



Hearings Office

City of Portland

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DECISION OF THE HEARINGS OFFICER ON APPEAL OF ADMINISTRATIVE DECISION

I. GENERAL INFORMATION

File Number: LU 21-001335 LDS (Hearings Office Case No. 4220007)

Applicant: Paige Miller, Humber Design Group, Inc.
117 SE Taylor Street Suite 001
Portland, OR 97214

Owner/Agent: Brandon Brown, Timothy P. Brown Trust
112 W 11th Street #100
Vancouver, WA 98660

Hearings Officer: William Guzman

Bureau of Development Services (BDS) Staff Representative: Sean Williams

Site Address: 3969 S/N Overlook Terrace

Legal Description: TL 400 0.34 ACRES, SECTION 21 1N 1E; TL 500 0.49 ACRES,
SECTION 21 1N 1E

Tax Account No.: R941210390, R941210540

State ID No.: 1N1E21DC 00400, 1N1E21DC 00500

Quarter Section: 2628

Neighborhood: Overlook , contact Brian Yarne at
landuse@overlookneighborhood.org

Business District: None

District Coalition: North Portland Neighborhood Services

Plan District: None

Other Designations: Potential Landslide Hazard Area

Zoning: Residential 5,000 (R5) w/ Environmental Conservation (c)

Land Use Review: Type IIx, Land Division Subdivision (LDS)

BDS Administrative Decision: Approval

Public Hearing: The hearing was opened at 1:35 pm on May 3, 2022, in the third floor hearing room, 1900 SW 4th Avenue, Portland, Oregon, also by Zoom's online meeting platform and was closed at 3:10 pm. The applicant waived applicant's rights granted by ORS 197.763 (6)(e), if any, to an additional seven-day time period to submit written rebuttal into the record. The record was closed to all testimony and written submissions at the end of the Hearing.

Testified at the Hearing:

Sean Williams

Jaime Howsley

Terry Flanagan

Chrystal Smith

Jeff Kleinman

Kevin Hillery

Kristen Terry representing Dr. Phyllis Reynolds

Bruce Nelson

Timothy North representing GEO Consultants Northwest

Proposal:

The applicant is proposing to subdivide the subject property into 3 lots, which will be 5,137 (Lot 1), 4,413 (Lot 2), and 7,225 (Lot 3) square feet in size. Three tracts are also proposed including two open space - environmental resource tracts (Tracts A and B) and a tree preservation Tract (Tract C).

This subdivision proposal is reviewed through a Type IIx procedure because: (1) the site is in a residential zone; (2) two or three lots are proposed; and (3) the site is located within a Potential Landslide Hazard or Flood Hazard Area (see 33.660.110).

For purposes of State Law, this land division is considered a subdivision. To subdivide land is to divide an area or tract of land into four or more lots within a calendar year, according to ORS 92.010. ORS 92.010 defines "lot" as a single unit of land created by a subdivision of land. The applicant's proposal is to create 6 units of land (3 lots and 3 tracts). Therefore, this land division is considered a subdivision.

Relevant Approval Criteria:

In order to be approved, this proposal must comply with the approval criteria of Title 33. The relevant criteria are found in Section 33.660.120, Approval Criteria for Land Divisions in Open Space and Residential Zones.

II. ANALYSIS

The City issued a decision in the Applicant's land use proposal approving the application with conditions. (Exhibit H-5). This matter is before the Hearings Officer on appeal by Friends of Overlook Bluff (Appellant). On appeal, Appellant alleges the following:

"As explained below, the applicant has not met its burden of proving compliance with several of the sections listed in this provision [Title 33.660.120]. Thus, the preliminary plan should not have been approved."

This is a very general statement and will not be interpreted as an objection or challenge to every criterion unless Appellant raises the issue with sufficient specificity to allow the Applicant to respond and the Hearings Officer to analyze the issue. The substantive content of the appeal focuses on the preservation and protection of a Heritage tree located on the site. It is this issue that will be the focus of the Hearings Officer's decision.

The Hearings Officer finds that there exists a tree on the subject property with the following pertinent characteristics:

- it is an Oregon white oak (*Quercus garryana*),
- it is designated Heritage Tree #259 by the City,

- it is 55.5 inches in diameter,
- it is in good health,
- it is still growing,
- it is middle-aged (approximately 150- 250 years old) and
- it may live up to 500 years (total).

These facts are agreed upon by the Applicant, the City, and the Appellant. Appellant argues that the health of the tree will be negatively impacted by the Applicant's development proposal. Appellant seeks additional protection for the tree:

"What is required in order to prevent that injury is the same protection the Hearings Officer found to be necessary in the 2018 proceeding—a Root Protection Zone of 1.5 feet per inch of diameter of the tree, and the inclusion of the entire Root Protection Zone within the Tree Protection Tract."

The Hearings Officer begins the analysis by noting that the outcome in the current case is not bound by the findings or conclusions in the Hearings Officer's 2018 decision; that is, the 2018-decision did not create a binding precedent that must be followed in this current matter.

Appellant argues that the Applicant's proposal does not meet the criteria because the Heritage Tree's roots will be injured, negatively impacting the health of the tree, unless a larger root protection zone is required by the Hearings Officer.

In support of this position Appellant submits a petition signed by arborists: "As local arborists, we ask the City of Portland to protect this irreplaceable tree by providing the optimal amount of root space." The word "optimal" means the most desirable or the most satisfactory option. Specifically, Appellant, with the support of their arborists (the Hearings Officer assumes these arborists are tree experts for the purpose of this decision) seeks a condition that extends the root protection zone from 1-foot per inch of diameter to 1.5-feet per inch of diameter. Their opinions are based on the tree's characteristics, including the soil type and the fact that the tree stands alone in a large field without competition from other trees, and that it has grown without being subjected to negative development nearby. The Hearings Officer finds that the soil is Latourell complex and the upper soil profiles are loam (Exhibit H-17). Therefore, the "tree's absorption occurs in the shallow soil profiles containing the favorable "loam" soil

type. The upper soil profile provides the best rooting habitat for the tree.” (Exhibit H-17 at page 7).

Applicant’s arborist and tree expert (qualifications of arborist found in Exhibit H-9 at pages 7-8) Terrence Flanagan, in Exhibit A-2, investigated the roots of this tree using methods that are acceptable within the arborist community.

“A report addressing the results of air spading that was done to map the outer extent of roots from the oak is attached to this report as appendix #4. The air spading was done to discover if there were any significant roots beyond a 54-foot set in a perpendicular direction from the face of the heritage oak's trunk toward the two buildable lots on either side of the oak (SE and NW). In the report the number and size of any roots discovered along a line set 54 feet from the face of the tree's trunk toward the buildable lots is listed.

As the report indicates, no roots above one inch were discovered except in the front northeast corner. Only two roots, 1.5 inches in diameter were found in the test pit to the front, east corner from the oak. The tree protection area will extend to the northeast beyond where that test pit was located, protecting a greater area of soil from impacts.”

(Exhibit H-9). In Exhibit A-2 (at page 6) Applicant’s Tree Expert submitted the Air Excavation Results of Pit Tests:

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Summary

Air spading was completed in six locations per the City of Portland's Urban Forestry Division Heritage Tree Root Pruning Permit #20-137104-000-00-UF, three pits on each side, northwest and southeast side of the Heritage Oregon white oak (*Quercus garryana*).

The results of the air spading done per the permit revealed that only one of the pits air spaded revealed any roots larger than one inch in diameter, pit #4. The two roots were only 1.5 inches in diameter. Pits #5 and #6 revealed two roots less than .8 inches in diameter; pit #2 only had two roots less than .25 inches in diameter; pit #3, one root .25 inches diameter; and pit #1, no roots were exposed.

A review of literature on the subject of proper tree protection processes for mature Oregon white oak provided three pertinent citations on the subject. All citations revealed that a radius of twelve times a tree's diameter in all directions for a healthy Oregon white oak on a site with good soil will be adequate to properly protect the tree's long-term health.

In addition, five projects of local tree protection projects for Oregon white oaks that have been managed by Teragan & Associates are presented as well.

Appellant did not contest these findings nor did Appellant contest the manner or method of air spading. The Hearings Officer adopts the findings of the air-spading specified above as true and accurate. Appellant's arborist estimates that the roots extend 100 feet from the tree ("It is highly likely that the Overlook Heritage Tree's roots extend over 100 feet from the trunk of the tree[.]" Exhibit H-17. The Hearings Officer finds that some of the tree's roots extend beyond the Applicant's proposed root protection zone.

Appellant asks the Hearings Officer to find that the optimal root protection zone is 1.5 feet/inch of diameter. Appellant's arborist states the following:

"The scientific literature and guidance documents give a range of formulas for establishing root protection zones. Oaks in the Urban Landscape provides a good summary of 8 different formulas for establishing the appropriate root protection zone."

(Exhibit H-17 at page 5). If Title 33 and Title 11 were silent as to the formula used for establishing the appropriate root protection zone then perhaps the Hearings Officer's duty would be to select the best formula for this tree. City Council was free to legislate any formula for establishing the appropriate root protection zone, including a requirement that Heritage trees require root protection of 1.5 feet per inch of diameter. In contrast to the suggested standard of "optimal" City Council (through their legislative power) directs the Hearings Officer's analysis to the following formula. The clear and

objective requirement found in City Code 11.60.030(C)(1)(a) states the following: “a minimum of 1 foot radius (measured horizontally away from the face of the tree trunk) for each inch of tree diameter[.]” The Hearings Officer finds Applicant’s proposal meets this criterion. “The area set aside for the tree on its own Tree Preservation Tract is equal to the tree protection area, set as a radius in all directions equal to at least 12 times the tree’s diameter from the tree trunk face plus additional area, 65.5 feet to the rear (SW) and 73 feet to the front (NE).” (Exhibit H-5). This is greater protection than required by 11.60.030(C)(1)(a) and this additional protection will help to offset the negative impacts of climate change, shade, soil type, and future growth.

In Exhibit E-6 the City’s Urban Forestry division states the following:

“[Applicant’s arborist] provided recommendations for additional root protection measures including implementing alternative foundation designs that reduce the root impacts in the footprints of the new structures, shifting utilities, and adding geotextile fabric with mulch over the other areas of the two lots to protect roots (see page 10 of 2020 arborist report). **These additional protection measures are important as they reduce the impacts to the Heritage tree roots beyond the root protection area established by the Prescriptive Path.** Identifying and protecting potential roots within the footprints of the building must be considered while determining building designs. Urban Forestry will review potential root impacts and foundation designs that best protect the Heritage Tree while also meeting required geotechnical requirements.”

Applicant’s tree expert and the City’s Urban Forestry division conclude the 1-foot/inch root protection zone is sufficient to protect the tree from health jeopardizing injury now and in the future as it grows. Appellant’s tree experts argue that a 1.5-foot/inch is necessary to protect the tree now and in the future as it grows.

Based on the testimony at the Hearing and the evidence in the record, the Hearings Officer resolves the issue in favor of Applicant. The proposal meets the clear and objective criteria applicable to this land use proposal. The City’s Code does not require the “optimal” amount of root protection. Lastly, Appellant argues that shade from any structures built and climate change (drought) may negatively impact the tree’s health. The Hearings Officer finds these concerns valid but overall these impacts, combined with the impacts of development proposed outside the root protection zone, do not amount

to a failure to “preserve” the tree. Climate change is a pre-existing condition and not a specific characteristic of site or the result of the proposed development.

Even if the Hearings Officer found that the optimal root protection zone is 1.5-feet per inch (“It requires as much undisturbed soil as possible to maintain itself and its root system.” Exhibit H-6 at page 4) is necessary to prevent health-jeopardizing injury to the tree, Applicant’s attorney argues that the Hearings Officer does not have the authority to require the enlarged root protection zone sought by Appellant. (Exhibit H-9).

“[Standards and criteria] that are not clear and objective simply cannot be applied to the application, and, therefore, provide no basis for denial of the application, nor for further conditions such as an enlarged tree preservation tract.” (Exhibit H-9).

Applicant’s legal argument is premised on the following Oregon Revised Statute (ORS) enacted by Oregon’s legislature: “[A] local government may adopt and apply only clear and objective standards, conditions and procedures regulating the development of housing, including needed housing.” ORS 197.307(4) (also known as, needed housing statutes). Protections for the Heritage tree in conjunction with the proposed subdivision amounts to regulation of the development of housing, including needed housing. The City has a need for additional housing to be built (Exhibit H-10 through H-15). Therefore, the Hearings Officer may only apply to the applicant’s proposal those tree protection provisions that are clear and objective.

In *Roberts v. Cannon Beach*, 316 Or. App. 305 (Or. App. 2021) the Court explained the purpose of the clear and objective standard:

“Ultimately, in the context of ORS 197.307(4), the degree of clarity required for standards, conditions, and procedures for housing development represents a balance between the need of applicants for an understandable route to approval of the applied-for development and the need of local governments for code-drafting requirements that are realistically achievable.”

The Land Use Board of Appeals (LUBA) and the Circuit Court have issued legal decisions in other land development cases that provide analysis regarding this “clear and objective” standard that guide the Hearings Officer’s analysis in the current case.

In *Warren v. Washington*, 439 P.3d 581 (Or. App. 2019), the Court noted that LUBA found the term used in the applicable City code “measurably improved” was not clear

and objective. For comparison, in *Roberts v. Cannon Beach*, 316 Or. App. 305 (Or. App. 2021) the Court rejected the position "that a standard is not 'clear and objective' any time that one of its terms, considered apart from its context, has more than one plausible meaning[.]" In that case, the Court explained that the standard has two parts:

"First, a standard, condition, or procedure must be objective. As LUBA has explained, "objective" means "existing independent of mind. "Standards are not objective "if they impose 'subjective, value-laden analyses that are designed to balance or mitigate impacts of the development on (1) the property to be developed or (2) the adjoining properties or community.'" Second, as LUBA observed in this case, standards must also be clear. "[T]he term 'clear' means 'easily understood' and 'without obscurity or ambiguity.'"

LUBA has found that "there is no possible dispute that the planned development standards [in the applicable code] requiring "compatibility" with surrounding development, based on 14 factors, are not "clear and objective" approval standards. The [applicable code's] compatibility standard requires "subjective, value-laden analyses that are designed to balance or mitigate impacts." *Group B, LLC v. City of Corvallis*, 72 Or LUBA 74, 81 (2015) citing *Rogue Valley Assoc. of Realtors*, 35 Or LUBA at 158.

The Hearings Officer now turns to the approval criteria cited and relied upon by Appellant to determine if they are clear and objective. In this case the applicable approval criteria are found in Title 33.660.120. This code requires that the standards and approval criteria of Chapter 33.630, Tree Preservation, must be met. "Heritage Trees must be preserved unless removal has been approved by the Urban Forestry Commission." Title 33.630.100(B). The Heritage Tree is preserved in the Applicant's proposal; that is, it will not be removed and it will not be subject to health-jeopardizing injury. Preservation of the Heritage Tree meets Option 1 of the Minimum Tree Preservation Standards (33.630.100.1).

PCC 33.630.200(A) requires that "To the extent practicable, trees proposed for preservation provide the greatest benefits as identified in the purpose of this chapter." In Title 33.630.010 the "[d]esired benefits of trees" include:

- Protecting public health through the absorption of air pollutants, contamination, and capturing carbon dioxide;
- Buffering from noise, wind, and storms;
- Providing visual screening and summer cooling;

- Reducing energy demand and urban heat island impacts;
- Filtering stormwater and reducing stormwater runoff;
- Reducing erosion, siltation, and flooding;
- Stabilizing slopes;
- Enhancing property values;
- Providing fish and wildlife habitat, including support for native species biodiversity through the preservation and planting of native trees;
- Providing food for people and wildlife; and
- Contributing to the beauty of the City, its natural heritage, and the character of its neighborhoods.

Title 33.630.200(C) requires the following: "Tree preservation is maximized to the extent practicable while allowing for reasonable development of the site, considering the following:

1. The specific development proposed;
2. The uses and intensity of development expected in the zone and the area in which the site is located;
3. Requirements to provide services to the site under Chapters 33.651 through 33.654, including street connectivity and street plan requirements. Options to limit impacts on trees while meeting these service requirements must be evaluated;
4. Requirements to protect resources in Environmental, Pleasant Valley Natural Resources, or Greenway Natural, Water Quality, and River Environmental overlay zones. Protection of environmental resources and retention of benefits from trees should be maximized for the site as a whole; and
5. Other site constraints that may conflict with tree preservation, such as small or oddly shaped sites or trees located in existing utility easements."

The Hearings Officer finds that these sections of the City's Code are subjective and require a value-laden analyses designed to balance or mitigate impacts of the development on the subject property. PCC 33.630.200(A)'s standard of "to the extent practicable" is not objective. The word "Practicable" is defined in PCC 33.910 as: "Capable of being done after taking into consideration cost, existing technology, and logistics in light of overall project purposes." And consideration of the "greatest benefits" requires application of 11 factors. Title 33.630.200(C)'s use of the phrase "maximized to the extent practicable while allowing for reasonable development" to be

determined by applying five factors is equally subjective. These standards may not lawfully applied to needed housing proposals.

Title 33.610.100 provides minimum tree preservation standards. Subsection B requires the following:

“Heritage Trees. Heritage Trees located on the land division site may be counted toward meeting preservation standards. Heritage Trees must be preserved unless removal has been approved by the Urban Forestry Commission.”

The word preserved is not defined in Title 33. Appellant argues that the word “preserved” in this context means the following: “The tree must be permitted to grow and remain healthy.” Applicant argues that whether a tree is “permitted to grow” and “remain healthy” requires a subjective and value-laden judgment. The Hearings Officer finds that reasonable minds can differ (as demonstrated by the conflicting expert testimony). “Permitted to grow” and “remain healthy” are subjective and value-laden judgments. Moreover, the Hearings Officer finds that Applicant’s proposal does allow the tree to remain healthy and grow as indicated in the findings of Applicant’s tree expert and the City’s Urban Forestry division.

Title 11.20.060(H) states the following: “It is unlawful for any person without prior written authorization from the City Forester to remove, prune, or injure any Heritage Tree.” PCC 11.80.020.B.20 definition of injury which includes the following: “‘Injury’ means a wound inflicted upon a tree from any activity, including trenching, excavating, altering the grade, smothering with the root protection zone of a tree, bruising, scarring, tearing or breaking of roots, bark, trunk, branches or foliage, herbicide or poisoning, or any other action leading to the death or permanent damage to tree health...[listing of various items].” The Hearings Officer finds that the City Forester has authorized the proposed land division: “Urban Forestry does not object to approval of the proposed development. The development will be subject to Urban Forestry standards and requirements during the permit review process.” Exhibit E-6. Therefore, these small roots outside the root protection zone will be injured in that some of the roots will break. Urban Forestry is authorizing this amount of injury to occur. The Hearings Officer finds that breaking these small roots will not prevent the tree from growing and remaining healthy (it is not a health-jeopardizing injury).

Appellant did not attempt to prove that Applicant's Tree Expert was unqualified. Although it was suggested through testimony at the Hearing that perhaps the Applicant's Tree Expert's credibility is impacted because they received compensation from Applicant. Exhibit A-2 at page 3 explains the compensation did not depend on a particular outcome in the report:

"That Teragan & Associates, Inc.'s compensation is not contingent upon the reporting of a predetermined conclusion that favors the cause of the client or any other party, or upon the results of the assessment, the attainment of stipulated results, or the occurrence of any subsequent events."

The Hearings Officer finds that the Applicant's tree expert's testimony is credible despite the compensation promised by Applicant because compensation was not contingent on a particular outcome in the report. Compensation is not a sufficient basis, under the facts of this case, to discredit the expert opinions of the Applicant's arborist.

The Hearings Officer finds that the entire site is located within the Potential Landslide Hazard Area. The approval criteria Title 33.632 states that the lots, buildings, services, and utilities must be located on parts of the site that are suitable for development in a manner that reasonably limits the risk of a landslide affecting the site, adjacent sites, and sites directly across a street or alley from the site. In Exhibit H-5 at pages 8-9, the City's decision states the following:

"Deep foundations, retaining walls, ground improvement, or other engineering solutions may be necessary to develop the lots in a manner that reasonably limits the risk of a landslide affecting the site. We concur with the opinion of Geo Consultants Northwest that the lots can be developed in a manner that reasonably limits the risk of a landslide affecting the site, adjacent sites, and sites directly across the street. A geotechnical report specific to the development proposed on each lot will be required at the time of application for building permits."

The Hearings Officer adopts this finding and concludes this criterion is met.

III. CONCLUSIONS

The applicant has proposed a 3-lot subdivision with Environmental Resource Tracts (Tracts A & B) and a Tree Preservation Tract (Tract C). The relevant standards and approval criteria have been met, or can be met with conditions. The primary issues identified with this proposal are: Potential Landslide Hazard Area and Tree Preservation. With conditions of approval that address these requirements this proposal can be approved. The Hearings Officer upholds the City's decision, adopts its findings of fact and conclusions of law, and hereby incorporates the City's decision into this order by reference. (Exhibit H-5).

IV. DECISION

The Appellant did not prevail in this appeal.

Approval of a Preliminary Plan for a 3-lot subdivision, that will result in three standard lots, two Environmental Resource Tracts (Tracts A & B) and a Tree Preservation Tract (Tract C), as illustrated with Exhibits C.1-C.3, subject to the following conditions:

A. The Final Plat must show the following:

1. The environmental resource tracts shall be noted on the plat as "Tract A & B: Open Space (Environmental Resource)." A note must also be provided on the plat indicating that the tracts will be commonly owned and maintained by the owners of Lots 1-3 or be consistent with the ownership requirements of 33.430.160.E.
2. The Tree Preservation tract shall be noted on the plat as "Tract C: Tree Preservation. A note must also be provided on the plat indicating ownership of the tract in conformance with 33.636.100.A.
3. A recording block for each of the legal documents such as maintenance agreement(s), acknowledgement of special land use conditions, or Declarations of Covenants, Conditions, and Restrictions (CC&Rs) as required by Conditions B.3-B.6 below. The recording block(s) shall, at a minimum, include language substantially similar to the following example: "A Declaration of Maintenance Agreement for (name of feature) has been recorded as document no. , Multnomah County Deed Records."

B. The following must occur prior to Final Plat approval:

1. The applicant shall meet the requirements of the City Engineer for right of way improvements along the site's N Overlook Terrace frontage. The applicant must obtain approved permits from the Portland Bureau of Transportation to install the required sidewalk corridor including street tree planting per the requirements of Urban Forestry. The improvements along the frontage of the Tree Preservation Tract (Tract C) must be constructed prior to final plat approval. The improvements along the frontage of the undeveloped lots may be constructed with development on each lot as per the City Engineer's discretion.

2. The applicant shall meet the requirements of the Water Bureau for providing plans and financial assurances for water main extensions in N Overlook Terrace.

3. A Maintenance Agreement(s) shall be executed for Tracts A & B, the Environmental Resource tracts described in Condition A.1 above. The agreement(s) must be reviewed by the City Attorney and the Bureau of Development Services, and approved as to form, prior to final plat approval. The agreement must also include:

- a. assign common, undivided ownership of the tract to the owners of all lots, a homeowner's association or meet the requirements of 33.430.160.E;
- b. include provisions for assigning maintenance responsibilities for the tract;
- c. provisions assigning maintenance responsibilities for required plantings located within the tracts;
- d. include a description of allowed/prohibited activities consistent with Chapter 33.430;
- e. include conditions of this land use approval that apply to the tract.

4. A Maintenance Agreement shall be executed for the Tree Preservation Tract (Tract C) described in Condition A.2 above. The agreement shall describe the tree preservation requirements and restrictions on development and include provisions assigning maintenance responsibilities for the tract consistent with the purpose of the tract, and all applicable City Code standards. The agreement must be reviewed by the City Attorney and the Bureau of Development Services, and approved as to form, prior to final plat approval.

5. The applicant shall meet Fire Bureau requirements for adequate fire flow by executing an Acknowledgement of Special Land Use conditions requiring residential development on Lots 2 and 3 to contain internal fire suppression sprinklers. The acknowledgement shall be referenced on and recorded with the final plat.

6. The applicant shall execute an Acknowledgement of Tree Preservation Land Use Conditions that notes tree preservation requirements that apply to Lots 1, 2, and Tract C. A copy of the approved Tree Preservation Plan must be included as an Exhibit to the Acknowledgement. The acknowledgment shall be referenced on and recorded with the final plat.

7. The applicant must obtain and finalize a Zoning Permit for clearing and planting within the environmental resource tracts as follows:

- Clearing a 3,375 square foot area of nuisance species and replanting it with native grass seed mix, 7 groundcover plants and 2 shrubs per 50 square feet of cleared area, per 33.430.140.L.
- Trees must be minimum one-half inch in diameter, shrubs must be in at least one gallon pots and groundcovers must be in a least 4 inch pots. All plants must be native species selected from the Portland Plant List.
- The permit plans must show the location, size and species of the required plants. The plants must be inspected and the Zoning Permit must receive final inspection approval prior to final plat approval.
- All new plantings must be labeled "Required plantings, per LU 21-001335 LDS".

8. The applicant must install protective fencing around the perimeter of the tree preservation tract as shown on the Preliminary Clearing and Grading Plan (Exhibit C.1). The fence must be 6-foot-high chain link and be secured to the ground with 8-foot metal posts driven into the ground. Prior to final plat the applicant a must receive final inspection approval of a Zoning Permit verifying that the fencing has been installed.

C. The following conditions are applicable to site preparation and development of individual lots:

1. Development on Lots 1 through 3 shall be in conformance with the Preliminary Clearing and Grading Plan (Exhibit C.1), the applicant's arborist report (Exhibit A.2) and Tree Preservation Approval Criteria document (Exhibit A.3). Specifically, the 55.5-inch Oregon white oak heritage tree located in Tract C is required to be preserved, with the root protection zone indicated on Exhibit C.1. Tree protection fencing is required around the perimeter of the Tree Preservation Tract. The fence must be 6-foot-high chain link and be secured to the ground with 8-foot metal posts driven into the ground. No encroachments are allowed within Tract C or the root protection zone unless specifically authorized by Urban Forestry.

a. Area not to be covered by structures, but outside of the tree protection fencing, must be covered with 12" depth of wood chips over geotextile fabric or fenced off to prevent soil compaction, unless directed otherwise by the Urban Forester. Wood chips and fabric to be removed at the end of the project with up to a 4" depth of wood chips that could remain without fabric beneath them.

b. Overall hydrology of the site may not be changed through soil augmentation or irrigation without permission from Urban Forestry.

c. See Arborist Report (Exhibit A.2) Appendix 3 for additional tree protection steps including requirements pre, during, and post construction.

d. Driveways, utilities, and stormwater facilities shall be positioned on Lots 1 and 2 to limit excavation on the side of the lots adjacent to the Tree Preservation Tract to the extent practicable.

e. Urban Forestry shall review potential root impacts and foundation designs for homes on Lots 1 and 2 that best protect the Heritage Tree while also meeting required geotechnical requirements.

2. Development on Lot 3 shall be in conformance with the Preliminary Clearing and Grading Plan (Exhibit C.1) and the Tree Protection Plan for Port Orford Cedar (Exhibit A.4). Tree protection fencing shall be installed on Lot 3 as indicated on Exhibit C.1. The fence must be 6-foot-high chain link and be secured to the ground with 8-foot metal posts driven into the ground.

3. The applicant shall meet the requirements of the City Engineer for right of way improvements along the frontage of Lots 1 through 3 including street tree planting.

4. The applicant must meet the Fire Bureau requirements for addressing and aerial fire department access. Aerial access applies to buildings that exceed 30 feet in height from the fire access as measured to the bottom of the eave of the structure or the top of the parapet for a flat roof.

5. The applicant will be required to install residential sprinklers in the new houses on Lots 2 and 3 to the satisfaction of the Fire Bureau.

6. A geotechnical report will be required for development of new structures on Lots 1 through 3 to the satisfaction of the Site Development section of BDS.

7. Development on lots shall be in conformance with the following:

Appealing this decision. The Hearings Officer's decision is final and takes effect on the day the notice of decision is mailed. The decision may not be appealed to City Council, but may be appealed to the Oregon Land Use Board of Appeals (LUBA), as specified in the Oregon Revised Statute (ORS) 197.830. Among other things, ORS 197.830 requires that:

- an appellant before LUBA must have presented testimony (orally or in writing) as part of the local hearing before the Hearing's Officer; and
- a notice of intent to appeal be filed with LUBA within 21 days after the Hearings Officer's decision becomes final.

Please contact LUBA at 1-503-373-1265 for further information on filing an appeal.

Recording the land division. The final land division plat **must** be submitted to the City **within three years** of the date of the City's final approval of the preliminary plan. This final plat must be recorded with the County Recorder and Assessors Office after it is signed by the Planning Director or delegate, the City Engineer, and the City Land Use Hearings Officer, and approved by the County Surveyor. **The approved preliminary plan will expire unless a final plat is submitted within three years of the date of the City's approval of the preliminary plan.**

EXHIBITS

NOT ATTACHED UNLESS INDICATED

The exhibits in the land use case file are all assigned a letter (example A-1). The Hearings Office accepts exhibits filed online in its case management system. These exhibits are marked in the lower right hand corner that identifies the exhibit as a "Portland Hearings Office" exhibit. All of these exhibits are designated "H Exhibits" (that is, Hearings Office Exhibits). See the BDS Staff Decision for a list of Exhibits A – G.