have no concerns or objection to the proposed vacation. Tacoma Power requested an easement reservation over the west half of the Vacation Area because of existing facilities, but no other actual conflicts presented. *Stevens Testimony; Exs. C-4~C-15.*

6. No one from the public appeared or testified at the hearing. Sound Transit commented on the proposed vacation prior to the hearing indicating that it would prefer that the vacation not be approved and that the Vacation Area remain encumbered by the City's right-of-way interest, presumably because if it remains right-of-way, Sound Transit's path to using that area for an expansion of its own right-of-way operations is easier than otherwise. Sound Transit also mentioned transient trespass activity as a concern. Maritz testified that any existing transient use of the Vacation Area at present will be lessened if the Vacation Area is developed, as intended, as a pedestrian walkway. Stevens indicated that City staff is supportive of the vacation despite Sound Transit's hesitancy. *Ex. C-6.*

7. City staff determined that the public would benefit from the proposed vacation to the extent that it adds value to the property to which it attaches on the tax rolls, and also facilitates private residential development.<sup>3</sup> The Vacation Area being improved as a part of a work-force housing project does provide some public benefit given the dire need for additional affordable housing in the Tacoma market. *Maritz Testimony; Ex. C-1.*

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<sup>3</sup> The City did not provide an explanation for how "private" development ends up benefitting the public, but the Petitioner's representative tied that in somewhat in the explanation that the private development will be for work-force housing—housing of a type that is needed in the city of Tacoma given its current severe affordable housing shortage.

8. The Vacation Area is not needed for future public use by the City, and no abutting owner becomes landlocked nor will their access be substantially impaired by the vacation. The Vacation Area is currently not used for any public right-of-way purpose. *Id.*

9. 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. *Ex. C-1.*

10. No environmental review of the proposed vacation was conducted. *See Conclusion of Law 3, below.*

11. RPS' Preliminary Report, as entered into this record as Exhibit C-1 (the "Report"), accurately describes the requested vacation, general and specific facts about the abutting properties, and Vacation Area and applicable codes. The Report is incorporated herein by reference as though fully set forth. Any conflict between this Recommendation and the Report should be resolved in favor of this Recommendation, however.

12. Public hearing notices were posted/published at the various locations and on the dates indicated below as follows:

On September 15, 2022-

- a. A public notice memo was placed into the glass display case located on the First Floor of the Tacoma Municipal Building next to the Finance Department.
- b. A public notice memo was advertised on the City of Tacoma web site at address: <http://www.cityoftacoma.org/page.aspx?nid=596>.
- c. Public notice was advertised in the Daily Index newspaper.
- d. A public notice mailing was sent to all parties of record within a 300-foot radius of the Vacation Area.
- e. Public Notice was advertised on Municipal Television Channel 12.

On September 19, 2022-

- f. A yellow public notice sign was posted at the southwest corner of South 25th Street and Commerce Street.
- g. A yellow public notice sign was posted approximately 150 feet southerly of the southeast corner of South 25th and Commerce Street.. *Ex. C-1.*

13. Any conclusion hereinafter stated which may be more properly deemed a finding 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. Pursuant to WAC 197-11-800(2)(i), the vacation of streets or roads (right-of-way) is exempt from the threshold determination and Environmental Impact Statement requirements of RCW 43.21.C, the State Environmental Policy Act (SEPA).

4. "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>4</sup>

5. If they are to be approved, petitions for the vacation of public right-of-way must be consistent with the following criteria:<sup>5</sup>

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.*

6. The Petitioner must demonstrate, by a preponderance of the evidence, that its vacation petition meets the foregoing criteria. *See TMC 1.23.070.* The Petitioner is entitled to rely on all evidence made part of the record, whatever the source of that evidence.

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<sup>4</sup> *Puget Sound Alumni of Kappa Sigma v. Seattle*, 70 Wn.2d 222, 238-239, 422 P.2d 799, 808-809 (1967).

<sup>5</sup> For consistency, outline numbering of the criteria is kept the same as in the original TMC text.

7. Findings entered herein, based upon substantial evidence in the hearing record, support a conclusion that the requested partial street vacation conforms to the criteria for the vacation of right-of-way set forth at Conclusion 5 above, provided the conditions recommended below are met. The public would experience benefits from the economic development, tax revenue, and increase to the housing supply that the requested vacation will facilitate. The requested partial street vacation would not impair traffic circulation, landlock any abutting owner, or adversely affect the public need.

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 Petitioner shall compensate the City in an amount equal to the full appraised value of the Vacation Area. One-half of the revenue received should 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. RESERVATION OF EASEMENT

A City utility easement shall be retained over the west half of the Vacation Area to provide for the continued existence of City utility facilities, as well as their maintenance, repair and replacement.

**B. ADVISORY NOTE:**

RPS/IN-LIEU

Any LID estimates or other in-lieu amounts referenced in the RPS Report are advisory comments only, and are not included here as a condition of approval; they can be voluntarily paid as part of the vacation process, or they may be required at the time of any subsequent development of the Vacation Area. Such fees are subject to increase until paid.

Beyond the two conditions set forth above, no objections or additional comments were received from the governmental agencies, City departments/divisions, and utility providers to whom the City circulated this petition.

**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.

9. Accordingly, the petition is recommended for approval, subject to the condition 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 vacation petition is hereby recommended for approval, subject the condition contained in Conclusion 8 above.

**DATED** this 26th day of October, 2022.

  
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**JEFF H. CAPELL, Hearing Examiner**

## N O T I C E

### **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***