## **MEMORANDUM**

TO: Tree Project Oversight Advisory Committee

FROM: Tree Project staff

RE: Tree credits, City Forester discretion

Two of the issues that the Committee sought additional information and discussion were the use of tree credits that were used in identifying mitigation requirements and City Forester discretion. While separate subjects, they are related to the extent that the use of tree credits was something that the City Forester found to be within her regulatory authority under Title 11. This memorandum will explore both of these subjects in greater detail.

**Prescriptive standards, discretionary criteria and City Forester discretion**. Title 11 applies prescriptive standards (clear and objective standards) in certain places, discretionary criteria in others and it also recognizes the need to develop administrative rules to address certain situations. It further allows appeals of decisions, limiting some to the applicant only, while allowing outside parties to appeal other decisions.

Administrative rules are one means of establishing decision-making standards. They are agency regulations that are intended to elaborate on the requirements of law or policy. Administrative rules are utilized by BDS to further clarify the intent of code and are also used to create standards to comply with City codes. A previous document explained when they are used and the procedural requirements for adopting permanent administrative rules.

The commentary for Title 11 discusses the need for future administrative rules in at least two situations:

- Establishment of "what qualifies as an undue burden and other guidance for determining appropriate mitigation ratios."
- Determining which violation remedies are appropriate for which situations.

The Interim Rule, which you are familiar with, was developed in order to address a discretionary standard contained in the code, specifically, "up to inch for inch". This Rule is in the review process and it is through that process that it will be determined, (a) whether the standards set by the Rule were those intended by the code; (b) if so, whether the proposed standard is appropriate; of (c) whether an approach allowing more detailed use of City Forester discretion to allow for differences in individual cases is the most consistent with City Council intent.

A constant theme in Title 11 is City Forester discretion. It may not be appropriate to simply apply prescriptive standards when it prudent to consider commonly accepted arboricultural principles to a specific fact pattern. City Forester discretion is also required when for example, the code states that the City Forester may determine the number of new trees that must be planted as mitigation or may accept payment in lieu of planting, or may reduce or waive the replacement requirement (11.40.060). The commentary indicates the need for administrative

rules in this situation (p. 78). The construction of the code is clear in these instances. In this section alone, the verb "may" is used no fewer than four times.

The City Council correctly recognized that the regulation of trees is a unique endeavor which must take a number of variables into consideration: science, risk management, urban development, legal issues, property rights, public health and safety, including traffic safety, environmental and conservation policies and urban infrastructure issues. The City Forester has the unenviable task of balancing all of these issues when evaluating fact-specific situations, in many instances. The regulation of trees within these various contexts demands flexibility and the use of discretion when balancing potentially conflicting objectives.

From a practical point of view, it is not always useful to allow a significant amount of discretion to any one individual who is assessing a situation for a number of reasons. These include the need to ensure public safety, allow development, including infill development and urban infrastructure construction and the need for consistent and timely decision making. It is well understood that consistency and transparency are highly valued in public policy and construction, both from the perspective of the applicant as well as other stakeholders, such as community members. Given their familiarity with the regulatory process and the need for an efficient system, staff recognized the need for further clarification through the administrative rule adoption process in some situations. The commentary and the construction of Section 11.40.060 provides clear signals that mitigation planting is an area that warranted further elaboration. As you know, the Interim Rule adoption process has commenced.

To summarize, it is probably not possible to draw a bright line where prescriptive standards should be replaced by discretionary decision-making from an arboriculture point of view. Discretion is a double-edge sword. Many a time, the same applicant who wanted to apply discretion to his/her situation (to his/her benefit) would want to deny the same discretion to a situation that he/she opposed. Because of experience in administering regulations and learning from field experience, however, staff are able to identify situations where the greater certainty that prescriptive standards provide should prevail.

**Tree credits**. In short, "tree credits" is a concept when evaluating tree replacement, trees of larger caliper or a desirable species is given greater credit in mitigation value than trees of smaller caliper or less-desirable species. Previous to the adoption of the Interim Rule for mitigation planting, Urban Forestry used a prescriptive schedule that spelled out the tree credits. Tree credits provided an incentive for property owners and public property project managers to choose more-desirable tree species for their mitigation plantings. "More – desirable" species are native, evergreen, disease–resistant, and larger form tree species; these provide the greatest amount of public service value per tree. If they chose more-desirable species, the total inches of mitigation trees to be planted was reduced by Urban Forestry according to a consistent standard. Tree credits therefore can be an integral part of the mitigation policy conversation.