

November 6, 2019

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

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**REPORT AND RECOMMENDATION**

SUBJECT: Department of Transportation file no. **V-2701**  
Proposed ordinance no. **2018-0010**  
Adjacent parcel nos. **0325079010, 0325079011, 0325079018**

**BENSON, DUVALL, SMITH, AND ANDONE**  
Road Vacation Petition

Location: a portion of 327th Avenue NE, Carnation

Petitioner: **Matthew Benson**  
7930 327th Avenue NE  
Carnation, WA 98014  
Telephone: (425) 306-0174  
Email: [mbenson@nwgeophysics.com](mailto:mbenson@nwgeophysics.com)

Petitioners: **Tom and Janet Duvall**  
PO Box 277  
Carnation, WA 98014  
Telephone: (425) 831-1012  
Email: [jcnine47@gmail.com](mailto:jcnine47@gmail.com)

Petitioners: **Warner Smith and Roxana Andone**  
PO Box 538  
Carnation, WA 98014  
Telephone: (206) 601-8412  
Email: [warner.smith@outlook.com](mailto:warner.smith@outlook.com)

King County: Department of Local Services  
*represented by* **Leslie Drake**  
201 S Jackson Street  
Seattle, WA 98104  
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## FINDINGS AND CONCLUSIONS:

### Overview

1. Today’s case involves a petition from three private parties to vacate an unopened portion of 327th Avenue NE near Carnation. After hearing the witnesses’ testimony and observing their demeanor, studying the exhibits admitted into evidence, and considering the parties’ arguments and the relevant law, we recommend that Council grant the petition, contingent on petitioners paying for their respective right-of-way segment.

### Background

2. In 2016, the Bensons, Smith/Andones, and Duvalls filed a petition to vacate the County right-of-way that runs through the middle of each of their properties. Ex. 3. Under the code then in place, the Roads Services Section (Roads) calculated the compensation due for the vacation at \$4,505 for the Bensons, \$5,255.85 for the Smith/Andones, and \$4,310.24 for the Duvalls.
3. As detailed in many of our recommendations to Council, the state changed the law later in 2016 to allow local legislative bodies to downwardly adjust the appraised value of a right-of-way “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. County law soon followed. KCC 14.40.020.A.1. However, the Roads Services Section (Roads) was unable to come up with a comprehensive methodology for calculating those downward adjustments, instead arguing for full waivers for all petitions coming before us.
4. Even without a sound methodology to back it up, we went along with Road’s request in *V-2669*, recommending entirely waving compensation in May 2017. Council flatly *rejected* our recommendation, requiring full compensation. Thus, in our October 2017 recommendation in *V-2703*, we wrapped up a recommendation with a pledge to Council that:

We assure Council that in future cases involving vacations to private ownership, we will not send up a recommendation to Council unless we can vouch for a transparent explanation, tracking the math, for how we quantified a conclusion to partially or fully waive compensation, thus ensuring that Council will not inadvertently be gifting public property interests.
5. In today’s case, we held our initial public hearing in March 2018. At that point, Roads was still unable to come up with a methodology. We thus stayed this petition (and other pending road vacation petitions) and turned to the Executive’s Office of Performance, Strategy and Budget (PSB) to help us come up with a sound financial model.
6. PSB answered the call, completing a thorough report at the end of January 2019 that, per the Executive’s transmittal letter, “furthers the King County Strategic Plan goal of exercising sound financial management by understanding administrative costs and

valuation of rights-of-way in road vacation petitions.” Ex. 38 at 001. We—and Council—have successfully applied that methodology in all of the other stayed vacation petitions. Today’s petition is the last one in the batch of stayed petitions.

7. We held a prehearing conference on July 26, and set a second public hearing for August 29. The day before that hearing, the Duvalls stated that they would be unable to attend the hearing and asked for a postponement to allow them to participate. We granted that request and rescheduled our hearing for September 29. We now answer the two critical questions.

### Is Vacation Warranted?

8. 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 where a petitioner fails to meet the standard, approval is discretionary where a petitioner meets the standard. RCW 36.87.060(1).
9. This portion of 327th Avenue NE was not opened, constructed, or maintained for public use, and it is not known to be used informally for access to any property. Vacation of the right-of-way would have no adverse effect on the provision of access and fire and emergency services to the abutting properties and surrounding area. A utility easement to Puget Sound Energy has been recorded for existing utility facilities. The right-of-way is not necessary for the present or future public road system for travel or utilities purposes. Vacation is not inconsistent with public interest.

### What Compensation Is Due?

10. The PSB model starts by working with the Assessor to get an individualized evaluation of what value merging the right-of-way area adds to each parcel. That is only the starting point, because we adjust downward to reflect transferred liability risk, avoided management or maintenance, and increased tax revenue.
11. PSB uses information from the Office of Risk Assessment—whom PSB described as having a complete methodology for calculating claims judgments and settlements, per mile—to arrive at a number for avoided liability risk. PSB explained which types of taxes (General Fund and Roads Fund) would figure into the mix and which would not (other taxes such as levy lid lifts). PSB analyzed the avoided maintenance costs. PSB also explained why it did not include petition-processing costs in its assessment. Ex. 38. We have previously detailed the workings of PSB’s model, and Council has adopted it in past vacations.
12. In several petitions that we stayed pending PSB’s analysis, we informed the petitioners that once PSB came up with a rigorous model and righted the ship, if that new number turned out to be higher, we would recommend that Council accept the original, lower compensation amount. We reasoned that, due to no fault of any petitioner, Roads had

taken an unfortunate detour. We explained that it did not seem fair to charge a petitioner more than he or she would have paid if they had been allowed to expeditiously go through with their original petition under the previous paradigm.

13. In every petition to reach us since PSB performed its analysis, the model has produced a *lower* compensation due than under the previous regulatory regime. So in cases such as *V-2687* and *V-2700*, our pledge was a moot point, simply disappearing into the ether once PSB’s model produced a lower figure. Petitioners paid the lower, PSB-calculated figure and acquired the right-of-way.
14. Today’s case is different. The PSB model produces a higher compensation-due number than that calculated under the old system. That is not altogether surprising. In the other recent road vacations, the public right-of-way ran along the *edge* of a particular parcel. One would presume that such an encumbrance would not exert too large a downward pressure on the market value of the larger parcel (as compared to a similarly-situated parcel without such an encumbrance). But here the public right-of-way actually runs smack dab down the middle of each of the three petitioner’s properties. One would expect that such an encumbrance would produce a larger downward pressure on market value than a similarly-situated parcel either without such an encumbrance at all, or with the encumbrance only on the periphery of the parcel.
15. In any event, application of PSB’s model increased the amounts from:
  - \$4,505 to \$5,843 for the Benson property (Ex. 34);
  - \$5,255.86 to \$7,803 for the Smith/Andone property (Ex. 35); and
  - \$4,310.24 to either \$4,862 or \$34,273 for the Duvall property, depending on which Assessor zone is used (Exs. 33, 36, 37).

For the reasons described in paragraph 12, we recommend allowing vacation at the initial-calculated, lower amounts.

16. Even the lower compensation does not sit well with today’s petitioners. That is completely understandable.
17. Part of that is a misunderstanding of how rights-of-ways are valued. Petitioners figured that because the rights-of-way themselves are useless—no one could purchase it and build anything on it—the right-of-way has no value. That is a misinterpretation even some professional appraisers have made. For example, in *V-2667*, the abutting private petitioner hired an appraiser in an effort to pay less to acquire the right-of-way than Roads had appraised it to be worth. The appraiser made a similar argument, one we (and ultimately Council) rejected thusly:

The premise of Ms. Janshen’s appraiser treating the road as an unbuildable, stand-alone parcel has some intuitive appeal but is ultimately incorrect and significantly undervalues the road area’s value.... The highest and best use of the road property is not as a “stand-alone,”

marginal lot. Instead, it will become part of a single, contiguous, unencumbered Janshen homesite. Pegging the value of the road area to the overall Janshen property, and then comparing the Janshen property to sales of other single family lots, is correct.

18. And part of that is unmet expectations. At the time of the original petition, the requirement was for compensation to be paid, so the parties went into it eyes wide open. Mr. Benson and the Smith/Andones deposited the initial amounts listed for their respective properties in paragraph 2, although they have since taken back their deposits.
19. However, state law changed later in 2016. The statute that actually passed in Olympia gave to the local legislative branches the authority to “adjust the appraised value to reflect” certain cost savings, RCW 36.87.120. Roads may be working off the earlier Senate Bill that—had it passed—would have given the authority to make those adjustments to the “appraising agency” (in King County, meaning Roads). 2016 Reg. Sess. S.B. 6314; 6314-S AMH LG JONC 091. Regardless of how or why, the bottom line is that Roads apparently informed many petitioners that the County would give away the right-of-way. Who would not latch onto the prospect of getting something for free?
20. In *V-2697*, the petition where the Council formally adopted the current model, we recommended that “Council adopt PSB’s thoughtful analysis as the benchmark going forward,” but we candidly raised this concern for Council to be aware of before it made its final decision. We phrased it as follows:
 

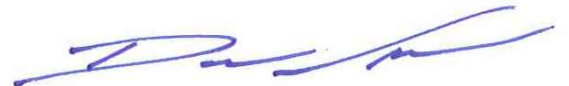
while the state clearly assigned the adjustment task to the legislative branch, Roads informed multiple petitioners that compensation should be zero. Having recalibrated their expectations to zero compensation, it will be upsetting for petitioners already in the pipeline to learn that they will need to pay compensation (albeit at a reduced dollar level). We will not be surprised if some current petitioners become upset enough to walk away. We do not want to overstate this concern—the only two other petitioners that have gone to hearing since PSB disseminated its model (the Wymans and the Creightons) have accepted the adjusted compensation figures and remain ready to proceed. So even in the short run, the adjustment may not prove disastrous. However, there may be some ruffled feathers in the short run.
21. That may describe today’s case. Petitioners are under no compulsion to acquire the stretch of public right-of-way running through each of their properties. We will phrase it, as we have in previous recommendations, so that each petitioner has the autonomy to make the decision that best meets that petitioner’s individual situation. No petitioner’s ability to acquire the right-of-way splitting his or her own parcel will be hampered by any other petitioner’s election not to exercise that option.

#### RECOMMENDATION:

1. We recommend that Council APPROVE proposed ordinance no. 2018-0010 to vacate each of the three road right-of-way segments, each with a condition on recording the vacation ordinance for each stretch of right-of-way.

2. Vacation of the portion of the right-of-way running through parcel 032507–9018 (Benson) is contingent on petitioner paying \$4,505 to King County within 90 days of the date Council takes final action. If King County does not receive \$4,505 by that date, there is no vacation and the right-of-way associated with parcel -9018 remains King County's. If payment is timely received, the Clerk shall record an ordinance against parcel -9018. Recording an ordinance against parcel -9018 will signify that payment has been received, the contingency is satisfied, and the right-of-way associated with parcel -9018 is vacated.
3. Vacation of the portion of the right-of-way running through parcel 032507–9011 (Smith/Andone) is contingent on petitioners paying \$5,255.86 to King County within 90 days of the date Council takes final action. If King County does not receive \$5,255.86 by that date, there is no vacation and the right-of-way associated with parcel -9011 remains King County's. If payment is timely received, the Clerk shall record an ordinance against parcel -9011. Recording an ordinance against parcel -9011 will signify that payment has been received, the contingency is satisfied, and the right-of-way associated with parcel -9011 is vacated.
4. Vacation of the portion of the right-of-way running through parcel 032507–9010 (Duvalls) is contingent on petitioners paying \$4,310.24 to King County within 90 days of the date Council takes final action. If King County does not receive \$4,310.24 by that date, there is no vacation and the right-of-way associated with parcel -9010 remains King County's. If payment is timely received, the Clerk shall record the ordinance against parcel -9010. Recording an ordinance against parcel -9010 will signify that payment has been received, the contingency is satisfied, and the right-of-way associated with parcel -9010 is vacated.

DATED November 6, 2019.



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 **December 2, 2019**, an electronic copy of the appeal statement must be sent to [Clerk.Council@kingcounty.gov](mailto: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 MARCH 15, 2018, HEARING ON THE ROAD VACATION  
PETITION OF BENSON, DUVAL, SMITH, AND ANDONE, DEPARTMENT OF  
TRANSPORTATION FILE NO. V-2701**

David Spohr was the Hearing Examiner in this matter. Participating in the hearing were Leslie Drake, Janet Duvall, Matthew Benson, Warner Smith, and Tom Duvall.

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

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|----------------|--|
| Exhibit no. 1  | Roads Services report to the Hearing Examiner, sent February 28, 2018  |
| Exhibit no. 2  | Letter from Clerk of the Council to KCDOT transmitting petition, dated May 18, 2016  |
| Exhibit no. 3  | Petition for vacation of a county road, transmitted May 18, 2016   |
| Exhibit no. 4  | Letter from KCDOT to Petitioners acknowledging receipt of petition and explaining road vacation process, dated August 3, 2016  |
| Exhibit no. 5  | Letter from KCDOT to Petitioners providing revised legal description for right-of-way, dated August 8, 2016  |
| Exhibit no. 6  | Revised petition for vacation of a county road   |
| Exhibit no. 7  | Site map depicting vacation area   |
| Exhibit no. 8  | Aerial photograph depicting vacation area  |
| Exhibit no. 9  | Vicinity map   |
| Exhibit no. 10 | Abstract of quit claim deed for subject property, dated February 7, 1907, recording no. 603852   |
| Exhibit no. 11 | KCDOT notification letter to stakeholders requesting responses by no later than September 12, 2016   |
| Exhibit no. 12 | Letter from KCDOT to Petitioners providing compensation estimated, dated September 21, 2016  |
| Exhibit no. 13 | Letter from KCDOT to KC Council recommending approval, dated October 10, 2016  |
| Exhibit no. 14 | Letter from KCDOT to Petitioners recommending approval, County road engineer's report, and compensation amounts due, dated October 10, 2016                            |
| Exhibit no. 15 | Compensation payment from Matthew Benson, check no. 1009710103 in the amount of \$4,505.49   |
| Exhibit no. 16 | Compensation payment from Warner Smith, check no. 0169201874 in the amount of \$5,255.58   |
| Exhibit no. 17 | Letter from KCDOT to Petitioners regarding need for easements and intention to re-evaluate compensation due to recent King County Code updates, dated January 13, 2017 |

Exhibit no. 18	Letter from KCDOT to Petitioners with update on easements required and revising compensation due to complete waiver, dated July 13, 2017
Exhibit no. 19	Easement between Warner Smith and Roxana Andone and Puget Sound Energy, dated July 22, 2017
Exhibit no. 20	King County iMap of subject area with environmental areas filter applied
Exhibit no. 21	County Road Engineer's report, dated June 13, 2017
Exhibit no. 22	Letter from KCDOT to Council Chair recommending approval and transmitting proposed ordinance, dated October 11, 2017
Exhibit no. 23	Proposed ordinance
Exhibit no. 24	Fiscal note
Exhibit no. 25	Affidavit of posting, noting posting date of February 16, 2018
Exhibit no. 26	Hearing notification letter from KCDOT to Bran and Calab Donnelly, dated January 25, 2018
Exhibit no. 27	Hearing notification letter from KCDOT to Givanni and Paula Fagioli, dated January 25, 2018
Exhibit no. 28	Hearing notification letter from KCDOT to BJ Morris, Guardian to Eugene Oliver, dated January 25, 2018
Exhibit no. 29	Hearing notification letter from KCDOT to Galen Trabont, dated January 25, 2018
Exhibit no. 30	Affidavit of publication, received March 14, 2018

The following exhibits were offered and entered into the hearing record on September 30, 2019:

Exhibit no. 31	Department Supplemental Report
Exhibit no. 32	Map CADS170299
Exhibit no. 33	E-mail from Elizabeth Shirer, dated August 6, 2019
Exhibit no. 34	Valuation for parcel no. 0325079018 Benson
Exhibit no. 35	Valuation for parcel no. 0325079011 Smith/Andone
Exhibit no. 36	Valuation for parcel no. 0325079010 Duvall
Exhibit no. 37	Valuation for parcel no. 0325079010 Duvall
Exhibit no. 38	Letter from Dow Constantine to Rod Dembowksi, attaching Roads Right-of-Way Valuation Model, January 31, 2019

DS/jo