

Meyers, Aundrea

From: Legg, Louisa on behalf of Hearing Examiner
Sent: Wednesday, December 9, 2020 9:48 AM
To: Cornforth (Van Allen), Ronda; holroydsn@aol.com; holroydsn@icloud.com; Kathy Hargrave; Jenkins, Jessica; Kammerzell, Jennifer; Russell, Lee; Alden Robinson - Boulton Insulation (AldenRobinson@hotmail.com); Magoon, Jana; Wung, Lihuang; Dressler, Teresa; Victor, Steve(Legal); Darci Brandvold (dbrandv@co.pierce.wa.us)
Cc: Krupa, Angie (Legal); Meyers, Aundrea
Subject: HEX2020-034 (SV 124.1421) NIELSEN PACIFI, LTD, Petitioner
Attachments: SIGNED_HEX2019-034_124.1421_NIELSEN_PACIFIC_LTD_Recomm_12.09.20.pdf
Importance: High

Dear Parties,

In regard to the above referenced matter, please find attached the Hearing Examiner's Findings of Fact, Conclusions of Law, and Recommendation to the Tacoma City Council, entered on December 9, 2020.

Sincerely,

Louisa Legg
Office Administrator
Tacoma Hearing Examiner Office
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OFFICE OF THE HEARING EXAMINER

CITY OF TACOMA

REPORT AND RECOMMENDATION

TO THE CITY COUNCIL

PETITIONER: NIELSEN PACIFIC, LTD.

FILE NO: HEX2020-034 (124.1421)

SUMMARY OF REQUEST

The Real Property Services division (“RPS”) of the City of Tacoma (“City”) Public Works Department (“PW”) received a petition to vacate that portion of East K Street, and an adjoining alley, lying between East 26th Street and East Wiley Avenue and westerly of East L Street. The vacated area of right-of-way is intended for business development and expansion.

RECOMMENDATION OF THE HEARING EXAMINER

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

PUBLIC HEARING:

After reviewing RPS’s 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 December 3, 2020.¹ Ronda Van Allen of RPS represented the City. The Petitioner NIELSEN PACIFIC, LTD., a Washington corporation, appeared through Kathy Hargrave, P.E., SITTS & HILL ENGINEERS, INC.² Testimony was taken, and exhibits were referenced and admitted. The record was left open briefly to take receipt of an additional written explanation from the Applicant. After receiving this information on December 4, 2020, the record formally closed.

¹ The hearing was conducted using internet conferencing technology over Zoom due to the current closure of City facilities for in-person gatherings.

² Through a notarized Property Owner Free Consent Form, dated October 29, 2020, governor/owner Stephen Nielsen of NIELSEN PACIFIC, LTD. authorized Kathy Hargrave of SITTS & HILL ENGINEERS, INC. to represents him “in any public hearings...for the duration of the application/decision/appeal process.”

FINDINGS, CONCLUSIONS, AND RECOMMENDATION:

FINDINGS:

1. Petitioner NIELSEN PACIFIC, LTD., a Washington corporation (the “Petitioner”), submitted a petition requesting the vacation of East K Street lying between East 26th Street and East Wiley Avenue, together with the alley lying between East 26th Street and East Wiley Avenue between East K Street and East L Street that connects into the East K Street section just described (the “Vacation Area” as legally described below).³ The Vacation Area will be incorporated into adjacent properties for future business development and expansion potential. *Van Allen Testimony; Ex. C-1.*

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

ALL THAT PORTION OF EAST ‘K’ STREET LYING BETWEEN AND ABUTTING BLOCKS 7634, 7636, 7733 AND 7735, AND THE ALLEY BETWEEN AND ABUTTING BLOCKS 7636 AND 7735, ALL OF TACOMA LAND COMPANY’S FIRST ADDITION TO TACOMA, W.T., ACCORDING TO THE PLAT THEREOF, FILED JULY 7, 1884, RECORDS OF THE PIERCE COUNTY AUDITOR, PIERCE COUNTY, WASHINGTON, LYING SOUTHERLY OF EAST 26TH STREET, WEST OF EAST “L” STREET AND NORTHERLY OF A LINE BEGINNING AT A POINT ON THE WEST LINE OF SAID BLOCK 7735 32 FEET NORTH OF THE SOUTHWEST CORNER THEREOF TO A POINT ON THE EAST LINE SAID BLOCK 7733 15 FEET NORTH OF THE SOUTHEAST CORNER THEREOF.

ALL SITUATE IN THE CITY OF TACOMA, COUNTY OF PIERCE, STATE OF WASHINGTON; WITHIN THE WEST HALF OF THE NORTHWEST QUARTER OF SECTION 10, TOWNSHIP 20 NORTH, RANGE 03 EAST OF THE WILLAMETTE MERIDIAN. *Ex. C-1.*

3. The East K Street right-of-way at this location is 80 feet in width, and the alley is 20 feet in width. Both were dedicated to the public as right-of-way on July 7, 1884 in the Plat filing of the Tacoma Land Company’s First Addition, records of Pierce County. *Van Allen Testimony; Ex. C-5 and Ex. C-6.*

4. Neither East K Street nor the subject alley have been improved and opened as street right-of-way. Both have been maintained largely as additional yard space to the adjacent parcels with the one exception being an area used as a private gravel driveway, addressed further below. Because the Vacation Area has not been improved and open to the general public as right-of-way for transportation purposes, it has not been a material part of the City’s street system. *Van Allen Testimony, Hargrave Testimony; Ex. C-1.*

³ Although only NIELSEN PACIFIC, LTD. is listed as the Petitioner, the other abutting property owners, R AND R COMMERCIAL PROPERTIES LLC and TLF EAST L STREET, LLC have consented to the vacation, and both had representatives present at the hearing.

5. Leading up to the hearing, the City and Petitioner had multiple discussions regarding the resolution of access and sanitary sewer issues/concerns. While concepts for the removal and relocation of the City’s sanitary sewer main in the Vacation Area were explored, the parties have now resigned themselves to leaving the existing line in the Vacation Area in place, reserving an easement for its continued existence and use for the time being. *Id.*

6. As a condition of approving this vacation, PW Traffic Division recommended that the gravel access drive from East 26th Street to the Petitioner’s real property on the west side of the Vacation Area be relocated within the western half of the East K Street section of the Vacation Area to resolve what were characterized as access and future encroachment concerns. At the hearing, the Petitioner proposed resolving the City’s concerns through the alternative means of creating a joint driveway approach for ingress, egress and utilities to both the Petitioner’s real property and the real property on the east side of the Vacation Area owned by R and R COMMERCIAL PROPERTIES LLC (“R&R”). The Petitioner proposed that this joint driveway would be centrally located in the Vacation Area and would be memorialized through a reciprocal easement agreement. *Hargrave Testimony; Ex. 11.*

7. In addition, PW Traffic and RPS recommended conditioning approval of the vacation upon completion of a Lot Combination of the two westernmost properties of the southern block abutting the Vacation Area, specifically Tax Parcel numbers 2077350010 and 2077350020, ultimately combining them with one of the adjacent properties along East L Street to ensure legal and physical access to East L Street as grades along East Wiley Avenue are prohibitive (the “Lot Combination”). TLF EAST L STREET, LLC, owners of the affected southern block, have elected to combine the aforementioned two parcels with the southernmost property, Tax Parcel number 2077350050 as evidenced by the November 19, 2020 submittal to the City under land use permit LU20-0247 (In the record as *Exs. C-7 and C-8*). *Cederstrand Testimony; Ex. C-1, Ex. C-2, Ex. C-7, Ex. C-8, Ex. 11.*

8. The proposed Vacation Area will reduce the City’s public right-of-way maintenance inventory and expenditure, will add taxable square footage to the abutting properties that may generate additional revenue, as well as facilitate more productive use of these properties after redevelopment. *Hargrave Testimony; Ex. C-1.*

9. The general public currently obtains no transportation-related benefit from this unopened, unimproved right-of-way area. In its current state, it is not part of the street pattern or circulation of the immediate area or the community as a whole. PW determined that the public need will not be adversely affected by its loss (as public right-of-way) nor is the Vacation Area contemplated or needed for future public use as right-of-way. *Id.*

10. With the completion of the Lot Combination, no abutting property becomes landlocked nor will their access be substantially impaired. *Van Allen Testimony; Ex. C-1 and Ex. C-7.*

11. 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. *Van Allen Testimony, Hargrave Testimony; Ex. C-1.*

12. RPS circulated the petition for review by interested governmental agencies, City departments/divisions, and utility providers. These various agencies, departments and divisions provided comments and recommended/requested conditions to RPS. These comments and requests were incorporated into the Report, were referenced in testimony at the hearing, and where appropriate, have been incorporated in this Report and Recommendation. *Van Allen Testimony; Ex. C-9.*

13. One abutting property owner appeared at the hearing commenting in support of the vacation and offering some additional information regarding the pending Lot Combination. No written public comments were received; however, RPS did receive one email and one phone call requesting additional information regarding the vacation, but did not receive any comments specifically in support or opposition. *Cederstrand Testimony; Ex. C-1.*

14. RPS's Report, which is in the record as Exhibit C-1, accurately describes the proposed vacation, general and specific facts about the Vacation Area, and applicable laws. 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.

15. Public hearing notices were posted/published at various locations on the dates set forth below:

On October 29, 2020-

- a. Yellow public notice signs were posted along the Vacation Area at the intersection of East K Street and East 26th Street, at the intersection of East K Street and East Wiley Avenue, and at the intersection of the alley and East L Street. *Van Allen Testimony; Ex. C-1, Ex. C-4.*

On October 30, 2020-

- b. A public notice memo was posted in the glass display case located on the first floor of the Tacoma Municipal Building next to the Finance Department.
- c. A public notice memo was advertised on the City of Tacoma web site at address: <http://www.cityoftacoma.org/notices>.
- d. Public notice was advertised in the Daily Index newspaper.
- e. A public notice card was mailed to all parties of record within 300 feet of the Vacation Area.
- f. Public notice was advertised on Municipal Television Channel 12. *Id.*

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. 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. "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."⁴

5. Petitions for the vacation of public right-of-way must be consistent with the following criteria:⁵

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.*

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

⁵ 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 street vacation conforms to the criteria for the vacation of street right-of-way set forth at Conclusion 5 above, provided the conditions recommended below are imposed and met. No potential for landlocking an abutting owner results from granting the petition, provided that the Lot Combination referenced in Finding of Fact (“FoF”) 7 is completed. The Vacation Area is not currently used as part of the City’s right-of-way system nor does the City anticipate any future need to use the Vacation Area for public right-of-way purposes. 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 into property tax valuations for the Petitioner’s abutting real property, and by facilitating the Petitioner’s present and potential future business development and operations while reducing the City’s maintenance obligations.

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 should be required to 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 rights-of-way. *TMC 9.22.010*

2. PUBLIC WORK TRAFFIC ENGINEERING

Prior to final approval of any Ordinance vacating the Vacation Area, the gravel access from East 26th Street to the Petitioner’s real property on the west side of the Vacation Area must be relocated within the western half of the East K Street part of the Vacation Area, OR a joint driveway approach for ingress, egress and utilities to both the Petitioner’s real property and the real property on the east side of the Vacation Area owned by R AND R COMMERCIAL PROPERTIES LLC must be created through a reciprocal easement agreement.

In addition to the foregoing, the Lot Combination referenced in FoF 7 must be completed.

3. ENVIRONMENTAL SERVICES

A City utility easement of adequate width should be retained, authorizing the continued placement, use and maintenance (including replacement) of the public sanitary sewer system that runs through the alley portion of the Vacation Area and up the eastern side of the K Street portion to East 26th Street.

B. USUAL CONDITIONS:

1. The recommendation set forth herein is based upon representations made and exhibits, including any development representations, plans and proposals, submitted as part of the hearing record. Any material change(s) in any such development plans, proposals, or conditions of approval imposed may be potentially 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.

C. ADVISORY NOTES:

1. Other than the conditions/concerns already expressly set forth herein, no objection or additional comment was received from the governmental agencies, City departments/divisions, and utility providers to whom the City circulated this petition.
2. There is an outstanding Connection Charge In-Lieu-of-Assessment estimated at \$4,412.83 provided by the City's Public Works Department in Exhibit C-9 of the hearing record that is referenced now as an advisory comment only. Payment thereof is not a condition to this vacation. The charges *can* be voluntarily paid at time of compensation for the Vacation Area. If not, the In-Lieu-of-Assessment Charge(s) will remain outstanding and 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.

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

10. Any conclusion above, 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 9th day of December, 2020.



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*