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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  
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**DECISION OF THE HEARINGS OFFICER**

**I. GENERAL INFORMATION**

**File No.:** LU 07-148304 TV (HO 4080033)

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

**Owner:** Graham L. and Diane L. Colton  
4435 SW Semler Way  
Portland, OR 97221

**Hearings Officer:** Gregory J. Frank

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

**Site Address:** 4435 SW SEMLER WAY

**Legal Description:** LOT 9 INC UND INT TRACT A, SEMLER PARK

**Tax Account No.:** R753300450

**State ID No.:** 1S1E07CC 01509

**Quarter Section:** 3423

**Neighborhood:** Bridlemile

**District Neighborhood Coalition:** Southwest Neighborhoods Inc.

**Zoning:** R10 – Low Density Single Dwelling Residential

**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 PM 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 PM. The record was closed at that time.

**Testified at the Hearing:**

Stephanie Beckman, BDS Staff Representative

Graham Colton, 4435 SW Semler Way, Portland, OR 97221

Greg Schifsky, Bridlemile Neighborhood Association, 4131 SW Lee St., Portland, OR 97221

**Proposal:**

This application was submitted to resolve a tree violation that occurred during construction activities on the lot (Code Compliance case 05-168689 CC). The original subdivision approval (S 16-90, 90-026636) required trees to be preserved. Eight of the ten trees were removed. No mitigation proposal has been provided.

**Relevant 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 9 in the Semler Park subdivision, located at the corner of SW Harrison and SW Semler Way. The lot is developed with a relatively new single-family house constructed in 2005. Vegetation on the site consists primarily of landscaping installed with the home, including trees, shrubs and lawn. There are also some original trees that were preserved.

The surrounding area consists primarily of other similar single-dwelling homes.

**Zoning:** The site is zoned R10, which 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.

**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.

**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 a comment with suggested mitigation to remedy the violation. See Exhibit E.1.

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/satisfying, 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 decision for the 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 or near Lot 9, ten trees were proposed to be permanently preserved on the tree preservation plan approved with the final plat. Eight of those trees were removed during construction on the site. Three of the trees shown to be preserved on the plan are within or in very close proximity to areas shown as being graded during public street construction (12" Deodar Cedar located in the northeast corner, 10" and 8" Cedars located near the southeast corner). Based on the location and grading shown, including these trees in the preservation plan appears to be an error. In addition, a note on the approved plan indicates some flexibility to remove trees within close proximity of the street. Therefore, the removal of these trees are not considered a violation.

On a site visit, BDS staff inventoried existing trees on the site. BDS noted that two larger trees (both 13" Cedars) were not originally shown on the tree preservation plan that were retained in the northwest corner of the lot and eleven additional trees that had been planted on the lot.

The five trees removed in violation of the approved plan and proposed mitigation plantings to maintain a significant tree cover on the site comply with Table 853-2 as described below:

<b>Tree Removed</b>	<b>Mitigation</b>
13" Deodar Cedar	Preserve existing 13" Cedar
22" Douglas Fir	7 replacement trees
23" Cedar	7 replacement trees
14" Hawthorne	5 replacement trees
12" Cherry	Preserve existing 13" Cedar
<b>Total</b>	<b>19 replacement trees</b>

As noted above, eleven trees were previously planted on the site, therefore an additional eight mitigation trees are needed to comply with Table 853-2. The property owner proposes to plant eight trees on the site. Staff proposes that the trees be planted in substantial conformance with the locations shown on the attached site plan. In addition, the of the eight trees, at least two shall be conifer species and at least two shall be chosen from at least the medium size trees in the City's Tree and Landscaping Manual. This will help to ensure a mix of tree types and sizes are planted on the site.

In summary, on-site mitigation will include: 1) preservation of thirteen existing trees on the site, including two mature trees that were not originally proposed for preservation and eleven more recently planted trees; and 2) planting of eight additional trees. This will result in substantial presence of trees on the lot as the newly planted trees mature. 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 and comply with Table 853-2.

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.

The Hearings Officer finds that with the condition that the trees are planted and that the existing trees are preserved 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:** The property owner proposes to plant the replacement trees on the lot. Previously, a BDS staff recommendation was made for payment into the tree fund because the property owner was not agreeable to a requirement to plant trees on the site. After additional conversations, the property has identified locations where they would like to plant trees and have indicated that they will maintain the trees on the site. Based on the proposal to plant on-site, this criterion is met.

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

**Findings:** Section 33.248.030 requires that broadleaf trees be 1.5 inches in diameter and fully branched and conifer trees be fully branched at least 5 feet in height 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 review was submitted to resolve a violation of an approved tree preservation plan for the Semler Park subdivision. Five trees required to be preserved on Lot 9 were removed in violation of the plan. The recommended mitigation is for preservation of existing trees on the site, including two mature Cedar trees and eleven newly planted trees, and planting of eight additional trees on the lot. This mitigation plan will provide a significant presence of trees on the site and will adequately mitigate for the trees removed. With conditions for tree planting and long term preservation of the new tree plan, the violation review 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 the attached Mitigation Plan (Exhibit C.1a), 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 eight (8) replacement trees on the site (Lot 9 of Semler Park) in substantial conformance with Exhibit C.1a (attached plan) 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. At least two (2) of the replacement trees shall be conifer species and at least two (2) of the trees must selected from at least the Medium size category in the City's Tree and Landscaping Manual.
- B. Required tree preservation for the site (Lot 9 of Semler Park) includes the replacement trees listed in condition A and existing trees on the site proposed for preservation (Trees #1-21), as depicted on Exhibit C.1a (attached plan).

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Gregory J. Frank, Hearings Officer

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Date

<b>Application Determined Complete:</b>	January 14, 2008
<b>Report to Hearings Officer:</b>	October 3, 2008
<b>Decision Mailed:</b>	October 22, 2008
<b>Last Date to Appeal:</b> 4:30 p.m.,	November 5, 2008
<b>Effective Date (if no appeal):</b>	November 6, 2008 Decision may be recorded on this date.

**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.

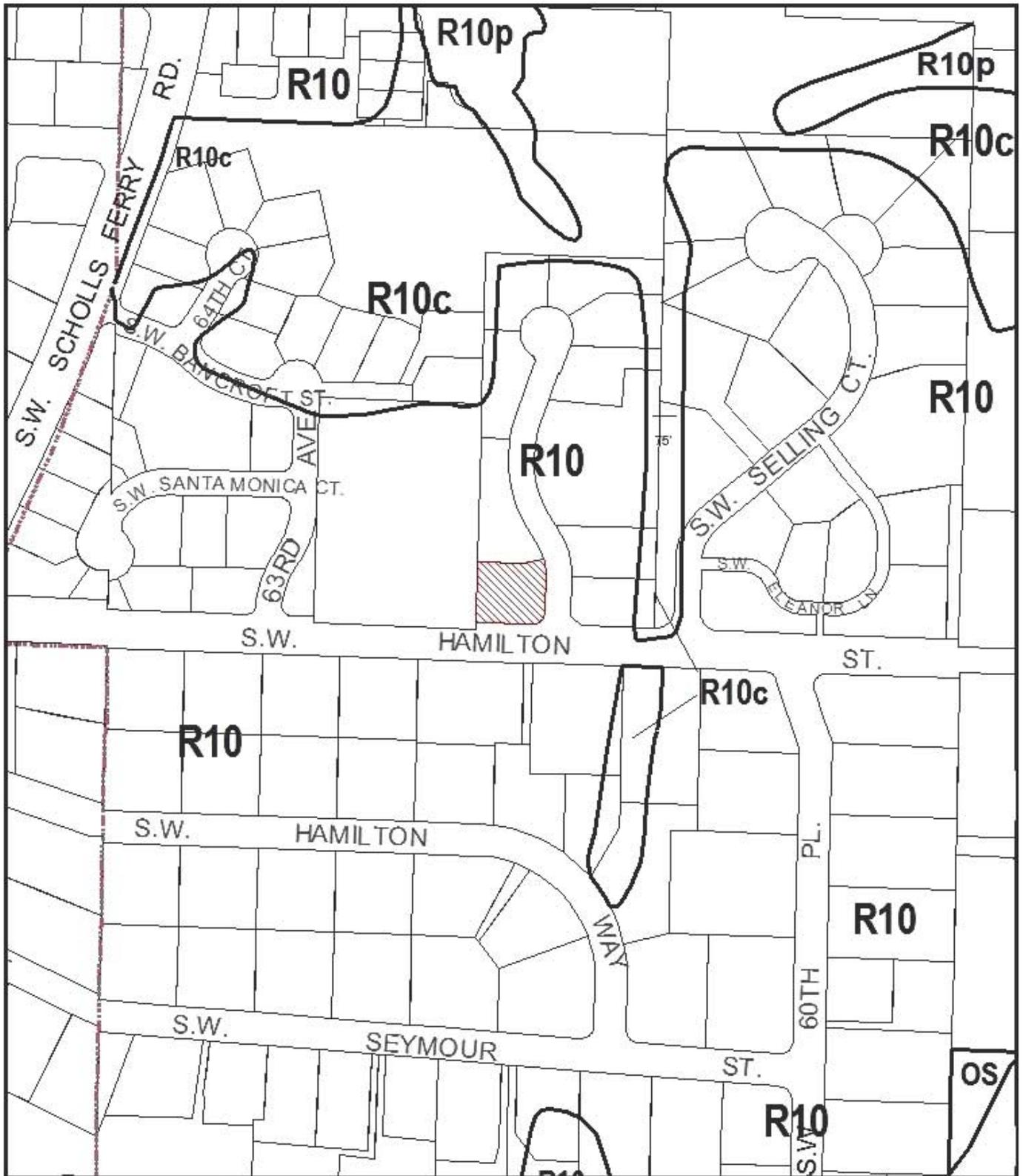
**Applying for your permits.** A building permit, occupancy permit, or development permit may be required before carrying out an approved project. At the time they apply for a permit, permittees must demonstrate compliance with:

- 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. 120-day extension
- B. Zoning Map (**attached**)
- C. Plans & Drawings
  - 1. Site Plan - Tree Inventory and Preservation Plan
    - 1a. Revised Site Plan – Tree Inventory and Preservation Plan (originally attached to BDS submitted Memo – Exhibit H.4) (**attached**)
    - 2. Original Tree Preservation Plan for Subdivision – 8 ½ x 11
    - 3. 11x 17 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 Service
  - 3. TRACS printout showing bureaus with "no concerns"
- F. Letters from interested parties (none)
- G. Other
  - 1. Original LUR Application
  - 2. Site History Research with original subdivision decision and final plat decision attached
  - 3. Pre-application notes
  - 4. Incomplete letter
  - 5. Void warning letter
  - 6. Letter to owner
  - 7. Email to Buena Vista
- H. Received in the Hearings Office:
  - 1. Hearing notice - Beckman, Stephanie
  - 2. Staff Report - Beckman, Stephanie
  - 3. PowerPoint presentation - Beckman, Stephanie
  - 4. 10/13/08 Memo with attachments - Beckman, Stephanie
  - 5. 10/9/08 Letter - Schifsky, Greg - Submitted After Record Closed
  - 6. Tree Benefits - Schifsky, Greg - Submitted After Record Closed
  - 7. 10/14/08 letter to Gil Kelley - Schifsky, Greg - Submitted After Record Closed





# ZONING

 Site



File No. LU 07-148304 TV  
 1/4 Section 3423  
 Scale 1 inch = 200 feet  
 State\_Id 1S1E07CC 1509  
 Exhibit B (Jul 24, 2007)

