

BEFORE THE HEARING EXAMINER FOR THE CITY OF LAKEWOOD

Connie Kay Short Plat

Administrative Appeal

LU-21-00104

Final Decision Upon Reconsideration

Overview

The City's request for reconsideration is granted in part. The February 11, 2022 Final Decision of the above-captioned matter is modified to eliminate the requirement for remand review. No mitigation is required under WDFW¹ management recommendations. No trees must be retained. The Kay Short Plat is found to be properly approved by City staff with no modifications to the staff approval. The Final Decision and associated Clarification are otherwise upheld. Single large Garry Oak trees are found to qualify as protected habitat under WDFW standards and are subject to WDFW management recommendations.

Although remand is found unnecessary for this particular application, no error was found in the findings and conclusions of the Final Decision as supplemented by its February 23, 2022 Clarification. As further detailed in this Decision Upon Reconsideration, the City's code is clear that even single large oak trees are protected as fish and wildlife conservation areas. The City has essentially adopted the same definition as that adopted by WDFW for what Garry Oak qualify as protected habitat. The WDFW definition is considered under applicable regulations and by the courts to be based upon best available science.

The City staff concern over the impacts of having to protect every large oak tree has significant

¹ "WDFW" is the Washington State Department of Fish and Wildlife

1 merit. Given the ubiquitous nature of the oak trees in Lakewood, and the fact that they are not an
2 endangered or threatened species, the City is justified in its hesitation to categorize all large Garry Oak
3 trees as fish and wildlife conservation areas. Doing so can potentially impair the City's responsibility
4 to accommodate urban growth and may also raise constitutional property rights issues. However, the
5 City Council has already taken those considerations into account by providing that only "*substantial
weight*" is due WDFW management recommendations. That "*substantial weight*" gives the City the
flexibility it needs to balance the need to protect Garry Oak trees verses GMA policies requiring urban
densities and the property rights of developers.

6 The City has failed to recognize, however, that the door the Council left open for other
7 considerations was in the mitigation of protected Garry Oak trees, not their initial designation as fish
8 and wildlife conservation areas. That is why the remand was initially ordered. Remand gave the City
9 the opportunity to make the balancing made available by the City Council for the mitigation stage of
10 review. It is no coincidence that the "*substantial weight*" clause is in LMC 14.154.030, entitled
"*Habitat protection standards*," and that the designation of the trees as fish and wildlife conservation
areas is in the preceding code section, LMC 14.154.020, entitled "*Designation of critical fish and
wildlife habitat areas*."

11 Ultimately, remand was not found necessary upon reconsideration because the consideration of
12 urban growth and private property rights is not necessary for the Kay short plat. Contrary to the
13 position of both the City and Applicant, the management recommendations of WDFW are clear and
14 specific. Under those standards, the City/Appellant have not met their requisite burden of proof to
establish that any retention or other mitigation is necessary for the protected trees in question.
Consequently, no modification to the management recommendations is necessary under the door
opened by the Council for that very purpose.

15 Given the far-ranging impacts of construing the trees as protected, the Examiner issued a
16 Clarification to the Final Decision to maximize the opportunity for the parties to flesh out any
17 shortcomings in the Final Decision analysis. The City's Motion for Reconsideration is essentially
18 based upon two assignments of error: (1) the Final Decision failed to recognize that only oaks
19 associated with a protected species qualify as fish and wildlife conservation areas; and (2) the Final
20 Decision failed to recognize that the Kay short plat is SEPA exempt and hence exempt from critical
21 area protection. The Clarification provided greater detail on these two points, identifying that Garry
Oaks associated with a protected species only comprise one, nonexclusive category of oak that qualify
as fish and wildlife conservation areas. In response, the City was unable to identify how or why it was
able to construe a nonexclusive category of Garry Oak as an exclusive one. The Clarification also
noted the obvious and very basic point that SEPA exempt projects are not exempt from critical area
standards. The City was unable to respond to that significant flaw in its position as well.

22 The City leads its motion for reconsideration with the point that the City Council's legislative
23 choice's control in the resolution of what Garry Oaks are subject to protection. Ultimately, however, it
24 is the City that is ignoring those choices. The City Council has chosen to adopt the definition of
25 protected oak adopted by WDFW, which includes single large oak trees. The City Council has also
26 chosen to give substantial weight to WDFW management recommendations, which includes retaining
single large oak trees in limited circumstances. City staff's opposition to the Final Decision is based
upon disagreement with its own City Council, not any exceedance of authority exercised by the
Examiner. The Council has addressed the concerns of City staff by enabling consideration of GMA
policy and private property rights impacts at the mitigation stage of project review. That is all that the
Final Decision required.

Background

A Final Decision was issued for the above-captioned matter on February 11, 2022. The Final Decision required a remand of the application to incorporate mitigation measures in an updated biological assessment². The Final Decision emphasized that this was an opportunity for the City to consider the impacts of mitigation on its ability to meet its responsibility to accommodate urban growth as contemplated by the GMA. The City requested reconsideration by motion dated February 18, 2022. The Examiner issued a Clarification to the Final Decision dated February 23, 2022 in response to a clarification request made by the Appellant. As noted in the Clarification, a primary purpose of the Clarification was to ensure that the parties had the opportunity to address the reconsideration issues the Examiner found most pertinent in their reconsideration briefing³. The Appellant and Applicant submitted reconsideration responses on February 28, 2022 and the City filed its reply on March 1, 2022.

Materials Relied Upon

The City's Motion for Reconsideration and the responses and replies associated with that motion, in addition to the administrative record of the Final Decision, were considered in issuing this Final Decision Upon Reconsideration. As noted in the Order for Reconsideration, dated February 21, 2022, no new evidence was permitted in the reconsideration briefing without prior authorization. To this end, references by the Applicant to her personal dealings with the Appellant in her February 28, 2022 response are excluded as unauthorized evidence outside the record. In addition, the Appellant's Exhibit 1 to her reconsideration response is also excluded as new evidence.

Conclusions of Law Upheld

The Conclusions of Law of the Final Decision, as supplemented in the February 23, 2022 Clarification, are upheld. The City has not demonstrated any error in the Conclusions of Law or provided any alternative interpretation of the City's fish and wildlife conservation regulations that can be reasonably based upon the LMC.

The City's assertions of error are primarily based upon two code provisions: (1) Garry Oak fish and wildlife habitat areas are only protected if associated with a protected species; and (2) SEPA

² The Final Decision used the term "biological assessment" to describe Manetti Ex. 44, the Applicant's Washington Forestry Consultants report. The report was presented as a "biological assessment" by City staff in an email dated January 19, 2022 and the Final Decision continued to use that terminology. Use of the term was not intended to encompass the content requirements referenced in LMC 14.154.030B.

³ The City had the opportunity to respond to the Clarification points in its reconsideration reply briefing. Had the City raised new issues in its reply to which the Appellant and Applicant had no reasonable opportunity to address, surrebuttal would have been permitted. No objections were raised by any party to the issuance of the Clarification or its comments that it was intended to supplement the reconsideration review process.

1 exempt projects are not subject to the City's critical areas ordinance. Neither of these positions is
2 supported by the LMC.

3 A. Garry Oak Do Not Have to Be Associated with Protected Species to Qualify as Fish and
4 Wildlife Habitat Conservation Areas.

5 The City's sole basis for arguing that Garry Oak trees are only protected if associated with a
6 protected species is LMC 14.154.020bii, which lists several types of "outstanding potential habitat
7 areas" as protected. LMC 14.154.020bii goes on to elaborate that these areas "include...*specific*
8 *habitat types which are infrequent in occurrence in Pierce County and Lakewood*" (emphasis added)
9 and "may" provide habitat for protected species. The City asserts that the quoted language creates an
10 exclusive threshold for any Garry Oak to qualify as an "*outstanding potential habitat area*" and hence
11 a protected fish and wildlife protection area.

12 As pointed out in significant detail in the Clarification, there is no reasonable basis to conclude
13 that the quoted threshold serves as the sole and exclusive basis for a Garry Oak to qualify as an
14 "*outstanding potential habitat area*." LMC 14.154.020bii only lists the quoted language as one type
15 of habitat area that is included in the types of areas that qualify as "*outstanding potential habitat*
16 *area*."

17 Significantly, after the threshold language relied upon by the City, LMC 14.154.020bii goes on
18 to provide a specific list of protected habitats, beginning as follows: "[t]hese areas include the
19 following: (A) *Priority Oregon white oak woodlands*..." In determining whether these listed habitats
20 qualify as protected on their own (as outlined in the Clarification), it's reasonable to conclude that the
21 City Council intended its fish and wildlife conservation area regulations to be interpreted in a manner
22 that is consistent with the state law that mandated their adoption, specifically the Growth Management
23 Act (GMA), Chapter 36.70A RCW.

24 Applying GMA requirements leads to the inescapable conclusion that the listed habitat,
25 specifically the "*Priority Oregon white oak woodlands*," on its own qualifies as protected habitat
26 independent of the prior sentence identifying habitat associated with protected species as protected
habitat. As noted in Finding of Fact No. 5 of the Final Decision, single large Garry Oak trees qualify
as protected habitat under the WDFW definition of "*priority Oregon white oak woodlands*," which in
turn was also adopted by the City as its own definition in LMC 14.165.010⁴. Division II of the Court
of Appeals has ruled that the WAC 365-190-130(4)(b)⁵ priority habitat and species information of
WDFW are based upon best available science. See *Whidbey Env'tl. Action Network v. Growth Mgmt.*
Hearings Bd., 14 Wash. App. 2d 514, 518 (2020). RCW 36.70A.172 requires that critical area

⁴ See LMC 14.165.010 "*priority Oregon white oak woodland*" definition and compare to Page 4 "*priority Oregon white oak woodland*" definition of 1998 WDFW Management Recommendations for Washington's Priority Habitats Oregon White Oak Woodlands. LMC 14.165.010 essentially adopts the portions of the WDFW definition that apply to urbanized areas such as the City, at least for single oaks and small patches of oak trees.

⁵ WAC 365-190-130(4)(b) identifies that habitats and species of local importance potentially include those identified by WDFW and that cities and counties should consider WDFW priorities in designating its priority habitats and species because WDFW priorities are based upon best available science. As outlined at Page 4 of the Clarification, WDFW priorities and associated management recommendations for Garry Oak are identified in the WDFW 1998 *Management Recommendations for Washington's Priority Habitats. Oregon White Oak Woodlands*.

1 regulations be based upon best available science. The *Whidbey* court recognizes that in “rare”
2 circumstances, a “*reasoned justification*” may be used to depart from best available science. *Id.* at 525.
3 However, any such “*reasoned justification*” would be laid out in the legislative history to the City’s
4 critical area regulations if the City Council intended to depart from the best available science
5 underlying the WDFW definition of protected oak habitat. The City has not shown any such
legislative determination in its briefing and none is apparent from the City ordinances from which the
City’s critical area regulations have evolved.

6 In point of fact, the legislative history underlying oak tree protection in Lakewood ordinances
7 evidences a legislative determination to move towards the WDFW protection measures rather than
8 away from them. The current definition of “*Priority Oregon white oak woodlands*” was adopted by
9 Ordinance No. 362 in 2004, which as previously noted adopts the WDFW definition for protected oak
10 habitat in urban areas. Prior to the adoption of the WDFW definition, the City’s critical areas
ordinance protected “oak woodlands,” which was limited to oak stands of one acre or more. *See*
Ordinance 362, p. 45 and 47. Under the prior definition, single oaks would not qualify as protected
habitat. The Council’s adoption of Ordinance 362 was a clear move towards recognizing single large
oak trees as fish and wildlife conservation areas.

11 B. SEPA Exempt Projects are not Critical Areas Exempt.

12 SEPA exempt projects are not exempt from critical area regulations (including fish and wildlife
13 regulations), except to the extent expressly exempted by the critical area regulations. For protected oak
14 trees, SEPA exempt status does not affect the designation of oak trees as fish and wildlife conservation
15 areas. However, it does affect the level of analysis required for mitigation oak trees that qualify as
protected.

16 In its reply brief, the City takes the entirely unfounded position that “*SEPA underlies all*
17 *environmental regulations in the City.*” If the City’s reference to “*environmental regulations*” are
18 meant to include critical area regulations, that position is patently false and supported by nothing in the
City’s code. The City’s continued reliance upon this specious argument undermines the credibility of
its position that single oaks do not qualify as fish and habitat protection standards⁶.

19 ⁶ Associated with the City’s contention that SEPA exemptions are equivalent to critical area contentions is the additional
20 argument that there is no authority to condition SEPA exempt projects under the critical areas ordinance. As authority for
21 this unique position, the City cites to RCW 43.21C.110 at p. 11 of this reconsideration motion, which prohibits the
imposition of conditions upon SEPA exempt projects “under this chapter.” “This chapter,” of course, is SEPA. No one is
arguing for the conditioning of the project under SEPA.

22 The conditions required by the Final Decision were under the subdivision code and critical areas ordinance. LMC
23 14.152.060 provides that the City “shall not” approve any permit, including short subdivision approvals, that do not
24 conform to the critical area regulations. LMC 14.142.020F provides that the intent of the critical area regulations includes
25 mitigating for impacts to critical areas. LMC 14.142.030B provides that the critical areas regulations “shall be liberally
26 construed” serve their purpose. Given these provisions, there is ample legal authority to arrive at implied authority for
conditioning a project under critical area regulations. Even without that authority, the subdivision code provides the
general authority to condition short plats under the “public health, safety and general welfare” criterion of LMC
17.22.070B1. In the unlikely event that City critical area regulations and subdivision regulations are not found to include
the authority to condition for compliance with critical area regulations, the City would just have to make applicants go
through the paper exercise of choosing between denial under LMC 14.152.060 or revising their project to avoid removing
oak trees required to be retained by WDFW management recommendations. That is what the City would do with a

1 Under the City's rational, wetlands, streams and steep slopes all would not be subject to
2 protection if located in a short subdivision because short subdivisions are exempt from SEPA review.
3 That is, of course, patently absurd as the City of Lakewood and likely every other city and county in
4 Washington State does not exempt such critical areas from protection based upon the SEPA exempt
5 status of a proposal. Lakewood's critical areas ordinance sets buffers for such critical areas and those
6 buffers are imposed regardless of SEPA-exempt status. See LMC 14.154.050A3; LMC 14.162.080,
Table 14.1; LMC 14.146.030B4. Wetlands, streams and geologically hazardous areas do not lose their
environmental significance because they're located in a short plat as opposed to a long plat. The same
reasoning applies to oak trees.

7 It is recognized that critical areas such as Garry Oak trees are distinguishable from streams,
8 wetlands and geologically hazardous areas because they have no set buffers. As outlined in the Final
9 Decision and page 4 of the Clarification, the mitigation is based upon the WDFW 1998 *Management*
10 *Recommendations for Washington's Priority Habitats. Oregon White Oak Woodlands*, to which the
11 City is only required to provide "substantial weight." See LMC 14.154.030B. As further outlined in
12 the Final Decision and Clarification, the mitigation required for protected Garry Oak trees is
13 dependent upon SEPA exempt status – development proposals affecting protected⁷ Garry Oak trees
must include a formal biological assessment as part of its SEPA review while SEPA exempt projects
are not subject to this requirement. The Clarification noted that one could try to argue that this
exemption from a formal biological assessment could be construed as a backdoor exemption from
protected status. The City made no comment on this issue, again showing that even it could not make
such an argument.

14 As outlined in page 5 of the Clarification, the reference in LMC 14.154.030B to projects
15 subject to SEPA review is limited to requiring those projects to have a formal biological assessment
16 prepared in conformance with the content requirements of LMC 14.154.050B. Other projects, such as
the Kay short plat, are still subject to the management recommendations of the WDFW 1998
Management Recommendations for Washington's Priority Habitats. Oregon White Oak Woodlands as
outlined at Page 5 and 6 of the Clarification.

17 **Remand Unnecessary**

18 In its request for reconsideration, the City makes the assertion that the remand requirement was
19 unduly burdensome because the City had no standards for imposing mitigation. The Applicant also
20 asserts a lack of mitigation standards in its reconsideration response. As outlined at Page 6 of the
21 Clarification, the WDFW 1998 *Management Recommendations for Washington's Priority Habitats.*
22 *Oregon White Oak Woodlands* (1998 WDFW Management Recommendations) provide specific
mitigation requirements that should not be difficult to implement. Neither the City nor Applicant
provided any explanation as to why the management recommendations are too vague and none are
evident from the record.

23 The City's focus on the mitigation requirements reveals that the Final Decision remand order
24 was unnecessary and the need for mitigation can be addressed without further project review. The

25 developer proposing to building with a stream or wetland buffer. The same could be done for an applicant proposing to
26 remove protected oak trees.

26 ⁷ "Protected" Garry Oak as referenced in this Decision refers to Garry Oak that are protected as fish and wildlife
conservation areas.

1 City Council's decision to only require "substantial weight" to the 1998 WDFW Management
2 Recommendations is construed as the one opportunity City staff can give to what it believes to be the
3 absurd consequences of having to protect the multiple single oak trees located in the City. Such
4 flexibility is in line with the long-standing principle expressed in the *Whidbey* case that departures
5 from the best available science of the WDFW recommendations upon a "*reasoned justification*." *Id.*

6 The Final Decision required a remand for several reasons, including (1) the oak trees had not
7 been treated as protected fish and wildlife habitat areas under the City's review process; (2) the
8 opportunity for "reasoned justification" had reasonably not been recognized by the parties; and (3) the
9 precedential impact of the Final Decision could significantly affect other projects due to the
10 pervasiveness of the oak trees throughout the City. However, upon reconsideration, as determined
11 below, the opportunity for "*reasoned justification*" need not be addressed for this project because the
12 1998 WDFW Management Recommendations do not compel any mitigation for the trees of this
13 project. Given the delays caused by the City's request for reconsideration and in the interest of
14 expeditious and economical review, the mitigation requirements will be addressed by this Decision
15 Upon Reconsideration in lieu of remand.

16 **No Mitigation Required**

17 No mitigation is required for the oak trees located on the Kay short plat. The City/Appellant
18 has not met its burden of proof in establishing that the trees are important to species highly associated
19 with the oak trees.

20 As outlined in the Clarification, the 1998 WDFW Management Recommendations provide for
21 retention of single and small patches of Garry Oak in urbanized areas if those trees are "*deemed*
22 *important to species highly associated with Oregon white oak*." Pages 10-12 of the 1998 WDFW
23 Management Recommendations identify what species are "*highly associated*" with the oak trees. The
24 City and or Appellant have the burden of proving that any such species are highly associated with the
25 oak trees. See RCW 82.02.020 (city must "demonstrate" necessity for dedications of land as condition
26 of project development); *Isla Verde Int'l Holdings, Inc. v. City of Camas*, 146 Wash.2d 740, 755-56
(2002)(City has burden of establishing that permit conditions are reasonably necessary as a direct
result of a proposed development).

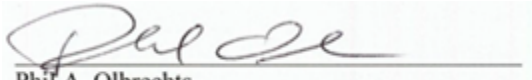
For this application, the City and Appellant have not proven that the short plat is associated
with any highly associated species identified at pages 10-12 of the 1998 WDFW Management
Recommendations. The Appellant has identified some highly associated species that may be located
in the vicinity of the project site, but none that are specifically located at the project site. Somewhat
vexing in the WDFW list of associated species are "invertebrates," which includes insects.
Presumably, all Garry White Oak serve as habitat for some types of insects. However, the
"*invertebrate*" section at page 11 references Appendix B, which lists only a few specific types of
insects as qualifying as "*highly associated*" with the Garry Oak. The City and Appellant have not
established that the oak of the project site serve as habitat for any of the "*highly associated*" insects
listed in Appendix B.

24 **Decision**

25 The Final Decision, as clarified by the Clarification, is upheld and no errors are found. The
26 Final Decision, as supplemented by the February 23, 2022 Clarification and this Decision Upon
Reconsideration, are upheld and shall constitute the final decision for the Kay Short Plat application.

1 However, the order requiring remand in the Final Decision is overturned and for the reasons identified
2 in this Decision Upon Reconsideration, no mitigation or tree retention is found necessary for the Garry
3 Oak trees located at the Kay Short Plat project site.

4 DATED this 14th day of March, 2022.

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6 
Phil A. Olbrechts

7 Hearing Examiner for Lakewood
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10 **Appeal Right and Valuation Notices**

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