



CITY OF

PORTLAND, OREGON

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Hearings Office

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HEARINGS OFFICER'S ORDER

APPEAL OF PATRICIA McINNIS-BRIOADY

CASE NO. 3100116

Bureau Case No. None Shown

PROPERTY / ZONE / PARK: 37 SW Woods Street

DATE OF HEARING: April 5, 2010

APPEARANCES:

Patricia McInnis-Brioady, Appellant

Jim Field, for the City of Portland

Robert Crouch, for the City of Portland

HEARINGS OFFICER: Mr. Gregory J. Frank

FINDINGS OF FACT AND CONCLUSIONS OF LAW:

Ms. McInnis-Brioady appeared at the hearing, on April 5, 2010, and testified on her own behalf. Mr. Jim Field, City of Portland Urban Forestry, and Mr. Robert Crouch, City of Portland Urban Forestry, appeared at the hearing and testified on behalf of the City. Mr. Field offered, into the evidentiary record, Exhibits 4, 5, 6, 7, 8, 9b, 9c, 9d, 9e and 9f. Ms. McInnis-Brioady did not object to the entry of these exhibits. Ms. McInnis-Brioady offered Exhibits 2a, 2b, 2c, 12 and 13, into the evidentiary record. Mr. Field did not object to the entry of these exhibits. The Hearings Officer offers and admits, on his own motion, Exhibits 1, 2, 10 and 11 into the evidentiary record. The Hearings Officer makes this decision based upon the testimony of Ms. McInnis-Brioady, Mr. Field and Mr. Crouch, and the exhibits admitted into the evidentiary record (Exhibits 1, 2, 2a, 2b, 2c, 4, 5, 6, 7, 8, 9b, 9c, 9d, 9e, 9f, 10, 11, 12 and 13).

Mr. McInnis-Brioady, on behalf of the owner of real property commonly described as 37 SW Woods Street, Portland, Oregon (hereafter, the "Subject Property"), appeals a City decision as set forth in Exhibit 6. Exhibit 6, a letter from Rob Crouch, Urban Forestry Coordinator, Portland Parks and Recreation, to Ms. McInnis-Brioady summarized the City's findings regarding Street Tree pruning at the

Subject Property. Exhibit 6 also imposed certain requirements on the owner of the Subject Property, including:

“* Remove seven (7) illegally pruned street trees. A removal permit is enclosed.

- **Plant seven (7) new 2” caliper street trees.** Select the tree species from the enclosed Recommended Street Tree List. Call Tree Inspector Jim Field at 503-823-4011 to report the species you have selected. A planting permit will then be mailed to you.
- **All work must be completed by March 23, 2010.**

If you fail to comply with this notice by March 23, 2010, we will be forced to initiate proceedings to allow the City to correct the violation at the property owner’s expense. You will be charged the cost of removing and replacing the trees, establishment care, overhead, and City Auditor’s charges. If unpaid, a lien will be placed against the property for the charges. In addition, a civil penalty of \$100 per tree will be assessed.”

At the hearing, Ms. McInnis-Brioady stated that she believed the City’s findings and impositions, in Exhibit 6, were improper as related to the following:

1. The seven (7) Street Trees at the Subject Property were not illegally pruned.
2. The City provided no law/rule support for the requirement that 2” caliper replacement Street Trees be planted.

Mr. Field testified that a complaint was received by Urban Forestry on December 9, 2009 that Street Trees on SW 1st and SW Woods had been topped. Mr. Field stated an inspection of the Street Trees at the Subject Property was made and that a permit for the pruning had not been obtained, and that the Street Trees had been damaged. (Exhibit 8). Mr. Field stated that during one or more subsequent conversations with Ms. McInnis-Brioady, he (Field) was informed that contractors recommended that the Street Trees at the Subject Property could be “restructured.”

Mr. Field testified that Portland City Code (“PCC”) 20.40.090 C. authorizes the City Urban Forester to remove Street Trees (trees within the City of Portland right-of-way) and also to require the adjacent property owner, at the owner’s expense, to replace the removed Street Trees with new Street Trees. Mr. Field stated that PCC 20.40.090 D. requires a City of Portland permit be issued prior to the pruning of Street Trees.

Mr. Crouch testified that he too inspected the Street Trees adjacent to the Subject Property and he believed that attempting to “restructure” these trees would not result in healthy and safe trees.

Ms. McInnis-Brioady testified that she received a letter from the City (Exhibit 8) and then came to Portland and spoke with at least two arborists, and one person retired as a forester for the City. Ms. McInnis-Brioady stated that the Street Trees at the Subject Property are Ash trees and not Maple trees as noted by the City in Mr. Field’s testimony. Ms. McInnis-Brioady submitted two reports prepared by arborists that are on the City’s list of approved arborists. (Exhibits 12 and 13). Ms. McInnis-Brioady stated that both reports recommended leaving the existing Street Trees, rather than removing the trees and replanting new trees.

Ms. McInnis-Brioady stated that the tree service contractor she hired (Preston’s Tree Service) is licensed and registered with the Oregon Construction Contractor’s Board. She stated that the goal was to have

the Street Trees trimmed; the work being done on November 10th and November 11th, 2009. Ms. McInnis-Brioady stated that she assumed Preston's Tree Service was knowledgeable and would follow all relevant laws/rules. Ms. McInnis-Brioady now acknowledges that Preston's Tree Service did not obtain the necessary City tree-cutting permit. Ms. McInnis-Brioady, however, stated that she believed the Street Trees at the Subject Property were pruned consistent with City regulations.

Ms. McInnis-Brioady testified that the small size of the tree wells where the current Street Trees are planted makes it very difficult to grind out the stumps to create space for new Street Trees. Ms. McInnis-Brioady stated that she has been told, by certified arborists, that newly planted Street Trees may not prosper and/or be viable.

During rebuttal testimony, Mr. Field stated that the Street Trees at the Subject Property were illegally pruned for two reasons: (1) no permit was obtained and (2) the Street Trees were not pruned consistent with arboricultural standards. Mr. Field stated that 2" caliper Street Trees are planted throughout the City of Portland and with proper care should be viable. Mr. Crouch stated, during rebuttal, that the Street Trees at the Subject Property were not pruned consistent with ISI Standards; in essence, he stated the Street Trees were "topped." Mr. Crouch stated that the "unpublished policy" of the City of Portland Parks and Recreation Urban Forestry, is that in commercial areas new Street Trees should be 3 ½" caliper and in residential areas 2" caliper. Mr. Crouch stated that he took into consideration the size of the tree wells at the Subject Property in requiring only 2" caliper new Street Trees to be planted.

Ms. McInnis-Brioady, during rebuttal, emphasized that the two arborists she contacted from the City approved list indicated that planting 2" caliper trees would not be viable; they would not likely survive. Ms. McInnis-Brioady emphasized that the existing Street Trees are mature and will regenerate a sizeable canopy.

The Hearings Officer finds that the testimony offered by Ms. McInnis-Brioady, Mr. Field and Mr. Crouch is truthful and generally credible. The Hearings Officer finds that Ms. McInnis-Brioady does not contest the City's allegation that a permit is required to prune the Street Trees at the Subject Property and, the pruning of those trees in November of 2009 was not accompanied by the issuance of a permit by the City. The Hearings Officer finds the reference to illegally pruned Street Trees is correct; the City made no error with respect to the Street Trees at the Subject Property being illegally pruned because a permit was not acquired prior to the November 2009 pruning.

Ms. McInnis-Brioady's focus, with respect to reference of the illegally pruned Street Trees in Exhibit 6, is on the technique or procedures used by Preston's Tree Service. Ms. McInnis-Brioady, relying upon the comments made by arborists (Exhibits 12 and 13), suggests that the technique or procedure used by Preston's Tree Service may be acceptable to certified arborists.

PCC 20.40.090 C. authorizes the City Urban Forester to remove or caused to be removed any Street Tree if "in the opinion of the Forester, causes its continued existence to be detrimental to the public interest."

The Hearings Officer finds that PCC 20.40.090 C. grants the City Urban Forester discretion to determine, in this case, if the November 2009 pruning of the Street Trees at the Subject Property caused the Street Trees continued existence to be detrimental to the public interest. There is no factual dispute between Ms. McInnis-Brioady and the City, that the Street Trees at the Subject Property were pruned in

November 2009. There is no dispute that the Street Trees at the Subject Property were pruned to such an extreme that no "terminal buds or branches" remained. (Exhibit 12, also see photos 9b through 9e). Mr. Field testified that the type of pruning done in November 2009 at the Subject Property leaves trees that are high maintenance with "weak re-growth and are subject to failure." Mr. Crouch testified that the type of pruning done in November 2009 at the Subject Property did not meet general ISA Standards.

Ms. McInnis-Brioady, through two certified arborist reports (Exhibits 12 and 13), argues that the method of pruning the Street Trees at the Subject Property is considered appropriate by arborists recommended by the City. The Hearings Officer acknowledges that there may be a difference of opinion, between Ms. McInnis-Brioady and the City, as to whether the Street Trees at the Subject Property have been damaged so severely that they are no longer viable. The Hearings Officer finds that Ms. McInnis-Brioady's argument is that the Street Trees at the Subject Property were not illegally pruned, because two certified arborists suggest the technique used by Preston's Tree Service in November 2009, may be acceptable in the arborist community.

The Hearings Officer may remand or reverse the City Urban Forester's determination in Exhibit 6 only if the Hearings Officer finds that the City Urban Forester's decision (Exhibit 6) is (1) outside of the City Urban Forester's discretion delegated by PCC, is (2) inconsistent with a relevant and applicable City rule, or (3) is in violation of a constitutional or statutory provision. ORS 183.282. The Hearings Officer may not *substitute* his judgment for that of the Urban Forester, as stated in Exhibit 6, as to any issue of fact. *Labor Ready Northwest, Inc. v. Bureau of Labor and Industries*, 208 Or App 195, 201 (2006). Discretion describes a decision maker's power to choose among several courses of action, so long as the choices are legal. *Liberty Northwest Insurance Corporation v. Jacobson*, 164 Or App 37, 41 (1999).

The Hearings Officer, as noted earlier in this decision, finds the November 2009 pruning of the Street Trees at the Subject Property to be illegal, because a permit was not obtained prior to the pruning activity. In addition, the Hearings Officer finds that PCC 20.40.090 C grants the City Urban Forester discretion to determine if pruning activity is detrimental to the continued existence of the Street Trees. In this case, the Hearings Officer finds evidence in the record that the pruning in November 2009, damaged the Street Trees at the Subject Property (Exhibits 6 and 8) resulting in Street Trees that will, in the future, have weak re-growth and will be subject to failure. The Hearings Officer appreciates that there is evidence in the record to suggest that the Street Trees at the Subject Property have undergone similar pruning in the past, may be viable in the future, and will provide greater benefits to the public that smaller new trees will not provide. However, the Hearings Officer must view the facts from the perspective of the City Urban Forester and determine if the City Urban Forester's opinion meets the tests of *Labor Ready* as set forth in the preceding paragraph.

The Hearings Officer finds that the City Urban Forester, in Exhibit 6, exercised his discretion within the limits provided by PCC 20.40.090 C. The Hearings Officer finds that the City Urban Forester provided factors (weak re-growth, subject to failure, greater maintenance obligations) to support his opinion that the Street Trees at the Subject Property would be detrimental to the public interest. The Hearings Officer finds that the statement in Exhibit 6 that the Street Trees at the Subject Property were illegally pruned is consistent with the relevant/applicable City laws/rules, and is not contrary to any constitutional or statutory provision cited by Ms. McInnis-Brioady.

Ms. McInnis-Brioady also argued that Exhibit 6 contained a requirement to plant seven (7) new 2" caliper Street Trees. Ms. McInnis-Brioady asserts that there is no written policy, rule or regulation

setting forth the 2" caliper requirement for new Street Trees. Mr. Crouch, during his testimony, concurred that there is no written 2" caliper policy, rule or regulation. Mr. Crouch stated that new Street Tree planting requirements imposed, throughout the City, are 3 ½" caliper for new Street Trees in commercial areas and 2" caliper for new Street Trees in residential areas. Mr. Crouch testified that he characterized the Subject Property as being in a commercial area, but required 2" caliper new Street Trees at the Subject Property because the tree wells are only 3 feet by 3 feet in size.

The Hearings Officer finds that it is not necessary that prior written policies, rules or regulations exist before the City Urban Forester can make a discretionary decision. *Dickinson v. Davis*, 277 Or 665 (1977). The Hearings Officer finds that Ms. McInnis-Brioady appears to be arguing that requiring a larger tree, to assure viability, would be better. The Hearings Officer interprets the language in Exhibit 6 stating "plant seven (7) new 2" caliper street trees" as permitting Ms. McInnis-Brioady to plant larger (than 2" caliper) trees; this requirement is that the Street Trees to be planted at the Subject Property must be at least 2" caliper. The Hearings Officer finds that the City Urban Forester did not exceed his discretionary authority granted in PCC 20.40.090 C by requiring 2" caliper Street Trees to be planted.

The Hearings Officer notes that the determination letter that is subject to this appeal (Exhibit 6) includes a March 23, 2010 deadline. The Hearings Officer finds that Ms. Patricia McInnis-Brioady filed an appeal contesting the validity of Exhibit 6. The Hearings Officer finds, as a result of the appeal, the March 23, 2010 deadline has passed. The Hearings Officer finds it reasonable and appropriate to modify the deadline until June 1, 2010.

The Hearings Officer finds that Appellant Patricia McInnis-Brioady did not prevail in this appeal.

ORDER AND DETERMINATION:

1. Appellant Patricia McInnis-Brioady did not prevail in this appeal.
2. The February 23, 2010 determination letter (Exhibit 6) is upheld excepting that all references to the March 23, 2010 deadline be replaced by June 1, 2010.
3. This order has been mailed to the parties on April 13, 2010.
4. This order may be appealed to a court of competent jurisdiction pursuant to ORS 34.010 et seq.

Dated: April 13, 2010

GJF:cb

Enclosure



Gregory J. Frank, Hearings Officer

Exhibit #	Description	Submitted by	Disposition
1	Appeal form page 2	Field, Jim	Received
2	Appeal form page 1 w/attachments	Field, Jim	Received
2a	Letter from Appellant (3 pgs)	Field, Jim	Received
2b	Portland Maps (9 pgs)	Field, Jim	Received
2c	Photo w/handwritten date of 7/13/09	Field, Jim	Received
2d	Letter from Appellant to Kerupi Tuaumu Vaoiva date 2/9/10	Field, Jim	Not Offered
2e	Copy of Prestons Tree Service business card	Field, Jim	Not Offered
2f	Copy of USPS Track & Confirm info sheet	Field, Jim	Not Offered
3	Bureau mailing list (handwritten)	Field, Jim	Not Offered
4	Code printout 20.40.090 pages 5 & 6 of 14	Field, Jim	Received
5	Code printout 20.40.215 pages 13 & 14 of 14	Field, Jim	Received
6	Letter from Crouch to Appellant dated 2/23/10	Field, Jim	Received
7	Urban Forestry Tree Permit	Field, Jim	Received
8	Letter from Field to Appellant dated 12/18/09	Field, Jim	Received
9	Photo	Field, Jim	Not Offered
9a	Photo	Field, Jim	Not Offered
9b	Photo	Field, Jim	Received
9c	Photo	Field, Jim	Received
9d	Photo	Field, Jim	Received
9e	Photo	Field, Jim	Received
9f	Photo	Field, Jim	Received
9g	Photo	Field, Jim	Not Offered
10	Mailing list	Hearings Office	Received
11	Hearing notice	Hearings Office	Received
12	Arborist Report	McInnis Brioady, Patricia	Received
13	Arborist Report	McInnis Brioady, Patricia	Received