



City of Emeryville

CALIFORNIA

MEMORANDUM

DATE: June 15, 2021

TO: Christine Daniel, City Manager

FROM: Mary Grace Houlihan, Public Works Director

SUBJECT: **Resolution Of The City Council Of The City Emeryville Finding That The Trees On The West Side Of Horton Street From Sherwin Avenue To 46th Street (as Addressed in Conditions of Approval SW VTM 8357 III.A.3.b.i.k" , "FDP 17-002 IV.A.1.d" , and "FDP-17002IV.D.1" for the Sherwin Williams development) Are Nuisance Trees As Defined In EMC Section 7-10.03(h) And Directing The Public Works Director To Send Notice To Property Owner As Prescribed In EMC 7-10.07(a).**

RECOMMENDATION

Staff recommends that the City Council review the information included with this report and, based on that information, approve the above entitled Resolution.

BACKGROUND

On November 1, 2016, the Emeryville City Council approved a Planned Unit Development (PUD) / Preliminary Development Plan (PDP) (Ordinance No. 16-006) for LMC Emeryville I Investor LLC ("Applicant") to construct a mixed use project comprised of up to 500 multi-family residential units, a minimum of 2,000 square feet and a maximum of 8,000 square feet of ground floor retail/restaurant/office space, 74,000 square feet of office space, parking garages, open, space, infrastructure and landscaping on the former Sherwin Williams paint factory parcel and adjacent City-owned parcel bounded by Sherwin Avenue to the south, the Union Pacific Railroad tracks to the west, Horton Street to the east, and Temescal Creek to the north ("Project"). The Planning Commission then approved a Tentative Map (SUBDIV17-001) on May 25, 2017, a Final Development Plan (FDP) for Public Park and Open Space (FDP17-002) on December 14, 2017, and an FDP for four new buildings (FDP17- 001) on February 22, 2018. The approved PUD/PDP plan set included a Landscape Plan that called for the retention of 11 existing street trees on the west side of Horton Street between Sherwin Avenue and the new 46th Street.

The developer subsequently applied for a PUD/PDP amendment for the Project to allow all of the street trees on the west side of Horton Street to be removed. The application included a Tree Removal Permit for the trees, for approval by the Planning Commission contingent upon City Council approval of the PUD/PDP amendment. The City Council chose not to approve the PUD/PDP amendment as submitted, but instead approved an amendment that allowed for the removal of four trees on the west side of Horton Street:

Based on the findings set forth in this Ordinance, and the evidence in the record as a whole, the City Council hereby approves the amendment to the Sherwin Williams Preliminary Development Plan (PDP) dated September 13, 2016 that was approved by Ordinance No. 16- 006 on November 1, 2016, by replacing the Landscape Plan on Page 18 that calls for the retention of 11 existing street trees on the west side of Horton Street between Sherwin Avenue and new 46th Street with a revised Landscape Plan attached as Exhibit B that calls for removal of four trees on the west side of Horton Street to accommodate new 46th Street and utility undergrounding.

(Ordinance No. 19-011)

The Project is currently under construction and the right-of-way work on Horton Street has commenced. During the construction of the storm drain system, the structural root system of the trees was found to be substantially more shallow than originally assumed. The structural root system of one of the trees was damaged. Batchelder and Associates, the City's contract Arborist, performed a field assessment concluding the tree to be unstable (Attachment A). The developer has subsequently removed the sidewalk on the west side of Horton Street to perform a complete inspection of the tree surface roots. The inspection has identified additional information about the status of the trees in that location. On June 3, 2021, the developer submitted an arborist's report to the City analyzing the status of the trees (Attachment B), and a request that the trees be treated as "nuisance" trees pursuant to Emeryville Municipal Code Section 7-10.03 (Attachment C).

DISCUSSION

The recent arborist's report submitted by the developer and included as Attachment B was prepared by John Leffingwell of Hortscience/Bartlett Consulting, Tree Risk Assessment Trained (TRAQ) Board Certified Master Arborist and Registered Consulting Arborist. The report concludes as follows:

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'.

The developer's letter of June 3, 2021 (Attachment B) requests that the City authorize removal of the trees on the west side of Horton and concludes:

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.

On June 10, 2021, the developer submitted an additional letter (Attachment C) detailing concerns about the impact of the trees on the joint utility trench work which is scheduled to commence the week of June 14, 2021:

When trees are finally removed, there is an extremely high risk that this operation will destabilize the sides of the installed joint trenches which are filled with sand per PG&E requirements, causing trench or pipe failures. It goes without saying that PG&E discourages any excavations (e.g., to replace trees) near or above live power lines and were this to be allowed it would be very dangerous for our workers. (see UFO "Nuisance Tree" Definition Section 7-10.07(h)(1)) additionally, if trees are removed later, we will not have the ability to place as much structural soil for replacement trees as we could if we were to start with a "clean slate" now given the sequence of trench construction. Less structural soil for any future trees means that there is a greater chance of long-term damage to public infrastructure from tree roots. (see UFO "Nuisance Tree" Definition Section 7-10.07(h)(2) & (4))

Title 7, Chapter 10 of the Emeryville Municipal Code (EMC) is the Urban Forestry Ordinance. The ordinance regulates the urban forest in Emeryville and provides a mechanism to address when trees may be removed. EMC Section 7-10.03(h) defines a "nuisance tree" as follows:

"Nuisance tree" shall mean any tree that poses a hazard to person or property. A tree may be deemed a nuisance if it or any part of it: (1) appears dead, dangerous,

or likely to fall; (2) obstructs or damages a street or sidewalk; (3) harbors a serious disease or infestation threatening the health of other trees; (4) interferes with vehicular or pedestrian traffic; (5) obstructs official street cleaning activities; or (6) poses any other significant hazard or potential hazard, as determined by the [Public Works] Department.

EMC Section 7-10.07(a) describes the process for abating a nuisance tree:

Notice to Property Owner(s). Upon a finding by the Department that any tree on private property or a street tree for which a property owner is responsible is a “nuisance tree” as defined herein, the Department shall send notice to the property owner(s) which describes the condition creating the nuisance, the actions required to be taken to abate the nuisance, and the date by which compliance must be completed. Required action may include replacement or removal of the tree. In cases of extreme danger, as determined by the Department, the Department may require immediate compliance.

The Urban Forestry Ordinance tasks the City’s Public Works Department with making various decisions under the ordinance, including determinations to remove nuisance trees. The Public Works Department has reviewed the developer’s information and arborist report submitted and engaged the City contract Arborist to perform a subsequent field review. City staff has also reviewed the improvement plans for the work yet to be completed for the undergrounding of utility lines and reviewed the means and methods to install the proposed infrastructure and CalOSHA guidelines for safe trench installation. In addition, should the removal of the trees be delayed to after the electrical and gas facilities are installed there will be potential destabilization of the electric and gas lines within the trench. The replacement of the trees after the installation of the electric and gas lines will result in a substantially more expensive tree replacement and prevent the installation of adequate structural soil to allow the trees to properly develop. Based on the foregoing, and reports and inspection of the two TRAQ certified arborists, the Cal-OSHA guidelines for trench safety and the risk to the public, the Public Works Department recommends that there is evidence to support a finding that these trees constitute “Nuisance Trees” and concurs with the arborists’ recommendation to immediately remove the trees.

However, in the current circumstance, the City Council has adopted an ordinance, Ordinance No. 19-011, that specifically requires the subject trees to be retained. Thus, there are two ordinances adopted by the City Council that are potentially in conflict. Accordingly, this report requests that the City Council concur that the trees on the west side of Horton Street from Sherwin Avenue to 46th Street are nuisance trees. and direct City staff to notify the developer to remove the trees.

FISCAL IMPACT

Delaying the removal of the existing trees requires hand digging for the trench. Should the hand digging around the trees on Horton Street not need to occur, the value of that

hand digging would be returned to the community benefits funding required by the Project approvals.

STAFF COMMUNICATION WITH THE PUBLIC

The agenda for this special meeting of the City Council was posted on Thursday June 10, 2021. No additional communication with the public has occurred.

CONFLICT OF INTEREST

Councilmember Bauters has a conflict of interest based on the proximity of his residence to the Project and thus cannot participate in this decision.

CONCLUSION

Staff recommends that the City Council review the information included with this report and based on that information, approve the above-entitled Resolution.

APPROVED AND FORWARDED TO THE CITY COUNCIL OF THE CITY OF EMERYVILLE:



Christine Daniel, City Manager

ATTACHMENTS

- Attachment A – February 24, 2021 SBCA Tree Consulting Report
- Attachment B – April 21, 2021 Hortscience Report
- Attachment C – June 3, 2021 Letter from LMC requesting approval to remove trees
- Attachment D– June 10, 2021 Letter from LMC requesting direction to remove trees
- Draft Resolution