

Meyers, Aundrea

From: Legg, Louisa on behalf of Hearing Examiner
Sent: Friday, October 30, 2020 8:37 AM
To: Rogers, Susie; Stevens, Troy; Kammerzell, Jennifer; Victor, Steve(Legal); Rossi, Rod; Muller, Gregory; megan.holt@pse.com; Russell, Lee; Seaman, Chris; Hicks, Chris; rob.bair@centurylink.com; Aaron_Cantrel@comcast.com; tvaslet@piercettransit.org; Walkowiak, Ellen (Elly); Magoon, Jana; Wung, Lihuang
Cc: Meyers, Aundrea; Krupa, Angie (Legal)
Subject: SV 124.1410 City of Tacoma, Petitioner
Attachments: SIGNED_HEX2019-020_OCH SV_CityofTacoma_FoFCoLRecomm_10.30.20.pdf
Importance: High

Dear Parties,

In regard to the above reference matter, please find attached the Hearing Examiner's Findings of Fact, Conclusions of Law, and Recommendation, to the Tacoma City Council, entered on October 30, 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: City of Tacoma

FILE NO: HEX2020-028 (124.1410)

SUMMARY OF REQUEST

Real Property Services (“RPS”) received a petition initiated by the City of Tacoma (the “City”) to vacate portions of Commerce Street and South 7th Street, to cure existing building encroachments on the perimeter of the building known as Old City Hall. As filed, the petition included a section of right-of-way in Pacific Avenue as well, but due to Public Works Traffic Engineering’s opposition to this section being vacated, all involved agreed at the hearing to remove this section from the petition.

RECOMMENDATION OF THE HEARING EXAMINER

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

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 22, 2020.¹ Susie Rogers of RPS represented the City of Tacoma in its role as the abutting property owner petitioner. Troy Stevens, also of RPS, appeared for the City in its regulatory role as the processor and reviewer of the petition. Testimony was taken² and exhibits were admitted. The hearing record was briefly opened and closed from October 27th to October 29th to take receipt of a revised legal description removing the Pacific Avenue section, clarifying legal descriptions,

¹ Due to National, State of Washington and City of Tacoma 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.

² Because no third-party members of the public were present at the hearing, testimony primarily consisted of City answers to Hearing Examiner questions from having reviewed the written record prior to the hearing.

and addressing other ambiguities in the Report. Based on the record, the Hearing Examiner now makes the following:

FINDINGS, CONCLUSIONS, AND RECOMMENDATION:

FINDINGS:

1. The City of Tacoma (“City” or “Petitioner”), as the owner of the real property abutting the Vacation Areas (defined below), initiated a petition to vacate present right-of-way interests in what appeared, from prehearing submissions, to be three different areas around the perimeter of the real property known as “Old City Hall,” at the address of 625 Commerce Street. The state purpose of the vacation(s) is to cure existing building and infrastructure encroachments. At the hearing, all City representatives agreed to remove from the petition the section of right-of-way shown in City exhibits in Pacific Avenue due to Public Works Traffic Engineering’s opposition to this section being vacated. Post-hearing questioning from the Examiner and related submissions (Exhibit C-17) clarified that there is an additional small area³ proposed for vacation more or less right next to the now removed area in Pacific Avenue that is essentially on the corner of South 7th Street and Pacific Avenue in the South 7th Street right-of-way.

2. After the conclusion of the hearing, and due to the City having removed the Pacific Avenue vacation area from the petition, the following revised (from what was included in Exhibit C-1) metes and bounds legal descriptions were provided for the remaining vacation areas:

A PORTION OF THE NORTHWEST QUARTER OF THE NORTHWEST QUARTER OF SECTION 04, TOWNSHIP 20 NORTH, RANGE 03 EAST OF THE WILLAMETTE MERIDIAN, PIERCE COUNTY, MORE PARTICULARLY DESCRIBED AS;

THE SOUTHERLY 127 FEET OF THE EASTERLY 1.0 FEET OF THE EASTERLY 40 FEET OF COMMERCE STREET RIGHT OF WAY NORTH OF SOUTH 7TH STREET;

TOGETHER WITH THE NORTHERLY 2.0 FEET OF THE NORTHERLY 38.4 FEET OF THE EASTERLY 16.0 FEET OF THE EASTERLY 63.5 FEET OF SOUTH 7TH STREET RIGHT OF WAY, ABUTTING THAT PORTION VACATED BY ORDINANCE NO. 19882 OF THE CITY OF TACOMA, RECORDED UNDER AUDITOR’S FEE NO. 2529850;

AND TOGETHER WITH THAT PORTION COMMENCING AT THE SURFACE BRASS DISK MARKING THE INTERSECTION OF SOUTH 7TH STREET AND PACIFIC AVENUE, THENCE NORTH ALONG THE CENTERLINE OF PACIFIC AVENUE EXTENDED NORTHERLY NORTH 7° 25’20” WEST A DISTANCE OF 40.00 FEET;

³ This area was not clearly shown in the City’s map exhibits submitted prehearing, but is now more clearly depicted in Exhibit C-17.

THENCE SOUTH 82°37'08" WEST A DISTANCE OF 49.87 FEET TO THE SOUTHWEST CORNER OF CITY OF TACOMA VACATION ORDINANCE NO. 19982;

THENCE NORTH 67°04'40" EAST A DISTANCE OF 1.00 FEET TO THE SOUTHEAST CORNER OF SAID VACATION ORDINANCE AND TRUE POINT OF BEGINNING;

THENCE NORTH 22°55'20" WEST ALONG THE EASTERLY LIMIT OF SAID CITY OF TACOMA VACATION ORDINANCE NO. 19982 A DISTANCE OF 6.37 FEET;

THENCE NORTH 66°53'25" EAST A DISTANCE OF 1.00 FEET;

THENCE SOUTH 22°55'20" EAST A DISTANCE OF 6.37 FEET;

THENCE SOUTH 67°04'40" WEST A DISTANCE OF 1.00 FEET TO THE POINT OF BEGINNING.

ALL SITUATE IN THE CITY OF TACOMA, COUNTY OF PIERCE, STATE OF WASHINGTON. *Ex. C-17*, (the "Vacation Areas").

3. The City acquired Commerce Street and South 7th Street as public right-of-way in the Map of New Tacoma, W.T., according to the plat thereof filed February 3, 1875, records of Pierce County, Washington. Portions of South 7th Street and Pacific Avenue were previously vacated for Old City Hall under City Ordinance Numbers 19982 and 20255. *Ex. C-1*.

4. The City, as the Petitioner, is the sole property owner abutting the Vacation Areas. *Ex. C-1*.

5. Commerce Street is an approximately 66-foot wide, mostly level right-of-way, and includes sidewalk curb, and gutter. It has recently been improved with light rail improvements for Sound Transit's Link light rail expansion project. South 7th Street varies in width because of the irregular shape of the Old City Hall parcel from between approximately 60 feet to 82 feet, depending on the location. It is sloped and includes sidewalk and curb and gutter. *Id.*

6. No abutting real property becomes landlocked by the granting of this vacation, nor is access to any property affected in any way. The Vacation Areas (as amended) serve no material public right-of-way purpose at present, and they are not contemplated by the City for future right-of-way use. *Id.*

7. The proposed vacation provides public benefit or serves a public purpose because unencumbering the Vacation Areas from the City's right-of-way interest will add taxable square footage

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

to the abutting real property, which may generate some additional tax revenue once the property is conveyed out of City ownership. Clearing the encumbrances benefits the City as well by establishing a clear delineation between the Petitioner's proprietary property interest and the usable public right-of-way interest. *Id.*

8. No members of the public appeared at the hearing. No written public comments were received.

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. 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 had the opportunity to recommend/request conditions to RPS. With Public Works Traffic Engineering's objection to the Pacific Avenue vacation area as the exception, no other objections were received. Traffic Engineering objected to the now-removed Pacific Avenue vacation area because of potential future right-of-way needs at that location. Requests for utility easement reservations are addressed at Conclusion 8 below. *Kammerzell Testimony; Ex. C-1, Ex. C-6.*

11. Notices of the Public Hearing were posted/published at the following locations on September 24, 2020:

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

Public hearing notices were posted at the following locations on September 25, 2020:

- A yellow public notice sign was placed 60 feet west of the northwest corner of South 7th Street and Pacific Avenue.
- A yellow public notice sign was placed 90 feet north of the northeast corner of South 7th and Commerce Street. *Ex. C-1.*

12. RPS's Report, which is entered into the record as Exhibit C-1, as supplemented/amended by Exhibit C-17, accurately describes the proposed vacation, general and specific facts about the site and Vacation Area, as well as referencing applicable laws. The Report (as amended) 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.

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

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

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.*⁴

⁴ For consistency, outline numbering of the criteria is kept the same as in the original TMC text.

6. The Petitioner must demonstrate, by a preponderance of the evidence, that its vacation petition meets the foregoing criteria. *See TMC 1.23.070.*

7. Findings entered herein, based upon substantial evidence in the hearing record, support a conclusion that the requested vacation conforms to the criteria for the vacation of street right-of-way set forth at Conclusion 5 above. No potential for landlocking an abutting owner exists from granting the petition, nor is there any future need for, or public right-of-way purpose served by retaining the Vacation Areas. No access is substantially impaired by the requested vacation. The provisions of RCW 35.79.035, governing areas close to bodies of water do not apply to these locations. The vacation meets the public benefit/public purpose criterion above because it adds taxable square footage to the property for its return to the tax rolls when the City sells it, it facilitates the sale, redevelopment, and ultimately the preservation of this historic property, and cures existing encroachments.

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 City, participating as both Petitioner and regulating agency in this matter, has requested that no interfund payment of fees be required for this vacation. The Examiner concurs with this request and recommends that there be no payment attached as a condition to any approval.

2. ENVIRONMENTAL SERVICES (ES)

A utility easement should be reserved for an 18" City surface water main (#6295687) that runs along the west side of the building on or near to one of the requested vacation areas. An easement will need to be reserved for this segment based on the pipe diameter and needed excavation/maintenance area.

An easement will need to be reserved for a catch basin and a private surface water pipe on the east side of the building (at least in part) in the South 7th Street right-of-way.

4. TACOMA POWER/CLICK!

Tacoma Power/Click! has requested that an easement be retained for an underground system on the west side of the building in or near the vacation area along Commerce Street.

5. PUGET SOUND ENERGY (PSE)

An additional easement for PSE facilities may need to be reserved at the time of vacation finalization if PSE facilities are actually located in the Vacation Areas.

B. ADVISORY COMMENTS:

Easement Legal Consideration-Timing of Reservations

All reservation of City easements referenced herein should take place when the City sells the Old City Hall property to a third party rather than at the time of vacation in order to avoid complications from the legal principle known as the merger doctrine which dictates that “[o]ne cannot have an easement in one's own property.” *Schlager v. Bellport*, 118 Wn. App. 536, 539, 76 P.3d 778 (2003).

Real Property Services (RPS) – In-Lieu

An In-Lieu amount of \$1,769.17 for sanitary sewer is outstanding on the Petitioner’s property abutting the Vacation Areas. The amount is not required to be paid as part of the vacation process; however, if the Petitioner chooses not to pay, it will be an obligation on title and the In-lieu amount may increase over time. The amount will likely become a required payment if future development permits for the property are requested.

C. USUAL CONDITIONS/COMMENTS:

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 conditions 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 present vacation petition is hereby recommended for approval, subject to the conditions contained in Conclusion 8 above.

DATED this 30th day of October, 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*