APPROVED

BEFORE THE DEVELOPMENT REVIEW COMMISSION OF THE
CITY OF LAKE OSWEGO

AN APPEAL OF A TENTATIVE DECISION BY PLANNING AND BUILDING SERVICES DEPT ON A TYPE II TREE REMOVAL APPLICATION TO REMOVE A 36-INCH DOUGLAS FIR TREE.	) AP 15-08 [TR 499-15-05916]-1885) THOMAS & KATHLEEN RASTETTER) FINDINGS, CONCLUSIONS & ORDER

NATURE OF APPLICATION

An appeal by Thomas and Kathleen Rastetter of a tentative decision by Planning & Building Services Department on a Type II tree removal application to remove a 36-inch Douglas fir tree.

The site is located at 17360 Grand View Court (Tax Lot 505 of Tax Map 21E 04BC).

HEARINGS

The Development Review Commission held a public hearing and considered this application at its meeting of January 20, 2016.

The following exhibits were submitted at the hearing or after the publication of the December 23, 2015 Staff Report and entered into the record:

Exhibit E-4	Photos submitted by the applicant, received January 20, 2016
Exhibit F-4	Arborist report from Teragan and Associates, Inc., received January 19, 2016
Exhibit F-5	Mitigation plan submitted by the applicant, received January 19, 2016
Exhibit F-6	Definition of landscape submitted by the applicant, received January 20, 2016
Exhibit F-7	Ordinance 2059
Exhibit G-100	Letter in support from Thomas W. Nay Jr., dated December 30, 2016
Exhibit G-101	Letter in support from W. Kent Anger and Billie Anger, dated January 11, 2016

CRITERIA AND STANDARDS

A. City of Lake Oswego Tree Code (LOC Chapter 55)

LOC 55.02.080	Criteria for Issuance of Type II Tree Cutting Permits
LOC 55.02.084	Mitigation Required
LOC 55.02.085	Request for Public Hearing on a Type II Tree Cutting Permit
LOC 55.02.094	Conditions of Approval for Tree Cutting Permits

B. Prior Approvals:

PD 5-84

CONCLUSION

The Development Review Commission concludes that AP 15-08 [TR 499-15-05916] does not comply with LOC 55.02.080(1).

FINDINGS AND REASONS

The Development Review Commission incorporates the December 23, 2015, Staff Report, (with all exhibits attached thereto), as support for its decision, except staff findings regarding LOC 55.02.080(2), page 6.

Following are the supplementary findings and conclusions of this Commission:

1. Second Criterion – Protection of Adjacent Trees. LOC 55.02.080(2) requires the proposed tree removal not have "a significant negative impact on erosion, soil stability, flow of surface waters, protection of adjacent trees, or existing windbreaks."

The City's contract arborist found: (a). The 36-inch Douglas-fir proposed for removal is the largest and most dominant tree in the group of 10 Douglas fir trees; and (b) The group of trees have grown up together, adapting to competition from one another. The City's contract arborist concluded, therefore, that removal of one or more trees in the group, particularly the dominant tree, would result in the probable failure of adjacent trees. (Oral Testimony and Exhibit F-3).

The applicant's arborist report (Exhibit F-4) notes the location of the subject tree relative to the other trees (the subject tree is not an edge tree), the health and future growth potential of the remaining trees (they are healthy and new root growth can occur that will strengthen the remaining trees), and there are existing wind deflectors that reduce the wind load on the trees (the trees are on the leeward side of the rise of the hill (northeast) from the direction of the winds (from the southwest) that tend to cause tree failure in this area of the metro region, and the house acts as a deflector of winds).

The Commission finds the applicant's arborist's findings and conclusion that the removal of the subject tree would not likely result in failure of the other nine trees in the cluster to be more persuasive than the City's contract arborist's findings and conclusion because of the detailed consideration of the health and characteristics of each tree in the grove, and the site conditions. Accordingly, the Commission finds that the applicant has met his burden of proof in showing that this criterion is met.

2. First Criterion – Landscaping Purpose. LOC 55.02.080(1) requires that the trees are proposed for removal for landscaping purposes or in order to construct development approved or allowed pursuant to the Lake Oswego Code or other applicable development regulations.

The applicant seeks removal of the subject tree because of the tree's litter and sap dripping on the applicant's roof and deck, and concern that a falling limb could result in personal injury or property damage. See Exhibits E-4 (photos), F-2 (application, pg. 4-5), and oral testimony. The applicant submitted a mitigation plan prior to the hearing (Exhibit F-5) but did not submit a landscape plan showing any details regarding proposed new landscaping on site that would be facilitated by the proposed tree removal. The applicant asserts that removal of the tree, either the removal itself, or in combination with the reasons motivating the request for removal, meet the "landscaping purpose" criterion.

a. Interpretation of "Landscaping"

The Commission follows the same method of code interpretation as used by the Oregon courts in an effort to ascertain the Council's intent in its use of the term "landscaping." To interpret code provisions, the methodology described in State v. Gaines, 346 Or 160, 165-73, 206 P3d 1042 (2009), and Portland Gen. Elec. Co. v. Bureau of Labor & Indus., 317 Or 606, 610-11, 859 P2d 1143 (1993) is applied: examination of text and context; due consideration of any relevant legislative history; and if the Council's intent remains unclear after examining text, context, and legislative history, resort to general maxims of statutory construction, to aid in resolving the remaining uncertainty. See Conrady v. Lincoln County, 260 Or.App. 115, 119, 316 P.3d 413, 415 (2013); Sarathy v. Washington County, 64 Or LUBA 279 (2011).

1. Text

"Landscaping" is not a defined term in LOC Chapter 55.

2. Context

To assist in understanding an undefined term, one looks to the context in which it is used, by looking at related code provisions and the general code scheme of which it is a part.

- To obtain a tree removal permit the applicant needs to do more than state that the purpose is for tree removal. The applicant must demonstrate a purpose beyond tree removal; the applicant

must show that the tree removal is in furtherance of a greater purpose: landscaping or development. LOC 55.02.080(1).

- An applicant must submit "information showing any proposing landscaping, planting" with a tree removal application. LOC 55.02.050(1)(b)(v). The "proposed landscaping, planting" is an addition to information about the "[t]he number, DBH, species and location of the trees proposed to be cut on a site plan of the property." LOC 55.02.050(1)(b)(i).
- If removal of a tree would have significant negative impacts to the neighborhood, the City "may consider ... alternate landscaping designs that would lessen the impact on trees." LOC 55.02.080(3). First, if tree removal alone is "landscaping," there could never be an "alternate landscaping design" that would have less impact on trees because the tree either is or is not removed. Second, tree removal is not a landscaping "design"; it is merely removal.

The Commission finds, from the context of "landscaping" in LOC Article 55.02, tree removal cannot, standing alone, constitute "landscaping." The Commission finds that in context "landscaping" means that the tree removal is to further the implementation of a new or modified landscaping plan for the site.

3. Legislative History

If the context of "landscaping" were not sufficient to determine the Council's meaning in its use, the Commission also considers the legislative history of the code provision. The Tree Code's requirement for a "landscaping purpose" for tree removal was added to the Tree Code by Ord. 2059, in 1992, as the text then adopted has remained the same as now found in LOC 55.02.080(1). (The Commission takes administrative notice of the enactments of the Lake Oswego City Council.) Prior to that time, tree removal was permitted, among other purposes, to "construct proposed improvements, or to otherwise utilize the applicant's property in a reasonable manner."

The Commission finds that the removal of the last clause and the insertion of a "landscaping" purpose indicates that the meaning of "landscaping" was other than a sole desire to remove the tree or, as may have been the case prior, to "utilize the applicant's property in a reasonable manner." Rather, the new purpose of "landscaping" akin to its companion purpose of "development" requires the applicant to demonstrate that the tree removal is to facilitate a landscaping plan for the property.

Staff stated that it has consistently applied the requirement of "landscaping" to require the applicant demonstrate that the tree removal is in furtherance of a greater landscaping purpose, beyond mere tree removal. The Commission finds that a history of staff interpretation of a term is some evidence of the Council's intent for the term because (a) staff would have likely implemented the term in the manner intended following the Council's recent enactment, and (b) the Council has not seen cause to amend the code provision following staff's interpretation.

From the above context and legislative history findings, the Commission finds that the "landscaping" is a term that requires a purpose other than merely tree removal, the tree removal must be in furtherance of a landscaping plan for the site.

4. General Maxims of Statutory (Code) Construction

When a term is undefined and its meaning cannot be determined from the context or legislative history, general maxims of statutory construction are applied.

One maxim cited by the applicant is that words are given their plain-meaning definition. See State v. Ausmus, 336 Or 493, 504, 85 P3d 864 (2004) (legislature intended that dictionary definition serve as meaning of statutory term because dictionary provides natural and ordinary meaning); but see Davidson v. Oregon Government Ethics Com., 300 Or 415, 420, 712 P2d 87 (1985) (stating that construing statutes "is not done by consulting dictionary definitions of words, unless there is reason to believe that the legislature consulted the same dictionary"). The applicant cited the definition of

"landscaping" in the Merriam-Webster Online Dictionary[1]: "to modify or ornament (a natural landscape) by altering the plant cover." (Exhibit F-6).

Another maxim cited by the applicant is that the Commission should not insert words into the statute (code) that the council omitted or omit what the council inserted. ORS 174.010. The applicant argues that "necessary" was inserted: "*necessary* for landscaping purposes."

Because the Commission finds from the context and legislative history that the Council's intended meaning of "landscaping" is clear, it is not necessary to resort to general maxims of statutory construction. "Landscaping" as used in LOC 55.02.080(1) is interpreted by this Commission to require that the proposed tree removal be a part of landscaping plan for the site, not merely tree removal in and of itself.

b. Applicant Has Not Demonstrated Tree Removal Is For "Landscaping"

1. Tree Needles and Sap

The applicant has stated a basis for the removal of one of 10 trees in a grove is because of its natural characteristics (tree needles falling and sap dripping). The applicant submitted photos (Exhibit E-4) that show the proximity of the tree to the deck and debris from the trees in the gutters.

The Commission finds that trees have expected and ordinary natural characteristics: leaves and needles fall and trees drip sap. These characteristics require a degree of clean-up and maintenance. Tree removal solely to lessen the "nuisance" of a tree's characteristics does not demonstrate removal is for *landscaping* purposes. (The Commission also notes that the applicant has not demonstrated that removal of the one tree, leaving nine others, will significantly lessen the amount of tree needles falling and sap dripping that the applicant finds objectionable.)

2. Concern about Falling Limb

The applicant has stated that a basis for the removal of the subject tree is concern that a tree limb will fall, injuring persons or property. Both the applicant's arborist and the City's contract arborist agree that it appears that the subject tree is a healthy Douglas fir, and it has no greater propensity from limb loss than any other Douglas fir.

The applicant and staff have noted that the Commission has approved tree removal where the structural damage would be an inevitable result from the natural growth of a tree, i.e., root damage to foundation. In such cases, the Commission has found a proposed landscaping plan was appropriate to replace the existing tree with a tree that would not inevitably result in property damage.

The Commission finds that there is insufficient evidence to demonstrate that the subject tree poses now or would inevitable pose a heightened risk of limb failure causing personal injury or property damage. The Commission finds that removal of a tree due to an applicant's unsubstantiated concern of limb failure is not for a "landscaping" purpose.

3. Mitigation Plan

The applicant submitted at the hearing a mitigation plan, to plant a milky way dogwood at each of two corners of the deck (rather than in the area of the subject tree).

The Commission finds that a mitigation plan is not equivalent to a landscape plan. See LOC 55.02.050(1)(b)(v)(applicant shall submit "v. A mitigation plan, if required pursuant to LOC 55.02.084(1), *with information showing any proposed landscaping, planting, ...*").

[1] Although the Oregon Supreme Court has stated that "no single dictionary is authoritative," Davidson v. Oregon Government Ethics Com., 300 Or 415, 420, 712 P2d 87 (1985), Oregon courts have predominantly used Webster's Third New International Dictionary (unabridged ed 1961 or later) to discern the plain meaning for statutes enacted from around 1961 to the present. See Dearborn v. Real Estate Agency, 334 Or 493, 502 n 6, 53 P3d 436 (2002), overruled in part, 337 Or 309 (2004) (interpreting ORS 696.301(26) (1995)).

The Commission finds that the applicant did not provide any details regarding new landscaping on site. The Commission finds that removing a tree and planting a tree on-site for mitigation does not constitute landscaping. The Commission finds that the removal of the tree is not for landscaping purposes. This criterion is not met.

ORDER

IT IS ORDERED BY THE DEVELOPMENT REVIEW COMMISSION of the City of Lake Oswego that:

1. AP 15-08 [TR 499-15-05916] is denied.

DATED this 1st day of February, 2016.

Kelly Melendez /s/
Kelly Melendez, Acting Chair
Development Review Commission

Janice Bader /s/
Janice Bader
Administrative Support

ATTEST:

TENTATIVE DECISION – JANUARY 20, 2016

AYES:	Melendez, Prichard, and Rabbino
NOES:	Smith
ABSTAIN:	None
ABSENT:	Ahrend, Shearer and Poulson

WRITTEN FINDINGS – FEBRUARY 1, 2016

AYES:	Melendez, Prichard, and Rabbino
NOES:	Smith
ABSTAIN:	Shearer
ABSENT:	Ahrend and Poulson