

Anguiano, Dora

---

C#1

**From:** Mars, Keith  
**Sent:** Tuesday, August 23, 2011 3:04 PM  
**To:** Embesi, Michael; Anguiano, Dora  
**Subject:** FW: Shoal Creek Trail & Heritage Tree Variance: TP 10617196 - 311, 313, 315 Bowie Street  
FYI

---

**From:** Charles Riou [mailto:~~charles.riou@att.net~~]  
**Sent:** Tuesday, August 23, 2011 3:02 PM  
**To:** sully.jumpnet@sbcglobal.net; dchimenti@austin.rr.com; vskirk@att.net; amdealey@aol.com; dave.anderson.07@gmail.com; mnrghatfield@yahoo.com; alfonsohernandez@gmail.com; donna.plancom@gmail.com  
**Cc:** Mars, Keith; Guernsey, Greg; Rusthoven, Jerry; jalam@endeavor-re.com  
**Subject:** Shoal Creek Trail & Heritage Tree Variance: TP 10617196 - 311, 313, 315 Bowie Street

As an avid bicycle commuter and regular user of the Shoal Creek Trail, I am e-mailing in support of actions by the planning commission to facilitate the construction of the damaged section of Shoal Creek Trail between 5th Street and West Ave. along the right bank of the creek. This section of trail has been damaged for decades and is a critical link between Austin's two major trail systems (Town Lake and Shoal Creek)

In regard to the Heritage Tree Variance, I support prompt, decisive action to define clear and consistent mitigation amounts for removal of trees fitting heritage status so that development of the property can proceed with fair and consistent mitigation provided for tree removal.

Charles Riou

140

140



CI

## ENVIRONMENTAL BOARD MOTION 081711 4b

Date: August 17, 2011

Subject: 311, 313, and 315 Bowie Street Permit #10617196

Motioned By: Mary Gay Maxwell

Seconded by: Mary Ann Neely

### Recommendation

The Environmental Board provides **no recommendation** to the request to remove a heritage tree with a stem greater than 30 inches as allowed under Land Development Code 28-8-643 on the case listed as 311, 313 and 315 Bowie Street Permit #10671796. A no recommendation action by the Environmental Board will be forwarded to the Planning Commission.

### Rationale

DRAFT

This case is the first in a potentially large number of similar variance requests that will come before the Environmental Board for our consideration. The issue is larger than Heritage Trees, including the goal of a densely populated downtown with the associated zoning already in place from former council actions.

The Downtown Plan does not adequately address Heritage Trees in the downtown area, and we urge the Planning Commission to initiate a process to consider ways to include heritage trees in the planning for a dense downtown.

The canopy of the area is in danger of being lost, and there needs to be an effort made to retain the canopy of the downtown area in ways that both allow for dense development and retain the cultural, aesthetic and environmental qualities necessary for a livable environment downtown.

For these reasons, we urge the Planning Commission to initiate changes to the Downtown Plan that will incorporate Heritage Trees into the plan.

Regarding this case, the Planning Commission has authority to place additional mitigation on the variance request that the Environmental Board does not have the authority to do. Suggestions for possible action by the Planning Commission could include increased mitigation for this tract, such as:

- 1) A mitigation amount that exceeds the staff mitigation of \$19,200 for the Heritage Pecan tree because the formula from which the amount is derived is inadequate;
- 2) Significant contribution toward the restoration of Shoal Creek along the border of the property where a hike and bike trail will be constructed in the near future.

10

**Vote** 5-0-0-1-1

**For:** Gary, Maxwell, Neely, Schissler, and Walker

**Against:**

**Abstain:**

**Recuse:** Anderson

**Vacancy:** One

**Absent:**

Approved By:

Robin Gary  
Environmental Board Vice Chair

Note: Board member Bob Anderson recused himself due to a potential conflict of interest.

DRAFT



## MEMORANDUM OF LAW

CI

To: City of Austin Planning Commission  
From: Brad Rockwell, Lowerre Frederick Perales Allmon & Rockwell  
Re: Variance requested to destroy Heritage pecan tree at 311 Bowie  
Date: August 23, 2011

### Facts

An affiliate of Endeavor Real Estate Group has acquired a contract on adjacent lots on Bowie Street downtown. Shoal Creek forms the eastern boundary of these lots. A Heritage pecan tree is located in one of the four quadrants of the lot, a quadrant that borders Shoal Creek. The Heritage tree is a few feet from the construction easement required for the public hiking trail on Shoal Creek. The current plans of the Endeavor affiliate are to build a five-story, above-ground parking garage that fills up the entire tract and on top of this parking garage a much more narrow tower would rise providing approximately 300 dwelling units and perhaps some office space.

The Environmental Board established a task force to study this issue and I attended task force meetings as an attorney who was involved the drafting of the Heritage tree ordinance.

### Law

The Endeavor affiliate is unwilling to design around the tree and seems to be asking for a variance on some sort of grounds not authorized by the Heritage Tree ordinance.

City staff and the Boards, Commissions and even City Council must follow city ordinances when granting variances and have no discretion to deviate from the standards set forth in those ordinances. See *City of Amarillo v. Stapf*, 101 S.W.2d 229 (Tex. 1937). Even when the landowner is alleging that without a variance the city will be unconstitutionally taking his property, a city has no authority to grant a variance that is not specifically authorized by its ordinances. *City of Houston v. Mack*, 312 S.W.3d 855 (Tex. App. - Houston [1st Dist.] 2009). A variance granted in a manner that does not follow the requirements of a city ordinance is void. *City of Lufkin v. McVicker*, 510 S.W.2d 141 (Tex. Civ. App.-- Beaumont 1973).

Austin Land Development Code ("LDC") section 25-8-643 authorizes variances from the prohibition against destroying Heritage Trees only if each of three conditions have been met.

The first condition is that the criteria set forth in 25-8-624 have been met. LDC § 25-8-643(A). The City staff report says that the section 624 criteria have not been met.

The second condition imposed by section 25-8- 643 is that the applicant must have applied for and been denied a variance, waiver, exemption, modification or alternative compliance from another city code provision that would eliminate the need to remove the Heritage Tree. LDC §§ 25-8-643(A)(1); 25-8-646. In the Environmental Board task force meeting, the applicant's representative said that the need to destroy the heritage tree was caused by city parking requirements. Nearly 100% of the lot is to be filled up with a five-story above-ground parking garage. The tower containing apartments, condos or offices is narrow and has a much smaller footprint on the lot. It could be located on the lot without interfering with the tree. The applicant could make room for the heritage tree if the city would grant it a variance

allowing it a lesser number of parking spaces. But the applicant said it is unwilling to pursue this variance. Therefore, the second condition is not met.

The third condition that has to be met before the Environmental Board or Planning Commission can authorize removal of the Heritage pecan is that the heritage tree removal is not caused by the method chosen by the applicant to develop the property. LDC § 25-8-643(A)(2). The method here chosen is a building with a broad base and narrow tower. If the applicant had chosen a method of development that was limited to a tall tower with a footprint that did not take up more than three-quarters of the lot, there would be no need to destroy a heritage tree. In addition, the applicant has wholly refused to consider a method of underground parking that would diminish the need for such a large above-ground facility. Therefore the third condition was not met.

The applicant has not met any of the three conditions that each have to be met before the applicant is entitled to a variance. The applicant is effectively saying that its choice to locate a parking garage of a maximum width on this site (and not resorting to underground parking) allows him to destroy a heritage tree. The Heritage Tree ordinance does not give it the right to do this.