



Requested Interpretation		Case Number
<p>Please re-confirm the determination made previously by the Planning and Zoning Administrator and the Urban Forestry Administrator as follows:</p> <p>Under UDO Section 9.1.4.C an area encumbered by an easement that authorizes tree disturbing activities is excluded from qualifying as a tree conservation area.</p> <p>Consequently, a parcel which is encumbered by a "blanket" utility easement which authorizes tree disturbance activities and which encumbers the entire parcel contains no trees which are eligible for tree conservation areas; and when a parcel contains no trees which are eligible for tree conservation areas, no tree conservation areas are required.</p>		<p>UI-2-18</p> <p>Application of TCA when a "blanket easement" has been applied to a property</p>
<p>Site Address/PIN:</p> <p>1200 Wicker Drive; 2200 Atlantic Avenue; 1111 E. Whitaker Mill Road; 1859 Capital Boulevard; 1121 E. Whitaker Mill Road</p>		
<p>Date Submitted: Feb. 16, 2018</p>	<p>Date Issued: July 3, 2018</p>	<p>Code Sections Affected: 9.1.2 and 9.1.3</p>

STAFF ANALYSIS

The applicant requests clarification of code language that exempts tree conservation area when an easement is present on a property. Section 9.1.2 of the UDO establishes the applicability of tree conservation standards. This section states that: "Prior to approval of any subdivision of any tract 2 acres or greater in size or site plan for a parcel 2 acres or greater, tree conservation areas must be provided in accordance with the requirements of this UDO, provided that delineation of tree conservation areas for a site subject to either condemnation or the threat of condemnation shall be delayed until a site plan or further subdivision of the parcel first occurs."

Further, the UDO establishes the minimum required tree conservation area, expressed as a percentage of the property. The UDO also establishes a priority for areas on the property, which must be preserved in accordance with the priority schedule in Section 9.1.4. A and B. These priorities are expressed as primary tree conservation areas (section 9.1.4.A) and secondary tree conservation areas (9.1.4.B).

The UDO contains a section titled "Excluded Areas"; this is Section 9.1.4.C. The language states that:
 "Tree conservation areas must exclude the following:

1. Sight triangles.
2. Slope easements.
3. Drainage easements.
4. Cross access easements.
5. Governmental and utility easements that prohibit trees.
6. Any easement that authorizes tree disturbing activities.
7. Any area devoted or to be devoted to streets, future right-of-way reservations, sidewalks, driveways, walkways, transit easements and storm drainage facilities, including without limitation, pipes, energy dissipaters and stormwater control measures which require the removal of vegetation.
8. Water-related activity areas located in, over, under or adjacent to a lake or natural watercourse shown on the site plan may not be included as Zone 2 areas of Neuse River Riparian Buffers.
9. Any tree 10 inches DBH and larger that has 30% or more of its critical root zone traversed in part or in entirety by any of the excluded areas in Sec. 9.1.4.C.1 through Sec. 9.1.4.C.7 above, by impervious surface or by any adjacent property."

This section is the focus of the requested interpretation. The applicant has asked whether or not a "blanket easement" meets criterion number 6 in Section 9.1.4.C. In responding to this request, it is worth noting that staff has not confirmed the presence of the "blanket easement" that the applicant claims is present on this property. Additionally, staff has not reviewed any specific language that would create a "blanket easement" for this property. In responding to this request, staff is depending upon the common usage of the term, which is an unspecified location on the property where the easement holder may enter the property to access and maintain a facility. This differs from a specific easement, where the location is described with a legal description or



shown graphically in a particular location on the property.

STAFF INTERPRETATION

The intention of Article 9.1 is to provide a framework for tree conservation area requirements. This is stated in the “Intent” section 9.1.1. The UDO is intentional about the requirements for tree conservation, providing a clear threshold for when the standards apply and identifying the most important areas on a site that must be conserved. The applicant has asked about the interaction between a “blanket easement” and the requirement for tree conservation area. Clearly, section 9.1.4.C includes a list of areas that must be excluded from tree conservation area. Many of these items in the list of exclusions are easements. Specifically, the applicant cites section 9.1.4.C.6, which excludes “any easement that authorizes tree disturbing activities.”

The intent of section 9.1.4.C is to exclude areas from tree conservation where removal is likely or is required to satisfy another rule. These exclusions are intended to apply at the point when a property owner is developing the property and is required to designate tree conservation to satisfy Article 9.1 of the UDO. These exclusions, with the exception of C.1, C.8 and C.9, are intended to be specifically designated via metes and bounds on a deed or graphically shown on a plat. Staff does not believe that this is the intent of the blanket easement, which was non-specific as to allow the grantee to choose the most advantageous location for location of utilities. To apply the language in Section 9.1.3.C to mean that an unspecified easement can exempt the entirety of the property from the tree conservation regulations would produce a perverse outcome. By this same logic, the blanket easement would prevent a building from being constructed, as the entirety of the site would be encumbered. If staff were to rely on the blanket easement as providing rights to the grantee over the entirety of the property, the site could not be improved whatsoever.

Staff opines that the blanket easement does not provide a total exemption for tree conservation areas on the property in question, and that the requirements of Article 9.1 must be satisfied prior to approval of a development plan.

SIGNATORY



Travis R. Crane
Interim Planning and Zoning Administrator