

Minutes from July 15, 2011 Meeting with Matt LeGrant (regarding 2750 32nd St. NW building permit)

Attendees: Matt LeGrant (DCRA, Zoning Administrator), Justin Bellow (DCRA), Judy Hubbard (Councilmember Mary Cheh's office), Milan Davis (Urban Forestry Administration), Kathy Ausubel and Larry Ausubel (owners/occupants of the neighboring property)

Meeting time: 11:15 am - 1:00 pm (approx.)

Request to delay issuing permit B1103986:

- The Ausubels had requested that building permit B1103986 not be issued until they could meet with Mr. LeGrant to follow up with him on his decision regarding whether the proposed addition was consistent with the Tree and Slope Protection (TSP) Overlay. Mr. LeGrant indicated that he had no authority to stop a permit from being issued, as all required sign-offs had taken place. (The last sign-off took place on July 13, the same date that he agreed to a meeting.)
- **Background:** The Ausubels had met with Mr. LeGrant on April 5, 2011 to express their concerns that the proposed addition to 2750 32nd Street NW, by Mr. Matt Voorhees, both violated the TSP and endangered their home. Subsequent to that meeting, revised plans were submitted to Mr. LeGrant by the applicant and his counsel. On June 15, Mr. LeGrant notified the Ausubels that he was intending to issue the permit B1103986, as he found the revised plans were in compliance with the "underlying R-1-A base code and the applicable TSP provisions set forth in Sections 1513 and 1514." Mr. LeGrant included a copy of Urban Forestry Administration's report, dated June 3, pertaining to trees that were affected by the proposed addition. The Ausubels then requested a meeting with Mr. LeGrant to follow up on his decision, as Urban Forestry's report seemed very much to support their position that the affected trees would be fatally damaged by this construction, conflicting with the TSP. Their first request was made on June 15, and numerous additional requests (emails, voice messages) were made over the next three weeks. On June 24, Ms. Dee Smith of Councilmember Mary Cheh's office tried to intervene, asking Mr. LeGrant to contact the Ausubels. On July 12, the Ausubels asked Mr. Majett, Director of DCRA, to intervene, as they still had not heard from Mr. LeGrant despite repeated requests; the Ausubels also asked DCRA to put a hold on issuing the permit until a meeting took place. On July 13th, the Ausubels received a phone call from Mr. LeGrant to set up a meeting on July 15th. The permit was issued by DCRA on July 13th, the same day that Mr. LeGrant set up the meeting.
- In advance of the meeting, the Ausubels highlighted one particular point: "The following is the preeminent issue -- it is an issue of the safety of District of Columbia residents -- and it deserves priority over all other issues. Given the proposed construction, we find ourselves in the following predicament. Both the UFA report and Keith Pitchford's report conclude that the remaining trees will become 'structurally unstable' and 'will be questionable as to their ability to remain standing during wind events over the next several years'. Due to the contour of the land, if they fall, they may well fall on our house (2744 32nd Street NW). Under normal circumstances, the property owner could deal with this by cutting down the trees in anticipation of their becoming hazardous, but that is clearly precluded by the TSP Overlay. This poses a direct

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threat to the lives and safety of our two children, and to Kathy and me -- as well as to our property. DCRA does not appear to be recognizing the extremely dangerous situation that is being created."

Regulations and role of DCRA:

- Mr. LeGrant indicated that all materials associated with the permit B1103986 were public record and anyone could obtain a copy of them from DCRA.
- Mr. LeGrant urged Mr. Voorhees to provide materials to neighbors. (The Ausubels noted that they did receive a copy of the overall site drawing from Mr. Voorhees twice – a draft of the original plan and a draft of the revised plan, but never received a tree protection plan despite asking for one since mid-March.)
- Mr. LeGrant indicated that any representation in the plans associated with the permit is binding.
- Mr. LeGrant indicated that zoning normally concerns itself with issues such as setback, height, volume. The regulations in the Tree and Slope Protection (TSP) Overlay must also be met for this permit, as the property is located in the TSP.
- Unlike many other jurisdictions in the country, Mr. LeGrant indicated that there were no overall regulations (zoning or otherwise) concerning trees for the District of Columbia, except for tree overlay protections for specific neighborhoods and the Urban Forest Preservation Act. So, except for compliance with conditions of the TSP, the only redress available to a homeowner who believes that construction will affect trees so as to create a hazardous situation to property or lives is through the court system. Mr. Davis of the Urban Forestry Administration indicated that UFA is working to change that for the future.

Tree Protection Plan (dated April 7, revision date unknown, approved by Zoning Administrator 6/21)

- The group examined the Tree Plan and Tree Protection Plan drawings. These drawings were dated April 7, approved by the Office of the Zoning Administrator on June 21.
- A total of four trees were discussed in the meeting of July 15.
 - Tree #1: Large, protected tree near front of house that was damaged by previous construction at 2750 32nd Street NW
 - Tree #2: Large, protected (circumference of 96 inches) tree further back in property than tree #1, closest to Ausubel home and intersected or touched by the property line between homes
 - Tree #3: Large, protected (circumference of greater than 75 inches) tree further back on property than tree #2
 - Tree #4, Large, protected (circumference of greater than 75 inches) tree further back on property than tree #3
- Tree #1: Mr. LeGrant indicated that there was "some back-and-forth" with Urban Forestry as to whether the tree was to be considered "hazardous". In the end, it was deemed "hazardous". This tree was not at issue during the meeting and, in fact, is not even listed on the Tree Plan.
- Trees #2-4: As with all the trees on the drawing, the sizes and species were not marked. Mr. LeGrant stated that he concurred with the Ausubels that the trees were three times the size that

he originally believed them to be at the time of their April 5 meeting. (The early drawings that the Ausubels and Mr. LeGrant saw on April 5 listed the diameters – not the circumferences – of the trees, without any notation to this effect. However, the TSP regulations are stated in terms of tree circumferences.) Given the fact that the Tree Protection Plan that the group saw on July 15 did not list the sizes at all, discussions about these trees (and related critical root zone areas) took place by measuring related sizes and distances using a ruler. It should be noted that all three trees are in excess of 75 inches in circumference, which put them in the most restrictive category in the TSP. Mr. LeGrant indicated that DCRA was now aware that the trees were over three times bigger than first believed. Mr. LeGrant said he would get back to us with a date as to when everyone was made aware that the trees were much larger than initially believed.

- Trees #2-4: The proposed construction is within the CRZ of each of these trees. Mr. Davis reiterated that the roots at the location of the proposed addition are on the uphill side of each of these trees. Many of the uphill roots are “tension roots”, roots that keep the trees standing upright during wind events.
- Tree #4: The root pruning line on the Tree Protection Plan comes within approximately three feet of Tree #4 and covers most of one quadrant of the CRZ.
- Tree #3: The root pruning line on the Tree Protection Plan covers a significant amount of the CRZ, all on the uphill side of this tree.
- Tree #2: As shown, the root pruning line on the Tree Protection Plan covers a significant amount of the CRZ. The root pruning line is incomplete for this tree and it is not marked for the south side of the construction. In addition, the CRZ shown is significantly skewed – see below.
- During the meeting, Mr. LeGrant measured the distance from the closest point of the proposed addition as approximately 8 to 9 feet from the center of Tree #2 and between 7 and 8 feet from the edge of the trunk of Tree #2.
- **Tree #2 anomaly:** On the Tree Protection Plan, for most of the existing trees, a circle is drawn around the tree that is labeled in the legend as “Critical Root Zone” (CRZ). With the exception of Tree #2, all critical root zone circles have the tree located at the center of the circle. For Tree #2, the largest tree at issue and the closest tree to the Ausubels’ living area, the critical root zone circle is significantly off-center. Mr. Ausubel pointed to this anomaly during the meeting. Mr. LeGrant indicated that he believed that this was because the canopy of that tree was off-center; therefore, the roots would be off-center. Mr. Davis of Urban Forestry stated that this assumption was clearly false: just because a tree’s canopy grows a certain way due to sunlight or due to trimming does not mean that the roots follow suit. Mr. Ausubel pointed out and the group acknowledged that if the drawing was factual, a significant fraction of the roots would be below the Ausubel home (below the basement, foundation, etc.). Mr. Davis of Urban Forestry indicated this was not possible and that the current plans are “misleading”. Mr. Davis stated during the meeting, “It is interesting that they skewed the critical root zone in the plans, sort of misleading everyone involved.” The Ausubels discussed the fact that this tree would have certainly adjusted its root structure based on the house (which was built in 1928, likely predating the tree). Mr. LeGrant stated that he did know whether the canopy to root analysis was accurate or not, as “I have no expertise in trees. I look to UFA.” He also stated, “If Mr.

Thomas [of UFA] got back to me [on this], that's new ground for me – I would have to take it under advisement". Mr. LeGrant was relying on the plans being accurate, and stated, "I regulate based on the representations that are put in front of me". It should be noted that if the same size critical root zone circle were drawn with Tree #2 in the center (like the other trees), the CRZ would extend half-way through the proposed addition.

- It was remarked that, if Tree #2, which is approximately 96 inches in circumference, was located in the center of the circle of the CRZ, this would mean the building line of the addition would need to be about eighteen (18) feet from the tree in order to stay out of the CRZ area – instead of the 8 to 9 feet distance that was measured in the plans.
- Mr. Davis of Urban Forestry asked Mr. LeGrant what standard was used to determine the CRZ area, as the determination of the size of the CRZ circles seemed to vary by tree. Mr. LeGrant answered that the TSP does not address this issue. Mr. Davis stated that there are standard formulas for determining CRZ of trees.
- As currently marked, a silt fence would be situated approximately two feet away from the proposed addition. The meeting participants discussed the fact that heavy equipment would be able to come two feet closer to each of Trees #2, 3, and 4 than the building line that was marked on the plans, putting additional stress on the tree, especially on the tension roots that were cut. Thus, for Tree #2, heavy equipment can come within six (6) feet of the protected tree – on the uphill side of the tree. Mr. Davis stated this should not be allowed.
- Mr. Davis did not believe that Urban Forestry had reviewed the Tree Protection Plan that was referenced in the meeting. A copy of this plan was provided to Mr. Davis and to the Ausubels during this meeting.

"Fatally damaging trees"

- The TSP contains restrictions "against removing, cutting down, or fatally damaging trees" that apply to trees "having a circumference of twelve inches (12 in.) or greater at a height of four and one-half feet (4 1/2 ft.) above ground." Trees #1 – #4 all lie well above this threshold.
- Per Mr. LeGrant, the challenge for evaluating this proposed construction is to determine what "fatally damaging trees" means, as Mr. Voorhees was not proposing to cut down Tree #2, Tree #3 or Tree #4.
- The June 3 report from the Urban Forestry Administration states "UFA has great concern and does not feel that these trees [Trees #2, #3, and #4] will survive the construction in the long term. . . Coupled with the fact that the roots are on the upward side are the tension roots, once these are pruned the trees will be questionable as to their ability to remain standing during wind events over the next several years."
- The March 23 report from Pitchford Associates (an outside arborist consulted by the Ausubels, who had also been consulted by the owners proposing the construction) states "the pattern of tree root expansion leads me to conclude that the proposed construction would irreparably harm to at least the white oak [Tree #2]. . . if the tree were to remain upright despite the loss of these support roots, this amount of damage will almost certainly kill this tree within a period of five years or less. Not only is this prediction based upon industry reference books, but I can

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concur that this amount of time is consistent with my own experience with trees in construction situations from my 22 years of work in the DC area.” Note that the Ausubels did not ask Mr. Pitchford to comment on Tree #3 or Tree #4.

- Mr. LeGrant stated that the arborist report submitted by the applicant focused on Tree #1, deeming it to be hazardous. There did not appear to be any arborist opinion in the record finding that Trees #2, #3, and #4 would be likely to survive the construction.
- Mr. LeGrant stated that he was under no obligation to consider the recommendations of the arborist report (the Pitchford Associates report) provided by a third party, as the regulations do not make any mention of submissions by non-applicants.
- Mr. LeGrant found the UFA report to be “speculative”, and did not want to base his decision on “fatally damage” on a “long term outlook”. He indicated that he would base his decision on a “short term” outlook.
- Mr. LeGrant noted that the time horizon for “fatally damage” was not defined in the TSP.
- Mr. LeGrant described that he had decided that the time horizon for “fatally damage” would equate to a one year. He stated that he made this determination himself.
- Using his one-year definition for the timeframe of fatally damaging trees, Mr. LeGrant said that the proposed construction “didn’t rise to the level, in my view, of fatally damaging a tree”.
- Mr. Davis of UFA stated “You can’t say one tree will die in any particular timeframe”. Trees will not necessarily show fatal damage within a year. They very often take a few years to die from events.
- Mr. Ausubel pointed out that Mr. LeGrant’s definition would mean that any developer could build within critical root zones, cutting tension roots, etc. -- and as long as the tree didn’t show fatal damage within one year, the developer would be free later (even two years down the road) to apply for a permit to cut down the tree if the tree was then declared hazardous and continue building. Similarly, if the tree were to fall more than one year later, it might be argued that this happened due to an “act of God” instead of a lack of tension roots that were cut during the previous construction. It was noted that, under this interpretation, the TSP would not have any penalties in this case, unlike TSP paragraph 1514.1 (f) which provides a 7-year period during which all building permits require a special exception after the owner cuts down a tree without a permit.

Six Additional Recommendations of Urban Forestry’

- As already indicated above, the June 3 Urban Forestry report expressed their strong concern that the trees would not survive the construction and would be questionable as to their ability to remaining standing during wind events. This report also made six specific recommendations at the end of the report for amending the Tree Protection Plan, should DCRA allow the construction to go forward despite these strong concerns.
- Mr. LeGrant indicated this June 3 report was passed on to Mr. Voorhees, but Mr. LeGrant did not make his approval of the Tree Protection Plan contingent on any of these recommendations being incorporated into the plan.
- Three of Urban Forestry’s recommendations were commented on in the meeting:

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- (1) "Six foot high chain link fence from the new exterior wall to the property line and down to the below of the slope." It was noted that the only fence in the plans in the area of Trees #2, #3, and #4 was a much shorter silt fence, and that the current plans allow heavy equipment to come two feet closer to each of the trees on the uphill side than this recommendation provides for.
- (5) "The roots shall be exposed through the use of an air spade and hand digging. If more than two roots per tree greater than 3 inches in diameter are cut, the project needs to be reevaluated. The ISA certified arborist shall make all decisions related to the treatment of the trees." There is no provision whatsoever in the plans to limit the cutting of roots or to reevaluate the project. This is critical, given the fact that many of the roots that would be cut are tension roots.
- (6) "Do not use the soil protection overlay as represented on the tree protection drawings shown on the April dated set." The date on the plans we were looking at said "7 April 2011".

Miscellaneous

- Per Mr. LeGrant, there was no need for an inventory of trees on the property to be submitted, as the only tree Mr. Voorhees was asking to cut down was Tree #1, and that tree was deemed "hazardous".
- The separate elevator structure that had been part of a different, earlier, cancelled permit application was not part of this permit application.
- The "Wall Check" step listed on the permit as not having been done pertains to a later step to make sure that the foundation is poured at the location specified in the building plans and in compliance with the building restriction line.
- The Ausubels noted that there have been two occasions in the past five years when protected trees located on the 2750 32nd Street property have fallen, the most recent occasion being on October 1, 2010. In this case, a huge oak tree and a large beech tree came down together (their roots were intertwined), knocking down the main branch of another beech tree and possibly decapitating another tree near the edge of the creek.

Next steps

- Mr. LeGrant indicated that he makes his decision of whether to allow a permit to go forward based on the information provided to him, various reviews by specialists in different fields (electrical, mechanical, etc.), and the various regulations in effect. Per Mr. Davis, Urban Forestry was not asked to provide a sign-off on the application. Mr. LeGrant relies on the information that is provided to him as being accurate.
- Urban Forestry is planning to review the Tree Protection Plan that was provided in the meeting and get back to DCRA.
- Mr. LeGrant would only reevaluate a permit if new information came to light, as he made his decision based on all of the information he had received.

- Mr. LeGrant does not have the authority to rescind the permit; only Mr. Majett, Director of DCRA has that authority.
- It was noted that the Ausubels are well within their rights to file an appeal to BZA. BZA does have the authority to issue a stay on the construction until the case is heard, but it is seldom, if ever, used. The Ausubels asked if anyone represented at the meeting (DCRA, Councilmember Cheh's office, Urban Forestry) would lend their support to asking BZA to issue a stay, as unlike a house (where construction can be undone), fatal damage to a tree cannot be undone. Matt LeGrant indicated he would need to confer with counsel on this request.
- The Ausubels indicated that they plan to file an appeal to BZA, as they believe that this proposed construction is in violation of the TSP (based on the reports of the Urban Forestry Administration, the report from the outside arborist, and the Tree Protection Plan drawings that were reviewed at the meeting). They believe that, under the TSP, a special exception is required before a building permit according to the submitted plans is granted.

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