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Mary Grace Houlihan, Director of Public Works
Charlie Bryant, Community Development Director

City of Emeryville
1333 Park Avenue
Emeryville, C A

June 3, 2021

Dear Mary Grace & Charlie,

I am writing to inform the City of Emeryville we now consider it “impossible” to comply with conditions of approval numbers “SW VTM 8357 III.A.3.b.i.k” , “FDP 17-002 IV.A.1.d” , and “FDP-17002 IV.D.1” for the Sherwin Williams development. These conditions of approval address the preservation of several street trees at along the western side of Horton Street on the frontage of Lot 1 (i.e. office building frontage). The original tentative map condition calls for preservation of all the existing street trees (11 trees) along this frontage. In September of 2019 FDP Conditions of Approval for tree preservation in this area were modified through a PUD amendment process which allowed removal of 4 of the 11 existing trees (note: one of the four had already been removed by the City at the time of approval). The Conditions of Approval we are concerned about read as follows:

- SW VTM 8357 III.A.3.b.i.k: “The preservation of the existing street trees on Horton Street along the frontage of Lot 1. The soil conditions for the existing street trees shall be improved by providing structural soil beneath all hardscaped areas and Bay Friendly horticultural soil in planting strips”
- FDP 17-002 IV.A.1.d: “Preparing and implementing a tree protection plan for all trees to remain within the Property, particularly street trees along Horton Street. The applicant shall post bond deposit in the amount equal to replacement value of all trees to be protected and shall be responsible for replacing any tree that dies during construction of the complete Sherwin Williams PUD/PDP project.
- FDP-17002 IV.D.1: “Damage to Public Facilities. Applicant shall be deemed responsible for any damage to public improvements that occurs during construction and shall repair such damage at its expense and to the satisfaction of the Public Works Director, including but not limited to sidewalk repair, street slurry seal or street reconstruction.”

Our assessment of “impossibility” is based on recent subsurface investigations conducted around the street trees on the west side of Horton Street.

Background

The September 17, 2019 City Council Staff report for the PUD amendment thoroughly recounts the process and history leading up to the Council’s approval that evening of a revised landscape plan which allowed 4 of the Horton trees in question to be removed and the remainder preserved. Notably, the City Staff, the City arborist, and the Planning Commission had all supported removal of all the trees in question in previous reports and meetings. Their support for removal of the trees was due to the amount of significant utility undergrounding work the City required near the trees, poor tree health in general, and the potential for continued substantial pedestrian and bike safety issues caused by the damage the trees had caused to adjacent sidewalks and streets. Months prior to the Council’s September 2019 approval Staff was directed to work with the applicant to determine if the underground utilities could be threaded in between the trees, so they could be preserved. Our consultants did their best with the information they had available at the time to accommodate Staff’s request and subsequently developed a plan that appeared feasible on paper and was ultimately approved.

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Current Conditions

Unfortunately, the site conditions we have encountered as the utility installation work on Horton Street has begun differ substantially from the assumptions made during our consultant planning leading up to the 2019 Council meeting, and can rightfully now be described as a “change of condition”.

For example, recently we installed a storm drain inlet at the corner of Horton Street and Sherwin Avenue immediately adjacent to tree #11 (See City arborist reports dated December 29th, 2014 & Hortscience report date April 28th, 2021)

Despite best efforts by our contractor a primary structural root of this tree was cut. The root was in direct contact with the back of the concrete curb (underground) and when the curb was cut the saw sliced through the tree root as well. It is our understanding the City’s arborist issued a finding that the tree was unstable, a pedestrian/vehicle safety hazard, and that it should be removed and replaced. Subsequently the City placed LMC on notice that we needed to structurally stabilize the tree in the near term which we have completed. Needless to say, when the drainage structure at this location was designed the size and exact locations of the tree’s structural roots were assumed to be different than what was ultimately encountered.

To avoid more unforeseen conflicts between the street trees and the large electric/telecom utility boxes and trenches that are required in this area, LMC secured an encroachment permit from the City to remove the sidewalks so our team could thoroughly investigate conditions. Once sidewalks were removed, we invited our arborist, Hortscience/Bartlett Consulting (Hortscience), to visit the site to assess the condition of the trees, their surface roots, and the potential impacts the significant remaining utility work could have on the trees.

Next Steps

Hortscience issued a report (enclosed) of their findings dated April 28, 2021 which includes the following summary:

Summary

In summary, preservation of the Japanese pagoda trees on the west side of Horton St. is not practical due to shallow roots, inadequate soil volume and construction activities that will cause irreparable damage to the trees. Preservation of the trees would result in future sidewalk, curb and gutter displacement, new ped/bike hazards and an increased potential for whole tree failures.

Tree stability, the potential for whole tree failures and future sidewalk, curb and gutter damage are concerns should the street trees on the west side of Horton St. be preserved. Tree stability would only be further compromised by the proposed water jetting required as part of the off-site improvement plans.

I recommend removal of all of the Japanese pagoda trees on the west side of Horton St. for continuity of design and to provide the best possible growing conditions for the new trees. This will help with tree and root development, reducing the potential for future infrastructure displacement.

In addition, The City of Emeryville Urban Forestry Ordinance, Chapter 10, section 7-10-03 defines nuisance trees as those that created safety hazards and damage public improvements. In my professional opinion, all of the Japanese pagoda trees that have displaced the surrounding sidewalk, curb and gutter certainly qualify a ‘nuisance trees’.

All of the young ginkgos and olives #24 and 25 on the east side of Horton St. can be preserved. Some amount of root pruning can be expected for olives #24 and 25.

It should be noted that previous surveys of these same trees by the City’s arborist contained similar observations (see City Arborist reports dated December 29, 2014, March 5, 2018, and November 15, 2018) even though they were conducted without the benefit of having removed sidewalks to see the extent of the surface rooting. As a result of our recent experience with the storm drain installation and careful consideration of the Hortscience tree assessment, LMC believes compliance with the Conditions of Approval previously cited will be “impossible”

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Those conditions require the “preservation of the existing street trees”, “implementing a tree protection plan”, and being “responsible for any damage to public improvements” ...” including but not limited to sidewalk repair”. The Hortscience report clearly indicates that attempts to preserve these trees if successful (which is unlikely) will lead to damage of any new infrastructure (i.e. sidewalks, cycle tracks, utility boxes and piping, etc.) LMC would construct. This infrastructure damage and the potential instability of the preserved trees themselves after utility installation would create unsafe conditions for pedestrians, cyclists, and motorists. It is our opinion that these conditions would place undue liability related to pedestrian and cyclist safety on LMC during the construction and acceptance periods of the development (next 3+ years) as well as the City in perpetuity.

LMC understands City’s goals to create and preserve a robust urban canopy in Emeryville and we want to be good partners in that effort. We believe the trees in our development and those that we would plant to replace the trees in question on Horton Street will be significant and much needed additions to the City’s growing canopy especially in this area of town which has needed additional trees for some time. As required by the City we have bonded for all the trees in question should they not survive construction activities. However, rather than waiting to see if the trees survive the extensive utility work, we urge the

City to allow their removal now. This would be much less disruptive to the new infrastructure that is required for this area. Rest assured we will work in good faith with the City on suitable replacement trees for this frontage and of course we would meet all the replacement requirements in the City’s Urban Forestry Ordinance (UFO) and/or our Conditions. We believe the goal of replacement trees should be to match the trees Biomed Realty is proposing for their recently approved adjacent property frontage so there is continuity of design in the public right of way, but we will defer to the City.

Request

In summary LMC respectfully requests relief from the conditions of approval which we now consider “impossible” to achieve and that the City allows the removal of Horton Street trees #1-19 as referenced in the Hortscience tree survey dated April 28, 2021. We appreciate your consideration of this request and will defer to the City on how to proceed procedurally. We look forward to your response.

Respectfully submitted,

LMV II EMERYVILLE HOLDINGS, LP,
a Delaware limited partnership;

By: Lennar Multifamily BTC Venture II GP Subsidiary, LLC,
a Delaware limited liability company,
its General Partner;

By: Lennar Multifamily BTC Venture II Manager, LLC,
a Delaware limited liability company, its Manager;

By: Nathan Tuttle, Vice President

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