



City of Portland, Oregon
Bureau of Development Services
Land Use Services
FROM CONCEPT TO CONSTRUCTION

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Date: August 24, 2022
To: Interested Person
From: Diane Hale, Land Use Services
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NOTICE OF A TYPE II DECISION ON A PROPOSAL IN YOUR NEIGHBORHOOD

The Bureau of Development Services has approved a proposal in your neighborhood. The mailed copy of this document is only a summary of the decision. The reasons for the decision are included in the version located on the BDS website <http://www.portlandonline.com/bds/index.cfm?c=46429>. Click on the District Coalition then scroll to the relevant Neighborhood, and case number. If you disagree with the decision, you can appeal. Information on how to do so is included at the end of this decision.

CASE FILE NUMBER: LU 22-108362 TV

GENERAL INFORMATION

Applicant/Owner: Peter A Kusyk, Firenze Development Inc
7110 SW Old Wilsonville Rd / Wilsonville, OR 97070 / (503) 381-4513

Site Address: 4215 NE SHAVER CT

Legal Description: Beehive Acres, Lot 3, Inc Und Int Tract A
Tax Account No.: R063040150
State ID No.: 1N2E19CB 15503
Quarter Section: 2635

Neighborhood: Beaumont-Wilshire, contact at info@bwnapdx.org
Business District: Our 42nd Avenue, contact at michael@42ave.org
District Coalition: Central Northeast Neighbors, contact Alison Stoll at 503-823-2778.

Zoning: R5h – Single-dwelling residential, 5,000 with an “h” airport height overlay

Case Type: TV – Tree Violation Review
Procedure: Type II, an administrative decision with appeal to the Hearings Officer.

Proposal:

The applicant has applied for a Tree Violation Review to address encroachment into the protection zone of trees # 32-38 that are located on the lot to the east of this site at 4306 NE Mason Street. The trees were required to be protected during new construction of the home on Lot 3 through a condition of approval of LU 18-147145 LDS, a land division review that created Lot 3. The tree preservation plan required a tree protection fence to be installed 12 feet west of the shared lot line (see Exhibit C.1). Site work related to the construction of the new home on Lot 3 resulted in damage to a 7” root of tree #34, which was subsequently cut ~6 feet west of the tree. Tree #34 is still alive, but a Tree Violation Review is required to address the disturbance within the root protection zone established through the land division review. The applicant is proposing to establish a contract with a Certified Arborist to conduct annual tree health assessments, revise the tree protection plan for the final stages of new home

construction on Lot 3 (see Exhibit C.2), and reserve a fund to pay for tree removal/replacement planting in the event that an assessment finds that the tree is a hazard and must be removed.

Relevant Approval Criteria:

In order to be approved, this proposal must comply with the approval criteria of Title 33. The relevant criteria are **Section 33.853.040.C, Approval Criteria for Corrections to Violations.**

ANALYSIS

Site and Vicinity: The site is two abutting single-dwelling properties. 4306 NE Mason St. is ~1/2 acre and contains a single-family home. 4215 NE Shaver Ct. is 6,500 square feet and was created through a land division in 2019; a new single-family home is under construction on this lot. The site is generally surrounded with single-family zoning and development. The Portland Japanese Cemetery and Rose City Cemetery are located ~1/4 mile to the southeast of the site.

Zoning: The site is in the R5 zone, which is one of the city's single-dwelling zones intended to preserve land for housing and to provide housing opportunities for individual households. The zones implement the comprehensive plan policies and designations for single-dwelling housing and provide options for infill housing that is compatible with the scale of the single-dwelling neighborhood.

Land Use History: City records indicate that prior land use reviews include the following:

- LU 18-147145 LDS – Approval of Preliminary Plan for a 3-lot subdivision with three single-dwelling lots and a new private street.

Neighborhood Review: A Notice of Proposal in Your Neighborhood was mailed on March 29, 2022. Two written comments were received from neighbors (see F Exhibits). The comments expressed the following:

- General dissatisfaction with the level of development allowed on the site through the 2018 land division;
- Concern with the applicant's inattention to illegal dumping and other hazards on the land division site prior to construction, and disregard for neighbor's concerns;
- Concern about the applicant's dangerous tree removal methods that destroyed a fence and bird bath on the abutting property;
- Concern that the City will not require the applicant to adequately mitigate for this situation; and
- Questions related to who has future liability and the applicant's requirement to disclose this tree damage to prospective buyers.

While staff is sympathetic to all of these concerns and questions, many of these topics cannot be addressed through this review because we can only address items related to the approval criteria for a Tree Violation Review (33.853.040.C). The findings below outline the mitigation requirements for the violation (damage to tree #34). The City will record this decision and it will be available to potential buyers through a title search; it is the onus of potential buyers to research potential properties for encumbrances and other potential concerns before entering into a real estate contract. Concerns about illegal dumping and other negative actions occurring on a property within the City of Portland should be directed to the Code Compliance group for investigation – neighbors are encouraged to call 503-823-CODE (2633) with future issues.

Agency Review: Urban Forestry has responded to this proposal and relevant comments are addressed under the applicable approval criteria. Exhibit E.1 contains the complete response. The Fire Bureau, Site Development section of BDS and Life Safety section of BDS responded with no concerns.

ZONING CODE APPROVAL CRITERIA

CORRECTIONS TO VIOLATIONS

33.853.040 Approval Criteria

33.853.040.C Corrections to Violations. For corrections to violations of tree protection and tree preservation regulations of this Title, or violations of tree preservation requirements of a land use review, 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 requirement of a land use review, 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 853-1. If additional trees on the site are proposed for preservation and protection, the applicant must submit an arborist's assessment indicating the suitability of the trees for preservation, recommendations for protection methods, and any remedial treatment that may be necessary to ensure the long term viability of the trees. The total diameter of additional trees preserved must exceed the total diameter of trees cut.

Size of tree removed (inches in diameter)	Number of Trees to be Planted
Up to 12	3 trees
More than 12 up to 20	5 trees
More than 20 to up to 25	7 trees
More than 25 to up to 30	10 trees
More than 30	15 trees

Findings: The violation is to condition C.3 of LU 18-147145 LDS, which approved a 3-lot subdivision and a new private street. Tree #34 is located on the lot to the east of the land division site (4306 NE Mason St.). PZC section 33.730.060.D.1.e.4 requires that a land division application include the location of trees on adjacent sites that may be impacted by the proposed land division development, and arborist recommendations as to how to protect the trees from potential disturbance. The Clearing and Grading approval criteria in 33.635.100 state that the limits of disturbance and tree protection measures for the proposed land division must be shown on the proposed development plans and be adequate to protect the trees shown on the tree preservation plan, including those trees on adjacent sites. The purpose of the Clearing and Grading criteria are:

33.635.010 Purpose

These approval criteria:

- *Ensure limits of disturbance are reasonable given infrastructure needs, site conditions, and tree preservation requirements;*
- *Limit impacts of erosion and sedimentation;*
- *Protect water quality and aquatic habitat;*
- *Allow some site development activities to occur before Final Plat approval; and*
- *Ensure that new lots can be safely developed.*

As noted above, tree #34 was required to be protected during new construction of the home on Lot 3 (21-007044 RS) through a condition of approval of LU 18-147145 LDS. The tree preservation plan required a tree protection fence to be installed 12 feet west of the shared lot

line between Lot 3 and the adjacent site to the east (see Exhibit C.1). During site work related to the new home construction on Lot 3, a 7" root of tree #34 was cut ~6 feet west of the tree. An arborist evaluated the root damage and noted that tree #34 will "have increased vulnerability to strong western winds, although strong eastern winds are more common". The arborist calculated the risk of tree failure using the International Society of Arboriculture Tree Risk Assessment Form as low, and recommended that the trees be assessed by a Certified Arborist on an annual basis for three years (see Exhibit A.7).

An arborist with the City's Urban Forestry group evaluated the damaged tree and noted that the tree is currently leaning to the east but is not yet showing obvious signs that it is dying or is a hazard. He recommends that the tree's health be assessed for five years, and that a method be established to monitor the angle of the tree's lean toward the east (Exhibit E.1).

Since the damaged tree (#34) is still alive and appears to be viable, the primary purpose of the mitigation plan is to identify measures that will limit any further disturbance to the tree, monitor its ongoing health, and provide the best chance for its survival so that it can be retained and meet the original requirements of the tree preservation plan. This is also consistent with the purpose of the Clearing and Grading regulations because it would retain a mature, native conifer tree, which helps limit the impacts of erosion and sedimentation, and helps filter stormwater.

The applicant is proposing the following actions as a mitigation plan:

- Establish a contract with a Certified Arborist to conduct annual health assessments of tree #34 for five years starting in the fall of 2022. The monitoring reports will include a general description of the tree's health, and specifically note if any new signs of flagging/decay are visible within the tree, heaving of the ground within the vicinity of the tree, and the angle of the tree's lean (see next item). The annual health assessment monitoring reports will be reviewed by City staff (Planning and Zoning and Urban Forestry) on an annual basis for five years. The applicant has submitted the application and paid for the future City monitoring reviews through Public Registry no. 22-158250.
- An arborist will install a plumb line system to establish a baseline angle and monitor the tree's lean for at least the next five years (installed August 2022, see Exhibit A.8).
- Establish a fund to reimburse the property owner of 3406 NE Mason (property containing the tree) for tree removal and mitigation planting, in the event that tree #34 is deemed hazardous and must be removed.

If the health assessments determine that the tree needs to be removed in the future, the applicant will be required to meet the mitigation requirements of the City's Tree Code (Title 11), 11.40.050, Table 40-3. Although this requirement would fall on the property owner of 3406 NE Mason, rather than the applicant, the applicant is supporting this potential future mitigation requirement by establishing a fund that would reimburse the property owner of 3406 NE Mason for these actions in the future (see Exhibit A.10). The City is not a party to this agreement and does not have access to this fund.

The applicant's arborist has also recommended that supplemental water be applied to the eastern side of tree #34 during dry months (July – September) for the next several years. To further limit potential root damage, the applicant is constructing a low deck over the root protection area on Lot 3 that will hopefully prevent additional excavation/construction within that area (see exhibit C.2). The deck will be supported by concrete deck blocks that will minimally disturb the top ½" of soil. A fence will be installed along the shared lot line using existing posts – no excavation will be required for the new fence. The applicant is proposing to install additional (non-required) landscaping on Lot 3 north of tree #34; the arborist is required to be on-site to observe the installation of plants/trees in pots larger than 1 gallon within 22' of tree #34. To ensure that these recommendations are implemented, and additional disturbance does not occur during the final stages of construction of the home on Lot 3, the applicant must revise the permit for the new house (21-007044 RS); the revision must include a revised site plan and arborist report that is in substantial conformance with the arborist recommendations

approved through this review (Exhibits A.8 and C.2). The revision cannot be approved by Planning and Zoning until this Tree Violation decision is final.

With the conditions described above, the tree violation criteria are 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.

CONCLUSIONS

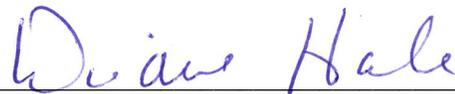
The applicant proposes to mitigate for the damage to tree #34 by establishing some baseline data regarding the tree's health, contracting with an arborist to conduct annual health assessments of the tree, and providing compensation for future tree removal and required mitigation in the event that the tree needs to be removed in the next five years. The applicant also prepared a revised tree plan based on arborist recommendations to better protect the tree during the final stages of new home construction at 4215 NE Shaver Ct ((21-007044 RS). With conditions to ensure this plan is applied to the new home under construction and that the annual health assessment monitoring reports are submitted, the violation remedy can be approved.

ADMINISTRATIVE DECISION

Approval of a tree violation review subject to the following conditions:

1. The applicant must revise the permit for the new house (21-007044 RS) with a revised site plan and arborist report that is in substantial conformance with the arborist recommendations in Exhibit A.8 and the site plan in Exhibit C.2. The revision cannot be approved by Planning and Zoning until this Tree Violation decision is final. The sheet on which this information appears must be labeled "Proposal and design as approved in Case File # LU 22-108362 TV. No field changes allowed."
2. The applicant must submit an annual health assessment monitoring report for tree #34 in the fall of 2022 through 2026 (22-158250 PR), that shall include a general description of the tree's health, and specifically note if any new signs of flagging/decay are visible within the tree, heaving of the ground within the vicinity of the tree, and the angle of the tree's lean, subject to review and approval by Planning and Zoning and Urban Forestry. If it is determined that the tree needs to be removed, Title 11 requirements will apply.

Staff Planner: Diane Hale

Decision rendered by:  **on August 22, 2022**

By authority of the Director of the Bureau of Development Services

Decision mailed: August 24, 2022

About this Decision. This land use decision is **not a permit** for development. Permits may be required prior to any work. Contact the Development Services Center at 503-823-7310 for information about permits.

Procedural Information. The application for this land use review was submitted on January 31, 2022, and was determined to be complete on March 2, 2022.

Zoning Code Section 33.700.080 states that Land Use Review applications are reviewed under the regulations in effect at the time the application was submitted, provided that the application is complete at the time of submittal, or complete within 180 days. Therefore this application was reviewed against the Zoning Code in effect on January 31, 2022.

ORS 227.178 states the City must issue a final decision on Land Use Review applications within 120-days of the application being deemed complete. The 120-day review period may be waived or extended at the request of the applicant. In this case, the applicant requested that the 120-day review period be extended by 131 days. Unless further extended by the applicant, **the 120 days will expire on November 8, 2022.**

Some of the information contained in this report was provided by the applicant.

As required by Section 33.800.060 of the Portland Zoning Code, the burden of proof is on the applicant to show that the approval criteria are met. The Bureau of Development Services has independently reviewed the information submitted by the applicant and has included this information only where the Bureau of Development Services has determined the information satisfactorily demonstrates compliance with the applicable approval criteria. This report is the decision of the Bureau of Development Services with input from other City and public agencies.

Conditions of Approval. If approved, 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.

Appealing this decision. This decision may be appealed to the Hearings Officer, and if appealed a hearing will be held. The appeal application form can be accessed at <https://www.portlandoregon.gov/bds/45477>. Appeals must be received **by 4:30 PM on September 7, 2022. The completed appeal application form must be emailed to LandUseIntake@portlandoregon.gov and to the planner listed on the first page of this decision.** If you do not have access to e-mail, please telephone the planner listed on the front page of this notice about submitting the appeal application. **An appeal fee of \$250 will be charged.** Once the completed appeal application form is received, Bureau of Development Services staff will contact you regarding paying the appeal fee. The appeal fee will be refunded if the appellant prevails. There is no fee for Office of Community and Civic Life recognized organizations for the appeal of Type II and IIX decisions on property within the organization’s boundaries. The vote to appeal must be in accordance with the organization’s bylaws. Please contact the planner listed on the front page of this decision for assistance in filing the appeal and information on fee waivers. Please see the appeal form for additional information.

If you are interested in viewing information in this file, please contact the planner listed on the front of this notice. The planner can email you documents from the file. A fee would be required for all requests for paper copies of file documents. Additional information about the City of Portland, and city bureaus is available online at <https://www.portland.gov>. A digital copy of the Portland Zoning Code is available online at <https://www.portlandoregon.gov/zoningcode>.

Attending the hearing. If this decision is appealed, a hearing will be scheduled, and you will be notified of the date and time of the hearing. The decision of the Hearings Officer is final; any further appeal must be made to the Oregon Land Use Board of Appeals (LUBA) within 21 days of the date of mailing the decision, pursuant to ORS 197.620 and 197.830. Contact LUBA at 775 Summer St NE, Suite 330, Salem, Oregon 97301-1283, or phone 1-503-373-1265 for further information.

Failure to raise an issue by the close of the record at or following the final hearing on this case, in person or by letter, may preclude an appeal to the Land Use Board of Appeals (LUBA) on that issue. Also, if you do not raise an issue with enough specificity to give the Hearings Officer an opportunity to respond to it, that also may preclude an appeal to LUBA on that issue.

Recording the final decision.

If this Land Use Review is approved the final decision will be recorded with the Multnomah County Recorder.

Unless appealed, the final decision will be recorded after **September 7, 2022** by the Bureau of Development Services.

The applicant, builder, or a representative does not need to record the final decision with the Multnomah County Recorder. 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.

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. Original submittal
 - 2. 5-30-2022 submittal
 - 3. 7-12-2022 submittal
 - 4. 7-15-2022 submittal
 - 5. 7-29-2022 submittal
 - 6. 8-2-2022 submittal
 - 7. Initial arborist evaluation and risk assessment
 - 8. Final arborist report
 - 9. Extension forms
 - 10. Signed legal agreement
- B. Zoning Map (attached)
- C. Plans/Drawings:
 - 1. Original tree preservation plan (attached)
 - 2. Revised tree preservation plan (attached)
- D. Notification information:
 - 1. Mailing list
 - 2. Mailed notice
- E. Agency Responses:
 - 1. Bureau of Parks, Forestry Division
- F. Correspondence:
 - 1. Susan Prows, 4-11-2022, 4235 NE Shaver
 - 2. Gretchen Edmundson, 4-19-2022, 4249 NE Shaver
- G. Other:
 - 1. Original LU Application

The Bureau of Development Services is committed to providing equal access to information and hearings. Please notify us no less than five business days prior to the event if you need special accommodations. Call 503-823-7300 (TTY 503-823-6868).