



AFTER RECORDING RETURN DOCUMENT TO:

City of Bellingham - Planning Department
210 Lottie Street
Bellingham, WA 98225

DOCUMENT TITLE: *Street Vacation Ordinance*

REFERENCE NUMBER OF RELATED DOCUMENT: *VAC2020-0001*

GRANTOR(S): *City of Bellingham*

GRANTEE(S): *21st And Taylor, LLC*

ASSESSOR'S TAX/PARCEL NUMBER(S): *The subject right-of-way abuts parcel #'s 370201455247 and 453225. (3702014552470000) and 3702014532250000)*

ABBREVIATED LEGAL DESCRIPTION: *The full width of Douglas Avenue abutting Lot 19, Block 8, Lysle's 1st Add to Fairhaven and Lot 2, Block 101, Fairhaven Land Co's 1st Add to Fairhaven, Bellingham, Washington and as described on EXHIBIT A and as shown on EXHIBIT B.*

ORDINANCE NO. 2021-07-030

AN ORDINANCE RELATING TO THE VACATION OF THE FULL WIDTH OF DOUGLAS AVENUE ABUTTING LOT 19, BLOCK 8, LYSLE'S 1ST ADD TO FAIRHAVEN AND LOT 2, BLOCK 101, FAIRHAVEN LAND COMPANY'S 1ST ADD TO FAIRHAVEN, WITHIN THE CITY OF BELLINGHAM.

WHEREAS, on November 6, 2019 the City's Technical Review Committee considered and recommended approval of the petition to vacate the subject right-of-way as described on EXHIBIT A and shown on EXHIBIT B, which are attached hereto and incorporated herein;
and

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Bellingham, Washington 98225
Telephone (360) 778-8270

WHEREAS, the petitioner for this proposed vacation of the subject right-of-way (“Petitioner”) is the owner of the parcels abutting the subject right-of-way to the north as described and depicted in Exhibit D (“Property”); and

WHEREAS, the Hearing Examiner held a virtual public hearing on the subject petition on July 8, 2020 at 6:00 PM; and

WHEREAS, on July 27, 2020 the Hearing Examiner recommended approval of the subject vacation petition with the findings of fact, conclusions of law and recommendation as provided in the record of proceedings; and

WHEREAS, an appraisal was conducted to determine the amount of compensation necessary to vacate the subject right-of-way; and

WHEREAS, said appraisal concluded that \$18,000 is the fair-market value of the subject right-of-way; and

WHEREAS, \$18,000 was remitted to the City of Bellingham for the subject right-of-way on June 30, 2020; and

WHEREAS, the City Council held a closed record hearing on the subject vacation petition on December 7, 2020 where the Hearing Examiner's record of proceedings were considered; and

WHEREAS, leading up to the closed record hearing the City Council received a large volume of comments from interested citizens asking the Council to deny the vacation petition; and

WHEREAS, in order to supplement the existing Hearing Examiner record and by a vote of 6-1 the City Council remanded the vacation petition back to the Hearing Examiner so that the issues raised in the public comments could be addressed; and

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VAC2020-0001

WHEREAS, the Hearing Examiner held the remand public hearing on March 10, 2021 and

WHEREAS, on March 30, 2021 the Hearing Examiner recommended neither approval nor denial of the subject street vacation petition as provided in the findings of fact and conclusions of law attached hereto and incorporated herein as EXHIBIT C, and:

WHEREAS, within the recommendation in EXHIBIT C the Hearing Examiner did request that Council enter the necessary conclusions and reach the appropriate final outcome, and;

WHEREAS, all the jurisdictional steps preliminary to the vacation have been taken as provided by law.

NOW THEREFORE,

THE CITY OF BELLINGHAM DOES ORDAIN:

Section 1. Following the execution and recording of the restrictive covenant described in Section 8 below, the subject right-of-way described on EXHIBIT A and shown on EXHIBIT B is hereby vacated.

Section 2. In the Hearing Examiner's Findings of Fact, Conclusions, and Recommendation, the Hearing Examiner concludes that City Council Street Vacation Policies 3, 4, 6, 7, 8, and 10 are satisfied by the street vacation proposal. The Hearing Examiner states that the record as a whole tends to show compliance with City Council Street Vacation Policies 1, 2, 5, 9, and 11, but defers to City Council make the policy determination that the proposal meets these policies. For the reasons stated in the Hearing Examiner's Findings of Fact, Conclusions, and Recommendation, City Council concludes that the street vacation proposal meets all of City Council's Street Vacation Policies, including Policies 1, 2, 5, 9, and 11. The

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Hearing Examiner's Findings of Fact, Conclusions, and Recommendation as provided in EXHIBIT C are hereby incorporated herein and adopted.

Section 3. The full width of the subject right-of-way shall be reserved for public utility easements. Private easements between private utility provider(s) and the petitioner shall be fully executed and recorded prior to the passage of this ordinance.

Section 4. A 30-foot-wide non-exclusive easement for public access shall be retained across the southern portion of the subject right-of-way to be vacated for trail improvements to the existing non-vehicular public-access connection between 21st Street and the alley lying between 20th and 21st Streets.

Section 5. No damage shall result to any person or persons or to any property by reason of the vacation of said right-of-way. If reconfiguration of existing utilities is necessary, it shall be at the sole expense of the petitioner.

Section 6. Payment of the appraised fair market value of \$18,000 was remitted to the City of Bellingham's Finance Department on June 30, 2020 to compensate the City for the vacated right-of-way.

Section 7. Any portion of the Douglas Avenue right-of-way that is not developed with public access improvements may be utilized by the Petitioner or any subsequent owner of the Property for any combination of multi-modal access, utility connections, usable and open space or vegetation restoration, or any other non-building element associated with a future land use action that is consistent with the easements reserved by the City.

Section 8. Prior to third and final reading of this Ordinance, Petitioner shall execute and record a restrictive covenant approved by the City that includes the following conditions:

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- As part of any future land use action by the Petitioner or any subsequent owner of the Property, the Petitioner shall improve the existing trail to a standard approved by the Parks Department including width, surfacing and stairways where necessary to accommodate grades and alignment, all of which may be eligible for park impact fee credit.
- Future land use action(s) by Petitioner or any subsequent owner of the Property that include removal of mature cedar trees in the subject right-of-way for any purpose shall require the cedar trees be replaced at a ratio of 2:1.
- Future land use action(s) by Petitioner or any subsequent owner of the Property may request a 25% parking reduction to minimize vehicular presence and revegetation of the northeastern quadrant of the subject right-of-way and to increase tree canopy coverage in Area 1A of the Happy Valley Neighborhood.
- The restrictive covenant shall be effective upon the recording of this Ordinance.
- The restrictive covenant shall run with the land and shall be binding upon and inure to the benefit of the Petitioner and successor owners of the Property.

Section 9. The recitals of this Ordinance are true and accurate statements of fact and are included as terms of this Ordinance.

PASSED by the Council this 26th day of July, 2021.



Hannah Stone, Council President

City of Bellingham
CITY ATTORNEY
210 Lottie Street
Bellingham, Washington 98225
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VAC2020-0001

APPROVED by me this 5 day of August, 2021.

[Signature]
Seth Fleetwood, Mayor

As the Finance Director, I acknowledge that the City has received \$18,000 as compensation for this right-of-way vacation.

Attest: [Signature]
Andy Asbjornsen, Finance Director

Approved as to Form: [Signature]

Office of the City Attorney

Published: July 30, 2021

STATE OF WASHINGTON)
COUNTY OF WHATCOM)ss

I CERTIFY that I know or have satisfactory evidence that **SETH FLEETWOOD** is the person who appeared before me, and said person acknowledged that he signed this instrument, on oath stated that he was authorized to execute the instrument and acknowledged it as the **Mayor** of the **CITY OF BELLINGHAM** to be the free and voluntary act of such party for the uses and purposes mentioned in the instrument.

Aug 5, 2021
DATED

[Signature]
SIGNATURE OF NOTARY PUBLIC

S. Brooksana Raney
NAME PRINTED

Notary
TITLE

7/28/24
MY APPOINTMENT EXPIRES



City of Bellingham
CITY ATTORNEY
210 Lottie Street
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Telephone (360) 778-8270

STATE OF WASHINGTON)
COUNTY OF WHATCOM)ss

I CERTIFY that I know or have satisfactory evidence that **ANDY ASBJORNSON** is the person who appeared before me, and said person acknowledged that he signed this instrument, on oath stated that he was authorized to execute the instrument and acknowledged it as the **Finance Director** of the **CITY OF BELLINGHAM** to be the free and voluntary act of such party for the uses and purposes mentioned in the instrument.



Aug 10, 2021
DATED

Elisabeth A. Oakes
SIGNATURE OF NOTARY PUBLIC

Elisabeth A. Oakes
NAME PRINTED

Deputy City Clerk
TITLE

6/19/2023
MY APPOINTMENT EXPIRES

EXHIBIT A

The full width of Douglas Avenue abutting Lot 19, Block 8, Lysle's 1st Add to Fairhaven and Lot 2, Block 101, Fairhaven Land Co's 1st Add to Fairhaven, Bellingham, Washington

EXHIBIT B

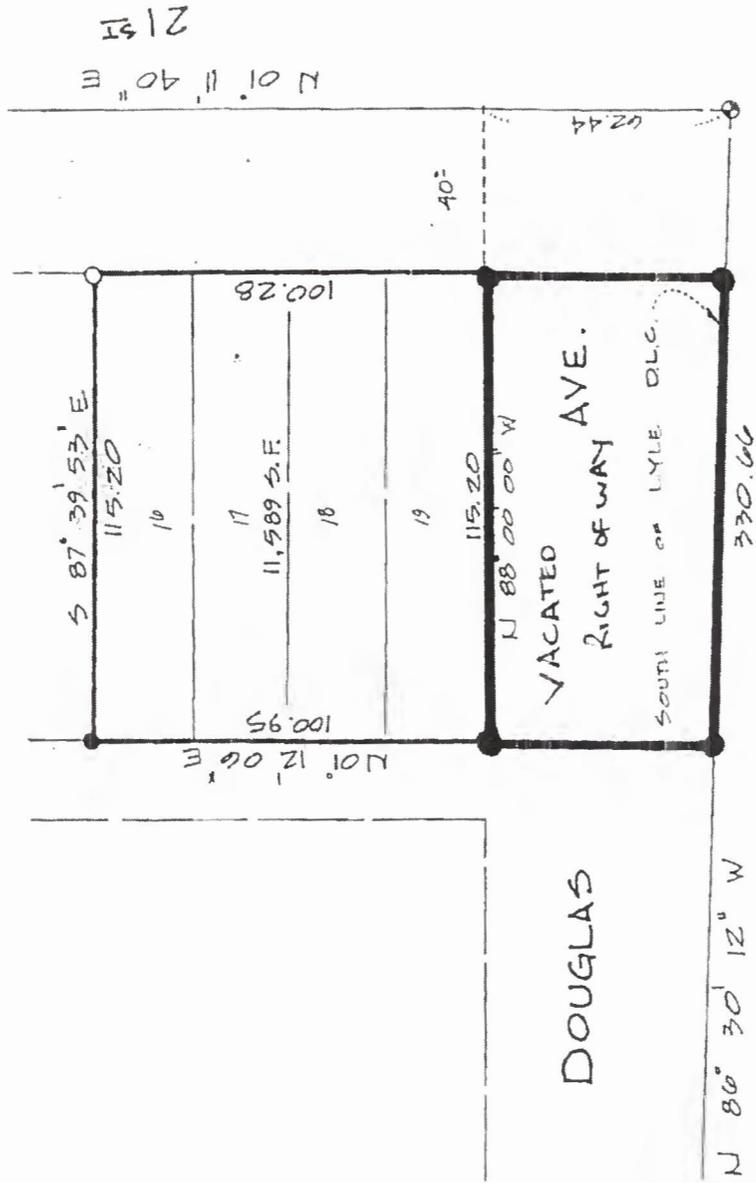


EXHIBIT "B"

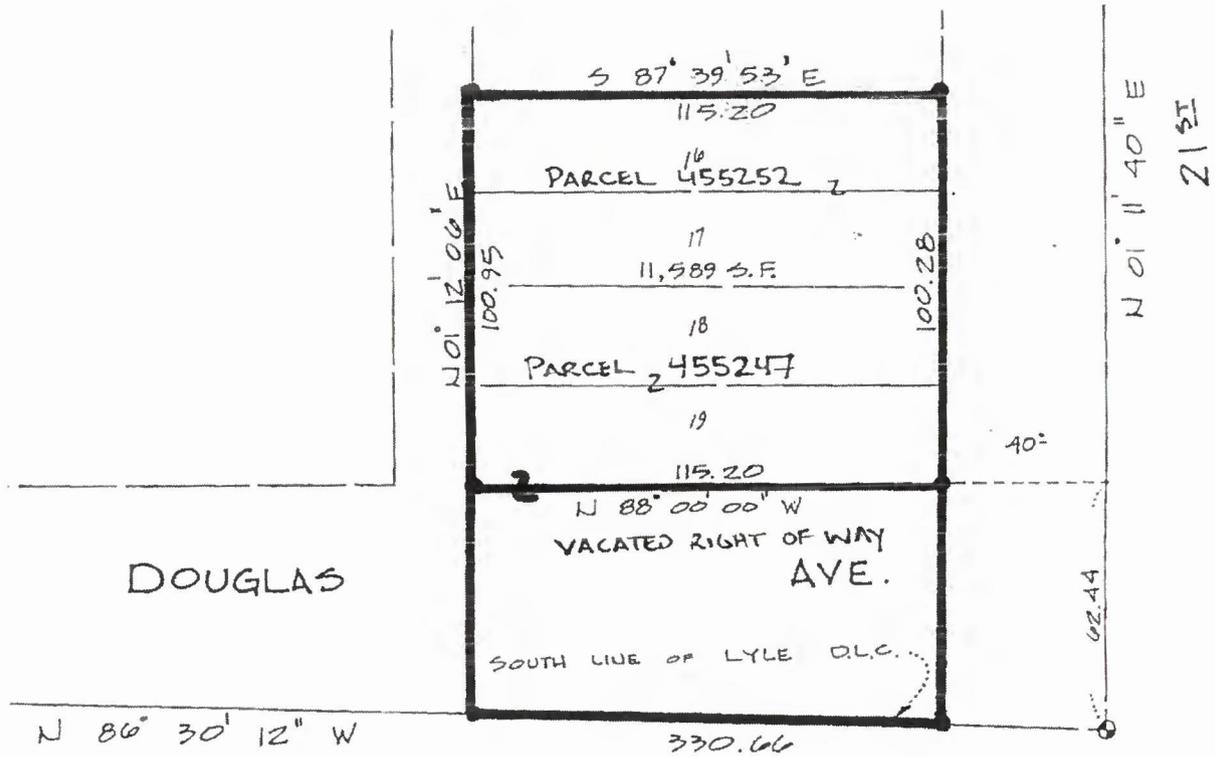


EXHIBIT C

THE HEARING EXAMINER OF THE CITY OF BELLINGHAM WHATCOM COUNTY, WASHINGTON

IN RE:	HE-20-PL-016
21 ST AND TAYLOR LLC, Petitioner	FINDINGS, CONCLUSIONS, AND RECOMMENDATION
Full width of Douglas Avenue, between 21 st Street and an alley to the west	
VAC2020-0001 / Street Vacation	SHARON RICE, HEARING EXAMINER

SUMMARY OF RECOMMENDATION

The Hearing Examiner does not make a recommendation for approval or denial of the proposal. As stated in the following findings and conclusions, the Hearing Examiner is able to conclude that vacation Policies 3, 4, 6, 7, 8, and 10 are clearly shown to be satisfied by the proposal. While the Examiner submits that the record as a whole tends to show compliance with all vacation policies, given the facts of this case - vacation Policies 1, 2, 5, 9, and 11 require a level of policy interpretation that is more appropriately conducted by local officials. The Examiner declines to make a recommendation on vacation Policies 1, 2, 5, 9, and 11 and requests that Council enter the necessary conclusions and reach the appropriate final outcome.

SUMMARY OF RECORD

Request:

Ali Taysi, AVT Consulting LLC, on behalf of 21st And Taylor, LLC (Applicant) requested vacation of the full width of Douglas Avenue abutting Lot 19, Block 8, Lysle's 1st Add to Fairhaven and Lot 2, Block 010, Fairhaven Land Co's 1st Add to Fairhaven in Bellingham, Washington.

Hearing Date:

The Bellingham Hearing Examiner conducted a virtual open record hearing on the request on March 10, 2021. The record was held open two business days to allow for public comment, with additional days for responses by the parties. One post-hearing public comment was submitted, and the record closed on March 16, 2021.

1 **Testimony:**

2 At the hearing the following individuals presented testimony under oath:

- 3 Steve Sundin, Senior Planner
4 Ali Taysi, AVT Consulting LLC, Applicant's Representative
5 Gregory Legestee, P.O. Box 30132
6 Tip Johnson, 2719 Donovan Avenue
7 Wendy Scherrer, 1905 Larrabee Avenue
8 Jake Charlton, 1609 Harris Avenue
9 Bobbi Vollendorff, 1119 20th Street
10 Alex McLean, 1009 32nd Street
11 Lidia Tillman, 916 21st Street
12 Margo Hammond, 1050 Larrabee Avenue

13 **Exhibits:**

14 At the open record hearing, the following exhibits were admitted in evidence:

15 Exhibit 1 Staff Report to the Examiner with the following attachments:

- 16 A. Vacation Area / Aerial / Public Utilities
17 B. Zoning Map
18 C. Project Narrative
19 D. Technical Review Committee Letter to Applicant
20 E. Vacation Petition
21 F. Appraisal Summary
22 G. Draft Ordinance

23 Exhibit 2 Remand Staff Report to the Examiner with the following attachments:

- 24 H. City Council Remand Order
25 I. Aerial Photo and Site Plan
26 J. Applicant's Response to Remand Order
27 K. Preliminary Trail Plan, dated July 2020
28 L. Public Comments since July 8, 2020 public hearing from:
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- a. Daniel Kirkpatrick email, March 2, 2021
- b. Bobbi Vollendorff email, March 1, 2021
- c. Lisa Beck email, March 1, 2021
- d. Tip Johnson email with attached articles, March 1, 2021
- e. Barbara Ryan email, February 26, 2021
- f. Robin Thomas email, February 25, 2021
- g. Michael Lilliquist, Bellingham City Council email, December 7, 2020 with attached Bellingham Trail Guide, September 2019
- h. Lynn Billington email, December 4, 2020
- i. Richard Easterly email, December 3, 2020
- j. Jamie K. Donaldson email, December 3, 2020
- k. Chris Webb email, December 3, 2020
- l. John Hatten email, December 3, 2020
- m. Mary J. Raikes email, December 3, 2020
- n. Wendy Larson email, December 3, 2020
- o. Thomas Goetzl email, December 2, 2020
- p. Julie Carpenter email, December 2, 2020
- q. Thelma Follett email, December 2, 2020
- r. Carol Follett email, December 2, 2020
- s. Chris Noell email, December 2, 2020
- t. Brooklyn Castellani-Kelsay email, December 3, 2020
- u. Mickey McDiarmid email, December 3, 2020
- v. Robin Thomas email, December 3, 2020
- w. Jeralyn A. Heil email, December 3, 2020
- x. Wendy Scherrer email, December 3, 2020
- y. Colleen Henehan email, December 4, 2020
- z. Lynn Billington email, December 4, 2020
- aa. Rachel Budelsky email, December 4, 2020
- bb. Sheri Russell email, December 4, 2020

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- cc. David Stalheim email, December 4, 2020
- dd. Teresa Hamilton email, December 5, 2020
- ee. Christopher Grannis email, December 5, 2020
- ff. Ken Kaliher email, December 6, 2020
- gg. Irena Lambrou email, December 6, 2020
- hh. Katie Novak email, December 6, 2020
- ii. Lisa K. Beck email, December 7, 2020
- jj. Jake Charlton email, December 7, 2020
- kk. Alex McLean, President of Happy Valley Neighborhood Association (HVNA) email, December 8, 2020
- ll. John Blethen email, December 3, 2020 (with City response)
- mm. John Tuxill email, December 7, 2020
- nn. Matthew Sorlien email, December 3, 2020
- oo. Jamie K. Donaldson email, December 3, 2020
- pp. Mark Gardner email, December 4, 2020
- qq. Sheri Russell email, December 4, 2020
- rr. Jon Miller email, December 4, 2020
- ss. Michael Lilliquist email to Alan Marriner, December 4, 2020 with forwarded email from Wendy Scherrer, December 3, 2020
- tt. Alex McLean email, December 3, 2020
- uu. Steven Sundin email to Alan Marriner, December 2, 2020 re: Wendy Scherrer email, November 30, 2020
- vv. Alex McLean email to Wendy Scherrer, November 30, 2020 and Wendy Scherrer email to Steve Sundin, November 30, 2020
- ww. Alex McLean email to Eric Johnston and City response, November 25, 2020
- xx. Alex McLean email to Michael Lilliquist with Lilliquist response, November 25, 2020
- yy. John Blethen emails to Michael Lilliquist with Lilliquist response, November 24, 2020

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zz. Michael Lilliquist email to Alan Marriner, November 25, 2020 with attached emails

aaa. John Blethen email, March 2, 2020

M. Excerpts from Follis Appraisal

N. Revised Draft Street Vacation Ordinance

Exhibit 3 Applicant’s suggested changes to conditions

Exhibit 4 Public comments received prior to hearing/after publication of staff report:

a. Alex McLean letter, dated March 10, 2021

b. John Blethen email, dated March 2, 2021

Exhibit 5 Notice of public hearing, mailing list, affidavit of publication and photographs of site postings

Exhibit 6 Post-hearing comment from Jon Miller, March 11, 2021

Exhibit 7 City response to post-hearing comment, dated March 11, 2021

On considering the testimony and exhibits submitted, the Hearing Examiner enters the following findings and conclusions:

FINDINGS

1. The Applicant requested vacation of the full width of unimproved Douglas Avenue abutting Lot 19, Block 8, Lysle’s 1st Add to Fairhaven and Lot 2, Block 010, Fairhaven Land Co’s 1st Add to Fairhaven in Bellingham. The Applicant owns vacant real property along the north boundary of the unopened right-of-way, addressed as 936 -21st Street. An unnamed public alley abuts the proposed vacation area and the Applicant’s vacant property along the west boundary. *Exhibit 1.*

2. The area proposed for vacation is approximately 6,900 square feet. It is currently developed with City stormwater and water mains, Cascade Natural Gas, and Puget Sound Energy transmission lines, but otherwise contains no structures or improvements. *Exhibits 1.A, 2, and 2.M.* The vacation area is fairly densely vegetated, including some mature trees and mixed understory vegetation, much of which is dominated by invasive blackberries. It slopes somewhat steeply from west to east. An existing informal pedestrian trail runs through this unopened right-of-way segment in a zigzag, switch backing path that extends in part into the Applicant’s adjacent property to the north due to

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topography; it ranges in width from 18 to 24 inches. *Exhibits 1, 1.C, 2, 2.J, 2.K, and 2.M.*

3. The subject right-of-way is in Area 1A, Happy Valley Neighborhood, and is zoned Residential Multi, Multiple, which requires a density of 1,000 square feet per unit for parcels of 10,000 square feet or greater, and a density of 2,000 square feet per dwelling unit for parcels of less than 10,000 but at least 4,000 square feet. *Exhibit 1; Bellingham Municipal Code (BMC) 20.00.090.*

4. Aside from the Applicant's parcel (936 - 21st Street), only the property south of the unopened segment of Douglas Avenue under petition for vacation (1002 - 21st Street) abuts the segment in question. Signatures of both property owners were provided with the initial application. All other parcels surrounding the right-of-way segment proposed for vacation have access from existing developed roads and/or alleys, meaning approval of the vacation would not landlock any parcel. The right-of-way segment in question does not abut any water body. *Exhibits 1, 1.A, and 1.E.*

5. The request was previously considered in an open record hearing on July 8, 2020. During that hearing process, public comment expressed opposition to the vacation request, arguing that the right-of-way is vital to the community for neighborhood circulation, describing it as a wildlife corridor that people enjoy and use to bridge between green spaces. Several noted that it is a popular trail for college students and that many of those students were not in the area at the time of the July hearing notice due to Covid-19. Others contended that notice was inadequate due to the location of posting, the mailing radius being too small, and the fact that the Happy Valley Neighborhood Association was not notified. All testimony was accepted, and having considered all evidence in light of the City's adopted vacation policies, the City's Hearing Examiner forwarded a recommendation for approval of the right-of-way vacation. *See HE-20-PL-016, Douglas Avenue Street Vacation, issued July 27, 2020.* Consistent with BMC 21.10.140, City Council considered the vacation request in a closed record hearing on December 7, 2020. Council remanded the matter back to the Examiner for consideration of additional information including: new information/testimony since the initial July 2020 hearing including all public comment, new plans for improvements within the potentially vacated right-of-way, relevant neighborhood plan policies not already considered, and any other relevant matters. *Exhibit 2.H.*

6. Information submitted in the course of the July 2020 hearing and in public comment to the City since that time has established that the unimproved right-

1 of-way has been used as a neighborhood greenbelt and habitat corridor.
2 Members of the neighborhood and the broader public planted at least a dozen
3 cedar trees in the southern half of the right-of-way in approximately 1994. A
4 public access trail was developed through the right-of-way in that time frame
5 creating what has become viewed by the neighborhood as a vital pedestrian
6 linkage between 20th and 21st Streets. *Exhibits 2 and 2.L.*

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7. The Applicant's proposed use of the right-of-way to be vacated was amended following receipt of the public comment. As stated in the current narrative:

[T]he purpose of the street vacation is two-fold. The addition of the right of way to the adjacent property will increase the density available to the property, allowing more units to be constructed on the site. Also, the area of the vacated right of way will facilitate access ramping to required parking, and additional space to meet other development regulations applicable to the proposed development, such as useable open space, lot coverage, etc... Without ramping into the [right-of-way segment requested to be vacated], parking can only be provided directly off the alley west of the property, which significantly limits how much parking can be provided for a future project (10 or fewer stalls). If ramping is provided to the site within the vacated right of way, then additional parking can be provided in a lower level parking facility, facilitating the additional density that is proposed and a broader unit mix. Due to topography, the site dimensions and other design factors, it is necessary to place this ramping at least partially within the right-of-way, so that the area on the [Applicant's] lot can be preserved for the parking facility. Each foot that the ramping moves north onto the site and out of the right-of-way eliminates space available for parking stalls. Useable open space is required at a rate of 250 square feet per unit. Land area for this useable open space is limited on site, however useable open space can be provided in the northern half of the right-of-way, while avoiding impacts to the proposed trail and mature vegetation.

Exhibit 2.J.

8. Following the remand and having considered the many public comments, the Applicant re-envisioned improvements in the segment of right-of-way requested for vacation as follows.

As a result of these comments the petitioner engaged in more detailed analysis of the access ramping and trail improvements [and] determined that they can shift the ramping north within the right-of-way approximately 15 feet.... While [not finally designed], it appears that ramping improvements can be limited to approximately the northwest corner of the vacated right-of-way, in an area approximately 30 by 40 feet. Any additional shift to the north would eliminate too much area on site that is needed for parking. Even with this shift, up to 6 stalls that were planned on site will be eliminated....

1 The general location ... where ramping [is now proposed] is predominantly
2 vegetated with blackberries and other invasive species and has limited mature
3 trees within it. ...[I]t is anticipated that with the proposed shift to the north, only
4 3-4 mature trees would require removal for this ramping improvement. One of
5 these trees is a tree that has been topped to eliminate interference with the
6 existing power lines in the right-of-way. Another ... is a large deciduous tree
7 that is located immediately on the edge of the asphalt alley improvement and
8 appears to be damaged/dying because of its proximity to the alley. If
9 improvements for ramping are limited to this general area, then mature
10 vegetation/tree removal will be mostly avoided within the right-of-way. Those
11 limited trees that will require removal can be replanted ... in the northern half
12 of the right-of-way. This approach also allows preservation of significant portions
13 of the existing trail system. This trail currently zigzags across the full right-of-
14 way due to the steep topography. Based on additional review of the site, the
15 petitioner and City staff believe that trail improvements can be made to the
16 existing trail, with the addition of only a few stair sections where the topography
17 is steep... as opposed to a straight stair section running the entire length of the
18 right-of-way. This approach will allow for the retention of most if not all the
19 existing mature trees planted within the south half of the vacated right-of-way,
20 while also providing space in the north half ... for private useable open space
21 improvements.

22 *Exhibit 2.J.* The proposed areas for development of Applicant's private
23 improvements and of public trail segment are called out on an aerial
24 depicting existing site conditions. *Exhibit 2.I.* The Applicant asserted:

25 With the proposed changes to the ramping location and the proposed changes to
26 the trail improvements, the concerns raised by the public can be adequately
27 addressed. Essentially, if the vacation is approved, the neighborhood can benefit
28 from an improved trail, which is safer for residents to use, year-round,
29 maintained by the City, while retaining mature vegetation in the right of way,
30 AND, the property owner can benefit from additional density, space to build
infrastructure to support parking, and space to provide required useable open
space, to the benefit of the future residents.

31 *Exhibit 2.J; Ali Taysi Testimony.* No dwelling units or structures aside from
32 paved maneuvering area and parking are contemplated within the vacated
33 segment. City Planning Staff recommended approval of the right-of-way
34 vacation subject to conditions intended to implement the revised envisioned trail
35 segment and reduction in private development footprint within the right-of-way.
36 *Exhibit 2; Steve Sundin Testimony.*

- 37 9. The current proposal is to reconfigure the existing trail, widening it to three to
38 four feet in width, and provide an all-weather surface such as crushed limestone,
39 with one or two sets of stairs at switchbacks to ease grade differentials. One

1 stairway proposed at the bottom section would essentially relocate the portion of
2 the trail that currently intrudes into the Applicant's property onto the southern
3 portion of the vacated right-of-way. Planning Staff noted that such trail
4 improvements would be constructed as part of the Applicant's development
5 proposal on the adjacent property and that the Applicant may be eligible for park
6 impact fee credits for such improvements. *Exhibit 2; Testimony of Ali Taysi and
7 Steve Sundin.*

6 10. Because of the reduction in proposed private improvements within the right-of-
7 way segment, six or seven planned parking stalls supporting the Applicant's
8 target density would have to be eliminated. The Applicant and Planning Staff
9 both forwarded the possibility that the parking count deficit could be addressed
10 through an administratively reviewed waiver process established in BMC
11 20.12.010.A(5), through which the Applicant could be excused from meeting the
12 Code-established minimum off-street parking standard by up to 25% of the
13 required stalls. Planning Staff noted that it appears that the proposed parking
14 waiver could meet the criteria for a 25% parking reduction, which could be
15 found to be consistent with the Happy Valley Neighborhood Association's
16 desire for reduced vehicle presence. Of course, no part of the Applicant's
17 contemplated development is under consideration in the instant proceedings.
18 Any future development by the Applicant would undergo appropriate review
19 processes, which include public notice and comment opportunities. *Exhibits 2
20 and 2.J; Steve Sundin Testimony.*

17 11. Planning Staff, the Applicant, and the interested public have forwarded the
18 following specific provisions of the Happy Valley Neighborhood Plan as
19 expressly applicable to consideration of the instant vacation request.

20 HV GOAL-1: Provide, maintain, and enhance natural open space in the
21 neighborhood.

22 HV POLICY-1: Create neighborhood greenbelts and habitat corridors through a
23 variety of means such as planting native plants in undeveloped rights-of-way,
24 connecting open space tracts and natural areas, and establishing a neighborhood
25 tree planting program including street trees.1 (See HVP-8, 32)

26 HV POLICY-7: Work with the City Parks and Recreation Department and
27 neighborhood to identify areas for trails and trail links that allow people to walk
28 and bicycle safely from residential areas to the Connelly Creek Nature Area,
29 commercial areas in Fairhaven, WWU, and Sehome High School.

30 HV POLICY-8: Develop a plan for using undeveloped rights-of-way as trail
corridors and natural areas. (See HVP-1, 32)

1 Happy Valley Tree and Forest (HVTF) Policy 1C – The goal for tree canopy in
2 the neighborhood as a percentage of the total area of the neighborhood should be
3 40%. Achievement of this overall goal should come through the following sub-
4 goals assigned to basic land use zones.

- 4 Average tree cover counting all zones 40%
- 5 Residential single zones 50%
- 5 Residential multi zones 25%
- 6 Commercial zones 15%
- 6 Public zones – police/fire stations, schools, library, developed parks 15-20%
- 7 Public zones – passive parks, open space 70-80%

8 HV POLICY-22: Whenever improvements are considered for 21st Street, the
9 City should use the Bicycle-Pedestrian Advisory Committee and involve
10 neighborhood residents in examining how changes to the 21st Street corridor
11 could improve bicycle and pedestrian safety and calm traffic, while providing for
12 balanced vehicular circulation needs.

12 HV POLICY-25: The cross section of the extra wide right-of-way within
13 Douglas Avenue between 21st and 25th Streets should be aligned to include a
14 greenway on the south side. (See HVP-8) Stormwater facilities should be
15 included and designed as natural features with associated native plantings.

15 E. Unimproved Rights-of-Way Vacating undeveloped rights-of-way should only
16 be considered after carefully evaluating the request to determine if the vacation is
17 in the public interest. These areas can serve a multi-purpose role as
18 pedestrian/bicycle/view corridors, stormwater treatment facilities, and open
19 space. [Plan, page 28]

18 HV POLICY-32: Unimproved rights-of-way should not be vacated, unless in the
19 public interest.

20 HV POLICY-33: Act on existing No Protest LIDs and initiate new LIDs along
21 targeted pedestrian corridors to provide necessary infrastructure including streets,
22 sidewalks, bike lanes, and trails. Create a funding mechanism as needed to pay
23 for the additional costs associated with stormwater quality management.

23 *Exhibits 2, 2.J, and 2.L(uu).*¹

- 24 12. Addressing consistency of the requested right-of-way vacation with the cited
25 neighborhood plan policies, the Applicant contended that the proposal does not
26 eliminate the greenbelt corridor in this area, but rather would improve and
27 enhance the green belt corridor with limited impacts. The Applicant's proposed

28 ¹ <https://cob.org/wp-content/uploads/happy-valley.pdf>. The undersigned added three policies to those
29 submitted by the parties as relevant to the instant vacation request: HVTF Policy 1C, HV POLICY-22,
30 and HV POLICY-33.

1 pedestrian improvements extend off site to the west, where the west side of the
2 alley is also proposed for trail improvements. The majority of the vacated right-
3 of-way would be retained in natural vegetation. Only three or four trees would
4 need to be removed (two of which have low value) and new replacement trees
5 would be planted at a ratio of 2:1 within the right-of-way concurrent with the
6 Applicant's adjacent development project. The Applicant contended that the
7 proposed trail improvements would improve pedestrian access and thus improve
8 the safety of the public who uses it currently, potentially making it accessible to
9 more users. The eastern two-thirds of the north half of the vacated right-of-way
10 would be cleared of invasive species and planted with native vegetation,
11 including trees. The Applicant could not yet say whether this open space would
12 be fenced off and reserved for the private use of residents of the Applicant's
13 development project and thus available to the public only visually, or whether it
14 would be generally open to the public. The southern half of the vacated right-
15 of-way would be placed within a dedicated public trail easement. The current
16 proposal limits total area of development impact within the vacated right-of-way
17 segment to approximately 1,200 square feet, or less than 18% of the total right-
18 of-way area proposed for vacation. The Applicant contended that with the
19 proposed trail improvements and potential for vegetation enhancement, the
20 immediate neighborhood would realize a direct benefit from the project, while
21 pedestrian travel for all residents and visitors of Bellingham would be safer and
22 available year-round, also benefitting the public. The Applicant argued that in
23 facilitating additional density on the Applicant's infill parcel within the Happy
24 Valley Neighborhood, the proposed vacation further serves the public interest.
25 *Exhibit 2.J; Ali Taysi Testimony.*

- 19 13. Planning Staff also analyzed the proposal's compliance with the cited
20 neighborhood policy plans. In addition to the described trail improvements,
21 Staff submitted that the revegetation of the northeast quadrant of the subject
22 right-of-way, including removal of dense blackberry thickets and replacement
23 tree planting of conifers, would move the neighborhood closer to its forested
24 canopy goal of 25% compared to the existing condition. Staff agreed that
25 approval of the proposal, conditioned to require trail and vegetation
26 enhancements and restricting private development to approximately 18% of the
27 right-of-way segment in the northwest corner, would be consistent with the
28 public interest. Planning Staff submitted that approval of the vacation would
29 allow for additional density in an urbanized area in close proximity to WWU
30 and adjacent to a WTA bus line, which Staff asserted would be consistent with
Bellingham Comprehensive Plan GOAL LU-5 (Support the Growth
Management Act's goal to encourage growth in urban areas) and Policy LU-44
(Focus higher-intensity land uses in mixed-use urban villages and transit

1 corridors, thereby maximizing use of existing infrastructure and services), and
2 thus in the public interest. *Exhibit 2; Steve Sundin Testimony.*

3 14. The extensive public comment submitted to the City following the initial July
4 2020 hearing, and the public comment submitted in the instant remand hearing
5 process, expressed the following categories of concerns (paraphrased and
6 abbreviated from written comment and verbal comment at the remand hearing):

- 7 • Inconsistent with adopted vacation policies: that the developer would benefit
8 much more than the public from the transfer of density rights (“density grab”);
9 that the unopened right-of-way as unimproved green space is highly valued in
10 its undeveloped condition by the neighborhood and its development would not
11 be perceived by the interested public as a benefit; that the right-of-way
12 segment is in fact needed and used for pedestrian circulation, rendering
13 vacation inconsistent with vacation Policy 5; that the intended use is not
14 relevant according to vacation Policy 9, at the same time as density transfer is
15 being touted as public benefit; that approval would constitute converting
16 public open space to private benefit;
- 17 • Compensation/fair market value: that the appraisal fails to adequately reflect
18 the true value of the right-of-way to such an extent that it represents a
19 “giveaway” and a failure of the City’s fiduciary responsibilities; that the
20 payment should reflect the increase in density afforded by the vacation; that
21 vacating the right-of-way for such a small sum of money to benefit one
22 developer undermines decades of neighborhood activity and efforts to develop
23 the greenspace and trail; that the City is motivated by the increase in property
24 taxes that would result from the Applicant’s contemplated development;
- 25 • Density: that increased density is not necessarily a benefit to the
26 neighborhood, which is already experiencing congestion (one comment
27 asserted that Happy Valley is already the densest neighborhood in the City);
28 the block in question already has 132 dwelling units on it, and providing an
29 increase for the Applicant is not in the public interest; the assertion that the
30 Happy Valley Neighborhood has a failing level of services for parks and this
right-of-way would be better used to address that public need than for
increasing density;
- Contemplated design for the retained trail: concern that the “straight line of
stairs” initially contemplated after the City and Applicant learned of the trail
through the right-of-way (*see Exhibit 2.K*) was a poor substitute for the
existing natural trail (no longer proposed); that installing stairs in this trail
segment would reduce accessibility for persons with disabilities, cyclists, or
people with strollers; that the tree replacement ratio should be 3:1; concern

1 that the exact dimensions of private improvements and of the proposed
2 improved trail are not yet known and that there that the Applicant isn't
3 actually bound to make the improvements discussed in these proceedings until
4 review of the future development proposal, during which process they could
5 be changed;

- 6 • That there is no official input from the Parks Department;
- 7 • Notice: the appearance of a “lack of transparency” regarding the initial notice
8 and the July hearing; adequacy of public outreach and involvement in the
9 proposal’s review; concern that the Happy Valley Neighborhood Association
10 was not adequately notified of this proposal;
- 11 • Trust in the process: a perception that the City is more disposed to “help”
12 developers achieve their goals than non-developer residents; many requests to
13 slow down the review process and allow more time for City, neighborhood,
14 and developer to come up with a better plan; concern that the timing of these
15 proceedings during the COVID-19 crisis was intentional, in order to
16 accomplish density transfer while the majority are distracted with concern
17 about that pressing issue; anger/dissatisfaction about land use processes
18 including closed record hearings before the City Council, because of which
19 Council members indicated to commenting members of the public that they
20 could not discuss the issue while a closed record hearing was pending; that the
21 density transfer makes this more of a rezone, which process should have been
22 followed;
- 23 • Preferred alternative outcome: a desire to protect all mature trees and open
24 green spaces; that the neighbors would prefer a project in which volunteers
25 and the City worked together to improve the right-of-way segment by
26 removing invasive species and improving the trail as was recently undertaken
27 at 21st Street and Larrabee Avenue; that through improvement and open and
28 notorious use since at least 1994, with City acknowledgement, the
29 neighborhood has acquired a prescriptive easement within this right-of-way
30 segment - and a request that the City acknowledge or declare said prescriptive
easement; concern that if any part of the vacated right-of-way is made into
private open space for the adjacent development, the public will have lost that
amount of public green space.

*Exhibits 2.L (53 comments with attachments and email threads), 4.A, 4.B, and 6;
Testimony of Gregory Legestee, Tip Johnson, Wendy Scherrer, Jake Charleton,
Bobbi Vollendorff, Alex McLean, Lidia Tillman, and Margo Hammond.*

- 1 15. One member of the public disagreed with the conclusion in the previous Hearing
2 Examiner recommendation on the July proposal that the right-of-way in question
3 “is not adjacent/does not lead to a park, open space, view, natural area, or any
4 other man-made or natural attraction,” contending that the right-of-way segment
5 itself affords a commanding view across Sehome Valley of Samish Ridge and
6 the Chuckanuts, and is a useful connector to Lowell Park in combination with
7 the Taylor Street steps one block north on 20th Street.² *Exhibit 2.L(mm)*.
8 Several comments suggested the project would be (paraphrased) more
9 acceptable or better if there was a way the developer could buy the density
10 credits without eliminating the trail. *Exhibits 2.L(ee), 2.L(ll)*. One comment
11 included the suggestion that the City’s street vacation policies should change to
12 include mandatory notification of all neighborhood associations of each petition
13 for vacation. *Exhibit 2.L(kk)*.
14
15 16. Some of the public comment challenged the appraised value of \$18,000.00 for
16 the subject right-of-way as unrealistically low. The comments criticized the
17 appraisal as provided in the record of the July 2020 public hearing, which was
18 only a summary page and not the full report. *Exhibits 1.F and 2.L; Gregory
19 LaGestee Testimony*. A more complete appraisal report is included in the
20 remand record, in which the professional appraiser arrives at a median value of
21 \$15 per square foot, which would result in a total value of \$103,500.00 if the
22 land were unencumbered and actually available for development. In the present
23 case, the land is significantly encumbered by utility easements, which restrict
24 buildable area to an infeasible degree. The appraiser estimated that 75% to 85%
25 of the developable value of the subject segment of right-of-way is encumbered
26 by restrictions that prevent development. As stated in the full report, the
27 \$18,000 appraised value reflects the remaining unencumbered value. *Exhibit
28 2.M*.
29
30 17. Some members of the public asserted that the trail was in fact established in
conjunction with City Parks Staff members, that it was partially City funded,
and that while it may not be a fully developed public City trail, it is occasionally
maintained by the City and is included in the City’s maps of trail systems. The
September 2019 City of Bellingham Trail Guide, which is available on the
City’s website, shows the trail as a dashed line on Figure 5, which depicts the
Connelly Creek Trail. *Bobbi Vollendorff Testimony; Exhibit 2.L (see Exhibit
2.L(g) for the Trail Guide figure)*. The City expressly acknowledged that the

² The undersigned takes notice that Google Maps shows Lowell Park is two blocks north of the subject right-of-way.

1 trail was created with full knowledge and some degree of participation by City
2 personnel. *Exhibit 7.*

3 18. The original Technical Review Committee (TRC) recommendation for approval
4 submitted in the July 2020 hearing process was not rescinded; neither was it
5 supplemented by City Staff in the remand hearing record. The November 13,
6 2019 TRC approval letter states that Parks did not attend the meeting because
7 they have no trail or park facility plans within the subject right-of-way. *Exhibits*
8 *1.D and 2.* Following the July 2020 hearing, representatives from the Planning
9 and Parks Departments and the Applicant met on site on August 11, 2020 to
10 discuss potential public access functions and trail improvements as directed in
11 condition #3 of the July 27, 2020 Hearing Examiner recommendation for
12 approval. The resulting plan was the single straight path primarily consisting of
13 stairs in Exhibit 2.K, which has since been soundly rejected by neighborhood
14 members. *Exhibit 2.* There is no formal comment from the Parks Department in
15 the record.

16 19. The record contains one comment from the City's Public Works Director, which
17 was not a formal comment on the revised remand proposal but was a response to
18 an email and submitted in public comment. In it, Director Eric Johnston stated
19 the following:

20 Agreed that a solution that works for all would be ideal. Unfortunately, there are
21 no simple solutions when dealing with the complexities of unimproved public
22 rights-of-way (ROW) and the underlying property rights. There is a City interest
23 to have this ROW vacated as described in the record of the hearing examiners
24 decision, which include the PW departments support of the vacation petition.

25 I would offer one consideration. Given the challenges with unimproved public
26 ROW (eg at Larrabee) it might be easier to let the ROW vacation proceed. After
27 the vacation is completed the neighborhood association would be working with a
28 single property owner and not the bureaucratic morass of the City. The owner
29 will be compelled to provide a pedestrian access as a condition of the ROW
30 vacation and there might be a mutually beneficial agreement that does not
involve the City.

Exhibit 2.L(ww).

31 20. One public comment from the president of the Happy Valley Neighborhood
32 Association contained quotes attributed to the Director of the City Parks
33 Department, in which it is stated that at an unidentified point prior to the July
34 2020 initial public hearing, the City changed case tracking software platforms
35 from a program called Lotus to something else. The gist of this comment is that
36 Lotus had a note function that the City used to automatically notify

1 neighborhood associations of certain classes of land use applications, and the
2 comment speculates that this function was inadvertently overlooked in the
3 platform switch, causing this automated notification to cease without the City
4 being aware of it. *Exhibit 2.L(xx)*. Notice of the July 8, 2020 hearing - posted,
5 mailed, and published - was detailed by the City planner on the case in an email
6 submitted in public comment. *Exhibit 2.L(yy)*. Notice of the instant March 10,
7 2021 open record hearing on the request was mailed to a 500-foot radius rather
8 than the required 300-foot radius, and to the neighborhood association, as well
9 as provided to abutting property owners, and was posted and published
10 consistent with City requirements. *Steve Sundin Testimony; Exhibit 5.*

11 21. The remand staff report contains erroneous citations to attachments as follows.
12 The staff report from the July 2020 hearing remains Exhibit 1 of the instant
13 record, along with the original attachments A through G. The staff report
14 prepared to address the remand was offered as Exhibit 2. During the drafting of
15 Exhibit 2, the author initially called the attachments to Exhibit 2 attachments A
16 through G, as well; however, it was later decided to relabel the remand staff
17 report's attachments as H through N, to better differentiate them from the
18 attachments to Exhibit 1. As posted on the Hearing Examiner webpage for the
19 instant hearing, the attachments are labeled H through N. Unfortunately, the
20 published version of Exhibit 2 kept the A through G lettering for its attachments,
21 meaning the internal references did not correctly identify the documents cited.
22 The City's examiner was able to figure this out before the hearing and
23 transliterate A through G to H through N to be able to follow the staff report, but
24 there was public testimony expressing anger that this additional layer of error
25 posed yet another obstacle to meaningful participation in the remand hearing.
26 *Exhibits 1 and 2; Steve Sundin Testimony.*

27 22. In response to public comment, Planning Staff submitted that the suggestion that
28 the appraised value should be based on density being transferred is "not how it
29 works," but rather the appraisal is based on the square footage, and that in any
30 case, Council ultimately decides the appropriate value. Staff fell on their sword
for not initially providing notice of the vacation application to the Neighborhood
Association and for the fact that the July 2020 staff analysis overlooked
applicable policies in the neighborhood plan. Staff asserted that through the
remand process, the public comment worked as intended, bringing issues of
importance to the City's attention. Now that the proposed trail improvements
have been revised and private development restricted to 1,200 square foot
portion of the right-of-way, Staff submitted that the proposed vacation is wholly
consistent with all applicable Neighborhood Plan policies, as well as the
Bellingham Comprehensive Plan. Staff stated that the City's notification

1 protocols have been modified as a result of the instant experience. Working
2 from the 132-unit figure provided in public comment, Staff submitted that under
3 the Applicant's present conceptual plan for his vacant parcel, the density transfer
4 would allow approximately five more units than could be developed onsite
5 without density transfer, which would be a 4% increase in density. Again, no
6 structures would be developed within the vacated right-of-way; only paved
7 maneuvering and parking areas are proposed. Staff submitted that tree
8 replacement ratios are left to the Department's discretion rather than being
9 established in code. In this case, requiring a 2:1 replacement ratio, with trees
10 that are a minimum of six feet tall at planting and provision of a three-year
11 surety, Staff submitted that tree removal would be adequately compensated for
12 as proposed. Addressing public sentiment regarding the fact that the City was
13 unaware of the trail at the time of the July 2020 hearing, Staff asserted that no
14 one disputes that the City was involved in some ways in developing the trail;
15 However, since 1994, the existence of any agreement regarding use of the
16 subject right-of-way segment for a trail had fallen off the City radar; the
17 institutional knowledge of its origin had not survived. Staff submitted the
18 position that the proposal to vacate the right-of-way as conditioned to restrict
19 private improvements in the northwest 18% of the segment, while revegetating
20 the remainder of the north half of the segment and improving the trail in the
21 south half of the segment as a whole would result in significant public benefit.
22 The recommended conditions would require the southern half of the right-of-
23 way segment to be dedicated to the public in an access easement. *Steve Sundin*
24 *Testimony; Exhibits 2 and 7.*

- 18 23. In response to public comment, the Applicant representative submitted that the
19 current plan was developed after extensive discussions with neighborhood
20 association members and the revised design was selected to maximally retain the
21 right-of-way for the public access and green space values put forth in public
22 comment. He asserted that the revised plan absolutely improves and
23 permanently protects the trail through the subject right-of-way. A maximum of
24 four trees might need to be removed, while all others would be retained, and the
25 removed trees replaced within the segment. Addressing the concerns that the
26 proposed path including stair segments would be less accessible, the
27 representative pointed out that in its current condition, the existing trail is not up
28 to public trail standards and is not accessible to all. If the requested right-of-
29 way vacation is approved, the Applicant would become obligated to improve the
30 trail, and the improvements are subject to review and approval by Parks
Department staff, ensuring accessibility would be improved. Further, it would
be required to be protected in a public access easement, which would
permanently protect the public's right to access through the segment. Permanent

1 protection and increased accessibility are public benefits. The Applicant
2 representative submitted that public comments comparing the requested vacation
3 to a rezone and asserting a prescriptive easement show a fundamental
4 misapprehension of the land use processes in question. Regarding rezone,
5 vacation does not change zoning or density; rather it adds area to the parcel of
6 the same zoning. The right-of-way is not City property, but rather is an
7 easement over private property. With some minor requested language changes
8 to Staff's recommended conditions, the Applicant has agreed to: reserve the
9 entire right-of-way segment for public and private utilities; provide a new
10 express public access easement across the southern 30 feet of the segment
11 expressly for the purpose of preserving the maximum amount of trail and mature
12 cedar trees; to improve the trail to a standard determined by the Parks
13 Department including width, all season surfacing and stairways where necessary
14 to accommodate grades and alignment; and to replace any removed trees at a 2:1
15 ratio. The Applicant submitted that the current proposal would provide benefit
16 to all interests. *Ali Taysi Testimony; Exhibit 3.*

- 17 24. Planning Staff agreed with the Applicant's proposed language changes for the
18 recommended conditions of approval. *Exhibit 3; Steve Sundin Testimony.*

19 CONCLUSIONS

20 Jurisdiction:

21 The Hearing Examiner is granted authority to conduct public hearings and enter
22 findings, conclusions, and recommendations to City Council on right-of-way vacation
23 requests pursuant to BMC 2.56.050.C(4) and RCW 35.79.030.

24 Criteria for Review:

25 City Vacation Regulations

26 *BMC 13.48.010 - Hearing - Application fee.*

27 As a condition precedent to the city's consideration of a resolution setting a date for a
28 public hearing on the question of whether a city street should be vacated, the petitioner
29 therefore shall submit an application accompanied by a fee in the amount set by city
30 council resolution and the petitioner shall pay to the city an amount equal to the cost of
preparation of an appraisal of the area proposed to be vacated and the city shall order
such appraisal. An appraisal, and payment therefor, may not be required when, in the
judgment of the director of planning and community development, it is not needed to
determine the fair market value of the area to be vacated.

BMC 13.48.020 - Payment for vacation.

Findings, Conclusions, and Recommendation

PAGE 18

M:/HE/DATA/DECISIONS/Douglas Avenue Street Vacation

OFFICE OF THE HEARING EXAMINER
CITY OF BELLINGHAM
210 LOTTIE STREET
BELLINGHAM, WA 98225
(360) 778-8399

1 Unless otherwise specifically provided by the city council in the street vacation
2 ordinance, such ordinance shall provide for the payment of compensation by the
3 petitioner of an amount equal to one-half the appraised value of the area proposed for
4 vacation. The city council shall have final authority to determine the appraised value.

4 In no event shall such vacation request come before the city council for final
5 consideration until such amount has been computed, incorporated into the ordinance,
6 and deposited with the finance director. In the event that final passage of the ordinance
7 is not granted, the deposited amount (exclusive of the application fee and appraisal fee)
8 shall be refunded to the petitioner.

8 State Vacation Requirements

9 *RCW 35.79.010 - Petition by owners - Fixing time for hearing.*

10 The owners of an interest in any real estate abutting upon any street or alley who may
11 desire to vacate the street or alley, or any part thereof, may petition the legislative
12 authority to make vacation, giving a description of the property to be vacated, or the
13 legislative authority may itself initiate by resolution such vacation procedure. The
14 petition or resolution shall be filed with the city or town clerk, and, if the petition is
15 signed by the owners of more than two-thirds of the property abutting upon the part of
16 such street or alley sought to be vacated, legislative authority by resolution shall fix a
17 time when the petition will be heard and determined by such authority or a committee
18 thereof, which time shall not be more than sixty days nor less than twenty days after the
19 date of the passage of such resolution.

17 *RCW 35.79.020 - Notice of hearing - Objections prior to hearing.*

18 Upon the passage of the resolution the city or town clerk shall give twenty days' notice
19 of the pendency of the petition by a written notice posted in three of the most public
20 places in the city or town and a like notice in a conspicuous place on the street or alley
21 sought to be vacated. The said notice shall contain a statement that a petition has been
22 filed to vacate the street or alley described in the notice, together with a statement of the
23 time and place fixed for the hearing of the petition. In all cases where the proceeding is
24 initiated by resolution of the city or town council or similar legislative authority without
25 a petition having been signed by the owners of more than two-thirds of the property
26 abutting upon the part of the street or alley sought to be vacated, in addition to the
27 notice hereinabove required, there shall be given by mail at least fifteen days before the
28 date fixed for the hearing, a similar notice to the owners or reputed owners of all lots,
29 tracts or parcels of land or other property abutting upon any street or alley or any part
30 thereof sought to be vacated, as shown on the rolls of the county treasurer, directed to
the address thereon shown: PROVIDED, That if fifty percent of the abutting property
owners file written objection to the proposed vacation with the clerk, prior to the time
of hearing, the city shall be prohibited from proceeding with the resolution.

1 *RCW 35.79.030 - Hearing - Ordinance of vacation.*

2 The hearing on such petition may be held before the legislative authority, before a
3 committee thereof, or before a hearing examiner, upon the date fixed by resolution or at
4 the time the hearing may be adjourned to. If the hearing is before a committee the same
5 shall, following the hearing, report its recommendation on the petition to the legislative
6 authority which may adopt or reject the recommendation. If the hearing is held before a
7 committee it shall not be necessary to hold a hearing on the petition before the
8 legislative authority. If the hearing is before a hearing examiner, the hearing examiner
9 shall, following the hearing, report its recommendation on the petition to the legislative
10 authority, which may adopt or reject the recommendation: PROVIDED, That the
11 hearing examiner must include in its report to the legislative authority an explanation of
12 the facts and reasoning underlying a recommendation to deny a petition. If a hearing is
13 held before a hearing examiner, it shall not be necessary to hold a hearing on the
14 petition before the legislative authority (*emphasis added*).

15 If the legislative authority determines to grant the petition or any part thereof, such city
16 or town shall be authorized and have authority by ordinance to vacate such street, or
17 alley, or any part thereof, and the ordinance may provide that it shall not become
18 effective until the owners of property abutting upon the street or alley, or part thereof so
19 vacated, shall compensate such city or town in an amount which does not exceed one-
20 half the appraised value of the area so vacated. If the street or alley has been part of a
21 dedicated public right of way for twenty-five years or more, or if the subject property or
22 portions thereof were acquired at public expense, the city or town may require the
23 owners of the property abutting the street or alley to compensate the city or town in an
24 amount that does not exceed the full appraised value of the area vacated. The
25 ordinance may provide that the city retains an easement or the right to exercise and
26 grant easements in respect to the vacated land for the construction, repair, and
27 maintenance of public utilities and services. A certified copy of such ordinance shall be
28 recorded by the clerk of the legislative authority and in the office of the auditor of the
29 county in which the vacated land is located. One-half of the revenue received by the
30 city or town as compensation for the area vacated must be dedicated to the acquisition,
improvement, development, and related maintenance of public open space or
transportation capital projects within the city or town.

31 *RCW 35.79.040 - Title to vacated street or alley.*

32 If any street or alley in any city or town is vacated by the city or town council, the
33 property within the limits so vacated shall belong to the abutting property owners, one-
34 half to each.

1 Adopted Bellingham City Council Vacation Policies³

2 It is the policy of the City of Bellingham to grant vacation of a street right of way when
3 it is determined both that such right of way is not needed presently or in the future for
4 public access (including vehicular, pedestrian, and visual access) and that such vacation
5 advances the public good. All of the following policies should be met prior to the
6 vacation of a right of way.

- 7 1. The proposed vacation should be determined to be necessary to the public good
8 either in terms of needed development or when such vacation will result in a
9 better or more desirable situation. In some instances a more desirable situation
10 may be a better road pattern in terms of safety, or when an exorbitant amount of
11 land is devoted to unneeded right of way.
- 12 2. The right of way must be determined to be of no value to the circulation plan of
13 the City either now or in the foreseeable future. The circulation plan is assumed
14 to include vehicular, pedestrian, or other modes of transportation.
- 15 3. No vacation will be allowed if such action land locks any existing parcel, lot of
16 record, or tract. Access to a right of way of less than 30 feet in width does not
17 constitute adequate access. One ownership of all the lots on a right of way does
18 not circumvent this policy and in this it will be necessary to vacate lots prior or
19 together with vacation action.
- 20 4. State law (R.C.W. 35.79.035) "(1) A city or town shall not vacate a street or
21 alley if any portion of the street or alley abuts a body of fresh or salt water
22 unless: (a) The vacation is sought to enable the city or town to acquire the
23 property for port purposes, beach or water access purposes, boat moorage or
24 launching sites, park, public view, recreation, or educational purposes, or other
25 public uses; (b) The city or town, by resolution of its legislative authority,
26 declares that the street or alley is not presently being used as a street or alley and
27 that the street or alley is not suitable for any of the following purposes: Port,
28 beach or water access, boat moorage, launching sites, park public view,
29 recreation, or education; or (c) The vacation is sought to enable a city or town to
30 implement a plan, adopted by resolution or ordinance, that provides comparable
or improved public access to the same shoreline to which the street or alleys
sought to be vacated abut, had the properties included in the plan not been
vacated. ...".

³ In the previous decision, the undersigned relied on the statement of adopted vacation policies in the staff report, as they are not codified in published City Code. Based on the critique from a member of the public that as stated in the previous decision, they were not the same as stated on the application form, the undersigned has elected to use the language directly from the City's application for street vacation form, which has a revision date of June 13, 2018.

- 1 5. Right of way adjacent or leading to any park, open space, view, natural area, or
2 any other natural or man-made attraction should not be vacated.
- 3 6. Notification of street vacation requests will be sent to the Planning Commission.
4 The Commission may choose to schedule review of street vacations that have
5 significant issues related to land use and the implementation of the
6 Comprehensive Plan. The Commission will hold a public meeting and make a
7 recommendation to the City Council on these vacations.
- 8 7. The petition should contain the approval of all the abutting property owners and
9 proof of ownership must accompany the petition.
- 10 8. Vacation is not mandatory even though 100% of the abutting owners request the
11 vacation.
- 12 9. Proposed or possible use of the vacated right of way is not relevant to City
13 action (court opinion).
- 14 10. Easements for utilities will be retained as a matter of procedure unless vacation
15 of such easement is specifically requested by the petitioners and approved by the
16 City Engineer.
- 17 11. The following may be accepted by the City Council as appropriate trade for a
18 Street Vacation: Payment, land, or major improvements to public facilities. In all
19 cases, fair market value of the right of way and of the item to be traded shall be
20 established. Proposed public improvements shall be reviewed and recommended
21 by the affected City Department(s) and shall exceed the established value of the
22 right of way proposed for vacation. Provision of such compensation or
23 departmental approval of proposed improvements does not mandate street
24 vacation approval by the City Council or Mayor.

20 **Conclusions Based on Findings:**

- 21 1. Conclusions regarding compliance of the proposal with specific vacation
22 policies necessitates detailed discussion on some but not all of the vacation
23 policies. For efficiency, those policies presenting no need for detailed
24 discussion are summarily covered in this first conclusion. Addressing vacation
25 Policies 3 and 4: approval would not landlock any parcel (3), and there is no
26 abutting water body (4). Addressing Policy 6, the instant proceedings fulfill the
27 mandated review by Planning Commission. Addressing Policy 7, all abutting
28 landowners have indicated consent. Vacation Policy 8 is acknowledged, as the
29 ultimate discretion whether to grant approval rests with Council. Addressing
30 Policy 10, the contemplated future development within the northwest corner of
the right-of-way segment would honor the existing utility easements and would
ensure perpetual utility accessibility by refraining for building any structure.

1 Any future development within the right-of-way if vacated would be reviewed
2 for impacts to the utilities during the land use and building/civil engineering
3 review processes. *Findings 1, 2, 4, 7, 8, 9, and 10.*

- 4 2. Vacation Policy 1: The determination of whether vacation results in a better,
5 more desirable situation sufficient to conclude it is “necessary to the public
6 good” and “result in a more desirable situation” is at the heart of these
7 proceedings. As of the remand hearing, public sentiment remained fully
8 opposed to approval of the vacation despite the proposed restriction in
9 improvements to less than 18% of the vacated area and trail/vegetation
10 enhancement. With so much opposition sentiment built up, it is easy to imagine
11 that the members of the public who submitted comment in the remand
12 proceedings would not experience the Applicant’s trail improvements as a
13 public benefit no matter how nice they were. Based on the idea of density
14 transfer, the public strongly believes that the primary benefit would be improved
15 financial outcomes for the Applicant, and that removal of any portion of the
16 unopened right-of-way from use as “public green space” is antithetical to the
17 public good. Some argue that increased density in this location would be a
18 public detriment.

19 As Council well knows, Washington courts have held that community
20 displeasure is not itself evidence and cannot alone serve as the basis for denying
21 a land use permit.⁴ If the instant application were a codified permit process in
22 which the Examiner authored the City’s final decision, the volume and
23 vehemence of this opposition would be less relevant.⁵ As a decision maker who
24 works exclusively in a quasi-judicial, non-legislative context, the undersigned is
25 persuaded that the record as a whole demonstrates the proposal as currently
26 conditioned would serve the public good to an extent that satisfies vacation
27 Policy 1 in that it would result in a better, more desirable situation than not
28 vacating the segment would. However, the instant proceedings are to determine
29 consistency with non-codified policies, which final decision is more legislative
30 in nature than a typical land use permit. Because of this, it could be appropriate
for Council to consider the volume and vehemence of public opposition in
determining whether the proposal is necessary to the public good. The
undersigned leaves it to Council to finally conclude whether the project can be

26 ⁴ “While the opposition of the community may be given substantial weight, it cannot alone justify a local
27 land use decision.” *Sunderland Servs. v. Pasco*, 127 Wn.2d 782, 797 (1995); *Maranatha Mining, Inc. v.*
Pierce County, 59 Wn. App. 795, 805 (1990).

28 ⁵ In hearings on land use permit applications for permits established in Code, public comment is relevant
29 to the extent it tends to show the application does or does not comply with codified criteria for approval
and development standards. The number of comments is not itself evidence.

1 found to be in the public good in the face of such public opposition. *Findings 2,*
2 *7, 8, 9, 11, 12, 13, 14, 18, 19, 22, and 23.*

- 3 3. Vacation Policy 2 requires a finding that the “right-of-way [sought to be vacated
4 is] of no value to the circulation plan of the City ... includ[ing] vehicular,
5 pedestrian, or other modes of transportation.” On one hand, the City’s TRC
6 determined that the right-of-way was “not necessary for future public circulation
7 or other public benefit needs.” (*Exhibit 1.D*) However, this determination was
8 expressly made without the input of the Parks Department and it fails to address
9 the existence of the informal trail, highly valued by the neighborhood, which the
10 evidence shows has been present since approximately 1994. Given the ample
11 evidence of pedestrian use and public interest in such use, a strict reading of
12 vacation Policy 2 could arguably require automatic denial of the application.
13 Members of the public urge this strict application.

14 The question of whether splitting the difference – retaining (actually, improving)
15 the trail and most of the vegetation while still allowing the vacation to provide
16 additional density to the Applicant’s adjacent multi-family zoned property – is
17 allowed by vacation Policy 2 feels more like policy setting than code
18 interpretation and application. Once again, if this were a land use permit and
19 this policy was a codified criterion, the undersigned would feel comfortable
20 concluding the criterion is met on the record submitted. However, this is a
21 question of interpreting policy, not applying code, and policy interpretation in
22 this case may well be more appropriately conducted by local officials. *Findings*
23 *2, 7, 8, 9, 11, 12, 13, 14, 17, 18, 19, 22, and 23.*

- 24 4. Vacation Policy 5 urges against vacation of any segment of right-of-way that
25 abuts or leads to any park, open space, view, natural area, or any other natural or
26 man-made attraction.⁶ Members of the public assert that the subject right-of-
27 way itself provides views worth preserving and serves as a pedestrian
28 connection to Lowell Park, two blocks away. The public urges a strict reading
29 of this vacation policy, given these facts, as prohibiting the instant vacation.
30 The undersigned cannot help but note that vacation approval, as conditioned,
would retain both the pedestrian access function and the view provided by this
right-of-way segment. Given the benefits of the permanent public access
easement, the tree planting, the invasive species removal, and physical trail
improvements to a standard deemed acceptable by the Parks department, the
undersigned would conclude this vacation policy should not prohibit the
proposal. However, such a conclusion assumes that Council agrees that said

⁶ Consistent with the nature of policies, vacation Policy 5 says rights-of-way leading to such destinations
“should not” be vacated. It does not say “shall not.”

1 provisions by the Applicant constitute public good resulting in a more desirable
2 situation than denial. Further, it is not clear whether the view and park access
3 claimed within the right-of-way in question by the public are equivalent to the
4 factors contemplated in the drafting of this policy as supporting denial outright
5 of the instant vacation request. Of note, denial of the vacation request leaves the
6 neighborhood association on its own to find funding for, to install such
7 improvements, and ensure survival of plantings - which circumstance is
8 apparently preferred by those who submitted public comment. *Findings 7, 8, 9,*
9 *14, 15, 18, and 19.*

10 5. Vacation Policy 9 directs that proposed use of the vacated right-of-way “is not
11 relevant to City action.” Members of the public read vacation Policy 9 as
12 meaning that evidence of what would be done in the vacated right-of-way
13 cannot be considered in deciding whether to approve the vacation; they
14 requested that all such evidence be stricken from the record. In the opinion of
15 the undersigned, such an interpretation would lead to the absurd result that
16 public good proffered by vacation petitioners could never be considered, thus
17 rendering vacation Policy 9 into a philosophical or academic exercise separated
18 from practical considerations. However, without guidance from the legislative
19 body, it is not clear what else is intended by vacation Policy 9. In previous
20 street vacations, it has been interpreted by the undersigned to be an
21 acknowledgement of the fact that subsequent projects would have to undergo
22 independent review processes. *Findings 14, 18, 19, 20, 22, and 23.*

23 6. With regard to vacation policy 11, the reason that policy was excluded from the
24 conclusions in the July 27, 2020 hearing examiner recommendation (as well as
25 the July 2020 staff report at Exhibit 1) is that compensation for vacated rights-
26 of-way is so wholly and only within the purview of Council that the City had
27 previously requested that the Examiner not render a conclusion on the adequacy
28 of compensation. Findings above address the public perception that the
29 appraised value already paid by the Applicant was too low. Having reviewed
30 the more full appraisal report in the record at Exhibit 2.M, and no evidence to
the contrary aside from public comments expressing disagreement having been
submitted (there is no competing appraisal or testimony from other appraisers),
the undersigned is persuaded that the value reflected in the appraisal was based
on a good faith attempt to arrive at proper fair market value. The decision of
whether to accept that appraisal as adequate is solely within Council’s
discretion. *Findings 5, 14, and 16.*

7. Based on Council’s remand, your Hearing Examiner takes note that the
conclusion in the July 27, 2020 recommendation for approval that notice had

1 been adequately provided was effectively overturned by Council. Future cases
2 in which notice is in question will receive more stringent scrutiny.

- 3 8. The confluence of circumstances leading to the public outcry in the instant case
4 represent a worst case “perfect storm”-style scenario in which all that could go
5 wrong, did go wrong, detracting from public trust in the process. Notice of the
6 vacation petition was inadvertently not sent to the neighborhood association, and
7 notice of the July hearing was posted in a location that was not optimally
8 viewable by all trail users because Staff and the Applicant were unaware of the
9 trail’s existence. Thus, most of the public found out about the process at the
10 stage at which the record was already closed and, consistent with BMC
11 20.10.140, Council members had to tell residents of Bellingham they could not
12 discuss the matter due to the pending closed record hearing. These factors, in
13 addition to the timing of the application coincidentally being submitted during
14 the COVID-19-related closure of City facilities, all contributed to an appearance
15 of substandard process. Having presided over both open record public hearings,
16 having heard/read all comment and other exhibits, and being familiar with land
17 use processes in Bellingham and statewide, the undersigned concludes that there
18 was no actual impropriety but rather that it was simply a coincidental
19 accumulation of unfortunate circumstances, which Council cured with the
20 remand order requiring a second open record public hearing.

21 Following the remand, City Staff and Applicant representatives proactively
22 engaged with the public and with Happy Valley Neighborhood Association in
23 re-reviewing the proposal. The outcome is a project that would develop only
24 18% of the right-of-way segment with paving (no structures, no dwelling units)
25 and retain the remaining 82% of the segment in vegetation. The proposal avoids
26 removal of all but three to four trees, two of which are of low value due to
27 location, and replaces these with six to eight trees planted in optimal locations
28 and insured for at least three years survival (which duration is intended to allow
29 them to establish independent survival ability), as well as removal of noxious
30 vegetation and replacement with native understory plantings. Most of all, the
project retains the vast majority of the existing trail, widens and improves its
surface, and records a public access easement over the southern half of the
segment, which would run with the land and ensure public right of access in
perpetuity. As conditioned, the vacation of the right-of-way effectively retains
82% of the vacated area in green space and preserves the pedestrian circulation
route that the neighbors cherish, which the undersigned concludes shows
consistency with all applicable Happy Valley Neighborhood policies. It is truly
unfortunate that the process encountered as many flaws as it did, leading to
public distrust, where it could have gone the opposite way and become a public-

1 private partnership widely embraced by the community, in which significant
2 trail and greenspace improvements are funded by a private developer to the
3 benefit of the City as a whole and specifically to the benefit of local neighbors.
4 Approval of the vacation as conditioned by Planning Staff would appear to be
5 consistent with public comment indicating that the proposal would be acceptable
6 “if there was a way the developer could buy the density credits without
7 eliminating the trail.”

8 RECOMMENDATION

9 Based on the foregoing findings and conclusions, the Hearing Examiner concludes that
10 vacation Policies 3, 4, 6, 7, 8, and 10 are clearly shown to be satisfied by the proposal.
11 While the record as a whole tends to show compliance with all vacation policies, the
12 Examiner submits that – given the facts of this case – vacation Policies 1, 2, 5, 9, and 11
13 require a level of policy interpretation that is only appropriately conducted by local
14 officials. The Examiner declines to make a recommendation on vacation Policies 1, 2,
15 5, 9, and 11 and requests that Council enter the necessary conclusions and reach the
16 appropriate final outcome.

17 Should Council conclude that all vacation policies are satisfied, approval of the vacation
18 should be subject to imposition of the following conditions on the Applicant and any
19 successors in interest:

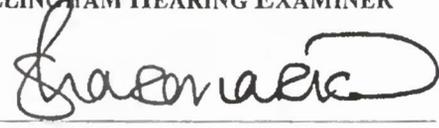
- 20 1. The entire right-of-way shall be reserved for public and private utilities.
- 21 2. A non-exclusive public access easement shall be retained across the southern
22 30-feet of the subject right-of-way for purposes of preserving the maximum
23 amount of trail and mature cedar trees.
- 24 3. Any portion of the Douglas Avenue right-of-way that is not developed with
25 public access improvements – as specified in condition #2 above – may be
26 utilized by the petitioner for any combination of multi-modal access, utility
27 connections, usable and open space, native vegetation restoration or any other
28 non-building element associated with a future land use action.
- 29 4. As part of a future land use action the petitioner shall improve the existing trail
30 to a standard determined by the Parks Department including width, all season
surfacing and stairways where necessary to accommodate grades and alignment
all of which may be eligible for park impact fee credit.

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- 5. Future land use action(s) that include removal of mature cedar trees for any purpose shall be replaced at a ratio of 2:1.
- 6. Future land use action(s) on the abutting parcels north of the subject right-of-way may require a request for a 25% parking reduction to minimize vehicular presence and revegetation of the northeastern quadrant of the subject right-of-way, generally, to increase tree canopy coverage in Area 1A of the Happy Valley Neighborhood.

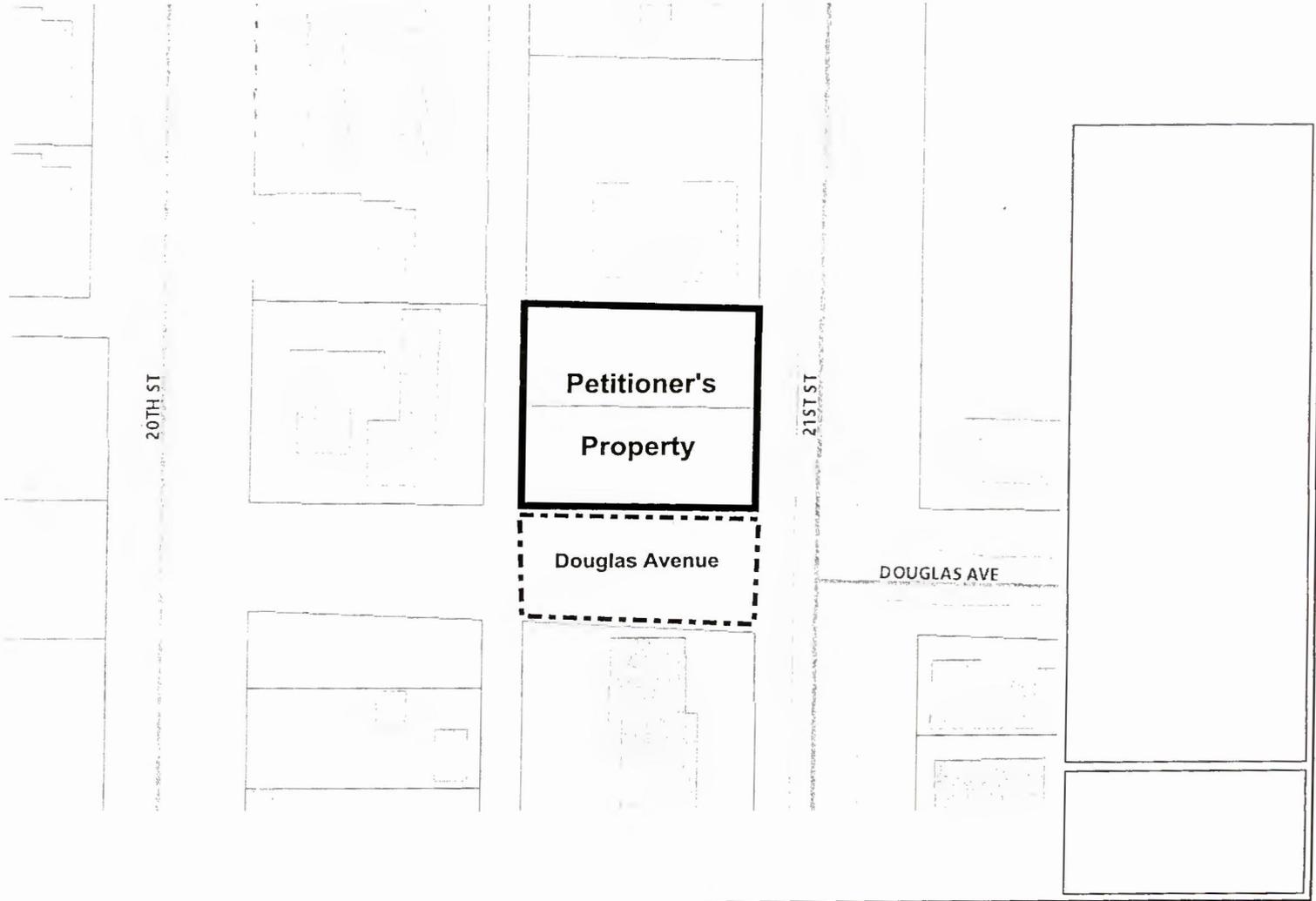
RECOMMENDED March 30, 2021.

BELLINGHAM HEARING EXAMINER



Sharon A. Rice

Exhibit D: Petitioner's Property



20TH ST

21ST ST

**Petitioner's
Property**

Douglas Avenue

DOUGLAS AVE