

March 6, 2015

MEMORANDUM

TO: Tree Project Oversight Committee
FROM: Tree Project staff
RE: Discussion Topic Descriptions

At the Oversight Committee meeting held on February 9, 2015, the Committee was provided with a list of eight Tree Code implementation issues to consider, attached. These issues were identified by staff during the course of implementation. This memorandum provides background information, analysis and a recommendation on two of those issues. We look forward to discussing these issues during our March 9, 2015, meeting. The issues are:

- Issue #5 regarding the definition of building and attached structure
- Issue #7 regarding the waiver policy found in 11.40.060 C.1. and C.2

Issue #5: Definitions of “buildings” and “attached structures.”

Problem statement. The Tree Code allows for the removal of any tree on private property that is within 10 feet of a building or attached structure (Section 11.40.050 A.2.e and Tables 40-1 and 40-3). This allowance was included in the code to recognize that tree roots can compromise building foundations often causing property damage. In these situations the code allows for trees to be removed, regardless of tree size or condition as long as one tree is planted to compensate for the loss. Property owners are using this provision to remove trees in a way that is inconsistent with the intent. Attached graphics show examples of situations where property owners have placed structural elements within 10 feet of a tree so that they are granted permission to remove the tree.

Applicable code. Section 11.40.050 regulates the removal and replacement of private trees in non development situations. It includes Table 40-3, shown below, and includes Section 11.40.050 A.2.e which says that trees within 10 feet of a building or attached structures may be removed.

- 2.** Removal. Trees shall be replaced as indicated in Table 40-3. The City Forester will grant a permit to remove a tree if the City Forester determines that the proposed removal is exempt or allowed by Title 33, Planning and Zoning; and meets at least one of the following:
 - a.** Dead trees. The tree is dead or has been damaged beyond repair or where not enough live tissue, green leaves, limbs, roots or branches exist to sustain life.

- b.** Dying trees. The tree is in an advanced state of decline because it is diseased, infested by insects, or rotting and cannot be saved by reasonable treatment or pruning, or must be removed to prevent spread of the infestation or disease to other trees or is imminently likely to become a danger or die. The City Forester may apply a condition of approval to the permit to require specific disposal methods for infected wood.
- c.** Dangerous trees. The City Forester may evaluate the removal request by first evaluating practicable alternatives to the removal. If the City Forester finds either that the cost of the alternatives significantly exceeds the value of the tree, or that such alternatives will not substantially alleviate the dangerous condition, the City Forester will grant the permit.
- d.** Nuisance species trees. The tree is listed on the "Nuisance Plant List".
- e.** Trees within 10 feet of a building or attached structure. The trunk of the tree at its base is located completely or partially within 10 horizontal feet of the wall of a building or attached structure.
- f.** Healthy trees. Up to 4 healthy trees may be removed per site per calendar year if each tree meets the following:

 - (1)** Each tree is less than 20 inches in diameter;
 - (2)** None of the trees are Heritage Trees; and
 - (3)** None of the trees are required to be preserved by a condition of a land use review, provision of this Title or the Zoning Code, or as part of a required stormwater facility;

**Table 40-3
Summary of Permit Requirements for Private Trees**

Activity	Permit Type	Tree Replacement[1] (See Section 11.40.060)	Public Notice / Public May Appeal
No permit is required for: <ul style="list-style-type: none"> - planting trees - pruning trees outside of the environmental protection (p), environmental conservation (c), or Pleasant Valley Natural Resource (v) overlay zones; - removal of trees smaller than the sizes regulated by this chapter (see 11.40.020 B.); or <ul style="list-style-type: none"> - other activities that are exempt from the requirements of this chapter (see 11.40.030) 			
Pruning native trees in c, p, or v overlay zones	A	n/a	No
Removal of any tree that is: <ul style="list-style-type: none"> - dead, dying, or dangerous - a nuisance species identified in the Portland Plant List - located within 10 feet of building or attached structure 	A	tree for tree	No
Removing up to 4 healthy non-nuisance species trees per site per year as follows:			
- Smaller than 20" diameter	A	tree for tree	No
- 20" diameter and larger	B	inch for inch	Yes[2]
Removing more than 4 healthy non-nuisance species trees per site per year as follows:			
12" diameter and larger	B	inch for inch	Yes

[1] "Tree for Tree" means one tree is required to be planted for each tree removed, "inch for inch" means the City Forester may require up to an equivalent number of inches be planted for the total diameter inches of the tree being removed.

[2] No public notice or opportunity for public appeal is required for removal of one healthy tree ≥ 20" diameter per lot per year in any residential zone.

There is no definition of "building" or "attached structure" in Title 11. According to Section 11.10.030 B.1, words used in Title 11 "have their dictionary meaning unless they are defined in Chapter 11.80."

Definitions. The following are found in Title 33 (Portland Zoning Code):

Building. A structure that has a roof and is enclosed on at least 50 percent of the area of its sides.

Attached Structure. Any structure that is attached to another structure by a common wall, by a roof, or by structural connections that allow pedestrian access to both

structures. For example, decks or stairways are attached structures when they are connected to another structure. A garage may be attached to another structure by sharing a wall or by a breezeway. Structures connected by an "I" beam or similar connections are not considered attached.

These definitions are found in Title 24, Buildings:

Building. A building is a structure used or intended for sheltering any use or occupancy.

Structure. A structure is that which is built or constructed, an edifice or building of any kind, or any piece or work artificially built up or composed of parts joined together in some definite manner.

The following is from Webster's Dictionary:

Building. Usually a roofed and walled structure built for permanent use (as for a dwelling).

Discussion. There is little commentary that sheds light on this regulation, but it remains clear that the Council recognized that if a tree is growing within 10 feet of a building or attached structure, its future is bleak, and further, that the tree could adversely impact the integrity of the building or attached structure. The definitions found in Title 33, while also adopted by the City Council, do not provide necessary guidance because the reasons for regulating structures in that code are different than Title 11. Building and structures are regulated for reasons of location relative to property lines, other buildings, massing, etc., in Title 33, while Title 11, while not regulating buildings or structures, alludes them as they relate locationally to trees, recognizing that trees can be impacted by buildings and structures and vice versa.

The strategy of placing a building or structures within 10 feet of a tree in order to obtain permission for tree removal is not consistent with the intent of the regulations. The dictionary definition meanwhile, provides one of the elements missing in the Title 33 definition to address this concern, that is, permanency. It is fair to assume that Council intended to provide special dispensation to trees within 10 feet of "permanent" or non-movable or non-portable buildings and attached structures, but not to temporary or other types of building or attached structures such as those intended to house animals or are intended for storage. These may include dog houses, chicken coops, storage sheds such as those pre-manufactured units that can be purchased at home improvement centers.

While Title 33 will continue to regulate all structures, permanent and non-permanent, the administration of Title 11 regulations that allow for the removal of trees within 10 feet of any structure, should be limited to permanent structures. Implicit is the notion that the tree, in its current state (that is, a tree that is regulated by Title 11 by its size and species) existed prior to the building or attached structure.

Staff reviewed similar definitions in the codes of other jurisdictions and they resembled the Title 33 definitions and therefore provided little guidance to this discussion. Definitions contained in Title 24, Buildings, similarly did not contribute to

this discussion. Finally, the code appears clear that it did not intend to allow removal of all trees within 10 feet of other types of development, such as fences, flag poles, utility vaults, etc.

Staff recommendation.

1. Accept definition (to be developed and discussed with Committee) of “building” and “attached structure” to include the following elements:
 - Permanency;
 - Not movable;
 - Includes examples of “development” which do not apply; and
 - Is developed after vetting against similar definitions found in other regulations.
2. Identify specific strategy on how to adopt the proposal on a permanent basis (i.e., code guide, administrative rule, code amendment).

Issue #7: Waiver policy for tree replacement

Problem statement. Section 11.40.060 provides guidance on tree replacement requirements for permits in non-development situations. Staff has received a number of inquiries about how the waivers will be applied, particularly Section 11.40.060 C.2.

Applicable code. Section 11.40.060 identifies tree replacement requirements but also allows for a waiver provision in C.1 and 2.

Waivers. The City Forester may waive or reduce the replacement requirement when the City Forester determines:

1. The abutting right of way and site already meet the tree density standards of Chapter 11.50; or
2. That the full mitigation required by this Chapter would impose an unreasonable burden on the applicant.

In addition, the purpose statement for this chapter (non development) states,

11.40.010 Purpose.

The purpose of this Chapter is to manage, conserve and enhance the urban forest when development activity is neither proposed nor occurring. The provisions of this chapter encourage preservation of high quality trees, large trees, and groves; regulate pruning and planting on City-owned and managed sites and streets to protect public safety and public infrastructure; and ensure replacement for trees that are removed. The permitting procedures that are required to implement these provisions are intended to not only enforce maintenance, removal and preservation requirements but also to educate property owners about the intrinsic urban benefits of trees as well as the principles of tree care.

Discussion. The City Council took care in drafting purpose statements for Title 11 overall and specifically for this chapter. Council adopted a two-prong strategy: adopting prescriptive standards while also providing the City Forester authority to

deviate from the standards when facts dictated. The latter recognizes: (a) tree regulations must be administered so that the tree canopy is preserved and enhanced by the propagation of healthy trees; and (b) other factors may require consideration. For these reasons, it is particularly important to provide clarification on what variables the City Forester will consider when practicing discretion.

Throughout Title 11, Council provides legislative guidance on how the regulations should be applied. The themes that must be considered are:

- The City Forester may practice discretion when considering the larger policy objectives;
- The City Forester is expected to identify those variables that are typically considered when evaluating specific situations by arboricultural professionals;
- The City Forester is expected to balance sometimes conflicting policies; and
- The City Forester must consider other variables as well, such as the burden it creates on the applicant.

An arborist, when evaluating a situation, will typically consider a number of variables, including, but not limited to, the following:

- Adequacy of space for long term tree health, including proximity to other trees, utilities and existing development;
- Appropriateness of the species in the area;
- Impact(s) on the health of existing trees; and
- The existence of tree groves in the immediate area.

An arborist can also evaluate existing fact patterns and proposal against other city policies, such as traffic visibility. Section 11.40.060 C.2, in addition, includes the term “unreasonable burden.” This type of terminology has been traditionally construed by Urban Forestry to connote a financial burden. Urban Forestry currently follows a policy which takes into consideration the annual income of applicants. To summarize, it allows for fee waivers or reductions when the applicant’s household income is less than 50 percent of the area median income (as established by US HUD). See attachment.

To conclude, whether an “unreasonable burden” exists will be made, based upon:

1. Typical variables taken into consideration when conducting an arboricultural evaluation, including, but not limited to,
 - Adequacy of space for long term tree health, including proximity to other trees, utilities and existing development;
 - Appropriateness of the species in the area;

- Impact(s) on the health of existing trees; and
 - The existence of tree groves in the immediate area.
2. The household income of the applicant if it is less than 50 percent of the area median income.

Staff recommendation. Adopt criteria, above.