

March 20, 2017

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

King County Courthouse
516 Third Avenue Room 1200
Seattle, Washington 98104
Telephone (206) 477-0860
Facsimile (206) 296-0198

hearingexaminer@kingcounty.gov
www.kingcounty.gov/independent/hearing-examiner

REPORT AND RECOMMENDATION

SUBJECT: Department of Transportation file no. **V-2672**
Proposed ordinance no. **2016-0525**
Adjacent parcel nos. **6862200115, 6862200120, 6862200130**

PORTAGE RIGHT-OF-WAY
Road Vacation Petition

Location: 22219 Dockton Road SW, Vashon

Petitioner: Malone Homestead LLC
represented by **Milt Reimers**
1420 5th Avenue Suite 3400
Seattle, WA 98101
Telephone: (206) 407-1572
Email: mreimers@schwabe.com

King County: Department of Transportation
represented by **Lydia Reynolds-Jones**
201 S Jackson Street
Seattle, WA 98104
Telephone: (206) 477-3631
Email: lydia.reynolds-jones@kingcounty.gov

SUMMARY OF RECOMMENDATIONS:

Department's Preliminary Recommendation:	Approve
Department's Final Recommendation:	Approve
Examiner's Recommendation:	Approve

PUBLIC HEARING:

After reviewing the Department of Transportation (Department) report and accompanying attachments and exhibits, the Examiner conducted a public hearing on the matter on March 6, 2017, in the Fred Conference Room, 12th Floor, King County Courthouse, 516 Third Avenue, Seattle, Washington.

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

FINDINGS AND CONCLUSIONS:

1. General information:

Road name:	Portage 1 st Addition
Location:	22219 Dockton Road SW, Vashon
Right-of-way classification:	C-Class
Area:	7,619 square feet
Compensation:	\$73,333.00

2. Malone Homestead, LLC petitioned the County to vacate the above described public right-of-way. On February 15, 2017, the Examiner received the Department Report recommending approval.
3. The required notice of hearing on the Department’s report was provided. The Examiner conducted the public hearing on behalf of the Metropolitan King County Council.
4. Except as provided herein, the Examiner adopts and incorporates the facts set forth in the Department’s report and the statements of fact contained in proposed ordinance no. 2016-0525. The Department’s report will be attached to those copies of this report and recommendation that are submitted to the County Council.
5. Maps showing the vicinity of the proposed vacation and the specific area to be vacated are in the hearing record as Exhibits 4, 10, 12, 13, 14, and 30.
6. Chapter 36.87 RCW sets the general framework for county road vacations, augmented by KCC Chapter 14.40. There are at least two main inquiries in a vacation petition. Is vacation warranted? If so, what compensation is appropriate? We address those in turn.
7. 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 does meet the standard:

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 benefitted by the vacation, the county legislative authority *may* vacate the road or any portion thereof.

RCW 36.87.060(1) (emphasis added).

8. 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. The linear continuation of it to the north (see Exhibit 13) has long since been vacated (1967). Moreover, its entire length abuts and runs parallel to the paved, well-traveled Dockton Road SW, so there is an adequate public road a few feet away. 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. The right-of-way is not necessary for the present or future public road system for travel or utilities purposes.¹
9. The County will obtain (as described below) the proceeds from essentially selling surplus property. The County gains from adding the area to the tax rolls. And the County is saved potential costs (as a property owner) for something like cleaning up illegal dumping on the property, and saved from the general liability risk property ownership carries.
10. So the road is useless as part of the county road system, and the public will be benefitted by its vacation and abandonment. Our only initial concern with vacation was that the right-of-way is close to Puget Sound, and one of the many maps seems to show that perhaps the extreme southwest corner nicks the water. Ex. 30. RCW 36.87.130 generally prohibits vacating a county road portion “which abuts on a body of salt or freshwater.” We probed this at hearing. Road Services had looked at this and concluded that there is private land between the edge of the right-of-way and Puget Sound.² That is sufficient for our purposes; we decide cases based on a preponderance of the evidence—not on a beyond a reasonable doubt—standard. *Compare* Ex. 30 *with* Exs. 4, 10, 12, 13, and 14.
11. Where the vacation is appropriate, the standard for determining the amount the petitioner must compensate the County changed when the new KCC Chapter 14.40 became effective on December 17, 2016. The old standard—applicable at the time Road Services and the Applicant did the work on this file, including determining compensation—pegged the amount due to the “class” of road, “class” itself being pegged to whether public funds had been expended in the right-of-way acquisition, improvement, or maintenance; for a class “C” road such as this one, compensation was slotted at 50 percent of the full appraised value. *See* pre-Ord. 18420 version of KCC 14.40.020(B) & .060.

¹ CenturyLink has requested a utility easement along the eastern edge of the right-of-way area, but CenturyLink has not been in any hurry to get it done. Ex. 31. This vacation is conditioned on Applicants’ express understanding that, at some point in the future when CenturyLink comes calling, Applicants will have a duty to grant a utility easement.

² While lying near to or close to (but not necessarily touching) qualifies as “adjacent,” something must actually join at a boundary or border to “abut.” *Abut & adjacent*, BLACK’S LAW DICTIONARY (20th ed. 2015)

12. That standard has now changed, and in opposite directions. On the “more” side (meaning the County should require more compensation), the automatic discount for rights-of-way for which the County did not expend funds acquiring, improving, or maintaining, has disappeared. On the “less” side (meaning the County can require less compensation), in 2016 the state changed the standard for right-of-way compensation to allow the local jurisdiction to “adjust the appraised value to reflect the value of the transfer of liability or risk, the increased value to the public and property taxes, the avoided costs for management or maintenance, and any limits on development or future public benefit.” RCW 36.87.120. Ordinance 18420 explicitly adopted this new state standard. KCC 14.40.020(A)(1).
13. At our March 6 hearing, we announced that for vacation applications like this, already near the end of the pipeline by the effective date of Ordinance 18420, we would continue applying the old standard. That is not a requirement Council must follow; the “vested rights” doctrine—that certain applications are to be decided on the basis of the law as of the date a completed application was submitted—is not applicable to a vacation petition. However, trying to apply a new standard now would require sending the parties back to the drawing board, after this much work (see below) has already been done and this much time has passed, because the record contains no information from which we could base a finding of, for example, the value of the transfer of liability or risk or the increased value to the public and property taxes. A remand would certainly increase the Department’s (and thus the public’s) administrative costs. So we recommend sticking with the old formulation for today’s case—and perhaps for a few in the near future where the compensation analysis was completed prior to the code change—but Council has discretion to go in a different direction.
14. As to the full appraised value on which to base the fifty percent discount, the initial Roads Services’ analysis valued the right-of-way in relation to the assessed values of the Applicants’ waterfront properties. Ex. 16. This averaged out to a fair market value of \$75 per square foot. That was too high, because whatever a potentially interested buyer would pay for a hypothetical 2,500 square foot waterfront parcel (the approximate size of one of the Applicants’ parcels) housing a single-family house, that typical buyer would not pay *double* for a 5,000 square-foot waterfront parcel which could still only house a single residence.
15. Roads Services’ initial assessment was justifiable. The code allows the “assessed land value of parcels adjacent to the County right-of-way” to be used in determining the appropriate compensation. KCC 14.40.020(A)(1). In many scenarios, especially where little money is at stake, is not worth the time or expense of a full appraisal.³ And thinking through the various permutations for how a surplus right-of-way might be joined to a pre-existing, abutting holding, one would surmise that if anything the value of abutting properties would be expected to be greater, not less, than the surplus right-of-way. So the public fisc seems protected by such an approach, and where an applicant believes the

³ In *Claremont Forest—V-2680*, the total assessed value for interior forest land, before any discount, amounted to approximately \$80.

situation warrants the time, effort, and private cost of retaining an appraiser, the applicant can do so.

16. The Applicants did so here, but their product was internally inconsistent. Ex. 20. Their appraiser stated that the “highest and best use of the subject property would likely be to vacate the property to the abutting properties [*i.e.*, the Applicants’ waterfront properties] to be used as expanded residential surplus area.” Ex. 20 at 036. Yet he used as comparable sales *interior* lots, meaning lots not actually touching the water. Ex. 20 at 042–049. It should hardly shock anyone that interior lots tend to fetch less than waterfront lots. That approach, not surprisingly, led to a too-low fair market value of \$9.48 per square foot, only 12 percent of Road Services’ initial assessment.
17. Road Services appears to have adequately reevaluated the situation. Its review appraiser described how Applicants’ appraiser’s highest and best use conclusion was inconsistent with the methodology. Ex. 21 at 004. She attempted to rectify this by coming up with a value for what the right-of-way property would be worth at its highest and best use—as additional acreage for the Applicants’ current properties. Ex. 21 at 004–005. She arrived at a figure of \$55 per square foot. She then discounted this figure by 65 percent, based on recent sales of residential parcels on Vashon Island and sales of surplus parcels in King County, to arrive at a figure of \$19.75 per square foot. Ex. 21 at 005. We are slightly concerned that maybe an almost two-thirds discount is too much (*i.e.*, that the price is too low), and the review appraiser was not present at the hearing to answer our questions or provide a fuller explanation. But based on what reads—from our years litigating appraisal issues—like a solid entry, we accept the review appraiser’s written opinion as sufficient. Again, we decide cases based on a preponderance of the evidence—not on a beyond a reasonable doubt—standard
18. And with that we arrive at a total compensation of \$73,333, which has been deposited with King County. Ex. 23.

RECOMMENDATION:

APPROVE proposed ordinance no. 2016-0525 to vacate the subject road right-of-way.

DATED March 20, 2017.



David Spohr
Hearing Examiner

NOTICE OF RIGHT TO APPEAL

A person appeals an Examiner recommendation by following the steps described in KCC 20.22.230, including filing with the Clerk of the Council a sufficient appeal statement and a \$250 appeal fee (check payable to the King County FBOD), and providing copies of the appeal statement to the Examiner and to any named parties listed on the front page of the Examiner's recommendation. Please consult KCC 20.22.230 for exact requirements.

Prior to the close of business (4:30 p.m.) on *April 13, 2017*, an electronic copy of the appeal statement must be sent to Clerk.Council@kingcounty.gov and a paper copy of the appeal statement must be delivered to the Clerk of the Council's Office, Room 1200, King County Courthouse, 516 Third Avenue, Seattle, Washington 98104. Prior mailing is not sufficient if the Clerk does not actually receive the fee and the appeal statement within the applicable time period.

Unless the appeal requirements of KCC 20.22.230 are met, the Clerk of the Council will place on the agenda of the next available Council meeting a proposed ordinance implementing the Examiner's recommended action.

If the appeal requirements of KCC 20.22.230 are met, the Examiner will notify parties and interested persons and will provide information about "next steps."

MINUTES OF THE MARCH 6, 2017, HEARING ON THE ROAD VACATION PETITION OF PORTAGE RIGHT-OF-WAY, DEPARTMENT OF TRANSPORTATION FILE NO. V-2672.

David Spohr was the Hearing Examiner in this matter. The hearing was attended by Lydia Reynolds-Jones, Milt Reimer and Ms. Malone.

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

- | | |
|----------------|--------------------------------------------------------------------------------------------------------------------------------------------|
| Exhibit no. 1 | Roads Services report to the Hearing Examiner |
| Exhibit no. 2 | Letter from Clerk of the Council to KCDOT transmitting petition, dated October 28, 2013 |
| Exhibit no. 3 | Cover letter to petition, transmitted October 28, 2013 |
| Exhibit no. 4 | Petitioner's vicinity map |
| Exhibit no. 5 | Filing fee check no. 1053 in the amount of \$100.00 |
| Exhibit no. 6 | Receipt for filing fee, dated October 28, 2013 |
| Exhibit no. 7 | Letter from Roads Services to Petitioner requesting signed petition |
| Exhibit no. 8 | Petition cover letter, transmitted March 24, 2014 |
| Exhibit no. 9 | Petition for vacation of a county road, transmitted March 24, 2014 |
| Exhibit no. 10 | Map of vicinity surrounding vacation area, Thomas Brothers page 683 |
| Exhibit no. 11 | Portage First Addition plat map |
| Exhibit no. 12 | Map depicting vacation area |
| Exhibit no. 13 | Aerial map of vacation area depicting onsite structures |
| Exhibit no. 14 | Final agency notice to stakeholders requesting comment, sent April 29, 2014, noting response deadline of May 30, 2014 |
| Exhibit no. 15 | Letter from Roads to petitioner explaining compensation calculation, additional requirements to finalize petitioner, dated August 13, 2015 |
| Exhibit no. 16 | Compensation worksheet |
| Exhibit no. 17 | Letter from Michael Malone of Roads requesting a nine-month extension, dated November 3, 2015 |
| Exhibit no. 18 | Letter from Roads to Michael Malone granting extension through August 1, 2016 |
| Exhibit no. 19 | Letter from Petitioner to Roads requesting new compensation evaluation, dated June 24, 2016 |
| Exhibit no. 20 | Petitioner's independent appraisal report, prepared by Patrick Lamb, dated April 25, 2016 |
| Exhibit no. 21 | King County analysis of appraisal report, dated July 12, 2016 |
| Exhibit no. 22 | Cover letter to compensation payment, dated September 12, 2016 |
| Exhibit no. 23 | Copy of two compensation checks: no. 0696401067 for \$18,576.00 and no. 2503711 for \$54,757.00 |
| Exhibit no. 24 | Letter from KCDOT to KC Council recommending approval, dated September 14, 2016 |
| Exhibit no. 25 | Copy of compensation deposit, dated September 15, 2016 |
| Exhibit no. 26 | Letter from KCDOT to KC Council transmitting proposed ordinance, dated, October 28, 2016 |
| Exhibit no. 27 | Proposed ordinance 2016-0525 |

Exhibit no. 28	Fiscal note
Exhibit no. 29	Affidavit of posting, noting posting date of February 9, 2017
Exhibit no. 30	<i>Reserved for affidavit of publication</i>
Exhibit no. 31	Email string regarding CenturyLink easement

DS/vsm

March 20, 2017

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

King County Courthouse
516 Third Avenue Room 1200
Seattle, Washington 98104
Telephone (206) 477-0860
Facsimile (206) 296-0198
hearingexaminer@kingcounty.gov
www.kingcounty.gov/independent/hearing-examiner

CERTIFICATE OF SERVICE

SUBJECT: Department of Transportation file no. **V-2672**
Proposed ordinance no. **2016-0525**
Adjacent parcel nos. **6862200115, 6862200120, 6862200130**

PORTAGE RIGHT-OF-WAY

Road Vacation Petition

I, Elizabeth Dop, 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.
- caused to be 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 March 20, 2017.



Elizabeth Dop
Legislative Secretary

All Parties of Record

Altschuler, Jennifer Department of Transportation Department of Transportation	Vashon Island Fire and Rescue Vashon Park District	mailed paper copy mailed paper copy
Ballweber, Jim Department of Transportation		
Biggs, Jim Wave Broadband		mailed paper copy
Brater, Rick Department of Transportation Department of Transportation		
Christian, Claire Department of Natural Resources and Parks		
Claussen, Kimberly Department of Permitting and Environmental Review		
Eichelsdoerfer, Robert Department of Transportation		
Freitag, Ivy Department of Natural Resources and Parks		
Harb, Alex CenturyLink		mailed paper copy
Ishimaru, Jim Department of Transportation Department of Transportation		
Kulish, Michael Facilities Management Division		
LeCompte, Jim Comcast Cable		mailed paper copy
McDonald, Andrew Department of Natural Resources and Parks		
Morehead, Tina Department of Transportation Department of Transportation		
Noris, Anne Metropolitan King County Council		
Potts, Michela Puget Sound Energy		mailed paper copy
Reimers, Milt Schwabe, Williamson & Wyatt		mailed paper copy
Torkelson, Cindy Department of Transportation		
Treichel, Chris Department of Transportation		