



COUNTY COMMISSIONERS

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District One

Gary Edwards
District Two

Tye Menser
District Three

HEARING EXAMINER

Creating Solutions for Our Future

**BEFORE THE HEARING EXAMINER
FOR THURSTON COUNTY**

In the Matter of the Application of)	NO. 2021104459
)	
Michael Miner)	
Olympic Capital Growth LLC)	FINDINGS, CONCLUSIONS,
)	AND RECOMMENDATION
<u>For Vacation of a Road Right-of-Way</u>)	

SUMMARY OF RECOMMENDATION

The Hearing Examiner recommends that the request to vacate a 60-foot segment of an unopened Thurston County right-of-way lying adjacent to tax parcel numbers 35905000100 and 35905000200 be **APPROVED**.

SUMMARY OF RECORD

Request

Michael Miner (Applicant/Owner) seeks to vacate a 60-foot segment of a Thurston County right-of-way described as follows:

The entire 60-foot width of 70th Avenue NE (platted Fifth Avenue) lying between Lots 30 through 39 in Block 50 and Lots 8 through 17 in Block 56 of the Plat of Boston Harbor, Division 1, as recorded on October 24, 1907, in Volume 8 of Plats at Pages 30-31, Auditor's File No. 38315, records of Thurston County, Olympia, Washington. Being in Section 14, Township 19 North, Range 2 West, W.M. Lying adjacent to parcel numbers 35905000100 and 3590500200.

Hearing Date

The Thurston County Hearing Examiner conducted a virtual open record public hearing on the request on November 9, 2021. The record was held open through November 12, 2021 to allow any members of the public having difficulty joining the virtual hearing to submit written comments, with time scheduled for responses from the parties. Timely post-hearing public comment was submitted, and the record closed on November 16, 2021.

Testimony

The following individuals submitted testimony under oath at the open record public hearing:

Craig Sisson, Real Estate Services Manager, Thurston County Public Works

Michael Miner, Applicant

Linda Kildahl, PO Box 6226, Olympia

Kim Kelley, 337 - 72nd Ave NE, Olympia

David Hartley, 503 - 77th Way NE, Olympia

Exhibits

The following exhibits were admitted in the record through the open record public hearing:

Exhibit 1 Public Works Staff Report including the following attachments:

- A. Notice of Public Hearing
- B. Copy of Application
- C. Vicinity Map
- D. Section/Township/Range Map
- E. Plat Map
- F. Aerial P photo showing wetland delineation
- G. Aerial Photo showing property ownerships

Exhibit 2 Public comment submitted prior to hearing:

- a. David Bergvall email, dated November 1, 2021; Email exchange between County staff and Applicant re: mitigation with attached photos and site map
- b. Jules James email, dated November 7, 2021 with attached 2009 satellite view of 70th Ave NE and Thurston County letters dated October 9, 2018 & April 10, 2017
- c. Jeff and Linda Kildahl letter with attached Thurston County letter dated April 10, 2017 and Grey Langemo property "Mitigation and Revegetation Plan"
- d. Kimberly Kelly email, dated November 8, 2021

Exhibit 3 Timely post-hearing public comment:¹

- a. Jordan Alyse Belmonte letter, November 9, 2021
- b. Lasha H. Steinweg email, November 11, 2021
- c. Edward Steinweg email, November 12, 2021
- d. Patty and Joe Belmonte letter, November 12, 2021
- e. Pandora Eyre letter, November 12, 2021

¹ The Hearing Clerk confirmed by email on November 19, 2021 that Staff and the Applicant did not submit responses to the timely post-hearing comment.

After considering the testimony and exhibits submitted through the virtual open record hearing process, the Hearing Examiner enters the following findings and conclusions:

FINDINGS

1. Michael Miner (Applicant/owner) seeks to vacate a 60-foot segment of a Thurston County right-of-way to allow future homeowners additional room for parking or accessory structures that can comply with zoning setbacks. The right-of-way subject to the vacation request is legally described as follows (hereafter referred to as “subject right-of-way”):

The entire 60-foot width of 70th Avenue NE (platted Fifth Avenue) lying between Lots 30 through 39 in Block 50 and Lots 8 through 17 in Block 56 of the Plat of Boston Harbor, Division 1, as recorded on October 24, 1907, in Volume 8 of Plats at Pages 30-31, Auditor’s File No. 38315, records of Thurston County, Olympia, Washington. Being in Section 14, Township 19 North, Range 2 West, W.M. Lying adjacent to parcel numbers 35905000100 and 3590500200.

The subject right-of-way does not abut a body of salt or fresh water capable of being navigated or otherwise used for recreation or transportation. *Exhibits 1 and 1.G; Michael Miner Testimony.*

2. The Applicant owns all parcels that abut the subject right-of-way. *Exhibit 1.B.* The Applicant’s property is comprised of 10 vacant parcels located between Bayview Drive NE and Boston Harbor Road Extension NE near their intersection in unincorporated Thurston County, Washington. The largest parcel, which is addressed as 7016 Bayview Drive NE, Olympia, fronts on Bayview Drive NE. Two much smaller parcels front on Boston Harbor Road Extension NE. The remaining seven smaller parcels are arranged in a line forming a rectangle that parallels the largest parcel, such that the overall Applicant ownership creates an irregular “U” in the center of which is the unopened subject right-of-way. With an underlying zoning designation of Rural Residential Resource (RRR 1/5), the Applicant’s property is surrounded by additional residential parcels, both vacant and developed. An additional unopened 20-foot wide right-of-way that appears to be a platted alley segregates the two parcels fronting Boston Harbor Road Extension NE from the remaining Applicant parcels. *Exhibits 1.B, 1.D, 1.E, and 1.G.*
3. The subject right-of-way, which as platted was named “5th Avenue” but is now known as “70th Avenue NE”, has never been opened or used for public travel. It contains no public utilities. No access permits have ever been issued for this segment of the unimproved right-of-way. Of note, the subject right-of-way is the only access for the Applicant’s seven linear smaller parcels. The subject right-of-way is currently vegetated with primarily native species, although aerial photographs in the record depict disturbance to vegetation, appearing to show exposed soils covering up to approximately half of the subject right-of-way. Thurston County GeoData Viewer identifies this area as containing wetland. *Exhibits 1, 1.B, 1.F, 1.G, and 2.A.*

4. The right-of-way was dedicated to the County in the plat of Boston Harbor, recorded on October 24, 1907. *Exhibits 1 and 1.E*. According to the County Engineer, the subject right-of-way is classified as a Class B road, wherein no public funds have been spent in the acquisition, operation, or maintenance of the right-of-way, and compensation is thus payable to the Thurston County general fund for its vacation. *Thurston County Code (TCC) 13.36.020; Exhibit 1; Craig Sisson Testimony*.
5. According to information submitted by the Applicant, with County Staff's agreement, a portion of the right-of-way of 5th Avenue/70th Avenue NE was already vacated by the County pursuant to Resolution 14224. A portion of the adjacent platted and unopened alley near the subject right-of-way was also vacated pursuant to Resolution 15894. *Exhibit 1.B; Testimony of Michael Miner and Craig Sisson*.
6. The County Engineer identified several public benefits that would result from vacation of the subject right-of-way, including relief from liability for the County for the subject portion of right-of-way, the County's receipt of compensation pursuant to TCC 13.36.030, and the anticipated increase in the County's tax base by having the land area added to the tax rolls. *Exhibit 1*.
7. Notice of the open record public hearing on the vacation request was published in The Olympian on October 26 and November 2, 2021. Notice was also posted in the vicinity of the subject right-of-way on October 14, 2021, at least 20 days in advance of the hearing, consistent with RCW 36.87.050. *Exhibits 1 and 1.A*.
8. Neighboring and nearby property owners opposed approval of the requested vacation on the following grounds.
 - Neighbors asserted that a former owner of the Applicant's property conducted extensive alterations to the subject right-of-way resulting in damage to the wetland and its regulated on-site buffer, which damage has not yet been mitigated. Neighbors asserted that the former owner not only cleared vegetation in the right-of-way and in Applicant's parcels, but also imported large amounts of fill material containing debris from his commercial excavation business between 1998 and 2020 (see County aerial photographs in Exhibit 2.A), harming the wetland and specifically altering its stormwater management function, resulting in flooding of their properties and damage to trees.
 - Neighbors submitted information regarding a 2017 notice of violation issued by the County to the former property owner for the unpermitted fill and critical area impacts. Because the County has not yet obtained mitigation of the previous damage, neighbors do not trust that the County would require the current owner to correct the unpermitted alterations and critical area damage in the course of future development. The granting of any approvals prior to remediation of this damage leads neighbors to believe it is possible that the County would eventually overlook the code violations conducted on site and allow development in place of remediation. They believe that the permits needed by the Applicant for the

envisioned six residential lots don't involve full public participation opportunities, and that the County would lose track of the need to remediate the prior damage.

- Others expressed concern that approval of the vacation would facilitate future development that would allow water to be re-directed away from a nearby seasonal stream into the Boston Harbor stormwater system.
- Additionally, alleging that County Staff has spent numerous hours - paid for by tax dollars - addressing the former owner's violations, one neighbor submitted that the proper classification of the right-of-way is Class A, rather than Class B, citing TCC 13.36.020.
- Further, neighbors asserted, based on site plans and advertising photos apparently posted by the Applicant, that the Applicant's ultimate purpose is to subdivide his total holdings into six residential units, which they feel is too many for land encumbered by critical area and associated buffer.
- They argued that the unopened right-of-way has greater value to the community if retained for critical area preservation than it would if it were to be developed as access and/or residential development. One neighbor asserted that County decisions are being made to support revenue generation at the expense of environmental protection and quality of life preservation.
- Neighbors contended that approval of the vacation request would not be in the public interest and therefore that the criteria for right-of-way vacation have not been met.

Testimony of Linda Kildahl, Kim Kelley, David Hartley; Exhibits 2.A, 2.B, 2.C, 2.D, 3.A, 3.B, 3.C, 3.D, and 3.E.

9. In response to public comment, County Staff submitted that future development applications would undergo review for compliance with all applicable County codes, that cleanup of the wetland/buffer damage by the former owner is very much on the County's radar, and that it is standard process for remediation of previous impacts to be addressed through future land use processes. Staff stated that notice of any future residential development would have to be posted on-site with a public comment period. County Staff noted that if the right-of-way vacation is denied, the Applicant's property would still be developed, but with somewhat less intensity. In responding to public comment, the Applicant conceded that the fill is not natural, and he testified that he offered to remove the fill first, but County Staff recommended that he proceed with the vacation before remediating the fill during subsequent development proposals. He testified that he has already hired a geotechnical consultant to look at the fill and a wetland biologist, and that he will hire a forester to assess trees. Although in his testimony the Applicant repeatedly stated that the wetland was already mitigated, he also stated that he knows he must mitigate in the future. *Testimony of Craig Sisson and Michael Miner.* The undersigned determined that the Applicant had apparently confused the terms mitigation and delineation.

10. Having heard all testimony and reviewed the comments submitted, County Staff maintained the recommendation of the County Engineer for approval of the right-of-way vacation, subject to compliance with the following conditions applicable to the Applicant and/or successors in interest: providing access/utility easement to all affected parcels, or other suitable mitigation, and providing compensation to the County pursuant to TCC 13.36.030 for Class B roads. *Exhibit 1; Craig Sisson Testimony*. The Applicant waived objection to the recommended conditions. *Michael Miner Testimony*.

CONCLUSIONS

Jurisdiction

The Hearing Examiner is granted jurisdiction to hear this request for a vacation of a right-of-way and to make a recommendation to the Thurston County Board of County Commissioners pursuant to the Revised Code of Washington (RCW) 36.87.060(2) and Thurston County Code (TCC) 13.36.060.

Criteria for Review

Pursuant to TCC 13.36.010, County roads must be vacated in accordance with RCW 36.87. RCW 36.87 provides:

“...The [vacation request] must show the land owned by each [Applicant] and set forth that such county road is useless as part of the county road system and that the public will be benefited by its vacation and abandonment.” *RCW 36.87.020*

“...If the county road is found useful as a part of the county road system it shall not be vacated, but if it is not useful and the public will be benefited by the vacation, the county legislative authority may vacate the road or any portion thereof.” *RCW 36.87.060(1)*

“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*

Additional Applicable Provisions

Thurston County Code 13.36.020, Classification

For the purposes of this chapter and pursuant to RCW 36.87.100 and RCW 36.87.110, Thurston County roads and rights-of-way are classified as follows:

Class A: Roads or rights-of-way for which public expenditures have been made in the acquisition, improvement, or maintenance of same except those roads or rights-of-way dedicated prior to March 12, 1904, which remained unopened for public use for a period of five years after authority was granted for opening them. (emphasis added)

Class B: Roads or rights-of-way for which no public expenditures have been made in the acquisition, improvement, or maintenance of same except those roads or rights-of-way dedicated prior to March 12, 1904, which remained unopened for public use for a period of five years after authority was granted for opening them.

Class C: Roads or rights-of-way dedicated prior to March 12, 1904, which remained unopened for public use for a period of five years after authority was granted for opening them.

Conclusions Based on Findings

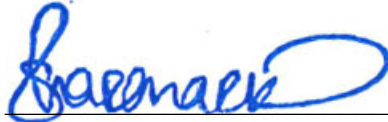
1. The subject right-of-way is not a necessary part of the County road system. Conditioned to require easement access to the adjacent parcels owned by the Applicant, no parcel would be landlocked by approval of the requested vacation. *Findings 1, 2, 3, 4, 5, and 10.*
2. Conditioned to require payment of compensation for the Class B road and requiring access and utility easements to be recorded ensuring access to all parcels solely accessed by the subject right-of-way, the public would benefit as a result of the requested right-of-way vacation because the County would be relieved of liability and would receive compensation. *Findings 6, 8, 9, and 10.*
3. The subject right-of-way does not abut a body of water as contemplated in RCW 36.87.130. *Finding 1.*
4. Surrounding property owners are understandably concerned about unmitigated damage to a regulated wetland and the associated buffer that has resulted in stormwater impacts, caused flooding, damaged trees, and that has not yet been remediated since a 2017 notice of violation to the previous owner. It is possible to interpret TCC 13.36.020's definition of Class A roads to include the tax-payer supported expense of County staff time in pursuit of that code violation; however, the undersigned is of the impression that the provision cited has been consistently applied to include the costs of road or utility construction and maintenance, rather than other County costs not directly associated with a use of the right-of-way in question. The Board may desire additional testimony from County staff on the historical interpretation of TCC 13.36.020, as well as testimony from Planning Staff about public participation opportunities likely to be available to neighbors if remediation is deferred until future development. Requiring remediation prior to final approval of right-of-way vacation is within the Board's discretion. Of note, however, all findings can be made in favor of granting the vacation request. Within the local experience and in the opinion of the undersigned, it would be typical to address remediation of previous impacts to critical areas in the process of land development permits, which would necessarily result in public notice and opportunity for comment and participation by the neighbors.

RECOMMENDATION

The Hearing Examiner recommends that the request to vacate a 60-foot segment of an of unopened Thurston County right-of-way lying adjacent to tax parcel numbers 35905000100 and 3590500200 be **APPROVED** subject to the following conditions:

1. Within the vacated right-of-way, the Applicant shall provide access/utility easements sufficient to serve all lots within the Applicant’s ownership.
2. The Applicant shall pay compensation as set forth in TCC 13.36.030.

Recommended December 1, 2021.



Sharon A. Rice
Thurston County Hearing Examiner