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MEMORANDUM

TO: City of Takoma Park Mayor and City Council

CC: Tree Commission; Daryl Braithwaite; Suzanne Ludlow; Jason Damweber; Jan Van Zutphen; Jessie Carpenter

FROM: Kenneth Sigman, City Attorney

SUBJECT: City Attorney's suggested revisions to the Tree Ordinance

DATE: July 16, 2019

The purpose of this Memorandum is to suggest revisions to the Tree Ordinance from the perspective of the Office of the City Attorney. They are based on policy and legal considerations and reflect eighteen years of experience advising City staff on the administration of the Tree Ordinance and assisting the Tree Commission with the adjudication of Tree Permit and Tree Protection Permit appeals. The suggestions are the City Attorney's alone and may not reflect the opinion of staff or the Commission. In accordance with the City Council's request, I am limiting my suggestions to no more than five and I am not providing suggested statutory language.

1. For trees that the *trunk* is impacting or about to impact a building (e.g., when a trunk is touching or about to touch the foundation of a house or the edge of the roof, the City should allow the removal of such trees without giving the public the right to appeal the granting of the permit, and the tree replacement requirements should be reduced in recognition of the nondiscretionary nature of the tree removal. This exception should not apply to conditions that can be ameliorated by pruning.
2. The Code should require that notices of preliminary denial of a Tree Permit include a copy of the Urban Forest Manager's Tree Rating Worksheet and a brief explanation of the reason for the denial so that the denial does not appear arbitrary. This may reduce the number of appeals to the Tree Commission, as some Tree Permit applicants have withdrawn their appeal at the hearing once hearing the Urban Forest Manager's explanation for the denial.
3. The tree rating chart in the tree replacement section of the Tree Ordinance should be more detailed to prevent seemingly arbitrary tree ratings and replacement requirements.
4. The right of neighbors to appeal the Urban Forest Manager's decision to grant a Tree Protection Plan Permit should be eliminated. In my experience, neighbors file Tree Protection Plan Permit appeals not because of a concern about the trees around a construction project, but because they oppose the construction project, and rarely provide valuable input regarding tree protection measures (to my knowledge, no neighbor appealing a Tree Protection Plan Permit has

hired an arborist to provide expert testimony in support of their appeal). Such appeals are factually intense and require significant work by the Urban Forest Manager, the Tree Commission, and the City Attorney. They are also expensive for the property owner, who often must have their engineers, contractors, and arborists testify, and must pay interest on second mortgages and construction loans while awaiting a hearing and Tree Commission decision.

5. The possibility of having the Tree Commission conduct a site visit at a property in connection with an appeal should be eliminated. Tree Commission decisions are subject to judicial review, and the court reviews the Commission's decision based on the record before the Commission. The court may only reverse a Tree Commission decision because the Commission's decision is not based on evidence in the record (i.e., not simply because the judge disagrees with the decision), because the Commission makes an error of law, or because of a procedural error. Capturing a site visit in the record is difficult, and increases the risk that the court will find a procedural error or deem evidence to be lacking. The Commission has never conducted a site visit, but often spends time considering whether to conduct one, particularly when new Commissioners begin hearing cases. Requiring a site visit would also delay the issuance of a final Commission decision.