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BEFORE THE HEARING EXAMINER FOR THE CITY OF LAKEWOOD

Connie Kay Short Plat )  
Administrative Appeal ) Final Decision  
LU-21-00104 )  
\_\_\_\_\_ )

Ms. Manetti’s appeal is sustained in part. The Kay Short Plat is remanded for preparation of a revised biological assessment. The revised assessment shall recognize Garry Oak trees larger than 20-inch DBH<sup>1</sup> and stands of Garry Oak trees with average DBH exceeding 15 inches qualifying as Fish and Wildlife Conservation Areas. The Applicant’s biological assessment shall be further revised to propose mitigation measures required by City regulations.

As outlined in the Conclusions of Law below, preparation of a revised biological assessment as directed does not necessarily signify that all protected trees must be retained. Property rights and the urban growth area policies of the Growth Management Act may dictate a flexible approach in assessing the adequacy of mitigation and the applicability of the City’s Fish and Wildlife Conservation Area standards.

Ms. Manetti’s appeal is denied to the extent it alleges that the Applicant’s lot area calculations are inaccurate.

\_\_\_\_\_ <sup>1</sup> “DBH” is diameter at breast height, which is set at 4.5 feet above ground level.

1 **Exhibits**

2 Exhibit A: December 21, 2021 Notice of Appeal

3 Exhibit B: Connie Kay Short Plat Approval

4 Exhibit C: Exhibits in Manetti exhibit and rebuttal exhibit lists

5 Exhibit D: January 28, 2022 Staff Report

6 Exhibit E: January 18, 2022 Washington Forestry Consultants biological assessment

7 **Findings of Fact**

- 8 1. Appeal. On December 21, 2021 Christina Manetti filed an appeal of the administrative  
9 approval of the Connie Kay Short Plat, LU-21-00104. The approved short plat divides a  
10 0.65-acre parcel into three lots. Ms. Manetti based her appeal on two issues: (1) the lot  
11 sizes identified in the approved short plat are inaccurate; and (2) the proposal fails to  
12 adequately protect Garry Oak trees located on the project site.
- 13 2. Hearing. The hearing on the appeal was heard on January 28, 2022.
- 14 3. Lot size. The Applicant has correctly identified the lot sizes and dimensions of her proposal.  
15 The Appellant asserts that the proposed lot sizes are inaccurate because they are not  
16 consistent with the lot area indicated in County assessor records. The lot sizes identified by  
17 the Applicant are based upon a professional survey. As indicated in the staff report, Ex. D,  
18 the County Assessor's Office has a disclaimer at its website that it doesn't warrant the  
19 accuracy of its property information. The Applicant's professional survey is found to be  
20 more accurate than county records. No error in the sizes identified by the Applicant are  
21 manifest in the administrative record of this proceeding.
- 22 4. Garry Oak Trees. There are seven Garry Oak trees located on the project site. Four of the  
23 trees have more than one stem. Average stem size is 18.8 inches DBH. Six of the stems  
24 have a DBH of 20 inches or more. All seven trees are documented with photographs and the  
25 sizes of the trees are uncontested. See Ex. D.
- 26 5. Oaks Particularly Valuable to Fish and Wildlife. The large oaks located on the subject  
property are found to be "*particularly valuable to fish and wildlife.*"

The issue of what oaks, if any, qualify as "*particularly valuable to fish and wildlife*" involves a question of law and fact that is concurrently addressed in this finding for purposes of clarity.

The Washington State Department of Fish and Wildlife (WDFW) *Priority Habitats and Species* publication (August 2008, updated February 2021) defines priority areas for Garry Oak trees as including single oaks "*when found to be particularly valuable to fish and wildlife.*" The WDFW website entitled *Management Recommendations for Washington's*

1 *Priority Habitats: Oregon White Oak Woodlands* further elaborates that such large oaks and  
2 stands of oaks less than an acre “*may also be considered priority habitat when found to be*  
3 *particularly valuable to fish and wildlife (i.e., they contain many cavities, have a large*  
4 *diameter at breast height [dbh], are used by priority species, or have a large canopy).*”<sup>2</sup>

5 The Applicant and Appellant experts both agree that large diameter oaks can individually  
6 qualify as “*particularly valuable to fish and wildlife.*” See Ex. C44 and C46. The Applicant  
7 also designates the threshold size for what qualifies as “large” oaks as individual trees at 15  
8 inch DBH and stands of trees that average 15 inches at DBH. See Ex. C44, p. 2. The  
9 Appellant’s expert does not dispute this threshold. Ex. C46. Unfortunately, the Applicant’s  
10 expert does not identify how this threshold was derived. The *Priority Habitats and Species*  
11 publication and associated WDFW website doesn’t identify what qualifies as a large oak  
12 tree, nor apparently do the reference materials in the Applicant’s biological assessment, Ex.  
13 C44. Given the concurrence of the only expert testimony on this issue, it is determined that  
14 the size thresholds identified by the Applicant in Ex. C44 are the qualifying DBH for large  
15 oaks to qualify as “*particularly valuable to fish and wildlife.*”<sup>3</sup>

16 The Applicant and Appellant disagree, however, on whether large DBH by itself is sufficient  
17 to qualify an oak tree as “*particularly valuable to fish and wildlife.*” As identified in  
18 Finding of Fact No. 4, several trees on the project size exceed the threshold for what  
19 qualifies as trees large enough to be particularly valuable to fish and wildlife. The  
20 Applicant’s expert concludes that despite meeting the size standard, the trees still do not  
21 qualify as particularly valuable because they do not show any signs of decadence, the trees  
22 are not associated with the understory typically associated with the oaks and the oaks are not  
23 associated with any threatened or endangered wildlife. Ex. C44, p. 7. The Appellant’s  
24 expert points out that the trees objectively meet the minimum size standards for large oaks  
25 and “[t]hat should be sufficient to call this a critical area and justify a full critical areas  
26 report before any development.” Ex. 46, p.1.

27 The Appellant takes the correct position in asserting that the Garry Oak trees can qualify as  
28 priority habitat solely because of size. As quoted above, the WDFW priority habitat website  
29 identifies that Garry Oak can qualify as priority habitat if “*they contain many cavities, have*  
30 *a large diameter at breast height [dbh], are used by priority species, **or** have a large*  
31 *canopy.*” (emphasis added). As is evident from the quoted language, the factors that lead to  
32 priority habitat designation are disjunctive – the quote provides that cavities **or** large DBH  
33 qualify a tree as priority habitat. The Applicant’s expert takes the position that both  
34 decadence (defined by the Applicant to be “*cavities, structure, large dead scaffold*”

35 <sup>2</sup> The webpage quote is also a direct quote from the WDFW publication, *Management Recommendations for*  
36 *Washington’s Priority Habitats, Oregon White Oak Woodlands*, p. ix and 4.

37 <sup>3</sup> It is recognized that the Applicant’s identification of DBH for large oaks was based upon the premise that the size by  
38 itself would not be sufficient to qualify as “*particularly valuable to fish and wildlife.*” If the Applicant has an alternative  
39 definition for what DBH qualifies as large enough by itself to qualify as particularly valuable, the Applicant is encouraged  
40 to make a request for reconsideration to clarify that position.

1 *branches*”) **and** large tree size is necessary for priority habitat status. The Appellant’s  
2 position is clearly more consistent with the WDFW guidelines than that of the Applicant.

3 Beyond the WDFW guidelines, the expert opinion in the record also more clearly supports  
4 the Appellant’s position as well. The Applicant provides no empirical evidence as to why  
5 decadence must be associated with a large oak for it to qualify as valuable to fish and  
6 wildlife.

6 In contrast, the Appellant’s expert provides a detailed explanation of the wildlife  
7 significance of the oak trees:

8 *These trees, with stems of 20” dbh and greater, have taken hundreds of years*  
9 *to grow to their present size. They cannot be replaced in one or even two*  
10 *human life spans. The wildlife habitat and canopy connectivity they provide*  
11 *will be lost, and the mosaic which is typical of Puget Trough Garry oak*  
12 *woodland will become that much more fragmented. With each fragmentation*  
13 *event, the remaining habitat becomes less capable of persistence or of*  
14 *performing its habitat functions.*

15 ...

16 *The points made by Dr Tallamy concerning use by insects and caterpillars*  
17 *are excellent. As well, the leaves and acorns serve as a critical food source*  
18 *for urban birds and mammals. Cavities are important, but they are only one*  
19 *of many benefits afforded by oak trees to wildlife.*

16 Dr. Tallamy’s comments are as follows:

17 *What is missing from this analysis [Applicant’s report, Ex. C44] is a*  
18 *consideration of the most important contributions oaks make to wildlife.*  
19 *They are far more than nesting habitats and cover. They are the best host*  
20 *plants for insects, particularly caterpillars, that the basis of most terrestrial*  
21 *food webs. ... Young oaks with no cavities support hundreds of species of*  
22 *caterpillars and therefore support bird reproduction better than any other*  
23 *tree genus in North America....*

22 It is undisputed, and therefore taken as a verity, that the oaks serve as valuable habitat for  
23 wildlife. They are “particularly” valuable given Dr. Tallamy’s reference to the fact that the  
24 young<sup>4</sup> trees with no cavities support bird reproduction better than any other tree genus in

24 <sup>4</sup> Dr. Tallamy’s reference to “young” trees without cavities may make his comment inapplicable to the large oak trees,  
25 which may not be considered young. Nonetheless the other factors asserted by the Appellant experts are still sufficient to  
26 qualify the oaks on the project site as “particularly valuable to fish and wildlife.”

1 North America. The unique ability of the trees to provide acorns and leaves as a “critical”  
2 food source also makes them “particularly” valuable.

3 The WDFW priority habitat and species guidelines themselves serve as a scientific basis for  
4 supporting the oak trees. WAC 365-190-130(4)(b) provides that “*while these priorities [in*  
5 *WDFW priority habitat and species information] are those of [WDFW], they should be*  
6 *considered by counties and cities as they include the best available science.*” WAC 365-  
7 195-905 provides criteria for what information qualifies as best available science. As  
8 expected, these criteria focus upon information that is credible and based upon a scientific  
9 process and qualified expert opinion. Given this depiction, it is reasonable to conclude that  
10 the WDFW priority habitat guidelines are also based upon credible scientific evidence as  
11 well. Given the science-based underpinnings of the  
12 WDFW guidelines, the testimony of the Applicant experts and the lack of evidence to the  
13 contrary by the Applicant’s expert, it must be determined that oaks qualifying as large under  
14 the Applicant’s DBH standards are “*particularly valuable to fish and wildlife.*”

15 At hearing, the City suggested that the oaks could only be considered priority habitat if they  
16 have an association with a protected species. This argument is not compelling for the same  
17 reasons that the Applicant’s position on tree size fails. The WDFW priority habitat website  
18 identifies that Garry Oak trees can qualify as priority habitat if “*they contain many cavities,*  
19 *have a large diameter at breast height [dbh], are used by priority species, or have a large*  
20 *canopy.*” (emphasis added). Again, the disjunctive in the quoted language provides that  
21 large trees or trees used by priority species qualify as priority habitat. The City’s own code  
22 has similar guidelines, providing only that habitats of local importance “may” but not  
23 “must” include “*specific habitats with which endangered, threatened, sensitive, candidate*  
24 *or monitor species have a primary association...*” Contrary to the City’s position, WDFW  
25 guidelines and the City’s own fish and wildlife conservation area regulations do not require  
26 that protected habitat is limited to that associated with protected species.

### 18 **Conclusions of Law**

- 19 1. Authority. General Review Authority. LMC 18A.20.030 authorizes the hearing examiner to  
20 hear appeals of short plat decisions.
- 21 2. Project Site Contains Fish and Wildlife Conservation Area. The project site contains Fish  
22 and Wildlife Conservation Area composed of seven large Garry Oak trees.

23 WDFW guidelines designate the large oak trees of the project site as Fish and Wildlife  
24 Conservation areas protected under Chapter 14.154 LMC. Specifically, the WDFW priority  
25 habitat guidelines are determinative in establishing Fish and Wildlife Conservation Areas for  
26 Garry Oak trees. LMC 14.154.020 sets the parameters for what qualifies as protected Fish  
and Wildlife Conservation Areas. LMC 14.154.020B1bii includes “[d]ocumented habitat  
areas or outstanding potential habitat areas for fish and wildlife species.” Areas expressly  
included in this classification are “Priority Oregon white oak woodlands.” LMC

1 14.154.020B2ci identifies the WDFW Priority Habitats and Species Program as a resource  
2 for mapping fish and wildlife habitat areas.

3 For the reasons identified in Finding of Fact No. 5, the trees identified as large in that  
4 finding qualify as Fish and Wildlife Conservation Areas. The WDFW publications  
5 referenced in Finding of Fact No. 5 are construed to be part of the WDFW Priority Habitats  
6 and Species Programs since they are clearly intended to provide guidance to cities and  
7 counties on how to designate and protect Fish and Wildlife Conservation Areas.

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3. Biological Assessment Required. The presence of Fish and Wildlife Conservation areas at the project site compels the preparation of a biological assessment.

LMC 14.154.030B provides that the Community Development Director “may” require a biological assessment “*whenever the Director finds that a project site may contain, affect, or be affected by, species or habitats designated in this chapter.*” This provision is problematical because the “may” term isn’t qualified by any standards as to when the Director should require a biological assessment for projects that potentially affect protected species and habitats. In fact, a similar provision that gave a planning director unfettered discretion to waive biological assessments was found invalid as violating Growth Management Act regulations in *Whidbey Env’tl. Action Network v. Growth Mgmt. Hearings Bd.*, 14 Wash. App. 2d 514 (2020). The *Whidbey* court found this unfettered discretion as violative of WAC 365-195-920, which requires jurisdictions to adopt a no risk approach to potentially harming critical areas when faced with scientific uncertainty. At the same time, the lack of standards also renders the requirement potentially unenforceable as void for vagueness under constitutional due process, because reasonable minds can differ as to when reports should be required. See *Anderson v. Issaquah*, 70 Wn. App. 64, 75 (1993).

Requiring a biological assessment for this project succeeds in navigating both the “void for vagueness” and “no risk” interpretative guidelines applicable to the LMC 14.154.030B biological assessment requirement. Reasonable minds could not reasonably differ on the need for a biological assessment – protected oak trees are dispersed throughout the project site. Without any meaningful assessment there is little doubt that at least some of the protected oak will be affected by the project. At the same time, the biological assessment requirement can be applied in a manner consistent with the “no risk” approach required by WAC 365-195-920 – a biological assessment will help identify the potential impacts that are central to assessing and employing a no risk approach to preventing harm to protected habitat.

It is recognized that the Applicant has already prepared a biological assessment. However, that assessment is incomplete because it erroneously discounts large Garry Oak trees as not qualifying as protected Fish and Wildlife Conservation Areas. The trees that qualify as large in the existing assessment need to be recognized as Fish and Wildlife Habitat Conservation areas and mitigated accordingly under applicable biological assessment standards.

1 The recognition of the trees as fish and wildlife habitat conservation areas does not mean  
2 that the trees cannot be removed. The *Management Recommendations for Washington's*  
3 *Priority Habitats, Oregon White Oak Woodlands*, p. 20, provides that “single trees or small  
4 patches of oaks **should** be maintained if they are deemed important to species highly  
5 associated with Oregon white oak.” (emphasis added). The “should” term renders the  
6 recommendation discretionary. Further, as noted by staff, City regulations only provide that  
7 the City shall give “substantial weight” to WDFW management recommendations. See  
8 LMC 14.154.030B.

9 The discretion built into the WDFW management regulations and associated City  
10 regulations enables the City to incorporate considerations of the impact of preserving the  
11 trees verses the Growth Management Act policies encouraging urban densities in urban  
12 growth areas, as well as constitutional restrictions on limiting private property rights. The  
13 fact that the oak trees under review have not been shown to provide any habitat for protected  
14 wildlife species arguably renders the trees less significant than more typical Fish and  
15 Wildlife Conservation Areas when balanced against the development rights of the  
16 Applicant. The Appellant presented maps and testified that Lakewood has an area of over  
17 250 acres of Garry Oak tree habitat. If most of that area is populated by protected oak trees,  
18 the impacts of that protection could severely undermine GMA urban growth area policies as  
19 well as private development rights. Given these factors, the City can potentially justify a  
20 flexible approach in assessing what qualifies as significant impacts and what level of  
21 mitigation is necessary to be recommended in a biological assessment.

22 Ultimately, although flexibility in mitigation may be warranted, failing to recognize that the  
23 large oak trees qualify as Fish and Wildlife Conservation Areas is not. The large oak trees  
24 clearly qualify as protected habitat under WDFW guidelines. The proposal should not be  
25 allowed to move forward without recognizing this fact and employing the appropriate  
26 mitigation as recommended in an approved biological assessment. Should required  
mitigation severely impact the Applicant’s development potential, she may still qualify for  
reasonable use exceptions under LMC 14.142.080.

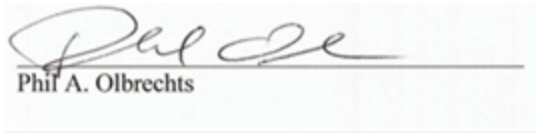
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1 **Decision**

2 Ms. Manetti’s appeal is sustained in part. The Kay Short Plat is remanded for preparation of a revised  
3 biological assessment that recognizes Garry Oak trees larger than 20-inch DBH and stands of Garry  
4 Oak trees with average DBH exceeding 15 inches qualifying as Fish and Wildlife Conservation Areas.  
5 The Applicant’s biological assessment shall be revised to recognize these protected areas and to  
propose mitigation measures required by City regulations.

6 Ms. Manetti’s appeal is denied to the extent it alleges that the Applicant’s lot area calculations are  
7 inaccurate.

8 DATED this 11th day of February, 2022.

9   
10 Phil A. Olbrechts

11 Hearing Examiner for Lakewood

12 **Appeal Right and Valuation Notices**

13 LMC 18A.20.080 provides that the final decision of the Hearing Examiner is subject to appeal to  
14 superior court. Appeals of final land use decisions to superior court are governed by the Land Use  
15 Petition Act (“LUPA”), Chapter 36.70C RCW. LUPA imposes short appeal deadlines with strict  
16 service requirements. Persons wishing to file LUPA appeals should consult with an attorney to  
17 ensure that LUPA appeal requirements are correctly followed.

18 Affected property owners may request a change in valuation for property tax purposes  
19 notwithstanding any program of revaluation.  
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