

June 11, 2009

Re: DPD Project 3004423
6515 Brooklyn Avenue NE
Brooklyn Court

To the Northeast Design Review Board:

As those who appealed the January 8, 2009, Master Use Permit Decision for the Brooklyn Court project, we believe we have information valuable to you in your continued review of the project. We are especially concerned with the existing exceptional and significant trees located on the site and the application of the Seattle tree protection ordinance to the project. We hope a full and complete examination of these matters will enhance the project to better fit into our neighborhood and do so without procedural or technical flaws that may cause further delay. We thank you for your efforts as volunteers on behalf of our community, and we appreciate your careful consideration of the research we have done.

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The legal requirement for tree protection

Seattle Municipal Code 25.11, also known as the tree protection ordinance, requires the preservation of exceptional trees on sites undergoing development. The City Council's purpose in adopting this ordinance according to 25.11.010 is to "especially protect exceptional trees that because of their unique historical, ecological, or aesthetic value constitute an important community resource and to require flexibility in design to protect exceptional trees." At 25.11.080 A. 2 it specifies that there are only two legitimate reasons for the DPD Director to permit the removal of an exceptional tree for a commercial project on private property. The presumption is in favor of the preservation of an exceptional tree unless the development applicant "demonstrates that protecting the tree by avoiding development in the tree protection area could not be achieved through the development standard departures permitted in Section 23.41.012, and/or a reduction in the parking requirements of Section 23.54.015." This means that only if the applicant proves that application of normal design review departures and/or reduction in required parking are inadequate to save an exceptional tree may such a tree be removed.

The ordinance also protects large non-exceptional trees in providing “the option of modifying development standards to protect trees over two feet in diameter in the same manner that modification of development standards is required for exceptional trees.”

The City Council understood that tree preservation would restrict development and that this would have a cost to developers, but they determined that the benefits of preserving exceptional and large trees outweighed these restrictions and costs. They did recognize, however, that it would be unreasonable to demand that a tree located in the middle of a potential development site preclude development on that site. This is why the ordinance demands analysis through design review of whether design departures and/or parking reductions are sufficient to preserve exceptional and large non-exceptional trees and “reward tree protection efforts by granting flexibility for certain development standards” (25.11.010 D). But it must be stressed that the default requirement is that such trees demand preservation.

The tree protection ordinance is a separate and independent part of the Seattle Municipal Code distinct from the land use code; the former is found in chapter 25 while the latter is found in chapter 23. It is only via internal references in the tree protection ordinance that land use provisions come into play at all. Therefore, land use requirements do not supersede tree preservation requirements—they are equal in legal standing. On the other hand, design guidelines, such as the Guidelines for Multifamily and Commercial Buildings and the Roosevelt Urban Village Design Guidelines, constitute a lesser standard of legal requirement that may not override the legal mandate for tree preservation. While there is fairly wide latitude in design review, the scope of design review is specifically limited by 23.41.012 B. For example, exceeding the maximum height allowed by the zoning is prohibited. Likewise, waiving or lessening the mandate for preserving trees is prohibited by 23.41.012 C.

Whether the Western Red Cedar at the Brooklyn Court site is exceptional

It may appear to be an open question whether the Western Red Cedar tree at the north side of the Brooklyn Court site meets the definition of “exceptional” within the scope of the tree protection ordinance. This is not the case. Each report of the three arborists who have examined the tree concludes that it is. It meets the definition of “exceptional” outlined in DPD Director’s Rule 6-2001 (the Rule in effect at the time of the original project application; this Rule has since been superseded by Rule 16-2008) as acknowledged by DPD staff and by the DPD Director. And the exceptional status was confirmed by the Hearing Examiner during the recent appeal. In the opinion of some, this tree may not be an especially noteworthy specimen of its species, it may be awkwardly pruned to avoid power lines, its trunk may not be single but consists of a tight cluster, or it may have less than ideal aesthetic quality. Each of these opinions is irrelevant to

whether the tree is exceptional. What matters is the species of tree, its size, and the official recognition, and this tree satisfies all three of those criteria.

The Western Red Cedar at the Brooklyn Court site is partly public property

The exceptional Western Red Cedar at the Brooklyn Court site is unusual given its location at the extreme north side of the site straddling the private/public property line. The declaration of the applicant's surveyor indicates that one third of the tree is located in the right of way of Northeast 66 Street. This makes this tree shared public and private property. The tree protection ordinance is silent on such matters, but SMC 15.02.048 grants authority to the Seattle Department of Transportation for "any tree in any public place." Under this authority, SDOT has denied permission multiple times when the property owner of the Brooklyn Court site has requested approval to remove this tree. Although there is no explicit authority to do so, SDOT unwritten policy is to defer to DPD on the status of trees located less than half on City property when the adjacent private property is being developed (and this informal approach was endorsed by the Hearing Examiner in the recent appeal). Given this informal transfer of jurisdiction, DPD and the Design Review Board as its agent has taken on the unusual responsibility of being the custodian of public property, and this casts the preservation of an exceptional tree that is partly public property in an entirely different light. Not only do the normal provisions of the tree protection ordinance for trees located on private property apply, attention to the portion of the tree that is public and not private cannot be ignored. The public interest in preserving exceptional trees located on private property may be limited, but there is a special and even greater public interest in exceptional trees that are public property. Although there is no specific legal direction here, this issue and the responsibility inherent in it cannot be taken lightly. If the default requirement for exceptional trees on private property is preservation, the requirement for exceptional trees on public property must be at least equivalent if not substantially greater. This responsibility is reinforced by Mayor Nickels's Executive Order 03-05 mandating that all trees removed from City property be replaced by two trees of at least two inch caliper planted on City property "in close proximity to the location of the original tree."

Large non-exceptional trees at the site

There are at least two other trees at the site subject to the tree protection ordinance, but this has not been the subject of design review discussions to date. A large Spruce tree at the west side of the site is noted on the site survey, but this tree is incorrectly noted as being 22 inches in diameter—it is actually 27 inches (when measured according to the method specified in 25.11.050 B and Director's Rule 6-2001). Likewise, an Apple tree located approximately 70 feet west of the Western Red Cedar is incorrectly noted as 20 inches in diameter when it is actually 26 inches. Since they are more than two feet in diameter, they fall within the scope of the tree protection ordinance. Both the applicant and DPD staff have been silent about these trees (one wonders whether this was

intentional), and no design review analysis has been offered regarding them. Almost needless to say, because these two additional trees were not recognized as subject to the tree protection ordinance, the potential tree protection areas of 25.11.050 B for them were not depicted on any of the project site plans.

The tree protection ordinance offers less protection for large non-exceptional trees compared to exceptional trees and seems to make their preservation optional. Such trees are offered only design review modifications but not parking reductions as a means of protection. But just as with exceptional trees, large non-exceptional trees must be replaced if they are permitted to be removed. Given the locations of these two non-exceptional trees, preservation may well preclude the proposed project, and it may not be reasonable to preserve them as well as the exceptional tree. But what is key is that the applicant has failed to meet the requirements of the tree protection ordinance for these non-exceptional trees. Neither they nor their basic tree protection areas have been identified on the project site plans, no potential design departures have been suggested to preserve them, and no commitment to replace them if they are removed has been made.

Potential parking reductions

To consider possible parking reductions as a means of tree preservation, the Brooklyn Court project has previously proposed the installation of a substantial number of parking spaces (72 total) for both the commercial and residential uses, and these are located both on the first floor and in the basement. In addition, large areas of the lot outside the building footprint are taken up by driveways for this parking. First, the number of parking spaces previously proposed is more than the minimum required at the time of the original application. There should be no reward for providing a surplus or excessive level of parking if it interferes with preserving an exceptional tree. Second, lowering the parking to the minimum required and then reducing it by 10% certainly leaves sufficient area for a reasonable tree protection area. Finally, there is a clear possibility that parking is not even an issue here. The site is within a future, if not a present, Station Area Overlay District, and no parking at all is required for commercial and/or residential projects in these zones according to 23.54.015 B. 2. It is true that this allowance for no parking whatsoever was not in effect at the time of original project application; however, DPD staff have suggested that they would be willing to apply the new code provisions and waive all parking if this is requested by the applicant. In short, it is not at all unreasonable to expect that some or all of the proposed parking be eliminated through the design review process to provide a reasonable tree protection area for the exceptional tree.

In the most recent site plans submitted for the Design Review Board's final review, the applicant has adjusted the original number of parking spaces from 72 to 69 and shows only 55 spaces in the redesign; this new reduction presumably accommodates the 30 foot radius tree protection area included in the latest design. The minimum number of parking spaces required is not explicitly

indicated, and it should be along with the method used for determining this figure. Recent discussions with DPD staff shows that they are not certain of the number of required parking spaces for either the original or the latest designs of this project. Without clarification of this, it is difficult to ascertain what portion of the parking spaces provided is required and what portion is surplus. In the end, however, lowering the parking to the minimum required based on the applicant's final design and then reducing it by 10% will certainly leave sufficient area for a reasonable exceptional tree protection area. (For example, if it is assumed that the total required parking is 60 spaces, a 10% reduction of six medium spaces of 8 feet by 16 feet covers 768 square feet. And a 22 foot wide driveway between two sets of three 8 foot wide parking spaces yields another 528 square feet for a total reduction of 1296 square feet. A complete 30 foot radius tree protection area takes 2827 square feet, but since only about half the tree protection area is on the project site (as is clear from the redesign site plans), the on-site part of the tree protection area is only approximately 1400 square feet. Given the open space and walkways planned north of original live/work space #1 (which is south of the exceptional tree) of approximately 200 square feet, the reduction of six parking spaces alone combined with previously planned open areas provides more than sufficient space for a 30 foot radius tree protection area— $768+528+200=1496 > 1400$.)

Potential design review departures

There appear to be a number of possible design review departure options that separately or together should provide reasonable tree protection areas for the exceptional tree as well as the two large non-exceptional trees. And these departures might also be combined with parking reductions outlined above. Departures could include concentrating the required landscaping at the tree protection areas (especially since a reasonable tree protection area for the exceptional tree alone would require only a fraction of the required landscaping). Eliminating the live/work units is also feasible (to permit both the desired number of residential units and reasonable tree protection areas). There is an orphaned and unused portion of the right of way adjacent to the northeast corner of the site at the slight S curve of Northeast 66 Street. The applicant could request the vacation of this area with the endorsement of the Design Review Board to offset the space necessary for reasonable tree protection areas for the exceptional tree if not for all three trees. In short, there clearly are design review options available for tree preservation for this project, and probably many more than those suggested here.

One thing must be clear about any potential departures. The tree protection ordinance is explicit that it is the applicant's responsibility to devise and propose departures intended to preserve trees that are acceptable to the Design Review Board and the DPD Director, yet, to date, the applicant has failed to do this. The applicant did outline one view of the impacts of a potential 49 foot radius tree protection area at the May 4, 2009, Design Review Board meeting, but the presentation seems to have been for the sake of argument only since no

concrete design review departures were presented or discussed (only parking reductions were discussed). Again, any request for departures is up to the applicant. It is not the responsibility of the Design Review Board, DPD staff, concerned neighbors, or interested members of the community, just as it is not the responsibility of others to design the project.

Tree preservation analysis

The essence of the tree protection ordinance is the default requirement that exceptional trees demand preservation. Only when the applicant proves that application of normal design review departures and/or reduction in required parking are inadequate to save an exceptional tree may such a tree be removed. Such proof has not been offered by the applicant. The applicant has stressed that preserving the tree might be difficult or costly or require a complete redesign of the project or result in fewer dwelling units than desired or that the process has been long, involved, and expensive. All of these considerations are beside the point, but they do indicate a lack of willingness to find a creative solution that meets the responsibilities the applicant must meet regarding the tree protection ordinance. The applicant and DPD staff seem to have assumed throughout that this exceptional tree may be removed without providing sufficient justification, but this view is mistaken, and that is why the Hearing Examiner remanded the proposal back for a complete and proper analysis. (It is telling that at the May 4 Design Review Board meeting concerning a potential 49 foot tree radius tree protection area for the exceptional tree, the applicant claimed this large an area to be an extreme burden since it would reduce the number of possible dwelling units to 38—recall that the original application for and the early design guidance review of this project called for 39 units and not the 54 indicated through most of the project discussions.)

If, in the end and after all of the potential options have been reviewed, it is determined that the requirements of the tree protection ordinance are inadequate to preserve this tree, a full specification of why this is the case together with a full review of all of the design review and parking reduction options considered and rejected must be provided. If this is not forthcoming, it will not be certain that the mandate of the tree protection ordinance has been met.

Tree protection areas

There has been a great deal of discussion about the size of the tree protection area necessary for the exceptional Western Red Cedar. Because they have been ignored, there has been no discussion of tree protection areas for the two large non-exceptional trees, the Spruce and the Apple. The tree protection ordinance at 25.11.050 B specifies the basic tree protection area as the area within the drip line of the tree and allows the Director to approve a limited reduction below this basic area according to a plan crafted by a tree care professional. The drip line radii for the three trees at the site subject to the tree protection ordinance are approximately 24 feet for the Western Red Cedar and

approximately 20 feet each for the Spruce and the Apple.

As noted, only the Western Red Cedar has been reviewed by tree care professionals, and it is ironic that the judgments of all of the arborists who have examined this tree outline a tree protection area substantially larger, rather than smaller, than the basic area specified by the tree protection ordinance. The consensus of the arborists is that a 49 foot radius tree protection area is the least required, although a 30 foot radius is feasible with additional interventions. The 49 foot radius tree protection area, it must be noted, is more than twice the 24 foot radius of the drip line basic tree protection area specified in the tree protection ordinance and requires a footprint more than four times the square footage of the basic area. It is doubly ironic that the supposed minimum tree protection area endorsed by the arborists is also substantially larger than the area the tree presently enjoys. But what is most confusing to those of us who are not tree care professionals is the number of similar Western Red Cedar trees in Seattle apparently flourishing in areas so small that they should be completely inadequate for the long term welfare of this species. If the tree care professionals are correct about what size area is minimally necessary for a mature Western Red Cedar such as this exceptional specimen, it is not at all clear why this tree and others like it have developed to the size and health they have at present given the severe constraints on them with structures encroaching into and compacted and impervious surfaces covering most, and in some cases almost all, of their basic tree protection areas (let alone the much larger areas considered minimally necessary by professionals). It may be that the tree care professionals are inherently conservative in their professional judgments, but the facts on the ground suggest that smaller, and even much smaller, tree protection areas are sufficient. At the May 4 meeting, the majority of the Board directed the applicant to consider a 30 foot radius tree protection area. Given that this is still much larger than either what is presently the case, is much larger than the basic area with a drip line 24 foot radius, and is much larger than the allowable reduced basic area (with a 20 feet radius), it is not clear why these other, smaller areas should not also be considered. Since the Board appears to be relying on the arborist report specifying a 49 foot radius tree protection area with only the possibility of a smaller, 30 foot radius area, even if the larger figure appears to be grossly excessive, the larger 49 foot area must be taken at face value until there is proof that a smaller area is feasible.

Unfortunately, neither the tree protection ordinance nor DPD Director's Rule 6-2001 gives direction on what is and what is not allowed within a tree protection area. It appears that the aim is to prohibit buildings or other structures that would encroach on or disturb the tree's roots. Although this is not explicit, this seems to be the implied minimum requirement to protect existing trees. A bit more of the intention of the ordinance may be found indirectly since "any filling, excavation, grading, or trenching in the dripline area of a tree which has the potential to cause irreversible damage to the tree" constitutes prohibited "tree removal" (at 25.11.020). But it is not clear whether paving within the drip line tree protection area, especially in a way that does not affect the roots or the ability of the tree to

receive water, is prohibited. The safe assumption is that even such sensitive paving is contrary to the ordinance despite this resulting in an extremely restrictive understanding of the ordinance.

Tree replacement

If it is determined that the exceptional Western Red Cedar cannot be saved through creative application of resign review and/or parking reduction options, the tree preservation ordinance at 25.11.090 requires a replacement “designed to result, upon maturity, in a canopy cover that is at least equal to the canopy cover prior to tree removal.” This was mentioned in the flawed Master Use Permit Decision issued on January 8, 2009, where it was suggested that two Incense Cedar trees be located at the east side of the site, but this was not discussed at the May 4 Design Review Board meeting. Since the applicant’s arborist has specified the minimum tree protection area required for the exceptional Western Red Cedar as 49 feet in radius, and the applicant contends that providing an area this size precludes developing the desired project, replacement is the only option available for this project consistent with the tree preservation ordinance. While this seems to have been the proposal, it has not been discussed recently, so it is not clear whether replacement continues to be the applicant’s intention. Certainly the applicant is to be commended for selecting conifers for the replacement (especially since conifers are not dormant up to one third of the year and provide arboreal benefits throughout the year); nevertheless, the replacement proposal brings up a number of problems that have not been adequately considered.

Because it is not clear that replacement with two trees is still the applicant’s preferred option, replacement with a single tree illustrates that the replacement strategy raises more questions than it answers. The obvious question is where would a replacement tree with an equivalent canopy and tree protection area at maturity be located at the site? If there is insufficient space for the existing tree with half of the canopy and tree protection area located on public property, it is not clear where there is sufficient space reserved wholly on the site for a tree that will require twice as much tree protection space eventually. The tree protection ordinance does permit replacement trees to be located off-site, but there has been no discussion of where the applicant intends to find a minimum 98 foot diameter space for a tree that will become an exceptional tree many decades from now, nor has there been discussion of how a replacement tree will be protected against development at that off-site space during the time it is growing but is not yet an exceptional tree (the tree protection ordinance does suggest a covenant recorded for this purpose (see 25.11.050 C), but it is not clear that this is required for off-site replacement). If the arborist is correct, such a future exceptional tree replacing the existing exceptional tree cannot be protected by SDOT by being located in a right of way planting strip since the very limited area of a planting strip cannot provide a sufficient tree protection area for such a future exceptional tree. In short, if the existing exceptional tree is permitted to be removed, substantially more discussion, analysis, and review are required

regarding any proposed replacement and its future equivalence to what presently exists.

If the two suggested Incense Cedar trees are intended to be an adequate replacement for the existing single Western Red Cedar, no analysis of these replacement trees has been provided by the applicant. If these are to constitute proper replacement, information must be provided that these two are “designed to result, upon maturity, in a canopy cover that is at least equal to the canopy cover prior to tree removal” (25.11.090 A). The term “canopy cover” is not defined in the tree protection ordinance, but, presumably, this means the plan view or drip line diameter of a tree. If so, no information has been presented regarding the mature drip line diameter of the Incense Cedar trees so that a judgment may be made regarding their ultimate equivalence in canopy cover. But even if this information had been provided, the proposed locations of the two Incense Cedars are completely inadequate relative to a sufficient tree protection area for these new trees when they reach maturity. The existing Western Red Cedar has a 24 foot radius canopy. For two trees to equal this area of canopy requires an approximately 17 foot radius tree protection area for each (area equals pi X radius squared; 24 foot radius yields about 1810 square feet; 17 foot radius yields about 908 square feet each). The minimum basic tree protection area for each replacement tree at maturity would be the drip line area, also a 17 foot radius; if the tree protection area follows the arborist report approach with a minimum tree protection area radius at least twice the drip line radius, each tree at maturity would require more than a 35 foot radius tree protection area. The areas previously indicated for the two new Incense Cedar trees provide only about 6 foot radius each, much too small an area for mature trees that would both equal the original canopy of the existing tree and stand a chance of long term survival. But there is another problem with the two Incense Cedars. Because this species tends to be narrow and columnar, akin to Cypress trees, it is doubtful that even at maturity they will equal the canopy cover of the original Western Red Cedar (that the wood of the Incense Cedar is often used for pencils is only coincidentally related to the typical shape of this tree). Again, if the existing exceptional tree is permitted to be removed and replaced by two trees, substantially more discussion, analysis, and review are required.

If the existing exceptional Western Red Cedar is permitted to be removed, the portion located on the City right of way must also be considered and considered separately from the portion located on private property. As required by the Mayor’s Executive Order, each tree removed from City property must be replaced by two trees. The Mayor’s Order is not specifically limited to trees wholly and only on City property (just like the tree protection ordinance, the Mayor’s Order is silent on trees that straddle a public/private property line). While it might be contended that the Mayor’s Order does not apply to cases of mixed or divided ownership, the more obvious understanding is that given the public interest in trees, all trees that are to any extent public are subject to public ownership requirements. Because the applicant rather than the City will be responsible for removing this tree to make way for the private project, the

applicant rather than the City must be responsible for replacing it. But the applicant has not suggested how or where this will be done. Moreover, given that this double replacement will be done to offset the removal of a tree on public property, any such replacement will have to be separate from and in addition to any requirement for street trees that may apply to the project since the same tree should not be able to count for two purposes. And because the planting strip along Northeast 66 Street is beneath utility and power lines, the double replacement is most likely not possible near where the tree currently exists if the trees are to reach maturity without future problems. Once again, substantially more discussion, analysis, and review are required.

Finally, if the large non-exceptional Spruce and Apple trees are permitted to be removed, they also must be replaced according to 25.11.090 A. Just as with exceptional trees, the replacement trees must provide an equivalent canopy cover as the original trees when the replacements reach maturity. Once again, there are unanswered questions of where on the site there is room for two future 20 foot radius canopy trees, where on the site there is room for two 20 foot (if not 40 foot or more following the arborist report approach) radius tree protection areas, where sufficient room will be found off-site for such canopies and tree protection areas if there is not sufficient space on-site, whether and where these replacement trees may be located on public property, and whether these replacement trees will be over and above any requirement for street trees. So, once again, substantially more discussion, analysis, and review are required.

A compromise solution

Based on a hasty examination of the applicant's most recent site plans submitted for the Design Review Board's final review, it appears that the applicant has redesigned the project to retain the exceptional Western Red Cedar and provide a 30 foot radius tree protection area for it that is substantially free of paved surfaces on the private property side of the tree. If this is, in fact, the case, the applicant deserves our appreciation for finally heeding the responsibilities of the tree protection ordinance. Retention of this tree maintains a neighborhood asset and will also benefit the project. Although the 30 foot radius area is less than the arborist report's minimum 49 foot radius area, it is larger than the 24 foot radius drip line basic area of the tree protection ordinance. Given that the applicant has relied on the arborist report that holds the 30 foot radius area to be inadequate without additional measures, those additional measures should be mandated. Finally, a covenant as outlined in 25.11.050 C should be created and recorded for both the 30 foot radius area and the additional tree protection measures. On the other hand, if the site plans showing the preservation of the Western Red Cedar with a 30 foot radius tree protection area are merely a design exercise and do not express the applicant's actual intentions, the Board should direct the preservation of this exceptional tree with at least the 24 foot radius basic drip line tree protection area together with other, additional measures appropriate for the long term health of the tree. This is the very least the tree protection ordinance demands.

Preservation of the exceptional tree does not exhaust the applicant's tree protection responsibilities; replacements for the large non-exceptional Spruce and Apple are still required. The suggested two Incense Cedar trees could substitute for the removal of the two non-exceptional trees with at least one of these replacements located on-site and the other at one of the larger planting strips in the right of way (such as at the sizable unused portion of the right of way adjacent to the northeast corner of the site at the jog of Northeast 66 Street). Although the mature canopies of the replacement trees will likely never equal the canopies of the existing trees, if the replacements are the large caliper trees the applicant previously suggested, they will immediately fill the void of the loss of the existing two trees. The previously suggested locations of the new Incense Cedars at the east side of the site also have the virtue of no overhead utility and power lines that would conflict with the mature growth of the replacements. Since Incense Cedar trees tend not to be broad branched, concerns about adequate tree protection areas for their future mature state may be mitigated by providing a sufficient area free of the building structure for the roots of each of these trees to grow into. And given that the tree protection ordinance does not necessarily limit paving above the roots within the drip line area, as long as there is sufficient unpaved area at the trees for natural and/or artificial irrigation, sensitive paving within the mature drip line protection areas should not be problematic. All of this, of course, will have to be endorsed by the applicant's arborist with any additional appropriate measures observed, and a relevant covenant as with the exceptional tree would be required for the replacement tree or trees located on-site.

Finally, the existing Japanese Maple tree at the extreme southeast corner of the site that was previously considered by the Board and mentioned in the January 8, 2009, Master Use Permit Decision should be retained and adequately protected during the adjacent construction. Although it is neither exceptional nor large, it is mature and in good health, and its preservation will substitute immediately for the loss of existing mature canopy, will soften and enhance the streetscape of the project, and will complement the new Incense Cedars.