

OFFICE OF THE HEARING EXAMINER, CITY OF CAPE CORAL

HEARING EXAMINER RECOMMENDATION

VAC HEX Recommendation 9-2024

Rendered September 17, 2024

DCD CASE VAC 24-000003

**APPLICATION FOR:** Vacation of Street Rights-of-Way and Multiple Platted and Drainage and Utility Easements

**PROPERTY OWNER:** Lee Memorial Health System <sup>1</sup>

**PROJECT NAME:** Lee Health-Veterans Plaza Plat Vacation

**APPLICANT:** Johnson Engineering, Inc.

**APPLICANT'S REPRESENTATIVE:** Dana Hume, P.E., Director of Land Development

**LOCATION OF PROPERTY:** Multiple sites, as set forth in detail in Exhibit "1" <sup>2</sup>

**ZONING DISTRICT:** Commercial (C)

**FUTURE LAND USE CLASSIFICATION:** Commercial/Professional

**HEARING DATE:** September 17, 2024

**SUMMARY OF REQUEST:**

The Applicant requests the following vacations:

1. ±102,007 square feet/2.34 acres of street right-of-way (ROW) along with all underlying easements associated with portions of SW 3<sup>rd</sup> Avenue, SW 3<sup>rd</sup> Place, SW 4<sup>th</sup> Avenue, SW 4<sup>th</sup> Place, and SW 25<sup>th</sup> Street; and
2. All platted easements associated with those sites as identified in Exhibit "1"; and
3. All drainage and utility easements associated with portions of the previously vacated Malabar Canal and part of the previously vacated Defender Canal.

**SUMMARY OF HEARING EXAMINER RECOMMENDATION**

The Hearing Examiner recommends that City Council **approve** the application for the requested vacations, subject to the conditions set forth below.

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<sup>1</sup> David Kistel, Vice President and chief Facilities Executive, was listed as the Owner's Representative via authorization letter of April 23, 2024. Johnson Engineering Representative Debi Pendlebury provided additional documents.

<sup>2</sup> Applicant's Representative testified that the subject are includes 36 single family parcels for a total of approximately 9.5 acres, plus easements underlying the Malabar Canal and part of the Defender Canal, with the relevant portions of said canals having been previously vacated via Resolution 55-04.

I. **NOTICE OF HEARING**

Based on the testimony of City Staff Mike Struve at the Hearing, the Hearing Examiner finds that proper notice of this hearing was provided, in accordance with the requirements of Article 3 (Development Review), Chapter 1, § 3.1.10 (“Public Hearing Scheduling and Notice Requirements”) of the City of Cape Coral Land Development Code (“LDC”).

In addition, the Hearing Examiner finds that proper notice of this hearing was provided in accordance with the applicable specific notice requirements for vacations, as set forth in Article 3 (Development Review), Chapter 4 (Specific Review Procedures – Quasi-Judicial Permits and Approvals), LDC §3.4.5.C.1-2.

II. **PARTICIPANTS IN HEARING**

CITY STAFF: Mike Struve, AICP, LEED Green Associate, Planning Team Coordinator <sup>3</sup>

CITY CLERK’S OFFICE: Sherri Rhine and Stacey Pasek, Recording Clerks

APPLICANT’S REPRESENTATIVE: Dana Hume, P.E.

TESTIMONY BY MEMBERS OF PUBLIC: None

TELEPHONE/EMAIL CORRESPONDENCE FROM PUBLIC: Staff testified that he received three (3) telephone calls prior to the Hearing regarding this Application. All the callers were looking for information and no opinion was expressed either way regarding the Application.

III. **EXHIBITS**

APPLICANT’S/CITY STAFF’S EXHIBITS: previously submitted.

IV. **REVIEW OF LDC REQUIREMENTS**

Authority. The Hearing Examiner has the authority to recommend approval or denial of an application for a vacation of easements, pursuant to Article 2 (Decision Making and Administrative Bodies), Chapter 2 (Hearing Examiner), Land Development Code (LDC) §2.2.3B.4:

A Hearing Examiner shall hear and decide, or, when applicable, make recommendations, on the following....  
.... 4. Applications for vacations”.

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<sup>3</sup> Based upon his C.V. on record with the Clerk’s Office and his prior testimony regarding matters similar to those under consideration in this Hearing, the Hearing Examiner found Mr. Struve to be an expert regarding land planning issues.

Entirety of the Record/Standard of Review of Evidence. The Hearing Examiner's recommendation is based on whether the application meets all applicable requirements of the Comprehensive Plan, the City Code of Ordinances, and the LDC, based upon the entirety of the record before the Hearing Examiner.

The decision or recommendation of the Hearing Examiner must be based upon competent substantial evidence in the record. LDC Article 3 (Development Review), Chapter 1 (Development Review Procedures), Section 3.1.11 (Public Hearing Procedures), §3.1.11E

Presumption of Relevance and Materiality. Matters related to an Application's consistency with the Comprehensive Plan, the City Code of Ordinances, or the LDC will be presumed to be relevant and material. LDC Article 3 (Development Review), Chapter 1 (Development Review Procedures), Section 3.1.11 (Public Hearing Procedures), §3.1.11F.4.

Hearsay Evidence. Hearsay evidence may be used for the purpose of supplementing or explaining other evidence, but it shall not be sufficient by itself to support a finding unless it would be admissible over objection in court. LDC Article 3 (Development Review), Chapter 1 (Development Review Procedures), Section 3.1.11 (Public Hearing Procedures), §3.1.11F.5.

LDC Standards. The Hearing Examiner reviewed the application in accordance with the standards for Vacations of Plats, Easements and Rights-of-way as set forth in LDC § 3.4.5 and specifically set forth in LDC § 3.4.5.A (General) and LDC § 3.4.5.B (Standards and Criteria) in addition to the general standards set forth elsewhere in the LDC and the City Comprehensive Plan.

## **TESTIMONY AT HEARING**

### Incorporation of Staff Report by Staff

Staff incorporated his Staff Report into his presentation by reference.

### Hearing Examiner's Recommended Findings of Fact.

All documentary and oral testimony referenced below is accepted by the Hearing Examiner as recommended findings of fact, except as specifically noted otherwise. The Hearing Examiner recommends that the City Council accept such testimony as findings of fact to substantiate its decision regarding this Application.

## **V. DISCUSSION**

### Site, Historical Information and Surrounding Area

The subject property consists of 36 parcels totaling 9.53 acres within the proposed vacation area, with the exact site information set forth on Exhibit "1."

It is located adjacent to and north of Veteran's Memorial Parkway, approximately 0.4 miles west of Santa Barbara Boulevard. Staff testified that most of the sites are relatively small, averaging approximately 11,534 square feet in size.

All of the subject sites have a Commercial/Professional Future Land Use Classification (FLUC) and Commercial (C) zoning and are vacant, except for one site located at 2500 SW 4<sup>th</sup> Place, which contains a single-family dwelling. The Applicant's Representative testified that the utilities for this residential property have been cut off and the City Police are using it as a practice facility. The Owner expects to demolish the structure in the future.

Surrounding sites to the north, south, and west have a Single Family FLUC and Single-Family Residential (R-1) zoning. Sites to the east have a Commercial/Professional FLUC and C zoning and include a Lowe's Home Improvement Store and a commercial shopping center anchored by Target.

North of the project area, Lee Memorial Health System owns an additional 14 sites totaling 3.44 acres. All sites have a Single Family FLUC and R-1 zoning with frontage on SW 24<sup>th</sup> Street. Staff testified that these sites are not included in this Application but rather this is provided for informational purposes only.

#### Zoning History

Staff testified regarding the subject property's zoning history as follows:

Block 1874: Lots 18-30 had the FLUC amended from Single Family and Multi Family to Commercial/Professional by Ordinance 57-04. The zoning for these lots was amended from Single-Family Residential (R-1B) to Pedestrian Commercial (C-1) by Ordinance 5-05.

Block 1875: Lots 18-27 had the FLUC amended from Single Family and Multi Family to Commercial/Professional by Ordinance 57-04. The zoning for these lots was amended from R-1B to C-1 by Ordinance 5-05.

Block 1876: Lots 22-23 had the FLUC amended from Single Family and Multi Family to Commercial/Professional by Ordinance 57-04. The zoning for these lots was amended from R-1B to C-1 by Ordinance 5-05.

Lots 24-25 had the FLUC amended from Single Family and Multi Family to Single Family by Ordinance 28-06, and to Commercial/Professional by Ordinance 37-10. The zoning was amended from R-1B to C-1 by Ordinance 16-11.

Block 1877: Lots 1-22 had the FLUC amended from Single Family and Multi Family to Commercial/Professional by Ordinance 57-04. The zoning for these lots was amended from R-1B to C-1 by Ordinance 5-05.

Lot 23 had the FLUC amended from Single Family and Multi Family to Single Family by Ordinance 28-06 and to Commercial/Professional by

Ordinance 37-10. The zoning was amended from R-1B to C-1 by Ordinance 16-11.

Reason for Application

The Applicant's Representative testified that "[the] vacation request is vital to facilitate the future medical complex proposed for the subject property."

Analysis of Request in Application Pursuant to LDC Section 3.4.5.A

1. Owner **has** color of title (LDC §3.4.5.A.1.a)  
The necessary documents are part of the Hearing record.
2. **Letters of Approval** from Lee County Electric Cooperative, Inc. (LCEC, dated January 12, 2024 and subsequently re-issued on June 27, 2024 due to six-month expiration of the original approval) and Comcast (dated December 18, 2023) were supplied by Applicant's Representative. Applicant's Representative also submitted an email interchange with Lumen regarding approval conditions (emails from March 7, 2024 through April 29, 2024), that were acceptable to staff as being in compliance with this requirement (LDC §3.4.5.A.1.b-e)

The conditions set forth in the above approvals are addressed in the proposed conditions *infra*.

3. A copy of a recent boundary survey or survey sketch of the property prepared by a registered surveyor, **has been provided**, showing the area requested to be vacated and providing a complete legal description(s). It shows all pavement and all utility and drainage facilities in said area, including water, sewer, cable lines, utility poles, swales, ditches, manholes and catch basins. Separate drawings and legal descriptions are required for each vacation area when right-of-way and easement configurations differ. (LDC §3.4.5.A.2)

The required documents **have been provided**.

Analysis of Request in Application Pursuant to LDC Section 3.4.5.B

1. Are the plat, easements, or rights-of-way required by the City for any future transportation, access, water management or public utility purpose? (LDC §3.4.5.B.1)

The Applicant's Representative testified that all rights-of-way requested to be vacated are surrounded by sites owned by Lee Memorial Health System.

Staff testified that such streets would not be needed for access to any sites owned by parties other than Lee Memorial, as the current street

network, assuming the development comes to fruition as envisioned by the Owner, would no longer be needed for access to platted residential lots under multiple ownership as envisioned when the subdivision plat was recorded in the 1960s.

The Applicant's Representative testified that at this time, streets existing within the project area would be an impediment to the owner's plans to develop this site as a medical center. If the requested vacation is approved by City Council, the Applicant's Representative testified that new streets more appropriate to the needs of the future medical center would be designed and constructed consistent with the current owner's vision for redeveloping this area.

Easements underlying the subject street rights-of-way are also requested to be vacated. As testified to by both the Applicant's Representative and staff, both Comcast and LCEC lack facilities in these easements.

However, as set forth in the Application documents, the City's facilities in these easements include a lift station in the right-of-way south of SW 25<sup>th</sup> Street, water and sewer lines, and drainage pipes. If City Council approves the requested vacations, City water and sewer lines would be capped, with remaining facilities being removed by the owner at the owner's sole expense.

In addition, six-foot-wide platted easements within the project area are requested to be vacated as unnecessary restrictions to development. The owner has agreed to provide six-foot-wide easements around the north and west sides of the site, and a 10-foot-wide easement around the east and south sides of the project area. Staff testified that combined, these two easements would be 29,639 square feet in size and together would provide a continuous perimeter easement around the project area.

Finally, easements underlying the previously vacated Malabar and Defender Canals are requested to be eliminated. The Applicant's Representative has testified that easements of six- or 10-foot-wide (depending upon location) would be provided by the owner, and described in the preceding paragraph, would provide a continuous perimeter easement along the eastern periphery of these vacated waterways.

Accordingly, the Hearing Examiner recommends a finding that this standard **has been met** by Applicant.

2. *Are any required easements necessary to accommodate the vacation of any plat, easement or right-of-way? (LDC §3.4.5.B.2)*

The Applicant's Representative testified that the easements referenced in Criterion One above, as well as drainage easements being coordinated with Lee County through its Department of Transportation to address run-off onto Veteran's Memorial Parkway, would accommodate any required easements resulting from the proposed vacation.

Accordingly, the Hearing Examiner recommends a finding that this standard **has been met** by Applicant.

3. *Are alternate routes required or available which do not cause adverse impacts to surrounding areas? (LDC §3.4.5.B.3)*

The Applicant's Representative testified that the project area would have frontage on SW 2<sup>nd</sup> Court and SW 25<sup>th</sup> Lane, and thereby provide direct access to the future development as currently contemplated. Staff testified that alternative routes would not be needed, under this circumstance.

Accordingly, the Hearing Examiner recommends a finding that this standard **has been met** by Applicant.

4. *Does the closure of a right-of-way negatively affect areas utilized for vehicles to turn around and exit an area? (LDC §3.4.5.B.4)*

The proposed vacation of SW 3<sup>rd</sup> Place will likely result in SW 25<sup>th</sup> Lane abruptly ending where this street intersects with SW 3<sup>rd</sup> Place.

Staff has addressed this probability by recommending a condition requiring the construction of a cul-de-sac or similar turn-around improvement on the owner's site directly north of where SW 25<sup>th</sup> Lane would terminate at the intersection with the vacated SW 3<sup>rd</sup> Place right-of-way.

The proposed improvement would provide fire trucks and other first responders with space for turning around should an emergency occur near the western end of SW 25<sup>th</sup> Lane.

Accordingly, the Hearing Examiner recommends a finding that this standard, if conditioned as proposed by staff, **has been met** by Applicant.

5. *Have local utility providers given consent to the vacation of the plat, easement(s), or right(s)-of-way? Note: The local utility providers may require additional easements or relocation of existing utilities facilities to complete the vacation (LDC §3.4.5.B.5)*

Applicant's compliance with this requirement is addressed elsewhere.

Accordingly, the Hearing Examiner recommends a finding that this standard **has been met** by Applicant.

*Analysis of Request in Application Pursuant to LDC Section 3.4.5.C*

1. *Is there any reasonably foreseeable public use for the vacated area? (LDC §3.4.5.C.3)*

For the reasons set forth above, the Hearing Examiner recommends a finding that there is **no reasonably foreseeable public use** for the vacated area.

2. *Is the City retaining easement(s) for utilities or drainage in and upon the vacated area? LDC §3.4.5.C.3)*

This is addressed in the conditions set forth below.

*Consistency with the Comprehensive Plan*

*Future Land Use Element, Table 1 in Policy 1.15*

The site's Commercial (C) Zoning is consistent with the Commercial/Professional Future Land Use Classification of this site.

*Policy 3.6.*

*The City may consider the vacation of rights-of-way to facilitate land assembly and the development of a unified, contiguous commercial project.*

Staff testified that Council's approval of these vacations would unify over 30 sites lacking cohesiveness due to the presence of several platted streets separating these sites from one another. Therefore, the proposed vacation would facilitate the assembly of property under common ownership with the result of increasing the area and depth of the consolidated site.

Staff further testified that, in turn, this single, expanded site would provide the owner with greater flexibility in designing a medical center for this property.

Eliminating a number of easements internal to the site facilitates the development of a unified commercial project since such easements would

become superfluous upon the provision of a continuous perimeter easement around the project area. Staff testified that such perimeter easement would suffice for future utility installation and maintenance purposes. Accordingly, staff testified that the application is consistent with this Policy of the Comprehensive Plan.

It is recommended that City Council find that granting the requested vacation, as conditioned below, is **consistent** with the City Comprehensive Plan, Land Development Code, and all other applicable law.

VI. **RECOMMENDED CONDITIONS OF APPROVAL**

City staff is recommending the conditions of approval as set forth below. The Applicant's Representative testified that Applicant accepts these proposed conditions.

The Hearing Examiner **recommends** that these conditions of approval be adopted as part of the City Council's approval of Applicant's request:

1. The rights-of-way and all underlying easements associated with SW 3<sup>rd</sup> Avenue, SW 3<sup>rd</sup> Place, SW 4<sup>th</sup> Avenue, SW 4<sup>th</sup> Place, and SW 25<sup>th</sup> Street shall be vacated within the area that is described by the sketch and accompanying legal description prepared by Johnson Engineering entitled "*Sketch and Description Lee Health Veterans Plaza Proposed Plat Vacation*," dated February 2, 2024, that appears in Exhibit "A."
2. All platted easements and easements underlying the previously vacated portions of the Defender and Malabar Canals shall be vacated as described by the sketch and accompanying legal description prepared by Johnson Engineering entitled "*Sketch and Description Lee Health Veterans Plaza Proposed Plat Vacation*," dated February 2, 2024, that appears in Exhibit "A."
3. The owner shall provide the City with easements sufficient for maintaining a minimum six-foot-wide public utility and drainage easement coincident with the perimeter of the project area as shown in Exhibit "B" and Exhibit "C", that are entitled "*Sketch and Description Lee Health Veterans Plaza 6-Foot-Wide Public Utility Easement*" and "*Sketch and Description Lee Health Veterans Plaza 10-Foot-Wide Public Utility Easement*," respectively. Both sketches and accompanying legal descriptions were prepared by Johnson Engineering and are dated February 2, 2024.
4. The owner shall reimburse Lumen for the relocation of the company's existing utilities located within the vacation area prior to the City approving a site development plan for the site.
5. To prevent fire and emergency management vehicles from encountering a dead-end street when reaching the terminus of SW 25<sup>th</sup> Lane following the

approval of the vacation, the owner shall provide a temporary paved turn-around area on the owner's site immediately north of the intersection of SW 25<sup>th</sup> Lane and the vacated segment of SW 3<sup>rd</sup> Place. This improvement shall be sufficient to accommodate a fire truck with a minimum length of 48 feet, 4 inches, and shall be constructed by the developer and inspected by the City as part of the construction plans associated with SDPL24-000019.

6. In order to ensure that this vacation complies with the City's duty to hold certain platted lands in trust for the public interest, the owner agrees to make improvements in the SW 2<sup>nd</sup> Court right-of-way between SW 25<sup>th</sup> Lane and SW 24<sup>th</sup> Street. These improvements shall include widening this street and installing a sidewalk on the west side of the street. A grass strip shall be provided between the curb and the sidewalk that shall contain canopy trees. The canopy trees within this area shall be installed every 30 feet and shall have a minimum height of 12 feet and a caliper of three inches as measured at a height of 12 inches above the ground at the time of planting. The installation and maintenance of these trees shall conform to those standards appearing in the Land Development Code. Additionally, the developer, at developer's discretion, may provide a gathering place for the public on developer's site that may include one or more of the following: a pavilion, benches, picnic tables, or similar improvements.

The developer shall keep and maintain an itemized list of the cost of all improvements constructed under this provision and make such records available for City review. In the event the total cost of said improvements is less than \$250,000, the developer shall make a contribution of any documented shortage to the General Tree Fund. All improvements as well as any contribution to the General Tree Fund shall be completed by the developer prior to the first certificate of completion for the site approved by the City.

7. The owner shall reimburse the City of Cape Coral the cost of recording this resolution with the Office of the Lee County Clerk of Court.
8. The City shall record this resolution with the Office of the Lee County Clerk of Court following the receipt of the recording fees from the owner of the property.

## VII. **EXHIBITS**

The following Exhibits are attached hereto and hereby incorporated by reference:

1. Exhibit 1: List of individual sites owned by Owner in the Vacation Area
2. Exhibit "A": As described and set forth in proposed Conditions 1 and 2 above.
3. Exhibit "B" As described and set forth in proposed Condition 3 above.
4. Exhibit "C": As described and set forth in proposed Condition 3 above.

VAC HEX RECOMMENDATION 9-2024  
Lee Memorial Health System Vacation  
DCD Case # VAC24-000003  
September 17, 2024

The Hearing Examiner herewith **RECOMMENDS APPROVAL** of the Vacation request filed by Applicant, **WITH THE CONDITIONS** set forth above.

This Recommendation takes effect on the date specified below.

**HEARING EXAMINER OF THE CITY OF CAPE CORAL, FLORIDA**

  
\_\_\_\_\_  
ANNE DALTON, ESQUIRE

September 17, 2024  
DATE

ATTEST:

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CITY CLERK