King County

1200 King County Courthouse
516 Third Avenue
Seattle, WA 98104

KING COUNTY

Signature Report

May 16, 2011

Ordinance 17098

Proposed No. 2011-0011.2 **Sponsors** Ferguson

AN ORDINANCE denying a petition to vacate a portion of Northeast 116th Street, File V-2655; Petitioners: Finn Hill Meadows Association.

STATEMENT OF FACTS:

1. A petition has been filed requesting vacation of a portion of Northeast 116th Street hereinafter described.

2. The subject right-of-way is located with the city of Kirkland's pending Finn-Hill, Juanita, Kingsgate Area Annexation, scheduled to be effective June 1, 2011. As of the effective date, King County will no longer have jurisdiction over the subject right-of-way ("ROW").

3. The department of transportation notified the various utility companies serving the area, the standard stakeholders, and the city of Kirkland for comments. The department of transportation has been advised that Puget Sound Energy and Northshore Utility District require easements within the vacation area.

4. The Northeast 116th Street ROW represents an opportunity to resolve long-standing, persistent and well-documented access issues for the Goat Hill Loop road system.

5. Through the stakeholder review process, the city of Kirkland has requested that King County not divest public interest in the subject ROW.

6. The department of transportation records indicate that Northeast 116th Street is an unmaintained public ROW.

7. For the reasons stated above, the department of transportation cannot consider the subject portion of the ROW useless as part of the county road system and believes the public would not benefit by the return of this unused area to the public tax rolls.

Due notice was given in the manner provided by law and a hearing was held by the office of the hearing examiner on the 16th day of February, 2011.

In consideration of the benefits to be derived from the subject vacation, the council has determined that it is in the best interest of the citizens of King County to deny said petition.

BE IT ORDAINED BY THE COUNCIL OF KING COUNTY:

SECTION 1. The council, on the effective date of this ordinance, hereby sustains the department of transportation's and hearing examiner's recommendations to deny the request to vacate and abandon that portion of Northeast 116th Street, also known as Juanita Point Road - County Road Survey No. 30-26-5-2, as established under King County resolution No. 4384, records of King County, Washington as described below:

That portion of the north 30-feet of the NE 116th Street ROW, also known as Juanita Point Road - County Road Survey No. 30-26-5-2, abutting and adjacent to the south line of Tract A, of the Plat of Finn Hill Meadows,

recorded in Volume 101 of Plats, on Page 78, records of King County, Washington, except the easterly 230-feet thereof.

Together with that portion of the south 30-feet of the Northeast 116th Street ROW, also known as Juanita Point Road - County Road Survey No. 30-26-5-2, located in the Northwest quarter of the Northwest quarter Section 31, Township 36 North, Range 5 East, Willamette Meridian, King County, Washington, lying easterly of the northerly extension of the west line of the property (tax parcel no. 312605-9014) described in the

Warranty Deed recorded under King County recording no. 20090708001475, except the easterly 230-feet thereof.

Ordinance 17098 was introduced on 1/3/2011 and passed by the Metropolitan King County Council on 5/16/2011, by the following vote:

Yes: 8 - Mr. Phillips, Mr. Gossett, Ms. Hague, Ms. Patterson, Ms. Lambert, Mr. Ferguson, Mr. Dunn and Mr. McDermott
No: 0
Excused: 1 - Mr. von Reichbauer

KING COUNTY COUNCIL
KING COUNTY, WASHINGTON

Larry Gossett, Chair

ATTEST:

Anne Noris, Clerk of the Council

APPROVED this 27 day of May, 2011.

Dow Constantine, County Executive

RECEIVED
2011 MAY 27 PM 3:49
KING COUNTY COUNCIL

Attachments: A. Hearing Examiner Report dated April 15, 2011

April 15, 2011

OFFICE OF THE HEARING EXAMINER
KING COUNTY, WASHINGTON
King County Courthouse, Room 1200
516 3rd Avenue
Seattle, Washington 98104
Telephone (206) 296-4660
Facsimile (206) 296-0198
Email hearingexaminer@kingcounty.gov

REPORT AND RECOMMENDATION TO THE METROPOLITAN KING COUNTY COUNCIL

SUBJECT: Department of Transportation file no. **V-2655**
Proposed Ordinance no. **2011-0011**
Adjacent parcel nos. **254090-0220, 312605-9014**

FINN HILL MEADOWS ASSOCIATION
Road Vacation Petition
Appeal from Notice of Denial

Location: Portion of NE 116th Street

Petitioner/ Appellant: Finn Hill Meadows Association
represented by **Mark Mason**
PO Box 2014
Kirkland, Washington 98083
Telephone: 425-269-0438

King County: Department of Transportation (KCDOT) Road Services Division (RSD)
represented by **Nicole Keller**
201 S Jackson Street
Seattle, Washington 98104-3856
Telephone: 206-296-3731
Facsimile: 206-296-0567

SUMMARY OF RECOMMENDATIONS:

Department's Administrative Decision:	Deny road vacation (appealed)
Department's Recommendation on Appeal:	Deny road vacation
Examiner's Recommendation:	Deny appeal and deny road vacation

DEPARTMENT'S REPORT:

The Department of Transportation's written report to the Hearing Examiner for road vacation petition V-2655 was received by the Examiner on January 31, 2011.

Note: minor typographical corrections made May 11, 2011.

PUBLIC HEARING:

After reviewing the Department's report and accompanying attachments and exhibits, the Examiner conducted a public hearing on the petition and report as follows:

The hearing was opened by the Examiner on February 16, 2011, in the Chinook Building, 401 Fifth Avenue, Room 115, Seattle, Washington. The hearing record was reopened on March 4, 2011 to receive additional information from the Petitioners as requested, and left open until March 15, 2011 for response and reply, of which there were none. Participants at the public hearing and the exhibits offered and entered are listed in the attached minutes. A verbatim recording of the hearing is available in the office of the Hearing Examiner.

FINDINGS, CONCLUSIONS & RECOMMENDATION: Having reviewed the record in this matter, the Examiner now makes and enters the following:

FINDINGS:

1. General Information:

Road name and location:	Portion of NE 116th Street
Right of way classification:	C-Class
Area:	44,517 square feet
Compensation:	Not calculated

2. Notice of hearing on the Department's report was given as required by law, and a hearing on the report was conducted by the Examiner on behalf of the Metropolitan King County Council.

3. Except as provided herein, the Examiner adopts and incorporates herein by this reference the facts set forth in the Department's report. The Department's report will be attached to those copies of this report and recommendation that are submitted to the County Council.

4. Maps showing the vicinity of the proposed vacation and the specific area to be vacated are in the hearing record as exhibit nos. 8 and 12.

5. The subject road right-of-way segment is a portion of NE 116th Street in the Finn Hill area adjacent to Kirkland. It was established by County Resolution No. 4384. Never improved with roadway construction, it connects two improved deadend streets, an unincluded portion of NE 116th Street extending offsite to the east and 84th Avenue NE. It is not currently opened or maintained in any fashion for public use, and is not known to be used informally for access to any property.

6. The site terrain, formed in part by a hillside slump, is very steep in most areas. It is vegetated with dense brush and trees, some of which are invasive species.

7. The segment is improved with privately installed drainage pipes/culverts, which improvements were never accepted by the County for maintenance. They therefore are not formal County facilities and are not maintained by the County.

8. Abutting and nearby properties are mainly developed with detached single family residences.

9. An abutting nearby property partly fronting the segment is under consideration for subdivision development that may necessitate the use of fronting portions of the segment for development access.

10. Annexation of the segment, lying within the Finn Hill, Kingsgate, Juanita Annexation Area, into the City of Kirkland is imminent, set to be effective June 1, 2011.

11. The Appellant/Petitioner requests vacation of the segment so that its abutting private greenbelt would be expanded and it may assume private stewardship and maintenance of it, noting that the segment has been an unmaintained, densely vegetated area with unmaintained drainage facilities which flood and cause drainage problems in the neighborhood.

12. KCDOT/Roads Services Division, the office responsible for administrative review and decisionmaking on road vacation petitions, issued a notice of administrative denial of the vacation petition on September 29, 2010. As it was not recommended for approval, further consideration only occurs if the denial is appealed, as provided by KCC 14.40.015.B. The Association filed an appeal of the administrative denial. Under KCC 14.40.015.B.3, an appeal is reviewed by the Hearing Examiner similarly to an original petition review, essentially *de novo* (anew, without reliance solely on the department's findings). The Examiner's role is one of recommendation to the final decisionmaker, the County Council, as set forth in RCW 36.87.060 and KCC 14.40.015.A.

13. The KCDOT RSD CIP and Planning Section recommends denial of the requested vacation, noting the aforementioned abutment to and connection with two improved deadend streets, that a walking path connection improved in the segment could provide a direct connection between approximately 150 residences to the west and destinations to the east including Juanita Beach Park (which currently has only one access route) and a neighborhood commercial center, and that until such connection might be provided the only pedestrian route is along Juanita Beach Drive, which is a less direct route with less pedestrian safety due to lack of pedestrian facilities. CIP/Planning notes that the City of Kirkland has established policies calling for development of pedestrian connector paths in locations such as the subject one.

14. The KCDOT RSD Traffic Engineering Section also recommends against the vacation, contending that the segment is necessary for present or future road system needs, noting longstanding severely substandard access issues along the Goat Hill Loop road system (which is essentially one long cul de sac). Traffic Engineering asserts that the segment represents the apparent final opportunity to resolve such access problems and, though acknowledging regulatory and technical challenges to improvement, concludes that the segment is not useless to the road system.

15. The County Department of Development and Environmental Services (DDES) concludes that it would be premature to vacate the right-of-way "as the adjacent neighborhood streets are set up for the road to extend in the future."

16. The City of Kirkland, similarly to Traffic Engineering, notes challenges presented to improvement of the segment, but concludes that a pedestrian path/trail could be constructed in the segment. The City has conducted further review of the issue and recommends denial of the petition as premature, stating that since the property is soon to annex into the City and any vacation consideration should await further analysis of pedestrian path feasibility, vacation at present would be premature.

17. As noted above, KCDOT/RSD issued notice of administrative denial of the requested vacation, and the instant appeal ensued. Given the facts presented, and the positions and recommendations of the City and the above-noted other county agencies, the Department continues to recommend against the vacation.

18. The Appellant/Petitioner:

A. Disputes the City's and County agencies' positions regarding the feasibility of pedestrian path improvement given the segment's steep terrain, contending that the terrain is so steep that a path is from all practical perspectives near impossible;
B. Opposes deferral of the vacation consideration until after annexation by the City, arguing that its petition to the County should be decided by the County; and
C. Contends that allowing the segment to revert to private ownership would allow for better maintenance of the segment, including of the routinely flooding culverts, which seem to be accommodating increased volumes of storm runoff.

The Appellant/Petitioner also disputes the feasibility of the proposed Hagerman subdivision and its need for the road segment at issue for development access. Lastly, the Appellant/Petitioner cites a road vacation granted by the County in 2000, claiming similarity of circumstances and in effect arguing that the County should be consistent in its vacation decisions. As a minor item, the Appellant/Petitioner points out that the pertinent fiscal note accompanying the title-only ordinance contains an error in stating the class of road category for value calculation. Such discrepancy is easily cured and of *de minimis* consequence to the vacation consideration.

19. In summary, it is found that vacation of the right-of-way could have an adverse effect on the provision of roadway and pedestrian access to abutting properties and the surrounding area. The right-of-way is at this juncture useful for the potential future public road/pedestrian path system for travel purposes.

CONCLUSIONS:

1. The applicable law on the authority of the County to vacate public right-of-way rests in state statute, RCW 36.87.060(1), which in pertinent part reads as follows:

> If the county road is found useful as a part of the county road system it shall not be vacated, but if it is *not useful* and the *public will be benefited* by the vacation, the county legislative authority *may* vacate the road or any portion thereof. [Emphasis added]

2. The test of review is multi-pronged, favors the public interest in the right-of-way rather than the desires and expectations of a petitioner, and in the final analysis, even after the finding that a segment is "not useful" required to grant a vacation petition, the Council is still left with full discretion (by the statute's use of the word "may") whether or not to vacate.

A. The first part of the test is the general provision that "if the county road is found *useful* as a part of the county road system *it shall not be vacated. . .*" (emphasis added) That test does not require the county to prove imminent necessity or practical feasibility of any improvement in order to deny a vacation petition; instead, it holds that if a jurisdiction finds the right-of-way useful, it is barred from vacating it, *i.e.*, from divesting the public of the right-of-way. The realm of found usefulness is broad and includes any

possibility of future usefulness which the agency may determine. The term "useful" is not defined in the statute, so statutory interpretation resorts to the common and ordinary meaning. "Useful" is defined in common dictionaries variously as "*adj:* capable of being put to use: Serviceable; *esp*: having utility"[1]; "*adj.* Capable of being used advantageously; serviceable."[2]; "***adj.*** that can be used; serviceable; helpful"(bold in original).[3] As can be seen from the cited definitions, the term "useful" extends to the *potential* ("capable"; "serviceable") for use as well as immediate usability; the term "useful" does not require an actual or immediate *necessity* of use. In this context, therefore, the term "useful" includes not just an immediate need of the right-of-way for use in the road system, but also any perceived need, desire or inclination to merely preserve a right-of-way for possible future use and improvement. That future usefulness is what lies at the heart of the City's and county agencies' recommendations that the right-of-way not be vacated, because it may be useful in the future for a desired and needed pedestrian connection and for development access.

B. The second part of the test is that in considering a vacation the right-of-way must be expressly found to be "not useful" *and* that "the public will be benefited by the vacation." Here, the City's and county agencies' findings and recommendations do not support a finding that the right-of-way would be "not useful." It is instead convincingly found useful to the local governments to preserve it pending possible use as a needed pedestrian connection. It also cannot be found that "the public will be benefited by the vacation." The City and county agency findings and recommendations provide the best formal indication of the public benefit that would be affected by the proposed vacation, since they currently have or very soon will have direct administrative responsibility for the segment and for providing pedestrian facilities.

   i. The agencies' common and consistent position is that the public will not be benefited by the vacation since their flexibility and effectiveness in providing pedestrian facilities for the public good will be adversely limited by the vacation, and the need for retaining public road access for a pending development proposal has not at this time been convincingly foreclosed by utilization of an alternative.

   ii. The Examiner particularly notes in such regard that KCDOT RSD CIP and Planning Section has noted the public benefits of the a public pedestrian connection placed in the segment, and KCDOT/RSD Traffic Engineering has concluded that the segment represents the apparent final opportunity to resolve longstanding and significant Goat Hill Loop access problems, in which there is clearly a public interest (to ensure safe and sufficient access to development and reduce dispute among road access users).

C. It is appropriate to grant considerable deference to the findings and recommendations of the City and County departments, since they have administrative responsibility for and/or proper interest (such as the City's imminent annexation and assumption of road and pedestrian facilities in the area, and attendant deficiencies and responsibilities) in the operation and administration of the road system for transportation and access, including that of pedestrians.

---

[1] Webster's New Collegiate Dictionary 1288 (1977)
[2] Second College Edition. The American Heritage Dictionary 1331 (1985)
[3] Webster's New World Dictionary of the American Language 825 (1975).

D. Lastly, even if a right-of-way were found to be "not useful" and that "the public will benefited by the vacation," the agency with jurisdiction, in this case the County through its legislative authority, the County Council, is left with full discretion whether or not to vacate the right-of-way, as noted above by the use of the word "may" in the pertinent portion of RCW 36.87.060(1).

3. The Appellant/Petitioner's motivation to gain private control of the segment to provide what it feels would be better stewardship and maintenance, and preclusion/correction of the culvert flooding issues, is certainly quite laudable in and of itself, but in the consideration of vacation of public right-of-way, under the applicable law it is subordinate to the public interest. That interest, recited above, compels at the very least deferring vacation until the segment is reviewed further by the agency soon to inherit jurisdiction over it and the surrounding area including its connecting road system, so that it is reviewed under City policies since it will lie in the City, and assessed for feasible accommodation of future public pedestrian improvements which have been clearly stated as needed, desired and advantageous (*i.e.*, useful), and also for its usefulness as proposed, contemplated or merely potential development access.

4. The right-of-way segment is found to be useful to retain for consideration of future needed public improvements and access to contemplated development. More precisely, when tested against the specific language of the law it does not meet the specific tests of a) being "not useful" as part of the road system, and b) the public being benefited by its vacation. The petition thus fails to meet the tests for road vacation established by applicable law.

5. As the proposed vacation does not conform to the law, it should not be granted. The appeal is denied; the vacation petition should be denied as not meeting the initial tests of approval.

6. Strictly speaking, the last provision of the vacation criteria need not be addressed given the failure of the petition to meet the non-usefulness and public benefit tests and thus be eligible for the Council to exercise its discretion to vacate. However, a recommendation to the Council should address the full complement of applicable criteria, not just for thoroughness's sake, but also to present the Council with a complete recommendation on all issues and criteria, so that the Council may avail itself of all options in considering the matter before it. Accordingly, the issue of the last test, the exercise of Council discretion, is addressed: Even if the tests of non-usefulness and public benefit were met in this case, the Examiner would recommend that the Council not vacate the segment under its discretionary authority. Given imminent annexation by the City of Kirkland and the consequent assumption of jurisdiction over the area's road system and its access and pedestrian issues, deference to the soon-assuming jurisdiction to review the proposal and decide the petition under its own vacation authority seems in order.

RECOMMENDATION:

DENY the requested vacation of the subject road right-of-way segment.

NOTE: If the Council determines that the vacation petition should not be denied, it should be noted that the defined monetary value of the vacated area has not been calculated by KCDOT; under county code, the cash compensation for such value must be deposited with the County as a condition precedent to vacation (subject to Council consideration of alternative compensation or waiver, neither of which is requested by the Petitioner nor recommended by the Department or the Examiner). [KCC 14.40.020 and .030]

Any approval ordinance consideration should therefore await such deposit. Alternatively, an ordinance approving the vacation, if enacted, could be conditioned to require such deposit for the vacation to take effect. The Council may wish to consult legal counsel regarding the efficacy of such a conditional approach, particularly given the imminent annexation on June 1, 2011, upon which the County's road jurisdiction over the segment will terminate (absent an interlocal agreement to the contrary by conferring on the County the authority to continue to process the petition).

RECOMMENDED April 15, 2011.

Peter T. Donahue
King County Hearing Examiner

NOTICE OF RIGHT TO APPEAL
AND ADDITIONAL ACTION REQUIRED

In order to appeal the recommendation of the Examiner, written notice of appeal must be filed with the Clerk of the King County Council with a fee of $250.00 (check payable to King County Office of Finance) *on or before* **April 29, 2011**. If a notice of appeal is filed, the original and two copies of a written appeal statement specifying the basis for the appeal and argument in support of the appeal must be filed with the Clerk of the King County Council *on or before* **May 6, 2011**.

Filing requires actual delivery to the Office of the Clerk of the Council, Room 1039, King County Courthouse, 516 Third Avenue, Seattle, Washington 98104, prior to the close of business (4:30 p.m.) on the date due. Prior mailing is not sufficient if actual receipt by the Clerk does not occur within the applicable time period. The Examiner does not have authority to extend the time period unless the Office of the Clerk is not open on the specified closing date, in which event delivery prior to the close of business on the next business day is sufficient to meet the filing requirement.

If a written notice of appeal and filing fee are not filed within 14 days calendar days of the date of this report, or if a written appeal statement and argument are not filed within 21 calendar days of the date of this report, the Clerk of the Council shall place a proposed ordinance which implements the Examiner's recommended action on the agenda of the next available Council meeting. At that meeting, the Council may adopt the Examiner's recommendation, may defer action, may refer the matter to a Council committee, or may remand to the Examiner for further hearing or further consideration.

Action of the Council Final. The action of the Council on a recommendation of the Examiner shall be final and conclusive unless within 21 days from the date of the action an aggrieved party or person applies for a writ of certiorari from the Superior Court in and for the County of King, State of Washington, for the purpose of review of the action taken.

MINUTES OF THE FEBRUARY 16, 2011, PUBLIC HEARING ON DEPARTMENT OF TRANSPORTATION, ROAD SERVICES DIVISION FILE NO. V-2655.

Peter T. Donahue was the Hearing Examiner in this matter. Participating in the hearing were Nicole Keller and Kelly Whiting, representing the Department; Mark Mason representing the Petitioner/Appellant, and Douwe Wielenga.

The following exhibits were entered into the record:
Exhibit No. 1 Report to the Hearing Examiner for the February 16, 2011 hearing, with 19 attachments.

Exhibit No. 2	Letter from Clerk of the Council to KC Department of Transportation (KCDOT), transmitting petition, dated June 10, 2010 to Harold Taniguchi
Exhibit No. 3	Letter to Clerk of the King County Council from Mark Mason dated June 8, 2010
Exhibit No. 4	Petition for Vacation of a County Road including legal descriptions of petitioners' properties
Exhibit No. 5	Bylaws of Finn Hill Meadows Association
Exhibit No. 6	Copy of filing fee: check no. 3012, in the amount of $100.00
Exhibit No. 7	Receipt no. 943 for filing fee
Exhibit No. 8	Vicinity map of vacation area; Thomas Brothers Page 506, B-6
Exhibit No. 9	King County Resolution No. 4384 establishing Juanita Point Road – County Road Survey No. 30-26-5-2, records of King County, Washington
Exhibit No. 10	King County Order of Establishment for Juanita Point Road – County Road Survey No. 30-26-5-2, dated October 13, 1931 records of King County, Washington
Exhibit No. 11	King Count y Establishment Map for Juanita Point Road – County Road Survey No. 30-26-5-2, records of King County, Washington
Exhibit No. 12	Map depicting vacation area
Exhibit No. 13	Letter dated July 20, 2010 to the petitioners notifying them that the RSD has received their petition and describing the vacation process
Exhibit No. 14	Letter dated September 29, 2010 serving as a notice of denial to the petitioners notifying them of DOT's recommendation to deny the petition
Exhibit No. 15	Transmittal letter dated October 6, 2010 to the Council providing the recommendation of KCDOT and the county road engineer
Exhibit No. 16	Memo dated October 26, 2010 to the Department of Transportation from the Clerk of the Council received October 27, 2010 notifying DOT of the petitioner's appeal of the vacation denial
Exhibit No. 17	Written letter of appeal dated October 26, 2010 from the petitioner identifying reasons for appealing the denial
Exhibit No. 18	Copy of the appeal fee – check #3038 from the petitioners
Exhibit No. 19	Receipt #954 from the King County Council for the appeal fee dated October 26, 2010
Exhibit No. 20	Title only ordinance transmittal letter dated December 20, 2010 from the King County Executive to Councilmember Bob Ferguson
Exhibit No. 21	Title only ordinance 2011-0011
Exhibit No. 22	Fiscal Note
Exhibit No. 23	Affidavit of Posting for the hearing with the notice of hearing
Exhibit No. 24	Affidavit of Publication for the date of the hearing
Exhibit No. 25	Email from Timothy Ord with attached letter from Alma Clark dated February 8, 2011
Exhibit No. 26	Email from Timothy Ord with attached letter from Paul Wu dated February 10, 2011
Exhibit No. 27	Email from Timothy Ord with attached letter from Amy P. Rostad dated February 9, 2011
Exhibit No. 28	Email from Timothy Ord dated February 22, 2011 with attached slides of property
Exhibit No. 29	Email from Timothy Ord dated February 13, 2011
Exhibit No. 30	Email from Nicole Keller dated February 14, 2011
Exhibit No. 31	Email from Timothy Ord with attached letter from Douwe Wielenga dated February 13, 2011
Exhibit No. 32	Email from Timothy Ord with article from the Kirkland Reporter dated January 14, 2011; email string from Rob Jammerman/Timothy Ord dated October 25, 2010
Exhibit No. 33	Email from Timothy Ord regarding Donlin road vacation of portion of 88th Avenue NE dated February 28, 2011

PTD:gao
V-2655 RPT