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THE HEARING EXAMINER OF THE CITY OF LAKEWOOD

IN RE:

Tree Removal Permit No. 295

Administrative Appeal

2022-02-17

ORDER DENYING REQUEST FOR
RECONSIDERATION AND
CORRECTING SCRIVENER’S ERRORS

Overview

Ms. Manetti has requested reconsideration of the Final Decision¹ of the above-captioned matter by motion dated June 15, 2022. Ms. Manetti’s request to have her appeal sustained is denied. She has identified some minor corrections that need to be made, but has not established that the criteria for Garry Oak preservation have been met. To prevail in her appeal, Ms. Manetti was required to prove that the Garry Oak trees under consideration were “important” to highly associated species. Although Ms. Manetti may have established that some unspecified number of highly associated species use the subject Garry Oak, she has not identified any reason why the specific trees under consideration are “important” to that species. There is no basis from the record to conclude that removal of the seven oak trees at issue would have any material impact on highly associated species, which Ms. Manetti has identified as neotropical birds and woodpeckers.

¹ “Final Decision” as referenced in this Order is the June 13, 2022 decision of the above-captioned matter erroneously titled “Order Granting Motion to Dismiss.”

1 The crucible of Ms. Manetti’s Garry Oak appeals has been useful in fleshing out how to
2 apply the City’s Garry Oak protection standards. The City’s initial position in the
3 Connie Kay short plat that examples of protected oak² in City regulations qualify as the
4 only protected oak is still unavailing – the plain language of the regulations identify
5 examples as examples, not exclusive classes of oak subject to protection. However, the
6 City position that WDFW management standards are too subjective for application to
7 small stands of trees is proving itself to be fairly accurate in practice, as Ms. Manetti’s
8 appeals are bearing out. Ultimately, the only way to apply the WDFW management
9 standards to small stands of oak in a legally defensible manner might be where the oak
10 serve as habitat for protected species. The plain meaning of the City’s oak standards
11 don’t allow that conclusion to be reached directly, but in her appeals Ms. Manetti may
12 not come across a set of circumstances that qualifies the oak for protection outside of a
13 protected species.

14 As outlined in the legal analysis below, the protection standards for small³ stands of
15 trees are ambiguous because they require only that substantial weight be given to a
16 standard that requires the trees to be “important” to highly associated species.
17 Consequently, to survive a due process vagueness challenge, the standard can only be
18 imposed when reasonable minds won’t differ on the interpretation of what qualifies as
19 “important.” Pages 8-10 of the WDFW recommendations identify the features of the
20 oak trees that can qualify as important to species, such as cavities for nesting and insects
21 and acorns as a food source. However, applying these standards to a particular
22 associated species can lead to reasonable differences of opinion as to when the specific
23 tree under review can be deemed important to that species.

24 As a threshold matter, reasonable minds would likely agree that a highly associated
25 species has to actually use an oak tree for that tree to be deemed important. But beyond
26 that threshold inquiry, reasonable minds could very well disagree as to whether a tree
27 should be considered “*important*” under WDFW standards to a particular species if the
28 removal of the tree wouldn’t adversely affect that species. This issue was of particular
29 importance to the Tree No. 295 appeal. Ms. Manetti established that oak trees serve as
30 an abundant food source for neotropical birds. But given the abundance of trees in a
nearby park and swamp area, would the removal of the trees (not necessarily oak trees)

² The “examples” are those listed in LMC 14.154.020B1bii. LMC 14.154.020B1bii was interpreted and applied at pages 2-4 of the Connie Kay clarification.

³ Small stands of trees for purposes of this discussion are stands less than one acre in size. As identified in the Final Decision, the definition for protected Garry Oak provides that the “important” criterion applies to stands of trees less than an acre in size. Stands greater than an acre in size don’t need to meet the “important” criterion for protection. Any stand over an acre in size is protected by the definition if the stand is pure oak or an oak/conifer association where the oak component is at least 25% of the canopy.

1 under appeal make any material difference in food abundance to those birds and thus
2 create any significant adverse impacts to them? On a broader scale, does the fact that
3 the City has adopted tree retention and replacement standards aimed at preserving tree
4 canopy adequately mitigate against the loss of food sources from removal of oak trees?
These issues are not addressed by the evidence presented by Ms. Manetti.

5 If Ms. Manetti succeeds in establishing that a specific tree is important to a highly
6 associated species, she must then overcome the hurdle that the City only has to give
7 substantial weight to that standard. The LMC is silent as to when that substantial
8 weight can be overcome. One very compelling basis for overriding that substantial
9 weight may be if the precedent set by a decision could undermine the City's Growth
10 Management Act responsibilities to accommodate urban growth. A significant portion
11 of the City's GMA development regulations are designed to accommodate future
12 growth projections assigned to the City by county-wide planning policies. Those
13 policies, in turn, are designed to prevent urban sprawl in more rural areas and the
14 adverse environmental impacts associated with that type of development. See RCW
15 36.70A.020. The more Ms. Manetti succeeds in stopping development to protect oak
16 trees, the greater the case to be made that "substantial weight" isn't enough to justify
17 imposition of the WDFW management recommendations.

18 **Evidence Relied Upon**

- 19 1) June 15, 2022 request for reconsideration.
- 20 2) All exhibits and hearing testimony admitted for Final Decision of above-
21 captioned matter.

22 **Analysis**

23 **Likely Use by Highly Associated Species Not Sufficient Basis for Tree Retention:**

24 As detailed in the Final Decision, to prevail in her appeal Ms. Manetti was tasked with
25 proving that the oak trees on the subject project site were "important" to "species highly
26 associated" with Garry Oak. Ms. Manetti arguably established that highly associated
species are present in the vicinity⁴. She also made a compelling argument that due to

27 ⁴ As outlined in Finding of Fact No. 5 of the June 13, 2022 Final Decision, Ms. Manetti established the
28 presence of neotropical birds and woodpeckers in the vicinity of the project site. It should be noted,
29 however, that only limited species of neotropical birds qualify as "highly associated." Page 12 of the
30 WDFW management recommendations identifies that only twenty-six of the 118 species of neotropical
migrant birds that frequent Washington are associated with Oregon white oaks to some degree. The

1 their presence in the vicinity, the associated species likely use the subject Garry Oak.
2 However, a likelihood of use is not sufficient to establish that the highly associated
3 species are important to the Garry Oak.

4 Ms. Manetti faces several daunting obstacles in proving her case. As noted in the Final
5 Decision, she has the burden of proof to establish that the Garry Oak must be retained.
6 Further, she is also tasked with applying protection standards, the WDFW management
7 recommendations, that are highly subjective and hence difficult to enforce. In essence,
8 she must prove that the seven Garry Oak of the project site are for some reason
9 “important” to highly associated species. Further, this “important” standard is only due
10 substantial weight, i.e. it doesn’t necessarily have to be applied all the time. There is no
11 question that persons can reasonably disagree as to when a specific tree should be
12 deemed “important,” with such disagreement exacerbated by the fact that only
13 substantial weight is due to the standard. As noted in the summary of this Order, the
14 WDFW management regulations offer examples of how a tree is important to an
associated species. These examples don’t address the issue of whether a specific tree
should be considered important when its functions for associated species are readily
replaced by other trees in the vicinity. Under these circumstances, the standard
qualifies as ambiguous.

15 Under principles of constitutional due process, ambiguous standards can essentially
16 only be enforced in circumstances where there is no reasonable disagreement as to their
17 applicability. The seminal case on this issue is *Anderson v. Issaquah*, 70 Wn. App. 64,
18 75 (1993). The *Anderson* decision involved a city design standards ordinance that
19 required project design to be “*harmonious*” and “*compatible*” with surrounding
20 development and that the design be “*interesting*.” The *Anderson* court ruled that, as
21 applied to the permit applicant of that case, those terms “*do not give effective or*
22 *meaningful guidance*” to local decision makers and as such the standards were
23 unconstitutionally vague. As referenced by the *Anderson* court, “*a statute which either*
forbids or requires the doing of an act in terms so vague that men [and women] of
common intelligence must necessarily guess at its meaning and differ as to its
application, violates the first essential of due process of law.” 70 Wn. App. At 76.

24 To avoid the due process problem outlined in *Anderson*, Ms. Manetti must identify why
25 the Garry Oak trees of the project site are “important” to highly associated species and
26 that explanation should not be subject to any reasonable disagreement. The only
27 explanation provided by Ms. Manetti for this appeal is that the highly associated species

28 management recommendations do not identify which of these 26 associated species qualify as “highly
29 associated.” However, the recommendations do identify the orange-crowned warbler as a neotropical
30 species with declining population. Ms. Manetti identified in her testimony that the orange-crowned
warbler has been observed at Seeley Lake Park, less than 300 feet away. See Ex. 43.

1 are likely to use the Garry Oak of the project site. She has also provided evidence of
2 how all protected oak trees provide valuable habitat for neotropical species due to
3 factors such as abundant food supply. Reasonable minds can certainly disagree that the
4 Garry Oak of the project site qualify as “important” to Ms. Manetti’s birds solely
5 because the birds use them and they generally serve as an abundant food source,
especially if there is other habitat readily available nearby.

6 Ms. Manetti needs to provide a much more compelling reason than the trees are likely
7 to be used by a highly associated species. An example could be that the trees qualify as
8 important if their retention is materially necessary to the survival of a protected species.
9 Reasonable minds likely would not disagree on that interpretation of the term
10 “important.” Other interpretations of what qualifies as important may survive scrutiny
as well. It is up to Ms. Manetti to identify those interpretations for her appeals.

11 **“Unnamed Expert” Issue Not Material to Resolution of Appeal:**

12 Ms. Manetti asserts error in a finding in the Final Decision that two experts she
13 referenced were unnamed. Her request for reconsideration clarifies that the experts are
14 Professor Tami and Darren Masters. The Final Decision is corrected to acknowledge
15 that the “unnamed” experts are Professor Tami and Mr. Masters. The correction makes
no material difference to the outcome of the appeal.

16 The testimony at issue was provided by Ms. Manetti as follows:

17
18 *So importantly, in advance of this appeal, two experts have assured me*
19 *when I explained what happened, that it is common knowledge, that's their*
20 *term, that these birds use these trees. And it is not reasonable for me to be*
21 *required to prove that the birds or other creatures use them by observing*
them in the trees myself, with my own eyes.

22 After making this statement, Ms. Manetti noted that Professor Tami stated in Manetti
23 Ex. 40 that Lakewood is within the migratory flyway for neotropical birds and that they
24 need to stop on Garry Oak to refuel. She noted that Mr. Masters in Manetti Ex. 41
25 identified that within urban landscapes under migration corridors “*conducting point*
26 *count surveys at specific sites is unnecessary because the chances are very high that*
27 *birds will be observed...*” Neither Professor Tami nor Mr. Manetti specifically stated in
28 the exhibits provided by Ms. Manetti that the specific trees of the project site are likely
29 to be frequented by neotropical song birds as testified by Ms. Manetti. However, it is
entirely reasonable to reach that conclusion from Mr. Master’s comments. The Final
Decision was in error in failing to understand that Ms. Manetti’s reference to “two
experts” was intended by her to be Dr. Tami and Mr. Masters.

1
2 Mr. Masters' "highly likely" comment quoted above could well serve as a basis for
3 concluding that the preponderance of evidence establishes that neotropical song birds
4 use the protected oak at the project site. However, as noted at page 7 of the Final
5 Decision, "more important" than establishing whether the birds use the trees is
6 "whether the oak on the project site would be considered 'important' to those birds."
As outlined above, Ms. Manetti has not established that the trees of the project site are
"important" to highly associated species and thus do not qualify for retention.

7 **Examiner "Speculation" Appropriate for Assessing Application of Vague**
8 **Standards:**

9 In her reconsideration request Ms. Manetti takes issue with the following "speculation"
10 in the Final Decision at Page 6:

11 *Given the proximity of a park and swamp, the isolated trees at the project*
12 *site may not attract many such birds, or play any significant role in*
13 *fulfilling the habitat needs of the birds for that area of the City.*

14 Ms. Manetti believes that this statement is contrary to the written statements of
15 Professor Tami and Mr. Masters. It is not. Mr. Masters concluded it is highly likely
16 that neotropical birds use areas such as the project site. Professor Tami identified that
17 Garry Oak is a rich food source for the birds. None of this testimony establishes that
18 the trees in any reasonably undisputable fashion are "important" to highly associated
19 species. The statements of Professor Tami and Mr. Masters do not establish that
20 removal of the trees, even assessed in a cumulative fashion, would materially reduce the
21 habitat necessary for the migratory birds. The significance of that habitat reduction has
22 not been identified, especially when so many other trees, not just oak trees, are available
23 elsewhere and also when the City has adopted standards that require retention and
24 replacement of trees. Without any information on how removal of the trees of the
25 project site affects neotropical birds as a whole, there is no means to assess the
significance of impact of the tree removal and whether that level of impact qualifies the
trees as "important" to the species via an interpretation of "important" that is not
reasonably debatable. The "speculation" by the Examiner just identifies the gaps in
evidence presented by Ms. Manetti.

26 **Project oak are isolated:**

27 Ms. Manetti takes issue with the Examiner's characterization of the project oak trees as
28 "isolated" from the Final Decision quoted language above. The trees are clearly
29 isolated to some degree in the common meaning of the term. As shown in Ex. 18, the

1 trees on the project site are separated from surrounding trees and each other by fields,
2 streets and development. Whether or not that isolation materially impaired the habitat
3 functions and values of the trees is unknown since there was no thorough analysis
4 presented on the importance of those specific trees to highly associated species. Ms.
5 Manetti asserts in her reconsideration request that habitat values are not impaired by
6 this separation because the trees have similar separation in undeveloped areas. That is
7 new information that has not been presented into the record. Ms. Manetti has the
8 burden of proof to show that the protected oak trees of the project site are important to
9 associated species. The unique features of the project site, including the developed and
10 isolated environment of the trees, is a valid consideration in assessing that importance.

11 **Tree Stand Definition Not at Issue:**

12 The Final Decision did not resolve whether the trees under appeal are part of a stand
13 and it is not necessary to do so.

14 Ms. Manetti presents a definition of a “stand” of trees from a textbook. The record is
15 closed and the textbook definition is not admitted into evidence. Further, as identified
16 in the Final Decision, it is not necessary at this time to ascertain whether the project site
17 contains a “stand” of trees, since even if the trees are part of a stand, they are not
18 protected from removal as a fish and wildlife conservation area.

19 **No Adverse Cumulative Impacts Identified:** Ms. Manetti finds error in the Final
20 Decision for failing to address cumulative impacts. The Final Decision does not
21 address cumulative impacts because Ms. Manetti presented no evidence on cumulative
22 impacts. She identified that hundreds of Garry Oak may have been removed over the
23 past few years, but that volume of tree removal does not signify any impacts to
24 associated species or the overall population of Garry Oak themselves. Expert testimony
25 on the cumulative impacts of Garry Oak removal under the City’s critical areas
26 ordinance as currently applied could potentially support a finding that highly associated
27 species and/or Garry Oak populations could be materially affected, but no such
28 evidence was presented.

29 **Mitigation Not Relevant:**

30 Ms. Manetti asserts that the fact that Tree Permit No. 295 requires the payment of
mitigation fees is contrary to the Examiner’s alleged ruling that the oak trees on the
property don’t qualify as critical habitat.

1 At the outset it must be noted that the Final Decision does not rule that the oak trees on
2 the project don't qualify as fish and wildlife conservation areas. As noted in the
3 Connie Kay decision and clarification, Garry Oak can qualify as fish and wildlife
4 conservation areas, but still be subject to removal unless they also qualify as important
5 to highly associated species. More pertinent, it's unclear what relevance the payment
6 of mitigation fees has to the designation of the oak as fish and wildlife conservation
7 areas. The mitigation fees are payable under the City's tree retention standards in lieu
8 of authorized replacement of significant trees. See LMC 18A.70.320G4b. Trees can
qualify as significant without also qualifying as a fish and wildlife conservation area
under the City's critical areas ordinance. Consequently, it's not clear what significance
the assessment of mitigation fees has to resolution of this appeal.

9 **Perimeter Tree Retention Beyond Scope of Appeal:** Ms. Manetti asserts error in the
10 Final Decision failing to impose tree retention standards applicable to perimeter trees.
11 The issue of perimeter tree protection was not raised in Ms. Manetti's written appeal
12 and so is beyond the scope of the appeal.

13 **Scrivener's Errors:**

14 Ms. Manetti correctly identifies some scrivener's errors in her reconsideration request.
15 Those errors are corrected in the accompanying Corrected Findings of Fact,
16 Conclusions of Law and Final Decision, dated June 27, 2022. It is also noted that the
17 title of the June 13, 2022 decision was in error and should have been designated as
Findings of Fact, Conclusions of Law and Final Decision.

18 **Decision**

19
20 Ms. Manetti's appeal is denied for the reasons identified in the Analysis above.

21
22 ORDERED this 27th day of June 2022.

23
24 *Phil Olbrechts*
25 City of Lakewood Hearing Examiner

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28 **Appeal Right and Valuation Notices**

29 LMC 18A.20.080 provides that the final decision of the Hearing Examiner is subject to

1 appeal to superior court. Appeals of final land use decisions to superior court are governed
2 by the Land Use Petition Act (“LUPA”), Chapter 36.70C RCW. LUPA imposes short
3 appeal deadlines with strict service requirements. Persons wishing to file LUPA appeals
4 should consult with an attorney to ensure that LUPA appeal requirements are correctly
5 followed. Affected property owners may request a change in valuation for property tax
6 purposes notwithstanding any program of revaluation.

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