

1 BEFORE THE HEARING EXAMINER FOR THE CITY OF EDMONDS

2
3 RE: Estate of Margot Birlenbach, Personal)
4 Representative Sabine Birlenbach)

APPEAL OF NOTICE OF VIOLATION AND
MONETARY FINE AND CONDITIONAL
USE PERMIT

5 Appeal)

6 APL20110002 and APL20110003)
7

8 **Summary**

9 Sabine Birlenbach appeals a Notice of Violation and Monetary Fine and a conditional use permit,
10 both issued as a result of the unauthorized cutting of 26 trees in critical areas or their buffers. The
11 fines are reduced from \$12,500 to \$3,000.00. Restoration will only be required for trees that will
12 perish as a result of the Appellant's actions, as determined by Peter Blansett. City staff will be
13 authorized to provide for substitute mitigation if Mr. Blansett is able to demonstrate to the satisfaction
14 of staff that small species trees required by the conditional use permit are not reasonably available.
15 Compliance deadlines are tolled for the duration of this appeal. All other portions of the Notice of
16 Violation and conditional use permit are sustained.

17 **Testimony**

18 *[This summary of testimony is not to be construed as any finding made by the Examiner. It is merely a
19 summary of what was said so that the reader may understand what was presented.]*

20 **City Testimony**

21 Jennifer Machuga, associate planner for the City of Edmonds, stated the City first received a
22 request in January, 2009 regarding a proposal to reduce the crowns of 26 previously topped trees
23 on property owned by Steve and Judy Lee (address 16520 72nd Ave West). Ms. Machuga
24 testified that Ms. Birlenbach had recently inherited a property adjacent to the Lee's property at
25 (16510 72nd Ave West) and was the individual who submitted the request. Ms. Machuga
26 remarked that city staff asked Ms. Birlenbach for additional information in regards to the request
so Ms. Birlenbach submitted arborist and biologist reports done by Sean Dugan with Tree
Solutions and Colin McDonald with Restoration Logistics, respectively. These reports and
addendums were submitted. The reports stated that the crown reductions should be considered
routine maintenance because the trees had been topped in the past. Ms. Machuga noted that in
her work as a planner for the city, generally, arborists have not recommended crowning because
it hastens the demise of trees, and the city has not supported crowning over the years. However,
she noted, arborists recommend that in cases where trees have already been topped, crowning

1 should be regular maintenance because the original topping creates a weak spot in the tree and
2 crowning reduces pressure on the tree core. Following review of the reports, the city issued
3 approval for the crowning maintenance on September 18, 2009, according to Ms. Machuga. She
4 added that the site of the trees is adjacent to several critical areas including a wetland habitat
conservation area, erosion hazard area, a stream, and a land site hazard area, so work on the site
is subject to the critical areas code (in addition to the tree-cutting code).

5 Ms. Machuga stated that following the mitigation work, staff was called out to inspect the site
6 (photos were taken). Ms. Machuga noted she went out to the site on April 22, 2010. Code
7 enforcement personnel also inspected the site on the same date, she added. Ms. Machuga
8 remarked that photographic evidence demonstrates that several trees were cut down to tall
9 stumps, more than just the approved crowning. The extent of the cutting is evidenced in photos
10 that show trees completely missing their tops and limbs and large piles of debris, she said.
11 Following visiting the site, staff sent a letter to Ms. Birlenbach stating that they found the work
12 done exceeded what is considered routine maintenance, she noted. Ms. Machuga said that the
13 letter reinforced that the original approval from September 2009 made it clear no cutting of the
14 trees could be done, just maintenance crowning. She noted that the letter was sent May 13, 2010.
15 Ms. Machuga testified that Ms. Birlenbach responded to the letter sent by the city by submitting a
16 conditional use permit application which was required as a post-event application (which is not
17 normally permitted but is the process for reviewing mitigation of the site). The presence of the
18 critical areas around the site required compliance with the critical area code, and the critical area
19 code requires that any alteration to a critical area require mitigation and restoration of the site,
20 according to Ms. Machuga. She stated that in Ms. Birlenbach's application she submitted three
21 reports, including one by a geo-technical engineer, a biologist, and an arborist, which provided
22 detailed recommendations for the restoration of the site. She added that the arborist report also
23 detailed the work that was done to each tree and how that work exceeded what was initially
24 approved.

25 According to Ms. Machuga, as far as the appeal of the notice of violation, fines were assessed in
26 the amount of \$12,500. She noted that the tree cutting code was recently updated by the city
council and now fines are as much as \$3,000 per tree outside critical areas and \$9,000 per tree in
critical areas, but the code in effect of Spring 2010 specified that maximum penalties for tree
cutting should be no more than \$500 per tree which shall be tripled to a maximum of \$1,500 for
trees in critical areas/buffers. As detailed in the critical area report, all of the trees in this case
were located in critical areas or critical area buffers, according to Ms. Machuga. She testified
that the city reduced the fine from the maximum \$1,500 to \$500 dollars per tree, which yielded a
total of \$12,500 in fines. Ms. Machuga noted that the fines were reduced from the maximum
because Ms. Birlenbach contacted the city in the beginning and has been working in good faith
with the city. She stated that, due to the scope of the violation, the city felt this fine (\$12,500)
was reasonable, and it was reviewed by the planning division, city attorney, and the mayor. The
city also looked at other recent tree-cutting violation fines for comparison and found that in one
case the individual was fined the maximum \$1,500 dollars for 7 trees (resulting in a \$10,500
dollar fine being collected) and another individual, who also was working in good faith with the

1 city, was fined \$500 for 8 trees (resulting in a \$4,000 fine being collected), according to Ms.
2 Machuga.

3 As far as the appeal of the conditional use permit, Ms. Machuga stated, two of the items that
4 were discussed in Ms. Birlenbach's appeal were the requirement for the performance bond and
5 the maintenance bond. Both of these came from the city code, ECDC 18.45.075 requires a
6 performance bond and ECDC 23.40.290 requires a maintenance bond for mitigation work, Ms.
7 Machuga noted. Ms. Machuga testified that in Ms. Birlenbach's reports (arborist and biologist)
8 the experts discuss the need for maintaining the new plantings for a few years and setting a
9 threshold for ensuring the new plants survive (the purpose of the maintenance bond). In regards
10 to the restoration requirements, ECDC 23.40.320 defines an alteration as any human-induced
11 action that changes the area, Ms. Machuga said. Ms. Machuga stated that the code notes when a
12 critical area or buffer has been altered, the work shall stop in the critical area and the area must
13 be restored. The reports submitted by Ms. Birlenbach were utilized to determine appropriate
14 mitigation for the site, according to Ms. Machuga. She stated that the staff report discusses the
15 mitigation of the site and what is required for restoration. A total of 52 replacement trees are
16 required to be planted with a variety of species (as recommended by the arborist and biologist
17 report), she noted.

18 Jeff Taraday, City Attorney, referenced the Appellant's wetland report (part of exhibit 8,
19 attachment 5, page 5), which proposes to plant 50 new trees in the area. Mr. Taraday wished to
20 note that the applicant is now appealing something she proposed in her own application. He also
21 testified that the City is required to work within the confines of the best available science and
22 essentially gave the benefit of the doubt to Ms. Birlenbach's scientists that she hired. Mr.
23 Taraday reiterated that it is Ms. Birlenbach's scientists that the City is relying upon to determine
24 appropriate mitigation. He said that all of the mitigation recommendations were based on
25 scientific study and were not randomly chosen.

26 Mr. Taraday also noted that while the City believes Ms. Birlenbach is working in good faith to
deal with the situation, the City feels it has already taken her good faith into account when
assessing her fines and mitigation. He said that the amount of the fine could have been as much
as \$37,500, but was reduced down to \$12,500 because of Ms. Birlenbach's compliance and good
faith. He further stated if current code was being used, the fine could have been tripled, but the
City is using the old city code. Recent city council action raising these fines demonstrates the
City's concern over the issue of tree-cutting and critical area protection, according to Mr.
Taraday. The fine imposed should represent both the extent of the applicant's actions and
current public policy, he said.

Upon questioning by the hearing examiner, Mr. Taraday noted that the City lowered the fine
penalty significantly in light of Ms. Birlenbach's initial attempts to comply with City Code in
seeking approval for tree maintenance; however, the City has no knowledge of whether the
applicant knew the extent of tree-cutting that would be done by her contractors. He stated he

1 does not believe it is incumbent upon the City to find out if Ms. Birlenbach or the contractor is at
2 fault.

3 Applicant Testimony

4 Ms. Birlenbach, Appellant, began her testimony by giving the history of her property (16510 72nd
5 Ave West) which she stated was owned by her parents. She said that her parents had a property
6 agreement with the Lea's that allowed for the cutting of trees and topping of evergreens that was
7 put into effect in the 1970s. Under this property agreement, she noted, 26 trees were topped and,
8 at that point, as far as she knows, this area was not considered to be a critical one. Later, it was
9 classified as a critical area, according to Ms. Birlenbach, so she requested a permit in 2009 to
10 perform crowning maintenance on the trees. She stated she made it very clear to her contractors
11 what routine maintenance of the trees was approved by the city. She said she was specific that
12 they should only top the trees; however, the contractors went way above the scope of what she
intended. She added that she has been attempting to contact the company that did the cutting (the
contractors), but they have been non-responsive. She further stated that the tree-cutting company
said they were familiar with the city of Edmonds codes before they began, but based on their
actions, it is clear they were not. Ms. Birlenbach stated that she believed it should be the tree
contractors in her position.

13 Ms. Birlenbach testified that after being topped before, the trees remained healthy and still grew.
14 She said that she took pictures in June 2011 (submitted in her repeal request) that, when
15 compared with the pictures the city took in April 2010, demonstrate how much growth has
16 occurred, despite the large amount of cutting. None of the neighbors have had any issues or
17 given any responses to the trees being cut down, she noted. Ms. Birlenbach testified that she
18 feels she has satisfied all of the city requests at great expense to herself. She observed that she
feels she is being penalized for following the rules. The mitigation of planting specimen trees in
an area that has a lot of vegetation and will never be developed does not make sense to her and
having to post the bond for three years also does not make sense, she noted.

19 Pete Blansett, expert witness and certified arborist, stated he has thirty-five years experience and
20 worked for the city of Edmonds doing tree evaluations in the 1980s. He stated that he is a
21 forester and does work with nature conservancies, so he understands the concept of protecting
22 green spaces. He stated that Ms. Birlenbach has been upfront throughout the process and her
23 appeal is an attempt to reduce the payment fees. He noted that he believes Ms. Birlenbach when
24 she says she did not authorize the amount of cutting that occurred. He testified that the site is a
25 critical area, but it is not an exciting critical area. He stated it is not a pristine, scenic forest, and
26 the trees are probably less than 40 years old. Red-Alder trees, which make up most of the subject
trees, are not a long-living species, and the site has gone through periods of being occupied by
nothing but brush because of the short-tree-life (he submitted a photo from the 1970s of the area
clear of trees). The mitigation being recommended attempts to change from Red-Alder trees to
other trees that will thrive better, he noted. He said that Ms. Birlenbach's proposal is in
alignment with the mitigation recommendations, and just asks for lessened fines. In regards to

1 the city's testimony about comparable tree-cutting violation fines, Mr. Blansett asked if those
2 trees had also been previously topped like the ones cut-down by Ms. Birlenbach's contractors.
3 The trees cut-down probably would not have lived another two-decades, in his opinion, because
4 they had been previously topped. He noted that the trees have vigorously re-sprouted since the
5 city inspection in April 2010 and new crowns are being grown. He did testify that a few of the
6 cut-down trees have not re-sprouted, but in his estimation 85% of the trees have re-sprouted and
7 will probably live another decade.

8 In Mr. Blansett's observation, the proposed fees are not reasonable being that the fees on the Lea
9 property reach almost more than the property is worth. In regards to re-planting, he proposed that
10 smaller nursery stock be used with a maximum height of 4ft rather than 6ft for the proposed 39
11 smaller trees. Additionally, the recommendation for debris abatement does not make sense to
12 him because these are deciduous trees, not coniferous ones, so there is not really a fire safety
13 hazard, according to Mr. Blansett. Tree solutions recommended the debris abatement for safety
14 reasons, but, he said, in his opinion there are no safety issues. He did agree that some irrigation
15 is needed, but low cost methods should be used such as polymer-salt beds and gaiter bags. He
16 stated that he does not agree that all three of the specialists (geo-technical engineer, arborist, and
17 biologist) should have to write a letter stating the compliance with mitigations; he believes that
18 only one or two of them is needed. He noted his main point is that the trees are not dead and that
19 he is not sure the intent of the tree-cutting fines is to go after people for prudence. Finally, he
20 said Ms. Birlenbach should not be responsible for replacing the 15 trees that were trimmed
21 properly (aka according to city standards).

22 In conclusion, Mr. Blansett reiterated that this is not a scenic, pristine site. The storm-water line
23 runs directly to the stream adjacent to the area and there was open-trenching done in the area.
24 This is not a well-protected area, he said.

25 On cross-examination by Jeff Taraday, Mr. Blansett stated that he has not prepared a written
26 report, but he has written a letter to Ms. Birlenbach with some solutions. He noted he has not
prepared an alternate mitigation plan. He testified that he is not taking the position that
mitigation should not be required.

27 Public Testimony

28 Lora Petso, member of the public, stated she is testifying as a citizen, not a city council member
29 or as a lawyer. She stated she supports the city of Edmonds efforts to regulate the process of
30 tree-cutting and recently voted as a city council member to increase fines for tree-cutting
31 violations. However, she stated, she recently visited the property that is the subject of the
32 hearing and has concluded that the mitigation recommendations in the city's decision will be
33 environmentally damaging. She testified that during her visit she saw the ground was completely
34 covered with vegetation and there was green growth on trees that had obviously been trimmed.
35 She observed that she does not believe 50 trees could be planted on the site without damaging the
36 existing growth with excessive clearing. Ms. Petso stated that ECDC authorizes tree replacement

1 when trees have been completely removed, but in this case the trees were only trimmed beyond
2 the scope of the permit. In finding of fact #4, city staff noted ECDC 18.45 and 23.40-90 as
3 justifying the replacement trees, but staff failed to find any section that actually authorizes the
4 replacement planting, according to Ms. Petso. On page 5 of the 15-page Tree Solutions arborist
5 report, she noted, the arborist cited 18.45.075 which provides for new plantings “for each tree
6 removed” and 23.40.220 which provides “landowner should replace any trees that removed...”
however, she said, in both cases, no trees were removed so the code sections should not apply.
Ms. Petso noted that the Edmonds code defines what “removed” means in 18.45.0040(O), and it
means removal that results in death.

7 Ms. Petso further stated that the city’s finding of fact #5 is incorrect because it cites ECDC
8 18.45.075, but it should be 18.45.065. She also testified that finding of fact #6 is incorrect which
9 cites 23.40.090 as finding a bond and applies only to mitigation completed prior to plat activity;
10 this is not a development proposal so this section does not apply, according to Ms. Petso. She
reiterated that no trees were removed, so these sections do not apply and replacement plantings
cannot be required.

11 Furthermore, Ms. Petso testified that ECDC 23.40.000(f) states that Title 23 should be
12 administered with flexibility and site-specific characteristics; in this case, adding new trees to the
13 site will do more harm than good. She stated that, according to 23.41.20, restoration of the site is
14 more important than replacement or enhancement. She concluded that the fact that nature
restored the site, rather than man, does not mean the city should damage the site again by re-
planting trees.

15 Roger Hertrich, member of public, noted he is running for Mayor of Edmonds this year, but is
16 speaking as a citizen. He stated he is interested in protecting the environment, but is also
17 concerned with “over-zealous” rules and penalties by the city. He testified that Ms. Birlenbach
18 has followed all of the city’s rules and regulations during this process, and the results of what
19 happened in the tree-cutting are not as extreme as the city portrayed. Mr. Hertrich commented
20 that there has been re-growth in the area, and the trees removed are more like bushes than trees in
21 their ability to grow back. The roots of these trees (Red-Alder trees) were not destroyed so they
22 are able to grow back (unlike an evergreen), according to Mr. Hertrich. The city is concerned
23 about destroying the environment, but by bringing the trees down more sunlight can reach the
trees, creating a healthier habitat, he said. He further remarked that the Edmonds city code is
based on removal, not on trimming. There has been no loss, so there should be no fine,
according to Mr. Hertrich. He said he believes the staff made an arbitrary decision because they
do not have enough guidelines. He concluded that the city staff should apologize to Ms.
Birlenbach for their misinterpretation of city code.

24 Carl Brecht, member of public, agreed with Ms. Petso and Roger Hertrich. He stated that there
25 has been tremendous re-growth on the site. He also noted that the storm-pipe that goes into the
26 property does more damage to the land than any tree-cutting has done.

1 Alvin Rutledge, member of public, stated that the city raised the fine of tree-cutting because it
2 believed it would lessen the number of tree-cutting cases. The applicant did contact the city to
3 come out and review the work being done, he noted. The city needs to go out and review the
4 sites more during the permit process in order to avoid these problems in order to avoid the costs
5 of having hearings like this one, according to Mr. Brecht.

6 City Rebuttal

7 Jeff Taraday, City Attorney, addressed concern over the word “removed” and whether the trees
8 cut should be considered “removed.” He stated that there has not been enough consideration of
9 the critical area codes and the term “alteration,” because the city has a multi-pronged violation
10 that considers both the city code and critical area codes. He stated he does not believe anyone is
11 contesting that there has been “alteration” to the site. Alterations include cutting, pruning, and
12 topping, he noted. There is no doubt that there has been alteration of a critical area, according to
13 Mr. Taraday. ECDC 23.40 requires that proper authorization be granted for critical area changes,
14 he noted, and Ms. Birlenbach’s cutting activity was not authorized. ECDC 23.42.240 says when
15 a critical area or buffer has been altered, the director should have the authority to order
16 restoration, according to Mr. Taraday, so the city’s re-planting requirements are in line with code.
17 He further noted that cutting the trees down for more sunlight fails to protect the stream in the
18 critical area because the water gets too hot and evaporates. The reports considered by the
19 hearing examiner need to be prepared by qualified scientists, he noted. Mr. Taraday also
20 reiterated that Ms. Birlenbach had the three original reports conducted, and she is essentially
21 appealing her own approval requirements from these reports. New expert testimony from this
22 hearing does not provide a real mitigation plan and is asking for the hearing examiner to create
23 his own mitigation plan, Mr. Taraday noted. In conclusion, he stated, that the city cannot
24 establish the precedent that applicants will not be held responsible for actions of the contractors
25 they hire. He noted that this would make it impossible to enforce city code because the City
26 needs to be able to hold property-owners responsible for what occurs on their property, even if
contractors are not following instructions, as the city cannot be responsible for chasing down
contractors. He finalized by saying that property-owners are responsible for the employees they
hire.

20 Jen Machuga, associate planner for city of Edmonds, noted that the City did receive Mr.
21 Blansett’s letter to Ms. Birlenbach, but it was not a mitigation plan. Ms. Machuga stated she sent
22 a letter in response to Ms. Birlenbach, in which she offered that one cohesive report from one
23 firm would meet the requirement for compliance-approval writings from a geo-technical
24 engineer, arborist, and biologist.

23 Applicant Rebuttal

24 Mr. Blansett, expert witness for applicant, stated his prior testimony did not mean he expected
25 the hearing examiner to create his own mitigation plan. He contended that he wished for the
26 city’s mitigation plan to be implemented with some minor changes in order to lessen Ms.

1 Birlenbach's fee burden. He testified that he gave specific changes (such as tree dimensions) that
2 should be made to the current mitigation plan. He remarked that companies like Tree Solutions
3 are just mimicking city code, instead of using scientific solutions/decisions of their own. He also
4 reiterated that Ms. Birlenbach did receive an initial permit, and the problem was that she
5 exceeded the permit. He concluded that once you top a tree, you have to keep topping the tree
6 and that is all Ms. Birlenbach was attempting to do. The trees cut have re-sprouted and the
7 habitat that was being shaded is not significant, according to Mr. Blansett.

8 Ms. Birlenbach, applicant, stated that the situation on the site has improved with lots of re-
9 growth since the studies by the geo-technical engineer, biologist, and arborist (that were the basis
10 for the mitigation plan) were conducted. She once again repeated that she had no intention of the
11 trees being cut so much, and her contractors did not follow her instructions and lied to her about
12 being familiar with the city of Edmonds code.

13 Exhibits

14 The May 12, 2011 staff report along with its attachments were admitted into the record during
15 the hearing. Attachments 1-8 to the staff report were admitted as corresponding Exhibits 1-8.
16 Exhibits admitted following the hearing are below:

- 17 Exhibit 9: Six photographs from April 2, 2010 City site visit
- 18 Exhibit 10: June 9, 2009 Tree Maintenance Report from Tree Solutions
- 19 Exhibit 11: May 25, 2008 Critical Areas Reconnaissance from Restoration Logistics
- 20 Exhibit 12: July 2, 2009 Tree Solutions Addendum
- 21 Exhibit 13: August 6, 2009 Supplement to Restoration Logistics report
- 22 Exhibit 14: August 5, 2009 Addendum to Tree Solutions report
- 23 Exhibit 15: September 18, 2009 City Critical Areas Reconnaissance Report
- 24 Exhibit 16: Written statement from Lora Petso
- 25 Exhibit 17: August 17, 2011 Memo from Jeff Taraday
- 26 Exhibit 18: August 24, 2011 Response from Appellant, including photographs

Findings of Fact

Procedural:

1. Appellant. The Appellant is the Estate of Margot Birlenbach, with Sabine Birlenbach as personal representative.
2. Hearing. The Examiner held a hearing on the appeals at 3:00 pm on August 11, 2011, in the City of Edmonds City Council Chambers. The hearing was left open one week for written

1 comments from the City Attorney and an additional week for a reply from the Appellant. The
2 record was closed on August 24, 2011.

3 **Substantive:**

4 3. Description of Appeal. The Appellant is making two appeals, which have been consolidated
5 under one hearing as they arise from the same events. The first appeal (Exhibit 1) is of the Notice
6 of Violation and Monetary Fine (Exhibit 7), of which the Appellant requests relief from the
\$12,500 fine that was imposed for tree cutting violations.

7 The second appeal (Exhibit 4) is of a conditional use permit (Exhibit 8), of which she seeks
8 changes to or elimination of conditions related to the required mitigation work, removal of the
performance bond for completion of the mitigation work, and removal of the maintenance bond for
continued maintenance of the site following completion of the mitigation work.

9 4. Property Description. The property in question is located at 16520 72nd Avenue West. The
10 property is comprised of two parcels, both of which are owned by Stephen and Judee Lea. The
11 Appellant is the personal representative of the estate owning the property across from the subject
property, at 16510 72nd Avenue West.

12 5. Factual Basis for Permit and Violation. During the process of closing out the estate of her
13 parents, Ms. Birlenbach had work performed on a total of 39 trees on the site in order to prepare
14 her parents' neighboring home for sale. Prior to conducting the tree cutting work, Ms. Birlenbach
15 obtained approval from the City on September 18, 2009 to reduce the crowns on 26 previously
16 topped trees as maintenance activity (Exhibit 8: Attachment 7). Following staff inspection of the
site on April 2, 2010, staff determined that the work conducted far exceeded the scope of work
previously approved by the City. Ms. Birlenbach was notified of the violation as well as the need
to submit a conditional use permit application.

17 Subsequently, Ms. Birlenbach submitted a conditional use permit application (Exhibit 8:
18 Attachment 4). The application included a determination that 39 total trees had work performed on
19 them, 13 of those trees were pruned consistent with the City's original approval, 1 hazardous tree
20 was cut, and 25 non-hazardous trees were cut either far below the previous topping or were cut
even though they had not been previously topped. Some of the cut trees were cut down to stumps,
while others were left as tall trunks with few or no branches. The trees cut were a combination of
Red Alders and Big Leaf Maples.

21 Fines for the tree cutting violation were assessed through a Notice of Violation and Monetary
22 Fine issued on May 26, 2011 (Exhibit 7). Additionally, a conditional use permit was granted and
23 issued on May 26, 2011 (Exhibit 8) for mitigation of the tree work. Ms. Birlenbach made timely
appeals for both, on June 6, 2011 (Exhibit 1) and June 9, 2011 (Exhibit 4) respectively.

24 6. Activities Within Critical Areas. It is undisputed that the tree cutting activities
25 referenced in Finding of Fact No. 5 occurred in a critical area or its buffer as alleged in the second
26 page of the Notice of Violation.

1 23.40.160 comprise the “conditional use permit” referenced in the staff report and all mitigation
2 required of the Appellant is based upon the requirements of that provision. The Notice of
3 Violation is based upon assertions of multiple code violations. Review of the Notice of Violation
4 is limited to violations of the clearing and grading regulations (Chapter 18.45 ECDC), since those
5 regulations set the fines imposed by the City.

6 **Notice of Violation**

7 ECDC 18.45.020 – Land clearing and tree cutting without a permit:

8 *No person shall engage in or cause any land to be cleared without first obtaining a land*
9 *clearing permit from the planning division manager or his/her designee.*

10 3. Land Clearing Permit. As noted in ECDC 18.45.020 quoted above, no clearing is allowed
11 without a clearing and grading permit. ECDC 18.45.030(C) exempts routine landscape maintenance,
12 which is defined by ECDC 18.45.040(P) as “tree trimming and ground cover management which is
13 undertaken by a person in connection with the normal maintenance and repair of property”. Ms.
14 Birlenbach did not specifically contest that her unauthorized tree cutting activities did not qualify as
15 routine landscaping maintenance. The record supports the City’s finding on this issue. Ms.
16 Machuga noted that in her work as a planner for the City, generally, arborists have not recommended
17 crowning because it hastens the demise of trees, and the City has not supported crowning over the
18 years. However, she noted, arborists recommend that in cases where trees have already been topped,
19 crowning should be regular maintenance because the original topping creates a weak spot in the tree
20 and crowning reduces pressure on the tree core. Ms. Machuga’s testimony on this issue is
21 uncontested and serves as a rational distinction between crowning activities that qualify as routine
22 maintenance and those that do not. The “Table of Trees” detailing the tree cutting activities of Ms.
23 Birlenbach for each tree supports the finding² that cutting of 26 trees exceeded that necessary to
24 crown at previous tree heights and, therefore, do not qualify as routine landscape maintenance. *See*
25 *Ex. 8, att. 5.* As this factual issue was not contested by Ms. Birlenbach it is concluded that 26 trees
26 were cut in a manner that does not qualify as routine landscape maintenance.

20 4. Fine Reduction. The Appellant expressed multiple reasons supporting her belief that
21 the fine imposed was excessive. Ms. Birlenbach noted that she had directed her contractor to work
22 according to her permit authorization and she did not know that they failed to do so until after the
23 work was completed. She noted that she has worked in good faith with the City to correct the
24 violations and has and will be incurring considerable time in expense in resolving the situation.

25 The City argued that allowing property owners to avoid fines by blaming their contractors
26 sets a bad precedent. Code enforcement could become impractical and often impossible if the City
is required to determine what happened between a property owner and the owner’s contractor.

² This is to be construed as a Finding of Fact and was only included in the Conclusions of Law because it is intimately linked to the resolution of legal conclusions.

1 Further, the City Council has evidenced a policy to crack down on persons who remove trees in
2 critical areas, by increasing the maximum fine from \$1,500 per tree to \$4,500 per tree. In addition,
3 the City has asserted that the Appellants concerns regarding financial burdens were considered
4 when the initial fine was imposed. The City was able to fine the Appellant an amount not to
exceed \$1,500 per tree, ECDC 18.45.070(b), but instead chose to place a fine of just \$500 per tree
that was altered.

5 The City makes a compelling case for the fines it has imposed. However, the amount of the
6 fine, especially in conjunction with the costs associated with restoration, is a substantial amount of
7 money for a primarily innocent homeowner. As acknowledged by the City, Ms. Birlenbach's only
8 wrongful conduct is probably limited to the selection and supervision of her contractor. Even Ms.
9 Birlenbach's supervision was probably done as well as anyone could expect, since she testified that
10 she made it clear to the contractor what was authorized by the City. The City Council obviously
11 wants to crack down on persons who engage in illegal tree removal, but it's unlikely it had
12 someone such as Ms. Birlenbach in mind when it adopted the most recent fines. A repeat offender
who surreptitiously removes trees from a wetland buffer in the dead of night with full knowledge
of the City's regulations is an easy candidate for the maximum \$4,500 fine per tree recently
adopted by the Council. Ms. Birlenbach's conduct is nowhere near such egregious behavior.
However, the large number of trees involved in the violation cannot be overlooked. The fine
against Mr. Birlenbach is reduced to a total of \$3,000.

13 **CONDITIONAL USE PERMIT CONDITIONS**

14 ECDC 18.45.075(A) – Restoration:

15 *A. Any person who violates any provision of this chapter or of a permit issued pursuant hereto*
16 *shall be liable for all damages to public or private property arising from such violation,*
17 *including the cost of restoring the affected area to its original condition prior to such violation*
18 *and the payment of any levied fine.*

19
20 *2. For each tree removed, replacement planting of up to three trees of the same species in*
21 *the immediate vicinity of the tree(s) which was removed so long as adequate growing*
22 *space is provided for such species. The replacement trees shall be of sufficient caliper*
23 *to adequately replace the lost tree(s). Replacement trees shall be a minimum of three*
24 *inches in caliper and shall be replaced at the direction of the planning division*
25 *manager.*

26 5. Restoration. As identified in ECDC 18.45.075(A) quoted above, the removal of a tree
without a required clearing permit requires restoration. The requirements of tree restoration are
folded into the review of the subject conditional use permit (governed by ECDC 23.40.160),

1 because ECDC 23.40.160(f) requires the permit application to be consistent “with other applicable
2 regulations and standards”. “Removal” is defined by ECDC 18.45.050(O) as “actual destruction or
3 causing the effective destruction through damaging, poisoning or other direct or indirect actions
4 resulting in the death of a tree or ground cover.” As determined in Finding of Fact No. 7,
approximately 85% of the trees cut without a required clearing and grading permit will not perish.
No restoration will be required for those trees.

5 6. Performance Bond. ECDC 18.45.065 requires a performance bond for any proposed re-
6 vegetation. Re-vegetation includes tree restoration. The requirements for tree restoration are
7 folded into the review of the subject conditional use permit (governed by ECDC 23.40.160),
because ECDC 23.40.160(f) requires the permit application to be consistent “with other applicable
8 regulations and standards”. The City is authorized to require a performance bond.

9 7. Maintenance Bond. ECDC 23.40.290(A) provides that if a development proposal “is subject
10 to mitigation, the application shall post a mitigation bond or other security to ensure mitigation is
11 fully functional.” A “development proposal” is defined by ECDC 23.40.320 as any activity
relating to the use and/or development of land requiring a permit or approval from the city. A
maintenance bond falls within this definition.

12 At hearing, the argument was made that ECDC 23.40.290(A) only applies to development
13 activities and not for mitigation of code violations. This argument may be based in part upon the
provision’s reference to “final plat approval” and “final building permit inspection”, as follows:

14 *A. When mitigation required pursuant to a development proposal is not completed*
15 *prior to final permit approval, such as final plat approval or final building inspection,*
16 *the applicant shall be required to post a performance bond or other security in a form*
17 *and amount deemed acceptable by the director. If the development proposal is subject*
to mitigation, the applicant shall post a mitigation bond or other security in a form
and amount deemed acceptable by the city to ensure mitigation is fully functional

18 The references to “final plat approval” and “final building permit inspection” appear to simply
19 clarify what is intended by the term “final permit approval” for permits that involve more than one
20 level of approval. More important, it would be somewhat absurd to require security of permit
21 applicants and not of people who have violated the code. This case aside, the need for security
would normally be greater for persons who have violated the City’s code provisions.

22 8. Tree Species List. Mr. Blansett testified that nurseries do not carry trees of the sizes required
23 for the small tree species list required by Condition No. 2 of the conditional use permit. There is no
24 evidence to the contrary on this issue except for the fact that Tree Solutions recommended this list
25 and it must be presumed they would not have done so if the condition can’t reasonably be
26 accomplished. Nonetheless, the conditions of approval will provide staff with the authority to
require an appropriate substitute if Mr. Blansett is able to establish that the required trees are not
reasonably available.

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DECISION

The Notice of Violation, Ex. 7, is sustained except on the following points:

1. The total fine is reduced from \$12,500.00 to \$3,000.00.

The conditional use permit, Ex. 8, is sustained except for the following points:

1. Mr. Blansett will identify which of the 26 trees subject to the Notice of Violation will not perish as a result of the Ms. Birlenbach's tree cutting activities. The identification shall be accompanied by a written explanation supporting the determination for each tree. The trees identified by Mr. Blansett shall not be subject to restoration. This information shall be submitted to City staff prior to the deadline for restoration, as tolled below by this decision, or full restoration as outlined in the conditional use permit will be required. The remaining trees will be subject to the restoration ratios required in the conditional use permit. The two trees identified as already dead at P. 2 of the Tree Solutions report, Ex. 8, att. 4, will not be subject to restoration.

2. Staff may designate an appropriate substitute to the trees required in the small species list of Condition 2 of the conditional use permit if Mr. Blansett demonstrates to the satisfaction of staff that the required trees are not reasonably available.

The compliance deadlines in the Notice of Violation and the conditional use permit are extended for 77 days, the time it took to process this appeal. Staff may further vary modify deadlines if necessary to optimize mitigation conditions.

DATED this 25th day of August, 2011.



Phil A. Olbrechts
City of Edmonds Hearing Examiner

Appeal Right and Valuation Notices

This decision is final and only subject to appeal to superior court as governed by Chapter 36.70C RCW. Appeal deadlines are short (21 days from issuance of the decision) and the courts strictly apply the procedural requirements for filing an appeal.

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