February 12, 2021

OFFICE OF THE HEARING EXAMINER
KING COUNTY, WASHINGTON

King County Courthouse
516 Third Avenue Room 1200
Seattle, Washington 98104
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www.kingcounty.gov/independent/hearing-examiner

REPORT AND RECOMMENDATION

SUBJECT: Department of Transportation file no. **V-2728**
Proposed ordinance no. **2020-0293**
Adjacent parcel no. **7427600190**

JOHN FRANZEL
Road Vacation Petition

Location: [redacted] Vashon

Applicant: **John Franzel**
[redacted]
Vashon, WA 98070
Telephone: [redacted]
Email: [redacted]

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

OVERVIEW:

1. John Franzel petitions the County to vacate an approximately 9,512-square foot stretch of public right-of-way. The Department of Local Services, Road Services Division (Road Services), urges denial, given a state prohibition against vacation. We conducted the public hearing on behalf of the Council. After hearing witness testimony, studying the exhibits entered into evidence, and considering the parties' arguments and the relevant law—here, a controlling statute—**we strongly recommend against vacation**.

BACKGROUND

1. The subject right-of-way on Maury Island peels off from Manzanita Beach Road SW, abutting Michael Hanson and Gretchen Van Dyke's property, then bisecting Mr. Franzel's property and reaching the ordinary highwater mark of Puget Sound, before continuing on and shaving off the corner of Patricia VanDenBroek's property and extending out into the Sound. *See* Ex. 5 at 001.

2. In 2019, Mr. Franzel petitioned the County to vacate the right-of-way. Exs. 2-3. The two abutting neighbors—Mr. Hanson and Ms. VanDenBroek—submitted letters expressing concerns with vacation, given drainage and erosion problems. Exs. 22 & 23. A few weeks before the hearing, Road Services sent out a staff report, exhibit 1 at 001-06, and exhibits. We adopt and incorporate the facts set forth in Road Services' report and in proposed ordinance no. 2020-0293. That report, and a map showing the specific area to be vacated, are in the hearing record and will be attached to the copies of our recommendation submitted to Council.

3. At yesterday's hearing:

   - Road Services explained that while it was not adverse—under County standards—to approving a vacation, state law bars vacation here.

   - Mr. Franzel explained why he wanted to obtain the right-of-way area, and noted he did not see any way on the ground to move or replace the right-of-way, given topographical restrictions.

   - Ms. VanDenBroek expressed surprise that the right-of-way went through a corner of her home, because an earlier survey showed it missed her home. (*Compare* Exs. 16 at 003, Ex. 17 & Ex. 18.) She discussed drainage and erosion issues, and she appreciated Road Services' responsiveness to her concerns and its ongoing work on such issues.

   - Mr. Hanson described significant erosion losses and drainage problems on or adjacent to the right-of-way footprint.

ANALYSIS

1. Normally we start our road vacation recommendations with the general framework and the standards related to whether vacation is warranted and what if any compensation the petitioner should pay for acquiring the right-of-way. We return to those issues briefly later, but we start with the threshold boulder-in-the-road here.

2. RCW 36.87.130 states that:

> No county shall vacate a county road or part thereof which abuts on a body of salt or freshwater unless:

> (1) The purpose of the vacation is to enable any public authority to acquire the vacated property for port purposes, boat moorage or launching sites, or for park, viewpoint, recreational, educational, or other public purposes;
>
> (2) The property is zoned for industrial uses; or
>
> (3) In a county west of the crest of the Cascade mountains and bordered by the Columbia river with a population over four hundred fifty thousand, the county determines that:
>
> > (a) The road has been used as an access point to trespass onto private property;
> >
> > (b) Such trespass has caused loss of human life, and that public use of the county road creates an ongoing risk to public safety; and
> >
> > (c) Public access to the same body of water abutting the county road is available at not less than three public access sites within two miles in any direction of the terminus of the road subject to vacation.

The proposed vacation will not enable a public authority to acquire the vacated property (for any purpose), and the property is not zoned for industrial uses. The third exception was added in 2020 to allow Clark County to vacate a specific railroad bridge along the Lewis River that had resulted in multiple fatalities;[1] it is inapplicable, starting with King County not bordering the Columbia.

3. Here, the right-of-way area reaches the highwater mark across Mr. Franzel's property and continues into the Sound across the VanDenBroek property. See Ex. 5 at 001. Thus, state law prohibits the County from vacating the subject right-of-way. While our vacation recommendations to Council typically emphasize that vacations are political functions belonging to municipalities, a legislative act (versus a quasi-judicial one),[2] and that the Council has wide discretion whether to vacate or not, here the state has tied the County's hands. The County may not grant the current vacation petition.

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

[2] *Chilivist v. Okanogan County*, No. 34585–8–III, 2017 WL 1032774 at *4-5 (Wn. App. Mar. 16, 2017) (unpublished), *cert. denied*, 188 Wn. 2d 1022, 398 P.3d 1138 (Aug. 2, 2017).

IN-THE-ALTERNATIVE

1. While the need to deny the current petition seems absolute, to create a full record we address the other inquiries that would apply in the absence of RCW 36.87.130.

2. The right-of-way is currently used for a County-maintained drainage system carrying runoff from Manzanita Beach Road SW to the Sound. Ex. 1 at 031. Such issues, however, can often be resolved through easements, and typically do not preclude vacation. Ex. 12 at 002.

3. The subject right-of-way segment is not currently opened, constructed, or maintained for public use, and it is not known to be used informally for access to any property. So long as drainage easements were provided, vacation would have no adverse effect on the provision of any 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.

4. The neighbors' concerns that vacation—and thus privatization and the development that might open up—could exacerbate the pre-existing (and significant) drainage and erosion problems, are not concerns we take lightly. However, we have not interpreted a vacation petition as the venue to address those concerns.

5. *Kelderman—V-2719* included neighbor opposition to a vacation petition, stemming from concerns over critical areas, impervious surface, setbacks, and drainage. We acknowledged that such items might preclude development or require mitigation, but noted that Road Services is not in the business of assessing such matters. Instead, those (and other issues) would be addressed by the Permitting division through the permitting process. More importantly, we reasoned that:

> rights-of-way exist to provide some sort of access. Although the vacation focus is on the public road network, the vacation analysis is slightly broader. Other inquiries tackle whether the particular stretch serves as access to other properties or contains utilities; if so, an easement may be required as a condition of vacation. KCC 14.40.0104.B.7 & .8. Road [Service]s always solicits the County's drainage experts to look at the need for potential drainage easements. And—without blowing up the very essence of a right-of-way—one could expand the concept somewhat. The County operates many rails-to-trails corridors, substituting one type of travel for another. And the County places a premium on linkages from a public right-of-way to a trail system, on linkages between areas in the County's regional trails system and points of interest, and on sites along a mapped wildlife habitat network. KCC 20.36.100.B.4, .5, & .16. …
>
> Instead, the neighbor's argument against vacation here is that the two-block right-of-way, including the portion abutting the Kelderman property, provides environmental benefits. We do not doubt that. There is no bar to the Council considering such factors in determining whether the

> public will benefit from a vacation. RCW 36.87.020. Denial is never mandatory, only discretionary. RCW 36.87.060(1). And road vacation is a political function, a legislative act and not a quasi-judicial one, meaning the Council has maximum leeway in deciding what to do.
>
> However, rejecting a vacation petition on the grounds that it is environmentally advantageous to keep an area public for reasons beyond access and utilities and corridors and their ilk risks transforming Road Services into a mini-Department of Natural Resources and Parks, having to manage public lands for more than even the broadest conception of a right-of-way, on only the vaguest of marching orders. Especially given Road Services' systemic budget shortfalls, and Road Services stated policy of jettisoning unnecessary rights-of-way, that seems highly problematic.[3]

6. If vacation is otherwise warranted, the compensation due would be $7,668. Ex. 10 at 001.

FORWARD-LOOKING

1. It is not clear if the situation—where part of at least the Hanson structure, and maybe of the VanDenBroek structure as well, sit in the public right-of-way—could be addressable via a future vacation petition. As a legal matter, could one essentially move the public right-of-way footprint, thus taking the structures out of the public right-of-way, while still protecting future public access to the Sound?

2. RCW 36.34.330 allows a county to exchange real property for property of equal or greater value. In light of that allowance, in 1972 Island County asked the Attorney General whether it could negotiate with a developer to vacate roads in return for the developer providing the County with similar road locations or other property in the vicinity to use for park, viewpoint, recreational, educational, or other public purposes. The AG's office read RCW 36.87.130's exceptions narrowly, finding that as "commendable" as Island County's proposal might be, the exception applies only where the vacated property *itself* is to be used for port, boat, or other public purposes.[4] Such a reading would severely hamstring, if not outright eliminate, any ability to adjust rights-of-way involving bodies of water.

3. However, in an unpublished 1996 opinion, an appellate court reconciled RCW 36.34.330 and RCW 36.87.130, in light of what it read as RCW 36.87.130's dual purposes: precluding a county from "granting a windfall to the owners of waterfront property" and preserving "public access to the waterfront." The court reasoned that both purposes could be "accomplished when a road subject to RCW 36.87.130 is being vacated and traded for other waterfront property that has equal or greater value, and will be used by the public." Thus, vacating and trading a waterfront road "for other waterfront property

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[3] *See* https://www.kingcounty.gov/~/media/independent/hearing-examiner/documents/case-digest/applications/road vacation/2020/V-2719_Kelderman.ashx?la=en.

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

of equal or greater value" is acceptable, so long as "the other property will be developed for public use."[5]

4. Although the court devoted less than a paragraph to the topic, and did not address or even note the longer 1972 AG opinion to the contrary, the court's reasoning seems more persuasive than the AG's. Thus, a future petition—especially a dual one covering both the Franzel and VanDenBroek property, to avoid creating an orphan right-of-way—would seem workable if it meets the court's criteria. There would still be the logistical and topographical hurdles to such a swap, as Mr. Franzel articulated, but reading RCW 36.87.130 in light of RCW 36.34.330 may remove the legal bar against future petitions—here or elsewhere in the County—involving a right-of-way that abuts a body of water.

RECOMMENDATION:

Adopt proposed ordinance no. 2020-0293 DENYING the petition to vacate the subject right-of-way.

DATED February 12, 2021.

David Spohr
Hearing Examiner

[5] *In re Exchange of Real Property by Pierce County*, No. 19264–1–II, 1996 WL 662424, at *2 (Wn. App. Nov. 15, 1996) (unpublished).

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 ***March 8, 2021,*** an electronic copy of the appeal statement must be sent to Clerk.Council@kingcounty.gov *and* a paper copy of the appeal statement must be delivered to the Clerk of the Council's Office, Room 1200, King County Courthouse, 516 Third Avenue, Seattle, Washington 98104. Prior mailing is not sufficient if the Clerk does not actually receive the fee and the appeal statement within the applicable time period.

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

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

MINUTES OF THE FEBRUARY 11, 2021, HEARING ON THE ROAD VACATION PETITION OF JOHN FRANZEL, DEPARTMENT OF TRANSPORTATION FILE NO. V-2728

David Spohr was the Hearing Examiner in this matter. Participating in the hearing were Megan Kim, John Franzel, Michael Hanson, and Patricia Vanden Broek.

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

Exhibit no. 1	Road Services report to the Hearing Examiner, sent January 28, 2021
Exhibit no. 2	Letter from Clerk of the Council to KCDOT transmitting petition, dated May 28, 2019
Exhibit no. 3	Petition for vacation of a county road, received May 28, 2019
Exhibit no. 4	Letter to Petitioner acknowledging receipt of petition and explaining road vacation process, dated June 4, 2019
Exhibit no. 5	Vacation area map
Exhibit no. 6	KC Assessor's information for Petitioner's property, APN 7427600190
Exhibit no. 7	Plat of Rosehilla Beach
Exhibit no. 8	Final stakeholder notification with vicinity map and site map, sent August 6, 2019, with comment deadline of September 9, 2019

Exhibit no. 9	Email to Assessor's Office on valuation of vacation area
Exhibit no. 10	Compensation calculation model spreadsheet for Petitioner's property, APN 7427600190
Exhibit no. 11	Letter to Petitioner recommending approval, conveying County Road Engineer report, proposing compensation waiver, dated March 13, 2020
Exhibit no. 12	Road Engineer report
Exhibit no. 13	Letter to KC Council recommending approval and transmitting proposed ordinance, dated August 27, 2020
Exhibit no. 14	Proposed ordinance
Exhibit no. 15	Fiscal note
Exhibit no. 16	Affidavit of posting, noting posting date of January 20, 2021
Exhibit no. 17	Survey recorded in 1981 showing property and plated Unnamed Road Plat of Rosehilla Beach
Exhibit no. 18	Survey of Petitioner's property, recorded in 2006
Exhibit no. 19	Deed vesting ownership in Petitioner John Franzel
Exhibit no. 20	Letter to abutting property owner, Patricia Vanden Broek, sent with the Notice of Hearing and the Road Engineer Report
Exhibit no. 21	Letter to abutting property owners, Gretchen Van Dyke and Michael Hanson, with the Notice of Hearing and the Road Engineer Report
Exhibit no. 22	Email comment from Michael Hanson
Exhibit no. 23	Email comment from Patricia VanDenBroek
Exhibit no. 24	*Reserved for future submission of* Affidavit of publication noting posting dates of

DS/jo

February 12, 2021

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CERTIFICATE OF SERVICE

SUBJECT: Department of Transportation file no. **V-2728**
Proposed ordinance no. **2020-0293**
Adjacent parcel no. **7427600190**

JOHN FRANZEL
Road Vacation Petition

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

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

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

DATED February 12, 2021.

Jessica Oscoy
Office Manager

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Department of Natural Resources and Parks

Carrasquero, Jose
Department of Local Services

Cassidy, Jon
Department of Local Services

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Jackson, Robert
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Kosai-Eng, JoAnn
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Kulish, Michael
Facilities Management Division

Ledbetter, Tony
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McDonald, Andrew
Department of Natural Resources and Parks

Miles, Dawn
Department of Local Services

Minichillo, Tom
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Nunnenkamp, Robert
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Torkelson, Cindy
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Vanden Broek, Patricia
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