December 17, 2021

OFFICE OF THE HEARING EXAMINER
KING COUNTY, WASHINGTON

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REPORT AND RECOMMENDATION

SUBJECT: Department of Transportation file no. **V-2727**
Proposed ordinance no. **2021-0247**
Adjacent parcel nos. **1243100045 and 1243100090**

GHR, LLC AND MICHAEL RITTER

Road Vacation Petition

Location: a portion of NE 113th Street/Henderson Road, Redmond

Applicant: GHR, LLC
represented by **Ken Ott**
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Redmond, WA 98052
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Applicant: **Michael Ritter**
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Redmond, WA 98052
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King County: Department of Local Services
represented by **Leslie Drake**
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FINDINGS AND CONCLUSIONS:

Overview

1. GHR, LLC and Michael Ritter petition the County to vacate a public right-of-way mapped as NE 113th Street/Henderson Road, near Redmond. The Department of Local Services, Road Services Division (Roads), urges vacation. We conducted the public hearing on behalf of the Council. After hearing witness testimony and observing their demeanor, studying the exhibits entered into evidence, and considering the parties' arguments and the relevant law, **we recommend that, given the potential use of the right-of-way to accommodate a missing link in the trail system, along with other uncertainties, the Council deny this petition for now**.

Background

2. The subject right-of-way has never been constructed as a street; it exists as lines on a map where what would be NE 113th Street would join the current public roads of NE Redmond Road and 196th Avenue NE. Ex. 8. Michael Ritter owns the abutting parcel to the southeast, GHR LLC (the Otts) to the southwest, Deborah Young to the northwest, and Lisa Fite to the northeast.

3. It appears that the genesis of the petition was a long-running spat between Ms. Young and the Otts over use of the right-of-way. *See, e.g.*, D12 at 001. The Otts petitioned to vacate the road. Ex. D4. Roads reached out to the other three abutting owners to see if they would participate. Ex. D5. Mr. Ritter joined in, but Ms. Young and Ms. Fite declined the opportunity. Ex. D6.

4. We held a hearing on September 16, 2021.

5. Leslie Drake from Roads explained how the right-of-way has no potential as an actual public road. As to potential trail interests, she noted that there had been a lot of internal discussion. Because of the nature of the interests the County holds in right-of-way (versus in something like park property), there may be limitations in converting one use to another, along with funding questions. And she noted that Roads has had to devote significant time responding to Ms. Young's complaints.

6. Laura Giorgi, with the King County Executive's Horse Council, submitted detailed comments and offered testimony. *See also* Ex. D13. She described the Horse Council's communications with Puget Sound Energy (PSE) and King County Parks representatives regarding the "Puget Power Trail East Segment" (McWhirter Park to Redmond Ridge), a longstanding regional trails project listed in the regional transportation plan.

7. Ms. Giorgi explained that the preferred east-west alignment between NE Redmond Road and 196th Avenue NE would not be the subject right-of-way (touching the *top* edge of the Ott and Ritter properties), but that PSE corridor (touching the *bottom* edge of the Ott and Ritter properties). She described the PSE corridor as the easiest and safest route. However, she noted that while PSE was not opposed to a trail in its corridor, all five adjacent owners [the three below the PSE corridor, along with the Otts and Mr. Ritter

above it] would need to be on board. *See* Ex. D8 (showing five parcels abutting the PSE corridor). The previous owner of what is now the Ott property had been the original holdout, but she thought Mr. Ott was supportive.[1] And she testified that Mr. Ritter has agreed to allow the trail to cross the west end of his property near Mackey Creek and continue east on the PSE property near his home.

8. However, given the uncertainty of gaining all the necessary approvals to use the PSE corridor, Ms. Giorgi questioned vacating the subject right-of-way until the trail alignment gets nailed down. Because if the PSE corridor falls through, and if the subject right-of-way is forfeited as an alternative alignment, it might eliminate the ability to site the needed trail. Ms. Giorgi clarifies that she was not against vacation of the subject right-of-way *per se*, so long as the ability to site a trail down that corridor was not jeopardized.

9. Monica Leers, with King County's Department of Natural Resources Parks, agreed the County has been interested in making a trail connection here; this has been part of their long-term plan. The PSE corridor is the preferred alignment, but the abutting property owners have easement rights on that corridor, and it has been a challenge for the County to engage PSE and to get all the abutting private property owners to agree to trail use on PSE corridor.

10. In addition to the legal items discussed below, Chris Soelling explained the need for a safe bicycle/pedestrian/equestrian corridor to complete the missing link, including unsafe conditions on the public roads bicyclists and equestrian users now encounter. He was encouraged that this petition process has been the first time in several decades that stakeholders were together talking about siting a trail. His concern is that, without the PSE corridor nailed down, vacation here could stymie trail creation, if the PSE corridor falls through.

11. Krysia Colts, a former trails commissioner and current neighbor, discussed decades of work to site a missing link, multiuse (meaning walking, biking, and equestrian) trail to McWhirter Park. He too described the existing public streets as dangerous for non-motorized use, noting that a dedicated trail would be an "extreme help."

12. Judith Westall, also with the Horse Council, explained a recent development that may facilitate a trail along the PSE corridor. Last year, the Washington Utilities and Transportation Commission removed a barrier to citing regional trails under power lines. She too described the PSE corridor as the superior alignment for the missing link trail, avoiding wetlands and providing a straighter line. She testified that Mr. Ott had, along with Mr. Ritter, agreed to donate 20 feet along the PSE corridor for a trail. She too was not averse to vacation here, as long as all trail options were preserved.

13. Deborah Young, who owns the northwesterly lot, complained that the Otts had fenced off the right-of-way for their own use, and noted that Roads staff had come out twice in response to her complaints. If only the southern 30 feet were vacated, Roads would be back out there [presumably on her future complaints]. She clarified that the utilities she

[1] No one representing the Ott property appeared at our hearing.

was concerned with were on her [northern] half of the right-of-way. She did not think the right-of-way would make a good trail location, as it is too wet.

14. Lisa Fite who owns the northeasterly lot, expressed a concern that vacation would, because of critical areas at the eastern edge of the property, land-lock her property. Although the eastern edge of her property abuts a different public right-of-way (the arterial Redmond Road) there is a stream (discussed further below) and possible wetland towards the eastern end of the Fite property. She was not averse to vacation *per se*, so long as her future access is preserved.

15. At the conclusion of the public hearing, we held the record open for, and requested briefing on, three legal issues Mr. Soelling raised:

- how petition requirements on frontage apply where only half of the right-of-way is being vacated;
- how various code provisions apply where the public value is not in a potential public road but in a potential public trail; and
- whether the right-of-way could allow future trail use, either without or alongside an actual road.

Analysis

Basic Standard

16. Chapter RCW 36.87 sets the general framework for county road vacations, augmented by KCC chapter 14.40. There are at least four somewhat interrelated inquiries. The first two cover whether vacation is warranted: is the road useless to the County road system and would vacation benefit the public? If the answers to these are both yes, the third and fourth relate to compensation: what is the appraised (or perhaps assessed) value of the right-of-way, and how should this number be adjusted to capture avoided County costs?

17. A petitioner has the burden to show that the "road is useless as part of the county road system and that the public will be benefitted by its vacation and abandonment." RCW 36.87.020. "A county right of way may be considered useless if it is not necessary to serve an essential role in the public road network or if it would better serve the public interest in private ownership." KCC 14.40.0102.B. While denial is mandatory ("shall not" vacate) where a petitioner fails to make that showing, approval is discretionary where a petitioner shows uselessness and public benefit ("may vacate"). RCW 36.87.060(1) (emphasis added).

18. Except as provided herein, we adopt and incorporate the facts set forth in Roads' report. That report, and a map showing the specific area to be vacated, are in the hearing record and will be attached to the copies of our recommendation submitted to Council. Exs. D1 at 001-05; D8.

Threshold Petition Requirements

19. GHR and Mr. Ritter own both parcels fronting the southern edge of the subject right-of-way. Ex. D8. And their petition seeks only to vacate the southern half of the right-of-way. KCC 14.40.0102.A allows "owners of the majority of the frontage on any county right of way or portion of the right of way" to petition the County to vacate all or part of a right-of-way. The question is how that applies where the request is to vacate only half of the right-of-way: does "majority" refer only those to properties abutting the footprint being vacated (the southern half), or also include properties abutting the not-to-be-vacated northern portion of the right-of-way?

20. In its response brief, Roads pointed to a survey showing that the southerly linear footage of the right-of-way clocks in at two feet longer than the northerly.[2] So here, by the slightest of margins, owners of the "majority of the frontage" are petitioners, anyway we slice it. Mr. Soelling conceded the point in his reply brief. However, Mr. Soelling raised a legitimate question, the issue has been fully briefed, and given that the half-width question is likely to arise again in the future, we address it.

21. The state prohibits counties from vacation under certain circumstances, such as rights-of-way not useless to the road system, vacations not benefiting the public interest, or rights-of-way abutting a body of water. However, the state allows county legislative bodies to start the vacation process on their own, without *any* frontage owner participation. RCW 36.87.010. County law follows suit, allowing the Council to start the vacation process on its own, again, without any private input. KCC 14.40.010.A. We interpret the majority requirement as a tool to winnow down the petitions the County has to expend resources examining—and to know who to charge its costs and expenses to if the County wants to offset those[3]—but not as controlling the ultimate outcome.

22. This is further illustrated by what the County's Road Engineer (engineer) is to do when owners of the majority of frontage fail to join a petition: that failure "is grounds for" the engineer to report the deficiency to Council and end the review, but it is not even mandatory that the engineer do so. Again, majority frontage is simply a trigger—and not the only trigger—that gets the engineer started on examining the merits of vacation. KCC 14.40.0104.B.

23. That some property owners abutting the right-of-way do not join in—and even oppose—vacation should be explored in the engineer's initial study, then thoroughly reviewed during the examiner hearing, and (if appealed) examined by Council. But we do not put an expansive reading on a threshold that merely acts as a signal for whether the

[2] Ex. 9. Lot 4 (GHR, 846.97 linear feet) and Lot 13 (Ritter, 536 linear feet) are, at a combined 1382.97 linear feet, slightly longer than the combined 1380.56 linear feet that make up Lot 3 (Young, 660 linear feet) and Lot 14 (Fite, 720.56 linear feet).

[3] State and County law allows the County to recoup from the petitioner the costs of processing a petition. RCW 36.87.020, .070; KCC 14.40.0106.B. For reasons never entirely articulated, Roads has steadfastly elected never to charge vacation petitioners for the County's costs of processing petitions.

engineer should proceed to analyzing the merits of the petition, especially where (as here) the engineer has *already* analyzed the merits of the petition.[4]

Value of the Right-of-Way as More than a Vehicular Road

24. It took us eleven lines to frame our question of how various code provisions apply where the public value is not in use as a potential vehicular road but as a potential trail. Roads' entire analysis on this question was only ten lines. Ex. D25 at 003. Unfortunately, it was not an example of less being more. Although both Mr. Soelling and Roads misread the codes, Roads' shortcoming was more significant and pervasive.

25. The first relevant code is RCW 36.87.060, cited above, which states that:

> If the county road is found useful as a part of the county road system it shall not be vacated, but if it is not useful and the public will be benefited by the vacation, the county legislative authority may vacate.

26. Mr. Soelling tries to read "county road system" expansively. Ex. S1 at 003. Although, as discussed in our recent multi-page analysis, there is precious little available legislative history pre-1970,[5] we disagree that in 1963—a few years after the interstate highway system act, and during a boom in auto-based suburbia—the state drafters had anything particularly visionary or progressive about what a "road system" entailed. And because it is a prohibitory prerequisite—a county cannot even consider whether vacation is otherwise in the public interest unless it first determines the right-of-way is useless to its road system—we define that term narrowly, as meaning traditional roads.

27. Unfortunately, Roads jumped from a properly narrow reading of "county road system" to the proposition that, "The only relevant determination when considering a road vacation petition is whether the subject right of way is useful for the current county road system or 'the county road system in the future.' See RCW 36.87.060 and K.C.C. 14.40.0104(B)." That is incorrect.

28. Uselessness as a road is, per RCW 36.87.060, only the first step; a county must still find that the public will be benefited by the vacation. So, uselessness to the road system is not even close to the end of the analysis. Proving a public benefit to vacation is always a necessary analysis. We go in depth below on language related to pedestrian-equestrian-bicycle trails in King County, but even in a county that had no trail-related language in its codes or plans, that jurisdiction would not be exempt from analyzing all aspects of the public benefits of vacation, including impacts on non-vehicular access.

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[4] We might look differently at the requirement if, for example a petition was filed, the engineer determined it did not meet the minimum criteria to warrant expending significant County resources to thoroughly review the merits, and the petitioner objected to dismissal.

[5] https://kingcounty.gov/~/media/independent/hearing-examiner/documents/case-digest/applications/road%20vacation/2021/V-2713_Steffen_Lemons.ashx?la=en at ¶¶ 27.

29. Roads compounded this by asserting that if we determine that the right-of-way is "not necessary for the current or future county road system, the road vacation inquiry is at an end."

30. Unfortunately, Roads misquotes the pertinent language. Under our code, the issue the engineer needs to study is not whether the subject right-of-way is useful for "'the county road system in the future'" but "Whether it is advisable to preserve all or a portion of the right of way for the county transportation system of the future." KCC 14.40.0104.B.4 (underscore added). "Transportation system" is a much broader term than "road system." For example, the East Lake Sammamish trail would be part of the County's transportation system but not of its road system. And Title 14 (Roads and Bridges) has an entire chapter (56) related to nonmotorized transportation, including integrating nonmotorized transportation into the future county transportation network, considering nonmotorized transportation needs in *all* related County programs, and encouraging nonmotorized modes of transportation. KCC 14.56.020.B,. 020.D,. 030.C.

31. It would be absurd if the code requires the engineer to analyze the impact of vacation on the county *transportation* system of the future and yet we, and the Council, then ignored this information and looked no further than the right-of-way's usefulness as part of the county *road* system. Our high court commands us to avoid a code reading that produces such an absurd result, because we do not presume the legislature intended absurd results. *See Tingey v. Haisch*, 159 Wn.2d 652, 664, 152 P.3d 1020 (2007).

32. So, contrary to Roads' final sentence, after determining that the portion of the road right-of-way proposed to be vacated is useless to the County road system, not only is there authority that "allows" us to analyze whether the right-of-way might be useful for the non-motorized transportation uses, the engineer—and we, and the Council—cannot meet our duty of ensuring that vacation is in the public interest without undertaking that analysis.

Possible Prohibition Against Citing a Trail Across the Subject Right-of-Way

33. The discussion about the potential usefulness of the subject right-of-way as a trail would be academic if there were a limitation such that a trail could never be cited there. This is why we asked for briefing on the topic. There are two potential prohibitions: code-based and property-rights based.

34. For the code, Roads asserts that "Equestrian, bicycle and pedestrian trails may only be located in County road right of way if they are "associated" with a County road. See K.C.C. 14.01.360." Ex. D25 at 003. That sounded definitive on first blush, as no one is suggesting a vehicular public road would ever be built along the subject right-of-way.[6] But the proposition cited,

[6] As discussed below, Ms. Fite may need *private* vehicular access to her single parcel, but no one is arguing that a *public* road linking 196th and Redmond Road would ever be in the cards.

> **KCC 14.01.360 Transportation facilities.** "Transportation facilities" means principal, minor and collector arterial roads and state highways, as well as associated sidewalks, bike lanes and other facilities supporting nonmotorized travel

is not even relevant, much less definitive, for two different reasons.

35. First, as Mr. Soelling points out, the definition speaks in terms of sidewalks, bike lanes and other facilities supporting nonmotorized travel that are "associated" with roads; it does not limit it nonmotorized travel routes "next to" an actual road. Mr. Soelling gives the useful example of a printer being associated with a computer terminal while not necessarily being in the same room. As any trail would connect NE Redmond Road and 196th Avenue NE (two existing, open, public roads), it would still be "associated with" roads. Ex. S6 at 2.

36. And second, and more broadly, KCC 14.01.360 is not a prohibition against, or a restriction on, the County constructing a trail on a right-of-way not containing an actual road. Instead, KCC 14.01.360 it is merely a definition. In reviewing the entirety of Title 14, outside the definition chapter (01) the term "transportation facilities" is only employed in the chapter (70) on transportation concurrency management, and in the context of level of service, fees and mitigation. KCC 14.70.205.B,. 290.B,. 290.D. In the next section we return to the question of whether subject right-of-way is legally broad enough to host the trail in the absence of the road. But KCC 14.01.360 adds nothing to that discussion.

37. As to the scope of the public property interest here, our last complex road vacation hearing involved a 1914 dedication limited to "dedicat[ing] to the use of the public forever, all the streets and roads shown hereon." We discussed at that hearing, and then wrote in our report, that while we *presumed* that the original dedication was legally robust enough to accommodate a trail not associated with an actual road, replacing one form of access with another does not always pass constitutional muster. We cited our high court's ruling that a hiking and biking trail was deemed not encompassed within a railroad right-of-way, and the corridor would need to be purchased at taxpayer expense to site a trail there. *See, e.g.*, *Lawson v. State*, 107 Wn.2d 444, 451, 730 P.2d 1308 (1986).[7]

38. Roads recognized at the beginning of the hearing that because of the nature of the interests the County holds in rights-of-way (versus in something like park property), there may be the limitations in converting one use to another. We echoed this concern at hearing. As the current right-of-way deals with an identically-worded 1913 dedication, we again questioned whether the County's interest in today's right-of-way is robust enough to allow a standalone trail, and we asked for briefing on the topic.

39. Unfortunately, Roads' response added nothing substantive. First, it re-urged its position, discussed and rejected above, the "transportation facilities" definition acts as a

[7] https://kingcounty.gov/~/media/independent/hearing-examiner/documents/case-digest/applications/road%20vacation/2021/V-2713_Steffen_Lemons.ashx?la=en at ¶ 42.

prohibition against trails not abutting a County road. Second, although Roads raised the legal limitations issue on its own at the beginning of our hearing, in its briefing Roads misinterpreted our "broad enough" question as referring to the strip being *physically wide enough*, and then addressed width under the erroneous assumption that any trail would have to be constructed abutting a vehicular road. There may be a legal limitation out there—either in code or judicial opinions—such that a trail cannot be placed on this or other dedicated rights-of-way in the absence of a road (which is why we asked for briefing), but Roads has not yet provided that.

40. Conversely, Mr. Soelling's response was on point. He observed that when this right-of-way was dedicated in 1913, only 1.2% of the population owned cars, and rights-of-way in rural King County were predominately used by horses and bicycles, not cars. From this he reasoned, persuasively, the grant could not have been limited in scope to automotive pathways, as that was barely a thing in 1913. Ex. S6 at 3.[8] That is not that is definitive, but it strengthens our presumption that the right-of-way here is legally sufficient to accommodate a non-motorized trail.

41. With the subject right-of-way appearing to be legally broad enough to site a future equestrian-pedestrian-bicycle trail, we now turn to whether it benefits the public to vacate or to preserve the subject right-of-way.

Public Benefits for and against Vacation

42. The subject right-of-way is not in some isolated area remote from any proposed nonmotorized trail. Instead, it is along the "missing link" of identified trail need between McWhirter Park and Novelty Hill Road. Ex. S2 at 003. The Puget Sound (PSE) Trail East Segment from the park is a longstanding regional trails project and in the regional transportation plan. Ex. S3. The City of Redmond has identified the "gap in trail" between McWhirther and the Redmond Watershed Preserve, noted it is relying on King County to close the gap, and pointed to the importance of securing public access to the corridor. Ex. S4.

43. Multiple witnesses, including one with King County's Department of Natural Resources Parks, testified, persuasively, to the benefits to making a trail connection here and filling in the missing link and avoiding the dangers of the current road-abutting routes. There is a *significant* public interest to preserving a trail option along the subject right-of-way.

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[8] Mr. Soelling raised a related point that was not so thought through. At hearing, he requested that any vacation be conditioned on the petitioners building out an actual trail where there currently is none. While a government can require a landowner to mitigate the negative externalities of, and bear the full costs of, their actions, a government cannot impose an unconstitutional condition as a requirement for approving an application. *Koontz v. St. Johns River Water Management Dist.*, 570 U.S. 595 (2013). So, if petitioners were tearing up or blocking a *pre-existing* trail, requiring them to construct an *alternative* trail would be warranted. But there is no trail, nor is anything the Otts or Mr. Ritter are doing creating the need for a trail. What Mr. Soelling was requesting would have created an unconstitutional exaction. *Dolan v. City of Tigard*, 512 U.S. 374 (1994).

44. To be sure, the PSE corridor (which runs along the *south* side of the Ott and Ritter properties) is an alignment preferable to the subject right-of-way (which runs on the north edge of the Ott and Ritter properties). However, multiple witnesses also explained the complexities of getting PSE and all property owners abutting the PSE corridor on board. In short, citing a trail along the PSE corridor is no sure thing. We agree that vacating the public right-of-way could, if the PSE route falls through, eliminate the only other identified option for the missing link alignment. And that would be a serious public loss.

45. That does not mean vacation of the subject right-of-way could not conceivably be accomplished in a manner that preserves the ability to cite a trail along the subject right-of-way, should the PSE route not come to fruition. Several witnesses cabined their opposition by essentially saying that they were not against vacation *per se*, so long as future trail use was not jeopardized. However, there are several stumbling blocks to trying to accomplish that today.

46. One complicating factor relates to the Fite parcel. While the Ott, Ritter, and Young parcels already have adequate access to a public road, the Fite property does not. Although the eastern edge of her property abuts the arterial Redmond Road, there is a stream and possible wetland in that area. As Permitting staff noted, that would make constructing a road difficult, and thus the Fite property would likely need an easement [from 196th Avenue NE and across the western, Young/Ott end of the right-of-way]. Ex. D1 at 019. Ms. Fite, or a future owner of that parcel, may very well need to construct a road through at least the northern half of the right-of-way.

47. We assume the 30-foot-wide right-of-way that would remain (the northern half) after vacating the southern half would be sufficient for Ms. Fite or a future owner to construct an access road from 196th Avenue to the Fite property. However, that is not crystal clear. In its briefing on the trails issue, Roads stated that a road constructed within the subject right-of-way would be a local access road, with a minimum width of 40 feet (i.e., 10 feet wider than the northern half). Ex. D25 at 003. We assume that statement was in the context of a through road connecting 196th Avenue with Redmond Road (a road which everyone agrees will never be built) and not a private road or driveway simply providing dead-end access from 196th Avenue to a single property.

48. But all these are assumptions, and assumptions are dangerous things. And even if we are correct that the northern 30 feet of the right-of-way would provide plenty of width for the class of private road potentially needed to keep the Fite property from being land-locked, that does not mean that the northern 30 feet would be wide enough to cite a future equestrian-bicycle-pedestrian *alongside* that road. Roads stated that a shared use trail would need to be 21 feet, plus be 2 feet from the road. Ex. D25 at 003. That would leave only 7 feet for a driveway, plus any shoulder requirements. So, it seems unlikely that simply preserving the northern half of the right-of-way would preserve a trail corridor.

49. We clarify that the potential need for a road to reach the Fite property is a different issue from an unpersuasive argument Mr. Soelling made against vacation. He argued that it would be unfair to allow vacation of the southern half of the right-of-way (to Mr. Ott and Mr. Ritter), while preserving future trail access entirely on the northern (Fite/Young) half of the right-of-way. Because then, if Ms. Fite and Ms. Young later petitioned to vacate the northern half of the right-of-way, they would be saddled with a condition not imposed on Mr. Ott or Mr. Ritter. However, Ms. Young and Ms. Fite, along with Mr. Ritter, were offered the opportunity to join in the current petition for a vacation that would have covered the entire corridor. And while Mr. Ritter elected to join, Ms. Young and Ms. Fite both declined. There is nothing unfair in Ms. Young and Ms. Fite, having turned down the same opportunity offered to all four property owners, leaving themselves worse off in the future by sitting out now. They would simply be living with the consequences of their own choices.

50. Such consequences are simply the way the cookie often crumbles. For example, the County sets a maximum number of 100 lots that can be served without two points of access to public roads. 2016 Road Design and Construction Standards § 2.19. So, an applicant who proposes adding 80 lots to a dead-end road already serving 20 lots would be in the clear, while the next applicant looking to add just one more lot may either be required to construct an expensive secondary access route or—if no secondary access route is feasible—be barred from development altogether. Sometimes if you are not at the table, you are on the table.

51. So, fairness is not the problem. But another complexity is exactly how to write a condition that would allow vacation of the southern half of the right-of-way while preserving the ability to site part of a public trail on the southern half, if it turned out the northern half was not wide enough to site a trail while preserving space for a driveway. There is nothing in the record on how to do that, and we are wary of trying to create one on the fly. And the Otts did not even participate in our hearing, so we had no idea if they would still want vacation under a public-access-preserving scenario.

52. Even if they and Mr. Ritter did, we would have a follow-up concern about how to properly calculate out the compensation owed, if we conditioned vacating the southern half on allowing a public use trail along what would by then be private property.

53. The compensation analysis starts by measuring enhanced property values to the receiving parcel from the extra square footage gained from adding the (formerly) public right-of-way area. This figure is generated by the Assessor. That is only the starting point, because State and County law allow local legislative branches to adjust the appraised value to reflect the expected value of avoided liability risk, eliminated management costs, and jettisoned maintenance costs, along with increased property taxes. RCW 36.87.070; KCC 14.40.020.A.1. Performance, Strategy, and Budget has generated that model for calculating those adjustments. Road Services then applies those figures to a given parcel. Here, for the Ott/GHR property, compensation due would be $13,530, and for the Ritter property $21,361. Exs. D17-D18.

54. However, is the increase in property values the receiving parcels will garner the correct starting point, where vacation is conditioned on allowing a future *public* trail across private property? After all, the right to exclude the public is one of the most "treasured" rights of property ownership. *Cedar Point Nursery v. Hassid*, 141 S. Ct. 2063, 2073 (2021). In addition, if Mr. Ritter and Mr. Ott provide and facilitate public access elsewhere along their properties and/or on the PSE corridor they abut, that would seem the type of "in lieu of" real property contribution that should reduce or eliminate the need for a cash compensation to vacate the subject right-of-way. KCC 14.40.020.B.

55. None of the above is to discount benefits from vacation. In addition to monetary benefits, the potentially strongest advantage from vacation comes, indirectly, from Ms. Young. The record contains two dozen emails, along with dozens of pictures and at least one other form, Ms. Young sent to Ms. Drake, complaining about the Otts' use of the right-of-way. Exs. D7, D12. That does not even count any phone calls, or her contacts with other County employees, all chewing up valuable taxpayer resources to respond. It would be a great public benefit to extricate the County from that situation in the future. However, that benefit dissipates somewhat, because only the southern half would be vacated via the current petition. Thus, even with vacation of the southern half, the County would still have a property interest in the strip of land dividing the Otts and Ms. Young, and thus would not be beyond Ms. Young's reach.

56. In the end, given the significant public interest from preserving options for sitting the missing link trail, the petitioners have not shown that vacation here is in the public interest. And showing that vacation will benefit the public is a necessary element for a county to vacate a right-of-way. We recommend against vacation.

Future-Looking

57. In the short term, an examiner retains jurisdiction to reconsider a recommendation during the applicable appeal period, KCC 20.22.220.A.2, a window which here runs out on January 10, 2022. So, if:

- the situation has changed since our September hearing and a legal right to use the PSE corridor as a trail has been established (eliminating the need to preserve the subject right-of-way for potential trail use and potentially reducing or eliminating the compensation due for vacating the southern half); or

- it is established that the *northern* half of the right-of-way is wide enough to accommodate (on its own) both a trail and a driveway to the Fite property (obviating the necessity of preserving potential trail access along the *southern* half of the right-of-way); or

- there is a way to write conditioning language for vacating the *southern* half to preserve, the same potential for trail use as exists today

anyone may move us to reverse our recommendation.

58. In the longer term (meaning assuming the current vacation petition fails), we offer some additional thoughts.

59. The right-of-way based on our current record, appears useless, in the sense that it is "not necessary to serve an essential role in the public road network or if it would better serve the public interest in private ownership." KCC 14.40.0102.B. If a trail later gets sited along the PSE corridor, the public value of the current right-of-way (either the southern half or the entire width), seems nil. And given the resources Roads and others in the County have had to devote to the Otts' use and Ms. Young's complaints, vacation seems even more in the public interest than in the typical acquisition of a "useless" right-of-way where the right-of-way was not even on Roads' radar screen before the petition was filed.

60. In his reply brief, Mr. Soelling raised an independent ground against vacation. Mackey Creek runs northeast to southwest across the eastern end of the right-of-way. RCW 36.87.130 prohibits, in most circumstances, a county from vacating even a useless road where vacation would otherwise benefit the public if that road "abuts on a body of salt or freshwater." Mr. Soelling argues that the creek precludes vacation here.

61. That interpretation seemly presents a dramatic expansion of a "body of salt or freshwater," potentially encompassing thousands of stockwater ponds, roadside ditches, or streams one could step across. Although, as discussed in our recent multipage analysis of RCW 36.87.130, there is little available legislative history behind the statute,[9] we see nothing so sweeping in the prohibition. It would be odd if a statute whose intent was preserving public access to waterfront was interpreted to protect small flows bisecting private parcels.[10] Again, the issue was raised only in a reply brief (the final entry before we closed our record), and the topic would benefit from discussion in a future hearing. But Mr. Soelling's argument on this score does not seem promising

62. Finally, we have rejected, in past vacations, opponents' arguments that we deny vacation for reasons like keeping the property vegetated, preserving open space, or protecting the environment, explaining that problems with denying a vacation petition "for reasons beyond access and utilities and corridors and their ilk."[11] But where the issue involves access and transportation corridors, it does not satisfy the engineer's duty to simply look at street system needs. And while Roads may have misunderstood its assignment as limited to analyzing a right-of-way in connection with at "the county *road* system in the

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[9] https://kingcounty.gov/~/media/independent/hearing-examiner/documents/case-digest/applications/road%20vacation/2021/V-2713_Steffen_Lemons.ashx?la=en at ¶¶ 27.

[10] *In re Exchange of Real Property by Pierce County*, 84 Wn. App. 1009, 1996 WL 662424 (1996) (unpublished). Mr. Soelling's citation to a 1970 AG opinion is unavailing. *See* https://www.atg.wa.gov/ago-opinions/counties-roads-limitations-vacation. The AG discussed the public's right of navigation and corollary rights, and riparian owner's rights to the entire surface of a nonnavigable lake for recreational and other purposes, ordinary high tide and ordinary high water marks, and uplands, tidelands, and shore lands. Nothing in the AG's opinion seemed geared to dramatically expanding the bodies of water the legislature was intending to protect access to (or at least vistas of) via RCW 36.87.130.

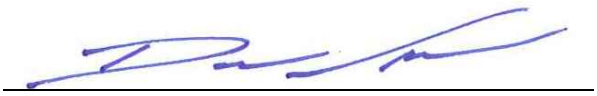
[11] https://kingcounty.gov/~/media/independent/hearing-examiner/documents/case-digest/applications/road%20vacation/2020/V-2719_Kelderman.ashx?la=en at ¶ 12; https://kingcounty.gov/~/media/independent/hearing-examiner/documents/case-digest/applications/road%20vacation/2021/V-2713_Steffen_Lemons.ashx?la=en at ¶ 42.

future"' (as it mis-quoted the code language in its briefing), going forward Roads should analyze, in the engineer's report and in the staff report due two weeks before the hearing, the impact of vacation on the "county *transportation* system of the future," a concept which includes more than simply vehicle roads.

RECOMMENDATION:

DENY proposed ordinance no. 2021-0247 to vacate the subject road right-of-way.

DATED December 17, 2021



David Spohr
Hearing Examiner

NOTICE OF RIGHT TO APPEAL

A person appeals an Examiner recommendation by following the steps described in KCC 20.22.230, including filing with the Clerk of the Council a sufficient appeal statement and a $250 appeal fee (check payable to the King County FBOD), and providing copies of the appeal statement to the Examiner and to any named parties listed on the front page of the Examiner's recommendation. Please consult KCC 20.22.230 for exact requirements.

Prior to the close of business (4:30 p.m.) on ***January 10, 2022,*** an electronic copy of the appeal statement must be sent to Clerk.Council@kingcounty.gov *and* a paper copy of the appeal statement must be delivered to the Clerk of the Council's Office, Room 1200, King County Courthouse, 516 Third Avenue, Seattle, Washington 98104. Prior mailing is not sufficient if the Clerk does not actually receive the fee and the appeal statement within the applicable time period.

Unless the appeal requirements of KCC 20.22.230 are met, the Clerk of the Council will place on the agenda of the next available Council meeting a proposed ordinance implementing the Examiner's recommended action.

If the appeal requirements of KCC 20.22.230 are met, the Examiner will notify parties and interested persons and will provide information about "next steps."

MINUTES OF THE SEPTEMBER 16, 2021, HEARING ON THE ROAD VACATION PETITION OF GHR, LLC AND MICHAEL RITTER, DEPARTMENT OF TRANSPORTATION FILE NO. V-2727

David Spohr was the Hearing Examiner in this matter. Participating in the hearing were Krysia Colts, Leslie Drake, Lisa Fite, Laura Giorgi, Monica Leers, Jane Millar, Michael Ritter, Chris Soelling, Judith Westall, and Deborah Young.

The following exhibits were offered and entered into the hearing record by Roads:

Exhibit D1. Roads Services report to the Hearing Examiner, sent September 2, 2021
Exhibit D2. Letter from Clerk of the Council to KCDOT transmitting petition, dated May 29, 2019
Exhibit D3. Petition for vacation of a county road
Exhibit D4. Letter to Petitioner acknowledging receipt of petition and explaining road vacation process, dated June 4, 2019
Exhibit D5. Letter to adjacent property owners, dated June 10, 2019
Exhibit D6. Amended petition, signed by Michael Ritter
Exhibit D7. Response from Deborah Young
Exhibit D8. Vacation area map
Exhibit D9. Plat of Burke and Farrars Kirkland Addition
Exhibit D10. King County Assessor's information for Petitioner GHR, LLC – APN 1243100045
Exhibit D11. King County Assessor's information for Petitioner Michael Ritter – APN 124300090
Exhibit D12. Emails from Deborah Young
Exhibit D13. Email from Laura Giorgi
Exhibit D14. Email from Chris Soelling
Exhibit D15. Final stakeholder notification, sent May 1, 2020, with vicinity map and vacation area map, with comment deadline of May 18, 2020
Exhibit D16. Email from Assessor's Office regarding valuation
Exhibit D17. Compensation calculation model spreadsheet for Petitioner GHR, LLC, APN 1243100045
Exhibit D18. King County Assessor's information for Petitioner GHR, LLC – APN 1243100090
Exhibit D19. Letter to Petitioner recommending approval, conveying County Road Engineer report, dated July 6, 2020
Exhibit D20. Road Engineer report
Exhibit D21. Letter from KCDOT to KC Council recommending approval and transmitting proposed ordinance, dated June 18, 2021
Exhibit D22. Proposed ordinance
Exhibit D23. Fiscal note

Exhibit D24. Declaration of Posting
Exhibit D25. Supplemental briefing, submitted October 14, 2021
Exhibit D26. *Reserved for future submission of* Affidavit of publication

The following exhibits were offered and entered into the hearing record by public:

Exhibit P1. Email from Deborah Young, dated August 17, 2021
Exhibit P2. Email from Deborah Young, dated September 11, 2021
Exhibit P3. Email from Deborah Young, dated September 11, 2021
Exhibit P4. Email from Laura Giorgi, dated September 13, 2021

The following exhibits were offered and entered into the hearing record by Chris Soelling:

Exhibit S1. Response to Notice of Briefing and Appendix C: Transportation, submitted September 30, 2021
Exhibit S2. Technical Appendix C2: Regional Trails Needs Report
Exhibit S3. Email from Robert Foxworthy, dated May 1, 2015
Exhibit S4. Redmond Planning Document: Chapter 6 Trails
Exhibit S5. Appendix C1: Transportation Needs Report
Exhibit S6. Response to Exhibit D25, submitted October 28, 2021