



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

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July 18, 2012

To: Mayor Adams
Commissioner Saltzman
Commissioner Leonard
Commissioner Fish
Commissioner Fritz

From: Tim Heron
Dave Skilton

T. Heron
Dave Skilton

RE: Landmarks Commission Appeal of LU 12-106944 HDZM – 19th and Johnson Street Development
Applicability of Zoning Code to Trees in the Right-of-Way

The question of the applicability of Title 33 Portland Zoning Code (Zoning Code) to the four elm trees in the public right-of-way adjacent to 1920 NW Johnson Street is first addressed in section 33.10.030 - When the Zoning Code Applies, specifically in section B, which reads as follows:

B. Clarification for rights-of-way. Land within private rights-of-way, including rail rights-of-way and utility rights-of-way, is regulated by Title 33. Land within public rights-of-way is regulated by Title 17, Public Improvements, and not by Title 33, except in the following situations where both Titles apply:

1. Rights-of-way in the greenway, environmental, and scenic resource overlay zones, including the creation of new rights-of-way and the expansion or vacation of existing rights-of-way;
2. The act of creating or dedicating public rights-of-way through a land division;
3. Development within design districts when specified in Chapter 33.420, Design Overlay Zone;
4. Structures that project from private property over rights-of way, such as oriel windows; and
5. Proposals for park-and-ride facilities for mass transit.

The part of the right-of-way in question is not regulated by the Zoning Code because none of the listed exceptions apply, specifically:

- The area in question is not in the Greenway, Environmental, or Scenic Resource Overlay zones, and no right-of-way is being created, expanded, or vacated;
- no land division is being created;
- the portion of the site where the trees are located is not in the Design Overlay zone;
- no projections into the right of way are under consideration; and
- no park-and-ride facility for mass transit is proposed.

The second bar to review occurs in 33.445.320 A - When Historic Design Review is Required in a Historic District, which reads:

33.445.320 Development and Alterations in a Historic District

Building a new structure or altering an existing structure in a Historic District requires historic design review. Historic design review ensures the resource's historic value is considered prior to or during the development process.

A. When Historic Design Review is required in a Historic District. Unless exempted by Section 33.445.320.B, below, the following proposals in a Historic District are subject to Historic Design Review:

1. Exterior alteration of a primary structure;
2. Building a new structure;
3. Exterior signs;
4. Nonstandard improvements in the public right-of-way, such as street lights, street furniture, planters, public art, sidewalk and street paving materials, and landscaping, that have not received prior approval of the City Engineer;
5. Proposals using one of the provisions of the a, Alternative Design Density Overlay Zone, specified in Sections 33.405.040 through .080; and
6. Proposals in the Albina Community plan district using the provisions of Section 33.505.220, Parking Requirement Reduction, or Section 33.505.230, Attached Residential Infill on Vacant Lots in R5-Zoned Areas.

In addition to the restriction applied by 33.10.030 B, none of the requirements for review in 33.445.320 A apply to the area of the right-of-way in question. Specifically, with reference to item 5, in preparation for this case the proposed removal and replacement of the street trees was determined by the Bureau of Transportation to meet its standards for improvements in the right-of-way. Although the Historic Landmarks Commission can and did express concern about the trees in question, it cannot and did not reach beyond its delegated authority and appropriate jurisdiction over them.

The applicable approval criteria were addressed. Beyond its assertion of errors in interpreting the Zoning Code, the appeal also states that the Historic Landmarks Commission "failed to consider the contribution made by the street trees to the fabric and context of the district as characterized in the *Community Design Guidelines* and the *Historic Alphabet District Community Design Guidelines Addendum* in making their findings and arriving at their final decision." However, a commission can only apply approval criteria to matters under its purview and the treatment of street trees, as demonstrated, is not such an item. This can perhaps be clarified further by noting that an application to cut down the trees submitted independently of this development proposal would be processed under the jurisdiction of the Urban Forestry Commission, not the Historic Landmarks Commission.

Furthermore, reference to the audio recording of the proceedings reveals that the Commission did discuss and consider the impact of the proposed development on the street trees in reviewing the design of the proposed building. In the end a majority of commissioners accepted the code interpretation of the Development Services staff, as well as the professional opinion of both the Urban Forestry staff and the applicant's arborist. Recognizing that any development on the site, including demolition of the existing non-contributing building, which is allowed outright by the Zoning Code, would very likely damage the trees' roots to the point that they would die, they approved the proposal.

All code authority aside, practically speaking there are only three options. The Council can:

- A) Require the street trees to be preserved, and deny demolition of the non-contributing building on the site because the work would impact the roots and kill the trees. This could be viewed as a taking by the owner.
- B) Require the street trees to be preserved, but allow the lot to be re-developed. This would result in the trees becoming hazardous due to the extensive loss of roots and crown, and it would also cause them to die.
- C) Allow removal of the street trees and the re-development of the site, and require appropriate mitigation from the developer. This is the only practical solution for this site, and it mirrors the considered decision of the Historic Landmarks Commission.

Portland, Oregon

**FINANCIAL IMPACT and PUBLIC INVOLVEMENT STATEMENT
For Council Action Items**

(Deliver original to Financial Planning Division. Retain copy.)

1. Name of Initiator Dave Skilton		2. Telephone No. 503-823-0660	3. Bureau/Office/Dept. BDS
4a. To be filed (date): July 18, 2012	4b. Calendar (Check One) Regular <input checked="" type="checkbox"/> Consent <input type="checkbox"/> 4/5ths <input type="checkbox"/>		5. Date Submitted to Commissioner's office and FPD Budget Analyst: July 13, 2012
6a. Financial Impact Section: <input checked="" type="checkbox"/> Financial impact section completed		6b. Public Involvement Section: <input checked="" type="checkbox"/> Public involvement section completed	

1) Legislation Title:

LU 12-106944 HDZM Two New Apartment Bldgs at NW 19th & NW Johnson

2) Purpose of the Proposed Legislation:

This is an appeal of a Land Use Review decision (quasi-judicial action). Title 33, Zoning Code Section 33.730 provides that Type III Land Use Review decisions may be appealed to City Council.

3) Which area(s) of the city are affected by this Council item? (Check all that apply—areas are based on formal neighborhood coalition boundaries)?

- City-wide/Regional Northeast Northwest North
 Central Northeast Southeast Southwest East
 Central City
 Internal City Government Services

FINANCIAL IMPACT

4) Revenue: Will this legislation generate or reduce current or future revenue coming to the City? If so, by how much? If so, please identify the source.

This is not a legislative action. This quasi judicial action, a land use decision, applies to one site. The decision will not solely or substantially impact City revenues.

5) Expense: What are the costs to the City related to this legislation? What is the source of funding for the expense? (Please include costs in the current fiscal year as well as costs in future years. If the action is related to a grant or contract please include the local contribution or match required. If there is a project estimate, please identify the level of confidence.)

Land Use reviews are fee supported. Fees are charged to file an appeal except when a City recognized organization – neighborhood or business association appeals the decision. This decision was appealed by the Northwest District Association (NWDA) and therefore the fee was waived.

6) Staffing Requirements:

- **Will any positions be created, eliminated or re-classified in the current year as a result of this legislation?** *(If new positions are created please include whether they will be part-time, full-time, limited term, or permanent positions. If the position is limited term please indicate the end of the term.)*

No

- **Will positions be created or eliminated in future years as a result of this legislation?**

No

(Complete the following section only if an amendment to the budget is proposed.)

7) Change in Appropriations *(If the accompanying ordinance amends the budget please reflect the dollar amount to be appropriated by this legislation. Include the appropriate cost elements that are to be loaded by accounting. Indicate "new" in Fund Center column if new center needs to be created. Use additional space if needed.)*

Fund	Fund Center	Commitment Item	Functional Area	Funded Program	Grant	Sponsored Program	Amount

[Proceed to Public Involvement Section — REQUIRED as of July 1, 2011]

PUBLIC INVOLVEMENT

8) Was public involvement included in the development of this Council item (e.g. ordinance, resolution, or report)? Please check the appropriate box below:

YES: Please proceed to Question #9.

NO: Please, explain why below; and proceed to Question #10.

9) If "YES," please answer the following questions:

a) What impacts are anticipated in the community from this proposed Council item?

Appeal: Consistent with State land use laws, the City's land use reviews provide for public participation. A public notice is mailed to nearby property owners, the site is posted with notice boards and the affected and nearby neighborhood associations are notified. The public comments submitted to staff and the Historic Landmarks Commission were taken into consideration before rendering a decision. This decision has been appealed by the neighborhood association. Given the interest in this proposal, the decision before the City Council will have an impact to the immediate area and to the Alphabet Historic District.

b) Which community and business groups, under-represented groups, organizations, external government entities, and other interested parties were involved in this effort, and when and how were they involved?

For Type III land use reviews, the Zoning Code requires public notice be mailed to the recognized neighborhood and business association as well as recognized organizations that are within 1,000 feet of the site. All property owners within 400 feet of the site are also mailed notice of the public hearing. The site is posted with notice boards. And City bureaus and Tri-Met, Metro, the State Historic Preservation Office, and the Oregon Department of Transportation are also mailed notice.

For this appeal all who participated in the initial hearing were also mailed notice of the appeal hearing.

c) How did public involvement shape the outcome of this Council item?

The outcome of the appeal will not be known until the Council makes its final decision.

d) Who designed and implemented the public involvement related to this Council item?

The Zoning Code mandates procedural requirements for the public hearing notice and hearing. State land use law applies procedural requirements for the hearing and decision. BDS staff implement the Zoning Code requirements.

e) Primary contact for more information on this public involvement process (name, title, phone, email):

Dave Skilton, City Planner II, 503-823-0660, dave.skilton@portlandoregon.gov

10) Is any future public involvement anticipated or necessary for this Council item? Please describe why or why not.

Once City Council makes their decision, the project may proceed, if the appeal is denied. the Council's decision may be appealed to the State Land use Board of Appeals (LUBA). Public involvement is not a component of a LUBA appeal.

Paul L. Scarlett by Denise Klein

BUREAU DIRECTOR: Paul Scarlett