

**BEFORE the HEARING EXAMINER for the  
CITY OF LAKE FOREST PARK**

**DECISION**

FILE NUMBER: 2018-RUE-0001

APPLICANT: Stephen Crane  
19741 53<sup>rd</sup> Avenue NE  
Lake Forest Park, WA 98155

TYPE OF CASE: Reasonable Economic Use Exception from Tree Canopy Preservation and Enhancement regulations to remove up to two exceptional trees to facilitate construction of a new single-family residence

STAFF RECOMMENDATION: Approve subject to conditions

EXAMINER DECISION: GRANT subject to conditions

DATE OF DECISION: October 24, 2018

**INTRODUCTION<sup>1</sup>**

On May 14, 2018, Stephen Crane (“Crane”) filed a Reasonable Economic Use Exception (“REU”) application under Lake Forest Park Municipal Code (“LFPMC”) 16.14.100 from Tree Canopy Preservation and Enhancement (“TCPE”) regulations to remove up to two exceptional trees to facilitate construction of a new single-family residence. (Exhibit 2.1 – 2.14<sup>2</sup>) The Lake Forest Park Department of Planning and Building (“Planning”) deemed the application to be complete on June 12, 2018. The initial application identified only one exceptional tree for removal. Crane amended the application on August 29, 2018, to include a second exceptional tree for removal. (Exhibit 2.15 – 2.17)

The subject property is located at 4611 NE 178<sup>th</sup> Street.

The Lake Forest Park Hearing Examiner (“Examiner”) viewed the subject property on October 4, 2018.

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<sup>1</sup> Any statement in this section deemed to be either a Finding of Fact or a Conclusion of Law is hereby adopted as such.

<sup>2</sup> Exhibit citations are provided for the reader’s benefit and indicate: 1) The source of a quote or specific fact; and/or 2) The major document(s) upon which a stated fact is based. While the Examiner considers all relevant documents in the record, typically only major documents are cited. The Examiner’s Decision is based upon all documents in the record.

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The Examiner convened an open record hearing on October 4, 2018. Planning gave notice of the hearing as required by the LFPMC.<sup>3</sup> (Exhibit 16) The hearing was continued to and concluded on October 17, 2018, when time ran out on October 4<sup>th</sup>.<sup>4</sup>

Testimony under oath was presented by:

Stephen Crane  
Jorgen Olson  
Paul Thompson  
Timothy Hohn  
Kathy Holzer  
Julian Andersen  
Tyson Greer  
Jim Halliday  
Mike Dee

Steve Bennett  
Kim Adams Pratt (unsworn counsel)  
Robert Anderson  
Jean Reid  
Eric Evans  
Daniel Olson  
Leyecke Mas  
Jeff Jensen  
Scott Baker

Exhibits were offered and admitted during the hearing, a list of which is maintained by the Hearing Clerk.

The action taken herein and the requirements, limitations and/or conditions imposed by this decision are, to the best of the Examiner's knowledge or belief, only such as are lawful and within the authority of the Examiner to take pursuant to applicable law and policy.

## FINDINGS OF FACT

1. Chapter 16.14 LFPMC is entitled "Tree Canopy Preservation and Enhancement" ("TCPE"). Fundamentally, the TCPE regulations seek to preserve the City's existing, predominantly evergreen tree canopy coverage while allowing development of individual properties. [LFPMC 16.14.010 and .020] TCPE regulations apply only to "significant" trees as defined: "a tree six inches or greater in diameter (DBH) or a required replacement tree of any size. Dead trees shall not be considered significant trees."<sup>5</sup> [LFPMC 16.14.030, "Significant tree"] Significant trees with a DBH of at least 24 inches are classified as "landmark trees." [LFPMC 16.14.030, "Landmark tree"] Other significant trees are classified as "exceptional" trees: Those of certain species which meet a minimum diameter

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<sup>3</sup> The hearing was originally scheduled and noticed for September 6, 2018. (Exhibit 13) That hearing was canceled when Crane amended the application to identify two exceptional trees, instead of one, for removal. (Exhibit 66, p. 3)

<sup>4</sup> Written notice of the October 17<sup>th</sup> hearing continuance was not required since the continuance was announced during the initial hearing and was to a date, time, and place certain.

Crane agreed to the Examiner's request for five additional working days in which to complete the decision-making process due to the Examiner's pending vacation. The Examiner did not need to use the additional time.

<sup>5</sup> "DBH" means "diameter at breast height" which is measured 4.5 feet above grade. [LFPMC 16.14.030, "DBH"] A bush or shrub (e.g., laurel, etc.) is not considered a tree. [LFPMC 16.14.030, "Tree"]

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(which varies by species), are healthy, do not pose a significant risk, have no structural defects that cannot be mitigated, and will remain viable if retained. [LFPMC 16.14.030, “Exceptional tree”]

The TCPE regulations seek preservation of tree canopy coverage, the amount of which varies by land use and size of lot. [LFPMC 16.14.070(A)] For a lot containing less than 10,000 square feet (“SF”) which is zoned for single-family residential use, the canopy coverage goal is 28 percent. [LFPMC 16.14.070(A), Table 2]

Chapter 16.14 LFPMC requires acquisition of a tree removal permit before removal of any significant tree. [LFPMC 16.14.040] Tree removal permits are divided into “major” and “minor” permits depending upon a number of factors. [LFPMC 16.14.040(B)] Major tree removal permits are further divided into two categories depending upon whether the proposed removal is “associated with major development activity”. [LFPMC 16.14.070(D)] “Major development activity” means subdivision or short subdivision; construction or demolition of single-family, multifamily, or commercial buildings; and alterations, repairs, enlargements or additions that add 1,000 square feet or more of impervious surface coverage.” LFPMC 16.14.030, “Major development activity”]

A minor tree removal permit will be conditioned to require planting replacement trees essentially on a one-for-one basis. [LFPMC 16.14.070(C)] Replacement requirements for a major tree removal permit depend upon the nature of the activity with which the permit is associated. A tree removal permit not associated with major development activity will require restoring the pre-removal canopy coverage or meeting the canopy coverage goal, whichever is less. [LFPMC 16.14.070(D)(1)] A tree removal permit associated with major development activity will require planting replacement trees to achieve the codified goal.<sup>6</sup> [LFPMC 16.14.070(D)(2)]

Removal of “viable” exceptional trees is prohibited. [LFPMC 16.14.060(B)] (The term “viable (tree)” is defined in LFPMC 16.14.030.)

2. The subject property is Tax Parcel Number 4019301515 (“Parcel 1515”), a 6,875 square foot (“SF”) lot which has approximately 57 feet of frontage on the south side of NE 178<sup>th</sup> Street and a north-south depth which varies from approximately 105 feet along its west property line to approximately 127 feet along its east property line.<sup>7</sup> Parcel 1515 is zoned RS-15 (aka RS-15,000), a single-family residential zone in which the minimum lot size is 15,000 SF and the minimum street frontage is 75 feet. (Exhibit 4; LFPMC 18.18.030; LFPMC 18.18.040)

Parcel 1515 is nonconforming as to both street frontage and lot area.

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<sup>6</sup> An exception applies if the lot is nonconforming as to lot coverage or size and is below the canopy coverage goal prior to tree removal. In those cases a portion of the required replacement trees can be planted off-site when meeting the requirement on-site is found to be infeasible. [LFPMC 16.14.090(D)(1)]

<sup>7</sup> For ease of reference, NE 178<sup>th</sup> Street will be assumed to follow an east-west alignment. All directional references in this Decision will use that directional convention.

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3. Parcel 1515 is undeveloped and relatively flat. (Exhibit 66, p. 2) Parcel 1515 contains five significant trees: 1) Tree #6, an exceptional 52" Douglas fir located near the center of the north property line; 2) Tree #10, an exceptional 42" Douglas fir located approximately 38 feet south of the northeast corner and approximately 4 feet from the east property line of Parcel 1515; 3) Tree #4, a 10" Western red cedar located near the northwest corner of Parcel 1515; 4) Tree #11, a vine maple of unspecified size located in the southeast corner of Parcel 1515; and 5) Tree #12, an elm of unspecified size also located in the southeast corner of Parcel 1515. Seven significant trees (Trees #1, 2, 3, 5, 7, 8, and 9) lie within the NE 178<sup>th</sup> Street right-of-way in front of Parcel 1515. Two significant elms lie just outside Parcel 1515 near its southwest corner; a significant Douglas fir is located about 15 feet south of Parcel 1515. (Exhibit 65, Drawing 3 of 3)
4. The TCPE regulations require protection of a significant tree's critical root zone ("CRZ") and interior critical root zone ("ICRZ"). The regulations require all development to be set back at least 5 feet from the CRZ unless the "structure is cantilevered or otherwise raised above the ground's surface so as not to disrupt the tree's roots ...." [LFPMC 16.14.070(D)(7)] Certain activities may be allowed with approval of "the city's qualified arborist" between the required setback and the edge of the ICRZ if they will not harm the tree. [LFPMC 16.14.070(D)(8)]

A tree's CRZ is an area encircling the base of a tree whose radius in feet is equal to the tree's DBH in inches. [LFPMC 16.14.030, "Critical root zone (CRZ)"] The ICRZ is an area encircling the base of a tree whose radius in feet is equal to one half of the tree's DBH in inches. [LFPMC 16.14.030, "Interior critical root zone (ICRZ)"]

5. Crane, a professional builder, purchased Parcel 1515 for the express purpose of building a single-family residence for re-sale. He wants the new residence to have a 1,890 SF footprint, including a two-car garage. (Crane had previously considered a proposal showing a 909 SF building footprint, but never made a formal application with that proposal. (Exhibit 61, Doc. 7)) Over the course of this application process Crane has submitted various proposals. At the October 17<sup>th</sup> hearing he stated that he has only two proposals that he wanted considered: Exhibit 65, Drawings 1 of 3 and 2 of 3. (Testimony)

Option 1 would remove both exceptional trees, Trees #6 and #10. Option 2 would preserve Tree #6 but would remove Tree #10. (Exhibit 65)

6. Consideration of TCPE REUs is regulated under LFPMC 16.14.100, Reasonable use exception to allow for reasonable economic use. Subsection 16.14.100(A) LFPMC reads as follows:
  - A. If the application of [Chapter 16.14 LFPMC] will prevent any reasonable economic use of the owner's property, then the applicant may apply to the planning department for an exception from the requirements of [Chapter 16.14 LFPMC].

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Subsection 16.14.100(C) LFPMC provides that “The hearing examiner shall grant a reasonable use exception only if” four criteria are met. Planning and Crane have provided analyses of the application’s compliance with those criteria. (Exhibits 2; 65; 66) The four specific criteria and the facts relating to each are:

A. “1. Application of the requirements of [Chapter 16.14 LFPMC] will deny all reasonable economic use of the property; and ...”

Facts: The CRZ of Tree #6 encumbers the entire north half of Parcel 1515; the CRZ of Tree #10 overlaps Tree #6’s CRZ and also encumbers nearly the entire northern half of Parcel 1515. (Exhibit 53, Exhibits A and B) The ICRZ of Tree #6 encumbers virtually the entire width of Parcel 1515. The ICRZ of Tree #10 overlaps Tree #6’s ICRZ. Between the two, they completely encumber the north portion of Parcel 1515. Sufficient area exists south of the ICRZs to construct a residence, but that residence could not be reached without crossing one or both of the ICRZs. (Exhibit 65, Drawing 3 of 3) The same holds true for a smaller footprint residence south of the CRZs. (Exhibit 53, Exhibits A and B)

B. “2. There is no other reasonable economic use with less impact; and ...”

Facts: This criterion relates to the nature of the proposed use; the suitability of the size of the proposed use is the subject of Criterion (C)(4) and will, therefore, be addressed later.

Permitted uses in the RS-15 zone are single-family residences, home occupations, accessory buildings, manufactured houses, accessory dwelling units, signs, and “Type I” day care facilities. [LFPMC 18.18.010] Home occupations, accessory buildings, and accessory dwelling units all presume the existence of a single-family residence. A Type I day care facility allows up to 12 children or adults to be cared for at any one time and requires on-site parking for employees. [LFPMC 18.50.045] It is reasonable to presume that a building housing a Type I day care facility would be as large or larger than a typical single-family residence. Only a sign would arguably have a lesser impact than a single-family residence – and a sign would not be a reasonable economic use under any rational view.

C. “3. The proposed development does not pose an unreasonable threat to the public health, safety, or welfare, on or off the proposed site, and is consistent with the general purposes of [Chapter 16.14 LFPMC]; and ...”

Facts: The requirement here is that the proposal not “pose an unreasonable threat to public health, safety, or welfare”. The adjective “unreasonable” is the key. The regulation does not

require that the proposal have absolutely no impact on tree canopy preservation and enhancement.<sup>8</sup>

A single-family residence of the size desired by Crane could be located south of the ICRZs of the two exceptional trees. (See Exhibit 70.) Thus, the residence itself would not require a REU and, therefore, would not trigger the considerations inherent in this criterion.

But such a residence could not be reached without a driveway and utilities passing through/over the ICRZs of exceptional Trees #6 and #10. Crane argues that Trees #6 and #10 pose safety risks to surrounding properties and should be removed; the City's arborist disagrees. The City's arborist finds both trees to have fair to good vigor; he believes that any crown irregularities could be easily remedied through fairly standard maintenance methods. (Exhibits 2; 8; and testimony)

Neighbors and other members of the public who participated in the hearing process almost universally believe that the public welfare would suffer if both exceptional trees were to be removed. (Exhibits 19 – 47, 53 – 64, 70, 74, and 75)

D. "4. The alteration proposed is the minimum necessary to allow for reasonable economic use of the property."

Facts: This is the criterion which addresses size of the proposed use. Or, more appropriately in this case, how much disturbance of exceptional Trees #6 and #10 must be allowed to provide for reasonable use (construction of a single-family residence in the portion of the property not encumbered by ICRZs) of Parcel 1515. This criterion is best addressed during consideration of LFPMC 16.14.070(D), below.

7. Subsections 16.14.100(D) - (G) LFPMC serve to limit the Examiner's discretion when granting TCPE REUs. Those provisions and the facts relating to each are:

A. "D. To the extent feasible, all tree replacement shall be at a ratio of three times the canopy coverage proposed for removal. If on-site canopy coverage replacement is not feasible, off-site replanting shall be used to the extent on-site replacement is not feasible."

Facts: According to Exhibit 65, tree canopy coverage after site development would equal about 31% of lot area if exceptional Tree #6 and exceptional Tree #10 were not removed, thus slightly exceeding the canopy coverage goal of 28% and not requiring replacement planting.

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<sup>8</sup> State appellate courts have recognized that it is a practical impossibility to have human development without some adverse impact to the physical environment.

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B. "E. Conditions of approval shall be subject to the approval criteria in LFPMC 16.14.070(D), to the extent feasible."

Facts: The approval criteria in LFPMC 16.14.070(D) will be discussed in the next Finding of Fact.

C. "F. The hearing examiner shall grant an exception from the requirements of [Chapter 16.14 LFPMC] only to the minimum necessary extent to allow for reasonable economic use of the applicant's property."

Facts: Subsection 16.14.100(F) LFPMC is a restatement of Criterion (C)(4). This criterion is best addressed during consideration of LFPMC 16.14.070(D), below.

D. "G. The hearing examiner shall consider conditioning any exception from the requirements of [Chapter 16.14 LFPMC] upon conditions recommended by the city and upon compliance with any mitigation plan approved by the city."

Facts: Planning recommends approval of the requested TCPE REU subject to 11 conditions. (Exhibit 66, pp. 11 & 12) This provision only requires that the Examiner "consider" the conditions recommended by Planning, it does not limit his discretion to take a different action if the preponderance of the evidence indicates that another course of action is appropriate. Discussion of the recommended conditions will be provided in the Conclusions of Law, below.

8. Subsection 16.14.070(D) LFPMC, referenced in LFPMC 16.14.100(E), above, establishes criteria for approval of Major Tree Permits. The specific criteria and the facts relating to each are:

A. "1. When the proposed tree removal is not associated with major development activity, trees may be removed if a tree replacement plan is approved that, at a minimum, does the lesser of the following:

- "a. Maintains the canopy coverage at or above the applicable canopy coverage goal; or
- "b. Maintains canopy coverage at or above the percentage existing prior to tree removal."

Facts: This criterion applies only if the "tree removal is not associated with major development activity". [Emphasis added] The proposal for which this REU is requested is construction of a single-family residence, which, by definition, is a major development activity. This criterion does not apply.

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B. "2. When the proposed tree removal is associated with major development activity, the trees may be removed if a tree replacement plan is approved that, at a minimum, brings canopy coverage to the applicable canopy coverage goal."

Facts: According to Exhibit 65, tree canopy coverage after site development would equal about 31% of lot area if exceptional Tree #6 and exceptional Tree #10 were not removed, thus slightly exceeding the canopy coverage goal of 28% and not requiring replacement planting.

C. "3. Development proposals associated with a tree permit shall:

"a. Incorporate trees as a site amenity and to reflect a strong emphasis on tree protection."

Facts: Crane's proposal to remove the only two exceptional trees on Parcel 1515 does not reflect a strong emphasis on tree protection.

"b. Demonstrate the following prioritized factors for retention:

- i. Existing viable trees in groups or stands;
- ii. Exceptional trees or other high quality open-grown, windfirm trees;
- iii. Landmark trees;
- iv. Trees in critical area buffers, or adjacent to critical area buffers;
- v. Trees that are interdependent with and therefore critical to the integrity of stands of other protected trees;
- vi. Other individual trees that will be windfirm, high quality trees if retained;
- vii. Other trees that provide wildlife or riparian habitat, screening, buffering or other amenities;
- viii. Trees that help to protect neighbors' trees from windthrow, or other trees within required yard setbacks or on the perimeter; and
- ix. Trees next to parks or other open space areas.

Facts: Trees #6 and #10 are viable and exceptional. Removal of them would not demonstrate retention following the code's prioritized factors.

"c. Retain a forested look, value, and function after development or modification. Trees should be protected within vegetated islands and stands rather than as individual, isolated trees scattered throughout the site."

Facts: Removal of exceptional Trees #6 and #10 would detract from the forested look of Parcel 1515 and of the neighborhood.

“d. Consider tree protection opportunities in the design and location of building footprints, parking areas, roadways, utility corridors and other structures.”

Facts: A reasonably sized single-family residence could be placed on Parcel 1515 while remaining outside the ICRZs of both Trees #6 and #10. However, a driveway and utilities would have to traverse through one or both of their ICRZs.

“e. Provide grading plans that accommodate existing trees and avoid alteration to grades around existing significant trees.”

Facts: Grading plans have not been presented. The Examiner believes that it is premature to require grading plans when Crane does not know the extent to which he will be allowed to affect exceptional Trees #6 and #10.

D. “4. Conditions necessary to safeguard trees identified for protection.”

Facts: This will be addressed in the Conclusions of Law, below.

E. “5. A notice on title, in the form required by LFPMC 16.16.190, shall be recorded by the applicant disclosing the permit and associated tree retention conditions as required by this chapter. A notice on title is required for all major permits associated with major development activity, and for major permits which would cause the property’s canopy coverage to fall below the canopy coverage goal.”

Facts: A notice on title would be recorded only if a major tree permit were approved. The requirement to record the notice is mandatory and would not need to be listed as a special condition on an REU.

F. “6. Conditions required by the city’s qualified arborist to safeguard at-risk trees throughout the development process.”

Facts: This will be addressed in the Conclusions of Law, below.

G. “7. Conditions that require sidewalks, structures, utilities, and roadways to be set back at least five feet from the CRZ, except where such structure is cantilevered or otherwise raised above the ground’s surface so as not to disrupt the tree’s roots, and the proposed construction is not likely to result in conflicts between the tree and the sidewalk, driveway, structure, or utility that would necessitate the tree’s removal during its normal lifespan.”

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Facts: This requirement simply cannot be met: A driveway and utilities cannot be constructed to serve a residence south of the ICRZs without having some impact on the root systems in the ICRZs. This is a requirement for which a REU is necessary.

H. “8. Conditions to allow trenching, construction, or an alteration of grades between the five-foot setback from the critical root zone (CRZ) and the interior critical root zone (ICRZ) of a protected tree; provided, that the tree protection plan approved by the city’s qualified arborist demonstrates that the proposed activity will not adversely affect the long-term viability of the tree.”

Facts: This requirement simply cannot be met either: A driveway and utilities cannot be constructed to serve a residence south of the ICRZs without having some impact on the root systems in the ICRZs. This is a requirement for which a REU is necessary.

9. Lake Forest Park’s Responsible Official has determined that the requested TCPE REU is categorically exempt from the State Environmental Policy Act (“SEPA”) threshold determination process pursuant to WAC 197-11-800. (Exhibit 12)
10. The record contains testimony and evidence from five ISA Certified Arborists: Jorgen Olson, Crane’s consultant; Paul Thompson, the City’s consulting arborist; Kathy Holzer, a neighbor and opponent of removing Trees #6 and #10; Scott Baker, consulting arborist for the Lake Forest Park Stewardship Foundation; and Tom Hanson, who visited the site presumably at Crane’s request. Only Olson and Hanson believe that exceptional Trees #6 and #10 should be removed. (Exhibits 2.13 & 2.14; 5.6 - 5.14; 8; 14; 19.3 – 19.13; 27; 30; 40; 59; 68) The Examiner finds Thompson’s, Holzer’s, and Baker’s opinions to be more objective and credible.
11. The existing side sewer for the residence to the east (“Evans”) crosses through the eastern edge of Parcel 1515. Crane and Evans have discussed the possibility of sharing a portion of that sewer line so that Crane could avoid having to trench near Tree #10. One option runs the sewer line through the overlapping portions of the two ICRZs, in the outer edge of each ICRZ. While they have yet to reach a firm agreement, Evans testified that he is still open to further discussions. (Exhibits 48; 50; 60; 64; 71; and testimony)
12. Exceptional Tree #10 contained a presumed Osprey nest. Neighbors claim it was an active nest. The Washington Department of Fish and Wildlife (“WDFW”) says that Osprey, a migratory bird species, do not return to this area “until about mid-April”. (Exhibit 41.2) On or about April 9, 2018, Crane applied to WDFW for a permit to remove the nest. A WDFW Wildlife Biologist visited the site in or around the week of April 10, 2018, and did not observe any Osprey in the nest. On April 23, 2018, WDFW issued an Inactive Nest Removal Permit to allow removal of that nest. Crane’s arborist removed the nest on or about April 24<sup>th</sup>. (Exhibits 6; 20; 29; 30; 31; 37; 38; 41; 43; 44; 75, EE Exhibit 024)

13. Any Conclusion of Law deemed to be a Finding of Fact is hereby adopted as such.

## **LEGAL FRAMEWORK <sup>9</sup>**

The Examiner is legally required to decide this case within the framework created by the following principles:

### Authority

An TCPE REU is the functional equivalent of a Type I application, which is subject to an open record hearing before the Examiner who makes a final decision on the application. The Examiner's decision is subject to the right of reconsideration and appeal to Superior Court. [LFPMC 16.16.250(B); LFPMC 16.26.030(A), .100, and .110; and Hearing Examiner Rule of Procedure 504]

A Type I application that complies with the applicable decision criteria shall be approved; provided, that the examiner may modify or condition a proposal to ensure conformity with the relevant decision criteria.

[LFPMC 16.26.110(A)]

### Review Criteria

The review criteria for a TCPE REU are contained in LFPMC 16.14.100 and have been set forth in the Findings of Fact, above.

### Vested Rights

The City does not have a vested rights provision within its land development regulations. The state's judicially-created vested rights doctrine has never been applied to applications which seek exception from the established rules (such as Variances, REUs, and Public Agency Utility Exceptions).

### Standard of Review

The standard of review is preponderance of the evidence. The Applicant has the burden of proof.

## **CONCLUSIONS OF LAW**

1. The REU process is akin to the zoning variance process. Both are intended to provide relief to a land owner who finds that literal compliance with regulations would render a parcel unbuildable. In order to avoid a "takings" claim, municipalities routinely include variance and REU processes in their regulations. Most, like the one involved in this case, provide that the applicant is to be afforded the

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minimum relief necessary from the regulations upon a showing that the parcel would otherwise be economically unusable.

2. The nonconforming status of Parcel 1515 (substandard street frontage and substandard lot area) is not an impediment to approval of a REU. The REU analysis proceeds normally, the lot is just smaller to start with.
3. It is indisputable that compliance with all requirements of Chapter 16.14 LFPMC would render Parcel 1515 economically unusable. Removal of viable exceptional trees is strictly prohibited. [LFPMC 16.14.060(B)] Disturbance of the CRZ and ICRZ is severely limited. Given the location of Trees #6 and #10 and the expanse of their CRZs and ICRZs, the unencumbered southern portion of Parcel 1515 cannot be reached if all restrictions are enforced.
4. However, the Examiner is not at all convinced that either Tree #6 or Tree #10 need be removed to allow a reasonable use to be made of Parcel 1515. The preponderance of the testimony and evidence from Certified Arborists in this record indicates that both trees are viable; any problems with their crowns can be remedied by normal arborist maintenance procedures.
5. The combined CRZs of Tree #6 and Tree #10 encumber a significant portion of Parcel 1515. (Exhibit 53) It is not so much that the remaining area is too small for a reasonably sized residence, it is that the configuration of the available area, coupled with side setbacks and storm drainage requirements severely limits construction in that small area.
6. If only the ICRZs are protected, there is plenty of room south of the ICRZs within which to construct a residence. Since the residence can be built south of the ICRZs of Tree #6 and Tree #10, the only relief needed is for a way to get utilities and a driveway to the residence.
7. The relief that is minimally necessary is to allow controlled, minimized disturbance within the ICRZ of Tree #6 and Tree #10 for installation of utilities and construction of a driveway.
8. Crane's current Option 2 places a portion of a proposed two-car garage within the ICRZ of exceptional Tree #10. The hearing included discussion suggesting that impact could be reduced by converting the proposed garage into a carport with a pervious floor. Crane objected to that concept. (Some witnesses went so far as to suggest that Crane not be allowed to have a garage; that cars could park on the street or in the northeast corner of the property. The Examiner cannot support either suggestion. First, City code requires every new single-family residence to have at least two off-street parking spaces. Off-street means out of the right-of-way, not just off the edge of the pavement. Second, if the parking were to occur in the northeast corner of Parcel 1515 it would be on top of the ICRZ of both Tree #6 and Tree #10.) The Examiner concludes that no reason exists to place any portion of a garage/carport within the ICRZ of either Tree #6 or Tree #10. Sufficient area is available outside both ICRZs to configure a residence with a two-car garage. Therefore, the Examiner concludes that Option 2 is not approvable.

9. “No-dig” options for installation of utilities and a driveway are available. The Examiner is not required to choose from among those options for Crane. Crane must obtain a Major Tree Removal Permit. His application for that permit will have to be very specific as to how he intends to comply with applicable provisions of Chapter 16.14 LFPMC. City staff (and its consulting arborist) will be able to review those plans and condition the permit as called for by LFPMC 16.14.070(D).

That said, it is appropriate based upon the preponderance of the evidence, to conclude that the driveway should be of minimal width where it passes through the ICRZs, that the driveway should be of “no-dig” design, and that the buried utilities should be located beneath the driveway (to the extent feasible) so as to minimize the area of the ICRZs affected by development.

10. After considering the conditions recommended by Planning in the context of all other testimony and evidence in the hearing record, the Examiner concludes that the recommended conditions of approval as set forth in Exhibit 66<sup>10</sup> are reasonable, supported by the evidence, and capable of accomplishment with the following changes:

- A. A new condition will be inserted before current Recommended Condition 1 which will identify the code provisions from which relief is being granted.
- B. Recommended Conditions 1 and 2. The references to “CRZ” will be changed to “ICRZ.” It would be a practical impossibility to avoid disturbance of roots outside of the ICRZ.
- C. Recommended Condition 2. This condition will be amended to require that driveway width be minimized to the greatest extent feasible.
- D. Recommended Conditions 1, 6, and 7. The word “applicant” will be replaced with “permittee.” A land use approval, including a REU, “runs with the land.” That means that the approval remains valid regardless of whether the land is subsequently sold. Many people interpret the word “applicant” to refer only to the party which initially sought the approval. In order to ensure that no confusion occurs in the future, a word which means the holder of the approval will be substituted for the word “applicant.”
- E. Recommended Condition 3. Everything after “100% OUTSIDE ICRZ” will be deleted: There is no justification to place any part of a garage or carport within the ICRZs of exceptional Tree #6 and exceptional Tree #10.

The reference to Exhibit 65.2 will be omitted. The “shaded area ... that is labeled as ‘FOOTPRINT 100% OUTSIDE ICRZ’” on that exhibit is wholly contained within the

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<sup>10</sup> The Examiner concludes that the additional condition suggested in Exhibit 72 is unnecessary: The City’s arborist testified that Tree #10 is viable. Given that testimony, the Level 3 analysis of Tree #10 recommended in Exhibit 72 is not needed.

building footprint configuration proposed by Crane in that exhibit. There is no reason to limit the building footprint to that one configuration. The limitation simply needs to prevent placement of the building within the ICRZ of exceptional Tree #6 and exceptional Tree #10.

- F. Recommended Condition 4. The verb form “should” is inappropriate in any condition. A condition requires compliance with some special requirement. The word “should” is only suggestive; it says the permittee ought to consider doing something. That is not a condition because the permittee could simply say “I choose not to do it” and the agency could not require that the action be taken. If something is important enough to include in a condition, it needs to be stated in a mandatory fashion. Therefore, “should” will be replaced with “shall.”
- G. Recommended Condition 10 will be deleted since the approval is not allowing removal of either exceptional tree.
- H. Recommended Condition 11. This condition will be omitted. Recordation of a notice on title is a requirement for all Major Tree Permits associated with major development activity. [LFPMC 16.14.070(D)(5)] Since it is a mandatory code requirement it need not be listed as a special condition on this REU. Perhaps even more importantly, this REU is not a Major Tree Permit. Rather, it is an authorization to not fully comply with the requirements of a Major Tree Permit. When Planning issues the required Major Tree Permit it can (and must) require recordation of the required notice. And at that time all the specific requirements of that permit will be known and can be enumerated in the notice as contemplated by the code. If a notice were required for this REU, a second notice would have to be required for the Major Tree Permit, potentially creating confusion.
- I. A few minor, non-substantive structure, grammar, and/or punctuation revisions to Recommended Conditions 1 - 4 and 6 - 9 will improve parallel construction, clarity, and flow within the conditions. Such changes will be made.

11. Any Finding of Fact deemed to be a Conclusion of Law is hereby adopted as such.

## DECISION

Based upon the preceding Findings of Fact and Conclusions of Law, and the testimony and evidence submitted at the open record hearing, the Examiner hereby **GRANTS** the Tree Canopy Protection and Enhancement Reasonable Economic Use Exception application under file number 2018-REU-0001 **SUBJECT TO THE ATTACHED CONDITIONS.**

Decision issued October 24, 2018.

\s\ John E. Galt (Signed original in official file)

John E. Galt  
Hearing Examiner

### **NOTICE OF RIGHT OF RECONSIDERATION**

This Decision is subject to the right of reconsideration pursuant to Hearing Examiner Rule of Procedure 504. Reconsideration may be requested by the applicant, appellant, a party of record, or the City. Reconsideration requests must be filed in writing with the City Clerk within seven (7) calendar days of the date of mailing of this Decision. Any reconsideration request shall specify the error of law or fact, procedural error, or new evidence which could not have been reasonably available at the time of the hearing conducted by the Examiner which forms the basis of the request. Any reconsideration request shall also specify the relief requested. See Hearing Examiner Rule of Procedure 504 for additional information and requirements regarding reconsideration.

### **NOTICE OF RIGHT OF APPEAL**

This Decision becomes final and conclusive as of the eighth calendar day after the date of mailing of the Decision unless reconsideration is timely requested. If reconsideration is timely requested, the Examiner's order granting or denying reconsideration becomes the final and conclusive action for the City. The final action may be reviewed in Superior Court pursuant to the procedures established by Chapter 36.70C RCW, the Land Use Petition Act. Section 36.70C.040 RCW requires that any appeal be properly filed with the Court within 21 days of the issuance of the final City Decision. Please refer to Chapter 36.70C RCW for further guidance regarding judicial appeal procedures.

The following statement is provided pursuant to RCW 36.70B.130: "Affected property owners may request a change in valuation for property tax purposes notwithstanding any program of revaluation."

**CONDITIONS OF APPROVAL  
2018-REU-0001  
STEPHEN CRANE**

This Tree Canopy Protection and Enhancement Reasonable Economic Use Exception is subject to compliance with all applicable provisions, requirements, and standards of the Lake Forest Park Municipal Code, standards adopted pursuant thereto, and the following special conditions:

1. This Tree Canopy Protection and Enhancement Reasonable Economic Use Exception is expressly limited to the following relief:
  - A. LFPMC 16.14.070(D)(3)(7) to allow “no-dig” installation of a driveway across the outer edges of the interior critical root zones (“ICRZs”) of Tree # 6 and Tree #10, generally in the area of the ICRZs overlap.
  - B. LFPMC 16.14.070(D)(3)(8) to allow “trenchless” installation of underground utilities through the outer edges of the ICRZs of Tree # 6 and Tree #10, generally in the area of the ICRZs overlap.

The City’s conditioning authority under Chapter 16.14 LFPMC is not otherwise limited.

No other relief is either expressed or implied. In particular, removal of exceptional Tree #6 and exceptional Tree #10 is not approved.

2. The permittee shall install all utilities and infrastructure in a manner that avoids damage to roots in the ICRZ of retained exceptional Tree #6 and exceptional Tree #10. If feasible, underground utilities shall be placed beneath the driveway.
3. Driveway construction shall incorporate low impact development techniques, specifically, a no-dig driveway within the ICRZ of all protected trees. Driveway width shall be minimized to the greatest extent feasible. The City shall have final approval of the construction method for the driveway.
4. The building footprint shall be limited to the area outside the ICRZ of exceptional Tree #6 and exceptional Tree #10.
5. Trenchless or low impact excavation techniques, i.e. dry-vacuum or hydro-vacuum in combination with pneumatic excavation tools, or hand-digging, shall be used to install underground utilities. Pit excavations for starting and receiving trenchless machinery shall be, wherever practicable, located outside the ICRZ of Tree #6 and Tree #10. Trenchless alignment shall place the utilities the furthest distance possible from Tree #6 and Tree #10.

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6. Appropriate tree protection measures shall be approved by the City and implemented prior to any staging of equipment and materials. Approved protection measures shall be maintained throughout construction. Any changes to the tree protection measures shall require City Arborist approval. A qualified arborist shall be on-site during all construction activity within the ICRZ of all protected trees and shall submit weekly reports to the City regarding the health and long term sustainability of all protected trees.
7. The permittee shall provide a performance security (bond) prior to development permit issuance for the purpose of securing the health of both exceptional Tree #6 and exceptional Tree #10 during the construction phase of the project. The value of the bond shall be based on the City Arborist's Landscape Tree Appraisal value which is included in Exhibit 14: \$39,215.00 for exceptional Tree #6 and \$23,808.00 for exceptional Tree #10.
8. Prior to release of the performance bond, the permittee shall post a five (5) year maintenance bond, ensuring the long-term and sustainable health of the Exceptional Trees based on the Landscape Tree Appraisal value. The cost of the bond shall be determined by the City Arborist. During the maintenance period, the permittee shall provide annual reports prepared by a qualified arborist on the trees' condition.
9. The permittee shall provide temporary irrigation to exceptional Tree #6 and exceptional Tree #10 during construction and during the five (5) year maintenance bond period, if determined necessary by the monitoring arborist.