

1 BEFORE THE LAND USE BOARD OF APPEALS

2 OF THE STATE OF OREGON

3  
4 LYLE MILLER, BETHANE KRONICK,  
5 COLLEEN SPECK, ROBERT SPECK,  
6 RON GAUT and ALICE GAUT,  
7 *Petitioners,*

8  
9 vs.

10  
11 CITY OF TIGARD,  
12 *Respondent,*

13  
14 and

15  
16 ALPHA ENGINEERING, INC.,  
17 *Intervenor-Respondent.*

18  
19 LUBA No. 2003-133

20  
21 FINAL OPINION  
22 AND ORDER

23  
24 Appeal from City of Tigard.

25  
26 Daniel Kearns, Portland, filed the petition for review and argued on behalf of petitioners.  
27 With him on the brief was Reeve Kearns, PC.

28  
29 Gary F. Firestone, Portland, filed the response brief and argued on behalf of respondent.  
30 With him on the brief was Timothy V. Ramis and Ramis, Crew, Corrigan and Bachrach, LLP.

31  
32 Jack L. Orchard, Portland, filed the response brief and argued on behalf of intervenor-  
33 respondent. With him on the brief was Kristin L. Udvari, Portland, and Ball Janik, LLP.

34  
35 HOLSTUN, Board Member; BASSHAM, Board Chair; BRIGGS, Board Member,  
36 participated in the decision.

37  
38 AFFIRMED

02/27/2004

39  
40 You are entitled to judicial review of this Order. Judicial review is governed by the  
41 provisions of ORS 197.850.

**NATURE OF THE DECISION**

Petitioners appeal the city’s approval of a 10-lot subdivision and associated tree protection plan for a 2.34-acre parcel.

**MOTION TO INTERVENE**

Alpha Engineering, Inc. (intervenor), the applicant below, moves to intervene on the side of respondent. There is no opposition to the motion, and it is allowed.

**FACTS**

In January 2003, intervenor submitted a subdivision application for a 10-lot subdivision on a 2.34-acre parcel within the City of Tigard. The application proposes single-family lots between 5,500 square feet and 6,879 square feet served by a single private street ending in a cul-de-sac. The subject property includes approximately eighty-five trees with diameter at breast height of over twelve inches. Approximately thirteen of these large trees grow along the northern boundary of the site, some of which straddle the property line between the subject property and property owned by several of the petitioners. The application proposes a private road approximately fifteen feet from the north boundary trees. There is also a grove of large trees at the western end of the site that will be impacted by development of the parcel.

According to Tigard Development Code (TDC) 18.745.030(A), a subdivision application filed with the city must be accompanied by a “tree plan,” prepared by a “certified arborist,” that sets out the proposed planting, removal and protection of trees on the parcel. Intervenor submitted its initial tree plan on February 3, 2003. Revisions to this plan were filed on May 1 and May 16 of the same year. The tree plan as revised provides that a total of 25 of the large trees would be removed from the site. Of these, nine will be cut because they are hazardous (*i.e.*, dead, dying, or diseased), and 16 are to be cut to allow development of the property.

Petitioners opposed intervenor’s application below, arguing that intervenor failed to show the tree plan provided by its arborist constitutes a protection plan that complies with TDC Chapter

1 18.790. On May 28, 2003, the city planning commission approved intervenor’s application,  
2 subject to conditions. Petitioners then appealed the planning commission decision to the city  
3 council. The city council held a public hearing July 8, 2003, which was continued to July 22, 2003.  
4 After hearing conflicting testimony regarding the adequacy of the tree plan, the city council denied  
5 the appeal and approved intervenor’s application. The city council adopted the planning  
6 commission’s conditions of approval and adopted additional findings in support of its decision. This  
7 appeal followed.

8 **THE TIGARD TREE REMOVAL ORDINANCE**

9 Petitioners’ assignments of error allege violations of the Tigard Tree Removal Ordinance  
10 (TRO). We summarize the main features of the TRO before turning to petitioners’ assignments of  
11 error.

12 **A. Purpose (TDC 18.790.010)**

13 The TRO purpose statement begins by stating that trees are valued. TDC 18.790.010(A).  
14 It then lists seven purposes of the TRO. TDC 18.790.010(B). The first listed purpose is to  
15 “[e]ncourage the preservation, planting and replacement of trees in the City.” Notwithstanding that  
16 purpose of encouraging tree preservation, the TRO expressly recognizes that “at the time of  
17 development it may be necessary to remove certain trees in order to accommodate structures,  
18 streets[,] utilities, and other needed or required improvements within the development.” TDC  
19 18.790.010(C).

20 **B. Tree Plan Required (TDC 18.790.030)**

21 The TRO requirement for a tree plan when seeking approval for a subdivision is the focus of  
22 this appeal. TDC 18.790.030 is set out in full in the margin.<sup>1</sup> Although the subdivision approval

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<sup>1</sup> As relevant, TDC 18.790.030 provides:

“A. Tree plan required. A tree plan for the planting, removal and protection of trees prepared by a certified arborist shall be provided for any lot, parcel or combination of lots or parcels for which a development application for a subdivision, partition, site

1 criteria at TDC 18.430 say nothing about saving or removing trees, the TRO requires that a “tree  
2 plan” accompany an application for subdivision approval. As relevant in this appeal, there are five  
3 key features of the TRO tree plan requirement. First, tree plans must be prepared by a “certified  
4 arborist” and tree “protection is preferred over removal wherever possible.” Second, tree plans  
5 must identify “the location, size and species of all existing trees” on the property to be subdivided.  
6 Third, the tree plan must save at least 75 percent of trees that are “over 12 inches in caliper”  
7 (hereafter large trees) or the plan must propose mitigation if fewer than 75 percent of the large trees  
8 are saved under the tree plan. Fourth, tree plans must identify trees that will be removed. Fifth, tree

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development review, planned development or conditional use is filed. Protection is preferred over removal wherever possible.

“B. Plan Requirements. The tree plan shall include the following:

- “1. Identification of the location, size and species of all existing trees including trees designated as significant by the city;
- “2. Identification of a program to save existing trees or mitigate tree removal over 12 inches in caliper. Mitigation must follow the replacement guidelines of Section 18.790.060D, in accordance with the following standards and shall be exclusive of trees required by other development code provisions for landscaping, streets and parking lots:
  - “a. Retention of less than 25% of existing trees over 12 inches in caliper requires a mitigation program in accordance with Section 18.790.060D of no net loss of trees;
  - “b. Retention of from 25% to 50% of existing trees over 12 inches in caliper requires that two thirds of the trees to be removed be mitigated in accordance with Section 18.790.060D;
  - “c. Retention of from 50% to 75% of existing trees over 12 inches in caliper requires that 50 percent of the trees to be removed be mitigated in accordance with Section 18.790.060D;
  - “d. Retention of 75% or greater of existing trees over 12 inches in caliper requires no mitigation.
- “3. Identification of all trees which are proposed to be removed;
- “4. A protection program defining standards and methods that will be used by the applicant to protect trees during and after construction.”

1 plans must include “[a] protection program defining standards and methods that will be used by the  
2 applicant to protect trees during and after construction.”

3 TDC 18.790.030 seems to envision a tree plan that places all existing trees on a subdivision  
4 site into one of two categories: (1) trees that will be saved, and (2) trees that will be removed. A  
5 central question in this appeal is how the city may go about allowing a tree to be removed after that  
6 tree is included on a tree plan required by TDC 18.790.030 and designated as a tree that will be  
7 preserved or saved. This question is complicated by the fact that the TRO does not provide any  
8 formal mechanism for amending a tree plan once a subdivision is approved.<sup>2</sup>

9 **C. After the Tree Plan is Approved**

10 The parties do not directly address the question of how the tree plan required by TDC  
11 18.790.030 is implemented or enforced by the city.<sup>3</sup> That enforcement mechanism appears to be  
12 TDC 18.790.060, which addresses illegal tree removal. TDC 18.790.060(A)(1) states that it is a  
13 violation of the TRO to remove a tree

14 “c. In noncompliance with any condition of any City permit or development  
15 approval; or

16 “d. In noncompliance with any other section of [the TDC].”

17 Where a tree plan identifies a tree as a tree that is to be saved, and that tree is later removed, we  
18 assume that removal of that tree would constitute a violation of the subdivision approval or a  
19 violation of the TDC, and therefore would constitute a violation of the TRO under TDC  
20 18.790.060(A)(1)(c) or (d). Such a violation of the TRO would trigger the remedy, fine and  
21 replacement provisions of TDC 18.790.060(B), (C) and (D). Under TDC 18.790.060(C) the city

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<sup>2</sup> TDC 18.790.040(A) sets out a number of development incentives for preserving trees. TDC 18.790.040(B) sets out specific limitations on subsequent removal of any trees that are preserved pursuant to the incentives in TDC 18.790.040(A). Because these provisions are not at issue in this appeal, we do not discuss them further.

<sup>3</sup> The parties seem to agree that after a subdivision is approved, a tree that the subdivision’s tree plan proposes to save may nevertheless be removed if it becomes a “nuisance,” becomes “a hazardous tree” or obstructs street intersection visual clearance. TDC 18.790.050(D)(1)-(3). That seems to be a reasonable interpretation of TDC 18.790.050(D)(1)-(3), although those provisions do not address the legal consequence, if any, for the tree plan that shows such trees as trees that will be saved.

1 can impose a civil penalty in response to a violation of the TRO and it may also require that the  
2 improperly removed tree be replaced or mitigated pursuant to TDC 18.790.060(D).<sup>4</sup> The  
3 replacement or mitigation provisions of TDC 18.790.060(D) are the same replacement or mitigation  
4 provisions that apply where a subdivision tree plan under TDC 18.790.030(B)(2) initially proposes  
5 to remove more than 25 percent of the existing trees. *See* n 1.

6 **D. Summary**

7 Summarizing the above discussion, the TRO requires that a subdivision applicant submit a  
8 tree plan. While the TRO favors saving trees, it does not *require* that all trees be saved. The tree  
9 plan must identify trees that will be saved and trees that will be removed. The tree plan must include  
10 a protection program to protect trees during construction and after construction. If trees that the  
11 tree plan proposes to save are later removed, removal of such trees constitutes a violation of the  
12 TRO. In that event, the city may impose a fine and require mitigation for the removal of a tree that  
13 the tree plan proposed to save.

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<sup>4</sup> TDC 18.790.060(D) provides as follows:

“Guidelines for replacement. Replacement of a tree shall take place according to the following guidelines:

- “1. A replacement tree shall be a substantially similar species taking into consideration site characteristics;
- “2. If a replacement tree of the species of the tree removed or damaged is not reasonably available, the Director may allow replacement with a different species of equivalent natural resource value;
- “3. If a replacement tree of the size cut is not reasonably available on the local market or would not be viable, the Director shall require replacement with more than one tree in accordance with the following formula: The number of replacement trees required shall be determined by dividing the estimated caliper size of the tree removed or damaged by the caliper size of the largest reasonably available replacement trees. If this number of trees cannot be viably located on the subject property, the Director may require one or more replacement trees to be planted on other property within the City, either public property or, with the consent of the owner, private property;
- “4. The planting of a replacement tree shall take place in a manner reasonably calculated to allow growth to maturity.”

1 **FIRST ASSIGNMENT OF ERROR**

2 Petitioners argue that the city erred in finding that the intervenor’s tree plan complies with  
3 the requirements of TRO, and that the city’s finding to that effect is not supported by substantial  
4 evidence. Petitioners contend that the city council, in affirming the planning commission’s  
5 conditional approval, failed to identify the approval criteria within the TRO, failed to explain how the  
6 intervenor’s plan complies with those criteria, and merely concluded that the tree protection  
7 program complies with the standards in the TRO, without responding to petitioners’ concerns.

8 Contrary to petitioners’ argument that the city’s findings fail to respond to their concerns,  
9 the city council adopted the following finding:

10 “The Council finds that the applicant’s tree plan, as revised[,] addresses the  
11 concerns that were raised by the City’s Arborist, Planning Commission, and  
12 neighbors of the project site. The applicant has shifted the building on lot 10, and  
13 the applicant has proposed alternative construction techniques for construction of  
14 the street and house foundations on lots 8-10 to minimize impacts to the trees.”<sup>5</sup>  
15 Record 7.

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<sup>5</sup> The revised tree plan specifically recognizes and responds to concerns regarding the potential impact of the proposed road on the trees along the northern boundary of the property:

“On the north site boundary, a group of large Douglas-firs near the access road will be protected and retained. \* \* \*

“Protection of the trees along the north boundary was a major consideration in the design of the north access road. Many of the design features from standard arboricultural references were incorporated to protect the trees:

“? **Road Profile.** The road will be built above the existing grade, and only the litter layer (grass and other undecomposed vegetation) will be removed. A layer of permeable geotextile fabric will be installed at the road base for load bearing and weight distribution, to keep base rock from moving into the existing soil profile, and to provide air and water exchange to tree roots. The load distribution characteristics of the geotextile fabric may also reduce compaction of the underlying soil. A layer of clean crushed rock (1 1/2 – 2 inch material with no fines) will overlay the fabric. This layer will be compacted to the minimum standard permitted by engineering. The finish grade will be asphalt. Soil aeration will be maintained within the rock area by curb vents. Although the soil environment will be altered, \* \* \* major root functions will be preserved under the roadbed.

“? **Road Location.** The north edge of the road will be at least 15 feet from the trees. Thus, there will be a substantial area between the road and the trees where roots will be undisturbed.

1 The above finding refers to the changes that intervenor made to the initial tree plan to respond to  
2 concerns that were raised by the city’s arborist and petitioners. Although petitioners clearly do not  
3 agree with that response, we fail to see why that response is inadequate.

4 We also fail to see any approval criteria that the city council failed to address. The council  
5 found that the tree plan was prepared by a certified arborist and “discussed the planting, removal,  
6 and protection of trees.” Record 6. That finding is directed at the requirements of TDC  
7 18.790.030(A). See n 1. The city council also expressly adopted the planning commission’s  
8 findings. Those findings point out that the applicant’s arborist report identifies the 85 trees on site  
9 deemed significant by the city (more than twelve inches in caliper), and also identifies each of the  
10 trees that are proposed for removal. Those findings are directed at the requirements of TDC  
11 18.790.030(B)(1) and (3) respectively. Finally, the city council finds that the tree plan provides “a  
12 protection program that ensures the preservation and protection of the trees, and defines standards  
13 and methods that will be used by [intervenor] to protect these trees during and after construction.”  
14 Record 6. That finding is directed at TDC 18.790.030(B)(4). Thus, the city council’s findings  
15 address each of the relevant approval criteria in the TRO, and explain (albeit briefly) how the  
16 applicant’s proposed tree plan satisfies each of those criteria.

17 As we explained in *Le Roux v. Malheur County*, 30 Or LUBA 268, 271 (1995):

18 “[A local government’s] findings must (1) identify the relevant approval standards,  
19 (2) set out the facts relied upon, and (3) explain how the facts lead to the conclusion  
20 that the request satisfies the approval standards.”

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“? **Utilities.** Trenching for utilities will be at least 25 feet from the trees. Roots larger than 2 inches encountered during excavation will be retained by tunneling.

“? **Lot Configuration: Lot 10.** The building envelope for lot 10 has been moved south to reduce impacts to the root zone of tree 3420, a 34-inch diameter Douglas-fir. The distance from the tree to the building envelope is now 17 feet. If roots larger than 2 inches are found during excavation of the foundation, a pier-and-grade-beam foundation design should be used to protect the roots.” Record 541-42.



1 The city’s findings are adequate to identify the relevant approval criteria, identify the facts relied on  
2 and explain how the proposal satisfies the approval criteria. The findings are also adequate to  
3 comply with ORS 227.173(3).<sup>6</sup>

4 The only approval criterion expressly identified in petitioners’ brief as one that the city failed  
5 to address is the mitigation requirement set out in TDC 18.790.030(B)(2). That section requires  
6 that a tree plan include a mitigation plan if more than 25 percent of the large trees on site will be  
7 removed during development. In this case, the record clearly shows that, although 25 of the 85  
8 large trees on site will be removed under the plan, nine of those trees are being removed because  
9 they are hazardous. Petitioners argue that these nine trees should be included in the mitigation  
10 calculations required under TDC 18.790.030(B)(2). Petitioners base this argument on a single  
11 statement made by the city’s arborist during the comment period while the application was before  
12 the planning commission. The city arborist wrote: “mitigation [calculations] are wrong—should be  
13 70% retain ([intervenor does] not get credit for [dead, dying, and diseased trees])?” Record 656.  
14 However, at no point in their appeal below did petitioners argue that intervenor’s arborist should  
15 have counted the nine hazardous trees with the healthy trees that are being removed to allow  
16 development for purposes of determining if mitigation is required under TDC 18.790.030(B)(2).  
17 The city arborist’s isolated comment, posed as a question rather than a definitive statement or  
18 interpretation, is insufficient to preserve this issue as a basis for reversal or remand by LUBA. That  
19 isolated comment did not provide “fair notice” to the city and intervenor of this issue that petitioners  
20 attempt to raise under this part of the first assignment of error. *See Boldt v. Clackamas County,*

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<sup>6</sup> ORS 227.173(3) provides:

“Approval or denial of a permit application or expedited land division shall be based upon and accompanied by a brief statement that explains the criteria and standards considered relevant to the decision, states the facts relied upon in rendering the decision and explains the justification for the decision based on the criteria, standards and facts set forth.”

1 107 Or App 619, 623, 813 P2d 1078 (1991) (ORS 197.763(1) requires “fair notice” to  
2 adjudicators and opponents).<sup>7</sup>

3 The first assignment of error is denied.

4 **SECOND ASSIGNMENT OF ERROR**

5 Petitioners contend that the city erred in approving intervenor’s tree plan because it gives  
6 too much discretion to intervenor’s arborists and, therefore, inadequately preserves and protects the  
7 large trees that are to be saved or retained under the plan. Specifically, petitioners point out that  
8 intervenor’s tree plan relies heavily on establishment of the Tree and Root Protection Zone (TPZ).  
9 The tree plan as written establishes the TPZ at the drip line of each tree, but this requirement only  
10 applies where “feasible.” Record 542. Under the tree plan, construction may encroach into the  
11 TPZ, if intervenor’s arborist determines that the tree will not be “unduly damaged.” *Id.* According  
12 to petitioners, there is no evidence that allowing excavation or encroachment into the TPZ will  
13 protect the health and stability of the trees. Petitioners point to evidence in the record that supports  
14 the opposite conclusion. Petitioners also argue that establishing the TPZ at the drip line does not  
15 provide adequate protection. According to petitioners, establishing the TPZ at the drip line is  
16 unreasonable and completely undermined by other evidence in the record. Instead, petitioners  
17 argue that an alternative method, the “trunk diameter” method for establishing a TPZ, should have  
18 been used. The petitioners point to evidence in the record that supports this contention. Petition for  
19 Review 17.

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<sup>7</sup> Even if we were to reach this issue, we would agree with intervenor’s response to petitioners’ argument. Intervenor argues that, because these trees are to be removed because they are hazardous, rather than to accommodate development, they should be excluded from the tree count for purposes of computing the mitigation requirement. Intervenor bases this argument on several subsections of TDC Chapter 18.790, which differentiate between healthy and hazardous trees. *See, e.g.*, TDC 18.790.020(A)(3) (“‘Hazardous tree’ means a tree which by reason of disease, infestation, age or other condition presents a known and immediate hazard to persons or to public or private property;” TDC 18.790.040(B) (allowing removal of a tree otherwise retained and protected under a tree plan if the tree either dies or requires removal as a hazardous tree); and TDC 18.790.050(D) (requirement for a tree removal permit is waived where the tree “[i]s a hazardous tree”). If the nine hazardous trees are excluded from the tree count for purposes of computing the mitigation requirement, a total of seventy-six trees remain on site. Of these seventy-six trees, sixteen, or twenty-one percent, are to be removed to develop the property. Thus, the city correctly decided that the mitigation requirement was not implicated by intervenor’s tree plan.

1           As noted above, the city council adopted the planning commission’s findings in approving  
2 intervenor’s application, and also adopted additional findings of its own. The city council found that  
3 it had “reviewed the evidence in the record [and] considered the public testimony” in coming to its  
4 conclusion that intervenor’s tree plan “provide[s] a protection program that ensures the preservation  
5 and protection of the trees, and defines standards and methods that will be used by [intervenor] to  
6 protect these trees during and after construction.” Record 6. Further, the city council explicitly  
7 found that the testimony of intervenor’s arborists was “sufficient to support the conclusion that the  
8 tree protection plan meets all applicable standards and criteria, even when it is considered with the  
9 evidence and arguments submitted by the appellants that the tree protection plan does not meet  
10 applicable standards and criteria.”<sup>8</sup> Record 7.

11           Petitioners’ argument under this assignment of error is essentially a disagreement with the  
12 conclusion that both the planning commission and the city council came to based on conflicting  
13 evidence. Petitioners point to evidence contrary to the city’s position. However, as stated above in  
14 our discussion of the first assignment of error, the city council explicitly found that intervenor’s  
15 arborists’ testimony was credible and persuasive. Their testimony apparently convinced the city  
16 council that the TPZ, as described in the tree plan, adequately provided for the preservation and  
17 protection of the trees.

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<sup>8</sup> The central dispute in this matter concerns the proximity of the proposed road to the large trees along the north property line and the efficacy of the proposed TPZ and the possibility that construction will encroach into that TPZ. Intervenor hired a second arborist to conduct a peer review of the tree plan that was prepared by Walter H. Knapp. In his review of the tree plan, Peter Torres offered suggestions for how to protect any roots that might be encountered and noted that the road will generally be at least 15 feet from the trees along the northern boundary. He pointed out that because those large trees “have grown in the open, exposed to weather, rather than inside a grove or stand,” they do not “appear[] to be prone to windthrow.” Record 287. He observed that the trees have “interwoven, grafted roots,” but he stated that in his opinion “the protected trees will easily tolerate [the proposed] disturbance.” Record 289. He also noted that the utility trench on the south side of the road should be far enough away to avoid encountering roots, but that smaller roots could be cut and larger roots could be avoided by tunneling under those roots. *Id.* In a May 12, 2003 memorandum, the city arborist continued to express some concerns about the trees along the northern property line and on the west end of the property, but stated that after reviewing revised plans he felt the “curb, road and sidewalk are far enough away from the trees that structural roots will not be cut.” Record 551. He also included suggested techniques that might be employed to avoid damaging any roots that might be encountered during construction. *Id.*

1 On appeal, LUBA does not conduct its own balancing of the evidence, reach its own  
2 conclusion about which evidence to believe and substitute that judgment if it differs with the  
3 evidentiary judgment of the decision makers. *1000 Friends of Oregon v. Marion County*, 116 Or  
4 App 584, 588, 842 P2d 441 (1992). The relevant inquiry in considering an evidentiary challenge to  
5 a land use decision is whether the evidentiary record, viewed as a whole, includes supporting  
6 evidence that a reasonable person would rely upon to adopt the land use decision. *Dodd v. Hood*  
7 *River County*, 317 Or 172, 179, 855 P2d 608 (1993). Applying that standard of review here, the  
8 city’s decision is supported by substantial evidence and the decision adequately explains why it  
9 found that intervenor’s tree plan satisfied the requirements of the TRO.

10 The second assignment of error is denied.

11 **THIRD ASSIGNMENT OF ERROR**

12 Petitioners argue that the city erred by approving intervenor’s application with an unlawful  
13 condition of approval. In particular, petitioners point to the planning commission’s conditional  
14 approval, which was adopted by the city council. The disputed condition requires intervenor to  
15 submit to the city arborist a complete set of construction documents with tree locations included  
16 before beginning actual site work.<sup>9</sup>

17 Condition 2 apparently was imposed to enable the city arborist to evaluate whether  
18 additional trees might need to be removed, based on more detailed construction plans. If so,

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<sup>9</sup> The planning commission and city council imposed the following conditions:

- “[1] The applicant shall comply with the recommendations of the arborist report, and shall provide the City Arborist with a construction sequence including installation and removal of tree protection devices, clearing, grading, and paving.
- “[2] Prior to site work, the applicant shall submit a complete set of construction documents with the tree locations for the City Arborist’s review. Should additional trees need to be removed, mitigation shall be recalculated.
- “[3] The applicant shall notify the City Arborist when tree protection measures are in place so that he may verify that the measures will function properly prior to construction.” Record 30.

1 mitigation might be required under TDC 18.790.030(B)(2) and TDC 18.790.060(D) if more than  
2 25 percent of the existing trees will be removed. Petitioners contend that condition 2 permits the  
3 city to make a future land use decision without following quasi-judicial land use decision making  
4 procedures. According to petitioners, that future land use decision would be made without any  
5 opportunity for notice or public comment on the “final” tree plan, and would not allow for any  
6 opportunity to appeal final decisions regarding additional tree removal and mitigation. Petitioners  
7 contend the city may not defer a finding of compliance with mandatory discretionary approval  
8 criteria to a time in the future, through a condition of approval, unless an opportunity for public  
9 participation in that future decision is provided. *Holland v. Lane County*, 16 Or LUBA 583, 596-  
10 97 (1988).

11 We do not agree with petitioners’ characterization of what the city did in this case. The  
12 difficulty in accurately characterizing the city’s action in this case begins with the TRO itself. As  
13 intervenor correctly points out, the TRO is short on standards or criteria and essentially relies on the  
14 expertise of an applicant’s arborist to propose a plan for protecting existing trees and for mitigation  
15 if 75 percent of the existing large trees will not be preserved. The ultimate standard that the TRO  
16 imposes is not a standard that requires protection of trees. Rather it is a standard that favors  
17 protection of trees but allows trees to be removed so long as any loss of more than 25 percent of  
18 large trees is mitigated.

19 Intervenor submitted a tree plan that proposes to save more than 75 percent of the large  
20 trees. The city council found that intervenor’s tree plan satisfies the TRO standard that relieves an  
21 applicant of any obligation to mitigate so long as 75 percent of the large trees on the site will be  
22 retained. However, presumably in response to the concerns expressed by petitioners and the city’s  
23 arborist, the city imposed the disputed condition. That condition is ambiguous. It can be read, as  
24 petitioners apparently read it, to authorize city staff to modify the tree plan without providing any  
25 opportunity for further public comment or participation. However, as the city and intervenor argue,  
26 the condition need not be read to express any position on the kind of procedure the city might

1 follow, in the event the city later determines that some of the trees that the tree plan proposes to  
2 save must be removed, or that the tree plan can be revised to allow such removal.

3         It does not appear to us that condition 2 does anything more than require that intervenor  
4 provide the city arborist with construction documents. The condition seems to envision that, based  
5 on the city arborist's review of those construction documents, the city may decide that it is  
6 necessary to remove more trees and, depending on how many additional trees must be removed,  
7 mitigation may be required. However, just as the TRO is silent about whether changes can be made  
8 to tree plans and how the city might go about approving such changes, condition 2 is silent about  
9 how the city might go about allowing additional trees to be removed. Condition 2 does no more  
10 than recognize that more detailed construction documents may lead to a conclusion that one or more  
11 of the trees that the tree plan proposes to save may need to be removed, without specifying how the  
12 city will go about allowing those trees to be removed. That ambiguity may leave all parties  
13 somewhat in the dark about precisely what the city will do in that circumstance and what  
14 procedures it will follow if it decides additional trees should be removed, but we fail to see how that  
15 ambiguity provides a basis for remand.

16         Finally, as we read the TRO, if intervenor were simply to proceed with construction and  
17 remove trees that the tree plan proposes to save, without city authorization to do so, that would  
18 appear to constitute a violation of the TRO under TDC 18.790.060(A)(1)(c) or (d). In that event,  
19 TDC 18.790.060(C) provides that the city could require that intervenor mitigate for the loss of  
20 those trees under TDC 18.790.060(D). That is precisely what condition 2 appears to require in the  
21 event the city determines, based on the more detailed construction documents, that fewer than 75  
22 percent of the existing trees will be saved. In other words, the disputed condition simply requires a  
23 more structured approach that would lead to the same mitigation remedy that would apply if  
24 condition 2 had been omitted and fewer than 75 percent of the existing large trees are preserved.  
25 We fail to see how such a condition could provide a basis for remand.

26         The third assignment of error is denied.

1           The city's decision is affirmed.