

May 17, 2017

**OFFICE OF THE HEARING EXAMINER
KING COUNTY, WASHINGTON**

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REPORT AND RECOMMENDATION

SUBJECT: Department of Transportation file no. **V-2669**
Proposed ordinance no. **2017-0078**
Adjacent parcel nos. **712040005, 7120400010, 7120400015, 7120400020,**
7120400025, 7120400030, 7120400035, 7120400045, 7120400050, 7120400055,
3223069093, 3223069005, 3223069096, 3223069091, 3223069071

KING COUNTY WATER AND LAND RESOURCES DIVISION

Road Vacation Petition

Location: portion of SE 180th Street, Renton

Petitioner: Department of Natural Resources and Parks
represented by **Jon Hansen**
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Suite 600
Seattle, WA 98104
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King County: Department of Transportation
represented by **Leslie Drake**
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SUMMARY OF RECOMMENDATIONS:

Department's Preliminary Recommendation:	Approve vacation, waive compensation
Department's Final Recommendation:	Approve vacation, waive compensation
Examiner's Recommendation:	Strongly approve vacation, mildly approve waiving compensation

PUBLIC HEARING:

After reviewing the Department of Transportation, Road Services Division (Road Services) report and accompanying attachments and exhibits, the Examiner conducted a public hearing on the matter on April 10, 2017, in the Fred Conference Room, 12th Floor, King County Courthouse, 516 Third Avenue, Seattle, Washington.

Participants at the public hearing and the exhibits offered and entered are listed in the attached minutes. A verbatim recording of the hearing is available in the Hearing Examiner's Office. Having reviewed the record in this matter, the Examiner now makes and enters the following:

FINDINGS AND CONCLUSIONS:

Introduction

1. In 2012, the Department of Natural Resources and Parks (DNRP) petitioned the County to vacate a public right-of-way, the far western terminus of SE 180th street as it dead ends near the Cedar River. On March 16, 2017, the Examiner received Road Services' report (Report) recommending vacating the right-of-way and waiving compensation. The required notice of hearing was provided. The Examiner conducted the public hearing on behalf of the Metropolitan King County Council.
2. Except as provided herein, the Examiner adopts and incorporates the facts set forth in the Report and the statements of fact contained in proposed ordinance no. 2017-0078. Exs. 1 & 15. Road Services' report will be attached to those copies of this recommendation that are submitted to the Council. A map showing the vicinity of the proposed vacation and the approximately 66,121 square feet of area to be vacated is in the hearing record as Exhibit 8.
3. Chapter 36.87 RCW sets the general framework for county road vacations, augmented by KCC chapter 14.40. There are at least two main inquiries in a vacation petition. Is vacation warranted? If so, what compensation is appropriate? We address those in turn.

Appropriateness of Vacation

4. 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. While denial is mandatory where a petitioner fails to meet the standard, approval is discretionary where a petitioner does meet the standard. RCW 36.87.060(1).
5. Here, the road in question was not acquired with County funds, but was opened and maintained by the County, serving approximately 15 parcels along a bend of the Cedar River. Ex. 8. According to hearing testimony, in the 1990s the County identified this area as part of a salmon recovery plan and later a flood hazard reduction plan. Between 2002 and 2008 DNRP acquired all the other properties (other than the right-of-way) within the boundaries of what would become a natural area. Ex. 19A at 003. In 2008, the County granted the State a "Deed of Right to Use Land for Salmon Recovery" under which—in consideration of monies coming from the State's Habitat Conservation Account—the

County agreed to make no use of the (by-then County) parcels abutting the road that are inconsistent with salmon recovery and conservation. Ex. 10.

6. All of the existing private residences and the surface to the road have since been removed. Private utilities have removed their lines. Ex. 1 at 013. As the salmon recovery project has unfolded, the remaining roadbed has been bisected by a new channel, leaving the western two-thirds of the right-of-way area basically on an uninhabited island. Ex. 13 at 004. It looks more and more like the natural area that it was designed to be. It is hard to imagine a more useless “road.” And habitat-related gains benefit the public.
7. By the close of our April 10 hearing, there was no question that the road subject to this vacation is useless and that vacation would benefit the public.

Compensation

8. Where the vacation is appropriate, the petitioner must typically compensate the County. The old code, under which Road Services processed DNRP’s 2012 application, set compensation for a “Class B” road such as this one at 75% of full appraised value, but gave the Council the authority to waive some or all such compensation. KCC 14.40.020. The new code, effective December 17, 2016, jettisons the 25% discount but tracks the 2016 State law change that allows a local jurisdiction to “adjust the appraised value 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.” RCW 36.87.120; KCC 14.40.020(A)(1).
9. The appraised value of a right-of-way is our starting point for the compensation analysis, which is why such information should be included in Road Services’ report to the examiner. KCC 14.40.0104(B)(6). Road Services recommended a complete waiver of compensation, but included insufficient information to allow us to make an informed recommendation to Council on this topic.
10. Road Services did not include any monetary analysis because it concluded that the right-of-way has “little or no economic value.” Exs. 12 at 002, 1 at 002. Viewing Road Service’s property as it exists today—some of it having already been eroded completely through by a new inlet, limited to salmon recovery purposes, and abutting properties no longer capable of housing riverfront residences—it is accurate to say that the road has little or no economic value. As Road Services described it, “through DNRP’s efforts to reduce flood hazard and improve salmon recovery, the river has cut channels through the parcels, creating islands within the river. What were once individual lots capable of sustaining [] private homes [] have become wildlife habitat forever dedicated to salmon recovery in conservation.” Ex. 12 at 001. Yet looking at the property as it exists on the ground in 2017 views compensation through an incorrect lens.
11. The “scope of the project rule” has been described by various courts and commentators in different ways over time. For example, 130 years ago the Court handled a case involving a local park commission attempting to acquire land for a park. *Kerr v. South Park Com’rs*, 117 U.S. 379 (1886). Once the park boundaries were announced, the value of lands adjacent to the planned-for park increased; the trial court rejected such enhanced prices in valuing land to be acquired within the park boundaries. *Id.* at 385. The Court

affirmed, reasoning that such special benefits or burdens arising from the prospect of establishing a public park should not figure into fair market value. *Id.* at 387. The core of the doctrine, as articulated more recently in 42 USC 4651(3), is that:

Any decrease or increase in the fair market value of real property prior to the date of valuation caused by the public improvement for which such property is acquired, or by the likelihood that the property would be acquired for such improvement, other than that due to physical deterioration within the reasonable control of the owner, will be disregarded in determining the compensation for the property.

12. The concept is best explained with a simple hypothetical. Picture two somewhat adjacent, similarly-valued properties, *Parcel A* and *Parcel B*. The government decides to damn a distant river and create an artificial lake and recreation area and to acquire both properties for its project. According to project plans, *Parcel A* will be completely submerged while *Parcel B* will abut the lake. The *with*-project fair market value of the soon-to-be underwater *Parcel A* would be next to nothing, while *Parcel B* would soar as prime, lake front property. The “scope of the project rule” avoids this inequity by ignoring the market value decrease or increase associated with the project; *Parcel A* and *Parcel B* in our hypothetical would each be valued as if there was no project.
13. The doctrine is applicable here. The starting point for valuation for land acquired for DNRP’s project is not the surface-less, washed through-road as it physically exists today, after the project removed levy or bank armoring and natural processes have started to take over. Given that rights-of-way are often assessed in reference to the dollars-per-square-foot values of abutting properties, the starting point is not even a physically intact road after the project decision was made to transform the higher value (market-wise) riverfront, residential properties into an uninhabitable conservation area. Instead the road should be valued consistent with the riverfront, residential lots in the *without*-project condition.
14. We thus held the record open and asked DNRP and Road Services for

some foundation for estimating the *without*-project value of the property and any downward adjusting factors. We are not looking to remake the wheel. We assume that DNRP had to do appraisals or assessments for the abutting properties that they acquired. Those should give Road Services relevant dollars-per-square-foot values to form the starting point for an at least back-of-the-envelope calculation for market value.

Both departments replied.

15. Road Services disagreed that valuation should consider the appraised value *without* the project, reasoning that compensation is pegged to the “appraised value of the vacated road as of the effective date of the vacation.” RCW 36.87.120; Ex. 19A at 002.¹ That

¹ The old KCC 14.40.020(A) on compensation specifically repeated this this “appraised value... as of the effective date of the vacation” language. The new code section on compensation, KCC 14.40.020, does not discuss the date, but we assume the date of vacation is still the appropriate date.

argument conflates the *date* of the appraisal with the *hypothetical conditions* an appraiser should be instructed to follow in assessing market value as of the effective date of appraisal. A hypothetical condition is “something that is known to be contrary to fact as of the effective date of appraisal but is taken to be true for purposes of the appraisal.”²

16. So, for example, although the exact time the natural area project was announced is not in the record, given that DNRP began acquiring other properties within the natural area boundaries (other than the right-of-way parcel) around 2002, we will use 2000 as a rough placeholder for when the project was a “go.” An appraiser would not use year 2000 comparable sales data to try to arrive at a 2017 value. “Without project” is not synonymous with “pre-project.” So long as, for example, a 2017 sale of riverfront property that was not adjacent to the project (where one might suspect the sale price was either enhanced by proximity to a natural area or depressed because of worries over increased public traffic) 2017 market information would provide the best information. A 2017 date of valuation does not mean an appraisal should incorporate project influences.
17. DNRP also argues that “there is no project that could skew the value of the right-of-way.” Ex. 19A at 003. We think a project turning abutting riverfront residential land into a natural area does skew the value of Road Service’s strip of property, especially since the “land value of parcels adjacent to the County right-of-way propose for vacation” is a factor in considering appropriate compensation for a right-of-way. KCC 14.40.020(A)(1). Thus we conclude that the *without* project value of the area is the appropriate starting point for the compensation analysis.
18. In response to our request for more information, Road Services provided Assessor information from 2012/2013, the last available Assessor values for abutting properties. Exs. 19A at 003, 19B & 19C. Road Services calculated an average assessed value of \$2.20 per foot, which for a 66,121-square foot property equates to about \$109,100. Ex. 19D. As assessments typically understate market value in a rising real estate market (and we take judicial notice of the almost daily news reminders that the local 2017 real estate market has climbed dramatically in the last five years), this number may be low.
19. On the other hand, in its recent briefing, DNRP noted that even *without* the project, the “road lies within the 100 year floodplain and the severe channel migration hazard area,” making it “more likely to be subject to damage and increase maintenance need as a result of flooding, erosion, and/or deposition of debris. It was this repeated damage to private homes and property that inspired residents to sell and KC to acquire the adjacent floodplain properties.” Ex. 20A at 002, 005, 006; Ex. 20B. Depending on whether the Assessor took into consideration flooding history and risk—and we cannot tell from looking through the various assessments, Exhibits 19B and 19C, whether or how this information was incorporated—the assessed values may conceivably *overstate* the fair market value of property within the natural area boundaries. In the absence of any better information, on whether or how much to adjust up or down the figure, we adopt \$109,100 as the right-of-way’s most likely market value *without* the influence of the project.
20. As discussed above, appraised value is the default, the ceiling that may be adjusted downward or even eliminated to account for reduced liability or risk, increased public

² THE APPRAISAL OF REAL ESTATE, THE APPRAISAL INSTITUTE 53–54 (14th ed. 2013).

benefits, increased property taxes, avoided management or maintenance costs, any limits on development, and future public benefit. RCW 36.87.120; KCC 14.40.020(A)(1); *see* former KCC 14.40.020 (Council may waive some or all compensation).

21. Some of the agencies' arguments for eliminating compensation are based on *with* project conditions. For example, DNRP pointed out that since DNRP purchased the properties and removed the residences, "unfettered access to the unoccupied properties" has resulted in dumping, or the "public cost or liability associated with the isolated, unmaintained road." Ex. 20A at 002, 004. Similarly, Road Services' reference to "the properties abutting the subject right away [being] no longer suitable for any purpose other than natural area," and the post-purchase removal of the road surface and the slicing up of the road, Exhibit 19A at 004, are describing the influences of DNRP's project.
22. However, confining our analysis to the *without* project scenario, there are significant benefits to transferring ownership. First, Road Services noted that it currently costs an estimated \$18,406 to maintain a mile of road. Ex. 19A at 005. Looking at the vacation map legend, it would appear the subject property is approximately 800 linear feet or 0.1515 miles, equating to an average \$2,800 in expected annual maintenance cost. And as discussed above, DNRP described the history of flood damage in the project area, with the right-of-way and abutting properties situated in a floodplain and severe channel migration hazard area, meaning that expected maintenance might be higher here than for a road in most other environments. Second, Road Services needs to respond to dumping and other encroachments on its road properties. *Id.* And jettisoning rights-of-way reduces risk for liability claims; in 2016 alone the County paid out \$3,022,232 on Road Services-related claims. *Id.* Here again, one might expect liability claims related to a road in an flood hazard area to be higher than for a more common stretch of road. And the public benefits from salmon recovery and establishment of a publically-accessible natural area. On the other hand, because the area is becoming a natural area, vacation here will not bring the increased property taxes that accompany transfers of public roads to private hands.

Conclusion

23. In the end, we feel somewhat boxed in. Vacation is clearly warranted. And at this point the *worst* thing that could happen to Road Services if compensation were demanded and DNRP simply elected to walk away and not take over ownership of an eroding, isolated, useless (from an economic perspective), liability-creating strip of land.³ Additionally there are no gift-of-public-funds or private benefit concerns here; the right-of-way is being transferred from one County department to another, and will continue be used for public use.
24. We remain concerned that DNRP scoped a project and paid to acquire all the other property interests within the natural resource area boundaries, and yet did not set aside any funds for purchasing Road Services' property interest, leaving Road Services the only uncompensated property owner in the natural area boundaries.⁴ Our concern is

³ DNRP explained at hearing that it has closed out this natural area project and has no remaining funds in the project budget.

⁴ See previous footnote.

heightened by (and we take judicial notice of) the road budget's extreme, systemic shortfall. We do not pretend to fully grasp funding "pots" and when it is okay for one County department to pay or not pay for something received from another County department. The best we can do is sketch out the compensation issue so that it is on Council's radar screen.

RECOMMENDATION:

1. We strongly recommend that Council APPROVE proposed ordinance no. 2017-0078 to vacate the subject road right-of-way.
2. We tepidly recommend that Council WAIVE all compensation for the vacation.

DATED May 17, 2017.



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 **June 12, 2017**, 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 APRIL 10, 2017, HEARING ON THE ROAD VACATION
PETITION OF KING COUNTY WATER AND LAND RESOURCES DIVISION,
DEPARTMENT OF TRANSPORTATION FILE NO. V-2669**

David Spohr was the Hearing Examiner in this matter. The following people were in attendance: Leslie Drake and Jon Hansen.

The following exhibits were offered and entered into the hearing record on April 10, 2017:

- Exhibit no. 1 Roads Services report to the Hearing Examiner, received March 16, 2017
- Exhibit no. 2 Letter from Clerk of the Council to KCDOT transmitting petition, dated August 17, 2012
- Exhibit no. 3 Petition for vacation of a county road, received August 17, 2012
- Exhibit no. 4 Petitioner's vicinity map
- Exhibit no. 5 Rainbow Bend plat map
- Exhibit no. 6 Quit claim deed no. 1626-328 from Henry McDonald to King County, dated April 9, 1932
- Exhibit no. 7 Quit claim deed no. 5925218 from Henry and Many Seijas, dated August 26, 1965
- Exhibit no. 8 Site map of vacation area
- Exhibit no. 9 Aerial map of vacation area
- Exhibit no. 10 Deed of right to use land for salmon recovery no. 20081107000786, dated November 6, 2008
- Exhibit no. 11 Email from KCDOT to agencies of final notice of road vacation, sent October 10, 2016
- Exhibit no. 12 Letter from KCDOT to Petitioner approving vacation and recommending cost waiver, dated November 15, 2016
- Exhibit no. 13 Letter from KCDOT to KC Council recommending approval, dated November 15, 2016
- Exhibit no. 14 Letter from King County Executive to Councilmember Joe McDermott transmitting ordinance, dated February 9, 2017
- Exhibit no. 15 Proposed ordinance 2017-0078
- Exhibit no. 16 Fiscal note
- Exhibit no. 17 Affidavit of posting, noting posting date of March 13, 2017
- Exhibit no. 18 *Reserved for affidavit of publication*

The follow exhibits were offered and entered into the hearing record on May 9, 2017:

- Exhibit no. 19
 - A. Road Services' supplemental memorandum, dated May 9, 2017
 - B. eReal Property information for Parcels 3223069091, 3223069071, 7120400005, 7120400010, 7120400015, 7120400020, 7120400025, 7120400030, 7120400035, 7120400045, 7120400050, 7120400055, 3223069093, 3223069005, 3223069096
 - C. eReal Property tax history for Parcels 3223069091, 3223069071, 7120400005, 7120400010, 7120400015, 7120400020, 7120400025, 7120400030, 7120400035,

Exhibit no. 20

- 7120400045, 7120400050, 7120400055, 3223069093,
3223069005, 3223069096
- D. Assessed land value worksheet
 - E. Aerial map of SE 180th Street, dated 2009, 2012, and 2015
 - A. Applicant supplemental information, dated May 9, 2015
 - B. Map of Cedar River channel migration zone, dated April 2015