



**City of Tacoma**  
Hearing Examiner

March 27, 2017

James W. Summers  
September Morn Corporation  
1606 Ridge View Ave NE J404  
Issaquah, WA 98029-7699  
(First Class & Electronic Mail Delivery)

Troy Stevens, Sr. Real Estate Specialist  
City of Tacoma, Real Property Services  
747 Market Street Room 737  
Tacoma, WA 98402-3701  
(Interoffice & Electronic Mail Delivery)

Napoleon Group, LLC  
PO Box 1069  
Sumner, WA 98396  
(First Class Mail Delivery)

**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 March 27, 2017, at Tacoma, WA.

*Louisa Legg*

**Re: HEX 2017-003 (Vacation Petition No. 124.1376) Petitioner: Napoleon Group, LLC**

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 as the result of a public hearing held on March 23, 2017.

Sincerely,

Louisa Legg  
Office Administrator

Enclosure (1) – HEX Report and Recommendation

Cc: Transmitted via Electronic Mail Delivery

- |  |   |
|--|---|
| Pierce County Assessor-Treasurer (Darci Brandvold)   | Comcast (Aaron Cantrel)                               |
| Puget Sound Energy (Marilynn Danby)  | CenturyLink (Franklin Bolden)                         |
| Clerk's Office, City of Tacoma (Nicole Emery)  | Legal (Jeff Capell)                                   |
| CEDD, City of Tacoma (Patricia Beard)  | Tacoma Public Utilities, Real Estate (Gregory Muller) |
| Tacoma Water, Water Distribution (Jesse Angel)   | Tacoma Power/T&D (Rich Barrutia/John Hilotin)         |
| Tacoma Fire Department (Chris Seaman, P.E.)  | Public Works, City of Tacoma (Sue Simpson)            |
| Public Works, City of Tacoma (Jennifer Kammerzell)   |   |
| Environmental Services Site Review (Frank Marescalco, P.E.)  |   |
| Environmental Services Department, Science & Engineering, City of Tacoma<br>(Merita Trohimovich, P.E., Rod Rossi, PMP) |   |
| 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:** Napoleon Group, LLC

**FILE NO:** HEX 2017-003 (124.1376)

**SUMMARY OF REQUEST:**

A petition to vacate a portion of the air rights of Court E, lying between South 15<sup>th</sup> and South 17<sup>th</sup> Streets, for balconies in an apartment development.

**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 March 23, 2017.

**ORIGINAL**

**FINDINGS, CONCLUSIONS, AND RECOMMENDATION:**

**FINDINGS:**

1. The Petitioner, Napoleon Group, LLC (Napoleon), is requesting to vacate a portion of the air rights of Court E, lying between South 15<sup>th</sup> and South 17<sup>th</sup> Streets. The area proposed for vacation is more particularly described below:

The Easterly 4.00 feet of the Westerly 14.00 feet of that portion of Court E lying adjacent to Lots 10 - 16, inclusive, Block 1511, Map of New Tacoma, Washington Territory, according to the plat thereof on file with the State Department of Natural Resources, Olympia, Washington, and lying between the elevations of 221.50 feet NGVD29 and 285.54 feet NGVD29.

*Stevens Testimony; Exs. 1 through 3.* The petition has been joined by all owners of property abutting the rights-of-way proposed for vacation. *Stevens Testimony; Summers Testimony.*

2. The City acquired the Court E street right-of-way in the Map of New Tacoma, according to the plat thereof recorded February 3, 1875, records of Pierce County, Washington. *Stevens Testimony; Ex. 1.*

A northerly 415-foot portion of Court E was vacated under Substitute Ordinance No. 26693, also known as Street Vacation No. 124.1124. A different entity previously petitioned to vacate property similarly located adjacent to the subject property in 2008 under Street Vacation No. 124.1286; however, the petition was not completed. *Stevens Testimony; Ex. 5; Ex. 16.*

3. Court E, between South 15<sup>th</sup> and South 17<sup>th</sup> Streets, is mostly level and has a gentle slope to the south with a combination of vacant land, residential, and commercial development abutting it. The north 415 feet is 30 feet wide, and the remainder is 40 feet wide. The north 240 feet is paved with curb and gutter, and the remainder is a combination of asphalt and/or gravel with no curb or a wedge curb. *Stevens Testimony; Ex. 1.*

4. The air rights proposed for vacation would begin at an elevation 21 feet above the ground. The use of this air rights area would not interfere with emergency or commercial vehicles using Court E and would not impair utility uses. The balconies that would be facilitated by the proposed air rights vacation would provide outdoor space, and design interest, for the enjoyment of residents of the apartment units. *Summers Testimony.*

5. The proposed development would provide additional residential living units of various sizes and configurations in the downtown Tacoma area. The first phase of the plans includes 135 units of apartment housing designed to maximize view corridors and provide a range of residential options. *Summers Testimony.*

6. The proposed vacation of air rights has been reviewed by a number of governmental agencies and utility providers. None of the entities opposed the air rights vacation. *Stevens Testimony; Exs. 6 through 15.* The area proposed to be vacated has not been assessed for sanitary sewers because it is an air rights vacation request. The adjacent private fee owned land may be subject to a Connection Charge-In-Lieu-of-Assessment, per Tacoma Municipal Code (TMC) 12.08.350, in the future. The assessment would appear as an obligation to the property title and the cost may increase over time. *Ex. 1.*

7. The Petitioner Napoleon concurs with the recommended conditions and agrees to compensate the City in the amount equal to the full appraised value of the area vacated. *Summers Testimony.*

8. Since the proposed air rights vacation would not affect the public's right to travel on Court E, lying between South 15<sup>th</sup> Street and South 17<sup>th</sup> Street, the vacation of such air rights would not adversely affect the street pattern and traffic circulation in the area. Further, the air rights above Court E, lying between South 15<sup>th</sup> Street and South 17<sup>th</sup> Street, are not contemplated for future public use. *Ex. 1.*

9. 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. *Stevens Testimony; Ex. 1.*

10. The air rights above Court E, lying between South 15<sup>th</sup> and South 17<sup>th</sup> Streets, neither abut, nor are proximate to a body of water and, thus, the provisions of RCW 35.79.035 are not implicated. *Stevens Testimony; Ex. 1.*

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. The DPW's Preliminary Report, as entered into this record as Exhibit 1, 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.

13. On February 16, 2017, a Public Hearing Notice for the March 23, 2017, hearing was placed into the glass display case located in the Municipal Building abutting the Finance Department and yellow public notice signs for the hearing were also posted near the site, at least 30 days prior to the hearing, as required by TMC 9.22.060. The yellow public notice signs were placed at the southeast corner of South 15<sup>th</sup> Street and Court E and at the northwest corner of South 17<sup>th</sup> Street and Court E. The Public Hearing Notice was also published in the Tacoma Daily Index and mailed to all parties of record within 400 feet of the vacation request. Additionally, the Public Hearing Notice memo was advertised on the City of Tacoma web site and on the Municipal Television Channel 12. All required postings of notices for the hearing have been accomplished. *Ex. 1; Stevens Testimony.*

14. No members of the public appeared at the hearing to testify regarding the proposed air rights vacation and no written opposition to the vacation was filed in the case.

15. Any conclusion hereinafter stated which may be deemed to be properly considered a finding 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 9.22.*

2. Proceedings involved in the 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 land-locked 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-of-way provided the conditions recommended herein are imposed. The proposed vacation of air rights

will place the property on the tax rolls and will benefit the public by facilitating the development of additional housing options in the downtown area. Court E will remain fully open for travel and no adverse effects to the street pattern or circulation in the area or community will occur. The public has no anticipated need for use of the air rights over this alley. No potential for landlocking an abutting owner exists and the provisions of RCW 35.79.035 governing areas close to bodies of water do not apply.

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

**A. SPECIAL CONDITION:**

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*

**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 COMMENTS:**

No objection or additional comment was received from the City's Real Property Services/LID, Traffic Engineering, Environmental Services, and Site Group; Tacoma Fire; Tacoma Water; Comcast; CenturyLink; Tacoma Power; and Puget Sound Energy.

7. Accordingly, the vacation petition should be granted, subject to the conditions set forth in Conclusion 6 above.

8. Any finding which may be deemed to be properly considered a conclusion of law is hereby adopted as such.

**RECOMMENDATION:**

The vacation request is hereby recommended for approval, subject to conditions contained in Conclusion 6 above.

**DATED** this 27<sup>th</sup> day of March, 2017.

  
\_\_\_\_\_  
**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.