



City of Tacoma
Hearing Examiner

November 27, 2017

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Re: Vacation Petitions Nos. 124.1382, 124.1383, and 124.1384
Petitioner: Puyallup Tribe of Indians

Dear Parties,

With regard to the above referenced vacation petition matters, please find enclosed copies of the Hearing Examiner's Reports and Recommendations to the Tacoma City Council entered on November 27, 2017, as the result of public hearings held on November 8 and 16, 2017.

Sincerely,

Louisa Legg
Office Administrator

Enclosures (3): Reports & Recommendations

cc: Transmitted via Electronic Mail Delivery
Pierce County Assessor-Treasurer (Darci Brandvold)
Comcast (Aaron Cantrell)
Puget Sound Energy (Marilynn Danby)
Tacoma Clerk's Office (Nicole Emery)
Legal (Steve Victor)
Tacoma Public Utilities, Real Estate Services (Gregory Muller)
Tacoma Water, Water Distribution (Jesse Angel)
Tacoma Power/T&D Electrical Services (Jeffrey Rusler, P.E.)
Tacoma Fire Department (Chris Seaman, P.E.)
Environmental Services (Larry Criswell, C.E.)
Public Works/LID, City of Tacoma (Sue Simpson)
Planning and Development Services Department, City of Tacoma (Jana Magoon/Lisa Spadoni)
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 Indians

FILE NO: HEX2017-030 (124.1382)

SUMMARY OF REQUEST:

A petition from the Puyallup Tribe of Indians to vacate that portion of the East 29th Street air rights, beginning at a minimum vertical distance of 24.5 feet from the finished street grade, between the easterly margin of Portland Avenue and terminating at a point 100 feet west of the westerly margin of East R Street, abutting and adjacent to tribal property, in connection with the Emerald Queen Casino relocation project.

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, Real Property Services Division (“RPS”) and examining available information on file with the petition, the Hearing Examiner conducted a public hearing on this petition on November 8, 2017.

ORIGINAL

FINDINGS, CONCLUSIONS, AND RECOMMENDATION:

FINDINGS:

1. The Petitioner, the Puyallup Tribe of Indians, a federally recognized Indian Tribe (hereinafter the "Tribe"), is requesting the vacation of that portion of the East 29th Street air rights, beginning at a minimum vertical distance of 24.5 feet from the finished street grade, between the easterly margin of Portland Avenue and terminating at a point 100 feet west of the westerly margin of East R Street, abutting and adjacent to tribal property. The area sought to be vacated is legally described as:

That portion of the Southwest Quarter of the Northeast Quarter of Section 10, Township 20 North, Range 03 East of the Willamette Meridian, more particularly described as follows:

That portion of East 29th Street air rights lying easterly of the east margin of Portland Avenue extended between a point marking the Northeast corner of a parcel conveyed to the City of Tacoma as recorded under Auditor File Number 8508260151, records of Pierce County, Washington, said point being 18 feet east of the Northwest corner of Block 7946 of the Indian Addition to the City of Tacoma, according to the Plat thereof filed on May 1, 1896, in Book 7 of Plats at pages 30 and 31, records of Pierce County, Washington and the Southwest corner of Lot 2, Block 7945 of said plat and lying westerly of a line extended from the Southeast corner of Lot 24 of said Block 7945 to the Northeast corner of Lot 24 of Block 7946, beginning at a minimum vertical distance of 24.5 feet above as measured perpendicular to the finished street grade.

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

Ex. 1; Cornforth Testimony.

2. The Federal Government, through its Bureau of Indian Affairs, and the Puyallup Tribe of Indians own all abutting real property. The vacation petition has been joined by these parties as the owners of all real property abutting the portion of air rights proposed for vacation. *Cornforth Testimony.*

3. With regard to physical land characteristics, the right-of-way area is fully improved with concrete curb, gutter and sidewalk. The surrounding site is currently undergoing major construction. This segment of roadway will ultimately be redesigned, replaced and/or restored to current City standards for full buildout and the street right-of-way area will remain passable to vehicular traffic.

Ex. 1; Cornforth Testimony, Hunter Testimony.

4. The City of Tacoma acquired this right-of-way, and the attendant air rights proposed for vacation, 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. 4 and 5; Cornforth Testimony.*

5. The requested air rights vacation has been reviewed by outside quasi-governmental agencies, City departments/divisions, and utility providers. The reviewing agencies have indicated no objection to the proposed vacation of air rights, provided that the conditions in section 6 below are imposed. *Exs. 6 and 7; Cornforth Testimony.* The Petitioner concurs in the conditions recommended by RPS and agrees to comply with the same. *Hunter Testimony.*

6. No one appeared at the hearing in opposition to the Tribe's petition to vacate the air rights over the subject right-of-way area. Several members/representatives of the Tribe appeared on its behalf and testified regarding the various ways that the Petitioner believes this vacation request meets the criteria set forth in Tacoma Municipal Code (TMC) 35.79 and TMC 9.22. *Exs. 8 through 11.* Those testifying on behalf of the Tribe included Robert L. Hunter, Jr. and John Howard Bell, both legal counsel for the Tribe, Frank Wright, the General Manager of the Emerald Queen Casino, Julie Hamilton, the Tribe's Chief Financial Officer, and Matt Wadhwani, Assistant CFO for the Tribe. In addition to their individual testimony, written statements from Hunter, Wright, Hamilton, and Wadhwani were submitted for the record. *Exs. 8 through 11.*

7. The public would benefit from the proposed air rights vacation to the extent that it would promote economic development, while keeping the right-of-way still passable for traditional street uses. *Cornforth Testimony, Hunter Testimony.*

8. The air rights that are the subject of this vacation request are not contemplated for future public use, and vacation of the air space would not adversely affect the public need. *Ex. 1; Cornforth Testimony, Hunter Testimony.*

9. No abutting property or nearby property would become landlocked or have its access substantially impaired as a result of the vacation of the requested air rights. *Ex. 1; Hunter Testimony, Cornforth Testimony.*

10. The proposed air space vacation neither abuts, nor is proximate to a body of water and, therefore, the provisions of RCW 35.79.035 are not implicated. *Ex. 1; Hunter Testimony, Cornforth Testimony.*

11. 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)*.

12. RPS' Preliminary Report, as entered into this record as Exhibit 1 (the "Report"), accurately describes the requested vacation and project proposed to follow the vacation, general and specific facts about the site and area, and applicable codes. The Report is incorporated herein by reference as though fully set forth.

13. On October 5, 2017, a yellow public notice sign was placed at the southeasterly corner of East 29th Street and Portland Avenue; and at the northwesterly corner of East 29th Street at East R Street. Subsequently, on October 6, 2017, the public notice for the November 8, 2017 hearing was mailed to all parties of record within 1,000 feet of the requested vacation area and advertised in the Daily Index newspaper. Also on October 6, 2017, a public notice memo was placed into the glass display case located on the First Floor of the Tacoma Municipal Building next to the City's Finance Department, and a public notice memo was advertised on both the City of Tacoma web site at address: <http://www.cityoftacoma.org/notices> and on Municipal Television Channel 12.

14. 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. The Hearing Examiner's role in street vacation proceedings is quasi-judicial in nature, leading to a legislative determination by the City Council when enacted by ordinance. *State ex rel. Myhre v. City of Spokane*, 70 Wn.2d 207, 218, 442 P.2d 790 (1967).

3. Petitions for the vacation of public right-of-way are reviewed for consistency with the following criteria:

1. That 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; and
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-of-way, provided the conditions recommended herein are imposed. The public would experience benefits from the economic development that the requested vacation will facilitate. 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 conditions:

A. SPECIAL CONDITIONS:

1. CONDITION—PAYMENT OF FEES

The Petitioner shall compensate the City in an amount equal to the full appraised value of the area and rights 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. RPS will commence its efforts to get the vacation area appraised based on this recommendation that the vacation proceed. *TMC 9.22.010.*

2. CONDITION—TACOMA POWER FACILITIES

Tacoma Power has no objection; however, a City of Tacoma easement shall be retained as necessary for an existing power pole and anchor at the southeast corner of Portland Avenue and East 29th Street for which formal survey shall be provided by the Petitioner to Tacoma Power to determine the extent of the easement necessary for retention. Final Reading of the Ordinance shall be held for such surveyed determination and subsequent direction.

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 recommendation made 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 any approvals that result herefrom and

is a continuing requirement of such approvals. By accepting any resulting 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(s) 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 COMMENTS:

1. COMCAST

Comcast has no objection to this petition; however, Comcast does have infrastructure attached to Tacoma Power poles within the vacation area anticipated to be within the same retained areas of Tacoma Power's facilities mentioned above. Prior to Final Reading of the Ordinance, Petitioner intends to grant Comcast an independent easement to protect Comcast's existing infrastructure.

2. TACOMA WATER

Tacoma Water has no objection to this petition; however, Tacoma Water does have underground facilities within the right-of-way area from which the air rights are requested to be vacated. Tacoma Water must continue to have access to these facilities in spite of the vacation being granted.

3. PUGET SOUND ENERGY

Puget Sound Energy ("PSE") has no objection to this petition; however, PSE has advised that it has underground infrastructure within the right-of-way area from which the air rights are requested to be vacated. PSE must continue to have access to these facilities in spite of the vacation being granted.

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 above.

DATED this 27th day of November, 2017.



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 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**