June 20, 2017

FIRST CLASS MAIL DELIVERY

See Transmittal List

Re: File No. HEX.NCSD.2017-004
L.I.D.8645 – Final Assessment Roll

To All:

In regard to the above referenced matter, please find enclosed a copy of Tacoma Hearing Examiner Capell’s Order Granting City’s Request for Clarification and Denying City of Tacoma and Grigsby Motions for Reconsideration entered in June 20, 2017.

Sincerely,

Louisa Legg
Office Administrator

Enclosure (1) – Order Granting/Denying Motions

CERTIFICATION

On this day, I forwarded a true and accurate copy of the documents to which this certificate is affixed via United States Postal Service postage prepaid or via delivery through City of Tacoma Mail Services to the parties or attorneys of record herein.
I certify under penalty of perjury under the laws of the State of Washington that the foregoing is true and correct.
DATED June 20, 2017, at Tacoma, WA.

Louisa Legg
TRANSMITTAL LIST - HEX 2017-004 – L.I.D. 8645

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Larry L. Strege, 505 Broadway, Unit 600, Tacoma, WA 98402-3997
Patricia A. Wagner, 235 Broadway, Unit 240, Tacoma, WA 98402-4009
Alex White, Managing Member, Evergreen Investments of WA, LLC, 744 Market Street, Unit 102B, Tacoma, WA 98402-3700
Jacqueline Wibby, 201 Broadway, Unit A, Tacoma, WA 98402-4020
The Winthrop, LP, c/o Redwood Housing Partners, LLC, ATTN: Ryan Fuson, 329 Primrose Road, Unit 347, Burlingame, CA 94010-4004

**Interoffice Mail Delivery:**
Tacoma City Clerk’s Office
Ralph Rodriguez, LID Administrator, Public Works, City of Tacoma
Michael Garrison, LID Representative, Public Works, City of Tacoma
Liz Wheeler, Customer Service Representative, Finance, City of Tacoma

747 Market Street, Room 720 • Tacoma, Washington 98402-3768 • (253) 591-5195 • Fax (253) 591-2003
OFFICE OF THE HEARING EXAMINER
CITY OF TACOMA

In the Matter of:
LOCAL IMPROVEMENT DISTRICT NO. 8645 (FINAL ASSESSMENT ROLL).

HEX2017-004
ORDER GRANTING CITY’S REQUEST FOR CLARIFICATION AND DENYING CITY OF TACOMA AND GRIGSBY MOTIONS FOR RECONSIDERATION

AFTER THE PUBLIC HEARING in the above-captioned matter regarding the final assessment roll for the Broadway Local Improvement District (L.I.D.) was held on March 29 and 30, 2017, before PHYLLIS K. MACLEOD, the Hearing Examiner for the City of Tacoma at the time of the hearing (hereinafter “Examiner Macleod”), Examiner Macleod issued in writing that certain document titled FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION dated May 26, 2017 (hereinafter the “Recommendation”). Examiner Macleod has since retired.¹

After issuance of the Recommendation, two requests for reconsideration have been received in the Office of the Hearing Examiner. The first was filed as a Memo during normal business hours on June 9, 2017, by the City of Tacoma Public Works Department (hereinafter “PWD”) through its L.I.D. Administrator, Ralph Rodriguez (the “PWD Request”). The second was submitted by e-mail at approximately 11:28 pm on June 9, 2017, by Paul Grigsby,

¹ At the close of the hearing on March 30, 2017, in conjunction with agreeing to keep the record open until May 9, 2017, Examiner Macleod made it clear to all in attendance that she was retiring.

ORDER GRANTING CLARIFICATION AND DENYING RECONSIDERATION
L.I.D. 8645 (ASSESSMENT ROLL) - 1 -
apparently on behalf of the owner of “753 St. Helens Avenue, Tacoma, Washington” Norma Rae Grigsby (the “Grigsby Request”).

I. APPLICABLE LAWS/RULES ON RECONSIDERATION

Requests for reconsideration of a Hearing Examiner recommendation are directly governed by Tacoma Municipal Code (“TMC”) section 1.23.140. Under TMC 1.23.140, an aggrieved person or entity with standing may request reconsideration of an L.I.D. recommendation even though such a recommendation is not a final determination. The City Council makes final decisions on L.I.D. assessments pursuant to Revised Code of Washington (“RCW”) 35.44.080-100.

Given that both requests were submitted to the Office of the Hearing Examiner on June 9, 2017, and inasmuch as neither TMC 1.23.140 nor the RPH makes mention of any timing requirement beyond reconsideration requests having to be filed within “14 calendar days of the issuance of the Examiner’s…recommendation…,” both requests are technically timely.

Similarly, neither TMC 1.23.140 nor the RPH imposes any requirements as to form for reconsideration requests other than to state that, “A motion for reconsideration must be in writing and must set forth the alleged errors of procedure, fact, or law…” (TMC 1.23.140).

The Hearing Examiner has chosen to respond to the PWD Request and the Grigsby

ORDER GRANTING CLARIFICATION AND DENYING RECONSIDERATION
L.I.D. 8645 (ASSESSMENT ROLL)
Request for reconsideration together in this Order for purposes of economy and timing.

II. ISSUES ON RECONSIDERATION

Presented in order of filing, the requesting parties’ issues on reconsideration appear to be as follows:³

A. City of Tacoma Public Works Department (“PWD”) Issues.

1. Whether all references in the Recommendation to “structural block” should be changed to “structural walk”?

2. Whether Conclusion of Law 6.c. of the Recommendation was in error, because, as PWD asserts, the evidence and testimony presented at the hearing was sufficient to support the L.I.D. Section and its appraiser’s benefit determination of four percent (4%) for all “Office/Retail/Commercial” properties?

2a. Whether, at this stage of the proceedings, the Hearing Examiner can consider PWD’s newly submitted support⁴ for its contention that its benefit determination of four percent (4%) to “Office/Retail/Commercial” properties is correct?

3. Whether Conclusion of Law 6.d. of the Recommendation and related Finding of Fact 57 were in error such that Examiner Macleod’s recommended reduction in interest charged to property owners should be reversed?

3a. Whether the Hearing Examiner can consider PWD’s newly submitted “clarification of the timeline of the project”⁵ at this stage of the proceedings?

4. Whether Conclusion of Law 6.g. of the Recommendation and related Finding of Fact 40 were in error such that Examiner Macleod’s recommended assessment reduction for the Winthrop, LP property should be reversed?

5. Whether the Winthrop, LP property should not be granted any reduction in interest owed if the reduction to its general assessment is not reversed (see Issue 4 above).

³ The Examiner has added Issues 2a. and 3a. based on the content of both the PWD Request and Grigsby Request as submitted.
⁴ Included as Exhibit A to the PWD Request for reconsideration.
⁵ Included as Exhibit B to the PWD Request for reconsideration.

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L.I.D. 8645 (ASSESSMENT ROLL) - 3 -
B. Norma Rae Grigsby ("Grigsby") Issues.

1. Whether Grigsby was erroneously charged $6,341.17 for "Interior Wall and Ceiling Removal"?

2. Whether an "additional work performed assessment" of $32,228.69 should have been pro-rated to account for areas in the vault occupied by Tacoma Power facilities?

III. AUTHORITY AND ANALYSIS

The Hearing Examiner makes recommendations to the City Council on L.I.D. assessments under TMC 1.23.050A.3 after conducting a public hearing as the designated officer of the City Council pursuant to RCW 35.44.070 and TMC 10.04.065. As already mentioned above, TMC 1.23.140 provides aggrieved parties with standing the ability to file requests for reconsideration of a Hearing Examiner recommendation even though such a recommendation is not a final decision. Although the Hearing Examiner could make revisions to an L.I.D. recommendation after considering a party's request for reconsideration, the City Council is not obligated to follow a Hearing Examiner recommendation. "The City Council may correct, revise, raise, lower, change, or modify the roll or any part thereof, or set aside the roll and order the assessment to be made de novo..." TMC 1.70 sets forth the process for "aggrieved person[s] having legal standing" to address the City Council prior to making its decision on the Hearing Examiner's Recommendation.7

There are at least two significant obstacles to the present Hearing Examiner making any revisions to Examiner Macleod's Recommendation. First, and perhaps most obvious

6 RCW 35.44.100. See also Hastie, LLC v. City of Edgewood, 179 Wn. App. 917, 934, 320 P.3d 163 (2014).
7 See the Recommendation at p. 34, beginning at ln. 12.
among these obstacles, is the fact that the present Hearing Examiner did not hold this position
at the time of the public hearing on March 29 and 30, 2017, and as a result was not in a
position to hear the testimony given at the hearing with the same charge, in the same manner,
and with the same level of scrutiny as Examiner Macleod.\textsuperscript{8} Examiner Macleod’s retirement
obviously prevents her from considering and responding to the two filed requests.

Second, both requests for reconsideration rely on newly submitted documents that were
not before Examiner Macleod and that were not submitted prior to the closing of the record.
Reconsideration is generally not an opportunity to establish a position that the moving party
failed to establish during the main course of the proceedings.\textsuperscript{9} New evidence is typically only
considered on reconsideration if it is not just new, but also “newly discovered.” Generally, in
most Washington State cases, in order to qualify as “newly discovered,” the evidence must
meet the test set forth in Civil Rule 59(a)(4)\textsuperscript{10} which states in pertinent part as follows:

(a) Grounds for New Trial or Reconsideration. On the motion of the party
aggrieved,...reconsideration [may be] granted. Such motion may be
granted for any one of the following causes materially affecting the
substantial rights of such parties:

....

(4) Newly discovered evidence, material for the party making the
application, which the party could not with reasonable diligence have
discovered and produced at the trial;

\textsuperscript{8} In the spirit of full disclosure, the present Hearing Examiner did attend the majority of the hearing on both days,
but not in any formal capacity for the Office of the Hearing Examiner.
\textsuperscript{9} Reconsideration is not intended to be a second bite at the apple. 15A Karl B. Tegland & Douglas J. Ende,
\textsuperscript{10} The Examiner recognizes that the requests for reconsideration addressed here are not Superior Court
proceedings, and therefore, the Civil Rules (“CR”) do not strictly apply. That said, the CRs are, by analogy, a
good guide to follow for procedural and evidentiary issues, even in these proceedings.

ORDER GRANTING CLARIFICATION
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It does not appear from the requesters’ submissions that any of the newly submitted materials qualify as “newly discovered evidence” as will be addressed further below.

A. City of Tacoma Public Works Department’s Request for Reconsideration.

The individual requests for reconsideration, and the issues raised therein, will now be addressed specifically in turn starting with the PWD Request:

**Issue 1.** Whether all references in the Recommendation to “structural block” should be changed to “structural walk”?

PWD’s first issue is a request for correction or clarification rather than reconsideration. This request is easily granted. The references in the Recommendation to “structural block” were erroneous and should have instead read “structural walk” as PWD contends. PWD is correct in its request that “Changing of the wording does not change the intent of the Examiner’s findings.” Nevertheless, for the sake of correctness and accuracy, all references to “structural block” in the Recommendation should be considered to read “structural walk” instead.

**Issue 2.** Whether Conclusion of Law 6.c. of the Recommendation was in error, because, as PWD asserts, the evidence and testimony presented at the hearing was sufficient to support the L.I.D. Section and its appraiser’s benefit determination of four percent (4%) for all “Office/Retail/Commercial” properties?

**Issue 2a.** Whether, at this stage of the proceedings, the Hearing Examiner can consider PWD’s newly submitted support for its contention that its benefit determination of four percent (4%) to “Office/Retail/Commercial” properties is correct?

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11 PWD points out instances of this error at “paragraph 3 at page 3 and paragraph 48 at page 23.” *Request for reconsideration*, at p. 1.
PWD Issue 2 is essentially a claim that Examiner Macleod erred by not following the L.I.D. Section and its appraiser’s benefit determination of four percent (4%) for all “Office/Retail/Commercial” properties in spite of there being sufficient evidence to support such a finding. As such, the issue is not unlike a “sufficiency of evidence” challenge. PWD attempts to bolster its position on the four percent (4%) increase with newly submitted material comprising its Exhibit A to its Request for reconsideration.

It should be noted that PWD’s four percent (4%) increase approach is not, of itself, prohibited or otherwise per se invalid under governing law. Examiner Macleod simply found the evidence at the hearing insufficient to support a blanket four percent (4%) increase for all “Office/Retail/Commercial” properties after presiding at the hearing and weighing all the testimony and evidence.

In most trial, or trial-like proceedings where testimony is given and other evidence is presented, substantial deference is given to the findings that result, “Because the trial court has the opportunity to hear the testimony and observe the witnesses…” Although the March 2017 hearing here was not a trial, that part of the L.I.D. proceeding functions the most like a trial and it is where all testimony is taken and other evidence ruled on and admitted (or rejected).

For the present Examiner to second guess Examiner Macleod’s findings and

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12 See RCW 35.44.047, which states in part: “Notwithstanding the methods of assessment provided in RCW 35.44.030, 35.44.040 and 35.44.045, the city or town may use any other method or combination of methods to compute assessments which may be deemed to more fairly reflect the special benefits to the properties being assessed.”

conclusions after the fact makes little sense and is not well supported by analogous case law, particularly in the present context where the Recommendation is not a final decision, and any “aggrieved person[s] having legal standing”\(^\text{14}\) can still be heard by the City Council before it does render a final decision on the L.I.D. final assessment roll here. It is questionable whether arguing sufficiency of the evidence, in the form of disagreeing with the Recommendation’s conclusions based on that evidence, is, in actuality an “error of procedure, fact, or law…” subject to reconsideration in any event.\(^\text{15}\) As such, the present Examiner is not inclined to revise the Recommendation on this issue. PWD is, of course, free to argue for a different conclusion from the City Council.

Regardless of the foregoing, the Recommendation follows the progression or pattern prescribed in controlling case law for assessing evidence in an L.I.D. hearing in arriving at its conclusions regarding the four percent (4%) increase.\(^\text{16}\) PWD presented its reasoning for the four percent (4%) increase while operating under the presumption that its assessment is fair and correct. This presumption was challenged by various property owners through testimony and the presentation of contrary appraisal evidence/opinion.\(^\text{17}\) Following the Hasit approach, the Recommendation recognizes that neither side presented evidence that was satisfactorily conclusive on this issue.\(^\text{18}\) The Recommendation essentially endorses the City Council.

\(^14\) TMC 1.70.010A.
\(^15\) TMC 1.23.140.
\(^16\) This process is essentially as follows: (1) PWD benefits from a presumption that L.I.D. property owners received a benefit from the improvements, and that the proposed assessment is fair; (2) an owner challenging this presumption bears the burden of producing evidence to the contrary; after which (3) the burden of proof would shift back to PWD to prove the validity of its proposed assessment. Hasit, 179 Wn. App. at 935-936; as well as the Recommendation at p. 31, Conclusion of Law 5.
\(^17\) See Recommendation at pp. 14-17, ¶¶ 28-35.
\(^18\) See Recommendation at p. 32, Conclusion of Law 6.c. (“Further appraisal analysis is needed to support the 4 percent benefit suggested for this type of property.”)

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City of Tacoma
Office of the Hearing Examiner
Tacoma Municipal Building
747 Market Street, Room 720
Tacoma, WA 98402-3768
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exercising its ability to revise/lower PWD’s proposed assessment of a four percent (4%) increase based on the present record and without more evidence and analysis being presented on the issue.

PWD did present additional analysis/explanation on this issue in the form of Exhibit A to its Request for reconsideration. The Examiner does not fault PWD for doing so, but is unable to consider this analysis at present without direction from the City Council essentially remanding the L.I.D. back to the Hearing Examiner for additional proceedings and augmentation of the record because the record for the hearing has closed. PWD’s Exhibit A is not “newly discovered” evidence that, with reasonable diligence, could not have been discovered and produced at the hearing. Nothing in Exhibit A is of a nature that it could not have been presented at the hearing or before the record closed on May 9, 2017.

The present Examiner recognizes the irony in the Recommendation suggesting, at the challenged Conclusion of Law 6.c. that:

The City Council may wish to consider requesting further appraisal analysis from the Valbridge firm to more fully document the basis for selecting a 4 percent increase for office/retail/commercial properties within the project area.

in light of the present position of the proceedings not allowing for further supplementation of the record. Such could be accomplished on remand, however. Short of that, the present Examiner declines to grant PWD’s requested relief on reconsideration for Issues 2 and 2.a. based on the existing record.

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19 Indeed the wording of Conclusion of Law 6.c. may have been read to invite it.
21 Recommendation at pp. 4-5, ¶ 6.

ORDER GRANTING CLARIFICATION
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Issue 3. Whether Conclusion of Law 6.d. of the Recommendation and related Finding of Fact 57 were in error such that Examiner Macleod’s recommended reduction in interest charged to the property owners should be reversed?

Issue 3a. Whether the Hearing Examiner can consider PWD’s newly submitted “clarification of the timeline of the project” at this stage of the proceedings?

Similar to Issues 2 and 2.a. above, Examiner Macleod was in a much better position than the present Examiner to decide these issues having heard the testimony, having received all other evidence, and having reviewed the same. She then made her recommendation on the contested interest charged to property owners in L.I.D. 8645 that PWD contests. Just as with its Exhibit A, PWD’s newly submitted timeline in Exhibit B of its request is not newly discovered evidence. Rather, it is additional explanation or argument as to why its position on the interest charges is justified and the Recommendation should be revised—specifically Conclusion of Law 6.d. Under the circumstances, and given that the timeline in Exhibit B of the Request is not newly discovered evidence, the present Examiner sees no viable errors of procedure, fact, or law upon which reconsideration can be granted on Conclusion of Law 6.d.—only new argument. The Recommendation on this point is supported by the existing evidence, specifically PWD’s own admissions that the close-out for L.I.D. 8645 was significantly delayed due to the City’s own prioritization.22 Examiner Macleod’s recommended adjustment of the passed on interest to a more typical (and originally projected by the City) period of 18 months is not unreasonable under the circumstances.

Issue 4. Whether Conclusion of Law 6.g. of the Recommendation and related Finding of Fact 40 were in error such that Examiner Macleod’s recommended assessment reduction for the Winthrop, LP property should be reversed?

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22 See Recommendation at p. 9, ln. 1-2.
In its Request for reconsideration, PWD argues that the Recommendation erred at Conclusion of Law 6.g. because the Winthrop, LP property assessment “was incorrectly decreased without consideration for the first floor retail or the residual value remaining after the rental agreements expire.” This contention does not comport the actual contents of the Recommendation, specifically paragraphs 36 and 37 where the Recommendation expressly calls out the difference between the residential portion of the property—offered by the owner as justification that there was no benefit to the property whatsoever—and the “street level retail component.” The property owner claimed no special benefit at all with support from two appraisers for its contention based solely on the affordable housing limitations on the residential portion of the property. PWD’s appraisal discounted limitations on the special benefit from those same affordable housing controls in place on the property. The Recommendation found a supportable middle ground. Both sides’ contentions were considered in arriving at the recommended reduction. Under the circumstances, the present Examiner cannot state that doing so was in error. PWD, of course, can always argue otherwise to the City Council as the Council is not obligated to follow the Recommendation.

**Issue 5.** Whether the Winthrop, LP property should not be granted any reduction in interest owed if the reduction to its general assessment is not reversed (see Issue 4 above).

PWD’s final issue cannot appropriately be characterized as setting forth an error of procedure, fact, or law upon which reconsideration can be granted. Rather, PWD’s contention is simply that if the reduction in Conclusion of Law 6.g. is upheld, the Winthrop, LP property should not receive any reduction in its interest (Issue 3 above from Conclusion of Law 6.d.).

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23 See Recommendation at p. 18, ¶ 37.
PWD makes this contention without any factual or legal authority stated in support. As such, the present Examiner sees no reason to revise the Recommendation on this point. If the interest passed on to the property owners is reduced, per the Recommendation, there is no reason such reduction should be denied the Winthrop, LP property.

B. Grigsby’s Request for Reconsideration. Norma Rae Grigsby owns the real property located at 753 St. Helens Ave., and as such is a property owner affected by L.I.D. 8645. “Paul Grigsby” forwarded an e-mail on her behalf at 11:28 pm on June 9, 2017 requesting “Reconsideration/Appeal of Findings of Fact related to LID 8645.” Grigsby’s issues, to the extent correctly ascertained by the Examiner, as stated above, are as follows:

Issue 1. Whether Grigsby was erroneously charged $6,341.17 for “Interior Wall and Ceiling Removal”?

Issue 2. Whether an “additional work performed assessment” of $32,228.69 should have been pro-rated to account for areas in the vault occupied by Tacoma Power facilities?

Prior to the hearing, Grigsby submitted the materials included in the record as Exhibit 18. In Exhibit 18, Grigsby claimed that she was not liable for “eliminating the underground vault located beneath the sidewalk in front of the Subject Property” and that she had hired her own contractor to perform that same work. Issue 1 above is essentially the same issue that was raised by Grigsby in Exhibit 18 and at the hearing. That issue was addressed at the hearing and Examiner Macleod made her recommendation based on the evidence presented at that time.24 Grigsby’s request for reconsideration essentially just restates this same objection.

24 See Recommendation at p. 22, ¶ 46.
Grigsby’s Issue 2 appears to be raised for the first time on reconsideration. Grigsby’s argument regarding pro-ration of amounts owed for sidewalk repair is based on a newly submitted letter dated May 12, 2010. This is not newly discovered evidence having been in Grigsby’s attorney’s possession since at least 2010. Grigsby provides no explanation for why this issue was not raised prior to or at the hearing. To the extent that Grigsby’s Issue 2 can be tangentially tied to the claims advanced in Exhibit 18, Grigsby’s argument on reconsideration still relies on evidence submitted after the record closed. The present Examiner is not in a position to revise the Recommendation as a result.

IV. ORDER

Based on the foregoing, it is hereby ordered as follows:

1. The City of Tacoma Public Works Department’s (“PWD”) request for clarification changing all instances of “structural block” in the Recommendation to “structural walk” is granted;

2. PWD’s request for reconsideration embodied in issues 2-5 set forth above, is denied and no revisions will be made to the Recommendation as a result; and

3. Norma Rae Grigsby’s request for reconsideration is also denied, and no revisions will be made to the Recommendation as a result.

It remains the recommendation of the Hearing Examiner that the Assessment Roll for L.I.D. No. 8645 be confirmed and approved as originally recommended on May 26, 2017.

DATED this 20th day of June, 2017.

JEFF H. CAPELL, Hearing Examiner
NOTICE

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 Hearing Examiner is based on errors of procedure, fact or law shall have the right to appeal the recommendation of the Hearing Examiner by filing written notice of appeal and filing fee with the City Clerk, stating the reasons the Hearing Examiner's recommendation was in error.

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

GENERAL PROCEDURES FOR APPEAL:

The Official Code of the City of Tacoma contains certain procedures for appeal, and while not listing all of these procedures here, you should be aware of the following items which are essential to your appeal. Any answers to questions on the proper procedure for appeal may be found in the City Code sections heretofore cited:

1. The written request for review shall also state where the Examiner's findings or conclusions were in error.

2. Any person who desires a copy of the electronic recording must pay the cost of reproducing the verbatim recording. If a person desires a written transcript, he or she shall arrange for transcription and pay the cost thereof.