

1 **OFFICE OF THE HEARING EXAMINER**

2 **CITY OF TACOMA**

3 **In the Matter of:**

HEX2017-004

4 **LOCAL IMPROVEMENT DISTRICT**
5 **NO. 8645 (FINAL ASSESSMENT**
6 **ROLL).**

SUPPLEMENTAL
RECOMMENDATION
AFTER REMAND

7
8 **PURSUANT TO** the Tacoma City Council’s motion passed in open session on
9 August 29, 2017, remanding the above-captioned matter—the finalization of the assessment
10 roll for the Broadway Local Improvement District (the “LID”)—the City of Tacoma’s Hearing
11 Examiner offers the following supplemental information:

12 **I. RELEVANT HISTORY¹**

13 The LID officially began its journey to this present point on April 18, 2006, when the
14 Tacoma City Council approved it through the adoption of Substitute Ordinance No. 27475.
15 The LID was controversial from the outset, and had only divided support among property
16 owners in the LID area (the “District” when referring to the area subject to the LID).²

17 Once formed, the LID experienced (a) problems getting under contract, (b) difficulties
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19 ¹ The word “relevant” is used here and at Section III below to indicate that both the history and the controlling
20 authority offered here are not a complete compendium of either one, for this, or any local improvement district,
21 but rather a selection of the background and authority that the Examiner thinks will be helpful to the City Council
in catching up, and making its final determination based on the Original Recommendation (see Fn 2 below) and
this Supplemental Recommendation. A reread of the Original Recommendation is also highly recommended.

² For a detailing of what area comprises the District, please see Finding of Fact (“FoF”) 1 in the Hearing
Examiner’s “Findings of Fact, Conclusions of Law, and Recommendation (Final Assessment Roll)” dated May
26, 2017 (hereafter referred to separately as the “Original Recommendation” and as “OR” in citation). The
Original Recommendation was authored and issued by Phyllis K. Macleod who retired shortly after it was issued.

SUPPLEMENTAL RECOMMENDATION
AFTER REMAND; L.I.D. 8645
(ASSESSMENT ROLL)

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1 with costs and scoping, (c) challenges arising from the City's cost projections and thereby its
2 assessment projections, which escalated by fifty percent (50%) over those originally projected,
3 as well as (d) challenges related to unexpected physical conditions in the District during
4 construction, among others.³ Along the way, related to (c) above, the City changed its method
5 of calculating the ultimate LID assessment for the benefitted properties in the District from the
6 zone and termini method (authorized in Revised Code of Washington ["RCW"] section
7 35.44.030 and .040), to a special benefit and proportionate assessment appraisal methodology
8 (implicitly authorized by RCW 35.44.047,⁴ and recognized in controlling case law).

9 These challenges notwithstanding, construction of the intended improvements was
10 completed in 2011. Final cost allocations and close out of the contract were not achieved until
11 2013, at which point, the City's Public Works LID Section then began its "extensive allocation
12 process for the charges connected with the project."⁵

13 Thereafter, Hearing Examiner Phyllis K. Macleod conducted a public hearing on
14 March 29 and 30, 2017, regarding finalizing the assessment roll for the LID. Examiner
15 Macleod's Original Recommendation, issued on May 26, 2017, details what was presented at
16 the hearing by whom, and sets forth her findings, conclusions and recommendations. Issuing
17 the Original Recommendation was Examiner Macleod's last official act with the City before
18 retiring. Inasmuch as the LID is now returning to the City Council for decision regarding the
19 finalization of the assessment roll, reviewing the Original Recommendation is certainly
20 warranted.

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³ OR at FoF 2~4.

⁴ OR at FoF 9.

⁵ OR at FoF 4.

1 After issuance of the Original Recommendation, two requests for reconsideration were
2 filed in the Office of the Hearing Examiner (the “HEX Office”)—one by the City, and another
3 by a property owner in the District.⁶ These were denied by written order dated June 20, 2017
4 (the “Reconsideration Order”). Two “appeals” of the Original Recommendation were then
5 filed with the City Clerk pursuant to Tacoma Municipal Code (“TMC”) 1.70 by different
6 property owners—the YWCA of Pierce County (the “YWCA”) and Ann and William Riley
7 (the “Rileys”).⁷

8 The Original Recommendation and the two appeals were set to go before the City
9 Council on August 22, 2017, at which time the Council would consider the Original
10 Recommendation for the first time, and also hear the YWCA and the Rileys’ appeals before
11 acting. After hearing the appealing parties’ presentations, and also from Deputy City Attorney
12 Steve Victor in defense of the City staff position, the Council set the matter over until
13 August 29, 2017, for decision. On that date, the Council voted to adopt the Original
14 Recommendation with some exceptions, and to that end approved the following motion and
15 order (the “Remand Order”) remanding parts of the LID process to the Hearing Examiner:

16 I move to concur in the findings, conclusions and recommendations of the
17 Hearing Examiner, and deny the appeals with the following exceptions:

- 18 1. Council rejects the use of a four percent (4%) benefit for
19 Office/Retail/Commercial properties, and remands to the Hearing
20 Examiner to review the record or allow the record be supplemented
to determine support for the use of a one percent (1%) benefit to be

21 ⁶ Part of the City’s request asked for clarification in addition to its reconsideration request. The clarification request was granted, although the reconsideration was denied.

⁷ The word “appeals” is in quotations because that is how TMC 1.70 characterizes the process engaged by the by the YWCA and the Rileys. It is not an appeal in the traditional sense because there has been no final decision at this stage to appeal. Rather, a TMC 1.70 “appeal” is an interested party’s opportunity to be heard by the City Council before it acts on a Hearing Examiner recommendation.

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used for all Office/Retail/Commercial properties and allow property owners an opportunity to object to any new assessment roll created.

- 2. Council remands to the Hearing Examiner the general assessments recommended for all non-profit entities including the YWCA Pierce County and directs the Public Works Department to prepare and submit a new assessment based on a special benefits analysis that takes into consideration the not-for-profit nature of these entities.
- 3. Council accepts the recommendation of the Hearing Examiner to reduce the interest payment to \$331,500 and directs the City to not assess the property owner's additional interest that may accrue while the final assessment role is prepared.⁸

With these marching orders in hand, the Hearing Examiner issued that certain document titled “Findings and Initial Order on Remand from the City Council” dated August 31, 2017 (the “Initial Order”)⁹, giving direction to the City and the appealing parties as to how the remand would proceed, acting under the presumption that the parties would want to resolve matters from the Remand Order quickly.

After some initial misconceptions were dispelled regarding the Initial Order, the City and the appealing parties were left to pursue a mutually agreed upon resolution to their differences over the proposed special benefit assessment, making the Initial Order essentially irrelevant. Nearly one year later, two separate settlement agreements were signed by the appealing parties and the City. The City’s settlement agreement with the YWCA is dated August 14, 2018, and the agreement with the Rileys is dated August 25, 2018 (collectively the “Settlement Agreements”).

⁸ On August 29, 2017, the Remand Order was given verbally during the course of the City Council’s regularly scheduled meeting. The written, three paragraph form set forth here was obtained by the HEX Office from the City Attorney as the script for Council’s verbal order. The Remand Order was separated verbally into these three distinct parts.

⁹ A copy of the Initial Order is attached hereto as Attachment 1.

1 Right around this same time, knowing that the City was on the verge of settling with
2 the YWCA and the Rileys, the HEX Office sent the following inquiry (in relevant part) to the
3 LID Section and its legal counsel on August 15, 2018:

4 I would request, however, given the wording of the City Council remand
5 regarding “office/retail/commercial properties” generally, that the City let me
6 know its intention regarding the non-Riley/non-YWCA owned office/retail/
7 commercial properties in LID 8645 in order to address these properties in the
8 [Supplemental] Recommendation [] for the return trip to the City Council. I...
9 hav[e] “review[ed] the record” as ordered by the Council, and also [have]
10 review[ed] applicable laws, but would like to know where the City stands in that
11 regard. I also need to know if the City is finished with its additional legwork that
12 would allow it “to prepare and submit a new assessment based on a special
13 benefits analysis that takes into consideration the not-for-profit nature of these
14 (non-profit) entities” also as ordered in the Council’s remand...

15 In response to the above request for information from the City, the HEX Office
16 received the following on January 23, 2019 from the City’s legal counsel Mr. Victor:

17 *Consistent with the City Council's direction* following the appeal hearing before
18 the Council on August 29, 2017, the City’s administration re-analyzed both the
19 validity of a general 4% increase for commercial properties, and the particular
20 facts and circumstances *of the properties of the only two owners who appealed*
21 *the assessment.* [Emphasis added]

Regarding the 4% valuation increase for commercial properties, the City’s
administration re-engaged Valbridge consulting to perform a thorough review and
re-analysis of their Special Benefit Study, including actual valuation increases
within the LID after the date of the study. This thorough re-analysis affirmed the
validity of the general 4% increase for commercial property within the LID area.
Further consistent with the City Council’s order. [sic] The City’s administration
engaged the two appellants, and reviewed and re-analyzed the particular
circumstances of their properties. This work resulted in the City’s entry into
Settlement Agreements with both appellants.

The Public Works Department has revised the proposed assessments to take into
account three factors, the general applicability of the re-validated 4% increase
factor, the City Council’s direction to not charge interest for the period from

March 2015 forward, and the figures contained in the Settlement Agreements.
Please note that the reductions in the assessments of the two appellants, and the

1 Council-directed interest reduction did not alter the assessments of any properties
2 that did not appeal. Rather the City will fully fund those deficits, and that funding
is included in the City's 2019-2020 budget.

3 The materials are currently under review by the City's bond counsel and upon
4 completion of that review, will be forwarded to your office with the request that
5 that the Examiner proceed to develop a final roll based on the revised
6 calculations.

7 The materials just referenced in the City's communication were submitted to the HEX
8 Office on May 22, 2019, clearing the LID's return to the City Council for finalization of the
9 assessment roll. They are attached to this Supplemental Recommendation as Attachment 2.
10 Aside from the YWCA Settlement Agreement, nothing in these supplemental materials
11 addresses "non-profit entities" as requested in paragraph 2 of the Remand Order. That said, it
12 appears to be the City's position that there are no other non-profit entities in the District
besides the YWCA to address.¹⁰

13 II. INTEPRETING THE REMAND ORDER

14 When first issued, paragraph one of the Remand Order caused the Examiner no small
15 amount of cognitive dissonance. The main reason for this is that the Remand Order did not
16 appear to be designed to determine the actual special benefit to the office/retail/commercial
17 properties (hereafter the "ORC Properties"), but rather seems to clearly direct the Examiner to
18 determine support for a lesser amount (a one percent [1%] benefit) than City staff had
19 championed at the hearing (the proposed four percent [4%] benefit).

20 As regards the City's request that a four percent (4%) special benefit be assessed to the
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¹⁰ A review of the Taxpayer/owner of record information for property owners in the District appears to bear this out. The word "non-profit" does not appear anywhere in the Original Recommendation.

1 ORC Properties, Examiner Macleod stated in the Original Recommendation that, “The level
2 of detail and justification using recognized appraisal techniques for quantifying the amount of
3 increase is weak.¹¹ As a result, Examiner Macleod could not recommend unreservedly the
4 City’s requested 4 percent (4%) special benefit for confirmation on the ORC Properties.
5 Instead, she suggested that “The City Council may wish to consider requesting further
6 appraisal analysis from the Valbridge firm to more fully document the basis for selecting a 4
7 percent increase for office/retail/commercial properties within the project area.”¹² The
8 Remand Order does not follow this suggestion, however, which is fine. As will be discussed
9 further below, the City Council has broad discretion in finalizing an assessment roll; provided
10 that the Council may not assess *more* than the supportable special benefit to any given
11 property. Instead, the Remand Order stated that:

12 “Council rejects the use of a four percent (4%) benefit for Office/Retail/
13 Commercial properties, and remands to the Hearing Examiner to review the
14 record or allow the record be supplemented to determine support for the use of a
15 one percent (1%) benefit to be used for all Office/Retail/Commercial properties
and allow property owners an opportunity to object to any new assessment roll
created.”

16 Nowhere in the foregoing is there direction to shore up the four percent (4%) recommendation
17 from City staff. Examiner Macleod paved the way for the City Council to do just that in the
18 language of Conclusion of Law 6.a of the Original Recommendation, but Council did not do
19 so. Again, that is fine. Instead, Council expressly “[r]ejected the use of a four percent (4%)
20 benefit for the [ORC] properties.”
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¹¹ OR at FoF 35.

¹² OR at Conclusion of Law (“CoL”) 6.a.

1 After so rejecting the four percent (4%) benefit, Council directed the “the Hearing
2 Examiner to review the record or allow the record be supplemented to determine support for
3 the use of a one percent (1%) benefit to be used for all Office/Retail/Commercial
4 properties...” In the roughly two years that have intervened since the Council issued the
5 Remand Order, the Examiner has done as ordered and has reviewed the record extensively.¹³

6 In addition to the Examiner’s review, the City has now supplemented the record, of its
7 own accord, with its 85-pages-in-length submission of May 22, 2019 (the “City Supplement”).

8 The City Supplement consists of the following:

- 9 (a) A two page cover letter from the City’s legal counsel to the Examiner (the
10 “City Cover Letter”),
- 11 (b) A four page letter from Valbridge to City LID staff primarily defending the
12 original conclusions of the Valbridge Study, but adding at least some
13 additional information in support of a four percent (4%) special benefit to the
14 ORC Properties,
- 15 (c) Four pages of before and after photos of two selected ORC Properties,
- 16 (d) One page of area maps taken from the original Valbridge Study,
- 17 (e) A one page reproduction of page 9 from the Valbridge Study,
- 18 (f) Six pages of supporting figures for the two ORC Properties Valbridge used to
19 shore up its case for a four percent (4%) benefit,¹⁴
- 20 (g) Copies of the City’s Settlement Agreements with the Rileys and the YWCA,
and
- 21 (h) Lastly, the City includes 59 pages of its proposed “Assesment Roll LID
8645,” which is explained to be “[r]evised LID calculations by the Public

¹³ It should be pointed out here that, although the undersigned Hearing Examiner was not the City’s Hearing Examiner when the March 29 and 30, 2017 hearing was held, he was in attendance for the hearing. He does, of course, have access to the entirety of the record.

¹⁴ Items (b) through (f) in the City Supplement are characterized by the City as “[a] thorough review and reanalysis of their (Valbridge’s) Special Benefit Study, including actual valuation increases within the LID after the date of the study” (collectively the “Valbridge Reanalysis”).

1 Works Department tak[ing] into account three factors: the general
2 applicability of the re-validated 4% increase factor, the City Council's
3 direction to not charge interest for the period from March 2015 forward, and
4 the figures contained in the Settlement Agreements” (the “Revised Proposed
5 Roll”).

6 It is clear from the City’s correspondence with the HEX Office, from the City Cover
7 Letter, and from the Valbridge Reanalysis that either the City had a very different
8 interpretation of the Remand Order than the Examiner, or somehow otherwise chose not to
9 follow it.¹⁵ As already stated above, nowhere in the Remand Order does it say to review and
10 supplement the record in order to better justify the City’s proposed four percent (4%) benefit.
11 It also does not direct the Examiner or City staff to see if there is support for a less than a four
12 percent (4%) benefit for the Rileys and the YWCA, but not for the other ORC Properties. The
13 Remand Order appears to require that all the ORC Properties be treated equally during the
14 remand reexamination when it says, “[r]eview the record or allow the record be supplemented
15 to determine support for the use of a one percent (1%) benefit to be used *for all* [ORC]
16 properties...” [Emphasis added]. The City appears to have considered anything less than four
17 percent (4%) only for the Rileys and the YWCA.¹⁶

18 Ultimately, what City staff did in the last two years,¹⁷ as represented in the City
19 Supplement, follows Examiner Macleod’s suggestion in the Original Recommendation to
20 obtain “[f]urther appraisal analysis from the Valbridge firm to more fully document the basis
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¹⁵ It is also possible that the City Council’s stated language at its August 29, 2017 meeting did not accurately convey what the Council intended and City staff had directions from Council different than what presents in the language of the Remand Order, but the Examiner cannot rely on that being the case.

¹⁶ See the *City Cover Letter* at pg. 2 which states “Please note that the reductions in the assessments of the two appellants, and the interest reduction, did not alter the assessments of any properties that did not appeal.”

¹⁷ Other than reach successful settlement agreements with the Rileys and the YWCA.

1 for selecting a 4 percent increase for [the ORC Properties] within the project area,”¹⁸ but does
2 not appear to actually be “Consistent with the City Council’s direction following the appeal
3 hearing...” as billed,¹⁹ at least insofar as that direction is represented in the plain language of
4 the Remand Order.

5 The fact that the City reached settled agreements with both the Rileys and the YWCA
6 is commendable, and the Examiner has no intention of recommending that the City do
7 anything other than what was agreed on in relation to the Riley and YWCA special benefit
8 assessments. That said, why City staff only looked at revising the assessments for the
9 appealing parties and not all ORC Properties is unclear given the language of the Remand
10 Order, specifically the directive to “[r]eview the record or allow the record be supplemented to
11 determine support for the use of a one percent (1%) benefit to be used *for all* [ORC
12 Properties]...” [Emphasis again added].

13 The above recounted differences in interpretation notwithstanding, given the passage
14 of nearly two years of additional time since the Remand Order, the Examiner would suggest
15 that it is now time for the City Council to make a final determination on the assessment roll
16 for the LID regardless, and has tailored this Supplemental Recommendation accordingly.

17 III. RELEVANT CONTROLLING AUTHORITY

18 Statutes

19 RCW 35.44.070, titled “Assessment roll—Filing—Hearing, date, by whom held”
20 requires the local “legislative authority” (the City Council) either to “hold a hearing on the
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¹⁸ OR at *Conclusion of Law (“CoL”)* 6.a. This is abundantly clear in pg. 1 of the Valbridge Reanalysis that quotes directly from the OR CoL 6.a.

¹⁹ *The City Cover Letter* at pg. 1.

1 assessment roll and consider all objections filed” itself, or to “direct that the hearing shall be
2 held before a committee” of the City Council or a “designated hearing officer.”²⁰ In Tacoma,
3 the City Council has appointed the Hearing Examiner to be its designated hearing officer,
4 under TMC 1.23.050.A.3, TMC 10.04.040 and TMC 10.04.065.

5 RCW 35.44.070 further states that the “[o]fficer designated shall hold a hearing on the
6 assessment roll and consider all objections filed following which the committee or officer
7 shall make recommendations to such legislative authority which shall either adopt or reject the
8 recommendations of the committee or officer,” all of which Examiner Macleod did. While this
9 sentence of the statute may seem somewhat inflexible in its wording, i.e., that the Council
10 must either accept or reject the recommendations entirely, such is not the case when read in
11 conjunction with other section of the LID statutes discussed below.

12 RCW 35.44.070 continues by stating that “If a hearing is held before such a committee
13 or officer it shall not be necessary to hold a hearing on the assessment roll before such
14 legislative authority.” This provision notwithstanding, property owners within the District can
15 still appeal their recommended assessment both under the last sentences of RCW 35.44.070,
16 and under the TMC 1.70 “appeal” process after the required hearing is concluded, but prior to
17 finalization of the assessment roll by the Council.

18 RCW 35.44.100, titled “Assessment roll—Hearing—Objections—Authority of
19 council,” gives the Tacoma City Council authority in local improvement district proceedings
20 as follows:

21 At the time fixed for hearing objections to the confirmation of the assessment roll,
and at the times to which the hearing may be adjourned, the council may *correct*,

²⁰ See also *Hasit, LLC v. City of Edgewood*, 179 Wn. App. 917, 934, 320 P.3d 163 (2014).

1 *revise, raise, lower, change, or modify* the roll or any part thereof, or set aside the
2 roll and order the assessment to be made de novo and at the conclusion thereof
3 confirm the roll by ordinance. [Emphasis added].

4 The “broad discretion” the City Council has in finalizing an assessment roll referenced above
5 in section II of this Supplemental Recommendation comes primarily from this provision of the
6 LID statute, but is referenced also in controlling case law.²¹ The specific language of
7 subsection .100 gives the Council far more flexible options in what it ultimately does with the
8 recommendations of the Hearing Examiner than just accepting or rejecting the
9 recommendation in its entirety, and the City Council already exercised this flexibility back on
10 August 29, 2017, when it accepted Examiner Macleod’s recommendation in large part, but
11 rejected her recommendation to obtain “[f]urther appraisal analysis from the Valbridge firm to
12 more fully document the basis for selecting a 4 percent (4%) increase for [the ORC]
13 [P]roperties,” and instead directed “[t]he Hearing Examiner to review the record or allow the
14 record be supplemented to determine support for the use of a one percent (1%) benefit to be
15 used for all [ORC] [P]roperties...” Of course, this flexibility can still be exercised in making
16 final decisions on the LID assessment roll after considering the information in this
17 Supplemental Recommendation.

18 RCW 35.44.110, titled “Assessment roll—Objections—Timeliness,” states in its
19 entirety that “All objections to the confirmation of the assessment roll shall state clearly the
20 grounds of objections. Objections not made within the time and in the manner prescribed in
21 this chapter shall be conclusively presumed to have been waived.” As already mentioned, in
 the pre-remand process, of the several objecting parties at the hearing, and on reconsideration,

²¹ See e.g., *Hasit*, 179 Wn. App. at 934.

1 only two—the Rileys and the YWCA—filed objections under TMC 1.70 on the way to the
2 City Council’s first consideration of the LID proposed assessments. It appears from the City’s
3 correspondence with the HEX Office and the City Supplement that the City considers any
4 objections beyond the Rileys and the YWCA to have been waived.

5 RCW 35.44.120, titled “Assessment roll—Amendment—Procedure,” states in its
6 entirety as follows:

7 If an assessment roll is amended so as to raise any assessment appearing thereon
8 or to include omitted property, a new time and place for hearing shall be fixed and
9 a new notice of hearing on the roll given as in the case of an original hearing:
10 PROVIDED, That as to any property originally entered upon the roll the
11 assessment upon which has not been raised, no objections to confirmation of the
12 assessment roll shall be considered by the council or by any court on appeal
13 unless the objections were made in writing at or prior to the date fixed for the
14 original hearing upon the assessment roll.

15 The provisions of this section of the LID statute are germane to the remand process for
16 several reasons. First, there is a possibility that the proposed assessment roll may be amended
17 during the remand process. Secondly, under this section, a new hearing to address any
18 amendment is only necessary if the amendment raises the assessment or adds property to the
19 district. Finally, any objections to the amended amount²² are only considered if “the
20 objections were made in writing at or prior to the date fixed for the original hearing upon the
21 assessment roll.”

In this matter, although amending the assessment roll is likely, the amendment will
not be to “raise any assessment” on the proposed roll and no properties are being added that

²² Again this presumes an increase after amendment. It is hard to imagine an objection being lodged to a decrease in one’s assessment.

1 were previously omitted. In addition, the only property owners whose “objections were made
2 in writing at or prior to the date fixed for the original hearing upon the assessment roll” have
3 now settled with the City. As a result, no new hearing is required by the statute.

4 Case Law

5 “Local governments may impose special assessments on property owners within a
6 local LID to pay for particular improvements that specially benefit those properties.”²³

7 “Special benefit is the increase in fair market value attributable to the local improvements.”²⁴

8 [Internal quotations omitted] “To be subject to an LID assessment, a property must realize a
9 benefit that is ‘actual, physical and material[,] ... not merely speculative or conjectural.’”²⁵ An
10 assessment may not substantially exceed a property’s special benefit.²⁶ In these just mentioned
11 rules from controlling case law lies the present challenge for the Examiner, in making a
12 revised, supplemental recommendation, as the City Council’s hearing officer, and ultimately
13 for the City Council, in finalizing the assessment roll for the LID. In other words, the issue at
14 hand is: what is the actual special benefit that can be assessed to the benefitted property
15 owners in the District?

16 **IV. THE CASE FOR ONE PERCENT (1%)**

17 Over the last almost two years, while waiting on the Settlement Agreements and the
18 City Supplement, in accordance with the actual wording of the Remand Order, the present
19 Hearing Examiner has considered the case for “support for the use of a one percent (1%)
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21 ²³ *Hamilton Corner I, LLC v. City of Napavine*, 200 Wn. App. 258, 266, 402 P.3d 368 (2017), citing *Hasit*, 179 Wn. App. at 933.

²⁴ *Id.*, citing *Doolittle v. City of Everett*, 114 Wn.2d 88, 103, 786 P.2d 253 (1990).

²⁵ *Id.*, citing *Hasit*, 179 Wn. App. at 933.

²⁶ *Id.*

1 benefit to be used for all [ORC Properties].”²⁷ It should be noted that Examiner Macleod was
2 not wrong in the Original Recommendation when she stated “[t]he proposed increase of 1
3 percent suggested by Mr. Riley... is wholly without support in the record,”²⁸ when viewed
4 from the standpoint of trying to determine the actual special benefit to the ORC Properties.
5 Examiner Macleod’s finding was based on the determination that there is no empirical data to
6 show that one percent (1%) is the *actual increase* in value to the ORC Properties. There is
7 ample support for a one percent (1%) special benefit/assessment to be found essentially as a
8 subset, or lesser included amount of the Valbridge Study and City staff’s proposed four
9 percent (4%) benefit/assessment, however. Where the support for four percent (4%) may have
10 been weak, as Examiner Macleod deemed it, that weak support for the higher figure easily can
11 be used to support a lower figure. The support for four percent (4%), whether weak or not, can
12 be used to justify a one percent (1%) benefit as a discounted assessment in acknowledgment of
13 the less than completely endorsed and iron clad four percent (4%) benefit/ assessment.

14 A local legislative body’s ability under RCW 35.44.100 to lower the roll or any part
15 thereof likely is granted to address situations such as the one presented to the City Council in
16 the summer of 2017, i.e., the City advocating for a benefit/assessment not quite supported
17 enough for the hearing officer and the Council’s complete comfort.²⁹

18 All parties involved to this point have acknowledged that the after condition of the
19 ORC Properties is better than before the LID improvements were made. Even the Rileys’
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21 ²⁷ *Remand Order* at paragraph 1.

²⁸ *OR* at *FoF* 35. The Rileys’ legal counsel first suggested a benefit for the ORC Properties of 1 percent in *Ex. 59* of the Hearing Record.

²⁹ That said, under the authority of RCW 35.44.100, the City Council could have simply approved a one percent (1%) assessment for the OCR Properties on the night of August 29, 2017 and been done with it. They did not

1 reviewer clearly acknowledged that “[t]here is a benefit from the Broadway LID Project.”³⁰
2 Controlling case law supports the idea that where LID improvements have been made they are
3 presumed to result in some special benefit to the associated property.³¹ The Valbridge
4 Reassessment concludes by asserting that “[a]ny fair minded appraiser considering the LID
5 properties without the improvements versus with the improvements would conclude each
6 property is without a doubt qualitatively superior.”³² The before and after pictures in the
7 Valbridge Reassessment show this to be the case.

8 Given Council’s authority to “correct, revise, raise, lower, change, or modify the roll or
9 any part thereof,” under RCW 35.44.100, Council can already lower the proposed four percent
10 (4%) benefit/assessment to one percent (1%) if it chooses to do so based on the existing
11 record. Examiner Macleod’s suggestion that “The City Council may wish to consider
12 requesting further appraisal analysis from the Valbridge firm to more fully document the basis
13 for selecting a 4 percent increase for the [ORC Properties] within the project area”³³ was made
14 in order to attempt to arrive at a firmer determination of the *actual* special benefit, or at least
15 for a better foundation for assessing the City’s proposed four percent (4%).

16 Nothing in applicable laws requires that the entire cost of a local improvement district
17 be assessed upon the property owners in the district.”³⁴ If Council’s intention in the Remand
18 Order was essentially to “cap” the assessment on the ORC Properties (after rejecting the four
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20 necessarily need to remand the assessment roll to find support for one percent (1%) when that support could
already be found in the less-than-iron-clad case for a four percent (4%) benefit/assessment.

21 ³⁰ *Ex. 59* at pg. 18 of the Hearing Record.

³¹ *Hasit*, 179 Wn. App. at 935; *Hamilton Corner I, LLC*, 200 Wn. App. at 268.

³² *Valbridge Letter* at pg. 4.

³³ *Original Recommendation* at pg. 32, Conclusion of Law 6.c.

³⁴ *Initial Order* at pg. 3, citing *MRSC Local and Road Improvement Districts Manual for Washington State*, 6th Ed., 2009.

1 percent [4%] benefit proposed) at one percent (1%) with appropriate support, that intention
2 can be easily met. There is support in the record for assessing at least one percent (1%) as the
3 special benefit to the ORC Properties. The City Council has no obligation to assess more,
4 although there will almost certainly be budgetary impacts from assessing a lesser amount.

5 Further “support for the use of a one percent (1%) benefit to be used for all [ORC
6 Properties]”³⁵ comes from the Settlement Agreements, which both landed on a net special
7 benefit of around one to two percent (1%~2%).³⁶

8 If the Remand Order really did evidence the City Council’s intent to “[u]se...a one
9 percent (1%) benefit...for all [ORC Properties],” it may do so with support from the record,
10 simply discounting the City’s proposed 4 percent (4%) benefit/assessment. No reason is
11 needed to make such a discount, given the statutory authority of RCW 35.44.10, but if the City
12 Council needs a reason, the reason could be found in the questions that still at least partly
13 remain around the four percent (4%) proposed benefit/assessment (discussed below in section
14 V). Given the foregoing, the Hearing Examiner has no problem recommending assessing a one
15 percent (1%) special benefit as being supported by both the facts and applicable law.

16 **V. THE CASE FOR FOUR PERCENT (4%)**

17 As already mentioned above, the City Supplement/Valbridge Reassessment does not
18 address the appropriateness of a one percent (1%) benefit/assessment. Instead, it reassesses
19 and reasserts the case for a four percent (4%) benefit/assessment for all ORC Properties not
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³⁵ *Remand Order* at paragraph 1.

³⁶ *See the City Supplement* at pg. 3 of the Riley Agreement and pgs. 2 through 3 of the YWCA Settlement, as well as the email correspondence included as Attachment 3.

1 owned by the Rileys or the YWCA.³⁷ The City characterizes the Valbridge Reassessment as “a
2 thorough review and reanalysis of the[] [Valbridge] Study, including actual valuation
3 increases within the LID after the date of the study.”³⁸ Given the possibility that the City
4 Council may still want to assess the validity of a four percent (4%) benefit/assessment, that
5 option is also considered here briefly.

6 “[A]ppraising property is more of an art than a science . . . [I]t necessarily deals in
7 imponderables and may involve wide disputes in expert opinion or judgment.”³⁹ The
8 Valbridge Reassessment concedes this in saying “Appraising is not physics, and the appraisal
9 process necessarily requires the appraiser to make reasonable judgments in any valuation.”
10 The Valbridge Reassessment also acknowledges that “[a]ppraisers can have differences of
11 opinion on the exact extent of any quantitative adjustment applied in the appraisal
12 process...”⁴⁰

13 From the outset in 2017, part of the difficulty in processing the proposed four percent
14 (4%) benefit/assessment no doubt came from the City’s appraiser having used what is
15 considered to be the most complex and esoteric appraisal method in its before and after
16 valuation of the ORC Properties, specifically the “income approach.”⁴¹ Grasping the
17 intricacies of the income approach is far more difficult, and therefore more susceptible to

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19 ³⁷ For purposes of full disclosure, it should be noted here that legal counsel for the City contacted the HEX Office
20 by telephone and stated that his interactions with the City Council indicated that, contrary to the actual language
21 of the Remand Order, the Council was looking for the City to supply additional support for a four percent (4%)
benefit/assessment, which the City did. These secondhand assertions notwithstanding, the Examiner’s only direct
guidance from the City council on remand is the Remand Order.

³⁸ *City Cover Letter* at pg. 1.

³⁹ *Wash. Beef, Inc. v. Yakima County*, 143 Wn. App. 165, 170, 177 P.3d 162 (2008).

⁴⁰ *City Cover Letter* at pg. 1.

⁴¹ *OR* at FoF 29. See also explanations found at <https://www.propertymetrics.com/blog/2018/09/14/income-approach/> and <https://www.investopedia.com/terms/i/income-approach.asp> which explain the income approach rather well after declaring “The income approach is one of three techniques commercial real estate appraisers use

1 challenge, than using a less complex and more common method such as the sales comparison
2 approach to valuation, for example.⁴² Nonetheless, the income approach is a recognized
3 appraisal technique.

4 The Valbridge Reassessment essentially reviews the Valbridge Study to conclude that
5 its four percent (4%) benefit/assessment was and remains correct. Along the way, Valbridge
6 provided a more in-depth look at two specific parcels from among the ORC Properties—
7 Parcel 183 (auto body shop at 620 Broadway) and Parcel 246 (NW Dental at 725 St.
8 Helens)—to add support for its reaffirmed conclusion.

9 In any appraisal, many factors and variables have to be accounted for mostly through
10 assumptions and the “quantitative adjustment[s]” referenced above. Valbridge is not wrong
11 that appraisers, hired by different parties with different interests, will very often disagree on
12 approaches, assumptions, adjustments and conclusions. Unfortunately, this is the nature of the
13 valuation business. The complexity of Valbridge’s chosen approach could be said to have
14 made its conclusions that much more susceptible to challenge.

15 Nonetheless, the only parties that challenged the Valbridge Study with their own expert
16 appraisal review, the Rileys, have now settled with the City (perhaps still pending City
17 Council approval), as has the other challenging party, the YWCA.

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20 to value real estate. Compared to the other two techniques (the sales comparison approach and the cost approach),
21 the income approach is more complicated and therefore it is often confusing for many commercial real estate
professionals.” It should be noted that Valbridge used other tools in confirming its income approach valuation
conclusions such as its walkability study, and what it refers to as “Paired sales and a land residual analysis
showing superior underlying land values due to project LID improvements.” *Valbridge Reassessment* pg. 2.
⁴² “The Sales Comparison Approach compares recently-sold local similar properties to the subject property” to
arrive at a valuation. <https://www.thebalancesmb.com/sales-comparison-approach-in-real-estate-appraisal-2867363>.

1 Except as qualified below, the Examiner finds nothing fundamentally wrong or
2 arbitrary and capricious in the valuation resulting from the Valbridge Study and the Valbridge
3 Reassessment. It is eminently possible to disagree on causal factors and conclusions, as the
4 Rileys did at the hearing and before the City Council on their TMC 1.70 “appeal,” but again,
5 that is true in nearly any valuation of consequence.⁴³ To the extent that the City Council’s
6 rejection of “the use of a four percent (4%) benefit for [the ORC Properties]” is being
7 reconsidered, the City Council could consider a four percent (4%) benefit/assessment as valid,
8 and not necessarily as “weak” anymore based on the reassessment and additional information
9 and evaluation submitted by the City in the Valbridge Reassessment, with two qualifications.

10 First, after reading the Settlement Agreements multiple times, it appears that, as
11 directed in the Remand Order, the City did “[d]etermine support for the use of a one percent
12 (1%) benefit [or at least a heavily discounted benefit]⁴⁴ to be used for [the Riley and YWCA]
13 [ORC Properties]...” The Remand Order directed that this analysis and determination be made
14 for all ORC properties. The City did not do as the Remand Order directed. That failure,
15 however, is harmless in the long run given that the City Council can determine and assess a
16 one percent (1%) benefit on the ORC Properties in any event based on the support present for
17 the higher four percent (4%) benefit/assessment, as discussed above.

18 Again after reading the Settlement Agreements multiple times, it is not entirely clear
19 what the City’s basis is for reducing the assessment on the Riley and YWCA properties, while
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21 ⁴³ This type of disagreement is virtually routine in LID proceedings and even more common in eminent domain actions where parties’ valuations will be vastly different.

⁴⁴ The discount for the Rileys appears to be \$198,522 (\$560,607 before, and now \$362,085 proposed in the Settlement Agreement). The YWCA discount appears to be \$203,814 (\$427,137 before, and now \$223,323 proposed in the Settlement Agreement).

1 still advocating a four percent (4%) benefit/assessment on the rest of the ORC Properties.⁴⁵

2 Both property owners were given significant reductions. Perhaps the City can address its
3 rationale in more detail before the City Council when the LID is next placed on the Council's
4 agenda on the way to finalization.

5 Second, the Examiner must note that, although the Valbridge Study, as augmented by
6 the Valbridge Reassessment, gives the City a firmer basis upon which to levy a four percent
7 (4%) assessment on the remaining ORC Properties, doing so is not without some risk of
8 challenge. The City Council's final assessment roll, once approved by ordinance per RCW
9 35.44.100, is susceptible to being appealed under RCW 35.44.200. Regardless of whether the
10 City may have good statutory, procedural and substantive arguments against any appeals
11 (which it may), LID litigation in the courts has not been entirely uncommon in recent times,⁴⁶
12 and there is no guarantee against appeal here.

13 VI. CONCLUSIONS AND RECOMMENDATIONS

14 **IN FURTHERANCE OF** the Tacoma City Council's Remand Motion passed in open
15 session on August 29, 2017, regarding the final assessment roll for the Broadway Local
16 Improvement District (again, the "LID"), and **BASED ON THE FOREGOING**
17 **AUTHORITY AND ANALYSIS**, the City of Tacoma's Hearing Examiner sets forth the
18 following Supplemental Conclusions and Recommendations:
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20 ⁴⁵ Clearer "rationale" is provided in the YWCA agreement (at recital C. and in its "Rationale" column), than the
21 Riley agreement, but even so was not entirely clear to the Examiner from his third party perspective. That said,
the Examiner was not part of the negotiation of the Settlement Agreements (and rightly so), and therefore only
has the text of the Settlement Agreements to go on.

⁴⁶ See e.g., *Doolittle v. Everett*, 114 Wn.2d 88, 786 P.2d 253 (1990) (*court reversed LID assessment on four
commonly owned parcels valued together even though use was only consistent among three of the parcels and
not the fourth*); and *Hasit, LLC v. City of Edgewood*, 179 Wn. App. 917, 320 P.3d 163 (2014) (*court reversed*

1 **Conclusions:**

2 1. The Valbridge Reassessment, together with the original Valbridge Study provide
3 ample support for a one percent (1%) assessment being levied on all ORC Properties.⁴⁷ The
4 support for a one percent (1%) special benefit/assessment comes from the City's continued
5 and bolstered argument for a four percent (4%) benefit/assessment given the City Council's
6 ability to lower assessments under RCW 35.44.100. Support for four percent (4%) logically
7 can also support the lower benefit/assessment.

8 2. In the event that the City Council has reconsidered its prior rejection of a four
9 percent (4%) special benefit/assessment for the ORC Properties, and now is seeking support
10 for a higher special benefit/assessment for the ORC Properties, the Council has additional
11 clarification and support for assessing up to the City's proposed (4%) special benefit/
12 assessment on the ORC Properties. The City Council could also land on a special
13 benefit/assessment for the ORC Properties somewhere less than four percent (4%) as well and
14 still be within the Council's authority.

15 3. Although the assessment roll that ends up being finalized will likely be different
16 (i.e., amended) from the roll presented in 2017, under RCW 35.44.120, because no
17 assessments are proposed to be raised over the previous 2017 proposal, and no property is
18 being added to the proposed roll that was previously omitted, there is no need for a new
19 hearing to be held on the proposed assessment roll.

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LID assessment roll primarily for notice defects and for including costs for future upsizing in present assessments).

⁴⁷ Excluding the YWCA and Riley properties.

1 4. Although the Remand Order specified that the ORC Property owners should be
2 “allowed...an opportunity to object to any new assessment roll created,” this does not have to
3 be done in a new hearing given that there is no proposal to raise their assessment over what
4 was originally proposed and no new properties are being added that were previously omitted
5 per RCW 35.44.120. The opportunity to object can come through the TMC 1.70 “appeal”
6 process.

7 5. The Settlement Agreements appear to be reasonable in their resolution of the
8 Rileys’ and the YWCA’s objections to their originally proposed assessments of four percent
9 (4%) and are generally in keeping with the Remand Order’s directive “[t]o determine support
10 for the use of a one percent (1%) benefit...”

11 **Recommendations:**

12 1. Given the plain language of the Remand Order and the authority for doing so set
13 forth in section IV above, the Hearing Examiner has no problem recommending the
14 assessment of a one percent (1%) special benefit/assessment for the ORC Properties as being
15 supported under the record. If the City Council chooses this approach, the Public Works LID
16 Section will have to prepare a new proposed roll reflecting a one percent (1%) special
17 benefit/assessment for the ORC Property owners other than the Rileys and the YWCA.

18 2. Should the City Council be reconsidering its prior rejection of a four percent
19 (4%) special benefit/assessment for the ORC Properties, there is now better support for
20 assessing a four percent (4%) special benefit/assessment for the ORC Properties and the
21 Hearing Examiner can recommend such an assessment, but with the qualification that

1 assessing four percent (4%) against the non-appealing property owners against the backdrop of
2 the discounts given to the YWCA and the Rileys appears to create an inequity that may or may
3 not be fully supported by any material differences in the actual properties. Such a disparity in
4 assessment would also appear to not be in keeping with the language of the Remand Order that
5 seemed to dictate treating all ORC Property owners the same.

6 3. As to the Riley and YWCA properties, the Hearing Examiner has no problem
7 recommending approval of the Settlement Agreements.

8 4. The Hearing Examiner recommends that no new hearing before the Examiner be
9 held because one is not necessary under controlling law. After mailing notice of (and links to)
10 this Supplemental Recommendation to *all* property owners in the District, they will have the
11 opportunity to object through the TMC 1.70 "appeal" process

12 **DATED** this 15th day of July, 2019.

13 
14 **JEFF H. CAPELL, Hearing Examiner**

1 **NOTICE**

2 **RECONSIDERATION/APPEAL OF EXAMINER'S RECOMMENDATION**

3 **RECONSIDERATION:**

4 Any aggrieved person or entity having standing under the ordinance governing the matter,
5 or as otherwise provided by law, may file a motion with the Office of the Hearing Examiner
6 requesting reconsideration of a decision or recommendation entered by the Hearing
7 Examiner. A motion for reconsideration must be in writing and must set forth the alleged
8 errors of procedure, fact, or law and must be filed in the Office of the Hearing Examiner
9 within 14 calendar days of the issuance of the Hearing Examiner's
10 decision/recommendation, not counting the day of issuance of the
11 decision/recommendation. If the last day for filing the motion for reconsideration falls on a
12 weekend day or a holiday, the last day for filing shall be the next working day. The
13 requirements set forth herein regarding the time limits for filing of motions for
14 reconsideration and contents of such motions are jurisdictional. Accordingly, motions for
15 reconsideration that are not timely filed with the Office of the Hearing Examiner or do not
16 set forth the alleged errors shall be dismissed by the Hearing Examiner. It shall be within
17 the sole discretion of the Examiner to determine whether an opportunity shall be given to
18 other parties for response to a motion for reconsideration. The Hearing Examiner, after a
19 review of the matter, shall take such further action as he/she deems appropriate, which may
20 include the issuance of a revised decision/recommendation. (*Tacoma Municipal Code*
21 *1.23.140*)

12 **APPEALS TO CITY COUNCIL OF EXAMINER'S RECOMMENDATION:**

13 Within 14 days of the issuance of the Hearing Examiner's final recommendation, any
14 aggrieved person or entity having standing under the ordinance governing such application
15 and feeling that the recommendation of the Hearing Examiner is based on errors of
16 procedure, fact or law shall have the right to appeal the recommendation of the Hearing
17 Examiner by filing written notice of appeal and filing fee with the City Clerk, stating the
18 reasons the Hearing Examiner's recommendation was in error.

15 **APPEALS SHALL BE REVIEWED AND ACTED UPON BY THE CITY COUNCIL
16 IN ACCORDANCE WITH TMC 1.70.**

17 **GENERAL PROCEDURES FOR APPEAL:**

18 The Official Code of the City of Tacoma contains certain procedures for appeal, and while
19 not listing all of these procedures here, you should be aware of the following items which
20 are essential to your appeal. Any answers to questions on the proper procedure for appeal
21 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 verbatim recording. If a person desires a written transcript, he or she shall arrange for transcription and pay the cost thereof.

**SUPPLEMENTAL RECOMMENDATION
AFTER REMAND; L.I.D. 8645
(ASSESSMENT ROLL)**