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Sent: Thursday, January 30, 2020 4:45 PM
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Subject: Findings of Fact, Conclusions of Law, and Recommendation - HEX2019-032 (SV 124.1403) Petitioner: Rush Development Company, Inc.
Attachments: HEX2019-032_RushDevelopmentCo.,Inc.(SV124.1403)_FoF,CoL,andRecommendation_01.30.20.pdf

Tracking:	Recipient	Delivery	Read
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	Stevens, Troy	Delivered: 1/30/2020 4:47 PM	Read: 1/30/2020 4:48 PM
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	Russell, Lee	Delivered: 1/30/2020 4:47 PM	Read: 1/30/2020 4:52 PM
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Dear Parties,

Please find attached the Hearing Examiner's Findings of Fact, Conclusions of Law, and Recommendation to the City Council. A hard copy of the Recommendation can be sent to you upon request with the Hearing Examiner's office. Should the attachment fail to come through, please let me know and I will resend.

Sincerely,
Aundrea Meyers
Office Assistant
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OFFICE OF THE HEARING EXAMINER

CITY OF TACOMA

REPORT AND RECOMMENDATION

TO THE CITY COUNCIL

PETITIONER: RUSH DEVELOPMENT COMPANY, INC. **FILE NO:** HEX2019-032 (124.1403)

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 North Adams Street, located at the southeast corner of North Adams Street and a public alleyway between North 27th and North 28th Streets, to facilitate new development.

RECOMMENDATION OF THE HEARING EXAMINER

The vacation petition is hereby recommended for approval, subject to conditions, as 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 January 23, 2020. Troy Stevens of RPS represented the City. Kim Orr, Development Manager for Rush Development Company, Inc., appeared at the hearing on behalf of the Petitioner. Two members of the public offered testimony: Nicholas Bond and Michael Lonergan. Testimony was taken, exhibits were admitted, and the record closed at the conclusion of the hearing. The Hearing Examiner conducted a site visit on January 24, 2020.

ORIGINAL

FINDINGS, CONCLUSIONS, AND RECOMMENDATION:

FINDINGS:

1. Rush Development Company, Inc., a Washington corporation (the "Petitioner"¹), submitted a petition for the vacation of an approximately 17' x 20' portion of public right-of-way ("ROW") located at the southeast corner of North Adams Street and the public alleyway lying between North 27th and North 28th Streets (the "Vacation Area"). The Petitioner intends to incorporate the Vacation Area into a new multi-family residential, and possibly mixed-use development on the abutting real property.² *Stevens Testimony, Orr Testimony; Ex. C-1.*

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

The East 17.00 feet of North Adams Street lying North of City of Tacoma Ordinance No.26670, Auditor's File Number 200010030312, records of Pierce County Auditor, and South of the North line of Block 14, Lawrence Addition to Tacoma, W.T., according to the plat recorded in Volume 3 of Plats page 40, all in the Southeast quarter of the Southeast quarter of Section 25, Township 21 North, Range 2 East of the Willamette Meridian, more particularly described as follows:

BEGINNING at the intersection of the West line of said Ordinance No. 26670 and the South line of said Block 14; THENCE North 01 °19'59" East, along said West line and its Northerly prolongation, 21.33 feet to the North line of said Block 14; THENCE South 87°40' 12" East, along said North line, 17.00 feet to the Easterly margin of North Adams Street; THENCE South 01°19'59 West, along said margin, 21.13 feet, more or less, to the South line of said Block 14, South line also being the North line of said Ordinance; THENCE North 88°19'55" West, along said South line, 17.00 feet to the POINT OF BEGINNING.

(Containing 361 +/- square feet - 0.008+/-acres). *Ex. C-1.*

3. The City acquired the North Adams Street ROW by plat dedication in the Lawrence Addition to Tacoma, W.T., plat recorded in Volume 3 of Plats, Page 40, records of Pierce County,

¹ Typically, the petitioner in a street vacation proceeding is the record owner of a parcel of real property abutting the proposed vacation area. Here, Rush Development Company, Inc. does not yet own the abutting real property, but has it under contract to purchase from the owners of record, Robert H. and Joan N. Cooper. A purchaser of real property under a real estate contract acquires an ownership interest under that contractual relationship sufficient to prosecute a street vacation petition. *See e.g. Stokes v. Polley*, 145 Wn.2d 341, 348, 37 P.3d 1211, 1214 (2001) ("The equitable interest in property a purchaser of real property under a real estate contract acquires is an ownership interest, not merely an interest just in the equity.")

² Some concern was expressed by members of the public that the Petitioner was mischaracterizing its intended development as residential, as opposed to being mixed-use. As will be discussed further below, regulatory review of the Petitioner's intended development will happen in earnest separately from consideration of the vacation. How that development matches up with the underlying zoning will be considered by the City as part of that process.

Washington; and under City of Tacoma Deed No. D-378, recorded May 16, 1921, under Pierce County recording number 597691. *Stevens Testimony; Ex. C-1, Ex. C-3, and Ex. C-4.*

4. The City previously vacated a length of North Adams Street, immediately to the south of the Vacation Area, in September, 2000, under City of Tacoma Ordinance No. 26670, which Ordinance is recorded under Pierce County recording number 20010030312. *Stevens Testimony; Ex. C-1, Ex. C-4.*

5. The North Adams Street ROW varies in width from approximately 63 feet to 78 feet, depending on the measurement location. The segment of North Adams Street ROW that runs along the Petitioner's abutting property is a mostly level surface, improved at a width of approximately 25 feet of paved surface, with a rolled curb and without sidewalks. *Stevens Testimony; Ex. C-1.*

6. A car repair shop occupies the real property to the east of the roadway with on-site parking, and a U.S. Post Office branch occupies the real property to the west. Post office customers currently park perpendicular to the post office on the North Adams Street ROW. *Stevens Testimony; Exs. C-1, C-2.*

7. 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 and these were incorporated into the Report and referenced in City testimony at the hearing. These comments and requests, where appropriate, have been incorporated in this Report and Recommendation at Conclusion 9 below. *Stevens Testimony; Ex. C-1, Exs. C-7~C17.*

8. Two members of the public appeared at the hearing to testify, as set forth above. Written public comments were received at the hearing from Nicholas Bond (who also testified) and Laura Barker, and from Peter and Linda Hayes. The public testimony and comments were all aimed in opposition to the vacation, but based more so on the Petitioner's intended development of the abutting real property than on the vacation *per se*. All commenters implored the Examiner to conduct a more comprehensive review of the "entire project" including making the street vacation subject to SEPA (State Environmental Policy Act) review.³ *Bond Testimony, Lonergan Testimony; Hayes Email, Bond/Barker Letter.*

9. City staff determined that the Vacation Area is not currently needed for ROW purposes, nor is it needed for future public use. The City also determined that unencumbering the Vacation Area from the City's ROW interest would not affect local traffic patterns or needs. *Stevens Testimony; Ex. C-1, Ex. C-7, Ex. C-7a.* Public commenters speculated that the Vacation Area might become needed for a public sidewalk as the Petitioner's development moved forward. *Bond Testimony, Lonergan Testimony; Hayes Email, Bond/Barker Letter.* RPS indicated that the City had not made that determination yet. *Stevens Testimony.*

³ Bond claimed that not subjecting the vacation to SEPA review together with the Petitioner's development project would constitute unlawful segmentation. This contention is addressed in the Conclusions section below.

10. No abutting owner becomes landlocked nor will any access be substantially impaired by vacation. *Stevens Testimony; Ex. C-1.*

11. The Vacation Area neither abuts, nor is proximate to a body of water and, therefore, the provisions of RCW 35.79.035 are not implicated. *Stevens Testimony; Ex. C-1.*

12. The vacation is a public benefit because it adds to the square footage of the abutting real property potentially increasing the property taxes that can be collected therefrom, and it facilitates the provision on additional housing into the Tacoma market—a market where all indications point to the need for an increased housing supply. *Stevens Testimony; Ex. C-1.*

13. RPS' Report, which is entered into the record as Exhibit C-1, accurately describes the proposed vacation, general and specific facts about the site and Vacation Area, and applicable codes. The Report is incorporated herein by reference as though fully set forth. To the extent that any content of the Report is in conflict with this Report and Recommendation, the provisions of this Report and Recommendation shall control.

14. Public hearing notices were posted/published at various locations on November 21, 2019:

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

Additionally, yellow public notice signs were posted at the following locations on December 3, 2019:

- f. RPS placed a yellow public notice sign 133 feet north of the northeast corner of North 27th and North Adams Street.
- g. RPS placed a yellow public notice sign at the northwest corner of North 27th and North Adams Street. *Stevens Testimony; Exhibit C-1.*

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), *Banchero v. City Council of Seattle*, 2 Wn. App. 519, 468 P.2d 724 (1970); *TMC 9.22.070*.

3. “[O]rdinarily, the fee in a public street or highway remains in the owner of the abutting land, and the public acquires only the right of passage, with powers and privileges necessarily implied in the grant of the easement.” *Kiely v. Graves*, 173 Wn.2d 926, 930, 271 P.3d 226 (2012).⁴ This rule applies specifically to a street dedicated to the public through the recording of a plat. *Id.*, citing *Schwede v. Hemrich Bros. Brewing Co.*, 29 Wash. 21, 69 P. 362 (1902). Washington courts have held that a city owns only an easement in the right-of-way it receives through a dedication and that the original owner retains title to the underlying property. *Id.* As a result, a street vacation is typically not in the nature of a conveyance of property from the City to a private property owner, but rather a release of an unneeded public easement interest that unencumbers the abutting property owner’s already existing ownership.

4. 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). Bond implored the City either to combine consideration of the vacation with review of the Petitioner’s intended development, or to postpone consideration of the vacation until after SEPA review has concluded on the Petitioner’s project.⁵ The Examiner concludes that there is no requirement in the law to grant either request. There is no unlawful segmentation present here, contrary to Bond’s claim. Street vacation petitions are routinely determined as a stand-alone precursor to a permitting entitlements process that follows afterwards. Street vacations are already exempt from SEPA review under WAC 197-11-800(2)(i). This particular street vacation petition was not purposefully separated out from the entitlements process for Petitioner’s development in order to avoid SEPA review. In that same vein, Petitioner’s project does not become exempt from SEPA review as a result of the street vacation not being combined into that process or otherwise delayed. Any cumulative impacts from the vacation and the project can be adequately considered in the City’s review of the project.⁶

5. That said, “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.”⁷

6. Petitions for the vacation of public ROW must be consistent with the following criteria:

1. The vacation will provide a public benefit, and/or will be for a public purpose.

⁴ Citing *Finch v. Matthews*, 74 Wn.2d 161, 167-68, 443 P.2d 833 (1968).

⁵ This is where Bond claimed the City would be engaging in unlawful segmentation if the vacation was not either combined with the project for purposes of SEPA review, or delayed until SEPA review of the project was concluded. “‘Segmentation’ occurs when project proponents divide their proposals into SEPA-exempt *segments* and, thus, avoid SEPA review of individual applications’ environmental impacts.” *Alpine Lakes Prot. Soc’y v. Dep’t of Ecology*, 135 Wn. App. 376, fn7, 144 P.3d 385 (2006), citing *WAC 197-11-305(1)(b)*.

⁶ See *Batchelder v. City of Seattle*, 77 Wn. App. 154, 890 P.2d 25 (1995)(*separate review and approval of a short plat, design departure and substantial development permit did not mean that the cumulative impacts of the proposed project were not analyzed so as to constitute unlawful segmentation or piecemealing*).

⁷ *Puget Sound Alumni of Kappa Sigma v. Seattle*, 70 Wn.2d 222, 238-239, 422 P.2d 799, 808-809 (1967).

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* 9.22.070.⁸

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

8. 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 ROW set forth at Conclusion 6 above, provided the conditions recommended below are imposed and met. No potential for landlocking an abutting owner exists from granting the petition. The Vacation Area is not currently used as ROW, nor *does the City* perceive any future use of the Vacation Area for that purpose.⁹ 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 Petitioner’s abutting real property, and by facilitating the redevelopment of that property in a manner that will add housing to the Tacoma market.¹⁰ “The fact that some one private party may benefit directly or incidentally from a street vacation does not mean that the vacation will not also serve a public use or purpose.”¹¹ The vacation of a public ROW interest is inherently a process of privatization.

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

⁸ For consistency, outline numbering of the criteria is kept the same as in the original TMC text.

⁹ Public commenters speculated that the Vacation Area may need to be used for a sidewalk as part of the Petitioner’s development. Whether that becomes true remains to be seen, but that appears to be a risk that the Petitioner is willing to take. In any event, if the City later determines sidewalks in this location to be the necessary, more area than just the 17’ x 20’ Vacation Area will likely be needed to do anything meaningful, and this consideration, as with many others, will be considered as part of the entitlements review for Petitioner’s project. This small “notch” of ROW presents very little utility by itself, and is the archetype for release to its owner through vacation.

¹⁰ The public benefit criterion is not a stringent one. Only where a street vacation present *no possible benefit* to the public will a court review a city council’s legislative determination. *Banchero v. City Council of Seattle*, 2 Wn. App. 519, 468 P.2d 724 (1970).

¹¹ *Id.*, citing *Freeman v. Centralia*, 67 Wash. 142, 120 P. 886 (1912).

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 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.*

2. TACOMA POWER

Tacoma Power has requested that a 5-foot wide easement be reserved for overhead power lines from the northeast property corner to the northwest property corner to accommodate the continued existence of utility lines. The Examiner recommends that this request be granted and the easement reserved.

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 Petitioner represents that any development or other activities facilitated by the vacation will comply with such laws, regulations, and ordinances. If, during the term of any approval granted, any development or other activities permitted do not comply with such laws, regulations, or ordinances, the Petitioner agrees to promptly bring such development or activities into compliance.

C. ADVISORY NOTES:

1. Other than the conditions/concerns already expressly set forth herein, no objection or additional comment was received from the governmental agencies, City departments/divisions, and utility providers to whom the City circulated this petition.

2. The Connection Charge In-Lieu-of-Assessment (In-Lieu-of-Assessment Charge[s]) estimate of \$16.58, provided by the City's Public Works Department in Exhibit C-1, is advisory only, and payment thereof is not a condition to this vacation. The sum can be voluntarily paid at the time of compensation for the Vacation Area. If not, the In-Lieu-of-Assessment Charge(s) will be required to be paid in conjunction with any future permitting on, or development of the Vacation Area, and may be subject to increase with the passage of time.

10. Accordingly, the petition is recommended for approval, subject to the conditions set forth in Conclusion 9 above.

11. Any above stated conclusion, which may be more properly deemed or considered a finding, is hereby adopted as such.

RECOMMENDATION:

The present vacation petition is hereby recommended for approval, subject to conditions contained in Conclusion 9 above.

DATED this 30th day of January, 2020.



JEFF H. CAPELLI, Hearing Examiner

ORIGINAL

NOTICE

RECONSIDERATION/APPEAL OF EXAMINER'S RECOMMENDATION

RECONSIDERATION:

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

APPEALS TO CITY COUNCIL OF EXAMINER'S RECOMMENDATION:

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

Appeals shall be reviewed and acted upon by the City Council in accordance with *TMC 1.70*