

OFFICE OF THE HEARING EXAMINER

CITY OF TACOMA

REPORT AND RECOMMENDATION

TO THE CITY COUNCIL

PETITIONERS: Carla Moreno Montgomery and Ana Yesenia Celestino-Valdovinos

FILE NO: HEX2022-002 (124.1433)

SUMMARY OF REQUEST

The Real Property Services division (“RPS”) of the City of Tacoma (“City”) Public Works Department received a petition to vacate a portion of the alley right-of-way between North L Street and North M Street, lying northwest of North 10th Street, to cure a garage encroachment.

RECOMMENDATION OF THE HEARING EXAMINER

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

PUBLIC HEARING:

After reviewing RPS’ 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 August 18, 2022.¹ Troy Stevens of RPS represented the City. Petitioner Carla Moreno Montgomery appeared *pro se*.² Testimony was taken, exhibits were admitted, and the record closed at the conclusion of the hearing, with one new exhibit being submitted post hearing by agreement of the parties.

¹ The initial hearing in this matter was convened, after notice, on May 5, 2022, at which time the Petitioners failed to appear. This failure required that the hearing be re-noticed and re-scheduled. On July 12, 2022, through Resolution No. RES40996, the Tacoma City Council rescheduled the hearing on August 18, 2022, at 9:00 am. Although State and City in-person meeting restrictions have been relaxed, the Office of the Hearing Examiner is continuing to conduct hearings over Zoom as another option to in-person hearings. This hearing was conducted over Zoom at no cost to any participant, with video, internet audio, and telephonic access.

² Neither party called additional witnesses.

FINDINGS, CONCLUSIONS, AND RECOMMENDATION:

FINDINGS:

1. Petitioners Carla Moreno-Montgomery and Ana Yesenia Celestino-Valdovinos (the “Petitioners”), as the owners of the real property located at 1010 North L Street, submitted a petition to vacate a portion of the alley between North L Street and North M Street lying northwest of North 10th Street (the “Vacation Area” as legally described below). The Petitioners made their request in order to address the existing encroachment of their garage into the right-of-way,³ as it presently exists. *Exs. C-1~C-4.*

2. The City’s Report provides the following legal description for the Vacation Area:

A portion of the Northeast Quarter of the Southeast Quarter of Section 31, Township 21 North, Range 3 East, Willamette Meridian, Pierce County, Washington, more particularly described as follows;

The Northeasterly 10 feet of alley abutting Lots 7 and 8, Block 4024, Map of New Tacoma, Washington Territory, according to the Plat filed for record February 3, 1875 in the Office of the County Auditor;

Situate in the City of Tacoma, County of Pierce, State of Washington. *Ex. C-1.*

3. The alley ROW between North L Street and North M Street, lying northwest of North 10th Street, is 40 feet wide. At both the north and south alley entrance, the ground slopes slightly, and both ends are improved with a concrete alley approach. The alley is graveled and has power pole locations along the southwesterly side, along with many utility drop lines connecting to the abutting properties. The abutting residences use the well-traveled alley to access their properties and garages. *Id.*

4. The City acquired the alley ROW by plat filing in the Map of New Tacoma, W.T., which was filed of record February 3, 1875 in the Office of the County Auditor. *Ex. C-1 and Ex. C-4.*

5. The existing garage, that encroaches into the ROW as it is presently constituted, appears to have been in its present location since at least 1982, and it appears that the construction of the garage was permitted by the City with an inspection upon completion. *Stevens Testimony; Ex. C-15.*

6. The garage encroaches approximately seven feet into the alley ROW as it currently exists. The petition is for a ten-foot width. RPS supports the ten-foot width requested in order to have some buffer between the garage footprint and the ROW boundary, as well as to facilitate uniformity for any future vacations along this alleyway. *Stevens Testimony; Ex. C-1~C-4, Ex. C-15.*

7. The vacation presents at least some public benefit because the Vacation Area will be added to the taxable square footage of the Petitioners’ property, thereby potentially increasing tax revenue. Curing the encroachment also alleviates potential problems regarding rights and responsibilities in and for the ROW. *Ex. C-1.*

³ “Right-of-way” may be abbreviated hereafter as “ROW.”

8. The public need is not adversely affected by granting the vacation because the Vacation Area is not contemplated or needed for future public use (except as addressed below at Conclusion 8). The alley ROW has functioned well enough for its intended purpose, even with the garage encroachment, for years. Formally acknowledging the garage's existence by vacating the City's ROW interest in the Vacation Area will not interfere unreasonably with the continued public use of the alley. *Exs. C-8, C-9, C-13, and Ex. C-14.*

9. No abutting owner becomes landlocked, nor is any access substantially impaired by granting the vacation. The property owner across the alley ROW from the Petitioners did express some concern about the possibility of further narrowing the usable width of the existing alleyway. The recommended condition of approval/restriction below at Conclusion 8 addresses and alleviates this concern. *Exs. C-1~C-3. See also FoF 12.*⁴

10. The Vacation Area does not abut, nor is it proximate to a body of water and, therefore, the provisions of RCW 35.79.035 are not implicated. *Exs. C-1~C-3.*

11. 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 recommended/requested conditions to RPS. These comments and requests were incorporated into the Report and referenced at the hearing. Where appropriate, any conditions have been incorporated in this Report and Recommendation at Conclusion 8 below. None of the reviewing agencies, City departments/divisions, or utility providers had any objection to the proposed vacation, provided that the conditions below are imposed. The Petitioners voiced no objections to the recommended conditions of approval. *Ex. C-1, Exs. C-6~C-14.*

12. At the hearing on August 18, 2022, Angela Carlin appeared and commented on behalf of her parents the Baties. Her father, Robert C. Batie had written a comment letter that was forwarded to the Hearing Examiner's office by RPS on August 16, 2022. The Baties' property contains a multi-family housing unit which is located directly behind and across the alley from the Petitioners' property. Ms. Carlin expressed having no objection to the requested vacation. However, she echoed her father's concern that the requested vacation could allow expansion of the Petitioners' garage, or construction of a fence or other improvements farther into the alley than the existing garage footprint, and that such expansion could potentially impact her parents' tenants' alleyway access and parking. In response, Petitioner Moreno agreed to an imposed condition of approval that would restrict any further encroachment into what has been the traversable alleyway. *Carlin Testimony, Moreno Testimony; Ex. C-15, Batie Comment Letter dated August 16, 2022.*

13. Public hearing notices were posted/published at the various locations and on the dates indicated below as follows:

On July 14, 2022-

- a. A public notice memo was posted in the glass display case located on the first floor of the Municipal building next to the Finance Department.

⁴ "FoF" is an abbreviation meaning "Finding of Fact."

- b. A public notice memo was advertised on the City of Tacoma web site at address: <https://www.cityoftacoma.org/cms/one.aspx?objectId=2283>.
- c. Public notice was advertised in the Daily Index newspaper.
- d. A public notice mailing was mailed to all parties of record within 300 feet of the Vacation Area.
- e. Public Notice was advertised on Municipal Television Channel 12.

On July 15, 2022-

- f. A yellow public notice sign was posted at the northwest corner of the alley southerly of North 10th and North L Street.
- g. A yellow public notice sign was posted at the northeast corner of the alley southerly of North 11th and North L Street. *Ex. C-1*.

14. The Report, which is entered into the record as Exhibit C-1, accurately describes the proposed vacation, general and specific facts about the general location and Vacation Area specifically, as well as applicable laws. The Report is incorporated herein by reference as though fully set forth. To the extent that any content of the Report conflicts with this Report and Recommendation, the provisions of this Report and Recommendation shall control.

15. 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.”⁵

⁵ *Puget Sound Alumni of Kappa Sigma v. Seattle, 70 Wn.2d 222, 238-239, 422 P.2d 799, 808-809 (1967).*

5. If they are to be granted, petitions for the vacation of public right-of-way must be consistent with the following criteria:⁶

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.*

6. The Petitioners must demonstrate, by a preponderance of the evidence, that their vacation petition meets the foregoing criteria. *See TMC 1.23.070.* The Petitioners are entitled to rely on all evidence made part of the record, whatever the source of that evidence. Here, the Petitioners relied primarily on the City's presentation.

7. Findings entered herein, based upon substantial evidence in the hearing record, support a conclusion that the requested street vacation conforms to the criteria for the vacation of street right-of-way set forth at Conclusion 5 above, provided the condition(s) recommended below are imposed and met. No potential for landlocking an abutting owner exists from granting the petition because the vacation will not interfere with traversal of the alley ROW any more than the garage encroachment already interferes. In other words, the public and adjacent property owners will still be able to use the alley ROW in the same manner to which they are currently accustomed, and therefore, the public need will not be adversely affected, nor will the street pattern or area circulation. The provisions of RCW 35.79.035, governing areas close to bodies of water do not apply to this location. Finally, at least some public benefit accrues through the Vacation Area being added into property tax valuations for the Petitioners' abutting real property while potentially reducing the City's maintenance obligations, together with the added benefit that curing the encroachment clarifies rights and responsibilities for the Vacation Area.

8. Given the foregoing, the Hearing Examiner recommends that the requested street vacation be approved subject to the following conditions:

⁶ For consistency, outline numbering of the criteria is kept the same as in the original TMC text.

A. SPECIAL CONDITIONS:

1. PAYMENT OF FEES

The Petitioner shall compensate the City in an amount equal to the full appraised value of the Vacation Area. One-half of the revenue received should 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 right-of-way areas. *TMC 9.22.010.*

2. NO-BUILD RESTRICTION

In order to address the Baties' concern, as well as to preserve the public and adjacent property owner's right/ability to traverse the alley ROW and use it effectively for access, a no-build restriction is hereby imposed over the excess three feet of the Vacation Area that extends beyond the actual garage footprint. Petitioners, and their successors and assigns shall not build any new improvement(s) into this portion of the Vacation Area, and this three-foot-wide length of the Vacation Area shall effectively remain as an access traversal easement for the public over that portion of the Vacation Area.

B. USUAL CONDITIONS:

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 Petitioners represent 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 Petitioners agree to promptly bring such development or activities into compliance.

C. ADVISORY NOTES:

1. Other than the concerns addressed in the conditions set forth above, no objections or additional comments were received from the governmental

agencies, City departments/divisions, and utility providers to whom the City circulated this petition.

2. An In-Lieu amount of \$562.50 that attaches to the Vacation Area is due for sanitary sewer. The Petitioners can clear this item from title through the Public Works Department, Real Property Services division, but is not required to do so as a condition to the vacation being approved. The rate of assessment is updated every few years, and the amount quoted may increase in the future, if not paid now, however.

If the charges are not voluntarily paid at time of compensation for the Vacation Area, the In-Lieu-of-Assessment Charge(s) will likely be required to be paid in conjunction with any future permitting on, or development of the Vacation Area (if allowed under the No-Build Restriction above), and again may be subject to increase with the passage of time.

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

DATED this 22nd day of August, 2022.



JEFF H. CAPELL, 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 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*)

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 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*