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Via Email

Dear Brian,

You inquired about an interpretation of particular provisions of Chapter 86 of the Salem Revised Code (SRC) related to the removal of the State Street Trees.

SRC 86.160 provides, in relevant part:

Whenever any application for permit under this Chapter is denied by the Director, an order issued by the Director directing certain trees, shrubs, or plants to be trimmed, treated, or removed, or a permit is granted by the Director containing conditions the applicant of the permit deems unreasonable, such applicant, affected person, or the Director may refer the matter to the Shade Tree Committee for recommendation. The Shade Tree Committee shall make a recommendation as soon as is practicable to the Director. The Director shall, upon receiving the Committee's recommendation, issue a final decision and notify the applicant or the affected person.

The issue is: who is an "affected person." The applicant cannot be the "affected person" because such an interpretation would fail to give meaning to every word and it would render portions of the code to be superfluous or unnecessary. *See Kankkonen v. Hendrickson*, 232 Or 49, 67, 374 P2d 393 (1962); *Due-Donohue v. Beal*, 191 Or App 98, 191 Or App 98 (2003); *Ratzlaf v. United States*, 114 S.Ct. 655, 659 (1994). If the word "applicant" was also interpreted to mean "affected person," then "affected person" would be superfluous and unnecessary.

Notably, SRC Chapter 86 does not define "affected person," and the only provision of SRC Chapter 86 to use the phrase "affected person" is SRC Chapter 86, which uses it on two occasions. SRC 86.010(c) defines "person" to mean "any person, firm, partnership, association, corporation, limited liability company, or other entity in law or fact." This definition is extremely broad and it would appear to allow any person to appeal the decision as long as that person is "affected." The word "affected" is not defined, and, therefore, the common usage of that word should be used, which means "influenced or touched by an external factor." Accordingly, such an interpretation based on the plain meaning of the word "affected" would not be restricted solely to an applicant.

Apparently City Staff indicated that “affected person” refers to those persons under SRC 86.140 who have been issued an order. This interpretation is not supported by the code. SRC 86.140 does use the word “affected,” but it is not in reference to a person. Instead it refers to a tree, plant, or shrub:

The director may remove or cause or order to be removed any tree, plant or shrub or part thereof planted or growing in or upon any public street or alley which is in an unsafe condition or which, by reason of its nature, is injurious to sewers or other public improvements or is affected with an injurious fungus, disease, insect, or other pest.

SRC 86.140 (emphasis added). The only reference to a person other than the Director is to a “property owner,” and there is nothing to suggest that the phrase “affected person” is synonymous with “property owner.” Had the City of Salem intended for SRC 86.140 to use the phrase “affected person,” then they would have done so. The City did not, and, therefore, it is eminently reasonable to assume that “affected person” is not restricted to “property owner” as used in SRC 86.140.

The foregoing analysis establishes that there are no reasonable grounds to restrict appeals to only applicants or individuals contemplated under SRC 86.140. In the event that the City refuses to allow an “affected person” to appeal the decision, then the City may well find itself subject to a lawsuit before the Marion County Circuit Court.

If you have any questions, please do not hesitate to contact me.

Sincerely,



Sean T. Malone
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