

**FINDINGS AND CONCLUSIONS AND RECOMMENDATIONS
OF HEARING EXAMINER REGARDING LID 6
CITY OF PACIFIC, WASHINGTON**

I. INTRODUCTION

Pursuant to notice, a hearing was held on May 30, 2019, at the Pacific City Hall in Pacific, Washington, for the purpose of considering protests to the final assessments for LID 6. Wayne Tanaka was the Hearing Examiner, pursuant to appointment by the City Council in Resolution 2019-581. The City was represented by Charlotte Archer and Kinnon Williams. An audio/video recording of the hearing was made. A complete list of exhibits is attached to this report as Exhibit A.

II. FINDINGS OF FACT

A. GENERAL FINDINGS.

1. LID 6 was formed by the Pacific City Council on August 22, 2011 by passage of Ordinance 1806. The LID was created to construct improvements to 136th Avenue East and Valentine Avenue SE (the Project).¹ The Project is a joint undertaking between the Cities of Sumner and Pacific although each city formed its own separate LID. This hearing pertains only to the assessments levied against properties in Pacific.
2. The Project included improvements to the Valentine Avenue/136th Avenue corridor from 24th Street East to 16th Street East.² Improvements include the construction of a three-lane road, bike lanes, sidewalks, street lighting and a traffic signal at 136th Avenue and 24th Street East. The preexisting waterline was upsized to accommodate future development and improvements were made to the storm drainage system. The Project construction began in July 2014. The Project was accepted as substantially complete on June 20, 2017.
3. Total Project costs were \$14,226,783.11 for Pacific. Approximately \$6,270,052 is to be paid by the owners of property specially benefited in Pacific.³
4. The Hearing Examiner took a short tour around the City and LID area to view the properties just prior to the Sumner hearing on April 8.

¹ Exhibit 1, pages 1-3. Exhibits may be examined at the City Clerk's office.

² The road is named Valentine Avenue in Pacific and 136th in Sumner.

³ Exhibit 1, page 6

5. At the start of the hearing, the Hearing Examiner explained his role and the procedures that would be followed at the public hearing. All who intended to testify were sworn.
6. The City presented certain preliminary testimony from Mr. James Morgan, Public Works Manager and Mr. Robert Macaulay, the appraiser. The City also submitted Exhibits 1 through 2. The City's testimony and exhibits provided the background for the LID, explained the financing and costs, described the general condition of the area both before and after the project and explained how the costs of the Project were allocated. Mr. Macaulay provided an explanation of his methodology and, in general, how he arrived at the recommended special benefits and assessments. While certain costs were shared, and Sumner was responsible for project management after 2012 through an interlocal agreement⁴, each LID was a separate entity.⁵
7. There were 4 written protests filed with the Clerk prior to the hearing and one filed at the hearing. The Hearing Examiner has reviewed each written protest, plus his handwritten notes. The hearing was opened at 9 am and was concluded at 11:50.

B. FINDINGS AS TO SPECIFIC PROPERTIES.⁶

1. Chuck Flowers, Parcels 070. A written protest was filed regarding Parcel 070 only⁷, but no testimony was offered. After the hearing concluded, the Hearing Examiner was advised that Mr. Flowers submitted a letter, dated May 26 that was received in the Clerk's office after the hearing had concluded. This letter provides a copy of the easement referenced in the written protest and goes on to make an objection for the other parcels owned by Mr. Flowers. These are Parcels 066-070. The Hearing Examiner has decided to admit this letter as Exhibit 5. Regarding Parcel 070, Mr. Flowers argues that because it is burdened by a gas utility easement, he is limited in what can be constructed on that lot. As to the other parcels, Mr. Flowers argues that the boundaries of the LID should have included other properties that would benefit from the improvements. The owner offers no appraisal evidence. In rebuttal, Mr. Macaulay testified that he used a larger parcel analysis since all the parcels are adjacent, owned by the same individual and are being put to a common use. He estimated FMV⁸ in the "with" and "without" condition to arrive at special benefits on the larger parcel and then apportioned the special benefit to the separate parcels to comply with the law.

⁴ Exhibit 1, page 3-4.

⁵ At the Sumner LID hearing Sumner witnesses stressed that the City of Sumner and the City of Pacific had each formed separate LID's. The Hearing Examiner takes notice of this testimony which is reflected in his written report.

⁶ The findings are not meant to summarize every aspect of the testimony, only that portion that the Hearing Examiner believes is relevant.

⁷ Exhibit 1, Number 1 under Tab labeled Owner Protests

⁸ Fair Market Value

2. Hratch Tavitian, Parcel 147. A written protest was filed⁹, but no testimony or other evidence was offered. The written protest argues that the appraisers estimate of FMV is overstated and that the improvements would not benefit the current use of a single-family home. The owner does not offer appraisal evidence.

3. Pacific Southern, LLC, Parcels 035 and 059. In addition to the written protest¹⁰, the property owner, Mr. Scarsella testified. The protest letter dated April 5 appears to be the same as was submitted at the Sumner LID hearing held on April 8 and is related to 6 parcels in the City of Sumner. Just prior to the hearing a second protest letter related to parcels in the City of Pacific was submitted.¹¹ The property owner argues that he and other owners were not given a meaningful opportunity to protest the increased costs of the Project. In 2011 at the formation stage, the Project was estimated to cost \$10.89 million with public funding estimated at \$7.24 million, leaving \$3.65 million for the property owners. Now, Project costs have risen to \$14.226 million, public funding at \$7.956 million, leaving \$6.270 million for the property owners. The ratio public/private financing has gone from 66.5%/33.5% at the formation stage to 56%/44% at the final assessment roll stage.

The owner next argues that the increased costs did not benefit the property owners citing the \$1.250 million settlement with the Project contractor and increased costs of utility relocation.

As to Parcel 035, Mr. Scarsella that approximately 16,000 square feet of the property is burdened by a wetland and wetland setback. The property is approximately 200,000 square feet. He had a wetland analysis submitted to the City in approximately 2005 when he obtained a grade and fill permit. He testified that he cannot develop this area of the property. Mr. Macaulay indicated that he was not provided with information on the extent of the wetlands and therefore did not factor this into his appraisal.

In rebuttal, the City explained that they tried to get as much public funding as possible, but the City was unable to come up with substantial additional funds. As to the cost increases, the City explains that over the 6 years it took to construct the LID, costs were increasing and could not be avoided. Mr. Morgan testified as to the efforts made to keep the property owners advised of the progress of the LID and the increased costs and that property owners always had the right and opportunity to speak to the Council about their concerns.

4. Petro Pacific Associates, Parcel 136. Mr. Aaron Reding testified on behalf of the lessee, Petro Pacific Associates (the Lessee). The Lessee runs a cardlock fueling facility on the property. Mr. Reding testified that the lease is "long term" and runs to about 2032. Analysis of the lease amendment executed May 23, 2012 provides for an extension of the lease to December 31, 2022, with a conditional

⁹ Exhibit 1, Number 2 under Tab labeled Owner Protests

¹⁰ Exhibit 1, Number 3 under Tab labeled Owner Protests. This letter is dated April 5, 2019.

¹¹ This protest, dated May 24 and received at 8 am on May 30 is considered Exhibit 6

right of lessee to extend for another 10 years.¹² No evidence has been provided that Lessee has exercised this right. Mr. Reding indicated the Lessee has no intentions of further developing the property at this time. No evidence was presented as to the intentions of the Lessor. An appraisal dated October 12, 2017 was submitted. It was performed by Matt Minarck an MAI appraiser for the Lessee. The interest appraised was of the leased fee estate, which is defined as the lessor's interest which includes the right to receive rent for the lease period plus the reversionary rights when the lease expires.¹³ The appraisal value of the property was \$1.1 million. Mr. Minarck did not perform a "with" and "without" appraisal as done by Mr. Macaulay.

Mr. Macaulay estimated the "without" land value to be \$1.087 million and the "with" land value to be \$1.32 million. He estimated the improvements, which belong to the Lessee, but which revert to the Landlord at lease termination¹⁴, were valued by Macaulay at \$170,000.¹⁵

5. William Gill, Night Train LLC, Parcels 148, 149 and 150. Mr. Gill testified on behalf of the owner, Night Train, LLC. The three parcels are owned by the same entity, are contiguous and are put to a common use, namely a landscaping business. Mr. Gill had questions about the cost increases associated with the LID as well as management of the Project. He also requested more time to respond. City staff explained the reasons for the cost increases and denied mismanagement of the Project. The Hearing Examiner had explained that all evidence must be submitted at this hearing and that once the hearing was closed, no further evidence would be allowed.

III. CONCLUSIONS

A. GENERAL CONCLUSIONS.

1. Any conclusion deemed to be a finding shall be so considered.
2. Special benefits are measurable increases in the value of real property in excess of any enhancement to the general area. It is measured as the difference between the market value of the property without the LID Project and the market value with the LID Project assumed completed at the same date.
3. Initially, the City is favored with certain presumptions: that the improvements are a benefit to the property within the LID, the assessment is no greater than the benefit, the assessment is equal or ratable to the assessments upon other properties similarly situated, and the assessment is fair.¹⁶ The property owner has the burden of producing evidence to rebut these presumptions. If the property owner presents

¹² The original lease and several amendments are attached to Mr. Minarck's appraisal referenced below.

¹³ Minarck appraisal page 2, found under Tab 4, Owner protests, Exhibit 1.

¹⁴ January 1, 1998 commercial lease, paragraph 8, attached to Minarck's appraisal.

¹⁵ Exhibit 1-1, chart following page 8. Macaulay's appraisal was as of February 22, 2019.

¹⁶ In Re Indian Trail Trunk Sewer, 35 Wash. App. 840 (1983).

sufficient evidence to rebut the presumptions (generally through appraisal testimony or other evidence of property value with and without the Project improvements), the City has the ultimate burden of showing special benefits.¹⁷

4. Mr. Macaulay's qualifications and experience are set forth in his study.¹⁸ No evidence was presented to challenge his qualifications. The Hearing Examiner concludes that Mr. Macaulay and his associates qualify as experts in the areas testified.
5. The special benefit analysis performed by the City more fairly reflects the special benefits to the properties within the LID other than the zone and termini or other method.¹⁹
6. The City Council has delegated certain limited authority to the Hearing Examiner for this hearing. As provided in 3.12.035 PMC, the Hearing Examiner is authorized to conduct the final assessment roll hearing and to make certain recommendations to the City Council. The City Council may correct, revise, lower, change or modify the roll or any part thereof, or set aside the roll in order for the assessments to be made de novo, or that the City Council adopt or correct the roll or take other action on the roll as appropriate, including confirmation of the roll without change.
7. The Hearing Examiner does not believe he has the authority to rule on the validity of the creation of the LID, any alleged failure to reopen the LID formation process, any alleged failure of the City to comply with non-statutory notice requirements or on constitutional issues.

B. CONCLUSIONS AS TO SPECIFIC PROPERTIES.

1. Charles Flowers. Mr. Macaulay correctly applied the larger parcel analysis to the five parcels owned by Mr. Flowers and therefore did not consider the easement as applying only to the one parcel. In Macaulay's opinion the easement would not prevent or hinder redevelopment of the property to its highest and best use. The owner is entitled to opine on the FMV of his property but offers no other evidence that the assessments are incorrect. The property owner has failed to overcome the presumptions in favor of the City and therefore the protest should be denied.
2. Hratch Tavitian. The property owner questions the validity of the appraisal but offers no evidence of error. The property owner has failed to overcome the presumptions in favor of the City and therefore the protest should be denied.
3. Pacific Southern, LLC. The property owner raises many of the same objections as his prior protest in the Sumner LID hearing held April 8. Here is the Hearing Examiner's response to the owner's objections raised at that time which is incorporated herein. *The main objection is to the increased costs and increased*

¹⁷ *Bellevue Plaza v. Bellevue*, 121 Wn.2d 397 (1993).

¹⁸ Exhibit 1-1, beginning at page 69.

¹⁹ Testimony of Macaulay at Sumner LID hearing and reflected in Hearing Examiner's report.

percentage borne by the property owners. The owner argues that he did not have a meaningful opportunity to protest the LID since the preliminary assessments were substantially lower than the final, again due to an increase in costs and the lack of grant money that was anticipated at the time of LID formation. There is no statutory provision that requires a City to hold a new formation hearing upon a certain increase in estimated assessments. The Hearing Examiner is not aware of any court case that sets up a bright line or even a set of criteria that would require a new formation hearing if assessments will increase from the preliminary roll. The North Bend case (unpublished and thus not to be cited to the courts) involved a substantial change in the scope of the project (from a vacuum sewer to a much more expensive gravity sewer). Here the scope of the project did not change although costs did increase and anticipated public funding did not materialize. The property owner states that he would not have purchased 3 of the 6 parcels he now owns if he had known of the final assessments. While there is no dispute on this point, reliance on a preliminary assessment is not grounds to support an assertion that the City “deceived” the property owners. The City has explained that there is no overlap between the assessment and other fees and charges imposed by the City. The property owner argues that the market value established by the Pierce County Assessor are substantially less than the Macaulay appraisal. However, the property owner does not provide information on when the County Assessor made his appraisal and the assumptions about the then uncompleted LID project.

Finally, the owner argues that the Macaulay appraisal did not consider the wetlands on Parcel 035 and that a reduction of \$20,160 is warranted. The Hearing Examiner concludes that this adjustment is justified. Other than as set forth above, the protest should be denied.

4. Petro Pacific Associates. While the Lessee did not submit a “with” and “without” appraisal, the Lessee did submit an appraisal of market value, albeit of the leased fee interest. The estimates of land value by the two appraisers is within the “margin of error”, with Macaulay later analysis having more weight in the Hearing Examiner’s opinion. Contrary to the testimony of Mr. Reding, the lease term is set to expire in 3 years and may only be extended another 10 years on certain conditions that may or may not occur.²⁰ In addition, Mr. Minarck considers the existing use the highest and best use and the possible extended lease term a “relatively short time frame.”²¹ Mr. Minarck does not offer any opinion of special benefits. The City has carried its burden of proof regarding the special benefits for this property.
5. Night Train LLC. Mr. Macaulay correctly used the larger parcel analysis to estimate special benefits. No appraisal or other evidence of error was presented. The owner has failed to overcome the presumptions and therefore the protest should be denied

²⁰ May 23rd 2012 lease amendment, page 1, attached to Minarck appraisal.

²¹ Minarck appraisal, pages 25-26, attached to protest letter 4 under Owner Protests tab of Exhibit 1

IV. RECOMMENDATIONS

Based on the Findings and Conclusions set forth above, the Hearing Examiner makes the following recommendations:

1. Other than as set forth below, the Hearing Examiner recommends DENIAL of all other protests.
2. Pacific Southern, the assessment on Parcel 035 should be reduced by \$20,160.

V. APPEAL

Pursuant to Section 3.12.035(C) PMC, any person who shall have timely filed objections to their assessments may appeal the recommendations of the Hearing Examiner regarding his/her property to the City Council by filing written notice of such appeal with the City Clerk no later than 14 calendar days after the date the Hearing Examiner's recommendation report is filed with the City Clerk.

DATED this 3rd day of June 2019

HEARING EXAMINER


Wayne D. Tanaka

Date of Filing with the City Clerk: 6/3/19

EXHIBIT A
ON FILE WITH CITY CLERK
LID 6 - EXHIBITS

May 30, 2019

1. City's Staff Report together with Exhibits 1 through 30 and Owner Protest 1-4
2. City's PowerPoint Presentation Slides
3. Macaulay's 2009 Special Benefit Study, which is considered Exhibit 1-31 to the Staff Report.
4. Night Train LLC protest submitted at the hearing and considered protest 5.
5. Letter and attachments sent by Charles Flowers and received by the City on May 30 after closure of the hearing.
6. Protest of Pacific Southern LLC dated May 24 and submitted just prior to start of hearing.