THE HEARING EXAMINER OF THE CITY OF LAKEWOOD

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| IN RE:<br><br>Tree Removal Permit No. 295<br><br>Administrative Appeal<br><br>2022-02-17 | FINDINGS OF FACT, CONCLUSIONS OF LAW AND FINAL DECISION[1] |

**Overview**

Christina Manetti appeals the issuance of Tree Removal Permit No. 295 on the basis that it authorizes removal of Garry Oak trees in violation of the City's critical areas ordinance. Ms. Manetti's appeal is denied. Although the trees might qualify as fish and wildlife conservation areas, Ms. Manetti did not establish that the specific trees of the project site are important to species highly associated with Garry Oak trees.

At hearing the City raised a new argument that has further limited the applicability of the City's critical areas ordinance to Garry Oak trees. The City's Garry Oak trees are protected under the City's critical area ordinance regulations to the extent that they qualify as "*Priority Oregon white oak woodland*." The Washington State Department of Fish and Wildlife (WDFW) has adopted management recommendations[2] for the priority oak to which City standards require "substantial weight" in implementation.

[1] This corrected decision incorporates corrections identified in the June 27, 2022 Order Denying Reconsideration.

[2] The WDFW management recommendations referenced in this Decision are titled "*Management Recommendations for Washington's Priority Habitats - Oregon White Oak Woodlands*," January, 1998.

However, as pointed out by Ms. Brunell, the priority oak definition adopted by the City differs from that adopted by WDFW for its management recommendations. Specifically, the WDFW definition protects individual priority oak while the City definition does not. The smallest number of trees protected by the City definition is a stand of trees. Consequently, the WDFW management recommendations do not apply to individual trees in the City of Lakewood -- only stands of trees or other larger specified compilations of such trees.

A "stand" of trees is not defined in the critical area regulations and it is unclear from the record whether any such stand is present on the project site. The issue of what qualifies as a stand of trees was not necessary to resolve in this appeal because even if a stand of such trees were present at the project site, that stand does not qualify for retention under WDFW management recommendations. To qualify, Ms. Manetti had to establish that the stand was "*important to species highly associated with Oregon white oak*." Ms. Manetti focused upon the presence of migratory birds in the area that qualify as "highly associated," but did not present any evidence that the specific oak trees on the project site were important to those species.

Ms. Manetti did successfully establish she had standing to bring her appeal. As an appeal of environmental regulations, Ms. Manetti had standing to pursue any interest in aesthetics the regulations were designed to protect. Both the City's critical area ordinance and its tree retention ordinance can be construed as designed in part to protect the aesthetics created by Garry Oak trees. Ms. Manetti established injury in fact on that interest because she drives past the project site on a regular basis.

Ms. Manetti asserted in her appeal that the Notice of Application (NOA), which includes notice of a State Environmental Policy Act (SEPA) determination, was not timely posted at the project site. The evidence establishes otherwise.

**Testimony**

A computer-generated transcript has been prepared of the appeal hearing to provide an overview of the hearing testimony. The transcript is provided for informational purposes only as Appendix A. Since the transcript is computer generated, it is not 100% accurate, but does provide a useful indication of what testimony was presented during the hearing.

**Evidence Relied Upon**

1) May 16, 2022 appeal hearing,

2) Exhibits identified in May 2, 2022 Appellant Exhibit List;

3) Exhibits identified in May 2, 2022 Applicant Exhibit List

4) Exhibits identified in May 16, 2022 staff report with included exhibits

5) Motion to exclude SEPA-based Evidence

6) City's Response To Property Owner's Motion - Exclude SEPA dated May 15, 2022.

7) Rebuttal exhibits identified in May 9, 2022 Appellant email.

8) May 16, 2022 email from Bill Lynn re: Standing Cases

9) City's Response to Property Owner's Motion to Dismiss, p. 6-9 addressing standing.

10) May 25, 2022 Manetti email response to Applicant standing motion with attachments.

11) Fleet Vehicle Mileage and Use Report attached to email from E. McKain dated May 16, 2022

## Findings of Fact

**Procedural:**

1. Hearing. The hearing on the appeal was held on May 16, 2022. During closing, the Applicant for the first time raised the issue of standing and emailed three standing cases to the hearing examiner. At the request of the Appellant, by email order dated May 17, 2022, the Appellant was given until May 25, 2022 to respond to Applicant's standing motion and Applicant until May 27, 2022 to reply. Applicant did not submit a reply.

**Substantive:**

2. Appeal. Christina Manetti filed an administrative appeal of Tree Permit No. 295 on February 17, 2022. Tree Permit No. 295 authorized the removal of nine significant trees for an affordable housing project located at 8931 Gravelly Lake Dr SW. Seven of those trees are Garry Oak trees. Ms. Manetti's appeal claims that the authorization was

issued in error because the trees qualify as fish and wildlife conservation areas under the City's critical areas ordinance.

3. Notice of Application. The project area was posted with the project's NOA on January 11, 2021.

The NOA set a comment period deadline of January 26, 2021. Ms. Manetti asserts in her written appeal and her testimony that she and the public were not given an opportunity to comment on the SEPA determination identified in the NOA because the project site was not posted with the NOA until several months after the comment deadline.

Ramon Rodriguez signed a declaration dated July 15, 2022 attesting that he posted the subject property with the NOA on January 11, 2021. See Manetti Ex. 50. Mr. Rodriguez confirmed during the hearing that he posted the NOA that day. Mr. Remy, project applicant, testified that he saw the NOA posted on January 14, 2021. He remembers that date because that same day he took pictures of an NOA posted on another one of his projects located nearby[3]. A mileage log also confirmed that Mr. Rodriquez had driven a City vehicle that day, which he said was for the purpose of posting the project site and other areas. A comment in response to the NOA was received by the City on January 22, 2021.

At the appeal hearing Ms. Manetti testified that she and a frequent passenger in her vehicle did not see the project site posted prior to expiration of the January 26, 2021 deadline. She testified that she drives past the project site almost daily and she and her passenger never saw it. She was suspicious that the sign had been timely posted because on July, 2021, the sign looked brand new, even though it had been allegedly posted since January, 2021. She showed how the sign looked in May 7, 2022, which was very worn in contrast to July, 20211. She gave another example to demonstrate that sign posted over the winter months would look much more worn. She also showed that the area below the sign on July, 2021 was bare, which was not consistent with how quickly grass grew at cleared areas as Ms. Manetti demonstrated in another photograph. Ms. Manetti was also skeptical of the declaration signed by Mr. Rodgriquez attesting to posting of the NOA, Manetti Ex. 50, because the declaration didn't spell his name correctly.

[3] The testimony on posting notice was very unclear from all witnesses except for Mr. Rodriquez. Mr. Remy testified about posting the property himself on January 7 ,2021, but also appeared to be confirming that he saw what the City had posted on January 14, 2021. From the testimony of Ms. Burnell, it appears that the Mr. Remy had inappropriately posted the NOA to a tree on January 7, 2021 and that Mr. Rodriquez re-posted the notice properly on a notice board.

Overall, Ms. Manetti's testimony is highly circumstantial compared to the direct testimony provided by Mr. Rodriquez. To adopt Ms. Manetti's narrative, Mr. Rodriguez was lying in his sworn declaration and/or the NOA sign was removed shortly after posting and the City (or some other party) would have posted the property with a new sign after expiration of the comment period. Given that the City received a comment on January 22, 2021 and the presence of the sign after the comment period, it is unlikely that the sign had been removed during the comment period. There is also no basis to believe that Mr. Rodriguez would blatantly lie about the posting of the sign. If the sign had not been properly posted, the City would have simply re-posted. The City demonstrated its willingness to correct posting errors for another project, where it re-set the public comment period for a project after discovering that the NOA had not been posted as required. See Manetti Ex. 64. For these reasons, the NOA is found to have been posted on January 11, 2021 as attested by Mr. Rodriguez and to not have been removed prior to expiration of the comment period.

4. Aesthetic Environment. Ms. Manetti's aesthetic environment will be adversely affected by approval of Tree Permit No. 295.

Ms. Manetti provided solid documentation that she drives past the site on a regular basis. She testified that she uses Gravelly Lake Drive "*all the time*" and averred in her written appeal that she passes by the project site "*almost daily*." As an example, she demonstrated that the project site is on her way to a hardware store that she frequents on a regular basis. Manetti Exhibits 99 and 100 show that the location of the project site is on a route that Ms. Manetti would likely take to go to the hardware store from her home. Manetti Exhibit 98 shows that she went to that hardware store 15 times between January 11, 2021 and July 13, 2021.

The trees authorized for removal by Tree Permit No. 295 would adversely affect Ms. Manetti's aesthetic environment as she drives to the hardware store. It's not entirely clear from the record what oak trees would be removed from view of Gravelly Lake Dr SW as Ms. Manetti makes her trips to the hardware store[4]. Manetti Ex. 17, an aerial photograph of the project site, shows a heavy tree canopy along Gravelly Lake Dr. in front of the project site. Manetti Exhibit 13 tallies 18 significant trees on the project site. Seven of those trees are Garry Oak that will be removed. In the absence of any additional information, this evidence shows that more likely than not oak trees visible from Gravelly Lake Dr SW will be removed as a result of the approval of Tree Permit No. 295.

[4] The tree retention plan submitted by Ms. Manetti, Ex.12, doesn't identify what type of trees will be removed and where the Gravelly Lake Dr SW street frontage is located. If the street frontage is on the left side of the Ex. 12 retention plan, it does appear that the two Garry Oak trees depicted in the Manetti Ex. 19 photo will be removed.

5. Highly Associated Species. Ms. Manetti did not establish that the protected oak stands of the project site are important to species highly associated with the protected oak.

At the appeal hearing Ms. Manetti identified numerous birds and other species located close to the project site. See Ex. 43-49. These animals included neotropical birds and various types of woodpeckers. Many of these animals have been observed in a nearby park and swamp. She also submitted comments from a university professor that coastal Washington is located along a major neotropical flyway. See Ex. 40. The neotropical birds and woodpeckers qualify as species highly associated with Garry Oak trees as designated at pages 11-12 of the WDFW management recommendations.

Although Ms. Manetti has identified some animals in the vicinity that qualify as highly associated with Garry Oak trees, this does not establish that the Garry Oak trees at the project site are important to those species. Ms. Manetti testified that a couple experts had told her that "these birds" use the Garry Oak on the project site. If Ms. Manetti is referring to neotropical birds, her expert testimony is not sufficient to meet her burden of proof in establishing that the project site is used by neotropical birds. The experts were not present for cross-examination. More important, it is entirely unclear whether the oak on the project site would be considered "important" to those birds, even if they did use the trees. Given the proximity of a park and swamp, the isolated trees at the project site may not attract many such birds, or play any significant role in fulfilling the habitat needs of the birds for that area of the City.

**Conclusions of Law**

1. Authority. LMC 18A.70.030 provides that decisions under the City's tree retention provisions, LMC 18A.70.300 et. seq., can be appealed using the appeal procedures of the administrative land use process. LMC 18A.20.080 provides that tree removal permits are subject to open record appeal to the hearing examiner, who issues a final decision on the appeal.

2. Posting of NOA. Ms. Manetti asserts in her written appeal that notice of the SEPA determination was not timely posted on the property via an NOA because the NOA wasn't posted until several months after the SEPA comment period had expired. Whether or not the examiner has jurisdiction over the timely posting of the NOA isn't entirely clear[5]. However, as determined in Finding of Fact No. 3, the NOA was

[5] The failure to provide required public notice can only be wholly remedied by re-starting the notice period and providing notice as required by applicable regulations. Equitable tolling, discussed by the parties at hearing, likely would be an insufficient remedy since it doesn't correct lack of notice to the rest (beyond Ms. Manetti) of the public. The adequacy of notice affects the validity of Tree Permit No. 295

posted on January 11, 2021, which was sufficiently in advance of the January 26, 2021 SEPA comment deadline identified on the NOA to comply with the 14-day comment period imposed by LMC 18A.20.330C5.

3. Standing. Ms. Manetti has standing to bring her appeal. The two pertinent requirements for standing are (1) injury in fact, and (2) that the Appellant's interests in the appeal are included in the zone of interests covered by land use regulations. Since Ms. Manetti appeal is an environmental case, a qualifying injury is adverse aesthetic impacts. Ms. Manetti has met this standard by establishing that the Garry Oaks subject to removal are along a road she frequently travels in her community. The aesthetics are within the zone of interests covered by the City's critical area and tree retention standards since those standards in part are designed to protect the quality of life and treed environment of Ms. Manetti.

The basic requirements for standing were summarized in *Thompson v. City of Mercer Island*, 193 Wash. App. 653, 662 (2016) as follows:

> *An allegedly aggrieved person has standing to file a land use petition only if he shows that the land use decision has prejudiced him, or is likely to. RCW 36.70C.060(2)(a). To satisfy the prejudice requirement, a petitioner must show that he would suffer injury in fact as a result of the land use decision. To show an injury in fact, the petitioner must allege a specific and perceptible harm. If the petitioner alleges a threatened rather than an existing injury, he must also show that the injury will be immediate, concrete and specific; a conjectural or hypothetical injury will not confer standing.*

(citations and quotations omitted).

In *Thompson*, a land use appellant contested Mercer Island's approval of a short plat, asserting that it violated the City's zoning code and comprehensive plan, as well as Washington law. *Thompson* failed to identify any injury to himself or his property. Thompson's sole interest was trying to enforce zoning protections in his neighborhood. The court concluded that Thompson's "*abstract interest in having others comply with the law is not enough to confer standing*." Id. At 663.

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because if SEPA notice was not properly posted, the SEPA process would be invalid, which in turn would make Tree Permit No. 295 invalid since non-exempt SEPA land use decisions cannot be issued until the SEPA process is complete. See WAC 197-11-055. Given these circumstances, it is unclear whether the Examiner has jurisdiction over the adequacy of SEPA notice. If the Examiner does have such jurisdiction, notice was found to be accurately posted as determined in Finding of Fact No. 3.

In addition to requiring a showing of prejudice, land use standing cases have also required that the appellants' interests are within the zone of interests the City was required to consider in making its land use decision. The test is not intended to be especially demanding. The test focuses on whether the legislature intended the agency to protect the party's interest when taking the action at issue. *Chelan County v. Nykreim*, 146 Wn. 2d 904, 937 (Wash. 2002).

Ms. Manetti's appeal has special status under standing cases because it alleges environmental harm, i.e. damage to a critical area. The state supreme court has expressly adopted the federal approach to standing in environmental cases. *Save v. Bothell*, 89 Wn. 2d 862 (1978); *Coughlin v. Seattle School Dist*, 27 Wn. App. 888 (Wash. Ct. App. 1980); *Trepanier v. Everett*, 64 Wn. App. 380, FN No. 1 (1992). A significant amount of federal case law focuses upon the type of harm that qualifies for standing in environmental cases, well summarized in *Sierra Club v. BNSF Ry. Co*., No. C13-967-JCC (W.D. Wash. Oct. 25, 2016) as follows:

> *The injury in fact requirement in environmental cases is satisfied if an individual adequately shows that she has an aesthetic or recreational interest in a particular place . . . and that that interest is impaired by a defendant's conduct. The individual's injury must be actual or threatened, though it is clear that an actual increased risk of harm can itself be injury in fact sufficient for standing The threshold question of citizen standing under the CWA is whether an individual can show that she has been injured in her use of a particular area because of concerns about violations of environmental laws, not whether the plaintiff can show there has been actual environmental harm. As the Ninth Circuit has explained, an individual can establish injury in fact by showing a connection to the area of concern sufficient to make credible the contention that the person's future life will be less enjoyable—that he or she really has or will suffer in his or her degree of aesthetic or recreational satisfaction—if the area in question remains or becomes environmentally degraded.*

(citations and quotations omitted).

Ms. Manetti meets the injury in fact element for standing required by the *Mercer Island* case. As outlined in Conclusion of Law No. 4, the key primary code sections at issue in this appeal are critical area regulations. As such, it is reasonable to conclude that Ms. Manetti's appeal qualifies as an environmental case under environmental standing cases. Environmental cases appear to typically involve appellants who frequent recreational areas, such as parks and hiking trails. However, as demonstrated in the *Sierra Club* quotation above, they also involve non-recreational impacts such as those

to drinking water. Since the case is an environmental case, all she needs to prove is that "*her degree of aesthetic … satisfaction*" will be reduced by approval of the tree permit. Ms. Manetti meets that standard for the reasons identified in Finding of Fact No. 4.

Ms. Manetti also meets the zone of interests standing requirement identified in *Chelan*, whether the legislature intended the City to protect the Ms. Manetti's aesthetic interest when approving Tree Removal Permit No. 295. As outlined in Conclusion of Law No. 4, there are two sets of standards that govern this appeal, the City's critical areas ordinance and the City's tree preservation ordinance. Ms. Manetti's aesthetic interests are only generally covered by the intent of both sets of these regulations, but as noted in the *Chelan* case, the zone of interests test "*is not intended to be especially demanding*." For this reason, the test is found to be met for the reasons identified below.

Ms. Manetti's aesthetic interests are within the zone of interests covered by the City's critical areas ordinance. As outlined in Conclusion of Law No. 4, Ms. Manetti's appeal rests upon the assertion that the Garry Oak trees on the subject property qualifies as fish and wildlife conservation habitat. LMC 14.154.010 governs the intent for fish and wildlife conservation regulations. All of those provisions address protecting the sensitive species and their habitat. None pertain to the aesthetic interests of someone such as Ms. Manetti. However, the intent of the City's critical areas as a whole, which includes fish and wildlife conservation areas, does arguably include Ms. Manetti's aesthetic interest. LMC 14.142.020B provides that part of the intent of the critical areas ordinance as a whole is to "*[p]rotect the natural environment, including air and water, to preserve the community's high quality of life*." Ms. Manetti is no doubt part of the Lakewood community and it is highly reasonable to conclude that protecting the rare and decades old Garry Oak trees adds to quality of life. As such, Ms. Manetti's aesthetic interests are squarely covered by LMC 14.142.020B.

Ms. Manetti's interests are marginally within the zone of interests covered by the City's tree retention ordinance. LMC 18A.70.300 identifies the purpose of the City's tree retention regulations. Surprisingly, none of the purposes directly relates to aesthetics, even though the purpose is quite specific about other benefits such as protecting/enhancing critical areas, facilitating aquifer recharge, reducing erosion and stormwater run-off and helping to define private open spaces. However, the overall purpose of the ordinance is to protect "…*the treed environment of the City of Lakewood*…" Under the lenient zone of interests standard, the "*treed environment*" should be construed as protecting the aesthetics of that environment. As such, Ms. Manetti's aesthetic interests are marginally covered by LMC 18A.70.300.

4. Relevance of CAO. The City's critical areas ordinance is pertinent to resolution of Ms. Manetti's appeal. The regulations are both required to be applied as a supplement to and within the tree retention standards themselves.

The issue of whether the Garry Oak trees on the project site qualify as fish and wildlife conservation areas must be resolved to properly apply the City's tree retention standards. LMC 14.142.040A provides that the city's critical area regulations apply to all development activity in the city. It further provides that if the CAO regulations are more stringent than other standards, the CAO regulations apply. For tree retention, this means that if tree retention standards authorize removal of a tree but the CAO does not, the CAO standards apply. In short, if a Garry Oak qualifies as a fish and wildlife conservation area, the tree must be retained even if removal is authorized by the City's tree retention standards.

The role of CAO regulations is directly affirmed in the tree retention standards themselves. LMC 18A.70.320B3 expressly provides that all trees within critical areas should be retained. This requirement of course necessitates an application of CAO standards.

5. Stands of Trees. Garry Oak trees only qualify as fish and wildlife conservation areas when they constitute part of a stand of trees. Isolated oaks are not protected.

The Connie Kay Short Plat appeal decision determined that individual Garry Oak trees qualify as fish and wildlife conservation areas because they are protected under certain circumstances under the WDFW management recommendations. However, at the appeal hearing, staff raised the new argument that the definition for protected oaks adopted by the City Council removed individual trees from the WDFW definition of the protected trees. The changes made by the City Council establish that the Council chose to limit protection to Garry Oak trees located in stands of trees or larger forested areas.

The differences between the City and WDFW definitions are highlight below. The WDFW definition, located at Page 4 of the management recommendations, is quoted below. The revisions made by the City Council, as adopted by LMC 14.165.010 for the definition "priority Oregon white oak woodland," are identified in the WDFW definition below in track change:

> *"Priority Oregon white oak ~~(Quercus garryana)~~ woodland~~s~~" means ~~consist of~~ forest areas ~~stands~~ of pure oak or oak/conifer associations where canopy coverage of the oak component of the ~~stand~~ area is at least 25%~~; or where total canopy coverage of the stand is <25%, but oak accounts for at~~*

*~~least 50% of the canopy coverage present~~. ~~The latter is often referred to as an oak savanna. In non-urbanized areas west of the Cascades, priority oak habitat consists of stands $0.4 ha (1 ac) in size. East of the Cascades, priority oak habitat consists of stands $2 ha (5 ac) in size.~~ ~~In urban or urbanizing areas,~~ **~~single oaks~~**~~, or~~ ~~s~~S*tands of oaks less than one acre in size ~~<0.4 ha (1 ac),~~ *may also be considered ~~a~~ priority habitat when found to be particularly valuable to fish and wildlife (i.e., they contain many cavities, have a large diameter at breast height [dbh], are used by priority species, .*

(emphasis added for "single oak" term).

Most of the revisions to the WDFW definition above are attributable to the fact that all of Lakewood would probably be considered urbanized under the definition and also that the definition as it pertains to areas east of the cascades is irrelevant to the City of Lakewood. However, one clear and pertinent substantive departure from the WDFW definition is the City Council's exclusion of "single oaks." This can only be interpreted as a conscious decision to limit the definition to "stands" of Garry Oaks and to exclude individual Garry Oaks. The LMC definition supersedes the WDFW definition because LMC 14.154.030 only requires that substantial weight be given to the WDFW definition.

The LMC does not define a stand of trees. As pertinent, Websters defines a stand, def. no. 9, as " *a group of plants growing in a continuous area*." At the least, this means that there must be at least two oaks growing in a continuous area to qualify as a stand of oak trees. A more expansive definition may well be reasonably formulated. The term may also have a more precise definition amongst forestry professionals. It is unclear from the record whether any of oak trees on the project site comprise a stand of oak trees as contemplated in the "*Priority Oregon white oak woodland*" definition adopted by the City Council. That issue need not be reached, since even if the definition is met, as outlined in Conclusion of Law No. 6, below, the stands do not qualify for protection.

6. Retention Not Required. The Garry Oaks of the project site are not protected from removal as fish and wildlife conservation areas. The Appellant has not established that the trees meet the standards for retention laid out in the WDFW management recommendations.

As outlined at Pages 5-6 of the "*Examiner Clarification*" for the Connie Kay Short Plat appeal, not all oaks that qualify as "*Priority Oregon white oak woodlands*" must be retained. As further identified at page 6 of the Clarification, only Garry Oaks "*deemed important to species highly associated with Oregon white oak*" are subject to retention.

For the reasons identified at p. 7 of the Connie Kay Short Plat Final Decision Upon Reconsideration, Ms. Manetti has the burden of proof in establishing that WDFW management recommendations require retention. Ms. Manetti has not met her burden of proof for the reasons identified in Finding of Fact No. 5.

Decision

Ms. Manetti's appeal is denied for the reasons identified in the Conclusions of Law above.

ORDERED this 27th day of June 2022.

Phil Olbrechts

City of Lakewood Hearing Examiner

**Appeal Right and Valuation Notices**

LMC 18A.20.080 provides that the final decision of the Hearing Examiner is subject to appeal to superior court. Appeals of final land use decisions to superior court are governed by the Land Use Petition Act ("LUPA"), Chapter 36.70C RCW. LUPA imposes short appeal deadlines with strict service requirements. Persons wishing to file LUPA appeals should consult with an attorney to ensure that LUPA appeal requirements are correctly followed. Affected property owners may request a change in valuation for property tax purposes notwithstanding any program of revaluation.