

August 4, 2020

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

King County Courthouse
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www.kingcounty.gov/independent/hearing-examiner

REPORT AND RECOMMENDATION

SUBJECT: Department of Transportation file no. **V-2719**
Proposed ordinance no. **2020-0138**
Adjacent parcel no. **7230200590**

BRIAN KELDERMAN

Road Vacation Petition

Location: a portion of 172nd Ave SE

Applicant: **Brian Kelderman**
17204 SE 144th Street
Renton, WA 98059
Telephone: (425) 864-1536
Email: Bigbri7091@gmail.com

King County: Department of Local Services
represented by **Leslie Drake**
201 S Jackson Street
Seattle, WA 98104
Telephone: (206) 684-1481
Email: leslie.drake@kingcounty.gov

FINDINGS AND CONCLUSIONS:

Overview

1. Brian Kelderman petitions the County to vacate an approximately 8,435 square foot stretch of public right-of-way mapped as 172nd Avenue SE, just north of SE 144th Street in the Renton area. The Department of Local Services, Road Services Division (Road Services), urges vacation upon payment of \$13,686 in compensation. We

conducted the public hearing on behalf of the Council. After hearing witness testimony, studying the exhibits entered into evidence, and considering the parties' arguments and the relevant law, **we recommend that Council vacate the right-of-way, contingent on receiving \$13,686 in compensation.**

Background

2. The Kelderman property abuts the easterly half of the right-of-way mapped as 172nd Avenue SE, just north of SE 144th Street. The larger right-of-way area extends two blocks, from the paved SE 144th Street to the paved SE 142nd Street. Two properties (including Mr. Kelderman's) abut the western half of the right-of-way, and four properties abut the eastern half. The right-of-way was never developed as a road. *See* Ex. D7 at 005.
3. A previous owner of the Kelderman parcel cleared part of the right-of-way and constructed improvements encroaching into the right-of-way area, without obtaining the proper permits. Ex. D4. Code Enforcement received a complaint and opened an enforcement file. The previous owners attempted to legalize the development.¹ That was not possible, given that much of the work was in the public right-of-way. In 2018, the previous owners petitioned the County to vacate the half of the right-of-way that abuts their property. Exs. D3 & D6. After Mr. Kelderman purchased the property, he continued with the vacation petition and with the attempt to legalize the past owner's work. Exs. D10 & D11.
4. Except as provided herein, we adopt and incorporate the facts set forth in Road Services' report and in proposed ordinance no. 2020-0138. That report, and maps showing the specific 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. Exs. D1 at 001-04; Ex. D4 at 001; Ex. D7 at 005-06.
5. Chapter RCW 36.87 sets the general framework for county road vacations, augmented by KCC chapter 14.40. There are at least four somewhat interrelated inquiries. The first two relate to whether vacation is warranted: is the road useless to the road system and would vacation benefit the public? If the answers to these are both yes, the third and fourth relate to compensation: what is the appraised (or perhaps assessed) value of the right-of-way, and how should this number be adjusted to capture avoided County costs?

Is Vacation Warranted?

6. 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

¹ It is unclear exactly what work was done by the owners immediately preceding Mr. Kelderman, and what was done by even earlier owners. Regardless, there is no allegation that Mr. Kelderman has done anything other than try to respond to a pre-existing code enforcement complaint by seeking vacation and permits to legalize past owners' work. He is, in code enforcement parlance, a "non-culpable property owner." KCC 23.36.030.B

- interest in private ownership.” KCC 14.40.0102.B. 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).
7. 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. It is useless as part of the county road system and does not serve any role in the public road network.
 8. Three neighbors participated in our hearing. Two were interested in understanding the process and did not oppose vacation. However, the owner of one of the properties abutting the Kelderman property directly across the right-of-way did object. She pointed to mature trees, active wildlife and a high water table along the right-of-way. She asserts the area should be protected as wetland, and private property should not be extended. Ex. P1.
 9. If indeed there is a wetland or other critical area, that may preclude future (or even the current) development or require some sort of mitigation. There are many restrictions in place for development in a critical area and their buffers. There may also be impervious surface and drainage concerns. However, those are issues addressed *during* the permit process to resolve a code enforcement case. A code enforcement representative participated in our hearing and explained that Mr. Kelderman’s application will need to meet zoning, building code, drainage, setback and other requirements. Road Services is not in the business of assessing such matters.
 10. Second, rights-of-way exist to provide some sort of access. Although the vacation focus is on the public road network, the vacation analysis is slightly broader. Other inquiries tackle whether the particular stretch serves as access to other properties or contains utilities; if so, an easement may be required as a condition of vacation. KCC 14.40.0104.B.7 & .8. Roads always solicits the County’s drainage experts to look at the need for potential drainage easements. Ex. D1 at 040. And—without blowing up the very essence of a right-of-way—one could expand the concept somewhat. The County operates many rails-to-trails corridors, substituting one type of travel for another. And the County places a premium on linkages from a public right-of-way to a trail system, on linkages between areas in the County’s regional trails system and points of interest, and on sites along a mapped wildlife habitat network. KCC 20.36.100.B.4, .5, & .16. However, the current right-of-way, which runs only two blocks between two paved streets, is none of those.
 11. Instead, the neighbor’s argument against vacation here is that the two-block right-of-way, including the portion abutting the Kelderman property, provides environmental benefits. We do not doubt that. There is no bar to the Council considering such factors in determining whether the public will benefit from a vacation. RCW 36.87.020. Denial is never mandatory, only discretionary. RCW 36.87.060(1). And road vacation is a political

function, a legislative act and not a quasi-judicial one, meaning the Council has maximum leeway in deciding what to do.²

12. However, rejecting a vacation petition on the grounds that it is environmentally advantageous to keep an area public 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. And there are countervailing public interest benefits to vacation here. The County saves on avoided management and maintenance costs, adds property taxes, and will receive compensation from Mr. Kelderman as a condition of vacation. As described below, vacation will create \$13,686 of public value. Thus, there is a tangible benefit to the County vacating this right-of-way. Ex. D14; Ex. D1 at 004.
14. We conclude that the public would benefit from this vacation and that vacation is warranted. We recognize however, that the question of whether vacation should turn on non-right-of-way factors, and how, are fundamental policy choices for the Council to make. Such policy choices are ones on which our view should carry less weight than (we hope) it usually does.

What Compensation is Due?

15. Sometimes compensation is the more complex issue, but here it is straightforward. Applying Performance, Strategy, and Budget's model, we start with increased land value from adding the vacation area to private property. The Kelderman's property will increase in size by about a third, which assessor staff opined would add approximately \$16,000 to the parcel's value. Ex. D13. Subtracting the expected \$2,000 savings in maintenance cost and an additional \$314 in future property taxes, the appropriate level of compensation is \$13,686. Ex. D14.

RECOMMENDATION:

1. We recommend that Council APPROVE proposed ordinance no. 2020-0138 to vacate the right-of-way abutting parcel 7230200590, CONTINGENT on petitioner paying \$13,686 to King County within 90 days of the date Council takes final action on this ordinance.
2. If King County does not receive \$13,686 by that date, there is no vacation and the right-of-way associated remains King County's. If payment is timely received, the Clerk shall record an ordinance against parcel 7230200590. Recording an ordinance will signify that

² *Chilivist 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).

payment has been received, the contingency is satisfied, and the right-of-way associated with parcel 7230200590 is vacated.

DATED August 4, 2020.



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 **August 28, 2020**, 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 JULY 21, 2020, HEARING ON THE ROAD VACATION
PETITION OF BRIAN KELDERMAN, DEPARTMENT OF TRANSPORTATION
FILE NO. V-2719**

David Spohr was the Hearing Examiner in this matter. Participating in the hearing were Jeri Breazeal, Leslie Drake, Brian Kelderman, Ray Morris, and Sarina Ziv.

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

Exhibit no. D1 Roads Services report to the Hearing Examiner, sent July 6, 2020

Exhibit no. D2	Letter from Clerk of the Council to ROADS transmitting petition, dated May 18, 2018
Exhibit no. D3	Petition for vacation of a county road, transmitted May 18, 2018
Exhibit no. D4	Survey of 2015 by Turnbow Land Surveying, submitted by Petitioners Patterson
Exhibit no. D5	Letter from ROADS to Petitioner acknowledging receipt of petition and explaining road vacation process, dated June 6, 2018
Exhibit no. D6	Revised petition for vacation of a county road, received June 19, 2018
Exhibit no. D7	Final stakeholder notification with vicinity map and site map, sent July 26, 2018, with comment deadline of August 28, 2018
Exhibit no. D8	King County Assessor's information for parcel no. 7230200590
Exhibit no. D9	Vacation area map
Exhibit no. D10	Letter from Petitioner, dated January 26, 2019
Exhibit no. D11	Second revised petition for vacation of a county road
Exhibit no. D12	Letter from ROADS to Petitioner recommending approval, dated February 6, 2019
Exhibit no. D13	Email from Sheila Frawley with valuation information, dated July 15, 2019
Exhibit no. D14	Compensation calculation model spreadsheet
Exhibit no. D15	Letter from ROADS to Petitioner recommending approval, with compensation and Road Engineer Report, dated October 21, 2019
Exhibit no. D16	Road Engineer report, dated September 30, 2019
Exhibit no. D17	Ordinance transmittal letter from ROADS to KC Council recommending approval and transmitting proposed ordinance (signed version unavailable), dated March 13, 2020
Exhibit no. D18	Proposed ordinance
Exhibit no. D19	Fiscal note
Exhibit no. D20	Photographs of SE 144 th Street at area of vacation
Exhibit no. D21	Affidavit of posting, noting posting date of June 26, 2020
Exhibit no. D22	<i>Reserved for future submission of Affidavit of publication</i>

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

Exhibits no. P1	Comment from Sarina Ziv, received July 21, 2020
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