

**OFFICE OF THE HEARING EXAMINER**

**CITY OF TACOMA**

**REPORT AND RECOMMENDATION**

**TO THE CITY COUNCIL**

**PETITIONER:** SoHo Properties Inc. d/b/a SoHo Properties 2 Inc., a Utah corporation licensed to do business in the state of Washington.

**FILE NO:** HEX2023-001 (124.1439)

**SUMMARY OF REQUEST:**

A petition by SoHo Properties Inc. d/b/a SoHo Properties 2 Inc. (“Petitioner” or “Soho”) to vacate portions of South 23rd Street and South Cushman Avenue, to cure existing building encroachments.

**RECOMMENDATION OF THE HEARING EXAMINER:**

The vacation petition is hereby recommended for approval, subject to conditions, as set forth herein.

**PUBLIC HEARING:**

After reviewing Real Property Services’ 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 February 16, 2023.<sup>1</sup> Senior Real Estate Specialist, Troy Stevens, of Real Property Services (“RPS”) represented the City. Ben Ferguson, Ferguson Architecture, appeared on behalf of the Petitioner SoHo Properties Inc., d/b/a SoHo Properties 2 Inc.<sup>2</sup> Testimony was taken, exhibits were admitted, and the record closed at the conclusion of the hearing.

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<sup>1</sup> This hearing was conducted with in-person participation available in the City Council Chambers, and also participation over Zoom at no cost to any participant with video, internet audio, and telephonic access. The Petitioner’s and the City’s representatives participated over Zoom. No members of the public joined in the hearing over the internet or appeared in the City Council Chambers.

<sup>2</sup> Ben Ferguson was given verbal authorization to represent the corporate entity petitioner at hearing by Sean McNaughton, a registered “governor” of SoHo Properties Inc., d/b/a SoHo Properties 2 Inc., who was also present at the hearing through Zoom. Neither party’s representatives called additional witnesses.

## **FINDINGS, CONCLUSIONS, AND RECOMMENDATION:**

### **FINDINGS:**

1. The Petitioner, SoHo Properties Inc. d/b/a SoHo Properties 2 Inc., a Utah corporation licensed to do business in the state of Washington (the "Petitioner" or "Soho"), has requested the vacation of portions of South 23rd Street and South Cushman Avenue (collectively the "Vacation Areas"). The Vacation Areas are legally described as follows:

That portion of South Cushman Avenue and South 23rd Street lying Westerly and Southerly of Block 27, Smith and Fife's Addition to New Tacoma, as recorded in Book 1 of Plats at Page 63, in Pierce County, Washington, more particularly described as follows:

BEGINNING at the Southwesterly corner of said Block 27;  
THENCE North 82°35'30" East, along the Southerly right-of-way margin of said South 23rd Street, 48.00 feet;  
THENCE South 07°24'30" East, 3.00 feet to a line 3.00 feet South of and parallel with said margin;  
THENCE South 82°35'30" West, 50.00 feet to a line 2.00 feet West of and parallel with the East right-of-way margin and its Southerly prolongation of South Cushman Avenue;  
THENCE North 07°25'08" West, along said parallel line, 44.00 feet;  
THENCE North 82°34'52" East, 2.00 feet to the Easterly right-of-way margin of said South Cushman Avenue;  
THENCE South 07°25'08" East, along said margin, 41.00 feet to the TRUE POINT OF BEGINNING.

(Containing approximately 232 square feet - 0.005 acres)

All situate in the City of Tacoma, County of Pierce, State of Washington. *Exs. C-1~ C-3.*

2. The Petitioner's intention is to acquire those portions of South 23rd Street and South Cushman Avenue, to cure existing building encroachments that will then facilitate redevelopment of Petitioner's property abutting the Vacation Areas as a duplex. *Stevens Testimony, McNaughton Testimony; Ex. C-1.*

3. Both South 23rd Street and South Cushman Avenue were platted as 80-foot-wide public right-of-way. The improved street areas for both have sidewalk, curb, and gutter. There are also recently constructed ADA ramps and a power pole at the northeast corner of the intersection of these two streets. South Cushman Avenue has a grass planting strip, and there is a driveway present just north of the Vacation Areas and north of the Petitioner's building. On South 23rd Street, there is a planting strip that is mostly paved in front of the adjacent building. *Ex. C-1, Ex. C-2.*

4. The City acquired the South 23rd Street and South Cushman Avenue right-of-way areas by plat dedication in the Map of Smith & Fife's Addition to New Tacoma, W.T., filed of record October 25, 1883, in the Office of the County Auditor. *Ex. C-1, Ex. C-3.*

5. The requested vacation has been reviewed by outside quasi-governmental agencies, City departments/divisions, and utility providers. Reviewing agencies indicated that they have no concerns or objection to the proposed vacation beyond easement reservations as addressed below. *Exs. C-4~ C-15.*

6. The Petitioner indicated that it has no objection to City staff's recommended conditions of approval. *McNaughton Testimony.*

7. No members of the public appeared at the hearing to offer testimony.

8. City staff determined that the public would benefit from the proposed vacations to the extent that they add taxable square footage to the Petitioner's property to which they attach, and thereby likely increase tax revenue even if only incrementally. The Vacation Areas are intended to facilitate the redevelopment of Petitioner's property for housing which is in short supply in the Tacoma market. This redevelopment could also be considered a benefit to the public. *McNaughton Testimony; Ex. C-1.*

9. Except for the rights to be reserved under (a) City utility easement(s), the Vacation Area is not needed for future public use by the City, and no abutting owner becomes landlocked, nor will their access be substantially impaired by the vacations. The Vacation Areas are currently not used for any public right-of-way purpose. *Ex. C-1, Ex. C-4.*

10. The Vacation Areas do not abut, nor are they proximate to a body of water and, therefore, the provisions of RCW 35.79.035 are not implicated. *Ex. C-1.*

11. No environmental review of the proposed vacation was conducted. *See Conclusion of Law 3, below.*

12. RPS' Preliminary Report, as entered into the hearing record as Exhibit C-1 (the "Report"), accurately describes the requested vacation, general and specific facts about the abutting properties, and the Vacation Areas and applicable codes. The Report is incorporated herein by this reference as though fully set forth. Any conflict between this Recommendation and the Report should be resolved in favor of this Recommendation, however.

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

On January 12, 2023-

- 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/cms/one.aspx?objectId=2283>.
- c. Public notice was advertised in the Daily Index newspaper.
- d. A public notice mailing was sent to all parties of record within a 300-foot radius of the Vacation Areas.

- e. Public Notice was advertised on Municipal Television Channel 12.

On January 17, 2023-

- f. A yellow public notice sign was posted 44 feet north of the northeast corner of South 23rd Street and South Cushman Avenue.
- g. A yellow public notice sign was posted 50 feet east of the northeast corner of South 23rd Street and South Cushman Avenue. *Ex. C-1.*

14. Any conclusion hereinafter stated which may be more properly deemed a finding 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, but without a final decision), 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 (right-of-way) 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.”<sup>3</sup>

5. If they are to be approved, petitions for the vacation of public right-of-way must be consistent with the following criteria:<sup>4</sup>

- 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.

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<sup>3</sup> *Puget Sound Alumni of Kappa Sigma v. Seattle*, 70 Wn.2d 222, 238-239, 422 P.2d 799, 808-809 (1967).

<sup>4</sup> For consistency, outline numbering of the criteria is kept the same as in the original TMC text.

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 Petitioner must demonstrate, by a preponderance of the evidence, that its vacation petition meets the foregoing criteria. *See TMC 1.23.070.* The Petitioner is entitled to rely on all evidence made part of the record, whatever the source of that evidence.

7. Findings entered herein, based upon substantial evidence in the hearing record, support a conclusion that the requested partial street vacations conform to the criteria for the vacation of right-of-way set forth at Conclusion 5 above, provided the conditions recommended below are met. The public would experience benefits from the tax revenue and additional housing that the requested vacations are intended to facilitate. The requested partial street vacations would not impair traffic circulation, landlock any abutting owner, or adversely affect the public need, because these unimproved side areas of the existing right-of-way are not being used for any sort of public traversal in any event. The easement reservations referenced herein will sufficiently protect the need for on-going utility use.

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

**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 Areas. 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 right-of-way. *TMC 9.22.010.*

2. TACOMA POWER

- a. Tacoma Power requests an easement be reserved over the entire area proposed for vacation along the north side of South 23rd Street for power facilities; and,
- b. Tacoma Power also requests an easement be reserved over the southerly 6 feet of the 2-foot wide Vacation Area in South Cushman Avenue.

**B. ADVISORY NOTE:**

RPS/IN-LIEU

Any LID estimates or other in-lieu amounts referenced in the RPS Report are set forth as advisory comments only, and are not included here as a condition of

approval; they can be voluntarily paid as part of the vacation process, or they may be required at the time of any subsequent development of the Vacation Areas. Such fees are subject to increase until paid.

Beyond 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.

**C. 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.

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 the conditions contained in Conclusion 8 above.

**DATED** this 21st day of February, 2023.

  
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**JEFF H. CAPELL, Hearing Examiner**

## NOTICE

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

#### **RECONSIDERATION:**

Any aggrieved person or entity having standing under the ordinance governing the matter, or as otherwise provided by law, may file a motion with the office of the Hearing Examiner requesting reconsideration of a decision/recommendation 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***