August 9, 2021

OFFICE OF THE HEARING EXAMINER
KING COUNTY, WASHINGTON
King County Courthouse
516 Third Avenue Room 1200
Seattle, Washington 98104
Telephone (206) 477-0860
hearingexaminer@kingcounty.gov
www.kingcounty.gov/independent/hearing-examiner

REPORT AND RECOMMENDATION

SUBJECT: Department of Transportation file no. **V-2713**
Proposed ordinance no. **2021-0180**
Adjacent parcel no(s). **1269200385 and 1269200386**

RICHARD BARRON STEFFEN AND GLEN AND ERIN LEMONS

Road Vacation Petition

Location: a portion of Richardson Road right of way on Vashon Island

Applicant: **Richard Steffen**
9075 SE Bayview Drive
Vashon, WA 98070
Telephone: (303) 956-9197
Email: rbsteffen@hotmail.com

Applicants: **Glen and Erin Lemons**
P.O. Box 347
Leavenworth, WA 98826
Telephone: (509) 387-1867
Email: erinlemons@gmail.com

King County: Department of Local Services
represented by **Leslie Drake**
201 S Jackson Street
Seattle, WA 98104
Telephone: (206) 477-7764
Email: leslie.drake@kingcounty.gov

FINDINGS AND CONCLUSIONS:

Overview

1. Richard and Seana Steffen, along with Glen and Erin Lemons, petitioned the County to vacate approximately 15 feet of a 60-foot, never-developed, public right-of-way on Vashon Island and exchange it for a similar 15-foot swath elsewhere on the Steffen property. The Department of Local Services, Road Services Division, concluded that the right-of-way was useless and would normally warrant vacation, but because of conflicting authorities on how to harmonize two RCW sections, it could not recommend approval. We conducted two public hearings. 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 Council approve the vacation, conditioned on increasing the right-of-way area the County would receive in exchange and contingent on several future confirmations. However, we emphasize that this case presents a threshold legal question about whether such exchanges are *ever* allowed; we extensively analyze that below, but Council may want its own legal analysis. And we reiterate that vacations are always discretionary.**

Background

2. In 1914, a 60-foot right-of-way identified as Richardson Road, along with other streets and roads, were dedicated to the public as part of the Burton Acres plat. Ex. 12 at 001. Richardson Road—neither the portion upland from SW Bayview Drive that currently bisects the Burton Acres and Jensen Point park, nor the seaward portion that runs between two properties owned by petitioners Richard and Seana Steffen to the northeast and one owned by Glen and Erin Lemons to the southwest, have ever been improved or provided any kind of access. Ex. 14 at 005.

3. In 1934, the then-owner of what would become one of the Steffen parcels built a small residence approximately 15 feet into that right-of-way, where the southwestern edge of that parcel abuts Puget Sound. Exs. 5, 10 at 002. The Steffens received insurance when they first purchased the property. However, when they attempted to refinance in 2017, the title company declined to continue their coverage, as the company had discovered that part of the house was in the right-of-way. Ex. 5.

4. The Steffens petitioned the county in early 2017 to vacate those 15 feet at the southwestern edge of their property and in exchange provide 15 replacement feet at the northeastern edge of their property. Ex. 3 at 001; Ex. 5; Ex. 9; Ex. 13. Their neighbors on the opposite side of the right-of-way, the Lemons, joined the Steffens' petition. The Lemons only have interest in the southwesterly 30 feet of the public right-of-way, an area not impacted by the petition, but their support was helpful because it meant owners of the *majority* of the right-of-way frontage were part of the petition. KCC 14.40.0102.A.

5. Ms. Steffen died in 2017, but Mr. Steffens and the Lemons continued with the petition.

Hearings

6. We originally noticed, and then held, a June 8 hearing. At the conclusion of our June 8 hearing, we learned that Road Services posted notice at the termini of the right-of-way, as the code requires, but that the passcode for the Zoom link on that notice was incorrect. At least two members of the public who tried to participate on June 8 were not able to. We thus scheduled a supplemental July 15 hearing to take additional public comment and any follow-up from the parties. The below synopsis includes testimony from both hearings.

7. Road Services explained why it viewed the right-of-way as useless. It explained that the right-of-way would never become a road for vehicles, and if there was ever a push to turn the steep slope into a pedestrian walkway, the remaining 45-foot width would be sufficient for pedestrians. However, it felt constrained by a state law (discussed in detail below).

8. Susan Lowrey pointed to a different area in Burton (not connected to the Richardson right-of-way or the Steffen or Lemon properties) where her family approached the County about vacating those tidelands. The County informed them they could not vacate those. She felt this set a "precedent" that should bar vacation here.[1]

9. Rene Hinojosa questioned whether a swap was in the public interest and would preserve the environment. Ex. 31. Partitioning the 60-foot right-of-way down to 45 feet would make that right-of-way less valuable, and he felt the 15-foot strip would be useless. He thinks the public right-of-way was not just dedicated as a road, but as open space, and open space should be preserved. He looked at things from a long-range perspective—maybe in 100 years the situation could look different. Maybe there could be a cell tower or other new development?

10. Douglas Ostrom, with the Vashon Parks commission, noted that the same unopened Richardson Road right-of-way "trespasses" further inland across Parks' property. He did not, however, view that same right-of-way extending across the Steffens' property as a similar trespass; instead, he urged rejection of the petition. He echoed Mr. Hinojosa's opinion that a narrow strip is not as useful as a wide strip.

11. Road Services explained that the County Road Engineer found the current 15-foot, to-be-vacated portion useless to the future road system; given the steep slope, Road Services believes there will not be a road placed there now or in the future. If the right-of-way were ever utilized, it would be as pedestrian access; 45 feet would certainly be

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[1] Mr. Lowery also testified that the owners in the vicinity of those other tidelands had encroached on the tidelands and blocked them off. *See also* Exs. 30 & 32. At hearing, we provided her with a number she could call to lodge a complaint about encroachment onto public property. After we closed our hearing and closed the record, Ms. Lowery emailed to complain that Mr. Steffen had earlier undertaken unpermitted work on his property. The time to raise that would have been to Mr. Steffen, during the hearing, so he could respond. We will not reopen the record.

sufficient for that, as would even 15 feet. The right-of-way was dedicated as a road, not as open space, so the County would be constrained in what it could do; it could theoretically put in a road or create access, but it would be limited to the purposes the right-of-way was dedicated for in the 1914 plat.

12. Mr. Steffen noted that he was trying to benefit others who find themselves in a similar predicament of a predecessor having built into the right-of-way. No bank will loan on a house discovered to have been built in the public right-of-way, meaning such homes are only sellable for cash. The drainage improvements in the existing right-of-way (a drainage swale) are in the 45-foot section that would remain, not in the 15 feet on which house sits and he is trying to vacate.[2] And the 15-foot swath on the northeastern side of his property he intends to exchange is less steep and has been maintained, so it would be less dangerous as public access.

13. Ms. Lemons (who owns the property across the right-of-way) noted that with property in a flood zone, it would make development difficult; she supports the exchange. A neighbor two houses (we assume northeast) from the Steffen property, Collin Hennessey, emailed to convey that he would vote no on vacation. Ex. 39. Conversely, the neighbor two house southwest of the Lemons, Laura Hansen, participated in our second hearing and testified that she fully supported the exchange and wanted to see the problem fixed.

<u>Basic Legal Standard</u>

14. Chapter 36.87 RCW sets the general framework for county road vacations, augmented by KCC chapter 14.40. 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.

15. 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).

<u>Intersection of RCW 36.34.330 and RCW 36.87.130</u>

16. As explained directly below, the County is *not* allowed to simply vacate a public right-of-way abutting a body of water. So, in the most recent vacation petition to reach the Council, a property owner on nearby Maury Island sought to vacate a stretch of public right-of-way that abutted Puget Sound. Road Services—and we—strongly recommended

[2] The Department of Transportation raised a concern about its storm drainage facilities in the existing right-of-way. Ex. 1 at 039.

against vacation, as state law prohibits that transaction.[3] The Council adopted our recommendation, denying the vacation petition in April. Ord. 19268.

17. That is *not* what is being requested by this petition. While the petitioner in the Maury Island case was seeking to vacate public right-of-way and leave less public right-of-way—a result state law prohibits—today's petition proposed to *move* a swath of the public right-of-way (a swath currently blocked off by the 1934 house) from the southwestern edge of the Steffen property to its northeastern edge. Under the petition submitted, the same square footage of proposed right-of-way would still extend from the public road down to the Sound, only the longitude of some of the right-of-way square footage would change. Whether such an exchange is ever allowed involves the interplay between two state codes.

18. In 1965, the state authorized counties to swap public property for privately-owned property of equal or greater value.

> The board of county commissioners of any county shall have authority to exchange county real property for privately owned real property of equal value whenever it is determined by a decree of the superior court in the county in which the real property is located, after publication of notice of hearing is given as fixed and directed by such court, that:
>
> (1) The county real property proposed to be exchanged is not necessary to the future foreseeable needs of such county; and
>
> (2) The real property to be acquired by such exchange is necessary for the future foreseeable needs of such county; and
>
> (3) The value of the county real property to be exchanged is not more than the value of the real property to be acquired by such exchange.

RCW 36.34.330. We will refer to this as ".330."

19. In 1969, the state prohibited counties from vacating roads abutting water bodies:

> No county shall vacate a county road or part thereof which abuts on a body of salt or fresh water unless the purpose of the vacation is to enable any public authority to acquire the vacated property for port purposes, boat moorage or launching sites, or for park, viewpoint, recreational, educational, or other public purposes, or unless the property is zoned for industrial uses.

RCW 36.87.130 (1969). We will refer to this as ".130."

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[3] *See* https://kingcounty Of.gov/~/media/independent/hearing-examiner/documents/case-digest/applications/road%20vacation/2021/V-2728_Franzel.ashx?la=en.

20. In 2020, the State temporarily amended .130 to allow Clark County to vacate a specific railroad bridge along the Lewis River that had resulted in multiple fatalities.[4] The amendment added subsection numbers to .130 but did not change the substance. The statute will revert back to its original format at the end of 2023.[5]

21. The threshold legal issue is whether the 1969 statute removed the right granted to counties in 1965 to swap public property for private property, when the properties to be vacated and acquired abut a body of water. We return below to whether an exchange here meets .330 and is advisable, but the threshold question is whether .130 sets an *absolute* prohibition on such swaps, regardless of whether a proposed swap meets .330 and regardless of whether the exchange is consistent with .130's purposes.

22. In 2000, an examiner reviewed a package worked out by Road Services and a petitioner to exchange rights-of-way in a manner that would "successfully achieve the purposes of [.130] to preserve public access to the shoreline" and would be "more amenable to saltwater access development."[6] By a unanimous vote of those Councilmembers present, the Council approved the vacation swap; the Council found that the intent of .130 was met by allowing a right-of-way exchange under .330. Ord. 13986; Ex. 29. Thus, .130 did not, in the eyes of Road Services, that examiner, and Council, absolutely overrule .330.

23. That was contrary to a 1972 Attorney General (AG) opinion that such a swap is not allowed, period.[7] In offering advice on Island County's request to exchange county rights-of-way for either substantially similar rights-of-way or for a single piece of property to use for a park, viewpoint, recreational, educational, or other public purposes, the AG saw the issue in black-and-white terms. Unless the to-be-vacated area was *itself* used for one of the recreational or public purposes specified in .130, then "commendable" though that exchange might be, it was not authorized. Meeting .330, in the AG's mind, was not authorization for a county to vacate public rights-of-way, even in exchange for other water-abutting rights-of-way.

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[4] *See* http://lawfilesext.leg.wa.gov/biennium/2019-20/Htm/Bill%20Reports/Senate/5613%20SBR%20HA%2020.htm?q=20210211180758.

[5] The current text of RCW 36.87.130, with the temporary section (3), reads as follows:

> No county shall vacate a county road or part thereof which abuts on a body of salt or freshwater unless:
>
> (1) The purpose of the vacation is to enable any public authority to acquire the vacated property for port purposes, boat moorage or launching sites, or for park, viewpoint, recreational, educational, or other public purposes;
>
> (2) The property is zoned for industrial uses; or
>
> (3) In a county west of the crest of the Cascade mountains and bordered by the Columbia river with a population over four hundred fifty thousand, the county determines that:
>
> (a) The road has been used as an access point to trespass onto private property;
>
> (b) Such trespass has caused loss of human life, and that public use of the county road creates an ongoing risk to public safety; and
>
> (c) Public access to the same body of water abutting the county road is available at not less than three public access sites within two miles in any direction of the terminus of the road subject to vacation.

[6] *See* https://kingcounty.gov/~/media/independent/hearing-examiner/documents/case-digest/applications/road%20vacation/2000/V-2398_GraliaREVISED.ashx?la=en.

[7] *See* https://www.atg.wa.gov/ago-opinions/letter-opinion-1972-no-002.

24. We do not find that 1972 opinion persuasive. The AG looked at the exceptions provided in .130 and reasoned that, because the exceptions were limited to port, moorage, launch, park, viewpoint, recreational, educational, or other public purposes (or zoned industrial), a swap was not allowed. It pointed to the proposition that "exceptions in a statute are to be strictly construed."

25. That cannon of construction is still good law today. *See, e.g.*, *City of Union Gap v. Washington State Dept. of Ecology*, 148 Wn. App. 519, 527, 195 P.3d 580 (2008) (exceptions to statutory provisions must be narrowly construed). However, .330 is not in .130 at all. The AG functionally treated .330 as if it was text within .130 or at least within chapter 36.87. Thus, the AG took the exceptions-construed-strictly cannon that would (properly) apply in interpreting, say, the "port purposes" or "boat moorage" or "zoned for industrial uses" exceptions listed in .130 itself, and applied that tool to a *different* statute (.330) in a different chapter (36.34) the legislature enacted *before* it enacted .130. The AG did not ask whether the 1969 legislature intended its no-vacation-abutting-water-body prohibition to carve out an exception to its 1965 counties-may-swap-equal-value-properties allowance, nor did the AG attempt to reconcile .330 with .130.

26. Instead, the 2000 Road Services, examiner, and Council determinations were in line with what we find the more persuasive approach, that contained in an unpublished 1996 appellate court opinion. The *In re Exchange of Real Property by Pierce County*, 84 Wn. App. 1009, 1996 WL 662424 (1996), court did not artificially treat .330 as if it was an exception *within* .130, but instead tried to reconcile two distinct statutes:

> it is our duty to reconcile apparently conflicting statutes and to give effect to each of them, if this can be achieved without distortion of the language used. RCW 36.34.330 and RCW 36.87.130 may seem to conflict in that the first authorizes an exchange of property so long as equal value is received, while the second prohibits the vacation (and thus an ensuing trade) of certain roads. They can be reconciled, however, by examining their apparent purposes. The apparent purposes of RCW 36.87.130 are to preclude the county from granting a windfall to the owners of waterfront property abutting a county road, and also to preserve public access to the waterfront. Both purposes are accomplished when a road subject to RCW 36.87.130 is being vacated and traded for other waterfront property that has equal or greater value, and will be used by the public. Thus, we reconcile the two statutes by concluding that RCW 36.34.330 constitutes an implied exception to RCW 36.87.130 when a waterfront road is being vacated and traded for other waterfront property of equal or greater value, and the other property will be developed for public use as a park.

27. We researched the legislative history on Senate Bill No. 55 (which included what would become .130) to see if we could glean the legislative intent behind the original .130. Unlike the history behind .130's 2020 amendment, which was easy to locate, State Archives was helpful, but informed us that there were no committee documents associated with that 1969 bill number. (Documents of this nature were, according to

Archives, not regularly collected and archived until after 1970.) Looking at the House floor journal (April 12, 1969, pages 1420 through 1431), there is a discussion about commissioner unanimity, the ordinary high watermark, navigable water, and tidelands, but nothing that provides substantive insight on the intent and purpose of .130 as it relates to our question.

28. Thus, we determine statutory intent from looking at the wording of the statutes themselves and attempting to glean their purpose. The preserving-public-access-to-waterfront purpose that *In re Exchange* found in .130 is obvious. It is far less clear why the court thought that .130 has a precluding-private-windfall purpose.

29. In a vacation the petitioner typically pays the assessed value, which should *already* eliminate a windfall potential. We have previously rejected petitioner attempts to artificially devalue the right-of-way by treating it as an unbuildable, stand-alone parcel; that approach *would* create a windfall. Instead, we value the public right-of-way in relation to how the private parcel into which the right-of-way is merging will increase in value.[8] Although today's case involves a swap, not a purchase, the starting point for all our vacations is the additional value to the acquiring property from adding the right-of-way area.[9]

30. Section .330 has an avoiding-private-windfall purpose, requiring that, "The value of the county real property to be exchanged is not more than the value of the real property to be acquired by such exchange." And other constitutional provisions, code sections, and principles aim to prevent private windfalls. But absent any legislative history discussing concern over ill-gotten private gain, we find the purpose of .130 is straightforward: preserving at least the possibility of public access to water bodies. It bars vacation unless the vacation enables some similar water-related public use, like ports, boat moorage, boat launch, parks, viewpoint, recreational, educational, or other public purposes, or unless the property is zoned for industrial uses (and one would presume the public would not be milling about industrial areas). That is .130's limited purpose.

31. *In re Exchange* is unpublished and, as a pre-2013 opinion, its approach is not even non-binding authority. Gen. R. 14.1. However, its approach is better in keeping with the cannon of construction that, "Where two statutes are in apparent conflict, this court will, if possible, reconcile them to the end that each may be given effect," *In re King*, 110 Wn.2d 793, 799, 756 P.2d 1303 (1988) than the AG's is. And the result *In re Exchange*'s

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[8] *See* https://kingcounty.gov/~/media/independent/hearing-examiner/documents/case-digest/applications/road%20vacation/2014/V-2667_Janshen.ashx?la=en at ¶ 13.

[9] In 2016 the state changed the law to allow counties to adjust the appraised value to capture decreased liability, increased property taxes, and avoided management/maintenance costs. RCW 36.87.120. So, for example, we recommended, and the Council later approved, waiving compensation for vacating an actual, open, and publicly maintained—but useless—road, where the result was the acquiring private property increasing in value by $11,500, while the County benefitted to the tune of $189,896. *See* https://kingcounty.gov/~/media/independent/hearing-examiner/documents/case-digest/applications/road%20vacation/2019/V-2692_GoodGround_GirlScoutsWW.ashx?la=en at ¶ 39. We do not see that scenario as impermissibly creating a private "windfall." Certainly, the drafters of RCW 36.87.120 did not think so. Again, today's case involves an exchange, not a simple acquisition.

approach would produce by attempting to harmonize .130 and .330 is in keeping with a *published* appellate court interpreting a right-of-way transaction as acceptable because "the county was neither giving up a specific use, provided for in the dedication, nor losing any quantity of land." *Nelson v. Pacific Co.*, 36 Wn. App. 17, 24, 671 P.2d 785 (1983) (analyzing *Finch v. Matthews*, 74 Wn.2d 161, 443 P.2d 833 (1968)).

32. The stakes here are high. If the AG is correct and .330's exchange provisions are irrelevant to .130's waterfront vacation prohibition, it would prevent Road Services doing any sort of road-related swap like it accomplished with the 2000 petition, if the right-of-way abuts body of water.[10] (County code specifically allows the County to accept property of equal or greater value, in lieu of cash compensation, for a proposed vacation. KCC 14.40.020.B.) We initially thought the "other public purposes" exception in .130 could preserve Road Services' ability to do that. However, the 1972 AG opinion implicitly rejected that, finding that only the "several recreational purposes specified in RCW 36.87.130" were appropriate grounds for vacation, despite finding the county's proposal "commendable."

33. On that narrow point, we do not disagree with AG. "'[G]eneral terms, when used in conjunction with specific terms in a statute, should be deemed only to incorporate those things similar in nature or 'comparable to' the specific terms.'" *Schnitzer West, LLC v. City of Puyallup*, 190 Wn.2d 568, 582, 416 P.3d 1172 (2018) (citation omitted). The "other public purposes" language for which the public authority may acquire the vacated property under .130 must be similar in nature to "port purposes, boat moorage or launching sites, or for park, viewpoint, recreational, [and] educational." A road does not seem comparable to those terms. And we note that in 2000 the examiner and Council did not base their approvals on the "other public purposes" language of .130 but on .330. We are open to other interpretations, but it seems it is section .330 or bust.

34. Ignoring .330 would not solve the quandary faced by the Steffens and similarly-situated people who purchase waterfront property with a portion of their home constructed in what turns out to be public right-of-way—not an actual road, but a never-opened swath mapped as right-of-way and useless to the County. It is a scenario we encounter not infrequently in our petitions, typically resolvable (outside of the waterfront context) by the petitioner acquiring the right-of-way.[11] As houses may not be built on public property, and the concept of adverse possession does not extend to public property, RCW 7.28.090, where does that leave people unable to get clear title to their own home, as the Steffens discovered when they attempted to refinance and were declined continued coverage?

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[10] For a more recent example, albeit outside the water body context, see 2018's https://kingcounty.gov/~/media/independent/hearing-examiner/documents/case-digest/applications/road%20vacation/2018/V-2688_Biliske.ashx?la=en (¶¶ 7-13) (County swapping useless right away for private property which would accommodate future intersection widening).

[11] *See* https://kingcounty.gov/~/media/independent/hearing-examiner/documents/case-digest/applications/road%20vacation/2014/V-2667_Janshen.ashx?la=en at ¶ 8.

35. The harm from that scenario is not to private interests alone. Instead, our "legislature finds and declares that the *public policy* of this state favors the marketability of real property and the transferability of interests in real property free of title defects or unreasonable restraints on alienation." RCW 64.60.005 (italics added). Thus, there is a very public benefit from clearing up title, if it can be accomplished in a way that preserves the possibility of waterfront access that .130 was written to protect.

36. In the end, this is an extremely complex question. It light of the "conflicting authorities" and lack of clear precedent or direction on whether .330 may be used to allow vacation of water-abutting rights-of-way, Road Services determined that it could not recommend vacation approval, even though it found the property useless as a road and otherwise worthy of vacation. Ex. 1 at 004, 006. We respect that, and we do not lightly dismiss AG opinions (although, and in the opposite direction, do we do not lightly dismiss appellate court opinions either). And if we found an actual conflict between the two statutes, we would "generally give preference to the more specific and more recently enacted statute," *Tunstall ex rel. Tunstall v. Bergeson*, 141 Wn.2d 201, 211, 5 P.3d 691 (Wash. 2000), i.e., .130.

37. However, we do not see an actual conflict. Section .130 was written to protect the public's water access and to keep a right-of-way area public. Simply moving a right-of-way going down to the water a little down the shore in either direction does not (if other safeguards are met) remove that protection.

38. We thus conclude that .130 does not outright prevent vacations that accomplish an exchange of water-abutting corridors and meet the purposes of .130 and .330. However, we recognize that this is a fundamental legal and policy call. The Council may wish to seek its own counsel. We will certainly not be disappointed if the Council goes the other way on this complex question. If it does, finding that .330 provides no relief from .130, then the Council should stop here, reverse us, and deny this and any future such petition.[12]

Preliminary Analysis

39. The subject right-of-way segment is not currently opened, constructed, or maintained for public use, and it is not known to be used informally for access to any property. Vacation would have no adverse effect on the provision of access and fire and emergency services to the abutting properties and surrounding area. The right-of-way is not necessary for the present or future public road system for travel or utilities purposes.

40. Except as provided herein, we adopt and incorporate the facts set forth in Roads' report and in proposed ordinance no. 2021-0180. That report, and maps showing the specific

[12] Obviously, if the Council finds .330 irrelevant, we will not recommend approval of a future water-abutting right-of-way swap. Yet, as we only issue recommendations (and not decisions) on vacation petitions, the Council must always act. KCC 14.40.015.A, 20.22.060.B & KCC 20.22.220.B. So, for the recent petition on Maury Island seeking to vacate a water-abutting right-of-way without providing commensurate property, we recommended denial on .130 grounds, which Council had to confirm by ordinance. *See* https://kingcounty Of.gov/~/media/independent/hearing-examiner/documents/case-digest/applications/road%20vacation/2021/V-2728_Franzel.ashx?la=en; Ord. 19268.

area to be vacated and the vicinity of the proposed vacation are in the hearing record and will be attached to the copies of our recommendation submitted to Council. Ex. 1, 001-07; Exs. 7-9.

41. Some of the concerns raised at hearing were not germane to our question. For example, the argument that vacation here should be denied because an attempt to vacate other tidelands presented an apples-to-anvils comparison. The petitioners there were not offering to exchange *any* private tidelands (or for any other private property interest) for public tidelands, let alone equally-value private property interests. So, .330 had no application, and a net loss of public square footage was clearly barred by section .130. That set no precent for whether a proposed *exchange* of private and public properties is allowed and warranted.

42. The idea that the right-of-way should be preserved as "open space" does not reflect the limited nature of the dedication. The County under certain circumstances may, and often does, require set asides for open space in subdivisions. However, that is not what happened in 1914. Instead, the 1914, dedication was limited to "dedicat[ing] to the use of the public forever, all the streets and roads shown hereon." Ex. 12 at 001. We presume that putting a pedestrian trail would fit within the grant, but even replacing one form of access for another form does not always pass constitutional muster. Having formerly defended the United States against actions for compensation by neighboring land owners after a railroad corridor is converted to a trail, we had to face our supreme court's determination that even a hiking and biking trail was deemed not encompassed within a grant for railroad purposes and would need to be purchased at taxpayer expense. *Lawson v. State*, 107 Wn.2d 444, 451, 730 P.2d 1308 (1986).

43. Moreover, in a past vacation where a neighbor opposed vacation in order to keep the property open and vegetated and to protect the environment, we observed that denying a vacation petition:

> for reasons beyond access and utilities and corridors and their ilk risks transforming Road Services into a mini-Department of Natural Resources and Parks, having to manage public lands for more than even the broadest conception of a right-of-way, on only the vaguest of marching orders. Especially given Road Services' systemic budget shortfalls, and Road Services stated policy of jettisoning unnecessary rights-of-way, that seems highly problematic.[13]

That is why our code defines "useless" as being "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 (emphasis added), and not as useless as against some broader concept of usefulness. This echoes the state standard that a petitioner must show that the "county road is useless as part of the county road system." RCW 36.87.020.

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[13] *See* https://kingcounty.gov/~/media/independent/hearing-examiner/documents/case-digest/applications/road%20vacation/2020/V-2719_Kelderman.ashx?la=en at ¶ 12.

44. The idea advanced at hearing that the Council should deny a vacation petition because we do not know how things will look 100 years from now on its face seemed unpersuasive. After all, that would be true for every vacation—we have no crystal ball that allows us to ever peer a century or more into the future. If omniscience were the standard, it would grind the vacation process itself to a halt, statewide. That is clearly not what the legislature intended.

45. However, on closer inspection, we think that concept has some merit in the waterfront context. The law has long required every right-of-way to be useless for road purposes for it to be vacated. Thus, section .130 only kicks in for the scenario where rights-of-way are *already* deemed "useless" in normal road vacation parlance. Yet the drafters wanted to prevent those "useless" rights-of-way's vacation, unless adequate safeguards were met. So, we think a broader-than-normal view is probably appropriate in the waterfront context.

46. The other two points from our July 15 hearing we carry forward into our analysis are the necessity of a vacation advancing a public (not just private) benefit and a 60-foot right-of-way potentially being more useful than a 45-foot right-of-way and a separate 15-foot right-of-way (a topic we raised and questioned Road Services about in our June 8 hearing).

Secondary Analysis

47. Turning to the vacation related codes, vacation is only allowed where a petitioner shows that "the public will be benefited by [the right-of-way's] vacation and abandonment." RCW 36.87.020. *Accord* KCC 14.40.0102.B. Normally the public benefit in vacating a useless right-of-way comes from the compensation the petitioner pays, along with the public's decreased liability, increased property taxes, and avoided management and maintenance costs. RCW 36.87.120. However, such benefits are not present in an *exchange* of rights-of-way.

48. As we cited above, our "legislature finds and declares that the public policy of this state favors the marketability of real property and the transferability of interests in real property free of title defects or unreasonable restraints on alienation." RCW 64.60.005 (italics added). However, that was in the context of determining whether .330 exchanges are outright prohibited by .130, a determination which could permanently cloud a slew of waterfront titles County-wide. However, in this part of our analysis we are inquiring into the public benefit only from granting Mr. Steffen's *specific* petition. Increasing the marketability and transferability of Mr. Steffen's two parcels provides some public benefit, but not an overwhelming one.

49. In terms of the public-access-to-waterfront possibilities .130 is designed to protect, the area at the northeastern edge of the Steffen property (where new public right-of-way would be added) seems slightly more amenable to some sort of future development than the current right-of-way, as the current right-of-way contains a ravine and a drainage slew. Certainly, it is highly unlikely that any public access route over any portion of the

to-be-vacated <u>or</u> the to-be-received area will ever be constructed. But in terms of *possibilities*, moving a portion of the public right-of-way out of the drainage basin might marginally *increase* the prospects of future access. And, of course, for almost a century the 15 feet of preexisting right-of-way in question have been completely blocked by a home. Ex. 35 at 001 (white building on right). Road Services noted that 15 feet would likely be wide enough for pedestrian access. Plus having a second right-of-way area to the northeast provides two possible locations where access might someday be explored.

50. Conversely, however unlikely it is that any public access route over any portion of the areas being discussed will ever be constructed, in terms of possibilities, having a 45-foot right-of-way and a separate 15-foot right-of-way could marginally *decrease* the prospects for actual access, because a 60-foot right-of-way would provide maximum width flexibility for a future project, and it is located at the foot of (at this point theoretical) Richardson Road. In addition to public comment on that topic at our July 15 hearing, we raised that issue at our June 8 hearing, and it was echoed by the Real Estate Services section, a topic we discuss again below. Ex. 1 at 021-23.

51. Obviously, neither we nor the Council would want to incentivize cavalierly building into potential right-of-way. However, the residence here was built in 1934, an era not exactly known as the information age. And Mr. Steffens explained how even in the modern era, unopened rights-of-way in his area can be difficult to ascertain—he called the County with concerns over potentially hazardous trees overhanging their property from the public right-of-way; at first the County said the trees were not on public property, only to later reverse itself.

52. In the end, the public benefits from either (a) keeping a 60-foot right-of-way, while leaving two parcels with significant marketability and transferability defects, or (b) approving an exchange, creating a 45-foot right-of-way and a separate 15-foot right-of-way, while increasing marketability and transferability on two parcels, are each relatively miniscule. We would consider that virtually a toss-up, public-benefit-wise. And because the burden lies with a petitioner to show the public will benefit from a right-of-way's vacation, the exchange, as currently proposed probably does not qualify.

53. However, those relative benefits shift considerably if one *increased* the to-be-received right-of-way width at the northeastern end of the Steffen parcel. If one were to, say, double the to-be-received property, then we would be comparing the public benefits of a single 60-foot, currently inaccessible right-of-way containing a drainage swale to a 45-foot right-of-way in that same area, along with a second potential access point along a *30*-foot right-of-way in a more hospitable area to the northeast, along with increased marketability and transferability on two parcels. In that scenario, we find that the public would like benefit from vacation and exchange (but see caveats in "Next Steps," below).

54. Those benefits also impact the .330 analysis. One requirement is that the value of the county real property being exchanged does not exceed the value of the real property being acquired. RCW 36.34.330(3). That was already true in the 15-foot-for-15-foot scenario, as the assessor noted that that land swap would not change any values. Ex. 18.

However, enlarging the exchange area means the County is receiving property of *greater* value in the swap, adding a margin of safety to the analysis.

55. The other two enumerated subsections of .330 allow an exchange only if the real property to be vacated is not necessary to the future foreseeable needs of such county, while the real property to be acquired is. RCW 36.34.330(1) & (2). On one level, the proposal fails, because Road Services has determined that *neither* the to-be-vacated and to-be-exchanged area are useful. As Road Services explained, neither the to-be-vacated or to-be-acquired areas would be good for even just pedestrian access; thus, the trade-off is not great, more theoretical, potential access for not great, more theoretical, potential access.

56. However, as analyzed above, we look at concepts like "useless" and "necessary" somewhat differently in the waterfront swap context. However unlikely it is that any public access will ever be constructed anywhere in the vicinity of the Steffen property (regardless of whether or not an exchange happens), it is conceivable that access could be investigated decades or centuries down the line, as Mr. Hinojosa suggested. And if access were someday explored, having a 45-foot right-of-way, along with a second bite at the apple provided by an additional, say, 30-foot right-of-way in a more hospitable area that is not a drainage swale, puts the public in better shape than a single 60-foot area containing a drainage swale. In a sense, such an exchange replaces a right-of-way area with marginal retention value for dual rights-of-ways which collectively have slightly more than marginal retention value.

57. So, we conclude that exchanging a 60-foot right-of-way for a 45-foot right-of-way, plus a separate right-of-way exceeding 15 feet, likely satisfies .130 and .330 and is in the public interest (if items addressed below under "Next Steps" are met). However, we emphasize that while denial is mandatory ("shall not" vacate) where a petitioner fails to make the legal showing, approval is discretionary even where a petitioner shows uselessness and public benefit ("may vacate"). RCW 36.87.060(1). So, unlike something like a preliminary plat, where if the application meets all the code criteria Council must approve it, there is no such compulsion for the Council to ever approve a vacation petition.

58. A remaining question involves sequencing. Section .330 speaks in terms of a decree from superior court, after publication of a hearing notice. But the vacation process has to start with the legislature: county legislative authorities, not courts, are the bodies charged with vacating roads. *Coalition of Chiliwist v. Okanogan County*, No. 34585–8–III, 2017 WL 1032774 at *4-5 (Wn. App. Mar. 16, 2017) (unpublished), *cert. denied*, 188 Wn. 2d 1022, 398 P.3d 1138 (Aug. 2, 2017). Thus, an exchange involving a vacation would need to begin in the legislative branch, especially given the publication of hearing notice and public input available (and here exercised) in the road vacation context, with a court reviewing the analysis at the appeal stage. By way of reference, that is how the 2000 exchange/vacation proceeded, with the proposal first coming through Road Services, to the examiner, and then to the Council to pass an ordinance, rather than starting in superior court. Ex. 29.

59. Even if the sequencing here is unlike a typical .330 exchange, the scenario is consistent with a published appellate court opinion interpreting a right-of-way transaction as acceptable, despite the "irregular" manner in which it came about, because "the county was neither giving up a specific use, provided for in the dedication, nor losing any quantity of land; in fact it received more land than it relinquished." *Nelson v. Pacific Co.*, 36 Wn. App. 17, 24, 671 P.2d 785, 790 (1983) (analyzing *Finch v. Matthews*, 74 Wn.2d 161, 443 P.2d 833 (1968)).

Next Steps

60. Because Road Services concluded that state law likely prohibited any such vacation/exchange, there was no need for it to get too granular. There are several items that would have been (and still would still be today) a fool's errand to spend resources verifying, if the Council ultimately determines that an exchange is prohibited outright or is otherwise not in the public interest here. Yet if the Council determines that there is no absolute prohibition on such vacation exchanges and that vacation seems warranted on our facts-to-date, to ensure that the public interest is protected several items need confirmation before the County actually vacates any public right-of-way.

61. From Road Services' perspective, the ordinance the Executive transmitted did not contain a legal description of the proposed to-be-acquired stretch of the northeastern edge of the Steffens property. Ex. 24. And, as Road Services noted, were the exchange to go forward, easements would be needed in favor of Puget Sound Energy, along with a right-of-way in favor of King County for access and maintenance of the drainage serving SW Bayview Drive, as well as delivery of an executed Statutory Warranty Deed from Mr. Steffen for the exchange area. Ex. 1 at 007. That needs to be nailed down.

62. From our perspective, as noted above, the public benefits from (a) keeping a single, 60-foot right-of-way in a drainage area/two parcels with significant marketability and transferability defects versus (b) creating a 45-foot right-of-way/separate 15-foot right-of-way in an area without those drainage restrictions/increased marketability and transferability on two parcels seems a wash. Thus, we surmised that the exchange and vacation initially proposed probably does not meet the criteria, while a transaction creating a net gain of public right-of-way square footage would. But the width necessary in the exchange area to make pedestrian access feasible over that new area, if pedestrian access was ever proposed in the future, needs further exploration.

63. Finally, in 2017 Real Estate Services raised several concerns with the proposed swap. Ex. 1 at 21-23. The Road Engineer reviewed those and other comments and in 2020 determined that the public would likely not be harmed from the exchange. Ex. 22 at 002. Still, if the Council concludes that .130 does not absolutely bar an exchange, and an exchange here seems in the public interest, four issues raised by Real Estate Services should be verified before vacation is finalized, to make sure the public is protected.

- Real Estate Services raised concerns with the status of tidelands deeded by the Peninsula Land Company (the outfit that subdivided the land and dedicated the roads

in 1914) to King County. Unless there is some reason to think that the legal status of the tidelands at the northeastern edge of the Steffens property (the exchange area) is *different and worse* than the legal status of the tidelands at the southwestern edge (the vacation area), those concerns are not relevant. We assume that the 1920 deed covered the entirety of what would become the Steffens property (and Lemon property and other properties in the vicinity). If so, then the *absolute* quality (good, bad, or ugly) of the entire tidelands is irrelevant to this like-for-like exchange. But circling back with Real Estate Services to make sure there is not some reason to suspect the *relative* quality of the tidelands at the northeastern edge of the Steffens property is more problematic than the tidelands at the southwestern edge, seems prudent.

- Real Estate Services notes that there appears to be an encroachment of the neighboring parcel's building foundation and/or seawall approximately 10 feet into the swap area, along with various outbuildings located in the swap area. At our June 8 hearing, we raised that as a concern, noting that while adverse possession and prescriptive easements are irrelevant on pre-existing public property (such as Richardson Road), a government can only acquire from a private owner what the private owner has to convey. If the neighboring property obtained some sort of legal interest in the swap area, that could work against the public. Mr. Steffens testified that the only improvements in the swap were those previous owners of *his* property had constructed; if so, the County could obtain the property from Mr. Steffens and require that those improvements be removed. However, if a third party has obtained a property interest in the swap area, that is problematic. There are no pictures (the exhibit 9 aerial is the best the record contains) for us to review, but the swap area should be verified before vacation is completed.

- Real Estate Services wrote that the encroachment into the existing right-of-way, including the house, septic, and structures and storage, appear to extend *more* than 15 feet. If a swap is to go forward, that should be investigated.

- Real Estate Services recommends a professional survey to clear up the encroachment issues. It would have been (and still would be) cruel to ask Mr. Steffen pay for a survey, if the eventual answer is, "Sorry, .130 bars all such exchanges, or, an exchange here isn't warranted regardless of what the survey showed, so you just wasted your money." But if the Council finds that vacation is warranted, contingent on the above items checking out, a survey to clear things up; seems necessary.

64. In a sense, then, approving vacation here is akin to those current use taxation applications where the Council approves enrollment into the public benefit rating system, but *contingent* on, say, an applicant submitting a forest stewardship plan by a certain date, with the agency approving that plan by a certain date. This will take some finessing. When we transmit this recommendation to Council for approval, we will include at least three versions of the ordinance:

- one denying vacation on grounds that .130 prohibits all such exchanges;

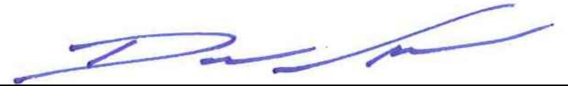
- another concluding that an exchange and vacation meeting the intent of .130 and .330 is legally allowed (and is available to future petitioners), but that vacation here is not warranted and thus denied; and

- a version concluding that that an exchange and vacation meeting the intent of .130 and .330 is legally allowed, and that vacation here is warranted and approved, but only contingent on several enumerated factors being satisfied by certain dates.

RECOMMENDATION:

We recommend that Council approve a version of proposed ordinance no. 2021-0180 that contingently vacates the subject road right-of-way.

DATED August 9, 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 ***September 2, 2021,*** 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 JUNE 8, 2021, HEARING ON THE ROAD VACATION PETITION OF RICHARD BARRON STEFFEN AND GLEN AND ERIN LEMONS, DEPARTMENT OF TRANSPORTATION FILE NO. V-2713

David Spohr was the Hearing Examiner in this matter. Participating in the hearing were Leslie Drake, Richard Steffen, Glen and Erin Lemons, and Charles Lovekin.

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

Exhibit no. 1	Roads Services report to the Hearing Examiner, sent May 24, 2021
Exhibit no. 2	Letter from Clerk of the Council to KCDOT transmitting petition, dated May 2, 2017
Exhibit no. 3	Petition for vacation of a county road, received May 2, 2017
Exhibit no. 4	Letter from Clerk of the Council transmitting Petitioner's May 1, 2017 letter, dated May 8, 2017
Exhibit no. 5	Letter from Petitioner, received May 8, 2017
Exhibit no. 6	Letter from KCDOT to Petitioner acknowledging receipt of petition and explaining road vacation process, dated May 24, 2017
Exhibit no. 7	Vacation area map
Exhibit no. 8	Vicinity map
Exhibit no. 9	Aerial photograph
Exhibit no. 10	KC Assessor's information for Petitioner Steffen's property, APN 1269200386
Exhibit no. 11	KC Assessor's information for Petitioner Steffen's property, APN 1269200385
Exhibit no. 12	Plat of Burton Acres
Exhibit no. 13	Survey from Petitioner showing vacation area and proposed exchange property, dated April 28, 2017
Exhibit no. 14	Final stakeholder notification with vicinity map and site map, sent June 13, 2017, with comment deadline of July 14, 2017
Exhibit no. 15	Letter from KCDOT to Petitioner recommending denial and proposing a Right-of-Way use Permit Extended, dated July 6, 2018
Exhibit no. 16	Email exchange with Petitioner Steffen regarding placing file on hold
Exhibit no. 17	Letter plating petition on hold, dated July 17, 2018
Exhibit no. 18	Email exchange with Assessor's Office regarding valuation of vacation area
Exhibit no. 19	Compensation calculation model spreadsheet for Petitioner's property, APN 126920386
Exhibit no. 20	Compensation calculation model spreadsheet for Petitioner's property, APN 126920385

Exhibit no. 21	Letter to Petitioners including Road Engineer Report, dated September 1, 2020
Exhibit no. 22	Road Engineer report
Exhibit no. 23	Letter from KCDOT to KC Council recommending denial and transmitting proposed ordinance, dated April 14, 2021
Exhibit no. 24	Proposed ordinance
Exhibit no. 25	Fiscal note
Exhibit no. 26	Affidavit of posting, noting posting date of May 15, 2021
Exhibit no. 27	Letter to abutting property owner David M. Schubert including the Notice of Hearing and Road Engineer Report, dated
Exhibit no. 28	*Reserved for future submission of* Affidavit of publication
Exhibit no. 29	KC Ordinance 13986 and amending Ordinance 14566

MINUTES OF THE JULY 15, 2021, HEARING ON THE ROAD VACATION PETITION OF RICHARD BARRON STEFFEN AND GLEN AND ERIN LEMONS, DEPARTMENT OF TRANSPORTATION FILE NO. V-2713

David Spohr was the Hearing Examiner in this matter. Participating in the hearing were Leslie Drake, Susan Lowrey, Rene Hinojosa, Richard Steffen, Laura Hansen, Doug Ostrom, and Erin Lemons.

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

Exhibit no. 30	Public comment by Susan Lowrey, sent June 8, 2021
Exhibit no. 31	Public comment by Rene Hinojosa, sent June 8, 2021
Exhibit no. 32	Public comment by Susan Lowrey, sent June 25, 2021
Exhibit no. 33	Letter from David Schubert, dated June 24, 2021
Exhibit no. 34	Affidavit of posting, noting posting date of June 23, 2021
Exhibit no. 35	Photograph of right-of-way for Richardson Road at western end with Notice of Hearing posting
Exhibit no. 36	Email to Julie McFarlane, sent June 24, 2021
Exhibit no. 37	Email to Rene Hinojosa, sent June 24, 2021
Exhibit no. 38	Email to Sue Lowrey, sent June 24, 2021
Exhibit no. 39	Public comment from Colin Hennessey, submitted July 15, 2021
Exhibit no. 40	*Reserved for future submission of* Affidavit of publication noting posting dates of July 2, 2021

DS/jo

August 9, 2021

OFFICE OF THE HEARING EXAMINER
KING COUNTY, WASHINGTON
King County Courthouse
516 Third Avenue Room 1200
Seattle, Washington 98104
Telephone (206) 477-0860
hearingexaminer@kingcounty.gov
www.kingcounty.gov/independent/hearing-examiner

CERTIFICATE OF SERVICE

SUBJECT: Department of Transportation file no. **V-2713**
Proposed ordinance no. **2021-0180**
Adjacent parcel no(s). **1269200385 and 1269200386**

RICHARD BARRON STEFFEN AND GLEN AND ERIN LEMONS
Road Vacation Petition

I, Jessica Oscoy, certify under penalty of perjury under the laws of the State of Washington that I transmitted the **REPORT AND RECOMMENDATION** to those listed on the attached page as follows:

☒ EMAILED to all County staff listed as parties/interested persons and parties with e-mail addresses on record.

☒ placed with the United States Postal Service, with sufficient postage, as FIRST CLASS MAIL in an envelope addressed to the non-County employee parties/interested persons to addresses on record.

DATED August 9, 2021.

Jessica Oscoy
Office Manager

Carr, Trevor
Department of Natural Resources and Parks

Carrasquero, Jose
Department of Local Services

Cassidy, Jon
Department of Local Services

Claussen, Kimberly
Department of Local Services

Drake, Leslie
Department of Local Services

Eichelsdoerfer, Robert
Department of Local Services

Hansen, Laura
Hardcopy

Hennessey, Collin

Hinajosa, Rene
Hardcopy

Ishimaru, Jim
Department of Local Services

Jackson, Robert
Department of Natural Resources and Parks

Kosai-Eng, JoAnn
Department of Local Services

Kulish, Michael
Facilities Management Division

Ledbetter, Tony
Department of Local Services

Lemons, Glen/Erin
Hardcopy

Lovekin, Charles
Hardcopy

Lowrey, Susan
Hardcopy

McDonald, Andrew
Department of Natural Resources and Parks

McFarlane, Julie

Miles, Dawn
Department of Local Services

Minichillo, Tom
Department of Local Services

Nunnenkamp, Robert
Department of Natural Resources and Parks

Ostrom, Kathy/Douglas
Hardcopy

Pedroza, Melani
Metropolitan King County Council

Puget Sound Energy
Hardcopy

Steffen, Richard
Hardcopy

Todd, Scott
Department of Natural Resources and Parks

Torkelson, Cindy
Department of Local Services