

1 **OFFICE OF THE HEARING EXAMINER**

2 **CITY OF TACOMA**

3 **In the Matter of:**

4 **PROPOSED LOCAL**
5 **IMPROVEMENT DISTRICT**
6 **NO. 8667**

HEX2020-036

FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND RECOMMENDATION

7
8 **A PUBLIC HEARING** on the above-captioned matter was held on December 14, 2020,
9 before JEFF H. CAPELL, the Hearing Examiner for the City of Tacoma (the “City”).¹ The Hearing
10 Examiner having considered the testimony and evidence presented, having reviewed the file, and
11 being otherwise fully advised, makes the following:

12 **FINDINGS OF FACT**

13 1. The Tacoma City Council adopted Resolution No. 40686 on November 17, 2020 (the
14 “Hearing Resolution”), addressing the potential formation of Local Improvement District No. 8667
15 (the “LID” or “LID 8667”).² The Hearing Resolution was the result of (among other efforts) a
16 number of Advisory Surveys the City distributed to property owners, and then received back signed
17 by certain numbers of property owners within the LID. Based on these Advisory Surveys, the
18 City’s Department of Public Works (“DPW”) LID Section staff determined that there was

19
20
21 ¹ Due to National, State of Washington (“State”) and City Proclamations of Emergency caused by the COVID-19 virus, the City closed the Tacoma Municipal Building to the public until further notice on or around March 17, 2020. As a result, the public hearing in this matter was conducted virtually using Zoom teleconferencing with both internet visual and audio access, as well as separate telephonic (only) access via call in number on Zoom. Due primarily to the format of the hearing, the record was left open until December 16, 2020, for the submission of additional written comments, a number of which were received and all were reviewed on the way to the issuance of this Recommendation.

² Local improvement districts may be referred to herein generically as “LID”s as well.

FINDINGS OF FACT,
CONCLUSIONS OF LAW,
AND RECOMMENDATION - 1

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1 sufficient property owner support to bring LID 8667 before the City Council to schedule a
2 formation hearing.³ *Rodriguez Testimony, Ex. C-2, Ex. C-3, Ex. C-5, Ex. C-6-Ex. C-8, C-9.*⁴

3 2. The Hearing Resolution formally set a hearing date of December 14, 2020, to consider
4 the formation of LID 8667. The locations included in LID 8667 are grouped in two “segments” and
5 are described in the Hearing Resolution, together with the proposed improvements, as follows:

6 [f]or establishing a grade and placing thereon a permanent street pavement
7 with a structural section, together with the installation of concrete curbs,
8 gutters, surface water mains, and surface water catch basins, where needed
9 on the following streets:

10 **Segment 1** – Ruby Street, from Baltimore Street to Shirley Street; and

11 **Segment 2** – Mullen Street, from North 46th Street to North 47th Street.⁵

12 The Hearing Resolution states that other improvements in the overall project “[m]ay include
13 driveway entrances; wastewater lateral connections from the wastewater main to the property line;
14 the removal and planting of trees; and all other work necessary to complete the same in accordance
15 with plans and specifications to be prepared by the City Engineer,…” The Hearing Resolution is
16 incorporated herein by reference as though fully set forth. *See also Ex. C-1, Ex. C-8, Ex. C-11.*

17 3. The proposed boundary of the LID, broken out by segments, is legally described in
18 the Hearing Resolution as follows:

19 **Ruby Street from Baltimore Street to Shirley Street**

20 Those portions of the Northeast Quarter of the Southeast Quarter of
21 Section 23, Township 21 North, Range 02 East, W.M., described as
follows:

³ The City’s Advisory Surveys are a tool used in tallying preliminary support/opposition to formation at the early stages of the process. They are not a definitive statement of either support or opposition when it comes time to actually consider formation.

⁴ Exhibit subparts may also be considered referenced whenever a main exhibit number is referenced.

⁵ The named streets in the LID may also be referred to herein with the prefix/modifier “North” in front of them.

1 Lots 1 through 20, Block 11 and Lots 1 through 20, Block 12,
2 **Outlook 2nd Addition to Tacoma, Washington**, according to the
3 plat thereof recorded in Volume 10, Page 120, filed May 24, 1918,
4 records of Pierce County Auditor.

5 And together with Parcels 'A' and 'B', City of Tacoma Boundary
6 Line Adjustment recorded under Recording Number 9704300215,
7 records of Pierce County Auditor.

8 All situate in the City of Tacoma, County of Pierce, State of
9 Washington.

10 Mullen Street from North 46th Street to North 47th Street

11 Those portions of the Northwest Quarter of the Southwest Quarter of
12 Section 24, Township 21 North, Range 02 East, W.M., described as
13 follows:

14 Lots 12 through 16, Block 9 and Lots 1 through 8, Block 10, **West
15 Tacoma, W.T.**, according to the plat recorded in Volume 1, Page 24,
16 filed September 13, 1871, records of Pierce County Auditor;

17 And together with Parcels 'A' and 'B', City of Tacoma Boundary
18 Line Adjustment, recorded under Recording Number 9504240077,
19 records of Pierce County Auditor.

20 All situate in the City of Tacoma, County of Pierce, State of
21 Washington;

Rodriguez Testimony; Ex. C-8, C-11.

4. For purposes of statutory application and process,⁶ LID 8667 is a City initiated (by resolution) LID. After initial property owner interest in forming an LID in this area was forestalled due to lack of City funds, contact with property owners in the proposed LID was reinitiated through a series of noticed community meetings when plans were being made to pave Ruby Street and Mullen Street with newly available Streets Initiative funding. The meetings were intended to

⁶ See Revised Code of Washington ("RCW") 35.43.120-.150.

1 inform property owners of the planned paving project(s), and let them know of other options for
2 neighborhood consideration, such as adding curb and gutters to the paving project through LID
3 financing.⁷ *Rodriguez Testimony; Ex. C-2, C-5.* Meetings for the various segments appear to have
4 been held on the following dates:

- 5 - July 19, 2017 (*Ex. C-2.2, Ex. C-2.3*),
- 6 - August 9, 2017⁸ (*Ex. C-5.1, Ex. C-5.2*)
- April 25, 2018, (*Ex. C-2.4*).

7 5. “Notices of Public Hearing” for LID 8667 were mailed on November 20, 2020, to all
8 owners of record within the proposed LID, as such are listed on the Pierce County tax rolls. Notices
9 were sent to both listed mailing addresses (when different than the LID site address) as well as to
10 the actual residence within the proposed LID boundary. The Hearing Resolution was published on
11 November 19 and 20, 2020, in the Tacoma Daily Index. An Affidavit of Publication has been filed
12 with the City Clerk, together with plans and estimates required by applicable laws. *RCW*
13 *35.43.150; Rodriguez Testimony; Ex. C-1, Ex. C-9~Ex. C-12.*

14 6. Pursuant to applicable law, and as directed by the Tacoma City Council in the Hearing
15 Resolution, the Hearing Examiner conducted a public hearing on December 14, 2020, to consider
16 formation of LID 8667. *RCW 35.43.150, Ex. C-1.*

17 7. DPW’s LID Section prepared a staff report which was entered into the record as
18 Exhibit C-1. The staff report indicates that the total estimated project cost is \$1,070,568.00 with an
19 estimated \$345,628.75 of that total cost being proposed for assessment to property owners within
20 the proposed LID, an estimated \$107,421.25 being contributed by the City of Tacoma’s
21

⁷ The differences between the City’s basic paving project and what was being offered as an LID financed upgrade option are shown in Exhibits C-2.10 and C-2.11.

⁸ The sign in sheet at Exhibit C-5.2 shows a date of August 8, 2017.

1 Environmental Services Department, and \$617,518.00 coming from Streets Initiative funds. The
2 LID is proposed to have a 20-year Assessment Roll/repayment period, and the estimated cost per
3 Assessable Unit of Frontage for the respective segments is as follows:

4 **Segment 1** \$160.00
5 **Segment 2** \$235.00

6 These costs and contributions broken down by segment come out as follows:

7 **Segment 1 - Ruby Street from Baltimore Street to Shirley Street.**

8 Total Assessed to Property Owners \$ 173,737.80
9 Streets Initiative \$ 359,565.50
10 Environmental Services - Surface Water \$ 21,483.75
11 **Estimated Segment Cost** **\$ 554,787.05**

12 **Segment 2 - Mullen Street from North 46th Street to North 47th Street.**

13 Total Assessed to Property Owners \$ 171,890.95
14 Streets Initiative \$ 257,952.50
15 Environmental Services - Surface Water \$ 85,937.50
16 **Estimated Segment Cost** **\$ 515,780.95**

17 *Rodriguez Testimony; Ex. C-1.*

18 8. The testimony of Ralph Rodriguez, LID Section Representative for DPW, further
19 established the following:

- 20 A. For purposes of measuring initial support, and for determining
21 percentages of protest now, the LID Section (has) looked at opposition to
 formation (remonstrance) by individual segment, not at the LID as a
 whole.
- B. DPW discussed options and answered property owner questions through
 the meetings referenced above, through individual phone and email
 contacts, and also at the hearing.
- C. In preparation for the hearing, the LID Section believed that there was
 less than 50% property owner opposition to LID formation for both
 segments. As the hearing neared, and then was concluded, that changed
 for Segment 1. *Rodriguez Testimony, Ex. C-1, Ex. C-7.*

1 9. The LID Section indicated that the “zone and termini” method was used to estimate
2 the preliminary assessments for each property within the LID. *RCW 35.44. 030 and .040;*
3 *Rodriguez Testimony; Ex. C-1.*

4 10. During the public comment portion of the hearing, property owners from three
5 different properties in the LID offered testimony or asked questions of the LID Section staff during
6 public testimony.⁹ Public testimony, both during the hearing and through written submissions
7 leading up to and after the hearing, established that some property owners who may have been
8 previously considered in favor of forming the LID based on Advisory Survey signatures, had
9 changed their position and now opposed formation. Several of these position changes are due to
10 current financial circumstances. Taking all testimony and written submissions into account, the
11 following property owners (by Segment) oppose formation¹⁰ of the LID 8667:

12 **Segment 1**

- 13 - Keil, 5335 N. Ruby Street, estimated assessment \$10,671.50
- 14 - Garnica, 5325 N. Ruby Street, estimated assessment \$7,732.95
- 15 - Tomal, 5323 N. Ruby Street, estimated assessment \$7,732.95
- 16 - Mora, 5317 N. Ruby Street, estimated assessment \$7,732.95
- 17 - Lane, 5309 N. Ruby Street, estimated assessment \$7,732.95
- 18 - Shulich, 5301 N. Ruby Street, estimated assessment \$10,071.35
- 19 - Shvets, 5342 N. Ruby Street, estimated assessment \$7,999.65
- 20 - Malfet, 5326 N. Ruby Street, estimated assessment \$7,999.65
- 21 - Keel, 5320 N. Ruby Street, estimated assessment \$7,999.65
- Brown, 5312 N. Ruby Street, estimated assessment \$7,999.65
- Preciso, 5308 N. Ruby Street, estimated assessment \$7,999.65
- Libhart, 4816 N. Baltimore Street, estimated assessment \$7,616.30

⁹ The written chat function, a feature of Zoom, was also utilized during the public comment period of the hearing.

¹⁰ The reason for only listing those in opposition is set forth at Conclusions of Law 6~8.

1 The opposing properties set forth above represent approximately 57% of the total estimated cost of
2 the improvements assessed to the property owners for Segment 1. ($\$99,289.20 \div \$173,737.80 =$
3 approx. 57%).¹¹ *Ex. C-12.*

4 **Segment 2**

- 5 - Greenman & Mitchell, 4711 N. 46th Street, estimated assessment \$6,692.10
- 6 - Williams, 4606 N. Mullen Street, estimated assessment \$10,574.50
- 7 - Olsen, 4602 N. Mullen Street, estimated assessment \$10,574.50

7 The opposing properties set forth above represent approximately 16% of the total cost of the
8 improvement assessed to the property owners for Segment 2. ($\$27,841.10 \div \$171,890.95 =$ approx.
9 16%). *Ex. C-12.*

10 **Total LID 8667**

11 When the LID is not broken into segments, but rather considered as a whole, the overall
12 percentage of protest is approx. 37%. ($\$99,289.20 + \$27,841.10 = \$127,130.30$; $\$127,130.30 \div$
13 $\$345,628.75 =$ approx. 37%). *Rodriguez Testimony, written and verbal testimony of all property*
14 *owners listed above; Ex. C-1, Ex. C-4.*

15 11. The LID Section recommends formation of Segment 2 of LID 8667 based on
16 insufficient levels of protest. Based on the level of protest for Segment 1 exceeding 50%, the LID
17 Section does not recommend formation for this Segment. *Ex. C-1.*

18 12. The digital audio recording of the hearing in this matter is in the custody of the
19 Hearing Examiner's office, and the file is in the custody of the City Clerk. Both are available for
20 review by the City Council and any party in interest.

21 _____
¹¹ Controlling state case law has determined that, for purposes of applying RCW 35.43.180 to a(n) LID such as this one where the municipality is also contributing to the cost of the project, the percentage of opposition is calculated using only the part of the cost to be assessed against property owners as the "total cost of the improvement." *See Conclusion of Law 6.*

1 13. Any Conclusion of Law more properly deemed or considered to be a Finding of Fact
2 is hereby adopted as such.

3 From these Findings of Fact, the Examiner makes the following:

4 **CONCLUSIONS OF LAW**

5 1. The Hearing Examiner has jurisdiction in the matter, under Tacoma Municipal Code
6 (“TMC”) 1.23.050.A.2 and TMC 10.04.026, to conduct a hearing and issue a written
7 recommendation to the City Council. *See also RCW 35.43.125 and 35.43.150.*

8 2. Washington State LID law provides that every city or town shall have the power to
9 create local improvement districts for paving of public streets and alleys and adding curbing and
10 drainage thereto, and to levy and collect special assessments against the real property specially
11 benefited thereby. *See RCW 35.43.040.* LIDs may be comprised of specific units (segments) of
12 “noncontinuous improvements” as was done here by the LID Section. *RCW 35.43.050.*

13 3. The purposes of the initial LID formation hearing are to determine if formation of the
14 district should proceed and to determine whether the limits of the district are proper. *Chandler v.*
15 *City of Puyallup*, 70 Wash. 632, 633, 127 P. 293(1912). Accordingly, the only issues properly
16 presented during the formation stage of the LID process are:

17 (a) Whether the City has jurisdiction or authority to proceed with creating the
18 district; and

19 (b) Whether the proposed boundaries for the district are proper.

20 *Underground Equality v. Seattle*, 6. Wn. App. 338, 342, 492 P. 2d 1071(1972).

21 //

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1 4. No party in these proceedings has challenged the City’s authority to create this LID
2 for street improvements under the provisions of RCW 35.43, except insofar as the various property
3 owners listed in Finding of Fact (“FoF”) 10 have registered their formal opposition to formation.

4 5. No party to these proceedings has challenged the City’s determination of the proper
5 boundary for proposed LID No. 8667 under the terms of RCW, Chapter 35.43, again except insofar
6 as there is general opposition to formation as recounted in FoF 10.

7 6. The City’s authority to form an LID initiated by resolution is divested if owners of
8 property shouldering a sufficient proportion of the project costs protest formation of the district per
9 the following provision of State LID law:

10 **§ 35.43.180 Restraint by protest.** The jurisdiction of the legislative
11 authority of a city or town to proceed with any local improvement initiated
12 by resolution *shall be divested by a protest filed with the city or town*
13 *council within thirty days from the date of passage of the ordinance*
14 *ordering the improvement, signed by the owners of the property within the*
15 *proposed local improvement district or utility local improvement district*
16 *subject to sixty percent or more of the total cost of the improvement*
17 *including federally-owned or other nonassessable property as shown and*
18 *determined by the preliminary estimates and assessment roll of the*
19 *proposed improvement district or if all or part of the local improvement*
20 *district or utility local improvement district lies outside of the city or town,*
21 *such jurisdiction shall be divested by a protest filed in the same manner and*
signed by the owners of property which is within the proposed local
improvement district or utility local improvement district but outside the
boundaries of the city or town, and which is subject to sixty percent or more
of that part of the total cost of the improvement allocable to property within
the proposed local improvement district or utility local improvement district
but outside the boundaries of the city or town, including federally-owned or
other non-assessable property:... [Emphasis added]. *RCW 35.43.180.*

The State Supreme Court has determined that, for purposes of RCW 35.43.180, the phrase “the
total cost of the improvement” means only the part of the cost to be assessed against property

1 owners, and not the actual total cost of the project. To that end costs taken on by the municipality
2 are not included in calculating the percentage of opposition under RCW 35.43.180.¹²

3 7. The City of Tacoma, has further limited its authority to proceed with formation of an
4 LID in the face of protest by adopting Resolution No. 37956 which expresses the Council's policy
5 to refrain from forming an LID if property owners representing 50 percent or more of the total
6 assessments file protests to formation of the district. This policy contains an exception allowing
7 formation if the City Council has previously determined the LID to be in the best interest of the
8 City, but this exception has not been invoked here.

9 8. The protest to proposed LID 8667, filed or otherwise attested to by the property
10 owners in each segment, is above the City's 50 percent limitation for Segment 1, but below the
11 State's 60 percent limitation for Segment 1, and below both the State and City mark for Segment 2,
12 when calculated by segment. If taken as a whole, LID 8667 falls below these percentages in total.¹³
13 Therefore, the City has the authority, by statute and its own LID policies, to proceed with
14 formation of the LID for Segment 2, but not for Segment 1. Under RCW 35.43.180, only protesting
15 property owners and their percentage of the total cost of the improvement are accounted for in
16 determining whether the City has been divested of its authority to form a(n) LID. Property owners
17 voicing their support for formation are taken into account as not being part of the protest
18 percentage.

19 9. There has been no evidence presented indicating that the boundaries of proposed LID
20 No. 8667 are not properly drawn. The LID boundaries appear to embrace, as nearly as practicable,
21

¹² *Kasper v. Edmonds*, 69 Wn.2d 799, 420 P.2d 346 (1966), *Thymian v. Massart*, 69 Wn.2d 806, 420 P.2d 351 (1966).

¹³ *FoF 10*.

1 all the real property that would be specially benefitted by the upgraded paving project.¹⁴ The
2 benefits of the project are special to those properties and, accordingly, they have been properly
3 included within the boundaries of proposed LID No. 8667.

4 10. Based upon the foregoing, the Hearing Examiner concludes that proposed LID No.
5 8667 meets the requirements of State law and the City's code and policies governing LID formation
6 as to Segment 2, and the Examiner recommends formation of that segment. Given the level of
7 protest in Segment 1 reaching approximately 57% and the LID Section's own recommendation at
8 this point to not form Segment 1, the Hearing Examiner concurs and recommends against forming
9 Segment 1 of the LID.

10 11. Any Finding of Fact stated herein above which may be more properly deemed or
11 considered to be a Conclusion of Law is hereby adopted as such.

12 Based upon the foregoing Findings of Fact and Conclusions of Law, the Hearing Examiner
13 enters the following recommendation:

14 **RECOMMENDATION**

15 Based upon applicable Tacoma City Council policies and controlling State and local law
16 with respect to formation of local improvement districts for street improvements the Hearing
17 Examiner recommends the City Council approve the formation of Segment 2 (only) of proposed
18 Local Improvement District No. 8667.

19 **DATED** this 30th day of December, 2020.

20 
21 **JEFF H. CAPELL, Hearing Examiner**

¹⁴ See RCW 35.43.080.

1 **NOTICE**

2 **RECONSIDERATION/APEAL OF EXAMINER'S RECOMMENDATION**

3 **RECONSIDERATION:**

4 Any aggrieved person or entity having standing under the ordinance governing the matter, or as otherwise
5 provided by law, may file a motion with the Office of the Hearing Examiner requesting reconsideration of
6 a decision or recommendation entered by the Hearing Examiner. A motion for reconsideration must be in
7 writing and must set forth the alleged errors of procedure, fact, or law and must be filed in the Office of
8 the Hearing Examiner within 14 calendar days of the issuance of the Hearing Examiner's
9 decision/recommendation, not counting the day of issuance of the decision/recommendation. If the last
10 day for filing the motion for reconsideration falls on a weekend day or a holiday, the last day for filing
11 shall be the next working day. The requirements set forth herein regarding the time limits for filing of
12 motions for reconsideration and contents of such motions are jurisdictional. Accordingly, motions for
13 reconsideration that are not timely filed with the Office of the Hearing Examiner or do not set forth the
14 alleged errors shall be dismissed by the Hearing Examiner. It shall be within the sole discretion of the
15 Examiner to determine whether an opportunity shall be given to other parties for response to a motion for
16 reconsideration. The Hearing Examiner, after a review of the matter, shall take such further action as
17 he/she deems appropriate, which may include the issuance of a revised decision/recommendation.
18 (*Tacoma Municipal Code 1.23.140*).

19 **APEALS TO CITY COUNCIL OF EXAMINER'S RECOMMENDATION:**

20 Within 14 days of the issuance of the Hearing Examiner's final recommendation, any aggrieved person or
21 entity having standing under the ordinance governing such application and feeling that the
22 recommendation of the Hearing Examiner is based on errors of procedure, fact or law may have the right
23 to appeal the recommendation of the Hearing Examiner by filing written notice of appeal and filing fee
24 with the City Clerk, stating the reasons the Hearing Examiner's recommendation was in error.

25 **APPEALS SHALL BE REVIEWED AND ACTED UPON BY THE CITY COUNCIL IN
26 ACCORDANCE WITH TMC 1.70.**

27 **GENERAL PROCEDURES FOR APPEAL:**

28 The Official Code of the City of Tacoma contains certain procedures for appeal, and while not listing all
29 of these procedures here, you should be aware of the following items which are essential to your appeal.
30 Any answers to questions on the proper procedure for appeal may be found in the City Code sections
31 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 verbatim recording. If a person desires a written transcript, he or she shall arrange for transcription and pay the cost thereof.