

Changes Recommended for the Tree Ordinance

References to Municipal Code 162 and Durham Development Code Chapter 5 in this document are to sections of the proposed, revised documents not current.

1. Definition of Scope for Municipal Code 162:Tree Ordinance and Chapter 5 of the Durham Development Code:Tree Protection. The purpose is to separate the types of tree removals for land development and the specific requirements that do not impact developed land tree removals.

162.01 Scope. “Chapter 162 applies to all land not covered by Chapter 5 of the Durham Development Code. In general, this includes improved residential, commercial and industrial lots and vacant land not before the City for approval of a land division, land use permit or building permit.” ***This section was created by the committee.***

5.1 Scope. “Chapter 5 applies to vacant land and all previously developed land which is substantially razed for new construction, but only if such land is before the City for approval of a land division, land use permit or building permit. For purposes of this Section 5.1, “land division” includes all land use matters described in Section 8.1 of this Code.”

Source: This section was created by the committee.

2. To reduce the load of processing tree removal permits and giving property owners more control of their landscape, the size requirement for tree removal without a permit is increased from 5 inches to 8 inches and exclusions added for required permits.

Exclusions to include “fruit trees (other than American black cherry and wild cherry) shrubs, hedges, vine maple, woody bushes, ivy, poison oak, holly, rhododendron, camellia, arborvitae, laurel and bamboo. Also exclusion for Certain Invasive Trees with diameter no greater than 10 inches. **Municipal Code 162.03 (a), (b), (c) and DDC Chapter 5: 5.2.2, 5.2.3**

Sources: Other cities set limits of 6” (LO) 10” (Tigard) 12” (PDX). Exclusion of fruit trees:

source: Lake Oswego Tree Removal Code 55.02.042 (1) (b) “any fruit trees regardless of size”

3. To simplify reading the Code, definitions are modified, added and deleted. **Municipal Code 162.02. Selected Definitions.** Modified: City Arborist, Project Arborist **162.02 (a)**; Cut **162.02(c)**, Hazardous Tree **162.05(c)**, Tree Care Provider **162.02(d)**; Added: City Administrator **162.02(b)**, Type 1 Process **162.02 (e)**, Type 2 Process **162.02 (f)**. Deleted: Girdling, Preserved Tree, Topping ***Source: Definitions were modified by the committee.***

4. To avoid misunderstandings with property owners, following is added to **Municipal Code 162.04(a) Application Requirements and Fees**, “By signing and submitting an application, the applicant agrees: (1) That the City Administrator may post a sign on the applicant’s property (giving public notice of the proposed action); and (2) to co-operate as reasonably necessary to provide the City access to the applicant’s property for the purpose of examining the trees to be removed”.

Source: PDX code

5. To off-set processing costs of removal permits, the associated fees are increased. **162.04 (b) Fees.** "Except when the application is the City, tree removal applications shall be accompanied by a \$50 fee for the first tree and \$20fee for each additional tree."
Sources: \$24 6"-15"DBH, \$247 healthy, over 15" (LO), \$100 for up to 3 over 12"DBH (PDX) \$25 approval in office,\$65 if site visit required (West Linn)

6. **162.05 Permit Process and Categories** Added 162.05(a)(2) "Non-owners May Not Apply for Permits" to keep the City out of disputes with neighbors over tree removals. Added 162.05(a)(3) Significant Trees as a category and assigned removal permit process to be a Type 2 to raise awareness of Significant Trees and require more stringent review for decision making for removal permits.
Sources: Tualatin, Tigard, Lake Oswego: 55.02.020 Definitions: Significant Tree, PDX: "trees greater than 36" DBH can not be cut without a fee (beyond the permit fee).

7. **162.05 (b)(c)(d)(e)(f)(g)** To reduce complexity and enhance understanding and remembering, descriptive names replace the current permit categories; Type A, Type B, Type C, Type D, Type E, Type F. The descriptions of the permit types are rewritten to help clarify the criteria to be met and how decisions will be made. Some of the categories use much of the same language, but the biggest change is to **162.05(c)** Hazard Tree.
Source: Lake Oswego Tree Removal Code 55.02.0421(3)(4)(5)

8. **162.06 Trees on City Property** This is an entirely new section created for tree removal to be defined on City property. The purpose of the city applying for tree removal permit in a Type 2 Process is to make it transparent to residents and for there to be checks and balances in the process by adding that permits be approved by the Planning Commission.
Source: created by the Tree Committee.

9. **162.07 Emergency Procedures** The purpose of revisions to this section is to remove complexity and improve responsiveness by allowing a property owner to proceed with removal of a tree that poses an immediate threat of falling when the City Administrator is not available instead of appealing to the Mayor, President of City Council or Planning Commission Chair or Vice Chair. The revision also allows 7 days rather than 48 hours after such a removal for a property owner to file a tree removal application along with specific evidence that supports the emergency nature of the situation. An arborist's analysis may be required as part of the evidence. If the emergency standard is not met, the permit shall be denied and the owner bay be subject to fine and mitigation planting as determined by the Planning Commission. *Sources: Tualatin Code (TDC 33.110(7)) "If an emergency exists and the City offices are closed, the emergency may be abated provided the person files information documenting the emergency..... as soon as practical." Lake Oswego (55.02.042(5)(d)) "Within 7 days of such removal, the owner of the tree shall apply for a retroactive emergency tree cutting permit and shall submit with the application evidence to demonstrate the emergency nature of the tree", (55.02.042 (5)(e)) " The City may require the applicant to hire an arborist to review the evidence....."*

10. 162.08 Mitigation To help retain the City's existing tree canopy, this section is revised so that application for any category of tree removal permit shall include planting of a mitigation tree that will provide similar canopy at maturity by selecting a tree from the City's approved list for the size tree that is removed. The planting could be on the applicant's property, on City property or in-lieu payment accepted. **Source: Created by Tree Committee**

11. 162.09 Appeals For transparency, the following is added so interested residents are informed of details of a hearing of appeal and may attend and testify if desired.

"(a) Appeals Process. A decision made by the City Administrator may be appealed to the Planning Commission..... "The applicant (or any persons entitled to notice of the application) shall be notified of the date, time and place of the hearing. On the date the appeal is set, the City shall publish online a copy of the appeal and the date, time and place of the hearing. Any resident of the City may attend and testify at an appeal." **" (b) No Fees.** There is no fee for an appeal.

Source: Existing code 162.09, Tree Committee adds phrases to indicate interested residents be informed and encouraged to participate.

12. DDC Chapter 5. 5.5 Means of Preserving Trees. The purpose of these changes are to make the criteria for a Tree Preservation Plan stronger and easier for the City Administrator and City Arborist to enforce. Much of the criteria are the same as currently included in DDC Chapter 5. 5.7.2. Some of the criteria added include: **5.5.3** Providing a tree assessment report prepared by the certified project arborist including an inventory of trees proposed for preservation indicating species, condition, DBH, estimated canopy square footage, native or non-native species, and likelihood of survival in light of the development proposed. **5.5.2.1.** Tagging all preservation trees with numbers that correspond with the numbers on the map and tree assessment report. **5.5.8.** All trees on site must be physically identified and numbered in the field with an arborist approved tagging system that corresponds to the Tree Preservation Map and Tree Assessment Report. **5.5.9.** The applicant shall install construction zone fencing at least 4' high, erected in a circle around the trunk at a distance of 1' for each 1" of tree diameter. **5.5.10.** The project arborist shall monitor retention of the tree protection zones. **5.5.11.** The applicant shall install root/soil compaction protection of permeable geotextile fabric secured on top of the grade, followed by a minimum 4" of wood chip or mulch, followed by ¾" plywood. **Sources: Durham Heights Planned Residential Development Application: Tree Preservation Plan, Portland Tree Consultancy, written by Lou Phemister, ASCA Registered Consulting Arborist and Sub-division plan for 7870 SW Elleman, Pacific Consulting Arborists written by Kyle Offerdahl, ASCA Registered Consulting Arborist, ISA TRAQ**

13. 5.6 Mitigation The two most recent land development applications resulted in removal of trees on much of the land square footage. Because of the existing generous 200% credit for the square footage of canopy of preserved trees, there was no mitigation required. Residents strongly objected to the "clear-cut" and the perceived unfairness of what they go through to remove 1 tree. The change to this section is to reduce the credit while still

encouraging preservation of existing trees. “5.6.2. Preservation of existing trees in good condition, suitable for preservation and of appropriate species, shall receive a 130% credit based on their existing canopy area.” No credit is given for mitigation with native trees as is currently in Chapter 5 Mitigation. **5.7.2 and 162.08(b)** The time within which a mitigation tree dies and must be replaced is changed to 3 years instead of 2 years. Also, **5.6.8.** Mitigation in-lieu fee is changed to \$500, the current fee (\$250) is not enough to encourage planting a tree instead of paying the fee.

Sources: Other cities in this area do not have tree canopy credits for preserved trees as Durham does. Trever March, ISA Certified Arborist, ISA Tree Risk Assessment Qualified

EXPLANATION OF NEW SECTION 162.06 (NATURAL AREAS)

Section 162.06 of the proposed ordinance reflects the recommendations and analysis of leading books and publications on tree risk management.

Authority Relied On

The most popular authority is Smiley, Matheny and Lilly, *Tree Risk Assessment* (2nd. Edition 2017), which is referred to as “TRA.” This book is published by the International Society of Arboriculture and is intended as a guide with best management practices for practicing arborists, urban foresters and their supervisors. See TRA, p. 1.

Another source is Urban Tree Risk Management, A Community Guide to Program Design and Implementation, which is published by the USDA Forest Service. It is referred to as “UTRA.” It is a training manual for community leaders, administrators, city foresters, parks and public works staff and private tree care practitioners. See UTRA, page iii.

Another cited authority is an email of October 30, 2024 from Nelda Matheny, one of the authors of TRA. It is referred to as “Matheny email.” The email responds to an email from committee member Streicher inquiring about books or articles covering tree management of walking or hiking trails in forests and riparian areas.

Balancing Risk With Benefits.

Trees always create risk, but this is the tradeoff for the benefits of trees. It is said:

“It is impossible to maintain trees free of risk. Some level of risk must be accepted to experience the benefits that trees provide.”
See TRA p. 5.

Attempting to attain zero risk is counterproductive because of the cost of frequent inspections, the cost of premature tree removals and the loss of the benefits that trees provide.

Community leaders and decision makers must consider the perceived public liability for tree damage and injury claims. In the extreme, trees are excluded from public rights-of-way to minimize public exposure. In the risk management field this is called risk avoidance. In these cases the public benefits that trees provide, which usually outweigh the perceived costs, are not delivered to the community. Other communities postulate that tree populations can be managed to have zero risk. The leaders of communities in this case do understand the benefits that trees provide and reduce the overall potential urban forest value through their attempts to attain zero risk (which may not be possible). Attempts to attain zero risk often become costly over time, due to premature tree

removals, frequent tree replacements, and loss of benefits that matures tree provide.” See UTRA, at p. 7. (emphasis added)

The cost of attempting to eliminate risk is borne out by the \$15,000 - \$20,000 bill paid by Durham in June, 2024 to remove 16 trees.

Target, Occupancy, Protection, Likelihood of Falling on Target, Consequences

The first step in assessing risk is to identify the target of a falling tree. Targets are either static (e.g., a building) or mobile (e.g., a person in motion). Another part of the analysis is the occupancy rate of the target zone where the tree may fall. The occupancy rate of a target zone is constant for a building and infrequent for a walking trail. See TRA pp. 23-26.

The next step is assessing the likelihood of the tree falling on the target during occupancy. The likelihood of a tree falling is usually measured by the intervening period between inspections. One to three years is common. See TRA p. 33. For example, if the time frame is three years, the likelihood of falling is said to be “possible” if the failure may be expected under normal weather conditions within the specified time frame. See TRA pp. 32 and 33. The focus then shifts to the likelihood of the tree hitting the target. The likelihood of falling on people is considered “low” for occasional occupancy. If the area is protected by other trees, the likelihood may be “very low.” See TRA p. 34.

The consequence of hitting the target is then analyzed. The most serious consequence is physical harm to a person, followed by damage to structures, cars, etc.

Assessing Overall Risk.

Finally, the focus is overall risk, which is said to be “moderate” when the likelihood for hitting the target is “somewhat likely” and the consequence is “severe.” See TRA p. 41. The risk would presumably be lower if the likelihood of hitting the target is “low,” rather than somewhat likely. This is corroborated by the Matheny email, which assigns a low risk to trails.

From a risk management standpoint, most agencies and property owners do not evaluate trees for risk in very low-use, non-improved areas such as hiking trails. It’s a matter of target: the potential for damage or injury is very low, where people rarely are present. However, there may be reasons to manage trees in low-use areas that are unrelated to risk: tree health, pest management, succession, fire management, habitat enhancement, etc. See Matheny email, p. 1.

Analysis of Section 162.06 to Durham Park and Rivendell Forest

In the natural areas of Durham Park (primarily the northern portion near the loop trail and Fanno Creek), the likelihood of hitting a person is low because of there is only occasional

occupancy. The risk is higher for the playground, benches and parking lot, but these areas are outside the natural areas.

The risk for the walking trail in the Rivendell forest (between Rivendell and Willowbottom) is low because the occupancy of the trail is very low. The risk is higher on the outer edges of the forest because of the adjoining streets and power lines.

Section 162.06 provides for tree removal when the target is static (e.g., streets, power lines, playgrounds, adjoining houses). If the occupancy rate is low, such as on a trail with occasional use, removal is discouraged. Likelihood of falling is also taken into account. For example, if a dead or declining tree is unlikely to fall in the next three years, removal is discouraged. The various citations above demonstrate that this approach is consistent with the view of experts in the field.

Planning Commission Oversight

There are several reasons why the committee recommends Planning Commission review for removal of trees on City property, including the following:

- Most residents are only marginally affected by removal of trees on private property. However, all residents are affected by tree removals on City property, especially the Rivendell forest which was purchased with resident funds through a bond measure.
- A fundamental feature of Durham's tree protection laws is that there is oversight for every removal decision. Allowing the city administrator to "self approve" is inconsistent.
- Without Planning Commission review, the risk assigned to a tree is based solely on the judgment of the single individual who happens to be serving as city administrator at that time. Risk assessment is subjective and taking multiple views into account ensures a more measured outcome.
- Resident participation in City decisions should be encouraged. This creates transparency and more ownership in our city. Unilateral decisions frustrate transparency.
- Section 162.06(a) and (b) provide flexibility by allowing the city administrator to take unilateral action to remove shrubs and invasive plants and in emergency situations.

**CITY OF DURHAM
WASHINGTON COUNTY, OREGON
ORDINANCE _____**

**DRAFT
11/07/24**

The objectives of this ordinance are:

A. Preservation of Tree Canopy. Recognizing that an abundant mature tree canopy is prized by residents of the City and is a material reason why people move to the City, this ordinance is intended to preserve the City's existing tree canopy for present and future generations and encourage creation of new canopy where none now exists. This will:

(1) Confer health benefits by improving air quality through absorption of pollutants such as carbon dioxide and dust; provide shade and reduce temperatures during the summer; protect against cold winds in the winter; release oxygen; reduce stress and improve mental health; and reduce noise;

(2) Provide animal habitat;

(3) Stabilize soil;

(4) Enhance the beauty and livability of the City; and

(5) Increase property values.

B. Public Safety. As an exception to paragraph A above, and in light of recent damage and danger caused by falling trees in certain neighborhoods, this ordinance acknowledges personal safety by facilitating removal of trees that are susceptible to falling by reason of acts of God including but not limited to high winds, excessive rainfall, extreme temperatures and ice accumulation.

C. Simplification. This ordinance is intended to remove the overlap and inconsistencies between Chapter 162 of the Durham Municipal Code and Chapter 5 of the Durham Development Code, which in turn will simplify administration for residents and City employees.

D. Public Lands. This ordinance clarifies the intent that the City's tree protection laws apply to trees on all land owned by the City.

The Ordinance is as follows:

**I.
AMENDMENT OF CHAPTER 5 OF DURHAM DEVELOPMENT CODE**

Chapter 5 of the Durham Development Code is amended to read as follows:

5 TREE PROTECTION

5.1 Scope. Chapter 5 applies to vacant land and all previously developed land which is substantially razed for new construction, but only if such land is before the City for approval of a land division, land use permit or building permit. For purposes of this Section 5.1, “land division” includes all land use matters described in Section 8.1 of this Code.

5.2 Obligation to Preserve Existing Trees. Approval of a land division, land use permit or building permit shall obligate the owner of the property described in Section 5.1 to use best efforts to preserve all trees on the site to be divided or developed.

5.2.1 Except as provided at Sections 5.2.2 and 5.2.3 below, trees protected under this Chapter 5 are those having a diameter greater than 8” measured 4.5’ above ground level, except that if a tree splits into multiple trunks above ground but below 4.5’, the trunk is measured at the most narrow point beneath the split. The diameter is calculated by dividing the circumference by 3.1429.

5.2.2 No protection under this Chapter 5 is extended to fruit trees (other than American black cherry and wild cherry), shrubs, hedges, vine maple, woody bushes, ivy, poison oak, holly, rhododendron, camellia, arborvitae, laurel and bamboo. Nut trees other than hazelnut trees are protected by this Chapter 5.

5.2.3 No protection under this Chapter 5 is extended to a tree listed on the City’s invasive tree species list if the tree has a diameter no greater than 10 inches, measured in the manner described at Section 5.2.1 above. The invasive tree species list shall be created and periodically updated by the Planning Commission and shall be on file with the City Administrator.

5.2.4 In general, permission for removal shall be granted for:

5.2.4.1 Trees that are negatively impacted by the footprint of the proposed improvement; and

5.2.4.2 Trees for which removal is allowed under Municipal Code §162.05(b), (c) or (g).

5.3 Definitions.

5.3.1 All references to an “arborist” mean an ISA certified arborist who is tree risk assessment qualified.

5.3.2 All references to “tree care provider” mean a person who performs tree preservation, tree maintenance, tree removal, pruning, limb removal, guying or fertilization.

5.4 Applications. Separate Chapter 5 permit applications shall be submitted for:

5.4.1 A land division and installation of required infrastructure; and

5.4.2 Installation of utilities and structural building permits on each lot at the time the lot applies for a building permit.

The applicant shall submit with the initial application a tree preservation plan prepared by an arborist with a narrative as to how the plan will effectuate tree preservation. A permit issued under Chapter 5 shall be subject to review and approval by the Planning Commission under a Type 2 process (as defined under Section 9.6 of this Code).

5.5 Means of Preserving Trees. An applicant shall preserve existing trees on a site by varying the site design, examining all means feasible under the code applicable to the zoning, and by the following means:

5.5.1 The applicant shall provide a tree preservation plan created by the arborist for the project, including (i) a map drawn to scale of the site, (ii) a tree assessment report, and (iii) specific measures for tree preservation and protection during all phases of construction, including excavation, grading, filling, cutting, augering, trenching, digging, repair and removal of trees, pruning and structural support, fertilization and aeration;

5.5.2 The map shall indicate:

5.5.2.1 The location, size, species and tag identification number for all trees on-site 10 inches or more in diameter;

5.5.2.2 All trees proposed for removal and all trees proposed to be preserved; and

5.5.2.3 All existing and proposed public and private improvements and all existing public and private easement;

5.5.3 The tree assessment report prepared by the certified arborist must include an inventory of trees proposed for preservation indicating species, condition, diameter at 4.5' above ground, estimated canopy square footage, native or non-native species, and likelihood of survival in light of the development proposed;

5.5.4 Prior to any on-site tree removal, the project contractor shall acknowledge in writing the approved tree protection plan and provide a copy to the City;

5.5.5 The applicant shall authorize the City to stop work for any violation of the approved plan;

5.5.6 All tree related decisions and activity shall be approved by the City's arborist;

5.5.7 Site grading shall be coordinated with the City's arborist to identify possible additional trees for preservation that are not shown on the application;

5.5.8 All trees on site must be physically identified and numbered in the field with an arborist approved tagging system that corresponds to the tree preservation map and tree assessment report;

5.5.9 The applicant shall install construction zone fencing at least 4' high, erected in a circle around the trunk at a distance of 1' for each 1" of diameter width;

5.5.10 The project arborist shall monitor retention of tree protection zones;

5.5.11 The applicant shall install root/soil compaction protection of permeable geotextile fabric secured on top of the grade, followed by a minimum 4" of wood chip or mulch, followed by ¾" plywood;

5.5.12 The project arborist shall monitor and oversee all excavation within critical root zones of trees to be preserved. Roots 3" or greater in diameter shall be evaluated by the project arborist before pruned or cut. Cut roots must be immediately covered with soil or mulch to prevent them from drying out; and

5.5.13 Any damage to a preserved tree shall be repaired in a timely manner.

5.6 Mitigation. Mitigation is required as follows:

5.6.1 Removed trees shall be replaced with mitigation trees to the extent that at maturity they equal the canopy being removed or mature canopy coverage equivalent to 35% of the square footage of the lot, whichever is less. Mature canopy coverage shall be as set forth on the City's tree list based on the tree species, or as otherwise determined by the City Administrator.

5.6.2 Preservation of existing trees in good condition, suitable for preservation and of appropriate species, shall receive a 130% credit based on their existing canopy area. (Example: A 10,000 sf lot would require 3,500 s.f. of canopy. An existing Maple has 314 s.f. of canopy. This property would receive a credit of 408 s.f., leaving 3,092 s.f. that will need to be mitigated with new plantings.)

5.6.3 Mitigation trees shall be selected from the tree list maintained by the City or otherwise approved by the City Administrator.

5.6.4 The minimum size for a deciduous mitigation tree shall be a 2" diameter when measured 6" inches above the root ball, and the minimum size of an evergreen tree shall be a height of 6' when measured from the top of the root ball.

5.6.5 Mitigation trees shall be located as follows:

5.6.5.1 Trees categorized as small on the City's tree list shall be spaced no closer than 15' on center from other trees and no closer than 10' from the face of any structure;

5.6.5.2 Trees categorized as medium on the City's list shall be spaced no closer than 20' on center from other trees and no closer than 10' from the face of any structure;

5.6.5.3 Trees categorized as large on the City's tree list shall be spaced no closer than 30' on center from other trees and no closer than 15' from the face of any structure; and

5.6.5.4 No tree shall be placed less than 5' from any hard surface;

5.6.6 Replacement of one or more trees when required as a condition of a land division or land development approval shall be completed within 6 months after the approval is final. The City may grant a 60-day extension if the City finds abnormal weather conditions require delay. Additional time beyond the 60-day extension shall be subject to Planning Commission approval.

5.6.7 Trees removed for the purpose of installation of infrastructure upon a division of land may be mitigated by the developer by planting the required mitigation trees upon any lot in the division. Such trees will be required to be planted outside the anticipated footprint of any future structure or within required structural setback areas. At such time as building occurs, the builder/owner of the lot shall receive a credit of 100% of mature canopy based on the species planted.

5.6.8 If an applicant declines to plant the required number of mitigation trees, the City Administrator may require the applicant to pay a fee of up to \$500 per tree in lieu of replacement.

5.7 Replacement of Failed Preserved Trees.

5.7.1 If a tree initially designated to be preserved in the tree preservation plan dies prior to 3 years after project completion, the landowner shall file an application for a tree removal permit under §162.05(b) of the Municipal Code and mitigate as required under §162.08 of the Municipal Code.

5.7.2 It shall be the responsibility of the property owner to notify the City at any time a preserved tree requires replanting within the 3-year period and to request a final inspection by the City at the end of the 3-year period.

5.7.3 A tree removal permit issued pursuant to Section 5.7.1 shall not be considered final until the expiration of the 3-year period in compliance with all conditions imposed thereon.

5.8 Rights Reserved. For all permits under this Chapter 5, the decision-making authority reserves the right to deny a permit, waive mitigation and fees, require mitigation or require mitigation beyond the minimum specified in this Chapter 5 when it is considered in the best interest and welfare of the community as a whole.

5.9 Oversight of Arborists and Tree Care Providers. Arborists and tree care providers working in the City are expected to know and comply with the laws in this Chapter 5. If an arborist or tree care provider violates such laws, the City Administrator may revoke the right of such person to perform services in the City for a period of up to 2 years.

II. AMENDMENT OF CHAPTER 162 OF DURHAM MUNICIPAL CODE

Chapter 162 of the Durham Municipal Code is amended to read as follows:

TITLE 16
CHAPTER 162: TREE PRESERVATION

- §162.01 Scope
- §162.02 Administrative Processes
- §162.03 Permit Required
- §162.04 Application Requirements and Fees
- §162.05 Permit Categories
- §162.06 Trees on City Property
- §162.07 Emergency Procedures
- §162.08 Mitigation
- §162.09 Appeals
- §162.10 Rights Reserved
- §162.11 Oversight of Arborists and Tree Care Providers.

§162.01 Scope.

Chapter 162 applies to all land not covered by Chapter 5 of the Durham Development Code. In general, this includes improved residential, commercial and industrial lots and vacant land not before the City for approval of a land division, land use permit or building permit.

§162.02 Selected Definitions.

(a) Arborist. All references to “arborist” mean an ISA certified arborist who is tree risk assessment qualified.

(b) City Administrator. All references to “City Administrator” mean the person hired as city administrator by City Council and any designee of the city administrator.

(c) Removal. All references to “remove” or “removal” mean felling, topping, girdling or any other action causing the death or substantial destruction of a tree.

(d) Tree Care Provider. References to “tree care provider” mean a person who performs tree preservation, tree maintenance, tree removal, pruning, limb removal, guying or fertilization.

(e) Type 1 Process. Type 1 is a process for review and decision by the City Administrator without prior public notice or public hearing and with notice of decision sent only to affected persons.

(1) Notice of a decision of a Type 1 process shall be in writing and include:

(A) A brief description of the application, the decision made and any conditions of approval if the application is approved;

(B) The location of the property and the zoning district where the property lies;

(C) A statement of the criteria for approval, the facts found and the basis for finding that the criteria for approval are met or are not met; and

(D) A statement that the decision is final unless appealed as provided at §162.09, the date and time by which the appeal must be filed, and the procedure by which a person may review the complete record of the decision.

(2) Notice of a Type 1 decision shall be mailed to the applicant and to any person who appeared orally or in writing in the decision process.

(3) The City Administrator shall decide a Type 1 application within 15 days after the application is deemed complete.

(f) Type 2 Process. Type 2 is a process for review and decision by the Planning Commission with prior notice to affected persons and a public hearing.

(1) Notice of a Type 2 application shall be sent after the application is deemed complete and prior to any decision, to the applicant, property owner and all owners of record within 300 feet of the tree covered by the application. Notice of a Type 2 application shall include:

(A) The street address or other easily understood geographical reference to the subject property, the zoning district in which it lies, and a map showing the general vicinity;

(B) A summary of the application and the relevant approval criteria;

(C) The time a place where one may review the complete record of the application and a statement that copies may be obtained from the City at cost;

(D) The date and time by which any interested persons must submit written comment on the application for the comment to be considered in the decision, which shall allow for at least 14 days for submission of comment prior to the decision;

(E) The name, telephone number and email address of the City's contact person;
and

(F) A statement that any issues which may provide the basis for an appeal to LUBA shall be raised in writing prior to the expiration of the comment period, with sufficient specificity to enable the City to respond to the issue.

(2) A Type 2 application shall be approved if the proposal complies with the relevant provisions of this Chapter 162.

(3) Notice of a Type 2 decision shall be in writing and shall include:

(A) The location of the property and the zoning district in which it lies;

(B) The decision made, including conditions of approval;

(C) The criteria and standards that the City deemed relevant to the decision;

(D) The facts relied on and the justification for the decision based on the criteria, standards and facts as set forth in the notice; and

(E) A statement that the decision is final unless appealed to City Council as provided at §162.09, that any person who is adversely affected or aggrieved may file an appeal, the date and time by which the appeal must be filed, and the procedure by which a person may review the complete record of the decision.

(4) Notice of a Type 2 decision shall be sent to those persons entitled under Section §162.02(b)(1) to notice of a Type 2 application and to every person who submitted comments in the decision process.

(5) The Planning Commission shall decide a Type 2 application at its next regularly scheduled meeting following expiration of the comment period.

§162.03 Permit Required.

(a) Requirement and Specifications. Except as otherwise provided at subsections (b) and (c) below, an approved tree removal permit is required prior to removing any tree in the City on private land, developed or undeveloped, having a diameter greater than 8” measured 4.5’ above ground level, except that if a tree splits into multiple trunks above ground but below 4.5’, the trunk is measured at the most narrow point beneath the split. The diameter is calculated by dividing the circumference by 3.1429. A tree that has been reduced to a stump shall be measured across the top of the trunk.

(b) Exclusion for Certain Trees and Bushes. No protection under this Chapter 162 is extended to fruit trees (other than American black cherry and wild cherry), shrubs, hedges, vine maple, woody bushes, ivy, poison oak, holly, rhododendron, camellia, arborvitae, laurel and bamboo. Nut trees other than hazelnut trees are protected by this Chapter 162.

(c) Exclusion for Certain Invasive Trees. A tree removal permit is not required for removal of a tree listed on the City’s invasive tree species list if the tree has a diameter no greater than 10”, measured in the manner described at subsection (a) above. The invasive tree species list shall be created and periodically updated by the Planning Commission and shall be on file with the City Administrator.

(d) Removal Without Permit. An owner who removes a tree without a permit shall be subject to a fine not to exceed \$1,500 per tree. The City Administrator may impose a fine not exceeding \$200 per tree without approval of the Planning Commission, but if the proposed fine exceeds \$200 per tree, the fine shall be determined by the Planning Commission in a Type 2 process. In determining the appropriate penalty, the City Administrator or Planning Commission, as the case may be, shall take into account:

(1) The significance, size and value of the tree;

(2) Prior notice from the City that removal would be unlawful; and

(3) The likelihood that a permit would have been approved if applied for prior to removing the tree.

(e) Tree Care Standards. No person other than the property's owner or a tree care provider licensed and bonded as such shall perform tree preservation, tree protection, tree maintenance or tree removal. All such work shall be done in accordance with ANSI standards.

(f) Trees on City Property. This section does not apply to trees on City property, which are subject to Section 162.06.

§162.04 Application Requirements and Fees.

(a) Application for Removal. Tree removal applications shall be made on forms provided by the City. The application shall contain a diagram of the applicant's lot showing the trees to be removed, an explanation of the reason for removal and information concerning planting of new trees to replace the trees to be removed. In addition, applicants are encouraged to provide evidence supporting the tree removal, including photographs, narrative descriptions, reports of experts (including arborists) and any other relevant information. By signing and submitting an application, the applicant agrees:

(1) That the City administrator may post a sign on the applicant's property (giving public notice of the proposed action); and

(2) To cooperate as reasonably necessary to provide the City access to the applicant's property for the purpose of examining the trees to be removed.

(b) Fees. Except when the applicant is the City, tree removal applications shall be accompanied by a \$50 fee for the first tree and a \$20 fee for each additional tree.

§162.05 Permit Process and Categories.

(a) In General; Significant Tree.

(1) General Requirements. A tree removal permit may be issued in part or denied in part, or it may be issued subject to compliance by the applicant with reasonable conditions to promote the purposes of the ordinance underlying the current Chapter 162. The burden is on the applicant to show that granting a permit will be consistent with the stated purpose of such ordinance. A permit shall state the period of time for which it is valid. Certain trees may qualify for removal under more than one permit type, and in such cases the City Administrator shall determine the appropriate permit type and may include one or more alternatives.

(2) Non-Owners May Not Apply for Permits. A permit application under this Section 162 may be filed only by the owner of the property on which the trunk of the tree is located.

(3) Significant Trees. Notwithstanding any provision in this Section 162.05 to the contrary, an application for removal of a significant tree shall be determined in a Type 2 process before the Planning Commission. A “significant tree” is a tree meeting 2 or more of the following criteria:

- (A) The tree is prominently visible from the street or skyline within a 300 ft radius of the site;
- (B) The tree is one of the tallest or largest trees in the neighborhood;
- (C) The species of the tree is uncommon or rare in the neighborhood;
- (D) The tree has distinctive characteristics that are unique to the neighborhood; or
- (E) The tree is the only remaining tree on the property.

(b) Dead or Declining Trees. A permit for removing a dead, declining or diseased tree shall be issued by the City Administrator in a Type 1 process if the applicant demonstrates that the tree is dead, diseased or in a state of irreversible decline. The City may require an arborist report to confirm the tree’s condition. A tree is considered to be diseased or in irreversible decline if it shows signs such as unseasonable lack of foliage, brittle dry branches, lack of growth during growing season, chlorotic foliage, crown thinning, significant branch mortality, top dieback, premature fall coloration or excessive fruit or flower production.

(c) Hazard Trees.

(1) Hazard Tree. A “hazard tree” is a tree having a significant likelihood of falling in the event of high winds, ice, snow, rain or extreme temperatures, as evidenced by the criteria at subsection (8) below and the arborist report.

(2) Process. A permit for removing a hazard tree shall be determined by the City Administrator in a Type 1 process.

(3) City Arborist Report. In determining whether to issue a hazard tree permit, the City Administrator shall give due consideration to the report of the City arborist, who shall be compensated by the City. The resident may (but is not required to) also procure an arborist report; provided, however, that the City Administrator shall resolve inconsistencies by deferring to the findings of the City arborist absent clear and convincing evidence to the contrary.

(4) No City Arborist Report for Dead or Declining Trees. The City Administrator shall reject a hazard tree application if the City Administrator determines that an application under subsection (b) (dead or declining trees) is more appropriate.

(5) Decision Without City Arborist Report. The City Administrator need not retain an arborist if the City Administrator determines that the facts (including the resident’s arborist report, if any) support approval of the permit without an arborist report from the City.

(6) Required Contents of Arborist Report. An arborist report under this subsection (c) shall include but not be limited to determinations of whether the criteria at (A) – (L) below are satisfied.

(7) Threshold Requirements. Relief under this subsection (c) is available only if collapse of the tree (due to high winds, ice, snow, rain or extreme temperatures) is likely to cause injury or damage to people, vehicles, buildings or power lines. For example, if the tree is not close enough or tall enough to reach such high-risk targets, no relief is available.

(8) Criteria.

(A) The tree has uneven branches, multiple large co-dominant stems or a live crown covering less than 50% of the height of the tree;

(B) There is a history of falling trees in the area;

(C) The tree is isolated with extreme exposure to wind or elements, especially if the tree was previously sheltered in a grove;

(D) The tree is on a steep slope facing high-risk targets;

(E) The tree has structural defects, such as visible cracks, splits or cavities that compromise stability;

(F) The tree is damaged, declining or weakening, due to age, disease, fungi, pests or injury;

(G) The tree has a significant lean, particularly if recently developed;

(H) The tree has damaged or rotting roots, indicating compromised stability;

(I) The tree is a species with high failure rates, such as those prone to shallow roots, splitting, windthrow or susceptibility to pests and disease;

(J) The tree is compromised by improper pruning, topping or neglect;

(K) Recent tree removals from neighboring properties expose the tree to winds or new environmental conditions; and

(L) The homeowner is unable to secure homeowner's insurance due to the tree's condition.

(9) Decision. Provided the threshold requirements at subsection (7) are satisfied, the City Administrator:

(A) may, in the City Administrator's discretion, approve a hazard tree removal permit if the City Administrator finds that the application is compelling and the City Administrator finds that 1 or more of the criteria in subsection (8) above are satisfied;

(B) shall approve a hazard tree removal permit if the City Administrator finds that 2 or more of the criteria in subsection (8) above are satisfied; or

(C) shall deny a hazard tree removal permit if neither (A) nor (B) applies.

(10) Overriding Guidance. This subsection (c) is intended to prevent catastrophic damages similar to those that occurred in the winter of 2024. Accordingly, the City Administrator (and Planning Commission, if on appeal) shall prioritize public safety and view the factual findings in a manner most favorable to the applicant.

(d) Trees Impeding Improvements. A permit shall be issued for removal of a tree for the purpose of making or expanding structures on the property (including a building, deck or patio) if the applicant has secured the applicable permit, if any, for the improvement and the City Administrator finds that removal of the tree is reasonably necessary to make the improvement. The permit shall be issued by the City Administrator in a Type 1 process.

(e) Trees Damaging Property. A permit for removing a tree damaging property shall be determined by the City Administrator in a Type 1 process using the following rules:

(1) If the tree is compromising a structure or its foundation, the removal decision shall take into account:

- (A) Proximity of the tree to the foundation or structure;
- (B) Feasibility of pruning limbs or roots;
- (C) Diameter of limbs or roots;
- (D) Evidence of damage to the structure or foundation; and
- (E) Any expert report that may be relevant.

Damage to a fence is generally insufficient reason for removal.

(2) If the tree is uplifting a sidewalk, walkway or driveway, the removal decision shall take into account:

- (A) Current damage to the surface;
- (B) Public use of the surface, if any;
- (C) Size, maturity and significance of the tree;
- (D) Tree's proximity to the affected surface;
- (E) Cost and feasibility of a repair; and

(F) Suitability of mitigation.

(f) Commercial and Industrial Zones. An application for removal of a tree in developed commercial or industrial zones shall be subject to review and approval by the Planning Commission under a Type 2 process, and shall not qualify for a permit under any other subsection of this Section 162.05. Mitigation shall be required as provided under Section 162.08.

(g) Extenuating Circumstances. An application may be filed for removal of a tree not eligible for a permit under (b), (c), (d) or (e) above. The application will be determined by the City Administrator in a Type 1 process unless the tree has a diameter of greater than 12", in which case a Type 2 process before the Planning Commission is required. In general, the applicant must provide compelling evidence that the tree does not materially contribute to the tree canopy or that mitigation will fully restore the tree canopy within a reasonably short period.

(h) Trees on City Property. Section 162.05 does not apply to trees on City property, which are subject to Section 162.06.

§162.06 Trees on City Property.

(a) Emergency Removal Permit. The City Administrator may issue an immediate tree removal permit for trees on City property if the City Administrator determines that the tree is likely to fall prior to the next scheduled meeting of the Planning Commission. If such an emergency permit is issued, a copy of the permit shall be provided to the Planning Commission at its next scheduled meeting.

(b) Excluded Trees. The City Administrator is authorized to remove the trees listed at Section 162.03(b) without permits or Planning Commission approval.

(c) Trees Not in Natural Areas. Except as provided in subsections (a) and (b) above, the following provisions shall apply to trees of any diameter on City property not in Natural Areas (as defined at subsection (e) below). The City Administrator shall submit a tree removal application to the Planning Commission, along with a detailed explanation of why removal is necessary. The Planning Commission shall review the application and consider factors such as the health and condition of the tree, its significance to the community and the impact of its removal.

(d) Trees in Natural Areas. Except as provided in subsections (a) and (b) above, the following provisions shall apply to trees of any diameter on City property in Natural Areas: The City Administrator shall submit a tree removal application to the Planning Commission, along with a detailed explanation of why removal is necessary. The City's residents place a high value on the experience of walking in wooded areas similar to a remote forest. Accordingly, the Planning Commission shall endeavor to preserve the City's Natural Areas. In general, an application covering a tree in a Natural Area shall be approved only if the tree is blocking a trail or street or is likely to fall on static targets (such as playgrounds, picnic tables, benches, congested walking areas, streets, power lines, parking lots or structures) prior to the next tree assessment or 3 years, whichever is first to occur. Trees in all stages of life (including snags) are part of a thriving forest with robust animal habitat. The fact that a tree is

declining or dead does not, in itself, warrant removal. Considerations the Planning Commission shall take into account include, but are not limited to:

- (A) The proximity of the tree to the target;
- (B) Protection factors such as trees or other barriers between the tree in question and the target;
- (C) If the target is a person, the occupancy (e.g., constant, frequent, occasional, rare) of the target area;
- (D) Feasibility of pruning to reduce risk of falling limbs; and
- (E) Recreational immunity laws (currently ORS 105.682) that protect the City from liability for personal injury and property damage resulting from recreational use of its property.

Mitigation shall be in the sole discretion of the Planning Commission.

(e) Natural Areas. “Natural Areas” mean: (1) the 3.5592 acre forested area bounded by Rivendell, Willowbottom and Upper Boones Ferry (tax accounts R2090739, R2087526, R2087524 and R1127916), (2) the forested areas on the outskirts of Durham Park, including the north loop trail, and (3) any undeveloped areas dedicated to the City, such as those adjacent to Durham Heights.

§162.07 Emergency Procedures.

In an emergency situation where a tree poses an immediate threat of falling or otherwise causing significant damage to person or property and the City Administrator is unavailable, the property owner may proceed with the necessary removal. The owner must take photographs prior to removal that clearly demonstrate the emergency condition. Removal is limited to the extent necessary to eliminate the immediate threat. Within 7 days after the emergency removal, the property owner shall retroactively submit a tree removal application, including evidence supporting the emergency nature of the situation. The City Administrator may require the owner to retain an arborist to review the evidence and opine on whether the tree posed an immediate threat. If it is determined that the tree did not meet the emergency removal standards set forth above, the permit shall be denied and the owner may be subject to fines and mitigation, as determined by the Planning Commission.

§162.08 Mitigation.

(a) General Requirements. Except when the City Administrator determines that removal of a tree does not significantly affect tree canopy (and that mitigation and fees are waived), an applicant shall plant a mitigation tree for any tree removed pursuant to a permit under this Chapter 162 or unlawfully removed without a permit. Mitigation trees shall be in compliance with a list of trees approved by the Planning Commission. The mitigation tree shall, at maturity, replace the canopy lost by removal and strengthen the community of trees around it and the stability of the existing canopy. The minimum size for a deciduous mitigation tree shall be a 2” diameter when measured 6” above the root ball, and the minimum size of an evergreen tree shall be a height of 6’ when measured from the top of the root ball. A

mitigation plan shall be submitted showing the location, size and species of mitigation trees. The mitigation tree shall be planted on the same lot as the removed tree. If the City Administrator determines there is insufficient space on that lot, the mitigation tree shall be planted on other property of the applicant in the City, or if none, on property of the City. If the applicant declines to plant a mitigation tree, the applicant shall pay a mitigation fee not to exceed \$250 per tree, as determined in the discretion of the City Administrator.

(b) Applicable Deadlines. A mitigation tree must be planted within 6 months of the date the tree removal permit is issued. If a mitigation tree (or a mitigation tree replacing a mitigation tree) dies prior to 3 years after being planted, the applicant shall plant a new mitigation tree. An applicant who fails to plant a mitigation tree to replace a prematurely dead tree shall pay a fine not to exceed \$250 per tree, as determined in the discretion of the City Administrator.

(c) City Trees Excluded. Section 162.08 shall not apply to trees removed from City property.

§162.09 Appeals.

(a) Appeals Process. A decision made by the City Administrator may be appealed to the Planning Commission, and a decision made by the Planning Commission may be appealed to the City Council. An appeal must be in writing, signed by the applicant and received by the City Administrator no later than 10 days after the date the decision being appealed was mailed or personally delivered to the applicant. The appeal shall state the facts and law supporting a reversal of the decision being appealed. Upon receipt of an appeal, the matter shall be heard at the next scheduled meeting of the Planning Commission or City Council, as the case may be; provided, however, that if the appeal is received less than 10 days prior to the next such meeting, the appeal shall be heard at the following meeting. The applicant (and any persons entitled to notice of the application) shall be notified of the date, time and place of the hearing and shall be entitled to testify at the hearing. On the date the appeal is set, the City shall publish online a copy of the appeal and the date, time and place of the hearing. Any resident of the City may attend and testify at an appeal.

(b) No Fee. There is no fee for an appeal.

§162.10 Rights Reserved.

For all permit types, the decision maker reserves the right to deny a permit, waive mitigation and fees, require mitigation or require mitigation beyond the minimum specified in this Chapter 162 when it is considered in the best interest and welfare of the community as a whole.

§162.11 Oversight of Arborists and Tree Care Providers.

Arborists and tree care providers working in the City are expected to know and comply with the laws in this Chapter 162. If an arborist or tree care provider violates such laws, the City Administrator may revoke the right of such person to perform services in the City for a period of up to 2 years. Without limiting the generality of the foregoing, removing a tree without evidence of a permit or in excess of the thresholds or exclusions in Section 162.03 is a violation.

III.
GENERAL PROVISIONS

A. Severability.

Each section of this ordinance, or any part thereof, is severable. If any part of this ordinance is held invalid by a court of competent jurisdiction, the remainder of the ordinance remains in full force and effect.

B. Effective Date.

Pursuant to ORS 221.310(2), this ordinance is effective 30 days after enactment and covers all applications, permits and land use matters filed on or after that date.

Adopted this ____ day of _____, 2024.

CITY OF DURHAM

Keith Jehnke, Mayor

ATTEST:

Jordan Parente, City Administrator