

**DEPARTMENT OF TRANSPORTATION
ROAD SERVICES DIVISION
REPORT TO THE HEARING EXAMINER**

PUBLIC HEARING: March 15, 2018 at 11:00 am or shortly thereafter

**King County Hearing Examiner's Office
516 Third Avenue, Fred Conference Room, 12th Floor
Seattle, WA 98104**

February 21, 2018

**PETITION TO VACATE: Portions of 327th Avenue NE, John McGee No. 2 Road,
Survey No. 2208**

Transportation File: V-2701

Proposed Ordinance: 2018-0010

A. GENERAL INFORMATION

Petitioner(s): Mathew Benson,
Tom Duvall and Janet Duvall,
Warner Smith and Roxana Andone

Location of Road: Portions of 327th Avenue NE, John McGee No. 2 Road
Thomas Brothers Page 539
Zoning – A35 and RA 10

Adjacent Parcels: 0325079010, 0325079011 and 032579018

B. HISTORY

R.C.W. 36.87 establishes the right of property owners to petition a county legislative body for the vacation of road rights-of-way. K.C.C. 14.40 establishes King County policies and procedures for accomplishing same.

The petition was filed on May 18, 2016 with the Clerk of the King County Council and subsequently revised to clarify the vacation area. The Department of Transportation, Road Services Division (Roads) circulated the request for vacation, soliciting comments from the agencies listed below. The petition requests vacation of portions of 327th Avenue NE, John McGee No. 2 Road

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located northerly of the town of Carnation in the SW quarter of Section 3, Township 2 N, Range 7 E, W.M. and Thomas Brothers Page 539.

Petitioners own all parcels abutting the subject portion of right-of-way. The subject portion of right-of-way bisects Petitioners' properties.

A search of records by staff found that King County acquired the subject right-of-way by deed recorded under recording number 603852 in conjunction with the establishment of John McGee No. 2 Road.

The subject portion of the right-of-way is unopened and unimproved. No record has been located reflecting expenditure of public funds for improvement or maintenance of the right-of-way. The southern portion of the right-of-way that is not part of this petition, is open and maintained by the County. The vacation area ends at the southern edge of Petitioner Benson's property before the start of the maintained portion of the right-of-way.

C. NOTICE

Notice of this hearing was posted at the termini of the proposed vacation area on February 16, 2018 and published in accordance with requirements of RCW 36.87.060.

D. REVIEWING AGENCIES AND COMMENTS

Roads did not receive responses from Comcast, King County Fire District #10, or the following King County agencies: Department of Executive Services, Real Estate Services Division; Department of Natural Resources and Parks, Open Space; and DNRP Water and Land Divisions. A copy of the Final Notice is included as Exhibit #11.

ATTACHMENTS	AGENCY	COMMENT
1.	Puget Sound Energy	Responses dated 08/03/2016, and 7/31/2017. Electric service lines in the vacation area. Easements needed to maintain existing facilities. Easements obtained from petitioners Smith and Andone.
2.	Frontier Communications Northwest, Inc.	Response dated 07/11/2016. No facilities in conflict with the proposed vacation location.
3.	Century Link	Response dated 06/21/2017. Centurylink does not have facilities on 327 th Ave NE in the vacation area.
4.	Wave Broadband	Response dated 7/8/2016. Wave has no facilities at this location.

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5.	DPER	Response dated 08/04/2016. No objection.
6.	DNRP- Parks Div.	Response dated 07/8/2016. Parks has no objections to this request. Okay to vacate.
7.	DNRP-Wastewater	Response dated 7/25/2016. No facilities on this property. Ok to vacate.
8.	DOT- CIP & Planning Section	Response dated 7/15/2016. From a transportation planning perspective, we have no objection to approving this road vacation. There are no short or long term transportation improvements planned for this right-of-way, and no funded County road improvements in the surrounding area. This right of way is not a documented transportation need for the present or future county road system.
9.	DOT- Roads Maintenance	Response dated 9/12/2016. This portion of 327 th Ave NE is unopened and unmaintained by Roads Maintenance. The portion of the right-of-way to the south is a road that we maintain.
10.	DOT- Traffic Engineering	Response dated 8/25/2016. No objection to this proposed road vacation.
11.	DOT- Transit	Response dated 8/09/2016. Transit has conducted a review of the above referenced street vacation. We've concluded that the subject vacate will have no effect on our facilities or operations.
12.	DOT-Enviro Unit	Response dated 9/1/2016. No comments regarding this road vacation.
13.	EXEC- Landmarks & Heritage	Response dated 8/03/2016. Reviewed data and files for the location and the adjacent parcels and find no indications of historical resources that would be affected by this road vacation. No concerns and no conditions to request.
14.	DOT – Survey	Response dated 08/08/2016. Right-of-way is not needed. Recommend approve vacation.

E. OTHER COMMENTS:

F. COUNTY ROAD ENGINEER RECOMMENDATION

The County Road Engineer recommends the petition V-2701 to vacate a portion of 327th Avenue NE, John McGee No. 2 Road be approved. The subject right-of-way is useless to the County Road System. The full report of the County Road Engineer is included as Exhibit #21.

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G. COMPENSATION

The County Road Engineer recommends that the County accept the non-monetary benefits of reduction of liability and obligation, the avoided costs of management and the additional tax revenue that will result from vacating this segment of useless right-of-way as full compensation for the proposed vacation and waiver of any payment by Petitioners.

Road vacations are a unique activity created and governed specifically by statute and county code. The circumstances, methodology and purpose of road vacations are limited to the statutes and codes from which they arise. RCW 36.87 and King County Code section 14.40 govern this action.

Under KCC 14.40.020, compensation may be required as a condition of a road vacation. The requirement is discretionary, not mandatory. If the county council chooses to require compensation for a road vacation, it “may consider as a factor the assessed land value of the parcels adjacent to the county right-of-way proposed for vacation in addition to the factors listed in RCW 36.87.120.”

The compensation analysis begins with the assessed value of the properties adjacent to the subject right-of-way. KCC 14.40.020. The Petitioners’ property and those in the immediate area are currently zoned A35 and RA 10. The Petitioners’ properties range from 28 to 18 acres. The addition of the vacation area to the parcels will not change the potential subdivision or development of the parcels.

The total vacation area is 127,921 square feet. Of the total vacation area, 40,959 square feet will attach to the property owned by Matthew Benson, 47,778 will attach to the property owned by Warner Smith and Roxana Andone, and 39,184 square feet will attach to the property owned by Tom and Janet Duvall.

The averaged assessed value on a square footage basis for the subject right-of-way is approximately \$0.22 per square foot. Application of this average assessed value of \$0.22 per square foot to the 127,921 square foot vacation area results in a total value for the vacation area of \$28,142.62. This amount would be apportioned between the parcels as \$4,505 for the 40,959 square feet to be vacated to Matthew Benson; \$5,255.85 for the 47,778 square feet to be vacated to Warner Smith and Roxana Andone; and \$4,310.24 for the 39,184 square feet to be vacated to Tom and Janet Duvall.

However, as a stand-alone strip of land, the vacation area for each parcel would not be usable as a building lot and by adding the vacation area to the Petitioners’ properties, the development and subdivision potential is not changed. Furthermore, the vacation area and much of the Petitioners’ property are encumbered with environmentally sensitive areas, including identified wetlands. Therefore, the valuation of \$0.22 per square foot is not directly applicable to the vacation area.

Unlike tax title parcels or other property owned by the County, sections of right-of-way do not have a readily open market. Vacation, pursuant to RCW 36.87, 58.17 and KCC 14.40, is the only method to eliminate the County’s interest in useless county right-of-way and the only method by

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which the County may divest itself of the duty and liability of maintaining county roads. *See Attorney General Opinion 57-58 No.3, March 13, 1957.* Except in the very limited circumstance of vacating right-of-way abutting bodies of water (RCW 36.87.130), the County is not free to transfer the vacated right-of-way to anyone other than the abutting property. Therefore, the area to be vacated does not have a ready market for its sale. The only party that can acquire the vacated area from the County is the petitioner. The County cannot sell the vacation area on an open market.

RCW 36.87.120 allows the County to adjust the appraised value of proposed vacation area “to reflect the value of the transfer of liability or risk, the increased value to the public in property taxes, the avoided costs for management or maintenance, and any limits on development or future public benefit.”

The County Road Engineer recommends that the County accept the non-monetary benefits of reduction of liability and obligation, the avoided obligations of enforcement and management, plus the addition of tax income as compensation for the proposed vacation. In reaching this recommendation, the following factors have been considered:

- The right-of-way is unopened and unimproved and no public funds have been expended to date for its maintenance or repair;
- The right of way is imposed over an area with no useful connectivity to the County Road system and it is unlikely that it would ever be developed as a road;
- The right-of-way is imposed over an area with environmentally sensitive wetlands, slopes and erosion risk making it unsuitable for use as a road;
- Upon vacation of this section of unopened, unimproved and unmaintained right-of-way the County shall receive monetary benefit as the 127,921 square feet of vacation area is added to the property tax rolls;
- Upon vacation Roads is relieved of obligation and liability associated with maintenance, improvement, enforcement, monitoring and management of the right-of-way;
- Upon vacation Roads is relieved of liability that can arise as an owner of vacant and unattended land; and
- Retention of this right-of-way provides no other benefit to the County.

Roads maintains approximately 1500 miles of roadway within unincorporated King County. The total amount of unopened unimproved road right-of-way in the County is not known.

Roads has limited staff hours available; diverting Roads staff to respond to calls associated with unopened right-of-way prevents Roads staff from addressing critical daily work on the County's contiguous road system. Roads supports the vacation of unopened unimproved road right-of-way that is useless to the county road system in order to allow Roads to focus on its core responsibility of maintaining improved county roads.

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Furthermore, the County's ownership of open and unopened right-of-way can give rise to tort liability for the County. Vacation of this unopened road right-of-way reduces the County's exposure to liability claims. King County Office of Risk Management Services informed Roads that as of March 2017 it had closed 428 claims on behalf of Roads for the five year period of January 1, 2012 through December 31, 2016. Of the 428 claims closed, 152 (64%) were closed with payments. In 2016, the Office of Risk Management Services paid \$3,022,232 to resolve 21 claims on behalf of Roads and closed 2016 with 42 additional open claims remaining.

Risk Management Services also reports that the County routinely pays out in excess of \$50,000 for a simple pedestrian trip and fall occurring in maintained county areas such as park-and-rides and sidewalks. The County has crews to maintain and service such improved areas and the general public will report hazards within an improved area. Whereas, not only does the County not know of all unopened and unimproved road right-of-way, it does not regularly patrol or monitor unopened right-of-way. A hazardous condition could arise on unopened right-of-way and the county wouldn't know until a claim is filed.

The County has the liability risks associated with simply being an owner of vacant land: hazardous materials dumped on unopened road right-of-way can migrate to adjacent properties exposing the County to potential trespass claims; hazard trees on unopened road right-of-way can fall on adjacent property damaging structures or harming residents; and attractive nuisances can be erected resulting in claims for personal injury.

The subject portion of right-of-way bisects the property owned by each of the petitioners. It is likely that the property owners, their guests and invitees cross some portion of the subject right-of-way every day. As the unopened right-of-way is not marked or otherwise readily identifiable from the ground, Petitioners could have planted trees, constructed fences or buildings or otherwise incorporated portions of the right-of-way into their use of the their property.

Every piece of unopened right-of-way held by Roads carries with it the real potential liability for injuries to persons and property. The cost of just one claim can far surpass the straight calculated compensation for the vacation of this road.

Roads seeks to reduce potential obligations, opportunity costs, and liability risk while benefiting the citizens of King County through the vacation of this portion of right-of-way. The dollars Roads might obtain from the petitioners through the vacation of this portion of right-of-way is insignificant in comparison to the County's potential liability from its mere retention.

The other factors included in RCW 36.87.120 to offset monetary compensation, limits on development and future public benefit are briefly highlighted here. Vacation of this useless right-of-way will not change the limits or increase the likelihood of development of the abutting properties. The addition of the vacation area to the Petitioners' property does not change the use or potential division of the property. Currently, the right-of-way bisects Petitioners properties running right through an identified wetland area. The public is benefited by reducing the cost and exposure

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associated with Roads retaining this right-of-way and the private property owners assuming full responsibility of this area and payment of the associated property taxes and assessments.

Throughout the county there are segments of right-of-way that are useless to the county road system. The County has many unopened short useless segments of right-of-way that will never be made into a county road. However, the County has the burdens of ownership and risk, which are risks to the County with no public benefit. Vacation is the only mechanism to move these useless segments of right-of-way out of the County inventory and into private ownership. The subject right-of-way is one of the useless segments of right-of-way that is better in private ownership than retained by the County.

It is the recommendation of the County Road Engineer and the Director of Roads that this portion of right-of-way be vacated and any associated monetary compensation be waived. The reduction in liability and obligations for maintenance and enforcement are valuable consideration for the vacation of this right-of-way.

H. EXHIBITS

Exhibit #	DESCRIPTION
1.	DOT Report to the Hearing Examiner February 21, 2018 with 14 attachments.
2.	Petition transmittal letter dated May 18, 2016 to the Department of Transportation from the Clerk of Council.
3.	Petition for Vacation of a County Road. Received May 18, 2016.
4.	August 3, 2016 letter to Petitioners acknowledging receipt of petition and explaining process.
5.	August 8, 2016 letter to Petitioner regarding legal description of vacation area
6.	Revised Petition for Vacation of County Road
7.	Site map depicting vacation area.
8.	Aerial Map showing vacation area
9.	Vicinity Map
10.	Abstract of quit claim deed recorded under 603852
11.	Copy of final agency notice sent to stakeholders on August 10, 2016, including comment sheet, vicinity map, and maps of vacation area.
12.	Letter dated September 21, 2016 to Petitioners with estimate of required compensation.
13.	Letter of October 10, 2016 to Council
14.	Letter of October 10, 2016 to Petitioners notifying petitioners of County Road Engineer's recommendation of approval of the petition, requesting payment of compensation and execution of easements in favor of Puget Sound Energy and CenturyLink.
15.	Copy of Cashier's check from Petitioner Benson received November 7, 2016

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16.	Copy of Cashier's check from Petitioner Warner Smith dated January 18, 2017.
17.	Letter dated January 13, 2107 to petitioners confirming request to place the vacation petition on hold.
18.	Letter dated July 13, 2017 to petitioner with a copy of the County Road Engineer's Report.
19.	Easement with Puget Sound Energy signed July 22, 2017.
20.	Site map showing environmental layers from iMap
21.	County Road Engineer's Report
22.	Ordinance transmittal letter dated October 11, 2017 from King County Executive to Councilmember Joe McDermott. (note: signed copy unavailable)
23.	Proposed Ordinance 2017-xxxx
24.	Fiscal Note.
25.	Affidavit of posting for hearing & notice of hearing.
26.	Letter dated January 25, 2018 to Brian and Calab Donnoley transmitting a copy of the County Road Engineer Report sent pursuant to KCC 14.40.015 (C)
27.	Letter dated January 25, 2018 to Giovanni and Paula Fagioli transmitting a copy of the County Road Engineer Report sent pursuant to KCC 14.40.015 (C)
28.	Letter dated January 25, 2018 to BJ Morris, Guardian of Eugene R. Oliver transmitting a copy of the County Road Engineer Report sent pursuant to KCC 14.40.015 (C)
29.	Letter dated January 25, 2018 to Galen Trabont transmitting a copy of the County Road Engineer Report sent pursuant to KCC 14.40.015 (C)
30.	Affidavit of Publication for date of hearing – to be supplied by Clerk of the Council.

G. ISSUES:

Exhibit #30 Affidavit of Publication, is typically received either on the day of the hearing or shortly thereafter. The Clerk of Council will forward a copy of the affidavit to both the Examiner's Office and Roads when they receive it.

**DEPARTMENT OF TRANSPORTATION
ROAD SERVICES DIVISION
SUPPLEMENTAL MEMORANDUM TO THE
HEARING EXAMINER**

March 29, 2018

**PETITION TO VACATE: Portions of 327th Avenue NE, John McGee No. 2 Road,
Survey No. 2208**

Transportation File: V-2701

Proposed Ordinance: 2018-0010

Petitioner(s): Mathew Benson,
Tom Duvall and Janet Duvall,
Warner Smith and Roxana Andone

Location of Road: Portions of 327th Avenue NE, John McGee No. 2 Road
Thomas Brothers Page 539
Zoning – A35 and RA 10

On March 16, 2018, the Hearing Examiner issued a Notice of the Record Left Open for road vacation petition V-2701. In the Notice, the Hearing Examiner presented several issues including: concerns regarding the Road Services Division (Roads) recommendation to approve the road vacation without requiring payment of compensation; whether the petitioners Tom and Janet Duvall should be removed from the petition and the petition proceed to council with a recommendation to accept payment from the remaining petitioners; and the division's cost to process a road vacation petition. This Supplemental Memorandum is submitted in response.

Roads submitted a Report to the Hearing Examiner regarding right-of-way vacation petition V-2701 on February 28, 2018; Roads recommended that the vacation petition be approved and that no monetary compensation be required of the petitioners on the grounds that the reduction in liability and obligations for management and enforcement are valuable consideration for the vacation of this right-of-way. This remains Road's recommendation.

In his March 16, 2018 "Notice of the Record Left Open for right-of-way vacation petition V-2701," the Hearing Examiner expressed concerns that Roads was not requiring compensation: "And this is not something we can accept, while still meeting our fiduciary duty." Approving a right-of-way

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vacation petition without requiring compensation could not violate a fiduciary duty since neither RCW 36.87.120 nor KCC 14.40.020 require the payment of compensation prior to a vacation petition being granted. Requiring vacation petitioners to pay compensation for a right-of-way vacation is a discretionary decision of the county council; the Council is under no duty to receive monetary compensation for a right-of-way vacation. Under the statutory right-of-way vacation process, the County Road Engineer files a report regarding the proposed vacation¹, the Hearing Examiner makes a recommendation to Council, and then Council ultimately decides whether to vacate the right-of-way, whether it will require compensation for the vacation, and if compensation is required, in what amount. The County Council could have adopted language in KCC 14.40.020 requiring compensation as a condition for the vacation of a county right-of-way. It did not.

The leadership of Roads has made a policy decision that, except in situations where the vacation will allow for significant added value to the vacation petitioner by creating the capacity for subdivision and development on the petitioner's property, the reduction in liability exposure and management responsibility, among other benefits ensured by the vacation of road right-of-way, justifies approving vacations without the payment of monetary compensation.

The risk posed to the County as an owner of vacant real property is significant. Roads is keenly aware that a single accident on its unopened road right-of-way could cost the County far more than it could possibly receive from one or probably even one hundred right-of-way vacations of property that are typically narrow strips that must, if vacated, go to the adjoining property owner. From actual litigation experience, Roads knows that it faces potential risk and liability for every foot, every yard and every mile of road and unopened right-of-way. As presented in Roads' materials submitted to the Hearing Examiner, one trip and fall can cost the County \$50,000. Injuries that require a lifetime of care or result in diminished earning capacity may involve judgments of millions of dollars. That is why the County Road Engineer consistently recommends no compensation being required where strips of property do not create significant value for petitioners.²

The Hearing Examiner requests Roads calculate a specific dollar amount per square foot for its risk exposure for each segment of right-of-way, and specifically to each petitioner's portion of right-of-way that is the subject of a vacation petition. This is an impossible task. Roads does not have the ability to see into the future and determine if, when, where or how an injury or damage will occur on a specific area of county road right-of-way.

Additionally, it is important to recognize that Roads does not have summary information on all unopened right-of-way. While there is an inventory of roads, there is no such inventory of unopened right-of-way. The square footage of these miscellaneous property rights is not reasonably

¹ KCC 14.40.0104 requires the county road engineer to include in his/her report "The appraised value of the county right of way or portion thereof proposed for vacation as well as the county road engineer's recommendation for compensation to be determined in accordance with the factors listed in K.C.C. 14.40.020A."

² The transfer of liability or risk to the road vacation petitioner is the first factor set forth at RCW 36.87.120.

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knowable, even assuming a square footage calculation of risk was a possible, logical or desirable methodology for determining the value of maintenance and claims avoidance.

As areas of the county were developed over the last one hundred years, many rights-of-way were created, but never developed, and such information is not easily discoverable as it is buried in old property documents. Typically, the county becomes aware of an unopened right-of-way when there is a dispute between neighbors, a property owner wants to expand facilities on their property, or they discover an existing encroachment on public property. Throughout the years, many such property owners have initiated vacation petitions, but dropped their petitions when informed they would have to pay compensation for a small addition of square footage. Roads recognizes the value of property owners coming forward seeking the vacation of roads and unopened right-of-way, and does not endorse a valuation method that would discourage such actions.

Furthermore, much of the county's inventory of unopened right-of-way is imposed over areas where a road cannot realistically be built. Much of the unopened right-of-way is over areas with environmental restrictions including wet lands and steep slopes. Right-of-way cannot be converted to other uses. The only way to extinguish the county's interest is to vacate the right-of-way. See RCW 36.87, 58.17 and KCC 14.40; *Attorney General Opinion 57-58 No.3, March 13, 1957*. There is no value to Roads to keep unbuildable, inaccessible and potentially hazardous portions of right-of-way. Such areas are useless to the county road system and, because of the obligations of management and the risks of ownership, of negative value to the county.

However, Roads does know the financial ramifications of an injury occurring on its right-of-way. Roads recommends to the County Council that no monetary compensation be required in appropriate cases and Council decides the value to the County of removing the risks and responsibilities associated with owning useless right-of-way.

The Hearing Examiner has also stated that perhaps different valuation models should apply if a vacation petition was initiated by a private party or solicited by Roads. Roads does not see a distinction between petitions initiated by private parties or those solicited or encouraged by the County. The goal of reducing the risk of tort liability for the County is furthered with every right-of-way vacation. The recommendation of Roads in this matter remains the same; approve vacation petition V-2701 for all three petitioners without a requirement of monetary compensation.

Roads would like to address a few other issues raised in the Hearing Examiner's March 16, 2018 Notice. The Hearing Examiner does not have the authority to remove a petitioner from this right-of-way vacation. The Duvalls have not withdrawn their petition, nor have they failed to meet a requirement of the vacation process. Payment is not due until ninety days after the receipt of the request for payment. KCC 14.40.020. The County Council has not requested payment of any petitioner to this vacation. The Hearing Examiner may only make a recommendation to the County Council which has the authority to require compensation.

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In response to the Hearing Examiner's question of whether it costs Roads \$20,000-\$22,000 to process a right-of-way vacation, this amount was a guestimate submitted in response to a question from the Hearing Examiner regarding a specific petition, petition V-2667 in 2014, and the estimate assumed that the petition processing took 200 hours. This estimate seems high, even for that time. Since 2014, a lean process was undertaken to reduce processing time for vacations. Today, the average petition might take 40-50 hours of staff time, although this is again an estimate since hours aren't tracked by petition. Regardless, Roads has made the policy decision that it is fiscally responsible for the County to transfer rights-of-way that do not substantially increase the value of the adjoining parcels for no or minimal monetary compensation in order to reduce the County's potential tort liability exposure and maintenance obligations, among other benefits.