

Jennifer Scott
Program Manager
City of Salem Public Works Department
555 Liberty Street SE., Room 325
Salem, Oregon 97301-3513

Letter of Intent to Appeal Tree Removal Permit Application
No. 20-109648-TR Salem Heights Rd.

Dear Jennifer Scott,

The Southwest Association of Neighbors (SWAN) is providing **notice of intent to appeal** the tree removal permit application No. 20-109648-TR decision issued on June 25, 2020. Per requirements of appeal we are providing the reason for the appeal, why SWAN believes the decision was in error and additionally noting requests for remedy.

It is our assumption that we will be afforded the opportunity to supplement this notice of intent to appeal with additional written testimony and comments according to the schedule for hearing the appeal established by the Salem Parks and Recreation Advisory Board.

Reason for the Appeal:

Among the reasons for this appeal is the trees listed for potential removal - two significant white oak trees, two locust trees and a Douglas Fir tree - have already been cut down and removed prior to issuance of a permit for removal in violation of City Code contained within SRC Chapter 86. We believe the Director's conclusion that there was no "reasonable alternative" was in error. We believe there were, or may have been reasonable alternatives.

City staff has confirmed with us that the trees were removed on April 15 in violation of the Code because the order granting the removal was not issued until June 25 with an effective date of July 28, 105 calendar days after they were cut down.

We believe the City Tree Code should be enforced in a way that protects the city's trees. Granting a permit after trees have been cut, as in this case, sends a message the Code enforcement is lax. We intend to show that the cutting of trees along the 500 block of Salem Heights Avenue violated City Code.

We believe city residents deserve the opportunity to offer reasonable alternatives during the permit application process. This was denied in particular to the removal of the white oaks. The Director has concluded, without explanation in the order, that there was no reasonable

alternative to cutting the trees. Our appeal will show the possibility that a reasonable alternative existed before the trees were removed.

This cutting and removal of trees on city-owned right of way prior to issuance of a tree removal permit is an egregious breach of current law and an affront to the citizens of Salem - a "tree" city. Cutting and removal of the trees in question prior to issuance of a tree removal permit is also an extreme breach of due process afforded by the tree removal permit application process.

It is ironic that the effort of city staff to comply with posting of the tree removal order and appeal process as required by the Code to be posted "where the tree or trees are located" had to be posted to a utility pole *after* the trees were reduced to stumpage. Again, this cutting was done prior to the issuance of a removal permit or posting of the required notice of removal.

We are also appealing because we believe the Board should establish conditions giving the Director instructions on the level of enforcement and penalties. We believe enforcement issues are parts of the merits of this case because the Board has the authority to impose conditions. Those conditions should include the level of penalties commensurate with the willful or negligent violation of the Code that undermined the appeals process.

This denial of due process has precluded the opportunity to present a reasonable alternative to prevent unnecessary removal of the trees, especially the white oaks.

This appeal is a means to restore the due process denied by the cutting of the trees in question and seek effective enforcement of City Tree Code.

Why the Decision was in Error:

We believe the finding that "no reasonable alternative" is in error and that reasonable alternatives either do exist or may reasonably exist and ought to have an opportunity to be pursued. Cutting the trees prior to issuance of a permit was also a clear violation of City Code SRC 86.090.

In support of our assertion regarding reasonable alternatives we offer the following observations:

Currently discussion is underway for a Salem Heights Avenue Refinement Plan with a city planner and members of the Salem Heights neighborhood. Examination of alternatives to removing the trees could have been discussed with this group to fit the demands of possible street widening and connections to better fit the entire plan.

Salem Heights Avenue is an undeveloped collector street and widening is planned only at the Wren Heights Development site. Residents of the area have requested the "feel" of the street be maintained, efforts be made to slow traffic and increase pedestrian safety.

Right of way varies on Salem Heights Avenue creating a meandering pattern of ownership. Could this pattern have been incorporated into the proposed street widening plan? Perhaps a shift of a few feet in the widening of Salem Heights or center line location of the Doughton connections at Salem Heights Avenue could have created opportunity to meet neighborhood needs as well as preserve trees.

An alternative could have been considered which could have included leaving the trees where they were, maintaining the pavement at its current width and configuration. Adding a paved pathway for pedestrians and cyclists and dropping the speed limit to 20 mph. This is a reasonable alternative because it preserves tree cover, enhances safety and expands opportunities for walkers and cyclists (all neighborhood priorities) while potentially saving money.

Another possibility is that a bulb out or curb extension could have been placed to eliminate the need for removal of the significant white oaks. This looks like a possible option especially for tree number 1001. Curb extensions increase the sharpness of a turning radius which is an efficient tool for reducing speed thereby meeting neighborhood needs as well as tree preservation.

Maintaining the trees which were cut prior to a permit being issued would have contributed to an attractive streetscape which may have helped maintain a buffer zone for pedestrians depending on alternative design again benefiting the community.

The white oak trees which were cut down without a permit have stumps six feet from the current North edge of the pavement. Trees slated for preservation along the right of way are only nine feet from the North edge of pavement. Recommendations from the Vista/Commercial corridor study have noted reduction in lane width to the standard of 11 feet is desirable. Perhaps an adjustment of street/sidewalk layout could have been another reasonable alternative to white oak removal.

SWAN is not selecting, suggesting or in a position to mandate layout or represent an expert design opinion. SWAN is merely demonstrating reasonable alternatives may have existed prior to unlawful tree removal. The illegal removal of the trees precludes these options for discussion. However, although the trees are gone, alternatives to the standardized street design put forward should still be examined. These alternatives developed with neighborhood input can assist in siting and replacement of the trees that were cut down.

The burden of proof that no reasonable alternative exists is on the City. The Board need not select any particular alternative. It only needs to find a reasonable alternative that may exist to conclude the order is in error. If the Board finds the order in error it has several alternatives, including adding conditions.

It is this authority to either affirm or remand with conditions that makes enforcement and the level of penalties matters of merit in this case. We believe there is a clear violation of the City Tree Code. We also believe that this violation is especially egregious because of the impact it has on the appeals process itself.

We believe the Board has the authority and should include instructions to the Director regarding the magnitude of enforcement of penalties including costs of restoration, civil penalties and other remedies required before any tree removal permit or construction permit is issued. It is clear in this instance that violations have occurred and that the violators are subject to the required penalties in the Code. Because the trees were removed before permitted and before any appeals process, these violations meet the “objectively impossible to correct” criteria in the Imposition of Civil Penalty Section 20J.140(c) of the City Code.

Remedy:

SWAN is asking for full enforcement of the City Tree Code. Even though the trees that were illegally cut down were given *tentative* approval for removal in an initial site plan, confusion on tree removal is not an excuse. This is especially important for those who report on development criteria being met. Condition 8 of SUB-ADJ19-02 specifically states - “prior to issuance of public construction permits, obtain final approval for tree removal permits for trees labeled as 10001-10004 and 10012”. These were the trees along Salem Heights Avenue that were removed without a permit.

SWAN believes there are several remedies that take into account the blatant disregard for Code requirements, the serious undermining of the public process and the opportunities to develop a reasonable alternative that is consistent with planned improvement on the entirety of Salem Heights Avenue.

We believe the developer should not be able to remove the trees illegally, undermine the appeals process and then be given an after the fact permit, thus allowing the developer to then be granted a construction permit. To do this essentially makes the appeals process useless. We believe the Board should impose conditions which should be met before any tree removal permit and subsequent construction permit can be issued.

Because Salem Heights Ave. is an unimproved collector street with a low priority for funding improvement, the City began the process called the Salem Heights Refinement Plan to work with residents of the area to adopt a plan for future improvement, including sidewalks. A citizen Policy Advisory Committee has been formed to work with the City and communicate with the larger community in the area. This presents a fortuitous opportunity to pursue what would be an alternative to the plans submitted by the developer that would have the approval of the City, the neighborhood and the developer. It would also mean the development design in question would be compatible with the improvements on the rest of the street.

When the Refinement plan process began last fall, the City Staff estimated it would take from nine months to a year so this should not present an unreasonably long delay for the developer.

SWAN is not opposing the eventual construction of the development. SWAN is, in a sense, through the City of Salem enforcement action, inviting the developer to work with Salem Heights Area residents as we build the Salem Heights Refinement Plan. Working with city planners, neighbors involved in the SHRP and perhaps Salem's urban forester, plans for restoration can be collaboratively put together to enhance the character of the development as well as Salem Heights Avenue. This could create a win for all out of a breach of Salem City Code.

SWAN also believes that the conditions should include directions regarding enforcement of the Code to the Director. The Board should make it clear that because the tree removal was not only illegal but was also injurious to the appeals process and the rights of citizens to appeal removal of the trees, the levels of penalties imposed should be the maximum.

Key elements are:

- 1) That each tree removed is a separate violation (Section 86.105(c))
- 2) that each day it was removed before the effective date of the permit is a separate infraction (Section 86.130)
- 3) monetary reimbursement for the trees removed not be linked only to commercial board footage value but also to the intrinsic value of the trees contribution to the character of the neighborhood
- 4) tree replacement and costs be based on comparable sized trees

In addition it is our belief that because we are forced to appeal the removal of trees that have already been illegally cut, SWAN requests reimbursement of \$283.00, the cost of intent to appeal the notice of tree removal. This is to be returned to the Southwest Association of Neighbors city account or reimbursed by the developer.

In summary we believe the Board should remand the Director's order with the conditions that no permit for tree removal and subsequent construction permit be issued until a plan for that portion of the development site has been adopted in the Salem Heights Refinement Plan and any level of penalties specified in the order have been enforced.

We believe the Board could also justify reversing the Director's decision for tree removal based on the disregard for the Code and public process.

If the board affirms the Director's order, we ask that it does so with conditions associated with enforcement and penalties and not leave such discretion up to the Director.

Respectfully submitted on behalf of SWAN by unanimous consent of the SWAN Board.

Jeanine Stice,
Chair, Southwest Association of Neighbors

Ted Burney
Land Use Chair, Southwest Association of Neighbors
Burney.ted.tb@gmail.com
503-428-0625

Photos included below:

#1 Notice of removal on utility pole - trees gone - unable to post on trees

#2 View of Salem Heights Ave. after tree removal without permit

#3 View of Salem Heights Ave. (same location) prior to tree removal

Appendix A - attached



City of Salem
Public Works Department
503-588-4211 • Fax 503-588-4009

NOTICE OF TREE REMOVAL

APPEAL DATE: July 28, 2020 (if no appeal is filed)

PERMIT APPLICATION NO.: 20-109648-TR

ISSUED DATE: June 15, 2020

This permit application is to remove two White Oak trees, two of which are located within the existing right-of-way.

The trees are located on the east side of Salem Heights Avenue S, Salem OR 97302 - Marion County. The parcel numbers are 00W04AA 10400, 10600, 10601, and 10800.

The applicable code for tree removal is found in SRC 86.090(a).

The trees are to be removed to meet the criteria described in SRC 66.090(a)(9). The applicant is required to mitigate impacts due to street construction.

Permit No. 20-ADU19-02

This project has been **GRANTED** Street Tree Removal Permit Application. The applicant must comply with the applicable standards of the Salem Revised Code (SRC), and all other applicable codes and ordinances with permits issued for construction in Salem Heights.

For more information, please contact the City of Salem Public Works Department at 503-588-4211.

An appeal of this permit application is filed with the City of Salem Public Works Department, 503-588-4211, no later than 5:00 p.m. on the date of the appeal. The appeal must state the basis of the appeal and the amount of the appeal fee must be paid at the time of filing. If the appeal is not filed by the deadline, the appeal will be rejected. The Salem Parks and Recreation Department will review the appeal at a public hearing. After the hearing, the City of Salem Public Works Department may affirm, amend, or rescind the action, or refer the matter to the City Council for a final decision.

For more information, including findings, conclusions and conditions of approval, if any, or to appeal this permit application, please contact the City of Salem Public Works Department, Room 325, 555 Liberty Street, Salem, OR 97301, during business hours.

Si desea más información, por favor llame al 503-588-4211.



SWAN APPEAL OF ORDER 20-109648-T

APPENDIX A

Code and Procedural Basis for Penalties and Remedies of Illegal Tree Removal

Background Facts:

On August 26, the City adopted a Facts and Findings statement on the appeal to the Wren Heights development in CASE NO. SUB-ADJ19-02 which upholding the decision to approve the development with conditions.

According to the City staff, the developer removed five trees in the City Right-of-Way on April 15., 2020. An inspection was conducted on April 17, confirming that the trees had been removed without the proper permit. Staff also confirmed that the Public Works Director was aware of the violation.

On June 25, the Director of Public Works issued an order, 20-109648-TR, granting a permit application by the developer to remove the Right-of-Way trees “because no reasonable alternative exist to mitigate impacts due to street construction required by land use decision SUB-ADJ19-02. The order does not mention that the trees have already

The June 25th order specified that it did not take effect until July 28, 2020, unless appealed by July 27. July 28 effective date is 105 calendar days after the trees were actually removed.

The removal of the trees was illegal and in violation of the City Tree Code, the land use order and the tree removal permit.

1. The land use order, on page 8, stated that the trees in the right-of-way were subject to the provisions of SRC Chapter 86. It stated that four of the nine existing trees in the right-of-way will likely need to be removed “to accommodate the required widening, sidewalk installation, and grading associated with the improvement of Salem Heights.” The order specified other right-of-way trees are to be conditioned for preservation but that the trees that were likely needed to be removed “will be required to obtain a permit for removal pursuant to SRC 86.090.”

2. Condition 8 noted that that the right-of-way trees in question were tentatively approved for removal but specifically stated “Prior to issuance of public construction permits, obtain final approval for tree removal permits for trees labeled as 10001 – 10004, and 10012 ...”

The removal of the trees in April violated the City Tree Code because no final written permit, exemption, or variance was granted before removal.

1. Sec. 86.030. – Prohibited Activities of the City Tree Code states

(a) It shall be unlawful for any person, except as expressly allowed by a written permit, exemption, or variance granted pursuant to the terms of this chapter, to willfully or negligently injure, destroy, top, or prevent the growth of a City tree, including, but not limited to, the following:”

2. Sec. 86.050(a) (1) also makes it clear that you have to have a permit to “prune or remove City trees or tree protection devices..”

3. Sec. 86.080 requires an application for tree removal and establishes application requirements and processes. It also provides that

(c) Effective date. A decision to approve a permit application for City tree removal shall be effective no earlier than 30 calendar days after the decision has been issued, unless an appeal has been filed, and any appeal fee paid.

4. The Director’s order also states that it is not final until after the deadline for appeal by July 27th has passed. “

The trees were unlawfully removed either “willingly or negligently.”

Any excuse that there was confusion over requirements for tree removal or that removal was unintentional is bogus. The developer isn’t new to the business. Developers have attorneys, planners and other consultants whose job it is to know the City Code. This is not new to them. They should reasonably be expected to know the Code and the instructions in the orders are clear: no trees are to be removed from the right-of-way until final approval is granted.

The removal of the trees subjects the violator to specific penalties required by the City Tree Code.

1. Section 86.105 (c) establishes the parameters for penalties that “shall” be imposed. This includes restoration and repair and civil penalties for each tree removed.

“Persons violating this chapter, or a permit issued hereunder, shall be responsible for restoring damaged areas in conformance with a plan approved by the Director that provides for repair of any environmental or property damage and restoration of the site. Costs of restoration shall be not less than those determined equal to the monetary value of the regulated trees removed in violation of this chapter, or permit issued hereunder, as set forth in an appraisal acceptable to the Director and based upon applicable administrative rules. Each removal of a regulated tree in violation of this chapter shall result in a separate civil fine in addition to costs of restoration.

Hence the developer is responsible for restoration and repair of the site, the costs of which shall not be less than those determined by an appraisal.

2. Section 86.120 (c) (1) sets out the civil penalties and reiterates that the civil penalties are in addition to the value of the trees.

Unauthorized City tree removal shall be subject to a civil penalty not to exceed \$2,000.00 per violation in addition to the value of the tree as calculated in accordance with applicable administrative rules (or in the absence of administrative rules, in accordance with the most current edition of Council of Tree and Landscape Appraisers "Guide for Plant Appraisal").

3. The civil penalties apply to each day after trees were removed as a continuation of the violation as provided for in Section 86.130 – Violations

“Violation of any of the provisions of this chapter is an infraction. Each day that a violation continues shall constitute a separate infraction.”

When a tree is illegally removed it is still unlawfully destroyed, gone and absent the next day and the next and the next, etc., until the effective date of any order that subsequently blesses the its removal.

4. An after-the-fact permit and any new plantings required in the land use order do not override or serve as substitutes for the above penalties. Any posthumous granting of a permit does not eliminate the penalties for violation of the Code. The Code’s requirement for restoration and repair is based on the assumption that trees were illegally removed before a permit was issued. Requirements in any land use order to replant trees in the right-of-way after removal of trees allowed by a permit cannot be substituted as restoration and repair penalties. To do so would mean that there would be no such penalties for illegal removal and would provide no incentive to wait for final approval.

The Board has the authority to provide direction on enforcement to the Director as well as other conditions, whether it affirms the order or not.

1. Item A.6(j) of the Boards adopted procedures states that the Board can attach conditions and findings to its decisions:

(j) Findings and Order. The decision of the Board shall be by simple majority vote of members present. Board decisions concerning appeals of a decision by the Public Works Director under SRC Chapter 86, may affirm the Director’s decision, affirm the Director’s decision with conditions, or remand the Director’s decision to the Director with specific findings identifying where the Director’s decision is in error, or reverse the Director’s

decision, with specific findings identifying where the Director's decision is in error, and why the decision must be reversed. The Board shall, in all decisions, adopt findings to support its decision.

2. In order to assure that sufficient penalties are assessed for the illegal removal of trees before the effective date of any required final order approving any removal, and before citizens have had an opportunity to appeal, the Board should include instructions to the Director on the level of penalties. Leaving it up to the Director risks assessment of penalties that are insufficient to deter any future violations of this kind.

The Board should include other conditions and findings delaying any issuance of a tree removal permit or subsequent construction permit because the illegal tree removal had undermined the right of citizens to appeal the Director's order. should, include as a condition of continuation of work on the develop

The Board can, and should, establish conditions for penalties and remedies before any continuation of work on the development is allowed.

1. The most egregious violation here is the impact of the tree removal on the process and the ability of the public to appeal an order allowing removal. By removing the trees before the effective date of the permit and the deadline for appeal, the public cannot appeal to prevent the removal and it is objectively impossible to correct the violation. This impact justifies either reversing the Director's order or the application of Section 86.120 (a) which allows stop work order or permit revocation:

(a) Stop work orders and permit revocation. The Director may suspend work or revoke a permit specifying the basis for the suspension or revocation that must be remedied prior to resuming other work on the project, upon a finding that:

(1) The work is not authorized by a valid permit or...

(3) The applicant is not complying with the terms of the permit or this chapter.

2. The criteria for taking such action have been met. If the Director can take such action, the Board can instruct him to do so, whether it is his preference or not. It can instruct the Director to make final approval of the tree permit or to not allow any construction permit until certain conditions or findings are met. These could include instructions on the level of penalties, the nature of the required restoration and repair, and further examination of potential alternatives.

The conditions can, and should, include a public process for examination of reasonable alternatives consistent with public works designs on the entire Salem Heights Ave S right-of-way.

One way to redress the impact the illegal tree removal has on the public process and citizens' right to appeal is to provide another process for determining if there may be a reasonable alternative. Such a process already exist through the City's Salem Heights Refinement Plan.

Consideration of alternatives, without precluding a finding that no reasonable alternative exists, through this planning process would provide the opportunity to make the right-of-way design of Wren Heights consistent with other adopted improvements on the entirety of the street.

The Board should either direct the refund of the SWAN appeal fee or require the developer to reimburse SWAN for the fee.

The Director could have informed the public of the illegal violations in his order and delayed the permit until penalties have been determined, assessed and enforced. And under the Code and procedures he could have referred the issue of whether to issue an after-the-fact approval to someone who had violated the Code to the Board. Instead, he left it up to the neighborhood association to decide to pay the fee in order to appeal his order that blesses the illegal activity and leaves no recourse to prevent the removal of the trees.