

**DISTRICT OF COLUMBIA  
OFFICE OF ADMINISTRATIVE HEARINGS**

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DISTRICT OF COLUMBIA  
DEPARTMENT OF TRANSPORTATION  
Petitioner

v.

BENJAMIN PEASANT  
Respondent

Case No.: 2010-DDOT-U100074  
NOI No.: U100074

**FINAL ORDER**

**I. Introduction**

On October 14, 2010, the Government served a Notice of Infraction on Respondent Benjamin Peasant, alleging a violation of D.C Official Code §8-651.04 for destroying a “Special Tree,” defined as tree with a circumference of 55 inches or more, without a permit.<sup>1</sup> The violation was alleged to have occurred on May 15, 2010 at 1575 Harvard Street, N.W. (the Property). The Government seeks a fine of \$10,600 for the violation.

On December 1, 2010, Mr. Peasant filed an untimely answer with a plea of Deny.<sup>2</sup> On

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<sup>1</sup> This definition of a “Special Tree” appears at D.C. Official Code § 8-651.02(5). The circumference is measured at a height of four and a half feet. D.C. Official Code § 8-651.02 (1).

<sup>2</sup> Respondent did not file an answer to the Notice of Infraction within the required 20 days after service. The twenty days consists of 15 days plus 5 additional days for service by mail pursuant to D.C. Official Code §§ 2-1802.02(e) and 2-1802.05. Failure to file a timely answer makes a respondent subject to a statutory penalty equal and in addition to the amount of the fine unless good cause for the late filing is demonstrated. D.C. Official Code §§ 2-1802.02(f) and 2-1801.04(a)(2)(A).

December 20, 2010, the Government filed a request that the hearing not be scheduled for a few months because the parties were working to settle the case. Because a settlement was not reached, I scheduled a hearing for April 13, 2011. At the hearing held on that date, Nicholas Simopoulos, Esq. appeared for the Government. Carlson Klapthor, the charging inspector with the Urban Forestry Administration, testified for the Government. Mr. Peasant appeared and testified on his own behalf. Graham Beard, an adjoining property owner, and Jesus Romero, general contractor for construction project at the Property, also testified for Respondent.

At the opening of the hearing after the alternative pleas were explained, Mr. Peasant elected to change his plea to Admit with Explanation.

Based on the testimony at the hearing, the documents admitted into evidence and the entire record, I now make the following findings of fact and conclusions of law.

## **II. Findings of Fact**

The Property is a rowhouse, which Mr. Peasant has owned since the mid-1970's. He rented the Property for a number of years, but the building was vacant and undergoing renovation in May, 2010, when the violation charged in this case occurred. The renovation included the construction of an addition at the rear of the existing structure.

A piece of earthmoving equipment was brought to the site for the project. Respondent's Exhibit "RX" 203, 208. Using the equipment, the construction crew excavated to depth of about 15 feet to install footings for the new addition. RX 203-205; 207. The fifteen foot excavation was within about five feet of the trunk of a large oak tree that abutted the fence between the Property and the rear yard of the adjacent rowhouse. RX 204-205. On two other sides of the tree,

soil was excavated to a depth of several feet within a few feet of the trunk. Petitioner's Exhibits "PX" 103; 106-107. The soil at the base of the tree was undisturbed only on the side of the tree that abutted the fence.

On May 14, Inspector Klaphor received an e-mail notifying him that contractors working in the rear yard at 1857 Harvard Street, NW had cut the roots of a large oak tree while excavating. He went to the Property and identified the tree as a Scarlet Oak. When he measured the circumference of the trunk, with a device designed for that purpose, he found that the trunk had a circumference of 106 inches. Neighbors who came to the site expressed concern about the stability of the tree.

Inspector Klaptor has had more than five years of experience in identifying hazardous trees and performing tree risk assessments. He is a certified arborist, a designation conferred by the International Society of Arborists, which is recognized in 50 countries. To obtain this certification, an individual must have at least five years of experience and pass a test. In addition, thirty hours of continuing education annually is required to maintain the certification.

Because of the proximity of the excavation to the base of the tree, Inspector Klaptor determined that the tree was in grave danger of falling. More than eighty percent of the roots of a tree are within two or three feet of the surface. Because the excavation was within a few feet to the tree, it had severed structural or buttress roots, which provide stability to a tree. Inspector Klaptor estimated that more than 60% of the total root mass had been cut, making a catastrophic failure likely. This posed a serious hazard requiring that the tree be removed as soon as possible because the tree was in a densely inhabited urban neighborhood.

Inspector Klaptor directed the workman at the site to top the tree to take weight out of the crown, since the reduced weight in the crown would lessen the risk that the tree would topple. He decided that the tree should be topped before it was taken down because there was not enough time to arrange for removal of the tree before a predicted wind storm, and topping could be done quickly. Respondent admitted that he destroyed a Special Tree without a permit by virtue of his plea of Admit with Explanation.

On March 24, 2009, Mr. Peasant applied for a Special Tree removal permit to remove the tree. An inspector from the Urban Forestry Administration visited the site after that application was filed and determined that the tree was not hazardous and was not an exempt species. PX 114. In view of this, Respondent was required to either pay a fee of \$35 per inch of circumference or agree to plant replacement trees to obtain a permit to cut down the tree. As the circumference of the Scarlet Oak was approximately 100 inches, the fee would have been about \$3,500. If Respondent had pursued the alternative option of planting replacement trees, Inspector Klaptor estimated that Respondent would have had to plant about 20 2-inch caliper trees in light of the circumference of the Scarlet Oak. Mr. Peasant decided to proceed with the project without cutting the tree down. The bank rescinded his loan, and he did not want to pay \$3,500 to obtain a removal permit because he had limited funds to continue the project.

Both Mr Peasant and Mr. Romero believe that they have been harassed by neighbors. They stated that neighbors have called both DCRA and the police with complaints about the project, and have threatened to call the INS about the immigration status of construction workers. Mr. Peasant also stated that neighbors have expressed concern that low-income housing is planned for the Property.

The Government served the Notice of Infraction by mail on October 14, 2010. Mr. Peasant filed an answer that he dated October 21, 2010, but it was not received by the Office of Administrative Hearings until December 1, 2010. Instructions on the Notice of Infraction form mailed to Mr. Peasant by the Government directed a respondent to file an answer by mailing to the Office of Administrative Hearings at “825 North Capitol Street, NE.” The Administrative Hearings moved from this address in April, 2010, about six months before the Notice of Infraction in this case was served.<sup>3</sup>

### **III. Conclusions of Law**

Respondent was charged with violating D.C Official Code §8-651.04 for destroying a Special Tree without a permit. This provision provides:

Preservation of Special Trees; permits; penalties

(a) It shall be unlawful for any person or nongovernmental entity, without a Special Tree removal permit issued by the Mayor, to top, cut down, remove, girdle, break, or destroy any Special Tree.

(b) The Mayor shall issue a Special Tree removal permit under this section where the applicant has:

- (1) Shown that the Special Tree in question is a Hazardous Tree;
- (2) Shown that the Special Tree in question is of a species that has been identified, by regulation, as appropriate for removal;
- (3) Paid into the Tree Fund an amount equal to \$ 35 for each inch of the circumference of the Special Tree in question; or
- (4) Averred in a signed Special Tree removal permit application that the applicant will plant, in compliance with the applicable regulations, a quantity of saplings whose aggregated circumference equals or exceeds the circumference of the Special Tree in question.

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<sup>3</sup> Respondent did not comply with the provision of the Scheduling Order requiring that photographs and other documents be filed and served on the Government five days prior to the hearing. At the opening of the hearing, the Government objected to the admission of Respondent’s photographic exhibits because of Respondent’s noncompliance with the Scheduling Order. That objection was denied, with leave given to the Government to renew the objection during the hearing if it demonstrated that admission of a specific exhibit was prejudicial because it interfered with its ability to prepare a defense.

(c) The showings required by subsection (b) of this section may be satisfied by a combination of payments and plantings pursuant to subsection (b)(3) and (b)(4) of this section.

(d) A violation of subsection (a) of this section, or a failure to comply with the conditions contained in a Special Tree removal permit, shall constitute a violation subject to a fine of not less than \$100 per each inch of the circumference of the Special Tree in question.

Mr. Peasant's plea of Admit with Explanation establishes that he violated this provision by destroying a "Special Tree" without a Special Tree removal permit. Since the evidence shows that the circumference of the tree was 106 inches, the statute authorizes a fine of \$10,600 for the violation.

This administrative court may suspend or reduce a fine for mitigating factors that include good faith attempts to comply and acceptance of responsibility for a violation. D.C. Official Code §§ 2-1802.02(a)(2) and 2-1801.03(b)(6). By virtue of his plea of Admit with Explanation, Respondent has accepted responsibility for the violation. This is a mitigating factor that warrants some reduction of the fine. However, a significant fine is nevertheless warranted in this case because of aggravating factors. First, Respondent decided to proceed with the project without obtaining a Special Tree removal permit. Although he did not cut down the tree, he either knew or should have known that extensive severing of the roots would destroy the tree. Secondly, The project was undertaken with reckless disregard for the safety of people in the neighborhood. The excavation around the tree created an imminent danger that the tree would fall, possibly causing injury or death. There was also a significant risk of property damage. Because of the size of the tree and the density of the neighborhood, a number of structures could have been damaged or destroyed if the tree had fallen. In view of all of these factors, a fine of \$8,000 will be assessed.

We turn next to the issues raised because the answer was filed late. A respondent is subject to a penalty equal to the fine for filing a late answer unless “good cause” for the late filing is demonstrated. D.C. Official Code §§ 2-1802.02(f) and 2-1801.04(a)(2)(A). In this case, the Notice of Infraction form used by the Government directed that an answer be filed at an incorrect address, which may have delayed receipt of the answer by the Office of Administrative Hearings. In light of this, good cause exists for the late filing and no late answer penalty will be imposed.

**V. Order**

Based on the above findings of fact, conclusions of law, and the entire record in this matter, it is this 12<sup>th</sup> day of May, 2011:

**ORDERED**, that Respondent shall pay a fine in the amount of **EIGHT THOUSAND DOLLARS (\$8,000)** in accordance with the attached instructions within 20 calendar days of the date of service of this Order (15 days plus 5 days service time pursuant to D.C. Official Code §§ 2-1802.04 and 2-1802.05); and it is further

**ORDERED**, that if the Respondent fails to pay the above amount in full within 20 calendar days of the date of mailing of this Order, interest shall accrue on the unpaid amount at the rate of 1½ % per month or portion thereof, starting 20 days from the date of mailing of this Order, pursuant to D.C. Official Code § 2-1802.03(i)(1); and it is further

**ORDERED**, that failure to comply with the attached payment instructions and to remit a payment within the time specified will authorize the imposition of additional sanctions, including the suspension of Respondent’s licenses or permits, pursuant to D.C. Official Code § 2-

1802.03(f), the placement of a lien on real and personal property owned by Respondent, pursuant to D.C. Official Code § 2-1802.03(i), and the sealing of Respondent's business premises or work sites, pursuant to D.C. Official Code § 2-1801.03(b)(7); and it is further

**ORDERED**, that appeal rights of any person aggrieved by this Order are set forth below.

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Mary Masulla  
Administrative Law Judge