



City of Tacoma
Hearing Examiner

February 4, 2014

BCRA
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City of Tacoma
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Tacoma, WA 98402
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Re: File No. HEX 2013-053 (Vacation Petition No. 124.1338)
Petitioner: Henry Foss Group, 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.

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 February 4, 2014, at Tacoma, WA.

Louisa Legg

Sincerely,

Louisa Legg, Legal Assistant

Enclosure (1)

Transmittal List

Via First Class Mail Delivery:

Henry Foss Group, LLC, ATTN: Scott Carino, 1584 McNeil Street STE 200, Dupont, WA 98327
Pierce Transit, ATTN: Ben Han, 3701 96th Street SW, PO Box 99070, Lakewood, WA 98499-0070

Via Electronic Mail Delivery:

Clerk's Office, City of Tacoma
Tacoma Fire Department (Ryan Erickson, P.E.)
Tacoma Power (Rick Van Allen)
Tacoma Water (Jesse Angel)
Solid Waste Management, City of Tacoma (Rick Coyne)
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)

OFFICE OF THE HEARING EXAMINER

CITY OF TACOMA

REPORT AND RECOMMENDATION

TO THE CITY COUNCIL

PETITIONER: Henry Foss Group, LLC

FILE NO: HEX 2013-053 (124.1338)

SUMMARY OF REQUEST:

A petition to vacate a portion of the Dock Street air rights north of State Route 509, for building modulation and design features for a project at 1933 Dock Street in Tacoma, Washington.

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.

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FINDINGS, CONCLUSIONS, AND RECOMMENDATION:

FINDINGS:

1. The petitioner, Henry Foss Group, LLC (hereinafter "Henry Foss"), is requesting to vacate a small portion of the air rights over Dock Street north of State Route 509, for building modulation and design features in connection with a proposed mixed use project at 1933 Dock Street. *Ex 6*. The area sought to be vacated is more particularly described below:

THAT PORTION OF THE AIR RIGHTS, BEING A MINIMUM OF 16.5 FEET ABOVE THE FINISHED GRADE OF DOCK STREET AND LYING WITHIN THE SOUTHEAST QUARTER OF THE SOUTHWEST QUARTER OF SECTION 4, TOWNSHIP 20 NORTH, RANGE 3 EAST, W.M., CITY OF TACOMA, PIERCE COUNTY, WASHINGTON, DESCRIBED AS FOLLOWS:

COMMENCING AT THE SOUTHWEST CORNER OF PARCEL "B" OF BOUNDARY LINE REVISION RECORDED UNDER AUDITOR'S FILE NO. 200611295003, BEING A POINT ON THE EASTERLY RIGHT OF WAY OF DOCK STREET, COINCIDENT WITH THE EASTERLY LINE OF SAID PARCEL "B"; THENCE NORTH 07°23'05" WEST ALONG SAID EASTERLY RIGHT OF WAY, A DISTANCE OF 61.19 FEET TO THE POINT OF BEGINNING 'A'; THENCE DEPARTING SAID EASTERLY RIGHT OF WAY NORTH 77°23'06" WEST, 6.44 FEET; THENCE NORTH 12°36'54" EAST, 17.69 FEET TO HEREINAFTER DESCRIBED POINT 'A', BEING A POINT ON SAID EASTERLY RIGHT OF WAY; THENCE SOUTH 07°23'05" EAST ALONG SAID EASTERLY RIGHT OF WAY, A DISTANCE OF 18.82 FEET TO THE POINT OF BEGINNING 'A'.

TOGETHER WITH THE FOLLOWING:
COMMENCING AT AFOREMENTIONED POINT 'A';
THENCE NORTH 07°23'05" WEST ALONG THE AFOREMENTIONED EASTERLY RIGHT OF WAY, A DISTANCE OF, A DISTANCE OF 25.08 FEET TO THE POINT OF BEGINNING 'B'; THENCE DEPARTING SAID EASTERLY RIGHT OF WAY NORTH 77°23'06" WEST, 8.38 FEET; THENCE NORTH 12°36'54" EAST, 23.03 FEET TO HEREINAFTER DESCRIBED POINT 'B', BEING A POINT ON SAID EASTERLY RIGHT OF WAY; THENCE SOUTH 07°23'05" EAST ALONG SAID EASTERLY RIGHT OF WAY,

FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND RECOMMENDATION

ORIGINAL

A DISTANCE OF 24.51 FEET TO THE POINT OF BEGINNING 'B'.

TOGETHER WITH THE FOLLOWING:
COMMENCING AT AFOREMENTIONED POINT 'B';
THENCE NORTH 07°23'05" WEST ALONG THE
AFOREMENTIONED EASTERLY RIGHT OF WAY, A
DISTANCE OF 61.51 FEET TO THE POINT OF BEGINNING
'C'; THENCE DEPARTING SAID EASTERLY RIGHT OF
WAY NORTH 77°23'06" WEST, 7.32 FEET; THENCE NORTH
12°36'54" EAST, 20.10 FEET TO SAID EASTERLY RIGHT OF
WAY; THENCE SOUTH 07°23'05" EAST ALONG SAID
EASTERLY RIGHT OF WAY, A DISTANCE OF 21.39 FEET
TO THE POINT OF BEGINNING 'C'.

2. The vacation petition has been joined by all owners of property abutting the right-of-way proposed to be vacated. *Stevens Testimony.*
3. Henry Foss is proposing a development at 1933 Dock Street known as "The Henry." The Henry will include approximately 10,400 square feet of retail space and 161 residential apartment units. *Ex. 9; Stevens Testimony.* Various public amenities will be constructed on areas adjacent to the structure as part of the project, including improvements to a public plaza and esplanade to the east, construction of seating areas and a playground at a park to the south, and improvements to a view corridor to the north. *Gould Testimony.* The project, as well as the proposed air rights vacation, has been reviewed by the Urban Design Review Committee of the Foss Waterway Development Authority. The angled design facilitated by the air rights vacation is supported by the Urban Design Review Committee as a method for creating a visual gateway to the Foss Waterway area. *Dowie Testimony.*
4. The Dock Street air rights north of State Route 509 were dedicated in the Official Map of the Tacoma Tide Lands filed in the Office of the Commissioner of Public Lands at Olympia, Washington 3 September 1895. In September 2002, under City of Tacoma Boundary Line Adjustment, recorded under recording number 20020909502, Block 58 of said Tacoma Tide Lands was modified and again on November 29, 2006 under City of Tacoma Boundary Line Adjustment, recorded under recording number 200611295003. Neither boundary line adjustment altered the right-of-way lines. *Ex. 9; Stevens Testimony.*
5. The Dock Street right-of-way in this area is a fully built street segment with curb, gutter, and sidewalks. It is level, in good condition, and adjacent to the Foss Waterway re-development area. *Ex. 9; Stevens Testimony.* The proposed vacation of air rights 16.5 feet above grade and higher would not interfere with the use of Dock Street for vehicular or pedestrian travel. Accordingly, the vacation of air rights would not adversely affect the street pattern or circulation in the area or the community. *Ex. 7; Gould Testimony.*

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

6. The proposed air rights vacation has been reviewed by a number of governmental agencies and utility providers. The reviewing agencies have indicated no objection to the proposed vacation of air rights. Pierce Transit has provided information indicating that the petitioner would be required to install certain improvements connected to the overall project, however, these issues are not specifically related to the air rights vacation. *Ex. 9.* The City of Tacoma Public Works Engineering Division advised that because the proposed vacation included only air rights, the petition would not be subject to a Connection Charge In-Lieu-of-Assessment per Tacoma Municipal Code 12.08.350. *Ex. 9; Stevens Testimony.*

7. No one appeared at the hearing in opposition to approval of Henry Foss's petition to vacate air rights over a portion of Dock Street. Susan Dowie, Executive Director of the Foss Waterway Development Authority, testified about the Development Agreement being executed by Henry Foss and the Development Authority, which contains provisions requiring the developer to install a number of amenities benefitting the public. *Dowie Testimony.*

8. The public would benefit from the proposed air rights vacation to the extent that it would permit the unneeded air rights over a public right-of-way to be returned to the public tax rolls. In addition, the air rights vacation would make possible a design that includes angled modulation of the building. This type of design presents a more appealing aesthetic presence than the flat vertical façade that would be necessary without the minor air rights vacation. *Gould Testimony.* The project as a whole also will provide a number of direct public amenities including completion of landscaping and utility work on a view corridor to the north of the building, improvements to a public waterfront plaza and esplanade to the east of the project, improvements to a park on the south side of the project, and completion of the Dock Street sidewalk to the west of the project. *Dowie Testimony.*¹

10. The air rights are not contemplated for future public use, and vacation of the air rights would not adversely affect the public need. *Stevens Testimony; Ex. 9.*

11. 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. *Ex. 7.*

12. The air rights above the right-of-way on Dock Street do not abut a body of water and, thus, the provisions of RCW 35.79.035 are not implicated.

13. 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)*.

14. The DPW Preliminary Report, as entered into this record as Exhibit 9, 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.

¹ 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 of 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).

15. All property owners of record adjacent to the proposed vacation have been 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. *Stevens Testimony*.

16. 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 TMC 9.22.*

2. Proceedings that involve 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 landlocked 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-

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

-5-
ORIGINAL

of-way provided the conditions recommended herein are imposed. The public would experience benefits from the requested vacation by returning unused air rights to the tax rolls. The design enhancements made possible by proposed the air rights vacation would benefit the public by providing a more desirable visual presence along Dock Street. The overall project would also result in direct amenities for public enjoyment. The vacation is limited to a small area of air rights well above the surface used for pedestrian or vehicular traffic. The requested air rights vacation would not impair traffic circulation, landlock any abutting owner, or adversely affect the public need.

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

A. SPECIAL CONDITION:

Payment of Fees

The petitioner 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.*

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

FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND RECOMMENDATION

-6-
ORIGINAL

ORDINANCES, THE PETITIONER AGREES TO PROMPTLY BRING SUCH DEVELOPMENT OR ACTIVITIES INTO COMPLIANCE.

7. Accordingly, the vacation petition should be granted, subject to 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.

DATED this 4th day of February, 2014.



PHYLLIS K. MACLEOD, 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 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**