



City of Tacoma
Hearing Examiner

April 6, 2017

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Re: HEX 2016-037 (Vacation Petition No. 124.1371)
Petitioner: Puyallup Tribe of Indians

To the Parties,

In regard to the above referenced matter, please find enclosed a copy of the Tacoma Hearing Examiner's Report and Recommendation to the Tacoma City Council.

Sincerely,

Louisa Legg
Office Administrator

Enclosure (1) – Findings, Conclusions, and Recommendation

cc: *See Transmittal List (Page 2)*

TRANSMITTAL LIST

Transmitted via First Class Mail Delivery

William T. Lynn, Attorney at Law, Gordon Thomas Honeywell, PO Box 1157,
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Elizabeth Tail, 111 66th Avenue NE, Tacoma, WA 98422-3921

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Pierce County Assessor-Treasurer (Darci Brandvold)
Puget Sound Energy (Marilynn Danby)
Clerk's Office, City of Tacoma (Nicole Emery)
Legal, City of Tacoma (Jeff Capell)
Tacoma Water, Water Distribution (Jesse Angel)
Tacoma Power/T&D (Rich Barrutia)
Tacoma Fire Department (Ryan Erickson, P.E.)
Solid Waste Management, City of Tacoma (Richard Coyne)
Public Works, City of Tacoma (Sue Simpson)
Public Works Traffic Engineering, City of Tacoma (Jennifer Kammerzell)
Environmental Services Department, Science & Engineering, City of Tacoma (Merita Trohimovich)
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: Puyallup Tribe of Indians¹

FILE NO.: HEX 2016-037 (124.1371)

SUMMARY OF REQUEST:

Real Property Services received a petition to vacate that portion of alley right-of-way lying between East 28th Street and East 29th Street from Portland Avenue to the extended Easterly line of Lots 24 of Blocks 7846 and 7945 of the Indian Addition to the City of Tacoma. The property would be used for the construction of a multi-level garage structure, casino, and hotel as part of the Emerald Queen Casino Relocation project.

RECOMMENDATION OF THE HEARING EXAMINER:

The revised 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 convened a public hearing on the vacation request on December 1, 2016. The Hearing Examiner also conducted a site visit to the property on December 6, 2016. The record of the case was held open at the request of the Puyallup Tribe of Indians, the City, and a nearby property owner, for discussions regarding an access easement to benefit adjoining property. The discussions were extended a number of times, but did not result in an agreement. The parties terminated their efforts to resolve the access dispute on or around March 17, 2017, and asked the Hearing Examiner to move forward with a recommendation. The Hearing Examiner requested final submissions from the Petitioner and the City by March 27, 2017. Upon receipt of those materials, and a submission by the nearby property owner, the evidentiary record was closed on March 27, 2017.

¹ During the pendency of this vacation request, the Puyallup Tribe of Indians' adjacent property for the casino relocation project was conveyed to the United States in trust for the Puyallup Tribe of Indians. The Bureau of Indian Affairs is joining in the petition as co-owner of the nearby lots as confirmed in its letter dated March 23, 2017. (*Attachment to Tribal Position document, Ex. 20*).

ORIGINAL

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION:

FINDINGS OF FACT:

1. The Puyallup Tribe of Indians (Puyallup Tribe) has petitioned the City to vacate that portion of alley right-of-way lying between East 28th Street and East 29th Street from Portland Avenue to the extended Easterly line of Lots 24 of Blocks 7846 and 7945 of the Indian Addition to the City of Tacoma. The property to be vacated is more particularly described below:

All that certain alley right of way lying between and abutting Lots 2 through 24 of Blocks 7846 and 7945 of the Indian Addition to the City of Tacoma, as per Plat recorded in Volume 7 of Plats at Page 30, records of Pierce County, Washington.

Situate in the City of Tacoma, County of Pierce, State of Washington; within Section 10, Township 20 North, Range 03 East of the Willamette Meridian.

The Petition has 100% joinder because the Puyallup Tribe owns the property adjoining the alley segment in question. *Ex. 1; Cornforth Testimony.*

2. The Petitioner is seeking the requested alley right-of-way to use as part of the site for a project to relocate the Emerald Queen Casino and build a hotel and parking garage. The project extends over the majority of the block involved. However, two lots at the southeast corner of the block are owned by David Smith. Mr. Smith's property adjoins East 29th Street on the south, East R Street on the east, and the alley in question on the north. The proposed alley vacation does not include that portion of the alley directly adjacent to the Smith property. *Cornforth Testimony.* Vacating the proposed section of alley would leave Mr. Smith without access to the remaining alley segment. Access to the alley remnant from the west would be blocked by the development project and access to the alley from the east would be blocked by the new freeway off-ramp configuration that eliminates a portion of East R Street. *Smith Testimony; Ex. 2; Ex. 17.*

3. The casino relocation project is a large undertaking that will create jobs both during construction and during ongoing operation of the new facilities. The Puyallup Tribe is planning a high quality design that will be an amenity for the surrounding area. The venture will spur additional economic development in the City of Tacoma. The property included in the proposed alley vacation is important to the overall design of the structures and the site layout. *Wright Testimony; Ex. 4; Ex. 15.*

4. The City of Tacoma acquired the alley right-of-way proposed to be vacated by Plat filing of the Indian Addition to the City of Tacoma as filed of record in Volume 7, at Page 30, records of Pierce County, Washington. *Exs. 1, 5, and 6; Cornforth Testimony.*

5. The alley right-of-way proposed for vacation is currently an active construction site and has been graded, graveled, and significantly closed to vehicular traffic for several months. Prior to construction, the alley was graveled, relatively flat, and pocked with potholes. The alley segment was not used as a primary thoroughfare and lacked curbs, gutters, or sidewalks. A single alley approach

existed at Portland Avenue, which has since been removed. The alley serves a number of parcels owned by the Puyallup Tribe as well as two parcels at the easterly end of the alley owned by David Smith. *Ex. 1; Cornforth Testimony.*

6. Construction of the new East R Street off-ramp from Interstate 5 by the Washington State Department of Transportation (WSDOT) has effectively barred any access to the alley from East R Street and has eliminated the possibility of through traffic along the alley from Portland Avenue to East R Street. The off-ramp configuration does not allow vehicular access to the east end of the alley or to the east end of the Smith lots. The City's Traffic Engineering Division has reviewed the vacation that is being requested and does not object to the proposed alley vacation. The area is not part of normal traffic circulation and is not contemplated for such use in the future. This is particularly true in light of the re-configuration of roads caused by the WSDOT's East R Street off-ramp project in the area. *Ex. 1; Cornforth Testimony.*

7. The proposed vacation has been reviewed by a number of governmental agencies and utility providers. None object to the proposed vacation; however, some have based their position on the inclusion of certain conditions addressing utility needs and a traffic study update. *Exs. 8 through 14; Cornforth Testimony.*

8. Vacation of the requested right-of-way will provide a public benefit by adding tax revenues from commercial uses. The project will also provide economic vitality and additional employment to the community and stimulate associated economic development. *Ex. 1; Cornforth Testimony.*

9. No general public purpose is served by this dead end alley segment and the property proposed for vacation is not contemplated or needed for future public use as a right-of-way. *Ex. 1; Cornforth Testimony.*

10. David Smith is the owner of property immediately adjacent to and east of a portion of the project site. The Smith parcels are adjacent to the subject alley and the proposed vacation would block access from Portland Avenue along the alley to the portion of the alley bordering the Smith parcels. The Smith property can be accessed from East 29th Street, but the amount of property frontage with street or alley access would be reduced by the combined effects of WSDOT's off-ramp project and the alley vacation. *Smith Testimony.* The Puyallup Tribe has offered to execute an easement to Mr. Smith that would run from East 29th Street to the remaining alley segment adjoining the Smith parcels. This easement would provide an alternate access to two additional sides of the Smith property. *Hunter Testimony; Ex. 7.*

11. David Smith and his attorney William Lynn testified at the hearing. Mr. Smith indicated that his family has owned the property in question for many years. He has considered developing the property in the past, but has not finalized a particular plan for the site. He wants to retain the ability to improve the property in the future. Mr. Smith is not opposed to the Puyallup Tribe's construction plans; however, he is concerned that the alley vacation and the nearby WSDOT off-ramp changes will severely limit the options for vehicular access to his parcels. *Smith Testimony.* Mr. Lynn maintains that the easement form suggested by the Petitioner fails to fully protect Mr. Smith's access rights in the

future. He contends that additional language would be needed to create a clear and lasting access to the alley from East 29th Street. Items of particular concern include (1) a five-year limit on property encumbrances contained in the Puyallup Tribe's constitution; (2) a 50-year limit on right-of-way grants contained in Bureau of Indian Affairs (BIA) regulation; (3) provisions allowing for termination of the easement after two years of non-use; (4) different regulations applying to the access easement than to the Smith property; and (5) lack of clear ability to assign the easement to subsequent owners or lessors. In sum, Mr. Smith contends the easement being offered by the Puyallup Tribe is less beneficial than the existing public alley. *Lynn Testimony*.

12. The evidence demonstrated that no abutting owner would become landlocked by virtue of the proposed alley right-of-way vacation; however, the Smith parcels would lose existing alley access from Portland Avenue. The proposed easement would create an alternate access point from East 29th Street to the remaining alley segment. If properly drafted, this easement would ensure that there is alternate ingress and egress to the Smith parcels beyond that provided by frontage on East 29th Street, even if it is less convenient than the existing configuration. Changing the location of the utility box currently in front of the Smith property on East 29th Street would provide additional flexibility to Mr. Smith in fashioning a design for the use of his property. The Puyallup Tribe has agreed to relocate the utility box to an area that does not front on the Smith property. *Ex. 7; Cornforth Testimony; Hunter Testimony*.

13. The right-of-way proposed for vacation does not abut, nor is it proximate to, a body of water. The provisions of RCW 35.79.035 are therefore not implicated. *Ex. 1; Cornforth Testimony*.

14. Other than Mr. Smith and his counsel, no members of the public appeared at the hearing opposing the alley vacation.

15. 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*.

16. The Real Property Services Preliminary Report, as entered into this record as Exhibit 1, with amendment, 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.

17. A Public Hearing Notice for the December 1, 2016, hearing was posted at the easterly margin of Portland Avenue and along East 29th Street at the easterly extents of the subject alley vacation near East R Street. The public notice was also published in the Daily Index newspaper and mailed to all parties of record within 1,000 feet of the vacation request. All required postings of notices for the hearing have been accomplished. *Ex. 1; Cornforth Testimony*.

18. Any conclusion hereinafter stated, which may be deemed to be properly considered a finding of fact herein, is hereby adopted as such.

CONCLUSIONS OF LAW:

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

3. Petitions to vacate public right-of-way are reviewed under the TMC 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. Findings entered herein, based upon substantial evidence in the hearing record, support a conclusion that the proposed vacation of alley right-of-way meets the criteria for approving a street vacation if conditions are imposed to protect utility installations, to require the Puyallup Tribe to move the utility box presently in front of the Smith property, and to require the Puyallup Tribe to provide an easement to Mr. Smith providing permanent and usable alternate access to the remaining alley right-of-way. The Puyallup Tribe's proposed alley vacation will provide a public benefit by supporting a major development that will generate significant economic growth in the area. The project will create employment opportunities and promote visitors to the City. These activities will have direct and indirect benefits to the economy and tax revenues. The public has no need for the particular piece of alley right-

of-way involved. The alley does not provide a connection between streets due to the reconfiguration of the East R Street off-ramp. The alley has never been part of the traffic circulation pattern in the area and is not positioned to be part of it in the future. The City's traffic division supports the alley vacation. The alley involved is not near a waterway, so the provisions of RCW 35.79.035 are not implicated.

5. The right-of-way vacation criterion in controversy states:

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.

TMC 9.22.070.A.5. In this case, the existing access from Portland Avenue to the alley bordering Mr. Smith's property would be eliminated by the proposed alley vacation. While Mr. Smith does have access on the south side of his property to East 29th Street, and is therefore not landlocked, he claims that access to a second side of the property is vital to commercial development of the parcels. He sees the need for a back side access to accommodate deliveries and garbage service. The issue is whether Mr. Smith's access would be "substantially impaired" by the alley vacation.

6. The concept of substantial impairment is the subject of considerable dispute among parties and the courts in this state. Under some authority it is conceivable that termination of existing access to the back side of Mr. Smith's property would be considered a substantial impairment of his access even though he has some access remaining. *See, TT Props., LLC v. City of Tacoma*, 192 Wn. App. 238, 366 P.3d 465 (2016). As a result, in order to obtain vacation of the alley, the Hearing Examiner recommends a condition requiring the Puyallup Tribe to provide a permanent, usable, non-revocable access easement to Mr. Smith running from East 29th Street to the remaining alleyway that can be transferred to subsequent owners or users of the property. The easement should contain specific language, committing the Puyallup Tribe to take necessary action to eliminate the prospect of a five-year maximum term for the easement. The Puyallup Tribe should also be required to seek approval from the BIA for a permanent term for the easement, rather than a 50-year limit. If the BIA refuses to accommodate a permanent term, the easement shall still be provided at the maximum length possible. Mr. Smith may need to cooperate in the Puyallup Tribe's efforts to obtain and execute this easement. If Mr. Smith chooses not to take reasonable steps necessary to effectuate the easement documentation, the requirement for the Puyallup Tribe to provide an easement to Mr. Smith will be extinguished and the alley vacation could be finalized without the Puyallup Tribe providing an easement.

7. Accordingly, the requested alley right-of-way vacation, should 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 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. PUBLIC WORKS TRAFFIC ENGINEERING

Second Reading of the vacation Ordinance shall be conditioned upon the acceptance of a revised traffic study. The Petitioner shall contact Jennifer Kammerzell at (253)-591-5511 regarding Traffic Engineering's comments.

3. ENVIRONMENTAL SERVICES

Second Reading of the Ordinance shall be conditioned upon the completion of Work Order Number 16-0075 for the formal and proper abandonment of an existing sanitary sewer main. Bonding for such work has been remitted to the City under BOND16-0531 and shall be released upon Work Order closeout. The Petitioner shall contact Larry Criswell at (253) 591-5787 regarding Environmental Services' comments.

4. TACOMA POWER

An easement shall be retained for the benefit of Tacoma Power over the southerly 10 feet of the westerly 45 feet of the subject alley for existing electrical infrastructure including, but not limited to, power pole, anchor, guywire, and service. The Petitioner shall contact Jeff Rusler at (253) 502-8309 regarding Tacoma Power's comments.

5. CENTURY LINK

Petitioner shall negotiate an independent easement to protect existing CenturyLink infrastructure in the vacate area, if any. The Petitioner shall contact Ross Taylor at (503) 819-3638 regarding CenturyLink's comments.

6. UTILITY BOX

Petitioner shall move the utility box currently in front of the Smith property to a location that is not bordering the Smith property.

7. ACCESS EASEMENT

The Puyallup Tribe shall provide a permanent or long-term, usable, non-revocable, access easement to Mr. Smith running from East 29th Street to the remaining alleyway that can be transferred to subsequent owners or users of the property. The easement shall contain specific language committing the Puyallup Tribe to take necessary action to eliminate the prospect of a five-year maximum term for the easement. The Puyallup Tribe shall also seek approval from the BIA for a permanent term for the easement, rather than a 50-year limit. If the BIA refuses to accommodate a permanent term, the easement shall still be provided at the maximum length possible. Mr. Smith may need to cooperate in the Puyallup Tribe's efforts to obtain and execute this easement. If Mr. Smith chooses not to take reasonable steps necessary to effectuate the easement documentation, the requirement to provide an easement to Mr. Smith will be extinguished and the alley vacation could be finalized without the Puyallup Tribe providing said easement.

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.

C. ADVISORY COMMENT:

PUBLIC WORKS/LID

LID has no objection; however, an In-Lieu amount of \$1,323.10 is due for sanitary sewer. The Petitioner shall contact Sue Simpson at (253) 591-5529, regarding resolution of this matter. This amount can be voluntarily paid at time of purchase or will be required at time of development.

8. Based upon the facts and the governing law, the modified vacation petition should be granted, subject to conditions set forth in Conclusion 7 above.

9. Any finding of fact hereinbefore stated, which may be deemed to be properly considered a conclusion of law herein, is hereby adopted as such.

RECOMMENDATION:

The modified vacation requested is hereby recommended for approval, subject to the conditions contained in Conclusion 7.

DATED this 6th day of April, 2017.



PHYLLIS K. MACLEOD, Hearing Examiner

NOTICE

RECONSIDERATION/APEAL 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*)

APEALS 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**