

**OFFICE OF THE HEARING EXAMINER**

**CITY OF TACOMA**

**REPORT AND RECOMMENDATION**

**TO THE CITY COUNCIL**

**PETITIONER:** Fawcett Avenue Owner, LLC      **FILE NO:** HEX2022-001 (124.1431)

**SUMMARY OF REQUEST:**

A petition by Fawcett Avenue Owner, LLC to vacate the air rights over a portion of South 15th Street, lying between South Court E and South Fawcett Avenue, and a westerly portion of South Fawcett Avenue, lying south of South 15th Street, to facilitate design variability for a residential building project.

**RECOMMENDATION OF THE HEARING EXAMINER:**

The request is hereby recommended for approval, subject to conditions.

**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 March 24, 2022.<sup>1</sup> Troy Stevens of Real Property Services ("RPS") represented the City. Luke Gemperline appeared on behalf of the Petitioner, Fawcett Avenue Owner, LLC.<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 over Zoom at no cost to any participant with video, internet audio, and telephonic access.

<sup>2</sup> Neither party called additional witnesses.

**FINDINGS, CONCLUSIONS, AND RECOMMENDATION:**

**FINDINGS:**

1. The Petitioner, Fawcett Avenue Owner, LLC (hereinafter the “Petitioner”), has requested the vacation of the air rights that attach to the City’s existing right-of-way interest over a portion of South 15th Street, lying between South Court E and South Fawcett Avenue, and the westerly portion of South Fawcett Avenue, lying south of South 15th Street (the “Vacation Area”). The Vacation Area is legally described as follows:

**SOUTH FAWCETT AVENUE AIR SPACE VACATION**

THE WESTERLY 3.00 FEET OF THE WESTERLY 40.00 FEET OF SOUTH FAWCETT AVENUE LYING ADJACENT TO LOTS 1 THROUGH 19, INCLUSIVE, BLOCK 1510, MAP OF NEW TACOMA, WASHINGTON TERRITORY, ACCORDING TO THE PLAT THEREOF RECORDED FEBRUARY 3, 1875, RECORDS OF THE PIERCE COUNTY AUDITOR; SITUATE IN THE CITY OF TACOMA, COUNTY OF PIERCE, STATE OF WASHINGTON; AND LYING BETWEEN THE ELEVATIONS OF 177.00 FEET AND 272.50 FEET AT THE SOUTHEAST CORNER AND 210.67 FEET AND 272.50 FEET AT THE NORTHEAST CORNER, CITY OF TACOMA PUBLISHED NGVD 29 VERTICAL DATUM.

and

**SOUTH 15TH STREET AIR SPACE VACATION**

THE SOUTH 3.00 FEET OF THE SOUTHERLY 40.00 FEET OF SOUTH 15TH STREET LYING ADJACENT TO LOT 1, BLOCK 1510, MAP OF NEW TACOMA, WASHINGTON TERRITORY, ACCORDING TO THE PLAT THEREOF RECORDED FEBRUARY 3, 1875, RECORDS OF THE PIERCE COUNTY AUDITOR; SITUATE IN THE CITY OF TACOMA, COUNTY OF PIERCE, STATE OF WASHINGTON; AND LYING BETWEEN THE ELEVATIONS OF 204.00 FEET AND 272.50 FEET AT THE NORTHEAST CORNER AND 220.50 FEET AND 272.50 FEET AT THE NORTHWEST CORNER, CITY OF TACOMA PUBLISHED NGVD 29 VERTICAL DATUM.<sup>3</sup> *Ex. C-1; Ex. C-2.*

2. The Petitioner desires to obtain release of the City’s air rights interest in the Vacation Area to facilitate design variability on a residential building project. Specifically, the vacation would allow for building façade modulation and/or extensions/outcroppings such as small balconies. *Gemperline Testimony; Ex. C-1; Ex. C-4.*

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<sup>3</sup> RPS confirmed at hearing that the Petitioner provided the legal description that was later reviewed by a City surveyor.

3. South 15th Street is an 80-foot wide, steeply sloped, street right-of-way with a 50-foot wide concrete road in the center. It is further improved with sidewalk, curb and gutter, and has space for parallel parking abutting the development site that will benefit from the requested vacation. Fawcett Avenue is an 80-foot wide, mostly level, street right-of-way with a 40-foot wide asphalt road in the center. It is relatively level, and is improved with sidewalk, curb and gutter, a dirt and grass planting strip, with parallel parking along the areas relevant to the Vacation Area. *Exs. C-1~ C-3.*

4. The City of Tacoma acquired the Tacoma Avenue right-of-way by dedication in the Map of New Tacoma, W.T., according to the plat filed of record February 3, 1875 in the Office of the County Auditor. *Exs. C-1 and C-5.*

5. The requested air rights vacation has been reviewed by outside quasi-governmental agencies, City departments/divisions, and utility providers. The reviewing agencies indicated that they have no objection to the proposed vacation. Two reviewing agencies identified existing facilities below the proposed air rights vacation area but no actual conflicts presented. *Exs. C-6~C-16.*

6. No one from the public appeared or testified at the hearing; however, one comment was received via email dated March 20, 2022 from Dave Whitesell. Mr. Whitesell expressed concern that “any changes to the air rights have the potential to block the views and value of our property [sic] on the 5th floor at...Tacoma Avenue S.” In response, the Petitioner indicated that only views of South 15th Street had the possibility to be minimally impacted, and then solely by the balcony bases on the planned residential building because railing would be see-through. *Gemperline Testimony.*

7. City staff determined that the public would benefit from the proposed vacation to the extent that it adds value to the property to which it attaches on the tax rolls and also facilitates private residential development. *Ex. C-1.*

8. The Vacation Area is not needed for future public use and no abutting owner becomes landlocked nor will their access be substantially impaired by the vacation. The Vacation Area is currently not used for any public right-of-way purpose. *Id.*

9. The proposed air space vacation neither abuts, nor is proximate to a body of water and, therefore, the provisions of RCW 35.79.035 are not implicated. *Ex. C-1.*

10. No environmental review of the proposed vacation was conducted.

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

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

On February 18, 2022-

- 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. A public notice mailing was sent to all parties of record within a 300 foot radius of the Vacation Area.
- e. Public Notice was advertised on Municipal Television Channel 12.

On February 25, 2022-

- f. A yellow public notice sign was posted at the southwest corner of the intersection of South 15<sup>th</sup> Street and Fawcett Avenue.
- g. A yellow public notice sign was posted at the northwest corner of the intersection of South 17<sup>th</sup> Street and Fawcett Avenue. *Ex. C-1*.

13. 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), 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>4</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>5</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.
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 vacation of air rights conforms to the criteria for the vacation of right-of-way set forth at Conclusion 5 above, provided the condition recommended below is met. The public would experience benefits from the economic development and tax revenue that the requested vacation will facilitate. The requested air rights vacation would not impair traffic circulation, landlock any abutting owner, or adversely affect the public need.

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

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<sup>4</sup> *Puget Sound Alumni of Kappa Sigma v. Seattle*, 70 Wn.2d 222, 238-239, 422 P.2d 799, 808-809 (1967).

<sup>5</sup> For consistency, outline numbering of the criteria is kept the same as in the original TMC text.

**A. SPECIAL CONDITION:**

PAYMENT OF FEES

The Petitioner shall compensate the City in an amount equal to the full appraised value of the Vacation Area. One-half of the revenue received should be devoted to the acquisition, improvement and maintenance of public open space land and one-half may be devoted to transportation projects and/or management and maintenance of other City owned lands and unimproved rights-of-way. *TMC 9.22.010.*<sup>6</sup>

**B. ADVISORY NOTE:**

Beyond the compensation requirement 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 condition 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.

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<sup>6</sup> RPS confirmed through testimony that there are no other conditions of approval.

**RECOMMENDATION:**

The vacation petition is hereby recommended for approval, subject the condition contained in Conclusion 8 above.

**DATED** this 28th day of March, 2022.

  
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**JEFF H. CAPELL, Hearing Examiner**

## N O T I C E

### **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***