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CITY OF  
**PORTLAND, OREGON**  
HEARINGS OFFICE

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1900 S.W. 4<sup>th</sup> Avenue, Room 3100  
Portland, Oregon 97201  
Telephone: (503) 823-7307  
FAX: (503) 823-4347  
TDD (503) 823-6868

**DECISION OF THE HEARINGS OFFICER**

**I. GENERAL INFORMATION**

**File No.:** LU 07-148292 TV (HO 4080032)

**Applicant:** Gary Andruss  
Buena Vista Custom Homes  
311 B Avenue, Suite B  
Lake Oswego, OR 97034

**Owner:** Robert J and Dru E Rosenthal  
4312 SW Semler Way  
Portland, OR 97221

**Hearings Officer:** Gregory J. Frank

**Bureau of Development Services (BDS) Staff Representative:** Stephanie Beckman

**Site Address:** 4312 SW SEMLER WAY

**Legal Description:** LOT 5 INC UND INT TRACT A, SEMLER PARK

**Tax Account No.:** R753300250

**State ID No.:** 1S1E07CC 01505

**Quarter Section:** 3423

**Neighborhood:** Bridlemile

**District Coalition:** Southwest Neighborhoods

**Zoning:** R10c – Low Density Single Dwelling Residential (R10), with Environmental Conservation (c) Overlay Zone over a portion of the site.

**Land Use Review:** Type III, TV – Tree Violation

**BDS Staff Recommendation to Hearings Officer:** Approval with conditions

**Public Hearing:** The hearing was opened at 1:29 p.m. on October 13, 2008, in the 3<sup>rd</sup> floor hearing room, 1900 SW 4<sup>th</sup> Avenue, Portland, OR, and was closed at 2:39 p.m. The record was closed at that time.

**Testified at the Hearing:**

Stephanie Beckman, BDS Staff Representative

Rob Rosenthal, 4312 SW Semler Way, Portland, OR 97221

Greg Schifsky, 4131 SW Lee St., Portland, OR 97221, representing Bridlemile NA

**Proposal:**

This application was submitted to resolve a tree violation that occurred during construction activities on the lot (Code Compliance case 05-168687 CC). The original subdivision approval (S 16-90, 90-026636) required a number of trees to be preserved on the lot. Two of those trees, 21-inch and 26-inch Cedars, were removed. The owner proposes a mitigation plan that includes tree planting and preservation of additional trees on site.

**Approval Criteria:**

In order to be approved, this proposal must comply with the approval criteria of Title 33, Portland Zoning Code. The applicable approval criteria are:

- 33.853.040.C, Corrections to Violations (Tree Review Approval Criteria)

## II. ANALYSIS

**Site and Vicinity:** The site is Lot 5 in the Semler Park subdivision, located at the end of the SW Semler Way which is a public street. The lot is developed with a relatively new single-family house constructed in 2005. Behind the house (to the north and east), there is a drainageway that runs through the site within Environmental Conservation zoning and a Drainage Reserve Easement to the City of Portland. Surrounding the house, the site is primarily landscaped with ornamental landscaping including trees, shrubs and lawn installed with the home. There are also a number of existing trees that were retained on the lot, primarily located further from the house east of the drainageway and along the northern property line.

The surrounding area consists of other similar single-dwelling homes and an open space tract associated with the adjacent Clarion subdivision located directly north of the site. The adjacent open space tract is heavily wooded.

**Zoning:** The site is zoned R10c.

The R10 designation is one of the City's single-dwelling zones, which is intended to preserve land for housing and to promote housing opportunities for individual households. The zone implements the comprehensive plan policies and designations for single-dwelling housing.

The Environmental Conservation “c” overlay zone is intended to conserve important environmental features and resources while still allowing compatible development. New development and exterior modifications to existing development must meet environmental standards or are subject to environmental review. The trees that were removed were not within the Environmental zone. Standards for vegetation planted within the Environmental zone will apply to the mitigation proposal.

**Land Use History:** City records indicate the prior land use review:

- S 16-90 – Approval of a 10-lot subdivision that created the lot that is the site of this land use review. Condition H of that approval required a tree inventory and preservation plan to be submitted and approved with the final plat. The final plat approval decision issued September 15, 2003 included an approved tree preservation as Exhibit C.3. See Exhibit G.2 of this decision for more information. A copy of the approved tree preservation plan for the subdivision is also attached to this report as Exhibit C.2.

**Agency Review:** A “Request for Response” was mailed **August 13, 2008**. The following Bureaus have responded with no issues or concerns:

- Bureau of Transportation Engineering
- Water Bureau
- Fire Bureau
- Bureau of Parks-Forestry Division

The Bureau of Environmental Services responded with the comment regarding the proposed planting within the public storm drainage reserve easement, indicating that this is allowed however, BES reserves the right to remove the trees if in the future this area is required to be used by the City. Please see Exhibit E.1 for additional details. Given the City’s general policy to retain open drainageways and to retain and plant trees and other native vegetation, this issue noted by BES does not present a significant issue for this review. If the mitigation trees are required to be removed in the future, they would need to be replaced to remain in conformance with this decision.

The Site Development Section of BDS responded that a Zoning Permit should be required to inspect the installation of any required mitigation plantings. An issue involving grading on the larger subdivision site was also identified. Please see Exhibit E.2 for additional details.

**Neighborhood Review:** A Notice of Proposal in Your Neighborhood was mailed on **September 23, 2008**. No written responses were received by BDS staff, prior to issuance of the BDS Staff Recommendation (Exhibit H.2), from either the Neighborhood Association or notified property owners in response to the proposal. Mr. Greg Schifsky, a representative of the Bridlemile Neighborhood Association, appeared at the hearing and indicated that the Neighborhood Association wanted fines assessed for the tree violations. Mr. Schifsky stated, at the public hearing, that he was not testifying in opposition to the proposed mitigation plan in this case.

The Hearings Officer notes that the decision in this case is based solely upon the application meeting, or not, the relevant approval criteria. In this case the relevant approval criteria are found in Portland City Code section 33.853.040. The Hearings Officer is not granted authority to impose fines or civil penalties under 33.853.040. Therefore, no fines or civil penalties are assessed in this case.

## **ZONING CODE APPROVAL CRITERIA**

### **TREE VIOLATION**

#### **33.853.040 Approval Criteria**

**C. Corrections to Violations.** For corrections to violations of tree protection and tree preservation regulations of this Title, or violations of tree preservation plans or the approved method of tree preservation or mitigation, the applicant must show the review body that all of the following approval criteria are met:

#### **1. Mitigation Plan;**

- a. The applicant's mitigation plan meets the purpose of the regulation that was violated. Where the violation is of a tree preservation plan or the approved method of tree preservation or mitigation, the mitigation plan meets the purpose of the regulation that required the preservation plan; and
- b. The mitigation plan includes replacement of trees cut, or the preservation and protection of additional trees on the site not originally proposed for preservation. If replacement of trees is proposed, the plan must at a minimum meet the requirements of Table 853-2. If additional trees on the site are proposed for preservation and protection, the total diameter of additional trees preserved must exceed the total diameter of trees cut.

<b>Table 853-2 Tree Replacement for Violations</b>	
<b>Size of tree removed (inches in diameter)</b>	<b>Number of Trees to be Planted</b>
6 to 12	3 trees
13 to 18	5 trees
19 to 24	7 trees
25 to 30	10 trees
over 30	15 trees

**Findings:** As discussed above, the tree preservation plan was required as a condition of approval of a 1990 subdivision. At that time there were no regulations that required tree preservation when a property was divided. The Hearings Officer's decision for the 1990 case indicated that the applicant proposed tree preservation, and that a final inventory and preservation should be provided and approved with the final plat. From the discussion, the reason for the plan at the time of final plat is that a number of revisions to tentative plan were anticipated and the tentative tree plan lacked specifics. With the lack of a specific regulation or description of the purpose of the requirement for a tree preservation plan, it is assumed that the purpose was to implement the plan as presented by the developer, which included preservation of significant tree cover on the site.

On Lot 5, seven trees were proposed to be permanently preserved on the tree preservation plan approved with the final plat. Two of those trees, a 21-inch and a 26-inch Cedar located along the western property line, were removed without prior approval, most likely during construction of the home on the lot. Another tree, a 10-inch Cedar, was removed by the current property with approval from the BDS Land Use Services Division based on documentation that the tree was dead (most likely by natural causes). The owner planted a tree elsewhere on the site to replace the dead tree. In addition, a number of other trees have been planted on the site since the home was constructed.

The applicant proposes a mitigation plan that includes the following:

- Preservation of two larger trees not previously shown on the tree preservation plan (both 10-inch Ash trees);
- Preservation of three existing newly planted trees; and
- Planting of seven additional trees on the property. Four of these trees are native Dogwood trees to be planted within the Environmental zone near the drainageway.

The proposed mitigation plan will result in substantial tree cover on the lot as the newly planted trees mature, particularly in the Environmental Conservation zone area. This will contribute to the purpose of the tree preservation requirement to maintain tree cover on the site and the related environmental and aesthetic benefits of tree retention.

In addition, the proposal complies with Table 853-2, which requires minimum mitigation in the form trees planted or other existing trees to be preserved. As discussed above, the applicant proposes a combination of the two options, which comply with the table as follows:

- Preservation of two 10-inch Ash trees is roughly equivalent to the preservation of the one 21-inch Cedar (the Ash trees are #5 and 6 on the site plan);
- Mitigation for the 26-inch Cedar requires ten trees to be planted: This will include three existing newly planted trees (#1, 2 and 4) and seven additional trees (#3 and 7-12).

To ensure the trees are planted in a timely manner and within the appropriate planting season, they must be planted and have final inspection by March 31, 2009.

Mr. Schifsky, the Bridlemile Neighborhood Association representative, stated at the hearing, that he was not testifying in opposition to the proposed mitigation plan.

With the condition that the existing trees are preserved as proposed and that the additional trees are planted as described above, this criterion is met.

**2. Replacement trees must be planted as follows:**

- a. On the site where the violation occurred;
- b. If it is not possible to plant the trees on the site where the violation occurred, then the trees must be planted on other property owned by the applicant within the City of Portland; this includes property owned by a Homeowners' Association to which the applicant belongs;
- c. If it is not possible to plant the trees on the site where the violation occurred, or on other property owned by the applicant within the City of Portland, then the trees must be planted in a City of Portland park, as approved by the Bureau of Parks and Recreation, or on a site approved by the Bureau of Environmental Services.

**Findings:** All of the replacement trees will be planted on the lot where the violation occurred. This criterion is met.

**3. Replacement trees must meet the requirements of Section 33.248.030, Plant Materials.**

**Findings:** All of the trees proposed to be planted are broadleaf trees. Section 33.248.030 requires that broadleaf trees be 1.5 inches in diameter and fully branched at the time of planting. The required size must be specified on the zoning permit plans. With this condition, this criterion is met.

**Development Standards**

Unless specifically required in the approval criteria listed above, this proposal does not have to meet the development standards in order to be approved during this review process. The plans submitted for a building or zoning permit must demonstrate that all development standards of Title 33 can be met, or have received an Adjustment or Modification via a land use review prior to the approval of a building or zoning permit.

**III. CONCLUSIONS**

This proposal consists of mitigation measures for violating an approved tree preservation plan for the Semler Park subdivision. Two Cedar trees that were required to be preserved on Lot 5 were

removed. The applicant proposes a combination of preserving additional trees and planting new trees on the lot. The proposal will provide a significant presence of trees on the site as the trees mature and will adequately mitigate for the loss of the two Cedar trees and should be approved.

The request by the Bridlemile Neighborhood Association representative that the Hearings Officer impose fines assessed for the trees removed is denied; the relevant approval criteria (33.853.040) does not grant the Hearings Officer authority to assess fines.

#### IV. DECISION

**Approval** of a Tree Violation Review per Exhibit C.1 to correct a tree violation subject to the conditions listed below.

- A. The applicant must obtain and final a Zoning Permit by March 31, 2009 to plant seven (7) replacement trees on the site (Lot 5 of Semler Park) in substantial conformance with Exhibit C.1 and in compliance with the following:
  1. Trees must comply with the minimum requirements for planting in Section 33.248.030. Specifically, broadleaf trees must be 1.5 inches in diameter and fully branched and conifer trees must be fully branched and a minimum on 5 feet in height.
  2. Four (4) of the replacement trees shall be native species selected from the Portland Plant List and located within the Environmental zone at the rear of the lot. These trees must be planted using handheld equipment.
- B. Required tree preservation for the site (Lot 5 of Semler Park) includes the replacement trees listed in condition A, existing trees on the site proposed for preservation, and trees required for preservation on the original tree preservation plan for the subdivision (Trees #1-17), as depicted on Exhibit C.1.

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Gregory J. Frank, Hearings Officer

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Date

<b>Application Deemed Complete:</b>	January 14, 2008
<b>Report to Hearings Officer:</b>	October 3, 2008
<b>Decision Mailed:</b>	October 21, 2008
<b>Last Date to Appeal: 4:30 p.m.,</b>	November 4, 2008
<b>Effective Date (if no appeal):</b>	November 5, 2008

**Conditions of Approval.** This project may be subject to a number of specific conditions, listed above. Compliance with the applicable conditions of approval must be documented in all related permit applications. Plans and drawings submitted during the permitting process must illustrate how applicable conditions of approval are met. Any project elements that are specifically required by conditions of approval must be shown on the plans, and labeled as such.

These conditions of approval run with the land, unless modified by future land use reviews. As used in the conditions, the term “applicant” includes the applicant for this land use review, any person undertaking development pursuant to this land use review, the proprietor of the use or development approved by this land use review, and the current owner and future owners of the property subject to this land use review.

**Appeal of the decision.** ANY APPEAL OF THE HEARINGS OFFICER’S DECISION MUST BE FILED AT 1900 SW 4<sup>TH</sup> AVENUE, PORTLAND, OR 97201 (823-7526). Until 3:00 p.m., Monday through Friday, file the appeal at the Development Services Center on the first floor. Between 3:00 p.m. and 4:30 p.m., file the appeal at the Reception Desk on the 5th Floor. **An appeal fee of \$2,220 will be charged (one-half of the application fee for this case).** Information and assistance in filing an appeal can be obtained from the Bureau of Development Services at the Development Services Center.

**Who can appeal:** You may appeal the decision only if you wrote a letter which is received before the close of the record on hearing or if you testified at the hearing, or if you are the property owner or applicant. If you or anyone else appeals the decision of the Hearings Officer, only evidence previously presented to the Hearings Officer will be considered by the City Council.

**Appeal Fee Waivers:** Neighborhood associations recognized by the Office of Neighborhood Involvement may qualify for a waiver of the appeal fee provided that the association has standing to appeal. The appeal must contain the signature of the Chair person or other person authorized by the association, confirming the vote to appeal was done in accordance with the organization’s bylaws.

Neighborhood associations, who wish to qualify for a fee waiver, must complete the Type III Appeal Fee Waiver Request for Organizations Form and submit it prior to the appeal deadline. The Type III Appeal Fee Waiver Request for Organizations Form contains instructions on how to apply for a fee waiver, including the required vote to appeal.

BDS may also grant fee waivers to low income applicants appealing a land use decision on their primary residence that they own in whole or in part. In addition, an appeal fee may be waived for a low income individual if the individual resides within the required notification area for the review, and the individual has resided at that address for at least 60 days. Individuals requesting fee waivers must submit documentation certifying their annual gross income and household size (copies of tax returns or documentation of public assistance is acceptable). Fee waivers for low-income individuals must be approved prior to filing your appeal; please allow three working days for fee waiver approval.

**Recording the final decision.**

If this Land Use Review is approved the final decision must be recorded with the Multnomah County Recorder. A few days prior to the last day to appeal, the City will mail instructions to the applicant for recording the documents associated with their final land use decision.

- A building or zoning permit will be issued only after the final decision is recorded.

The applicant, builder, or a representative may record the final decision as follows:

- **By Mail:** Send the two recording sheets (sent in separate mailing) and the final Land Use Review decision with a check made payable to the Multnomah County Recorder to: Multnomah County Recorder, P.O. Box 5007, Portland OR 97208. The recording fee is identified on the recording sheet. Please include a self-addressed, stamped envelope.
- **In Person:** Bring the two recording sheets (sent in separate mailing) and the final Land Use Review decision with a check made payable to the Multnomah County Recorder to the County Recorder's office located at 501 SE Hawthorne Boulevard, #158, Portland OR 97214. The recording fee is identified on the recording sheet.

For further information on recording, please call the County Recorder at 503-988-3034. For further information on your recording documents please call the Bureau of Development Services Land Use Services Division at 503-823-0625.

**Expiration of this approval.** An approval expires three years from the date the final decision is rendered unless a building permit has been issued, or the approved activity has begun.

Where a site has received approval for multiple developments, and a building permit is not issued for all of the approved development within three years of the date of the final decision, a new land use review will be required before a permit will be issued for the remaining development, subject to the Zoning Code in effect at that time.

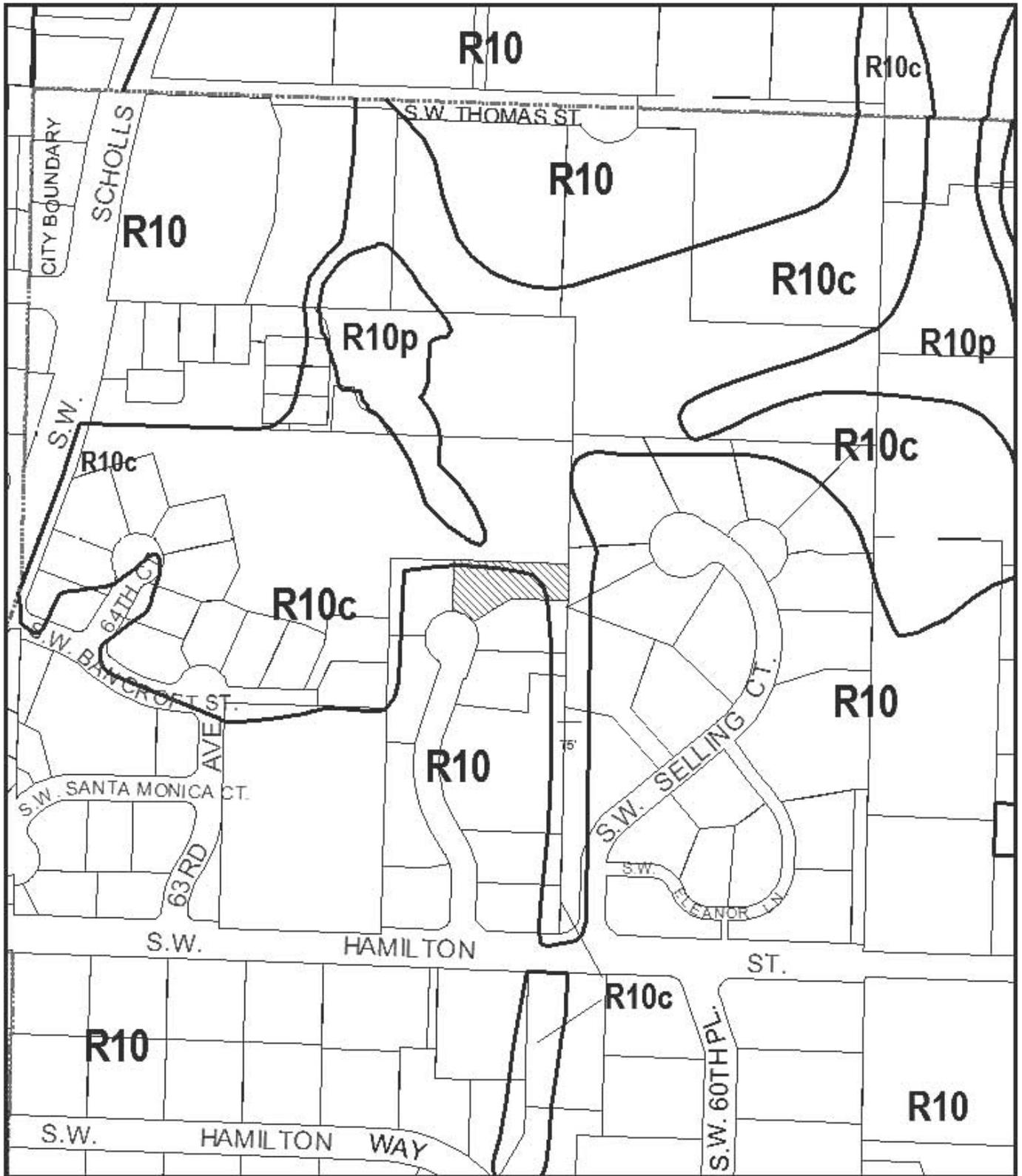
Zone Change and Comprehensive Plan Map Amendment approvals do not expire.

**Applying for your permits.** A building permit, occupancy permit, or development permit may be required before carrying out an approved project. At the time they apply for a permit, permittees must demonstrate compliance with:

- All conditions imposed herein;
- All applicable development standards, unless specifically exempted as part of this land use review;
- All requirements of the building code; and
- All provisions of the Municipal Code of the City of Portland, and all other applicable ordinances, provisions and regulations of the City.

**EXHIBITS**  
NOT ATTACHED UNLESS INDICATED

- A. Applicant's Statement
  - 1. Narrative
  - 2. Owner's proposal
  - 3. Revised owner's proposal
  - 4. 120-day extension
- B. Zoning Map (**attached**)
- C. Plans & Drawings
  - 1. Tree Mitigation and Preservation Plan and Description – 3 pages (**attached**)
  - 2. Original Tree Preservation Plan for the Semler Park Subdivision – reduced
  - 3. 11x17 copy of Original Tree Preservation Plan
- D. Notification information
  - 1. Request for response
  - 2. Posting letter sent to applicant
  - 3. Notice to be posted
  - 4. Applicant's statement certifying posting
  - 5. Mailing list
  - 6. Mailed notice
- E. Agency Responses
  - 1. Bureau of Environmental Services
  - 2. Site Development Review Section of Bureau of Development Services
  - 3. TRACS printout showing responses with "no concerns"
- F. Letters from interested parties (none)
- G. Other
  - 1. Original LUR Application
  - 2. Site History Research including copy of hearings officer decision and final plat decision
  - 3. Pre-application conference notes
  - 4. Incomplete letter
  - 5. Void warning letter
- H. Received in the Hearings Office
  - 1. Hearing notice - Beckman, Stephanie
  - 2. Staff report - Beckman, Stephanie
  - 3. PowerPoint presentation - Beckman, Stephanie
  - 4. 10/8/08 Letter - Schifsky, Greg (Submitted After Record Closed)
  - 5. Tree Benefits - Schifsky, Greg (Submitted After Record Closed)
  - 6. 10/14/08 letter to Gill Kelley – Schifsky, Greg (Submitted After Record Closed)



# ZONING

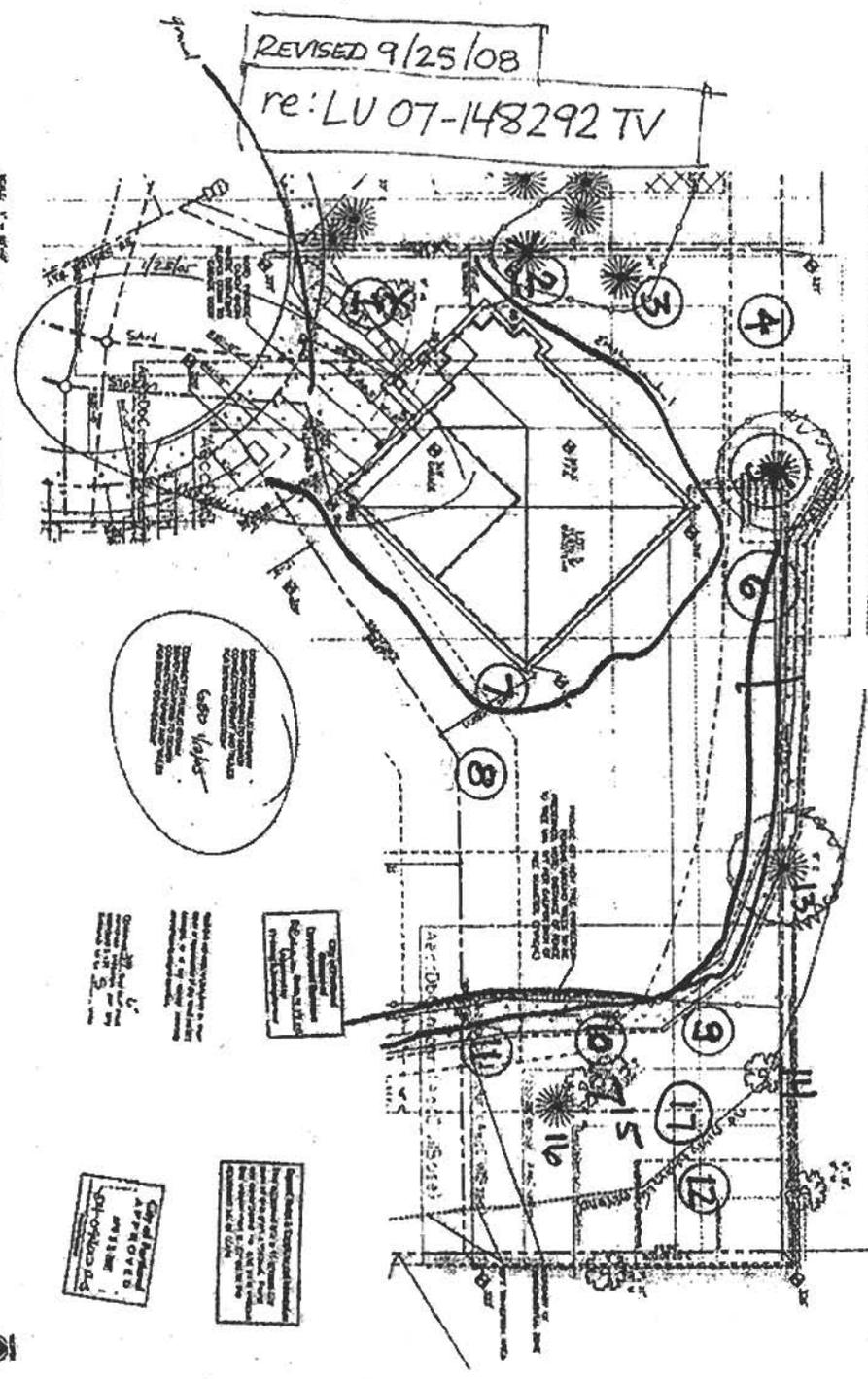
 Site



File No.	<u>LU 07-148292 TV</u>
1/4 Section	<u>3423</u>
Scale	<u>1 inch = 200 feet</u>
State_Id	<u>1S1E07CC 1505</u>
Exhibit	<u>B (Jul 24, 2007)</u>

#3 & 7-12 to be planted on site  
 Remainder are existing trees to be preserved

Tree Mitigation and Preservation Plan  
 Lot 5 Sewer Park  
 - see also attached list of trees.



**LEGEND**

--- Boundary & Street Location  
 --- Existing Utility  
 --- Existing Tree or Shrub in this Project Area  
 --- Existing Tree to be Removed  
 --- Existing Tree to be Preserved  
 --- Proposed Street Location  
 --- Proposed Utility Location

**LEGEND**

○ Tree to be Planted  
 ○ Existing Tree or Shrub in this Project Area  
 ○ Existing Tree to be Removed  
 ○ Existing Tree to be Preserved  
 ○ Other Notes

**LOT 3 OF SEWLER PARK SUBDIVISION**  
 N 24' 00" W 1/4 SEC 7, T11S, R11E, SW/4  
 2.11 AC SHELTER WAY, CITY OF  
 MULTNOMAH COUNTY, OREGON

**RECORDING INFORMATION**  
 This plan is a preliminary plan and is not to be used for recording or for any other purpose without the approval of the City of Multnomah County, Oregon.

1.1	BUENA VISTA HOMES PORTLAND, OREGON LOT 6 - SITE PLAN	SEWLER PARK SUBDIVISION BVH3212-R	Series	_____
			Option	_____
			Lot Number	_____
			Buyer's Name	_____

CASE NO. LU 07-148292 TV  
 EXHIBIT C.1 (1 of 3)

Land Use Review Case # LU 07-148292 TV  
MITIGATION PLAN for 4312 SW Semler Way  
REVISED September 24, 2008

Per Table 853-2, Zoning Code Section 33.853.040 and after consultation with BDS Senior Planner Stephanie Beckman, a total of 16 new trees are required to be planted. These will replace the two cedar trees cut in 2005 by the previous property owner, Buena Vista Custom Homes.

To satisfy the 16-tree requirement, five existing trees not currently on the Semler Park Tree Preservation Plan will be designated for protection. Two of these trees (both 10" ashes) will each be considered equivalent to 3 new trees. This means seven new trees must be planted.

All newly-planted trees will be a minimum of 1-1/2" in diameter and meet all other requirements as defined by Section 33.248.030. Only native species from the Portland Plant List will be planted within the designated environmental zone on the east end of the property.

Here are the species and locations of the five existing trees to be protected and the seven new trees to be planted: (For specific locations, please see corresponding number on enclosed Site Plan.)

- 1) Flowering Plum in front of house. (Existing tree)
- 2) Yoshino Cherry along western property line. (Existing tree)
- 3) Japanese Maple along western property line. (New)
- 4) Cyprus near NW corner of lot. (Existing tree)
- 5) Ash along northern property line. (Existing tree)
- 6) Ash between northern corner of house and creek. (Existing tree)
- 7) Japanese Maple along southern property line. (New)
- 8) Japanese Maple along southern property line. (New)
- 9) Dogwood 'Cornus nuttallii' just east of creek. (Native. New)
- 10) Dogwood 'Cornus nuttallii' just east of creek. (Native. New)
- 11) Dogwood 'Cornus nuttallii' just east of creek. (Native. New)
- 12) Dogwood 'Cornus nuttallii' on NE corner of lot. (Native. New)

over →

LU 07-148292 TV  
CASE NO. \_\_\_\_\_  
EXHIBIT C.1 (2 of 3)

NOTE 1: The lot is surrounded on three sides by large evergreen conifers, several abutting the property line. The planting of deciduous species will create a visual balance between the two types of trees.

NOTE 2: The size of the lot and density of existing trees will not allow for the planting of more large trees. For that reason, the trees in this proposal are on the smaller end of the size spectrum - a maximum mature height of 30-40' with a spread of 20-25'.

Trees required to be preserved on original tree preservation plan for subdivision:

- 13) 9" Cedar - northern property line
- 14) 12" Cherry - northern property line
- 15) Alder cluster (9" and 8") - east of drainageway
- 16) 20" Cedar - east of drainageway
- 17) Newly planted Cedar - east of drainageway (replaced 10" Cedar on northern property line)