

**STAFF REPORT**  
**CITY OF LAKE OSWEGO**

---

**PLANNING DIVISION**

---

**APPLICANTS/PROPERTY OWNERS**

Lisa and Don Rainer

**FILE NO.**

AP 16-04 (TR 499-16-03588)

**LOCATION**

2518 Wembley Park Rd

**TAX LOT REFERENCE**

Tax Lot 2600 of Tax Map 2 1E 8AA

**STAFF**

Ellen Davis

**NEIGHBORHOOD ASSOCIATION**

Uplands

**ZONING DESIGNATION**

R-10

**COMP. PLAN DESIGNATION**

R-10

**DATE OF REPORT**

September 16, 2016

**DATE OF HEARING**

September 19, 2016

**I. APPLICANTS' REQUEST**

The applicants are requesting approval to remove seven trees under a Type II tree removal permit in order to construct a new single-family dwelling and driveway on the site.

**II. TENTATIVE STAFF DECISION / REQUEST FOR HEARING AND APPEAL**

On August 23, 2016, staff tentatively approved the applicants' request to remove ten trees as part of a Type II tree removal application (TR 499-16-03588).

On September 6, 2016, Jane Kolberg (owner of 2580 Wembley Park Rd, abutting the west side of the site) filed a request for public hearing in opposition to the application (Exhibit A-1). Pursuant to LOC 55.02.085, the Development Review Commission (Commission) shall hold a public hearing on this request.

On September 15, 2016, the applicant withdrew three invasive hawthorn trees from the application (Exhibit F-2). [English hawthorn trees are classified as invasive

trees and may be removed under a separate “invasive tree” permit. See LOC 55.02.042(7), .050(1)(a).]

**III. APPLICABLE REGULATIONS**

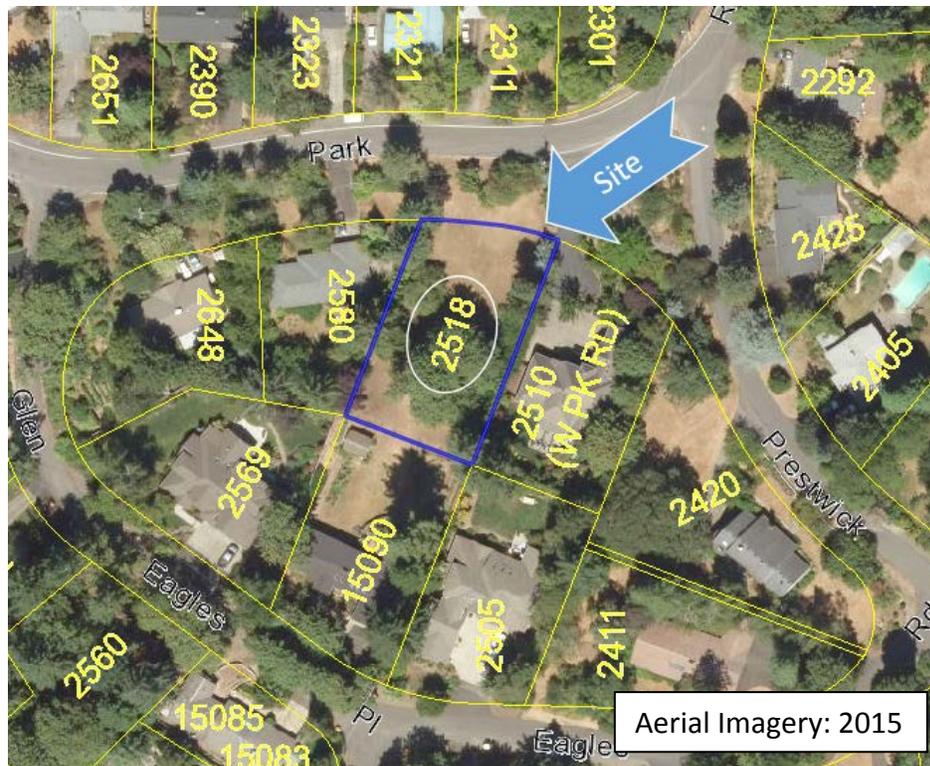
A. City of Lake Oswego Tree Code (LOC Chapter 55, effective prior to August 18, 2016)<sup>1</sup>

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

**IV. FINDINGS**

A. Background/Existing Condition

1. The site is a 17,186 square-foot vacant lot with frontage along Wembley Park Rd. The site is approximately 100 feet wide and 156 to 179 feet long.



2. The site is zoned R-7.5. A building permit for a proposed single-family dwelling on this site is currently under review (BP 499-16-03591).

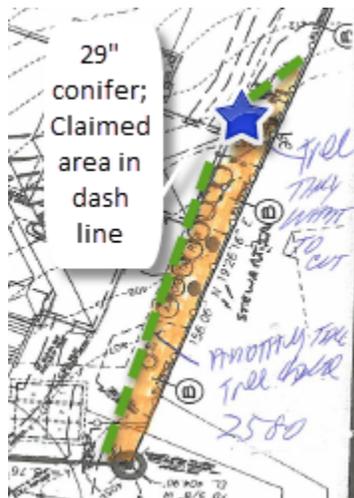
<sup>1</sup> The Tree Code was amended by Ord. 2721, effective on August 18, 2016. Because the tree removal application was filed prior to the effective date of the ordinance, the standards in existence at the time of filing are applied. ORS 227.173.

- 3. The Tree Removal Plan shows that there are twenty-one trees on the site and in the Right-of-Way adjacent to the site with a diameter at breast height of five inches in diameter or greater (Exhibit E-3). Seven trees are now proposed for removal under the Type II application 499-16-03588; eleven trees located on the site are not proposed to be removed and would be under Tree Protection Plan 499-16-03589 (Exhibit E-3).
- 4. The site slopes down from the southeast to the northwest with an elevation of 422 feet at the southeast corner to an elevation of 406 feet at the northwest corner property line (see contours, below).



//  
//  
//

B. Ownership of Subject Area where 29" Tree is Proposed to be Removed.



Staff notes that the appellant asserts an adverse possession claim “on a slice of property [along the west property line] ... which involves the 60 ft. tall tree [29” conifer] they want to cut down.” Exhibit G-200)

An applicant must have an interest in the real property upon which the tree is located and have the right to remove the tree. See LOC 55.02.042 (only owner may seek emergency tree removal permit; 55.02.050(3) misrepresentation of owner’s signature on application shall invalidate permit);

55.02.084(4)(b)(mitigation replanting shall occur “on other property in the applicant’s ownership of control within the City [if no room for planting on the subject property]; 55.02.125(3)(violation is prima facie evidence that the owner of the property upon which the tree is located committed the violation). Also the “City Manager [staff]” requires the owner to sign the application. LOC 55.02.050(1).

The appellant, by a claim of adverse possession, is asserting that the record fee title owner should not be found to be the owner of the land upon which the 29” conifer is located, but rather that the appellant should be determined to be the owner. To prove a claim of adverse possession, a party must establish through a “suit in equity” before the appropriate circuit court<sup>2</sup> that the criteria for adverse possession are met: the person and the predecessors in interest of the person have maintained actual, open, notorious, exclusive, hostile and continuous possession of the property for a period of 10 years.<sup>3</sup> (Each of these terms have been the subject of litigation

<sup>2</sup> **ORS 105.605 Suits to determine adverse claims.** Any person claiming an interest or estate in real property not in the actual possession of another may maintain a suit in equity against another who claims an adverse interest or estate therein for the purpose of determining such conflicting or adverse claims, interests or estates. \*\*\*).

<sup>3</sup> **ORS 105.620 Acquiring title by adverse possession.** (1) A person may acquire fee simple title to real property by adverse possession only if:

(a) The person and the predecessors in interest of the person have maintained actual, open, notorious, exclusive, hostile and continuous possession of the property for a period of 10 years;

(b) At the time the person claiming by adverse possession or the person’s predecessors in interest, first entered into possession of the property, the person entering into possession had the honest belief that the person was the actual owner of the property and that belief:

(A) By the person and the person’s predecessor in interest, continued throughout the vesting period;

(B) Had an objective basis; and

(C) Was reasonable under the particular circumstances; and

(c) The person proves each of the elements set out in this section by clear and convincing evidence.

and court opinions through the Oregon courts.) If the claimant can establish that the criteria are met, the court will then enter a judgment, decreeing that the claimant is the owner of the claimed area. Until such a judgment is entered, the record title owner is the owner of the property.

It is not within the scope of the DRC to hear, or decide “suits in equity” to determine whether the appellant can meet the adverse possession criteria. Until a judgment is entered by the Circuit Court, the City considers the record fee title owner to be the “owner” for purposes of submitting a tree removal application.

C. Compliance with Criteria for Approval

Type II tree removal applications must comply with the following approval criteria of LOC 55.02.080<sup>4</sup>:

1. *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 tree removal is requested for development purposes, to construct one new single-family dwelling and driveway on the site. All seven trees are located within or in close proximity to the footprint of the proposed development. Single-family dwellings are permitted outright in the R-10 zone.

Staff finds that this criterion is met.

2. *Removal of the trees will not have a significant negative impact on erosion, soil stability, flow of surface waters, protection of adjacent trees, or existing windbreaks; and*

There are no water courses on this site. The property slopes 16 feet from northeast to southwest. The building permit plans show 2-4’ tall retaining walls along the east property line and to the southeast of the proposed dwelling near the five 8”-17” maples requested for removal.

---

(2)(a) A person maintains “hostile possession” of property if the possession is under claim of right or with color of title. “Color of title” means the adverse possessor claims under a written conveyance of the property or by operation of law from one claiming under a written conveyance.

(b) Absent additional supporting facts, the grazing of livestock is insufficient to satisfy the requirements of subsection (1)(a) of this section.

(3) As used in this section and ORS 105.005 and 105.615, “person” includes, but is not limited to, the state and its political subdivisions as created by statute.

<sup>4</sup> See Footnote 1.

Erosion:

The building permit plans show that sediment fences will be installed to prevent erosion during construction. The erosion control plan for construction has been approved by staff.

Flow of Surface Waters:

The appellant states that removal of the trees “will contribute to additional runoff into my property and into the street.” (Exhibit A-1).

A Tree Removal Permit for development purposes is only issued with the associated building permit. Stormwater management is required for construction of the proposed single family residence, as a “large” project. The criteria for approval of the stormwater management plan includes:

“On-site stormwater management facilities shall be sized to infiltrate 100 percent of the stormwater runoff for a ten-year, 24-hour design storm based on location- and depth-specific tested infiltration rates.” LOC 38.25.120(1)(d)(i)(B).

The proposed stormwater management plan includes installation of an approximately 496 square-foot stormwater chamber facility at the lowest point of the property in the northwest, adjacent to the appellant’s property and the Wembley Park Road right-of-way. The stormwater management plans are still under review, however, City staff must review and approve the proposed stormwater plans prior to issuance of the building permit and tree removal permit. With the stormwater requirements of construction, staff finds that removal of the seven trees will not have a significant negative impact on flow of surface waters.

Protection of Adjacent Trees:

- The 29” conifer, 7” maple, and 8-16” maples are not located within a stand of trees or near the other trees to remain on the site.
- The 17” maple is located to the northwest of a stand of three maples that are not proposed for removal. The location of the 17” maple does not provide a windbreak or protect the three maples from southwesterly storm winds. Its removal will not have a significant negative impact on protection of adjacent trees or existing windbreaks.

For these reasons, staff finds that the removal of the seven trees will not have significant negative impacts to erosion, soil stability, or flow of surface waters, or protection of adjacent trees. This criterion is met.

3. *Removal of the trees will not have a significant negative impact on the character, aesthetics, or property values of the neighborhood. The City may grant an exception to this criterion when alternatives to the tree*

*removal have been considered and no reasonable alternative exists to allow the property to be used as permitted in the zone. In making this determination, the City may consider alternative site plans or placement of structures or alternative landscaping designs that would lessen the impact on trees, so long as the alternatives continue to comply with other provisions of the Lake Oswego Code.*

The first question under this criterion is whether the proposed tree removal will have a significant negative impact on the character, aesthetics, or property values of the neighborhood. If not, then alternatives to tree removal are not considered; if tree removal would have a significant negative impact, then alternatives to tree removal are considered. Some testimony has been received that does not state the tree removal would have a significant negative impact on the neighborhood but nevertheless recommends alternative site plans be considered. (Exhibits G201 and G202, Uplands NA; G204, Alexander)

Significant negative impact on neighborhood:

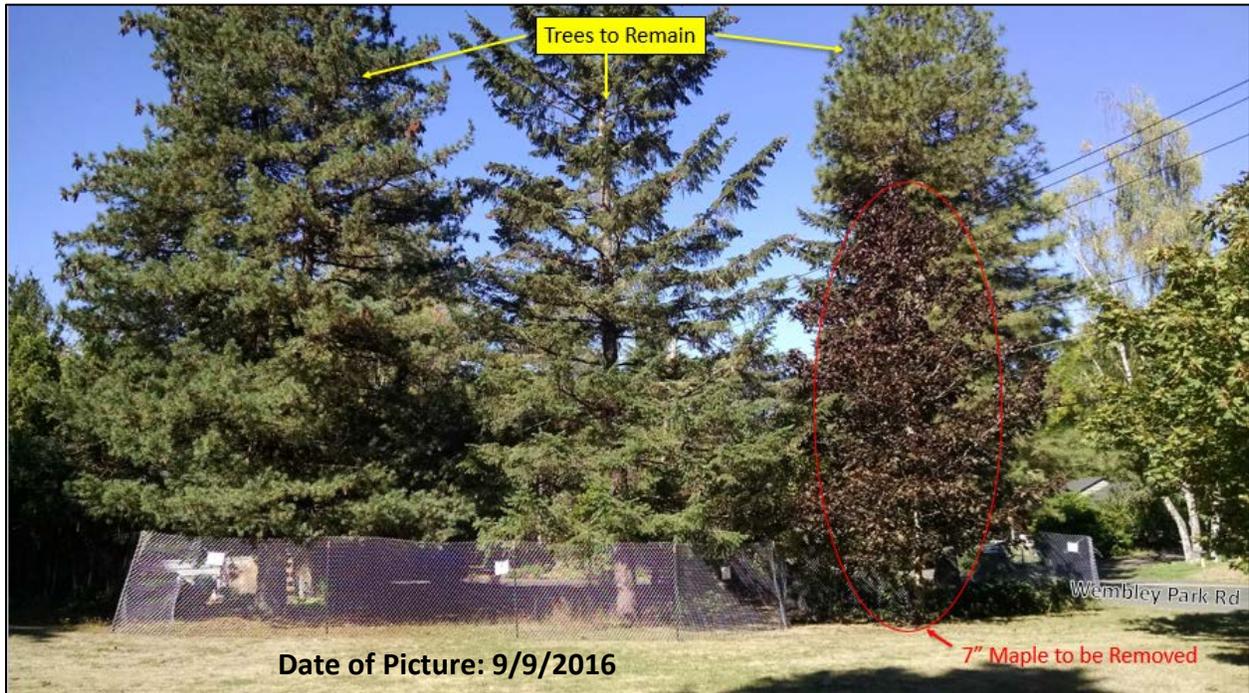
The proposed removal of 7 trees will not have a significant negative impact on the character, aesthetics, or property values of the neighborhood for the following reasons:

- There are large trees located on the subject property that are not proposed for removal and will be protected from development activities under tree protection permit 499-16-03589 (Exhibit F-3).
- There are also large trees on nearby adjacent properties and in the surrounding neighborhood, including the properties to the south and west, which contain several large and prominent trees and trees of varying sizes lining Wembley Park Road (Exhibit E-2). All of these remaining trees on the site and in the surrounding neighborhood maintain the character and aesthetics of the neighborhood.
- Specific Trees Proposed for Removal:
  - The 5 maples ranging in 8"-17" in size proposed for removal are located toward the interior of the lot and are screened from the neighborhood view from the east, south, and west by other mature trees (Exhibit E-3).
  - The 29" conifer is set back approximately 52' from the paved edge of Wembley Park Rd behind three large pine and fir trees that are not proposed for removal (Exhibit E-3).
  - The 7" maple located in the right-of-way is a small stature tree that is currently dwarfed by other nearby large trees. See photo next page.

//

//

//



*View from Site of Large Conifers to Remain, 7" Maple to be Removed, and Wembley Park Road (right)*

The negative impact of the tree removal on the character, aesthetics, or property values of the neighborhood would be minimal. Staff finds this criterion is met.

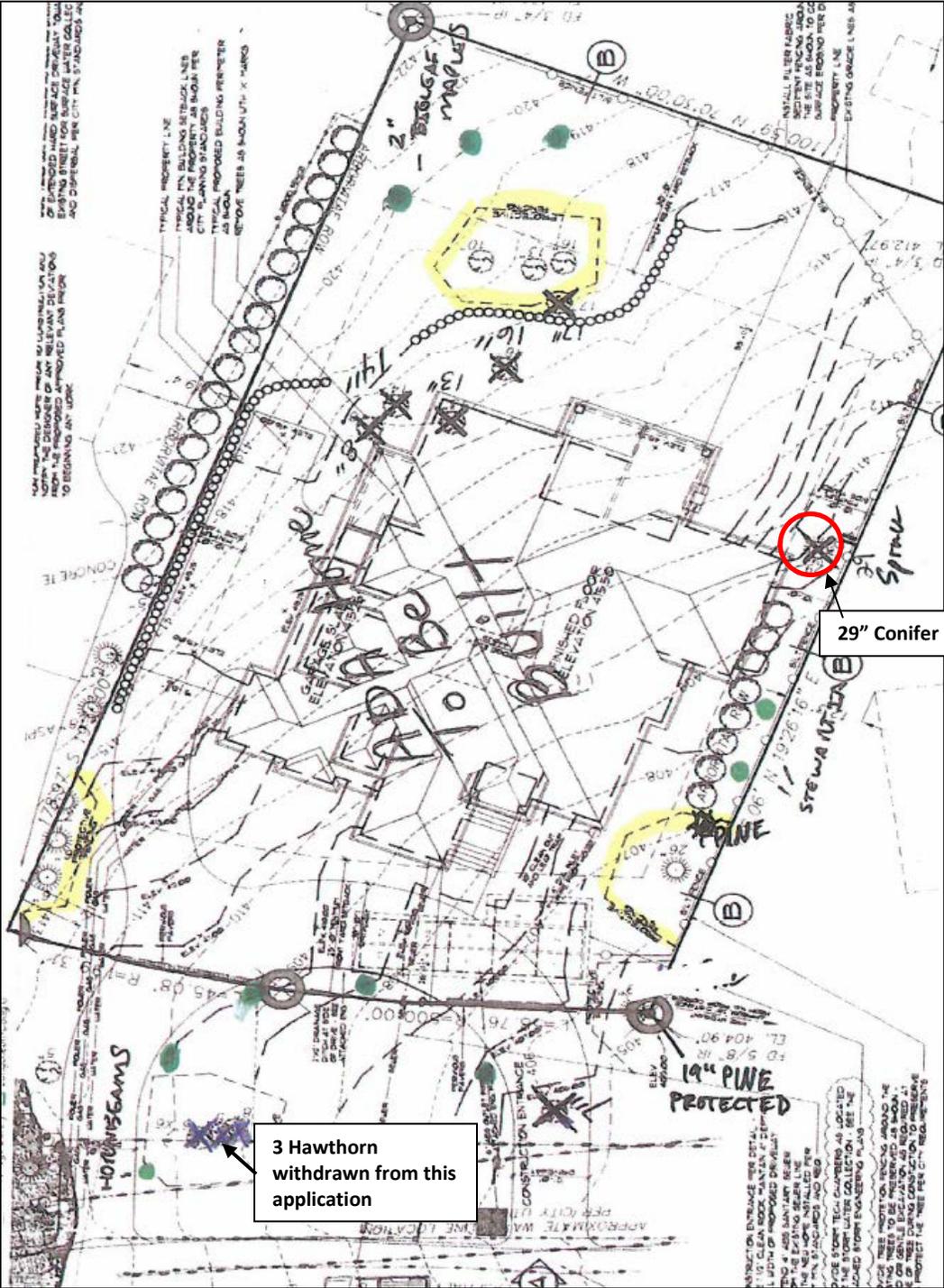
Consideration of alternative site plans or placement of structures or alternative landscaping designs?

Because the proposed tree removals are not found to have a significant negative impact on character, aesthetics, or property values of the neighborhood, the applicant need not demonstrate that alternative site or landscaping plans have been considered and the applicant has not proposed alternative plans.

If the Commission finds from the evidence presented at the public hearing that the proposed tree removal would have a significant negative impact on the neighborhood, then the Commission must determine from the evidence whether alternative site plans or placement of structures or alternative landscaping designs have been considered that would lessen the impact on trees, while still allowing the applicant to develop the property to the extent permitted by the Lake Oswego Code.

In the R-10 zone, the front yard building setback is 25 feet. The side yard setbacks are 10 feet along the east and west property lines. The rear yard setback along the south property line is 30 feet. The area outside of these setbacks on the lot is referred to as the available building envelope, within which a building footprint must be located.

The building permit plans (see Site Plan below) show the new single-family dwelling would be located approximately 20 feet from the east property line and 10 feet from the west property line (Exhibit E-3). The building permit for the proposed dwelling is still under review (BP 499-16-03591); however, staff notes that the setbacks and lot coverage for the proposed dwelling comply with the requirements of the R-7.5 zone regulations.



Site Plan (Exhibit E-3)

The appellant contends that the coniferous tree identified as a 29" spruce in the application and as a 60' / 80'<sup>5</sup> fir in the appeal letter is "a beautiful and healthy tree that does not need to be cut down." (Exhibits A-1, E-3, and F-1). The 29" conifer is located in close proximity to the building envelope and to the building footprint at the required 10-foot side yard setback.

The appellant does not state whether an alternative site plan could lessen the impact upon one or more of the following trees. Staff finds that they are located in or so near to the building or driveway footprint that construction activity would unavoidably damage or cause the tree to die:

- The 13" maple is located within the building footprint.
- The 8", 14" and 16" maples are located 1'-5' from the building footprint.
- The 17" maple is located adjacent to a retaining wall, which is a part of the grading plan for construction of the dwelling.
- The 7" maple is located within the footprint of the proposed driveway.

If the proposed tree removal would have a significant negative impact on the neighborhood, based upon the building permit and site plan submitted, staff finds that without a major re-design of the house, simply moving the footprint of the proposed house within the building envelope to protect a greater number of trees does not appear feasible because the building is already located at the front building setback line and cannot be moved farther north on the site to protect the maple cluster. Moving the house farther from the western property line toward the eastern property line would require a complete redesign of the structure to facilitate a front loading-garage which would change the allowed lot coverage for the structure and trigger additional garage location and appearance standards that do not apply to side-loading garages.

4. *Removal of the tree is not for the sole purpose of providing or enhancing views.*

The applicant states that the sole purpose of removal of the trees is for construction, not for providing or enhancing views (Exhibit F-1). Staff finds that the proposed tree removal plan would not open up desirable views for the dwelling on this property. This criterion is met.

5. *The City shall require the applicant to mitigate for the removal of each tree pursuant to 55.02.084. Such mitigation requirements shall be a condition of approval of the permit.*

If the Commission approves the tree removal application, the applicant is required to plant seven mitigation trees on the property. The applicant is proposing to plant three 2" Bigleaf maples, two 2" hornbeams, and two 2"

---

<sup>5</sup> The appellant states it is a 60 ft. tree in Exhibit G-200, and states it is an 80 ft. tree in Exhibit A-1.

stewartia to meet the mitigation requirement (Exhibit E-3). This criterion can be met.

**D. Additional Issues Unrelated to Tree Removal**

The letter of appeal states that plans of grading the property “could cause the roots of other trees on my property to be damaged.”(Exhibit A-1). Staff notes that neither the grading plan for construction of the single family residence nor the tree protection plan are under review by the DRC. The effect of surface water flow from the property upon adjacent properties is under the scope of the Stormwater Management Code, (LOC Art. 38.25) and Stormwater Management Standards (LOC 50.06.006.3), if applicable to the proposed development.

**V. RECOMMENDATION**

As staff finds that each of the approval criteria of LOC 55.02.080 are met, staff recommends **approval** of the Type II tree removal application, subject to the following conditions of approval:

1. Prior to the issuance of the final building inspection for the new dwelling, the applicant/owner shall plant 7 mitigation trees: 3 Bigleaf maple, 2 Hornbeam, 2 Stewartia.

**EXHIBITS**

**A. NOTICE OF INTENT TO APPEAL**

A-1 Request for public hearing from Jane Kolberg, received September 6, 2016

**B - C.** [No current exhibits; reserved for hearing use]

**E. GRAPHICS/PLANS**

- E-1 Tax map
- E-2 Existing Features Map
- E-3 Tree Removal Plan
- E-3 Pictures (9/9/2016)

**F. WRITTEN MATERIALS**

F-1 Tree removal application TR 499-16-03588, submitted July 20, 2016

**G. LETTERS**

Neither for nor Against (G1-99)

None

Support (G100-199)

None

Opposition (G200+)

G-200. Letter from Jane Kolberg, received July 26, 2016

G-201. Letter from Bruce Brown, received August 17, 2016

G-202. Letter from Tom O'Connor (Uplands Neighborhood Association), received August 18, 2016

G-203. Letter from Michael Bowen, received August 17, 2016

G-204. Letter from Meri Jo Alexander, received August 18, 2016

G-205. Letter from Jane Kolberg, received August 11, 2016