

**ORDINANCE NO. 11-12**

**AN ORDINANCE OF THE CITY COUNCIL OF THE CITY OF COVINGTON, KING COUNTY, WASHINGTON APPROVING A PETITION TO VACATE APPROXIMATELY 80 FEET OF THE SOUTHEASTERLY PORTION OF 176<sup>TH</sup> PLACE SE, ADJACENT TO SE WAX ROAD.**

WHEREAS, on November 15, 2011, Covington Investment II, LLC (“petitioner”) submitted a letter requesting the vacation of approximately 80 feet of the southeasterly portion of 176<sup>th</sup> Pl. SE adjacent to SE Wax Road and paid the associated \$920.00 street vacation application fee; and

WHEREAS, on May 17, 2012, the hearing examiner held an open record public hearing to hear the petition and recommended that the city council GRANT approval of the street vacation pursuant to the Findings of Fact and Conclusions of Law as attached as Exhibit B, dated May 23, 2012; and

WHEREAS, the hearing examiner and city council find that the street vacation meets the criteria for granting a street vacation as provided in CMC 12.55.090 and outlined in Exhibit B; and

WHEREAS, the city has complied with and completed the street vacation procedures pursuant to RCW 35.79.040 and CMC 12.55.

NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF COVINGTON, KING COUNTY, WASHINGTON, DOES ORDAIN AS FOLLOWS:

Section 1. That portion of 176<sup>th</sup> Pl. SE, maintained as right-of-way by the City of Covington and shown on Exhibit A, incorporated herein by this reference, is hereby vacated, subject to the hearing examiner’s recommendation in Exhibit B, incorporated herein by this reference.

Section 2. This ordinance shall be in full force and effect five days after proper posting and publication. A summary of this ordinance may be published in lieu of publishing the ordinance in its entirety.

Section 3. If any provision of this ordinance, or ordinance modified by it, is determined to be invalid or unenforceable for any reason, the remaining provisions of this ordinance and ordinances and/or resolutions modified by it shall remain in full force and effect.

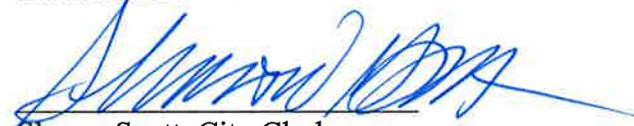
Passed by the City Council in an open public meeting on the 10<sup>th</sup> day of July, 2012.

  
\_\_\_\_\_  
Mayor Margaret Harto

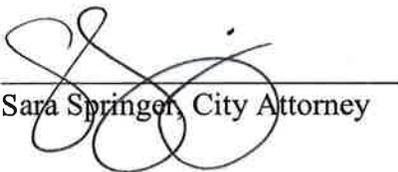
PUBLISHED: July 13, 2012

EFFECTIVE: July 18, 2012

ATTESTED:

  
\_\_\_\_\_  
Sharon Scott, City Clerk

APPROVED AS TO FORM:

  
\_\_\_\_\_  
Sara Springer, City Attorney



**EXHIBIT B**

**RECEIVED**

MAY 24 2012

City of Covington

**BEFORE the HEARING EXAMINER for the  
CITY of COVINGTON**

**RECOMMENDATION**

**FILE NUMBER:** LU11-0016

**APPLICANT:** Covington Investments II, LLC  
ATTN: Michael Crowson  
11711 SE 8<sup>th</sup> Street, Suite 303  
Bellevue, WA 98005

**TYPE OF CASE:** Petition to vacate approximately the southeasterly 80 feet of  
176<sup>th</sup> Place SE adjacent to SE Wax Road

**STAFF RECOMMENDATION:** Approve subject to conditions

**EXAMINER RECOMMENDATION:** GRANT subject to conditions

**DATE OF RECOMMENDATION:** May 23, 2012

**INTRODUCTION**<sup>1</sup>

Covington Investments II, LLC (Petitioner) filed a Petition for Vacation of a City Street (the Petition) on or about November 28, 2011. (Exhibit 2<sup>2</sup>) Petitioner agreed to place the Petition on hold until the City Council could update its right-of-way vacation regulations. (Exhibit 1, p. 3, § II.A.2, ¶ 2) The City Council enacted a replacement Chapter 12.55 CMC, Street and Public Easement Vacation, by Ordinance No. 06-12 on March 13, 2012. (*Ibid.* and official notice) This Petition has been processed in accordance with the new regulations.

<sup>1</sup> Any statement in this section deemed to be either a Finding of Fact or a Conclusion of Law is hereby adopted as such.  
<sup>2</sup> Exhibit citations are provided for the reader's benefit and indicate: 1) The source of a quote or specific fact; and/or 2) The major document(s) upon which a stated fact is based. While the Examiner considers all relevant documents in the record, typically only major documents are cited. The Examiner's Recommendation is based upon all documents in the record.

Petitioner desires the Covington City Council (Council) to vacate approximately the southeasterly 80 feet of 176<sup>th</sup> Place SE adjacent to SE Wax Road.<sup>3</sup>

The Covington Hearing Examiner (Examiner) viewed the area of the requested vacation on May 17, 2012.

In accordance with Covington Municipal Code (CMC) 12.55.070, the City Council set May 17, 2012, as the date for the Examiner's hearing on the vacation by Resolution No. 12-04. (Exhibit 6) The Examiner held the required open record public hearing. The Community Development Department (Department) gave notice of the hearing as required by CMC 12.55.080. (Exhibit 8)

The following exhibits were entered into the hearing record during the hearing:

Exhibits 1 - 13: As enumerated in Exhibit 1, the Departmental Staff Report

The action taken herein and the requirements, limitations and/or conditions imposed by this decision are, to the best of the Examiner's knowledge or belief, only such as are lawful and within the authority of the Examiner to take pursuant to applicable law and policy.

### ISSUES

Does the requested vacation meet the criteria for vacation of a public street?

### FINDINGS OF FACT

1. Petitioner seeks vacation of the southeast 80 ± feet, containing 4,058 square feet (SF), of the 176<sup>th</sup> Place SE right-of-way adjacent to SE Wax Road. Petitioner is also interested in acquiring three small pieces of surplus City property in the immediate vicinity. (Exhibit 3) The process for disposing of surplus City property does not involve the Examiner and is not before the Examiner in this proceeding. Therefore, other than explaining participants' interest in that process, it will not be discussed herein nor will any recommendation regarding it be offered.
2. The section of right-of-way for which vacation is requested is bordered on its southwest by Parcel 3780400130 (Parcel 0130), a former drainage detention pond site now owned by the City and one of the three pieces of surplus property in the area, and on its northeast by Parcel 3780400010 (Parcel

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<sup>3</sup> Street alignments in the area of the requested vacation do not follow a regular north-south or east-west grid. For simplicity, the following directional conventions were used in the Examiner's open record hearing and will be used herein: SE Wax Road is presumed to lie on a northeast-southwest alignment; 176<sup>th</sup> Place SE is presumed to lie on a northwest-southeast alignment; and SE 270<sup>th</sup> Street is presumed to lie parallel to SE Wax Road. (In fact, SE 270<sup>th</sup> Street and SE Wax Road intersect about 150 feet northeast of the requested vacation area.) Exhibit 3 accurately depicts properties and rights-of-way in the area.

0010), owned by the Petitioner. Parcel 0010 presently contains a single-family residence. Those are the only two parcels which abut the section of 176<sup>th</sup> Place SE for which vacation is requested. (Exhibit 3)

3. Ray Markley (Markley) owns the two parcels northwest of Parcel 0130 along the southwest side of 176<sup>th</sup> Street SE: Parcels 3780400120 (Parcel 0120) and 3780400110 (Parcel 0110). The Markley parcels each presently contain a single-family residence and abut a portion of 176<sup>th</sup> Place SE which is not proposed for vacation in this proceeding. (Exhibit 3 and testimony)
4. Petitioner's Parcel 0010 is bordered on its northwest and northeast by the other two small, surplus City-owned parcels in the area: Parcels 378040020 (Parcel 0020) and 378040030 (Parcel 0030).
5. 176<sup>th</sup> Place SE used to provide access from SE Wax Road into the *June Estates* single-family residential subdivision to the north. When the Wal-Mart store was developed in the early 2000s, SE 270<sup>th</sup> Street was created to serve as its primary access. At that time the connection between 176<sup>th</sup> Place SE and SE Wax Road was closed off (The street trees along SE Wax Road which block access to 176<sup>th</sup> Place SE are clearly visible on the aerial photograph in Exhibit 3.) and the portion of 176<sup>th</sup> Place SE southeast of SE 270<sup>th</sup> Street became a dead-end providing access to Parcels 0010, 0110, and 0120. (Exhibits 1 and 3 and testimony; the aerial photograph in Exhibit 9 depicts the area, including the Wal-Mart store, clearly)
6. The Petitioner is developing the "Firestone" parcel on the northwest side of SE Wax Road adjacent to the southwest side of Parcel 0130. The Petitioner desires to aggregate Parcels 0020, 0030, and 0130 as well as the 176<sup>th</sup> Place SE right-of-way not fronting on the Markley properties for development purposes. (Exhibit 3 and testimony)
7. Markley supports the requested right-of-way vacation, but opposes sale of the three surplus parcels to the Petitioner. Markley wants to acquire one or more of those parcels himself to facilitate commercial redevelopment of his two parcels. (In fact, if the Examiner understood the testimony accurately, Markley would support the vacation of the entirety of 176<sup>th</sup> Place SE southeast of SE 270<sup>th</sup> Street and would be interested in acquiring the southwest half of the entire right-of-way.) (Testimony)
8. The criteria for approval of street vacations are set forth at CMC 12.55.090. The preamble sentence to the criteria reads as follows: "The Hearing Examiner and City Council shall review the requested vacation, provided the applicant can demonstrate that:" The four specific criteria and the facts relating to each are as follows:
  - A. "(1) Granting the vacation will not conflict with the general purposes and objectives of the city's comprehensive plan regarding land use, streets, utilities, drainage, parks, trails, and open space;"

Facts: The City's comprehensive plan land use map identifies the properties adjacent to 176<sup>th</sup> Place SE, southeast of SE 270<sup>th</sup> Street, as Downtown Commercial; the area is intended to be redeveloped for commercial development. No parks or trails are designated within the City's comprehensive plan that would be accessed from this section of 176<sup>th</sup> Place SE. (Exhibit 1, p. 5)

- B. "(2) The street, or portion thereof, is not likely to serve a useful public purpose both now and in the future, which cannot be met through use of easements for a specific purpose, or the vacation will best serve the public interest;"

Facts: The section of SE 176<sup>th</sup> Place SE proposed to be vacated provides access to the three single-family residences on Parcels 0010, 0110, and 0120. It is no longer needed to provide a connection to SE Wax Road; the signalized SE Wax Road/SE 270<sup>th</sup> Street intersection provides a much safer connection. Access to the single-family residences on Parcels 0110 and 0120 (the Markley parcels) will be provided from the portion of 176<sup>th</sup> Street SE not proposed to be vacated; Parcel 0010 will retain about 15 feet of frontage on the un-vacated portion of 176<sup>th</sup> Place SE. The Petitioner intends to redevelop Parcel 0010 for some commercial purpose in any event. (Exhibits 1 and 3 and testimony)

- C. "(3) The vacated area will not increase the number of single-family building sites or multifamily density. This may be mitigated by appropriate conditions on the vacated area; and"

Facts: The properties adjacent to 176<sup>th</sup> Place SE are zoned Mixed Commercial (MC) and are intended to be redeveloped for commercial development and higher multifamily density. Pursuant to CMC 18.31.090, residential density in the MC zone is 24 units per acre; with ground floor commercial, there is no limit on the residential density. (Exhibit 1, p. 5)

- D. "(4) The request for vacation was not initiated to correct a condition created by an applicant in violation of City ordinance."

Facts: No ordinance violations are associated with this requested right-of-way vacation. (Exhibit 1, p. 6)

9. Subsection 12.55.100(3) CMC provides that

The City may condition the vacation to retain easements for the construction, repair, and maintenance of public utilities and services and establish easement trails for pedestrians and nonmotorized vehicular travel. The City Council shall grant easements to utility agencies within the right-of-way of said vacation to maintain the existing location of its facilities. Such easements may also be granted to utility

agencies to allow for future location of facilities as reasonably anticipated by the utility agency.

When SE 270<sup>th</sup> Street was constructed, water and sewer mains were installed to service the area. Other utilities such as power, cable, etc. are also located within SE 270<sup>th</sup> Street. Any utility easements required will be for the purpose of future development and will be established through the engineering review process and provided prior to construction of any proposed redevelopment of the adjacent properties. (Exhibit 1, p. 5)

Covington Water District, which provides water to the City of Covington, is requesting that a 20 foot wide exclusive easement be retained within the area proposed to be vacated. The District has an existing main that connects to SE 270<sup>th</sup> Street and that serves the existing single-family residential homes. (Exhibit 12)

10. Subsection 12.55.110(2) CMC requires the Examiner to recommend to the Council “[t]he amount of compensation owed to the City for the vacated street, alley, public easement, or part thereof”.

Pursuant to CMC 12.55.050(1)(e) the Petitioner retained McKee & Schalka, “an appraiser licensed in the State of Washington with an MAI designation” to establish “the fair market value” of the area requested to be vacated. McKee & Schalka concludes that the fair market value of both the right-of-way for which vacation is sought and of the three adjacent surplus City properties is \$21.00 per SF. (Exhibit 4)

The Department retained Abaco Pacific, which in turn retained Commercial Realty Consulting, Inc., whose appraiser also holds an MAI designation, to provide independent peer review of the appraisal pursuant to CMC 12.55.050(2); the Petitioner compensated the City for the peer review costs. (Exhibit 10) Abaco Pacific and Commercial Realty Consulting, Inc. both agree with McKee & Schalka that the right-of-way’s fair market value is \$21.00 per SF. (Exhibit 11)

11. The criteria for determining the amount of compensation owed to the City for the vacated street, alley, public easement, or part thereof are set forth at CMC 12.55.110(2) and (3):

(2) ... (a) The full appraised value owed for a street of which public funds have been expended, through an approved capital improvement project, for the acquisition or construction of the street or property;

(b) Seventy-five percent of the full appraised value owed for a street for which funds have been expended for improvements and maintenance within five years from the date of the petition;

(c) Fifty percent of full appraised value owed for streets for which no funds have been expended in the acquisition, improvements, and maintenance;

(d) Administrative costs of the vacation owed for street vacation issued as a matter of the laws of 1889-1890 and affirmed by City Council action;

(e) Real property of equal or greater value, or public right-of-way which has value for access, may be accepted in lieu of cash compensation;

(f) Any combination of subsections (2)(a) through (e) of this section may be accepted; provided, that the total value of the combined compensation does not total more than the maximum amount of monetary compensation allowed under subsections (2)(a) through (c) of this section.

(3) When a street is vacated for a governmental agency, compensation shall be in accordance with the classification of the street, except that some or all of the compensation may be waived at the discretion of the City Council if it will fulfill a public purpose.

The subject portion of 176<sup>th</sup> Street SE was constructed by the developer of *June Estates*. No City funds have been expended in the acquisition, improvements, and maintenance of 176<sup>th</sup> Place SE. (Exhibit 1, p. 6) Therefore, CMC 12.55.110(2)(c) applies and the amount of compensation for the requested right-of-way vacation is 50% of \$21.00 per SF, or \$11.50 per SF.

12. Section 12.55.120 CMC requires that the compensation determined to be paid shall be a condition precedent to the vacation of any city street and shall be paid to the City of Covington by the Petitioner within 90 days of the approval of the adopting ordinance.
13. The Department recommends approval of the requested right-of-way vacation subject to six conditions.<sup>4</sup> (Exhibit 1, pp. 6 and 7) The Petitioner has no objection to the recommended conditions. (Testimony)
14. As of the date of the Examiner's hearing, the Department thought that disposition of the nearby surplus parcels would be on a Council agenda before the right-of-way vacation would get on a Council agenda. (Testimony)
15. Any Conclusion of Law deemed to be a Finding of Fact is hereby adopted as such.

## LEGAL FRAMEWORK<sup>5</sup>

The Examiner is legally required to decide this case within the framework created by the following principles:

### Authority

A Petition to Vacate a City Street is a Type 4 land use application which is subject to an open record hearing before the Examiner. [CMC 12.55.070 *et seq.*, 14.30.040, and 14.30.050] The Examiner submits "a recommendation to the City Council." [CMC 12.55.100(1)] The Examiner's recommendation is subject to

<sup>4</sup> Exhibit 1 contains a few typographical errors which were noted and discussed during the hearing.

<sup>5</sup> Any statement in this section deemed to be either a Finding of Fact or a Conclusion of Law is hereby adopted as such.

the right of reconsideration. [Hearing Examiner Rule of Procedure (RoP) 2.27] The Council “may adopt, reject, or modify the Hearing Examiner’s recommendation based on the criteria demonstrated by the applicant in CMC 12.55.090.” [CMC 12.55.100(2)]

Review Criteria

The criteria for approval of street vacations are set forth at CMC 12.55.090. The applicable criteria have been set forth in Finding of Fact 8, above.

Standard of Review

The standard of review is preponderance of the evidence. The applicant has the burden of proof. [CMC12.55.100(2)]

Scope of Consideration

The Examiner has considered: all of the evidence and testimony; applicable adopted laws, ordinances, plans, and policies; and the pleadings, positions, and arguments of the parties of record.

**CONCLUSIONS OF LAW**

1. The testimony and evidence undisputedly indicates that vacation of the 80 ± foot section of 176<sup>th</sup> Place SE right-of-way adjacent to SE Wax Road meets all criteria for approval as set forth in CMC 12.55.090.
2. All evidence indicates that the fair market value of the right-of-way to be vacated is \$21.00 per SF, but that the right-of-way falls within the category established by CMC 12.55.110(2)(c). Therefore, the amount by which the City should be compensated for the right-of-way is \$11.50 per SF. (The Examiner offers no recommendation regarding the fair market value of the three surplus properties as that subject is beyond the scope of the Examiner’s jurisdiction in this proceeding.)
3. When right-of-way is vacated, one half reverts to the ownership of the abutting property on each side of the right-of-way. In the present case, who would get (and who would pay for) the southwest half of the right-of-way to be vacated will depend upon whether the vacation occurs before or after the surplus property issue is concluded: If the right-of-way were vacated today, the City would gain the southwest half as it owns Parcel 0130; if the surplus process were completed before the vacation, then whomever had prevailed in that process and held title to Parcel 0130 would pay for and gain the southwest half.
4. The recommended conditions of approval as set forth in Exhibit 1 are reasonable, supported by the evidence, and capable of accomplishment with one change.

As written, the conditions presume that the Petitioner acquires Parcel 0130 through the surplus process; in other words, that the entire area to be vacated inures to the benefit of the Petitioner. There

is no guarantee that that will be the outcome of the surplus process. Therefore, instead of assuming that the Petitioner acquires the entirety of the right-of-way being vacated and specifying a total compensation figure, the Examiner will recommend more generic language in the conditions.

5. Any Finding of Fact deemed to be a Conclusion of Law is hereby adopted as such.

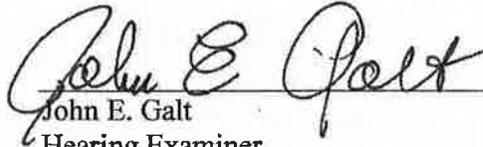
### RECOMMENDATION

Based upon the preceding Findings of Fact and Conclusions of Law, and the testimony and evidence submitted at the open public hearing, the Examiner recommends that the City Council **GRANT** the Petition to Vacate the southeasterly 80 ± feet of the 176<sup>th</sup> Place SE right-of-way, consisting of 4,058 SF, as depicted on Exhibit 3 **SUBJECT TO THE FOLLOWING CONDITIONS:**

1. The Petitioner shall be responsible to abide by the terms of the Reimbursement for Consultant Review Services Agreement (Exhibit 10) and its associated contracts.
2. Compensation for the vacated right-of-way shall be based on fifty percent (50%) of the appraised value of the portion to be vacated.
3. The owner acquiring title to the portion of the right-of-way within which the water main is located shall be responsible for recording a 20 foot wide exclusive easement for Covington Water District, unless otherwise determined by the District that the easement is no longer required upon development of the adjacent properties. The acquiring owner shall coordinate directly with Covington Water District to ensure that the easement language meets the District's requirements.
4. The acquiring owner(s) shall pay the City of Covington compensation in the amount of \$11.50 per square foot of vacated right-of-way within 90 days of approval by the City Council for the vacation of a portion of 176<sup>th</sup> Place SE.
5. In the event of failure of the acquiring owner(s) to pay such sum within 90 days, the petition for vacation shall be deemed denied and the vacation not effective.
6. Upon approval by the City Council and full payment by the acquiring owner(s), an ordinance vacating 176<sup>th</sup> Place SE shall be recorded with King County Records Office. The Petitioner shall be responsible for recording the ordinance with King County and paying all associated recording fees.

HEARING EXAMINER RECOMMENDATION  
RE: LU11-0016 (176<sup>th</sup> Street SE right-of-way vacation)  
May 23, 2012  
Page 9 of 9

Recommendation issued May 23, 2012.

  
\_\_\_\_\_  
John E. Galt  
Hearing Examiner

### HEARING PARTICIPANTS <sup>6</sup>

Michael Crowson  
Nelson Ogren

Salina Lyons  
Ray Markley

### NOTICE of RIGHT of RECONSIDERATION

This Recommendation is subject to the right of any party of record to file with the Examiner (in care of the City of Covington, ATTN: Kelly Thompson, 16720 SE 271<sup>st</sup> Street, Suite 100, Covington, Washington 98042) a written request for reconsideration within 10 days following the issuance of this Recommendation in accordance with the procedures of CMC 2.25.080 and Hearing Examiner Rule of Procedure (RoP) 2.27. Any request for reconsideration shall specify the error which forms the basis of the request. See RoP 2.27 for additional information and requirements regarding reconsideration. Any request for reconsideration shall specify the error which forms the basis of the request. See CMC 14.35.320 and RoP 2.27 for additional information and requirements regarding reconsideration.

A request for reconsideration is not a prerequisite to judicial review of this Recommendation, nor does filing a request for reconsideration stay the time limit for commencing judicial review.

### NOTICE of COUNCIL CONSIDERATION

The Examiner's final recommendation will be considered by the Covington City Council in accordance with the procedures of Chapter 12.55 CMC. Please contact the Department of Planning and Public Works for information regarding the scheduling of Council consideration of this Recommendation. Please have the applicant's name and City file number available when you contact the Department.

The following statement is provided pursuant to RCW 36.70B.130: "Affected property owners may request a change in valuation for property tax purposes notwithstanding any program of revaluation."

<sup>6</sup> The official Parties of Record register is maintained by the City's Hearing Clerk.