

Winning the Battle but Losing the War

One man's opinion about lessons learned

Well, we lost in our efforts to save the 70-year-old Western red cedar at Brooklyn Court, but I hope we have learned some lessons in the process. What follows is one man's opinion about why we lost the battle to save "Big Red" and some lessons for future consideration by the Roosevelt community.

(You can read the final December 3, 2009 decision of the Seattle Hearing Examiner Sue Tanner permitting the removal of Exceptional Western Red Cedar known by some as "Big Red." The decision is recorded at <http://clerk.ci.seattle.wa.us/~public/hear1.htm> - just search for "MUP-09-001 (DR,W)".

You can also view the details of the history of this saga by going to <http://web1.seattle.gov/dpd/luib/NoticeSearch.aspx> - just search for the project number 3004423)

In my opinion there are a few important **lessons to be learned** from this failure to save the tree.

I. Acting vigorously early on is crucial. The official history of this saga is captured in the documents referenced above. However, in my opinion, the demise of "Big Red" began years ago, well before the early design review guidance meeting held in February of 2007. The developers and their architect based their very first publicly available design of the proposed development on the assumption that our tree would be removed. That assumption focused attention on aspects of the design review other than the tree. So much so that even though the community raised the need to preserve the tree at the early design review meeting, most of us were uninformed about the status of the tree being "Exceptional" according to city ordinance and rule. The whole process was shrouded in lack of communication. Active and early sharing of information simply did not occur, despite the heroic efforts of a few individuals whose voices were either not heard or were ignored. Even the Department of Planning and Development (DPD) did not inform the Design Review Board about the Exceptional Tree. The end result was that, while the project proceeded with some positive design concessions to the community, it was mainly the developer who informed (or rather misinformed) the community about the status of the tree.

Recommendation: *The RNA should establish proactive ways to hear opinions about important issues, even if they are considered "marginal" by some, and to hear them early in the process.*

II. Informal surveys can be dangerous. At a public meeting held in late 2008 by the Roosevelt Neighborhood Association (RNA)'s Land use committee, an informal straw vote was conducted inquiring about whether the tree should be preserved. Attendees were given only one choice: between the proposed development called "Brooklyn Court" and the survival of our tree. In my

opinion, few of the attendees were conversant with the tree protection ordinances and rules; most did not know that “Big Red” had been designated Exceptional; comprehensive review of the tree’s status was not provided ahead of time and most did not know in advance that this informal poll was going to be take place. In fact, many of the people at that particular meeting were attending not because of interest in the development of the Brooklyn Court property, but because of anger about the condition of Sisley properties in general. They came believing that that information about developing those properties was going to be shared – none was. Ravenna residents outnumbered Roosevelt residents. The “informal” straw vote by raised hands was flawed because only a false choice was offered (“false” because, in my opinion, reasonable development could have occurred and at the same time the tree be saved). Despite this, the results of that straw vote have been used repeatedly by the developer and others at future design review meetings, RNA board meetings, RNA letters, and in presentations to the Hearing Examiner during our appeal of DPD’s decision in January 2009 to permit the developer to kill the tree.

Recommendation: *The RNA should establish principles and protocols to assure the validity of surveys and straw votes on issues that have communitywide implications.*

III. “You can’t fight city hall” Appealing a DPD decision is a daunting task for two main reasons:

- 1) Appeals are very time-consuming, because the efforts of lay people are up against the substantial resources (lawyers, arborists, administrative staff) of the DPD and the developer.
- 2) Appeals to the Hearing Examiner place the burden of the proof upon the appellants to prove that DPD acted erroneously. The Hearing Examiner tilts toward not reversing a department decision unless an explicit error is proven beyond a reasonable doubt.

Despite this precedent, during the process of our appeal the Hearing Examiner did determine that DPD failed to complete the design review and remanded the case back to DPD. The win in this battle was considered by most to be almost unheard of. We were advised again and again by people in and outside the formal system about the difficulty of our task. To give the reader some flavor of the detailed work done in this appeal, I provide the following “Finding of Facts” within the decision of the Hearing Examiner:

“15. Following prehearing motions, the Hearing Examiner dismissed the Appellant's issue on SDOT authority over the tree, but concluded that the under SMC 25.11.080 and SMC 23.41.004 A.5, a design review process was required for the exceptional tree, and that the resulting design review decision could be appealed to the Hearing Examiner. The Examiner therefore remanded the matter to the Director to assure that the Western Red Cedar was considered as part of the design review process for the proposal, and for

reconsideration of the Director's analysis of, and decision on the proposal in light of the Board's recommendation. The Examiner retained jurisdiction of the matter.

Action on Remand

16. The Applicant met with the Director to explore possible design changes and development standard departures that would enable the Applicant to retain the intended 54 residential units and unit mix but avoid development within a 49-foot tree protection zone. Exhibit 18. They concluded that even with departures, there would be a significant loss of residential and live work units, commercial area and residential parking, and that the departures would not create a "development that better meets the intent of the adopted design guidelines," as required by SMC 23.41.012 A.

17. The Board met twice in response to the remand. At its May 4, 2009 meeting, it received a design recommendation packet from the Applicant showing the project as proposed, and the project with a potential 49-foot radius tree protection area for the Western Red Cedar. It also heard testimony from the Applicant concerning the arborist reports reviewed by the Director, and the reasons the Applicant had determined that the project with a 49-foot protection circle would be financially infeasible. Exhibit 18. Noting that a 49-foot protection area was not the only option for tree retention and development on the site, the Board concluded that it needed more information to determine whether the proposal design would better meet adopted design guidelines with retention, or with removal of the tree. Therefore, the Board recommended that the Applicant return for another recommendation meeting with alternative designs, including a 30-foot tree protection area. The Board stressed that it would consider all departures and possible designs, and that the Applicant was not limited to the design, parking access or departures discussed to that point. Exhibit 17.

18. At its June 15, 2009 meeting, the Board considered the design recommendation packet from the Applicant showing the project as proposed, and the project with a potential 30-foot radius protection area for the Western Red Cedar. Exhibit 19. The packet shows a loss of three residential units, 16% of the residential parking stalls, and 15% of the commercial area. In addition, the packet shows that the project with departures would fail to meet many of the applicable design guidelines.

19. Three of the four Board members agreed at the June 15 meeting that removal of the tree would be inconsistent with SMC 25.11.080 because with proposed departures and parking reduction to save the tree, the development would be comparable to what could be achieved with the tree removed. However, all Board members stated that the project design resulting from a 30-foot protection zone would less adequately meet the Roosevelt Neighborhood Design Guidelines than did the original design without the tree.

20. The Board issued a unanimous recommendation at the close of its June 15 meeting that "[i]f DPD agrees that removal of the exceptional tree is inconsistent with SMC 25.11.080.A.2," then the Applicant should return for a fourth recommendation meeting and present a design that responded to specifically listed design constraints and issues

that could result from a 30-foot protection zone for the tree. The Board also listed additional information it required from the Applicant. Exhibit 17 at 11.

21. The Director considered the Board's recommendation but rejected it for the following stated reasons: 1) the Director had determined that a 49-foot tree protection area was required to assure the long-term health of the tree; 2) either the 49-foot or 30-foot protection zone could impede the proposal's compliance with adopted design guidelines; 3) available development standard departures and parking reductions would not provide sufficient protection for the long-term viability of the tree by avoiding development within a 30-foot protection area; and 4) accommodation of either proposed tree protection zone would require a reduction in the proposal's density, which would be contrary to the goal of siting transit-oriented development adjacent to a transit station. The Director reconsidered the January 2009 decision approving the proposal and reaffirmed it, including removal of the exceptional tree pursuant to SMC 25.11.080A.2. Exhibit 14. “

Buoyed by our unprecedented victory, the appellants contributed documentation to each of the two design review meetings following the remand then prepared for the formal appeal challenging the reaffirmed decision to allow the removal of the tree. Despite valiant efforts, after a grueling six-hour hearing in which the full resources of the developer and DPD were evident, we were unable to convince the Hearing Examiner that the decision to remove the tree was in error.

One member of the original appeal team started work on collecting information about the tree more than three years ago. Others of us on the team spent many hours learning, writing briefs and discussing approaches over the past year and a half. To our knowledge, no one has taken DPD to court to try to overturn the Hearing Examiner's decision. So I assume that “Big Red” will come down once the development is started.

Recommendation: Before ordinary residents pursue an appeal, they should learn about the costs upfront. Since success eluded us in this case, I point the reader to the first two recommendations as being potentially more effective.

I am wondering who is going to plan the wake for “Big Red” and what is going to happen to the timber of its limbs.

- Submitted by Paul Wiesner

02/08/2007 [Notice of Design Review Early Design Guidance Meeting](#)

06/07/2007 [Application](#)

01/08/2009 [Decision](#)

01/29/2009 [Appeal](#)

04/16/2009 [Notice of Design Review Second Board Public Meeting](#)

06/04/2009 [Notice of Design Review Third Board Public Meeting](#)

09/18/2008 [Notice of Design Review Board Public Meeting](#)