

City of Durham
PLANNING COMMISSION MINUTES
January 5, 2021

1. CALL TO ORDER. Chair Goddard called the meeting to order at 8:03 p.m. via Zoom.

2. ROLL CALL. *Planning Commissioners present:* Chairman Brian Goddard, Vice Chair Krista Bailey, Commissioners Pat Saab, Gary Paul, Matt Winkler, Joshua Drake and Susan Deeming
Staff present: City Administrator Linda Tate and Administrative Assistant Emily Baker
Public provided with a Zoom link to the meeting: Peter Van Oss from NW Tree Specialists and Glenn Armstrong from Pacific Landscape Management

3. PLANNING COMMISSION MINUTES. Commissioner Saab moved to approve the minutes from the November 10, 2020 meeting. Commissioner Paul seconded the motion. The vote was unanimous (7-0). **MO 010520-1**

4. PUBLIC FORUM. None.

5. SELECTION OF CHAIR AND VICE CHAIR FOR 2021. Commissioner Paul moved to re-elect Brian Goddard and Krista Bailey as Chair and Vice Chair, respectively, of the Planning Commission for 2021. Commissioner Deeming seconded the motion. The vote was unanimous (7-0). **MO 010520-2**

6. TREE REMOVAL PERMIT APPLICATION 574-20 at 17300 and 17400 SW Upper Boones Ferry Road. Peter Van Oss introduced himself to the Planning Commission and explained that he put the protection and mitigation plans together. Glenn Armstrong also introduced himself. Tate gave a brief background of the situation. Van Oss explained that there were 11 trees cut without a permit and 9 trees that they are wanting to cut down next. Bailey asked for some context for the landscaping project. Armstrong explained that there have been some issues with water drainage and damage to the building.

Chair Goddard asked about the mature height of a Hinoki. Van Oss said typically they are 30 feet and the ones that were removed were about 25 – 30 feet. Commissioner Paul asked about when the trees were planted. Armstrong said he believes they were planted as part of the original landscaping plan, but that he does not have those plans. Commissioner Drake asked about the other options explored for resolving the drainage issue. Armstrong said the level of the soil was above the grade of the sidewalk and the windows, so the alternative to the landscaping work, would have been to rebuild the windows. Van Oss explained the details regarding the water damage around the windows. Commissioner Bailey asked about their plan and asked if they were putting any additional protection between the landscaping and the building to mitigate any future hydrology issues. Armstrong said they are grading away from the building and adding a dry creek bed around the building to hold any water that puddles up. Chair Goddard asked if the water intrusion issue was in both buildings. Armstrong said it is and that there has been damage to both buildings.

Commissioner Drake asked about tree protection fences. Van Oss said they are retroactively entering into that phase and that since they are working directly next to the trees tree protection fencing is not beneficial. He added that they have located and marked where and how deep the root systems are and that he has been onsite while they have been doing exploratory digging to make sure they do not harm the fir trees. Commissioner Winkler asked if equipment is being used in the protection zones. Van Oss said there is only foot traffic and that they have marked

areas where only hand digging is allowed. Commissioner Winkler asked about whether the issue of water damage will come up again in the future. Armstrong said mitigation trees are going to be planted with plenty of room to grow and that the rest of the trees are going to be planted along the border of the property to avoid future issues. Tate added that there is a parking lot between the area they are planting the mitigation trees and the building. Commissioner Drake asked about the tree protection fences and plan, clarifying that the fences are not necessary. Van Oss said that the roots are below grade and he believes they can carry out their plan without damaging the existing trees.

Chair Goddard said that there has been an issue with people moving to Durham and not knowing there was a Tree Ordinance, but the property owner has owned the property in question for a while, so it is daunting to him that they would not have created a plan and met with the City sooner. He asked Tate if the property owner has made any comments on this issue, and Tate replied that he has passed everything off to Armstrong. Armstrong said the proposal they took to the property owner included the arborist and the permitting for the fir trees. He said the mistake was on the Hinokis, which was on him, because he thought those trees were ornamental and did not fall under the Ordinance. He stated that they are now asking for the permits for the second building and the permits for the trees that have been cut down already. Chair Goddard asked why they did not consider the tree ordinance and check with the City beforehand. Chair Goddard explained that there is a precedent that has to be maintained to avoid people coming in and using this as an example for why they should be able to clear cut the trees around their building. Armstrong said they did not intend to circumvent the City and he had planned to meet with the arborist and the City and that it was a mistake to cut down the Hinokis. Van Oss added that he was working on the tree protection plan when the trees were cut down. Commissioner Bailey asked what trees they were planning to submit permits for. Armstrong said he was not planning to pull a permit for the Hinokis, but was planning to re-plant them. Tate explained to the Commissioners that Armstrong did not know that he needed a permit for the Hinokis that were cut.

Commissioner Deeming asked about the mitigation trees and the calculation of the canopies for those trees. Van Oss said he went by the City code and based his findings on the trees that Pacific Landscaping is planning to plant as mitigation. He added that he calculated the canopies of the trees removed by using the largest canopy measure he found online for the Hinokis and then used similarly sized trees on the tree mitigation list for the calculations specified in the City code. Armstrong added that the measurements Van Oss got were based on the largest tree and that a lot of the trees removed were under the canopy of the firs and were less than the number given. Commissioner Deeming followed up her question by asking about the location of the landscape trees. Armstrong said they are not planting anything within 3 ft from the building and the trees will be in at least 10 ft from the building.

Commissioner Drake asked if there were any changes to the plan that may be different from the plan that was submitted. Van Oss said he does not believe there are any major changes that would have come up. Commissioner Saab asked about the length of time the project will take. Armstrong said it is unknown because they are working in phases and that it could be 1 to 2 years before completion. Chair Goddard asked about irrigation around the building. Armstrong said there is an existing system and they will work with the existing system. Commissioner Bailey noted that there is a timeframe with the permitting process and mitigation requirement. Van Oss said they can make it work and Armstrong said they can plant the mitigation trees before they finish the entire project and that they are planning to plant the mitigation trees by late winter. He added that they may resubmit the permits for the second building because they

want to plan those trees in the fall. Tate asked about the timing for their existing mitigation tree plan and Armstrong said they could in fact plant all the required mitigation trees soon.

Commissioner Winkler asked about the tree protection part of the plan submitted. Van Oss said that he prescribed flagging trees instead of putting up fences because of how close they are working to the fir trees and that he will be on site the entire time making sure that the root systems and trees are not damaged. However, he could also change the plan to advise fencing if the Planning Commission wanted that.

The Planning Commissioners began discussing their findings:

1. The Planning Commission found that 11 trees were cut in violation of the Durham Development Code.
2. The Planning Commission found that a mitigation plan with required information has been submitted.
3. The Planning Commission found that the permit falls into a Type F, subject to review under a Type 2 process and mitigation should be required for at least 6,006 square feet.
4. The Planning Commission found that this application has been processed as a Type 2
5. The Planning Commission discussed the criteria for issuance of tree cutting permits.
 - a. For Criteria A, Commissioner Deeming asked about the condition of the tree, and Tate and Goddard explained that the condition of the trees is different from the condition of the building due to the trees. Commissioner Deeming suggested changing the punctuation of Criteria A to make it clearer. The Planning Commission found that Criteria A is not applicable because there is nothing wrong with the condition of the trees.
 - b. For Criteria B, the Planning Commission found that Criteria B is applicable because the building has been having hydrology issues and water damage as shown in the invoices for water damage repair provided by the applicants.
 - c. For Criteria C, the Planning Commission found that Criteria C is applicable and that based on the professional opinion and evidence provided by the applicant, removing the trees will not have a negative effect on the topography or soil condition.
 - d. For Criteria D, the Planning Commission found that Criteria D is applicable and that the removal of the trees located directly next to the building will not have a negative impact because the property is surrounded by a significant number of fir trees and the landscape plans include replacement trees.
 - e. For Criteria E, the Planning Commission found that Criteria E is applicable and that the applicant has adequately provided substitution for the trees to be cut in accordance with Section 7 and 8 of the Tree Protection Ordinance.
 - f. For Criteria F, the Planning Commission found that Criteria F is not applicable because there were no trees that were diseased.
 - g. For Criteria G, the Planning Commission found that Criteria G is not applicable because there were no dead trees presented by the applicants.
6. The Planning Commission discussed imposing a fine for the trees that were cut prior to obtaining a permit. Commissioner Drake asked for clarification on if the violation was for the incident or per tree. Chair Goddard said it was per tree. Commissioner Bailey asked about the application fee for the tree removal. Tate explained that it is \$25 for the first tree and \$10 for each additional one, and that the permit fee for these trees have already been paid.

Commissioner Drake suggested imposing a fine of \$720 for each tree, because they, as Planning Commissioners, are representatives of the community and should take these removals seriously. Armstrong asked for the fine to be scaled because they did not

intend to violate the Tree Ordinance. Commissioner Drake stated that the report that was submitted was dated the day the trees were cut down and the arborist showed up on that same day, presumably after the trees were cut down and that it does not look like there was a plan before the trees were cut. Van Oss said that the plans were in the works and Armstrong said they were not trying to cover their tracks, they were trying to go through the process and thought they only need permits for the Doug Firs so their intentions were to save those trees. Chair Goddard re-stated that tree removals have been a hot topic in the City and have to be taken seriously. Commissioner Bailey said that they do have to take into consideration the preparedness of the applicants and plans and reports that were submitted. Chair Goddard agreed, but said they also have to answer to the community. Van Oss asked if they could mitigate more trees in lieu of a fine. Commissioner Bailey said they can consider it if it would be appropriate. Commissioner Saab said that had the plans and permits been submitted prior to cutting the trees down, the permits probably would have been approved, so under these circumstances they should not have such a heavy fine. Commissioner Bailey agreed with Commissioner Saab and that she thinks they have an obligation to penalize the improper process, but should keep in mind how the process would have unfolded had the proper steps been taken. Commissioner Paul said that the trees were probably planted for landscaping and were causing damage to the building, so the full fine seems excessive to him. Commissioner Deeming agreed that the maximum fine is not called for, but that there should be some recognition that the process was not followed.

Commissioner Drake said they have to look at the approval and the fine separately. He added that the plan was a good one, but they are in a situation where the plan was not being followed closely. Commissioner Paul said that by having someone on site, they are having better tree protection methods than stated in the plan and that there should be some room for changes to the plan based on the situation. Commissioner Bailey said that the code requires some protection, but that following the plan is the responsibility of the people doing the work and that they can't really dictate how they work. Chair Goddard agreed, saying they have seen applicants a lot less prepared. He suggested using the \$250 in lieu of mitigation fee as a fine, which would bring the total down to about a third of what the fee would be if they did the full \$720 fine. Commissioner Paul suggested reducing the \$720 fine by 50% to \$360 per tree.

Commissioner Bailey said they should consider the commitment of the applicants to reinvesting in the landscape and suggested asking for more mitigation in lieu of part of the fine. Chair Goddard asked about how they could mitigate more trees on the property with the large number of trees that exist already. Van Oss said that they could make room for more mitigation trees on the property in lieu of the fine. Chair Goddard said they cannot afford to not impose a fine in this situation because it would open the Planning Commission up to people saying "if them, why not me?". Commissioner Drake said that since it was 11 trees the dollar amount of the fine is larger than if it was one tree, but the fine amount is the ordinance. Commissioner Bailey said that there may be an avenue to appeal the fine, but it is not a situation of "either-or". Armstrong said that they are fine with the fine, and understand where the Planning Commission is coming from.

Commissioner Paul asked if the Hinoki Cypress is on the City's approved tree list. Van Oss said it is not. Chair Goddard said that even if a tree is not on the mitigation tree list, if it grows beyond the 5" DBH it is subject to the Tree Protection Ordinance and that the

Planning Commission has to decide on it. Commissioner Bailey asked which fund the fine goes to. Tate said the fine goes into the general fund.

Commissioner Drake gave a number break down of the fees discussed so far. 50% of the \$720 fine would be a total of \$3960, 75% would be \$5940, and 25% would be \$2750. Commissioner Paul asked if they have to do the fine per tree or if they could do a flat amount. Chair Goddard said they could do it either way, and Commissioner Drake said they could divide a flat fine by 11 and figure out how much it would be per tree, too.

Commissioner Deeming asked how the \$720 fine has been used in the past. Commissioners Bailey and Saab said they have sometimes used the \$720 and they have sometimes reduced it. Commissioner Drake said they have spent so much time discussing tree removals as a Planning Commission and that he feels they should not reduce the fine to a small fee because it is an important issue to the community. Commissioner Bailey agreed with him, but they do have the flexibility to consider each situation based on what is presented. She said she would be comfortable around the \$250 amount, but to also allow them the opportunity to mitigate more trees if it made sense. Chair Goddard said he thinks \$720 is too much, when considering the amount of research and level of preparedness of the applicant, but he thinks they should do a 50% reduction of the \$720 fine. Commissioner Deeming said that since they would have approved the permit had it come up to them prior to the trees being cut, a fine of \$250 is good. She added that the plan is good and there was just a question of not understanding the process.

Commissioner Winkler said they broke the rules, but are cooperating with the City so the \$250 is a good fine. Commissioner Drake said that he agrees more with Chair Goddard and that a \$360 per tree would be low, but better than \$250. Commissioner Paul agreed, and said he is more in line with the \$360 fine per tree than the \$250 amount. Chair Goddard asked Commissioner Saab her thoughts, and she said the \$250 fine per tree would be adequate because there probably would not have been an issue of approving them had they come to the Planning Commission first. Commissioner Bailey said she is in support of the \$250 per tree fine, because they violated the ordinance, but they have been cooperative with the City.

Commissioner Paul moved to impose a fine of \$360 per tree illegally removed. Commissioner Drake seconded the motion. The motion failed with Commissioners Drake, Paul, and Goddard voting in favor and Commissioners Winkler, Saab, Bailey, Deeming voting against (3-4). **MO 010520-3**

Commissioner Saab moved to impose a fine of \$250 per tree illegally removed. Commissioner Deeming second the motion. The motion passed with Commissioners Winkler, Saab, Bailey, and Deeming voting in favor and Commissioners Drake, Paul, and Goddard voting against (4-3). **MO 010520-4**

The Planning Commission found that they would like to assess a fine of \$250 per tree for a total of \$2750.

The Based upon the above findings, the Planning Commission approved the tree removal application with the following conditions:

1. Thirteen trees will be planted as mitigation with a canopy size of 7895 square feet. The trees will be from the list of approved mitigation trees and will be the size that complies

with the requirements set forth in Chapter 5, Section 5.5.1, i.e., 2" in diameter when measured from the top of the root ball for deciduous trees or 6' tall when measure from the top of the root ball, excluding the leader, for evergreens.

Tate verified that Van Oss had see this section in the Code. He said he did, but that it is not recommended to plant anything over 1.5" in diameter when measured at the top of the root ball. Tate said that 2" is what is in the code and Commissioner Bailey added that they have had many mitigation trees planted with that specification, so they are going to stick with what the code says.

2. Mitigation trees will be located as required in Chapter 5, Section 5.8.4.
3. Replacement should be complete within 6 months of approval. City Hall can grant an extension of 60 days, but anything longer than that is subject to Planning Commission approval.
4. Any mitigation tree that fails within two years of the date of planting requires that they notify City Hall and that the failing tree be replaced.
5. Within 60 days of the second anniversary of the planting, they are to request a final inspection of the mitigation planting. The permit will not be finalized until all of the conditions are complied with and the final inspection requested.
6. A fine of \$2750 must be paid to City Hall within 30 days within.

Van Oss asked if they were obligated to any additional obligations. Chair Goddard said no, and that they are in agreement with the tree protection plan if that is Van Oss' professional opinion. Tate also clarified that the 9 additional trees that they are applying for cannot be cut down until after the 12 day appeal period.

Commissioner Drake moved to approve the Planning Commission's decision to approve tree removal permit 574-21 with the above conditions. Commissioner Winkler seconded the motion. The vote was unanimous (7-0). **MO 010520-5**

7. POTENTIAL DISCUSSION ON TREE PRESERVATION ORDINANCE. None.

8. COMMISSIONER COMMENTS / REPORTS / STAFF UPDATES. Chair Goddard pointed out the updated Planning Commission roster to the Commissioners. Tate asked the Commissioners to verify their information on the roster and send her any corrections that need to be made.

9. ADJOURN. Chair Goddard adjourned the meeting at 10:05 p.m.

Approved: _____
Brian Goddard, Chair

Attest: _____
Linda Tate, City Administrator