



Bureau of Planning and Sustainability

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MEMO A-10

DATE: May 1, 2020
TO: Planning and Sustainability Commission
FROM: Mindy Brooks and Jeff Caudill, Bureau of Planning and Sustainability
SUBJECT: Enforcement of Title 33 Regulations Related to Tree Removal

ISSUE SUMMARY

Stakeholders and PSC commissioners expressed concern with the effectiveness of enforcement of the regulations associated with environmental/greenway overlays, especially in areas along the western riverbank of the Willamette River. Frustration was expressed with a number of steps in the process: (1) difficulty in initiating enforcement actions; (2) the time to resolve environmental violations, (3) the perceived lack of City follow up, and (4) ineffective penalties for repeat offenders.

The River Plan/South Reach includes a proposal to establish exemptions and standards for vegetation and tree removal within the River Environmental zone. (*Note – In the existing regulations for this area in 33.440, Greenway, there are no exemptions or standards for removal of trees within the greenway setback, with the exception of nuisance species. All other tree removal always requires Greenway Review.*) In the proposal, the size of trees regulated by Title 33 will be >1.5 inches within the River Setback and >3 inches within the River Environmental zone outside of the setback. These size thresholds are well below the size of trees regulated throughout the rest of the city, which is >6 inches. With these decreased thresholds, it may be more difficult for Bureau of Development Services (BDS) to document environmental violations and enforce tree regulations.

STAFF RECOMMENDATIONS

Recommendation A: Remove Exemptions. Within the River Setback (33.475.210) and Riparian Buffer Area (Map 475-6) remove proposed exemptions for removal of trees regardless of size, including nuisance and non-native trees, and require approval through standards (33.475.440.K) or River Review (33.865). Removal of other non-native vegetation (e.g., ivy, blackberry) within the River Setback would remain exempt as proposed. Outside of the River Setback and Riparian Buffer Area, the proposed exemptions for some (e.g., dead/dying/dangerous) tree removal would remain in place.



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Recommendation B: Create simple landscaping permit. Establish a simple and fast landscaping permit process to allow an applicant to follow the standards of 33.475.440.K. This process would require the submittal of a simple landscaping plan including location, species and size of trees to be removed, as well as a planting plan that meets the zoning code standards (33.475.440.K). Inspection would be required after planting is complete. *Note - A permit would not be required if no trees will be removed and other vegetation to be removed is not native.*

Recommendation C: Increase monitoring requirements. For all landscaping or mitigation plantings, extend the monitoring period to three (3) years and at the end of the monitoring period require proof that the code requirements are met.

ANALYSIS

The existing Title 33.440, Greenway Overlay Zones, exempts the removal of nuisance trees and removal of trees outside of the setback and outside of the n (natural) or q (water quality) zone. There are no standards for tree removal in 33.440. Therefore, a Greenway Review is required for removal of any non-nuisance tree within the setback and n or q zone. The existing Title 33.430, Environmental Zones, which applies to some areas of the South Reach, exempts removal of nuisance trees, dead, dying and dangerous trees that pose an immediate risk and trees within 10-feet of structures; replacement of trees that are >6 inches dbh is required.

The current proposal within Title 33.475, River Overlay Zones, includes regulations that are similar to 33.430 and provides exemptions and standards for some tree removal, instead of the full Greenway Review required today. The current proposal would allow removal of nuisance trees, dead/dying/dangerous trees and trees within 10 feet of structure through an exemption; and would allow some other tree removal, such as for construction of a public trail, through standards. Tree replacement would be required.

BPS staff met with BDS and BES staff to review the existing steps in an enforcement cases and discuss areas where improvement could be made. The various steps are listed below with key limitations identified at each step. The **gray** highlight steps are where staff have recommended a change in proposal to address the identified concerns:

- 1. Reporting** – Violations are reported by individuals in the community. City staff do not generally go out looking for violations. Individuals can report a potential violation via an online form or by calling into the city. They can submit supporting documentation such as photographs. The complaint-driven process means many violations are never reported and some properties may be targeted by watchdog groups or a neighbor.
- 2. Investigation** – Once a potential violation is reported, city staff investigates to determine if the situation is in fact a violation to city code. Access to the site must be granted by property owner, otherwise staff must use other tools, such as over-the-fence observations from a neighbor's property (if provided), photographs and aerial photography. It is illegal for staff to enter property without permission or a warrant.



- 3. Burden of Proof** – Burden of proof is on the City. On-site investigation often allows staff to obtain definitive proof of tree location, but gathering adequate evidence is often challenging. At 6 inches dbh it is often possible to prove tree size and species. The reduced size thresholds will make it harder to confirm that the vegetation was a tree (not a shrub) and, when it is determined to be a tree, to definitively identify the species.

If access is denied and there is no way to see the area of violation and no photographs are provided, relying solely on aerial photography has not been used and may not be sufficient during an appeal. It is often difficult to prove the species or size of vegetation removed through aerial photography alone.

The recommendations will result in landscaping plans for any tree removal within the River Setback, which will establish proof of tree location, size at time of planting, and species.

- 4. Appeals** – The property owner can appeal staff’s determination that a violation has occurred to the BDS Director and then the hearings officer. There is no appeal recourse for complainants that are unsubstantiated.
- 5. Enforcement** – If a violation is proven, BDS requires the property owner to either replace and remediate the removed trees if they meet certain thresholds specified in the code or apply for a land use review (Environmental or River review) to correct the violation, which will also require tree replacement and remediation. Once a violation is proven, the property owner generally comes into compliance.
- 6. Fines and Other Penalties** – BDS has the authority to levy fines of up to \$700 per month, which can be doubled after 3 months, until the violation is resolved. Additional tools that may be utilized include property liens, abatement authority and others. At this time, BDS staff believe that the penalties available to them are adequate to address violations. Additionally, repeat environmental violations are not viewed as common.

A number of River Plan/South Reach stakeholders suggested that fines should be increased, or other mechanisms could be used for property owners that have repeat environmental violations. At this time, BDS staff believe that the penalties available to them are adequate to address violations. The current process provides BDS adequate discretion in levying penalties tailored to the violation. Additionally, repeat environmental violations are not common.

- 7. Monitoring** – The zoning code (33.475.450) describes how violations can be corrected. Two common avenues that can be used to rectify a violation are to replace and remediate the trees removed or obtain a retroactive permit, which would also require mitigation.

If the property owner chooses to replant the trees, 33.475 require that 33.248.090, Mitigation and Restoration Planting, be met. Title 33.248.090 requires that proof be submitted to BDS that all requirements of the section have been met one (1) year after planting is complete.



If there is a retroactive permit obtained, BDS staff generally requires the property owner to apply for a new zoning permit two (2) years after planting to confirm all required vegetation are healthy.

Whether the choice is a retroactive permit or replacement planting, it is the responsibility of the property owner to meet these monitoring requirements. BDS has in the past dedicated staff resources to follow up on the zoning permits associated with retroactive permits but funding is not available for this work at this time. BDS has considered, although not recommended by staff at this time, to keep zoning permits open until the 2-year monitoring permit is obtained.

The recommendation will require proof that the requirements are met after three (3) years, which will allow more time for trees to get established and increase the likelihood of survival.

