

**SUPPORT
APPEAL**

**2 NEW APARTMENT BUILDINGS
APPEAL OF NW DISTRICT ASSOCIATION
NW 19TH AVE & NW JOHNSON ST LU 12-106944 HDZM**

IF YOU WISH TO SPEAK TO CITY COUNCIL, PRINT YOUR NAME, ADDRESS, AND EMAIL.

NAME (print)	ADDRESS AND ZIP CODE	Email
✓ TERRY PARKER	P.O. Box 13503 PDX 97213	parker2012@gmail.com
✓ Bill Harris	2803 NW Cumberland Rd Portland OR 97210	bbharris1936@gmail.com
✓ Dan Volkmer	2205 NW Johnson PDX 97210	dane@danvolkmer.com
✓ Myriam Alaux	1921 NW Hoyt St. PDX 97209	station2station@comcast.net
✓ Joe Keller	" " "	" " "
✓ Bill C.M. Welch	2805 NW Pettygrove St PDX 97210	bcmwelch@earthlink.net
✓ Sherm Genasi	2217 NW Johnson PDX 97210	
✓ Jerry Powell	1926 SW Madison St 97205	
✓ CASS HUMPHREY	1929 NW Hoyt	casshumphrey@comcast.net

7.18.12

Testimony to City Council re: Elms on NW 19th & Johnson Streets:

Thank you for this opportunity to testify about our wonderful 125 year old elm trees on NW Johnson and 19th. My name is Sharon Genasci, and I live on NW Johnson, not far from the elms.

I have been noticing a number of elms about that age around the NW neighborhood. These elms, the equally beautiful and historical lindens in front of our house and other historic trees throughout Portland form a magnificent testimony to Portland's past - to the care and thoughtfulness of our Portland predecessors. Now we have discovered that these trees, vital to our health and imagination, are not protected by the Landmark Commission's language concerning their responsibility to protect historic Portland landmarks.

Please make it clear to the Landmark Commission and staff that the City Council places great value on both historic trees and buildings. Please insist on code language that protects our trees.

Sharon Genasci

Submitted by
FRANK DIXON 7-18-12

When the City Engineer undertakes to plan or design major capital improvements to the road system, the Urban Forestry Commission shall be consulted through the Superintendent. The purpose of these consultations shall be to ensure that the beautification policies of the Arterial Streets Classification Policy are implemented to the maximum extent feasible.

Article 4 Streets and Street Improvements

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Section 9-401 Definition of "Improve" and "Improvement."

As used in this Article, the terms "improve" and "improvement" include all construction, reconstruction, grading, regrading, paving, repaving, surfacing, resurfacing, bettering and repairing roadways, bridges, trestles, means of access and egress, underpasses, overpasses, sidewalks, crosswalks, pedestrian ways, gutters, curbs, street drainage facilities and appurtenances therefor within any street. [New sec. Nov. 8, 1966; am. Nov. 3, 1992.]

Portland
City
Charter

HILL

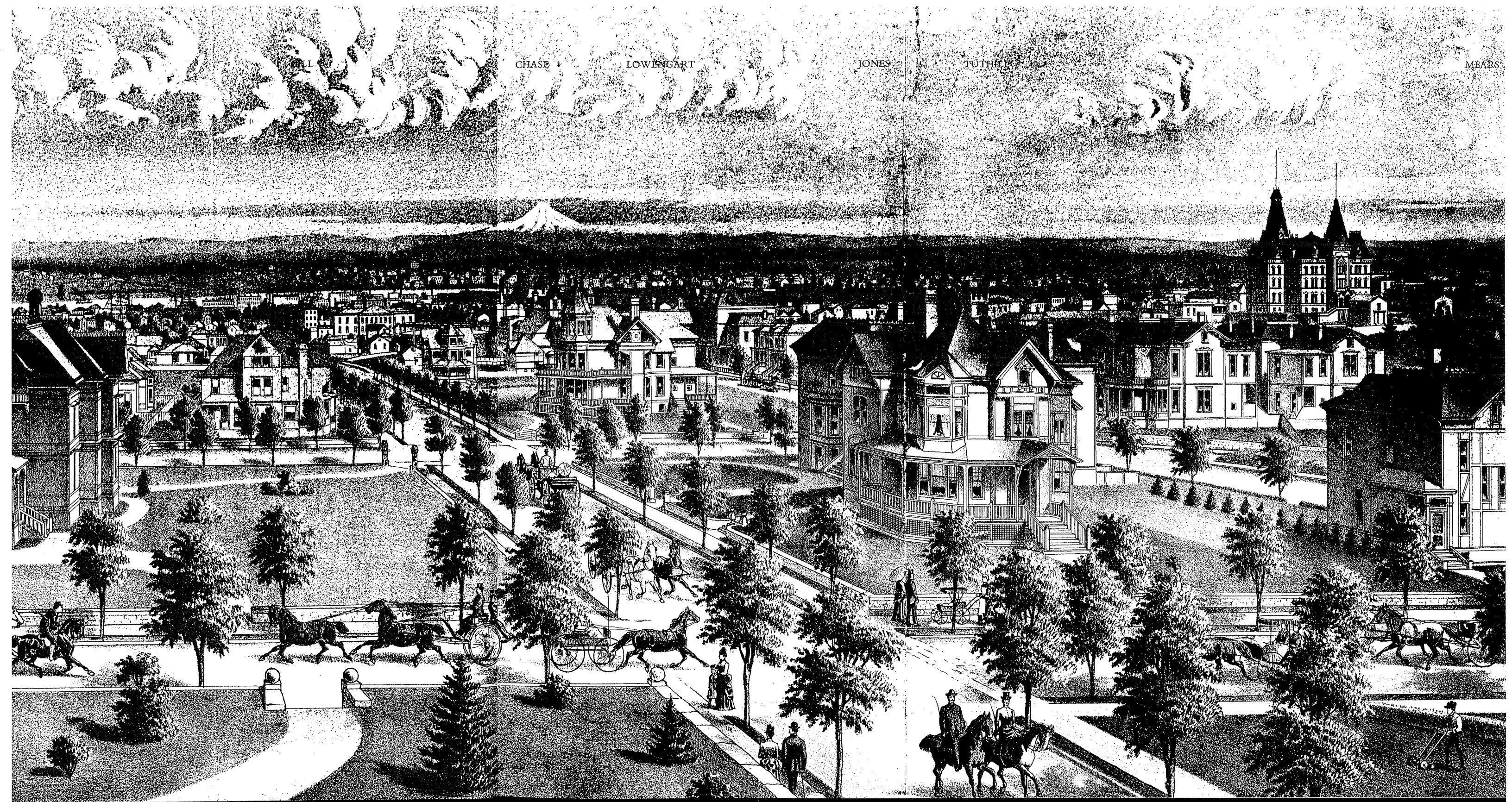
CHASE

LOWENGART

JONES

TUTHILL

MEARS



Submitted by
DAN VOLKMER
7-18-12

July 18, 2012

City of Portland
1220 SW 4th Ave
Portland, OR 97204

Re: Design Review/Historic Tree Preservation

Dear Mayor Adams and Councilors,

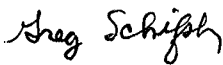
A development at NW 19th and Johnson and the cutting of street trees by a developer necessitates the need to improve/strengthen preservation of Portland's historic tree canopy.

In the early 1970s I was fortunate to have thinned Horse Chestnut street trees in that neighborhood, doing an aesthetic job because the property owner/manager insisted on preservation. I have met many such individuals, and I refer to them as pioneer tree preservationists, because that was their choosing. Since those times, many distractions have altered "preservation-protection" thinking in favor of electronics, life-styles.

The job of preserving Portland's historic trees now falls on caring individuals and City Bureau personnel. Will this be enough to keep a Portland tradition alive and a City beautiful?

Please note that when some storm event across the state and country, news media only covers damage to life, property, and never what losses also occur when a significant tree falls, such as air and water quality. Portland chose to purchase 100(?) acres from a cemetery near the West end of the Sellwood bridge to enhance water quality to the Willamette River. Our historic and significant trees also enhance water quality (among a list of many benefits that trees provide mankind). Strengthen historical values of trees and oppose their removal. Neighborhood character also needs preserving and trees do identify our communities.

Sincerely,

Greg Schifsky 
4131 SW Lee St.
Portland, OR 97221-3667

From: Joe A. Keller 1921 NW Hoyt Street, Portland, OR 97209
joeadreonkeller@gmail.com

To: Portland City Council

Re: Case File: LU 12- 106944 HDZM -

July 18, 2012

Portland is known not just for the trees growing in parks and natural areas, but for the trees growing along its streets and in its neighborhoods - so-called street trees.

These trees are essential to neighborhood identity and livability. Mature street trees are especially so. They supply canopy, scale, movement, aesthetic pleasure, a touchstone to the past and a partial context for historic architecture, as well a measure of natural time.

A quantitative expression of these virtues is USDA Forest Service Report of 2008, entitled, *The Value of Street Trees in Portland, Oregon*. It states:

- Benefits of street trees in Portland far outweigh their costs. Estimated benefits are \$45 million annually, compared to annual maintenance costs of \$4.6 million.

New, short spindly trees do not substitute for mature ones.

I urge the City Council to support this appeal and modify the codes appropriately to include language which requires review boards to consider existing street trees as one factor in approval. It is not just these four irreplaceable Elms that are at stake, but great and enduring trees throughout Portland.

Indifference to livability issues on the part of developers is further evidenced by the very footprint of the building which is greater than any of the surrounding structures. They are out of scale. The use of a certain referential motif or material does not mitigate this fact. The south facade of Bldg A is especially incompatible with the surrounds. It is a largely unbroken wall, robbing the neighborhood of light, air, movement, and depth. I dread its oppressive institutional presence.

Thank you.

Myriam Alaux
1921 NW Hoyt Street , Portland, OR 97209
station2station@comcast.net

To: Portland City Council
Re: Case File: LU 12- 106944 HDZM
July 18, 2012

I urge the City Council to support the appeal of the NW District Association to change the codes , the language, of the Historic Landmarks Commission guidelines that currently do not provide consideration and protection for street trees.

Such an omission is contrary to the spirit of the NW Historic Alphabet District and to the spirit of the city of Portland. We are a neighborhood known for our trees; we are a city known for our trees; people come here because of the trees:

I previously testified at a Historic Landmarks Commission hearing that these four elms are inseparable from four adjacent architectural structures that are protected; these trees were planted by the same owners & architect of those valued buildings to harmonize with them.

Which they do: these trees are our reference points, we see them from our windows, on the street, they are living architecture- they represent a spirit of place, the spirit of the neighborhood, & they have done so for over 100 years

To cut them is to do irreparable harm; they have many decades of life ahead of them.

To be oblivious to their value is to be oblivious to the character of the neighborhood.

To require cutting them is proof that the scale & design of Buildings A & B are inappropriate for our neighborhood.

The SW facade of Building A in particular is a design straight out of a Charles Dickens' novel- it is punishing. With it's massive monolithic unbroken facade, it evokes a 19th century penal institution... We, the inhabitants of the Historic Alphabet District do not deserve such punishment & certainly neither do our trees.

I urge you, the City Council, to approve our neighborhood's appeal to protect these and other glorious trees in the city, and to send this building plan back to the drawing board.

We should not use ill- conceived scale, design, & parking as an excuse to do irreparable harm.

Thank you for your consideration.

Parsons, Susan

From: Dillmann, Katja
Sent: Wednesday, July 18, 2012 9:22 AM
To: Moore-Love, Karla; Parsons, Susan; Council 140
Subject: FW: Appellant's Memo to City Council Regarding NW 19th and Johnson (LU 12-106944 HDZM)
Attachments: 20120717181508789.pdf

Apologies - just seeing this email. It's for today's 2 pm Council session.

Katja Dillmann

Transportation Policy Advisor
Office of Mayor Sam Adams
1221 SW Fourth Avenue, Suite 340
Portland, Oregon 97204
P: 503.823.1125
E: katja.dillmann@portlandoregon.gov
W: mayorsamadams.com

≥ [Hear my name](#)

Our latest: [Progress Report 2011](#)

From: gustavo.cruz@usbank.com [<mailto:gustavo.cruz@usbank.com>]
Sent: Tuesday, July 17, 2012 6:20 PM
To: Dillmann, Katja
Subject: RE: Appellant's Memo to City Council Regarding NW 19th and Johnson (LU 12-106944 HDZM)

Katja,
Thanks very much for this. Attached is the "settlement" document as a separate PDF file. If you could forward it along, that would be great. I just wanted to make sure that the Commissioners view this as a separate document from our memo (the Appellant's memo), as it was a joint product of the developer and the NWDA and has both parties' support.

Best,

Tavo

Gustavo J. Cruz, Jr.
Vice President and Senior Corporate Counsel
Special Assets Group
U.S. Bank National Association
555 S.W. Oak Street, Suite 505, PD-OR-P5SA
Portland, OR 97208-3108
Phone: (503) 275-3758
Cell: (503) 860-5896
Fax: (503) 275-6063
e-mail: gustavo.cruz@usbank.com

7/18/2012

From: "Dillmann, Katja" <Katja.Dillmann@portlandoregon.gov>
To: "gustavo.cruz@usbank.com" <gustavo.cruz@usbank.com>
Date: 07/17/2012 04:58 PM
Subject: RE: Appellant's Memo to City Council Regarding NW 19th and Johnson (LU 12-106944 HDZM)

Tavo -

If you send it to me the way you want Commissioners to receive it, I'll re-email it to Council

Katja Dillmann
Transportation Policy Advisor
Office of Mayor Sam Adams
1221 SW Fourth Avenue, Suite 340
Portland, Oregon 97204
P: 503.823.1125
E: katja.dillmann@portlandoregon.gov
W: mayorsamadams.com
> Hear my name

Our latest: Progress Report 2011

-----Original Message-----

From: gustavo.cruz@usbank.com [<mailto:gustavo.cruz@usbank.com>]
Sent: Tuesday, July 17, 2012 4:39 PM
To: Dillmann, Katja
Subject: RE: Appellant's Memo to City Council Regarding NW 19th and Johnson (LU 12-106944 HDZM)

Katja,
Would it be possible for them to receive the settlement document as a separate document, just to avoid confusion with our memo?
I can resend to you when I get back to the office if necessary.
Thank you!
Tavo

Gustavo J. Cruz, Jr.
Vice President and Senior Corporate Counsel Special Assets Group U.S. Bank National Association
555 S.W. Oak Street, Suite 505, PD-OR-P5SA Portland, OR 97208-3108
Phone: (503) 275-3758
Cell: (503) 860-5896
Fax: (503) 275-6063
e-mail:

----- Original Message -----

7/18/2012

From : "Dillmann, Katja" <Katja.Dillmann@portlandoregon.gov>
To : "Moore-Love, Karla" <Karla.Moore-Love@portlandoregon.gov>,
"Parsons, Susan" <Susan.Parsons@portlandoregon.gov>, Council 140
<council140@portlandoregon.gov>
Cc : "'gustavo.cruz@usbank.com'" <gustavo.cruz@usbank.com>
Sent on : 07/17/2012 06:06:02 PM
Subject : FW: Appellant's Memo to City Council Regarding NW 19th and Johnson (LU 12-106944 HDZM)

Karla & Sue,

Attached please find a memo that the parties involved with the 2 pm time certain tomorrow (7/18/12) would like all members of Council to receive.

Kind regards,
Katja

Katja Dillmann
Transportation Policy Advisor
Office of Mayor Sam Adams
1221 SW Fourth Avenue, Suite 340
Portland, Oregon 97204
P: 503.823.1125
E: katja.dillmann@portlandoregon.gov
W: mayorsamadams.com
> Hear my name

Our latest: Progress Report 2011

From: gustavo.cruz@usbank.com [<mailto:gustavo.cruz@usbank.com>]
Sent: Tuesday, July 17, 2012 3:14 PM
To: Dillmann, Katja
Cc: fdixon@hevanet.com; bradleyj@ohsu.edu; srodriguez@mcctrust.com; dkrawczuk@perkinscoie.com; ronaldjwalters@hotmail.com; gustavocruz@nobhilllaw.com
Subject: Appellant's Memo to City Council Regarding NW 19th and Johnson (LU 12-106944 HDZM)

Katja,
Attached please find a PDF copy of the memo I mentioned this morning.

(Please note that this is the Appellant's memorandum to City Council. Although the NWDA and Mill Creek both support the proposed settlement, including the findings and approval conditions, we may not agree regarding all of the legal analysis contained in this memorandum.)

Thank you for your assistance with this.

Best regards,

Tavo

Gustavo J. Cruz, Jr.

7/18/2012

Vice President and Senior Corporate Counsel Special Assets Group U.S. Bank National Association
555 S.W. Oak Street, Suite 505, PD-OR-P5SA Portland, OR 97208-3108
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U.S. BANCORP made the following annotations

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(See attached file: 20120717150002844.pdf)

U.S. BANCORP made the following annotations

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U.S. BANCORP made the following annotations

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7-18-12
Submitted by
Tavo Cruz

Interpretation and Conditions for LU 12-106944 HDZM

Two New Apartment Buildings on NW 19th and NW Johnson

1. Findings Related to Interpretation of PCC 33.445.320.B(5)

The City Council finds that the code related to whether or not street trees may be considered during historic design review of a new structure is ambiguous. Although the City Engineer has standards relating to street trees, because the City Forester determines when street trees may be removed and planted (pursuant to PCC Chapter 20.40 and 20.42), we find that the historic design review exemption in PCC 33.445.320.B(5) does not apply when a new structure may impact existing street trees. Accordingly, the City Council will consider the potential impact to existing street trees when the Community Design Guidelines and Historic Alphabet District Community Design Guidelines Addendum are applied to the proposed project. The City Council will also incorporate this interpretation into the Citywide Tree Policy Review and Regulatory Improvement Project, as set forth in the new PCC Chapter 11, as amended.

2. Findings and Conditions Related to Street Trees

Community Design Guidelines, Landscape Features, Guideline D3 requires that a project "enhance site and building design through appropriate placement, scale, and variety of landscape features." The suggestions on how the guideline may be met encourage the preservation and protection of street trees.

Balancing the project's compliance with all of the applicable approval criteria, as described by the Historic Landmarks Commission, the height, density and front yard setback expectations of Building A's RH zone, on the one hand, and the size, age and the enhancement to the streetscape provided by the four elm trees on NW Johnson Street on the other hand, the City finds that it is appropriate for the applicant to take commercially reasonable efforts to preserve the street trees. If, despite these measures some or all of the trees must be replaced with new street trees (as determined by a certified arborist), the replanting of street trees and the open space and landscaping proposed by the project will be deemed to comply with D3. Accordingly, City Council imposes the following conditions of approval, which are appropriate tree preservation measures for the four elm trees on NW Johnson Street:

- The north basement wall of the building will be moved back 10 feet from the design approved by the Historic Landmarks Commission so that the wall is at the property line;
- The four elms will be inoculated against Dutch elm disease (to be supervised by a certified arborist);
- Spray the four elms with insecticide to ward off the beetle that transmits Dutch elm disease (to be supervised by a certified arborist);

- Provide protection at the base of the four elms to avoid soil compaction. This will consist of metal plates between the trees and barriers around the tree trunks. Construction activity, to the extent possible, will avoid impacting the trees;
- Implement a controlled demolition process, particularly related to the slab on grade to minimize distress on the four elms. The controlled demolition process includes:
 - The walls and roof of the existing building will be demolished by a bulldozer or comparable equipment.
 - The slab on grade will be carefully broken up mechanically along the site's northern property line and the slab and debris will be pulled away from the four elms.
 - Prior to the demolition of the remaining slab on grade of the existing building, a trench along the site's northern property line will be dug by hand and/or air spades. The trench digging will be supervised by a certified arborist. The intent of the trench is to demarcate the property line so that tree roots north of the property line will not be damaged by the demolition of the slab on grade. Tree roots south of the property line trench will be pruned.
 - After the protective trench is complete, the remaining slab on grade will be demolished mechanically, including by a bulldozer or comparable equipment.
 - To the extent possible, all demolition debris will be removed from the site towards NW 19th Avenue. If debris is removed towards NW Johnson Street, the four elms must first be protected from soil compaction by installing them metal plates and barriers described above.
 - Demolition activity related to the slab on grade and sidewalk removal will be supervised by a certified arborist;
- Implement pruning as recommended by a certified arborist;
- Provide guide wires to stabilize the four elms (to be supervised by a certified arborist);
- For all construction operations near or around the four elms a certified arborist will be consulted; and
- During construction of the project, a monthly report evaluating the condition of the elms and compliance with this preservation plan will be provided to the Applicant, the City Forester and the Northwest District Association by a certified arborist.

Moore-Love, Karla

From: Gail Shibley [gailshib@me.com]
Sent: Wednesday, July 18, 2012 7:52 AM
To: Moore-Love, Karla
Subject: testimony for this afternoon's 2:00 agenda item

Attachments: LU 12-106944 HDZM testimony.pdf



LU 12-106944
HDZM testimony.pdf

good morning -

i am unable to attend this afternoon's land use appeal hearing, and wish to submit the attached as testimony for the record. i appreciate your help in assuring the Council timely receives the 2-page document, and confirming receipt.

thank you very much for your assistance.

regards -
gail shibley
1930 nw irving street #602
portland, oregon 97209

gailshib@me.com
503/347-4009

Gail R. Shibley, J.D.

1930 NW Irving Street, #602
Portland, OR 97209

gail@dsl-only.net
(c) 503/347-4009

TO: PORTLAND CITY COUNCIL
FR: GAIL SHIBLEY
RE: APPEAL ON LU 12-106944 HDZM

AUDITOR 07/18/12 PM12:03

Though I cannot attend the appeal on the above-cited land use case in person this morning, I appreciate you considering this testimony as part of the record. There are three issues I believe pertinent to your deliberation.

First, City staff and volunteer commission members need your clear direction regarding proper interpretation of existing code regarding street trees. The City of Portland expresses commitment to the urban forest, tree canopy and ecosystem services our trees provide. This case raises the troubling specter that such commitment is only lip service and that – even, or especially, in Historic Districts – the oldest, soundest structures in a neighborhood are within no one’s jurisdiction save the City Engineer’s (and that only to make sure trees aren’t in the way of road traffic).

Second, I urge the Council to take the opportunity of this process to question the size and mass of the proposed buildings within the unique context of the Alphabet Historic District. The Southwest building in particular is fine on paper and would fit well a few blocks away in the Pearl or many other places – but is out of place in its proposed site. At the hearing I was able to attend on this project, staff and commissioners depended on the developer showing line drawings of admitted “approximate” heights for both the proposed buildings and adjacent and surrounding historic buildings. Such approximation exists only on paper or Powerpoint – once a structure is up, neighbors, visitors and City residents see quite specifically and tangibly how out of size and character the new building is, and feel the “looming” effect it has on the historic treasures it overpowers.

It is impossible to know which individual large, modern development will “tip the scale” and forever destroy one of Portland’s iconic historic neighborhoods. Which straw broke the camel’s back? That is why each and every new development in Historic Districts simply must receive sleeves-rolled-up, hands-dirty, precise data review by diverse City programs and volunteer commissioners – and active and ongoing oversight by you.

Third, the experience in this case reinforces the need for you, as City councilors, to continuously remain actively engaged with volunteer commissions. Staff, with volunteer oversight, is how policy gets translated into reality on the ground – and how livability either becomes a marketing term or the way Portlanders experience daily life.

A former Planning Commissioner, I know first-hand how important and helpful it was when Commissioner Leonard was actively engaged in developing what I called “the skinny houses cookbook” that provided smart ways to add urban infill, reduce permitting time and demonstrate that increased density does not have to mean lousy design. Such personal attention by each Councilor regardless of bureau portfolio is essential to making sure our actions match our public words. Otherwise, we end up where we find ourselves today: formally pronouncing commitment to becoming the most biophilic city in North America, prioritizing urban tree canopy, recognizing economic services of our natural environment...until our “commitment” bumps into individual development rights.

In this case, the century-plus elms are healthy and sound, and are the oldest and tallest structures in the immediate area. If the trees were human-made, we would be doing everything possible to save them and the continuing contribution they make to the Historic District. I urge you to ensure these trees – owned by everyone in Portland – are not sacrificed in order to maximize private profit. A devotee of livable urban density, I also urge you to demand specifics regarding height and massing effect of the proposed buildings in order to ensure the Alphabet Historic District continues to thrive into the next century and beyond.

Thank you for your consideration.

TO: City Council of Portland, Oregon

FROM: Gustavo J. Cruz, Jr., Frank Dixon and John Bradley on behalf of the Planning Committee of The Community Association of Northwest Portland, Inc. aka The Northwest District Association or the NWDA (“NWDA”)

DATE: July 18, 2012

RE: Appellant’s Memorandum Regarding Appeal of Decision of Historic Landmarks Commission, NW 19th and Johnson Street (LU 12-106944 HDZM)

The purpose of this memo is to provide context for your review of the decision of the Historic Landmarks Commission (“HLC”) regarding a proposed development project to be located at NW 19th and Johnson Street (the “Project”).

A. BACKGROUND AND INTRODUCTION.

The Project consists of a proposal to build two new apartment buildings at the intersection of NW 19th and Johnson Street. The building to be located on the southwesterly corner of the intersection will have five floors, 86 dwelling units and 66 below-grade parking stalls (the “Building”). (The building to be located on the northeasterly corner is not part of this appeal.) The HLC considered the Project because the site is located in the Alphabet Historic District, and is therefore subject to the Historic Alphabet District Community Design Guidelines Addendum, among other approval criteria. Located in the public right-of-way, or “parking strip,” on the Johnson Street (north) side of the Building are four (4) elm trees estimated to be over 100 years old (the “Elms”). Upon the advice of staff, the HLC determined that the Elms were “not within the purview” of the HLC. Therefore, the HLC was unable to consider the Elms while reviewing the application, and could not strike a balance between protection of the Elms and potential design changes to the Building. The HLC omitted making any finding related to the Elm trees in its final decision.

Given the age of the Elms and their value to the fabric of our historic district, many residents of Northwest Portland objected to the plan to remove the Elms. More importantly for purposes of this appeal, and for similar situations throughout the City, it was apparent that certain portions of Title 33, Portland Zoning Code (the “Code”) are unclear regarding the treatment of street trees in historic districts. This lack of clarity creates uncertainty for developers, neighborhood residents and the City in addressing similar situations. The NWDA voted to appeal the HLC decision, based on City staff’s misinterpretation of the Code to exclude consideration of the Elms by the HLC.

During the pendency of the appeal, the NWDA continued discussions with the developer of the Project, Mill Creek Residential Trust LLC (“Mill Creek”), and developed a proposed “settlement” (see attached) for consideration by the City Council (the “Settlement”). Mill Creek shares the NWDA’s concern that street trees are not clearly addressed within the Code. The Settlement document includes both proposed findings to be adopted by the City Council

regarding the Code interpretation issue, as well as a number of approval conditions designed to minimize the impact of construction of the Project on the Elms. The NWDA and Mill Creek support the Settlement, and respectfully request that the City Council adopt the findings and conditions set forth therein.

B. OVERVIEW OF LEGAL ISSUES ON APPEAL

The Appellant's Statement set forth in the Type III Decision Appeal Form for this matter is the following:

The Historic Landmarks Commission (the "HLC"), acting in consideration of the advice of City staff, erroneously construed PCC 33.445.230, and possibly other code sections, in such a way as to exclude from consideration certain street trees at the site (four mature elms). The HLC also 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. PCC 33.856.060, 33.420.010 and 33.420.045A.

1. Improper construction of jurisdictional statute.

First, the jurisdictional statute was incorrectly construed. PCC 33.445.320 is broken into two sections, with section A providing a list of proposals requiring historic design review, and section B listing proposals which do not. Following are relevant excerpts from this Code section:

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.

B. Exempt from historic design review.

1. Construction of a detached accessory structure with 300 square feet or less of floor area when the accessory structure is at least 40 feet from a front property line;
2. Changes that do not require a building, site, zoning, or sign permit from the City, and that will not alter the exterior material or color of a resource having

- exterior materials or color specifically listed in the Historic Resource Inventory, Historic Landmark nomination, or National Register nomination as an attribute that contributes to the resource's historic value;
3. Normal repair and maintenance other than change of facade color where exterior material or color is specifically listed in the Historic Resource Inventory, Historic Landmark nomination, or National Register nomination as an attribute that contributes to the resource's historic value;
4. Parking lot landscaping that meets the standards of this Title and does not include a wall or fence;
5. Improvements in the public right-of-way, such as street lights, street furniture, planters, public art, sidewalk and street paving materials, and landscaping, that meet the City Engineer's standards;

[Emphasis added.]

The City staff applied what they call a "straight-up reading of the code" set forth above to exclude historic street trees from consideration by the HLC. However, this interpretation makes no sense as a matter of legal construction or common sense. The staff reads subsections A and B together, such that if historic design review is appropriate under subsection A above, then subsection B can be applied to exclude specific elements of the proposal, such as the removal of street trees, from consideration. This is an incorrect interpretation, because once the threshold for review has been met, such as "[b]uilding a new structure" under PCC 33.445.320A.2. above, then the HLC should be able to consider the project as a whole. The HLC should not be required to wear blinders as to certain elements because, arguably, they are excluded by subsection B.

In addition, although the City Engineer has standards relating to street trees, because the City Forester determines when street trees may be removed and planted (pursuant to PCC Chapter 20.40 and 20.42), the historic design review exemption in PCC 33.445.320.B.5. does not apply in this situation. The City Engineer's standards should not supersede those of the City Forester when evaluating street trees. Therefore, even assuming that existing street trees are deemed "improvements" for purposes of this Code section (see discussion below), the unique nature of street trees renders this exemption inapplicable. Please note that this narrow argument -- limited to cases involving new construction and existing street trees in historic districts -- is the primary legal basis for the proposed findings set forth in the attached Settlement document.

2. Terms are undefined and ambiguous.

Second, City staff has incorrectly construed the meaning of terms used in the code, such as "improvement." The code does not define either "improvement" (or "landscaping" or "tree") but PCC 33.700.070.D.1. states that undefined terms shall have their "dictionary meaning." Black's Law Dictionary 757 (6th Ed. 1990) defines "improvement" as follows:

"A valuable addition made to property (usually real estate) or an amelioration in its condition, amounting to more than mere repairs or replacement, costing labor or capital, and intended to enhance its value, beauty or utility or to adapt it for new or further purposes. Generally has reference to buildings, but may also include any permanent structure or other development, such as a street, sidewalks, sewers, utilities, etc. An expenditure to extend the useful life of an asset or to improve its performance over that of the original asset."

It is unclear how an existing elm tree could be construed as an “improvement” in the context of a proposal for new construction. The “improvements” at issue are those described in the Mill Creek’s apartment building proposal, not the existing elm trees on the site. Despite this obvious disconnect, the staff construed the existing elms as “improvements” that were not subject to historic design review (see attached e-mail dated May 11, 2012 from Dave Skilton, Design and Historic Resource Review Team).

3. The City’s alternative statutory argument is inapplicable.

After providing notice of appeal, the NWDA learned that City staff may rely on PCC 33.10.030 B in the alternative to PCC 33.445.320B.5. Following is the section at issue:

33.10.030 When the Zoning Code Applies

A. All land and water. The zoning code applies to all land and water within the City of Portland except as provided in Subsections B., C., and D. below. All land divisions, uses and development must comply with all of the requirements specified in the zoning code for that location.

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.

C. Clarification for waterbodies. The siting of fills or structures on or over waterbodies is subject to the zoning code provisions. The zoning code does not regulate shipping, dredging, boating, and other similar uses on or in water bodies.

D. Private rights-of-way. The creation of private rights-of-way is regulated by Title 33, Planning and Zoning. Street improvements in private rights-of-way are allowed by right in all zones.

[Emphasis added.]

In this case, Building A is zoned RH, while Building B is zoned EXd, but both buildings are subject to the Historic Resource Protection overlay. PCC 33.420.045A clearly specifies that the provisions governing historic design review may substitute for the more general design review regulations. Therefore, it would be anomalous to apply the zoning Code to the public right-of-way when design review applies under subsection B.3. above, but not apply the Code when the more specific historic design review criteria apply. If that were the case, then the special protections afforded by historic district status would be of little value, create an inconsistency in the Code, and produce an absurd result.

4. Guidelines support consideration of street trees.

In addition, the HLC failed to consider trees in the context of the applicable Community Design Guidelines and the Historic Alphabet District Community Design Guidelines Addendum. These guidelines were drafted in a holistic manner, and they promote the protection of historic resources, including streetscapes, trees, gardens and other natural areas. The code expressly states that in the absence of definitive language, the HLC should consider the intent of regulation and its relationship to other regulations and situations:

33.700.070 General Rules for Application of the Code Language

A. Reading and applying the code. Literal readings of the code language will be used. Regulations are no more or less strict than as stated.

G. Applying the code to specific situations. Generally, where the code cannot list every situation or be totally definitive, it provides guidance through the use of descriptions and examples. In situations where the code provides this guidance, the descriptions and examples are used to determine the applicable regulations for the situation. **If the code regulations, descriptions, and examples do not provide adequate guidance to clearly address a specific situation, the stated intent of the regulation and its relationship to other regulations and situations are considered.**

[Emphasis added.]

For example, D3 of the Community Design Guidelines provides that successful project design should: *Enhance site and building design through appropriate placement, scale, and variety of landscape features.* The Guidelines then state (showing the photo at right as an example):

This guideline may be accomplished by:

A. Preserving existing trees and incorporating them into the project design.

This new apartment complex preserved a mature street tree and planted additional street trees.

In addition:

This guideline may be accomplished by:

C. Protecting and planting street trees.

These trees provide shade, interest, and enclose the street and sidewalks.

Beyond these specifics, references are made throughout the Community Design Guidelines to street trees as rain and shade protection, as well as favorable elements enhancing the character of other districts such as Irvington, Piedmont, Outer Southeast Portland, and others. The new Portland Plan envisions a time when one can "*shift the paradigm from trees*

as constraint to trees as infrastructure and a key community asset”(emphasis added).

5. There is precedent for consideration of street trees by the HLC.

Notwithstanding City staff’s current interpretation of the Code, the HLC (or “PHLC”) has previously considered street trees to be within its purview. For example, see Case File LU 07-180515 HDZ, Irvington Squire (Location: 1510 NE Hancock). In considering this application in 2008, the HLC devoted significant time to street tree preservation. The decision notes that “[w]hile the decision was made to deny the project solely based on the building being out of scale with the neighborhood [Guidelines P2 and D7], there was *strong encouragement from the PHLC for tree preservation.*” (Emphasis added.)

C. CONCLUSION

As noted above, both the developer and the NWDA are seeking clarity and predictability from the City Council regarding the treatment of street trees when affected by new construction in a historic district. Only a tortured reading of the Code would exclude the Elms from consideration by the Historic Landmarks Commission. As a matter of common sense, it seems clear that over 100 year-old elm trees should rightly be considered by the HLC when reviewing an application involving new construction in a historic district.

We respectfully request that the City Council:

1. Approve the proposed findings and conditions attached to this memorandum;
2. Instruct City staff to interpret the Code in a consistent manner, thereby allowing street trees to be considered by the HLC in future applications involving new construction in historic district; and
3. Incorporate the proposed interpretation in the new the Citywide Tree Policy Review and Regulatory Improvement Project, as set forth in the new PCC Chapter 11, as amended.

Thank you for your consideration of this appeal.

E-MAIL DATED

MAY 11, 2012



RE: NW 19th and Johnson: Legal Opinion

Skilton, Dave to: 'gustavo.cruz@usbank.com'

05/11/2012 12:16 PM

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History: This message has been replied to and forwarded.

Gustavo:

Thanks for the e-mail. Contrary to what you may have been told by others, we haven't sought or been given any opinion by the City Attorney relative to removal of trees in the right-of-way. We're relying on a straight -up reading of the Zoning Code, 33.445.320 A - When Historic design Review Is Required, see: <http://www.portlandonline.com/bps/index.cfm?c=34562&a=53352>

As you can see, in 33.445.320 A 4, non-standard improvements in the right-of-way are subject to Historic Design Review. However, the proposed improvements meet PBOT standards and so they are not subject to review. Another way to think of this is that if removal of the trees were proposed independently, the question would not come before the Historic Landmarks Commission, but rather the Urban Forestry Commission.

Dave Skilton
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From: gustavo.cruz@usbank.com [mailto:gustavo.cruz@usbank.com]
Sent: Friday, May 11, 2012 9:15 AM
To: Skilton, Dave
Cc: ronaldjwalters@hotmail.com; bradleyj@ohsu.edu; juliet@lifturbanportland.org; juliet@easystreet.net; gustavocruz@nobhilllaw.com
Subject: NW 19th and Johnson: Legal Opinion

Mr. Skilton,
I understand that you are the staff person assigned to the project at NW 19th and Johnson (LU 12-106944 HDZM). I also understand that the City Attorney recently rendered a legal opinion to the effect that consideration of the elm trees on the site is not within the "purview" of the Historic Landmarks Commission.

Could you please confirm whether the City Attorney rendered such an opinion, and if so, could you please provide me with a copy of it (via e-mail)? If it is not available for public review (i.e. if the City Attorney invokes attorney-client privilege or some exception from the public records law), then I would appreciate knowing that as well.

Thanks for your assistance.

Best regards,

Tavo

(Below is my contact information, however, I am writing this e-mail in my capacity as a resident of NW Portland, and not as counsel to U.S. Bank.)

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U.S. BANCORP made the following annotations

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PROPOSED "SETTLEMENT,"
INCLUDING FINDINGS
AND CONDITIONS OF APPROVAL

Interpretation and Conditions for LU 12-106944 HDZM

Two New Apartment Buildings on NW 19th and NW Johnson

1. Findings Related to Interpretation of PCC 33.445.320.B(5)

The City Council finds that the code related to whether or not street trees may be considered during historic design review of a new structure is ambiguous. Although the City Engineer has standards relating to street trees, because the City Forester determines when street trees may be removed and planted (pursuant to PCC Chapter 20.40 and 20.42), we find that the historic design review exemption in PCC 33.445.320.B(5) does not apply when a new structure may impact existing street trees. Accordingly, the City Council will consider the potential impact to existing street trees when the Community Design Guidelines and Historic Alphabet District Community Design Guidelines Addendum are applied to the proposed project. The City Council will also incorporate this interpretation into the Citywide Tree Policy Review and Regulatory Improvement Project, as set forth in the new PCC Chapter 11, as amended.

2. Findings and Conditions Related to Street Trees

Community Design Guidelines, Landscape Features, Guideline D3 requires that a project "enhance site and building design through appropriate placement, scale, and variety of landscape features." The suggestions on how the guideline may be met encourage the preservation and protection of street trees.

Balancing the project's compliance with all of the applicable approval criteria, as described by the Historic Landmarks Commission, the height, density and front yard setback expectations of Building A's RH zone, on the one hand, and the size, age and the enhancement to the streetscape provided by the four elm trees on NW Johnson Street on the other hand, the City finds that it is appropriate for the applicant to take commercially reasonable efforts to preserve the street trees. If, despite these measures some or all of the trees must be replaced with new street trees (as determined by a certified arborist), the replanting of street trees and the open space and landscaping proposed by the project will be deemed to comply with D3. Accordingly, City Council imposes the following conditions of approval, which are appropriate tree preservation measures for the four elm trees on NW Johnson Street:

- The north basement wall of the building will be moved back 10 feet from the design approved by the Historic Landmarks Commission so that the wall is at the property line;
- The four elms will be inoculated against Dutch elm disease (to be supervised by a certified arborist);
- Spray the four elms with insecticide to ward off the beetle that transmits Dutch elm disease (to be supervised by a certified arborist);

- Provide protection at the base of the four elms to avoid soil compaction. This will consist of metal plates between the trees and barriers around the tree trunks. Construction activity, to the extent possible, will avoid impacting the trees;
- Implement a controlled demolition process, particularly related to the slab on grade to minimize distress on the four elms. The controlled demolition process includes:
 - The walls and roof of the existing building will be demolished by a bulldozer or comparable equipment.
 - The slab on grade will be carefully broken up mechanically along the site's northern property line and the slab and debris will be pulled away from the four elms.
 - Prior to the demolition of the remaining slab on grade of the existing building, a trench along the site's northern property line will be dug by hand and/or air spades. The trench digging will be supervised by a certified arborist. The intent of the trench is to demarcate the property line so that tree roots north of the property line will not be damaged by the demolition of the slab on grade. Tree roots south of the property line trench will be pruned.
 - After the protective trench is complete, the remaining slab on grade will be demolished mechanically, including by a bulldozer or comparable equipment.
 - To the extent possible, all demolition debris will be removed from the site towards NW 19th Avenue. If debris is removed towards NW Johnson Street, the four elms must first be protected from soil compaction by installing them metal plates and barriers described above.
 - Demolition activity related to the slab on grade and sidewalk removal will be supervised by a certified arborist;
- Implement pruning as recommended by a certified arborist;
- Provide guide wires to stabilize the four elms (to be supervised by a certified arborist);
- For all construction operations near or around the four elms a certified arborist will be consulted; and
- During construction of the project, a monthly report evaluating the condition of the elms and compliance with this preservation plan will be provided to the Applicant, the City Forester and the Northwest District Association by a certified arborist.