

CITY OF SANTA ROSA
CITY COUNCIL

TO: MAYOR AND CITY COUNCIL
FROM: ANDREW TRIPPEL, ACTING SUPERVISING PLANNER
PLANNING AND ECONOMIC DEVELOPMENT DEPARTMENT
SUBJECT: 1900 BRUSH CREEK ROAD APPEAL

AGENDA ACTION: RESOLUTION

RECOMMENDATION

It is recommended by the Planning and Economic Development Department that the Council, by resolution, deny the appeal and uphold the decision of the Planning Commission and determinations made by the Planning Director during Planning review of Building Permit B20-6871.

EXECUTIVE SUMMARY

In 2020, without City-issued permits, property owners of 1900 Brush Creek Road modified the property by (1) removing a Redwood tree, and (2) constructing a 12 x 30-foot addition on the north side of an existing residence (Attachments 1 and 2). Code Enforcement Case No. CE20-0139 was opened for unpermitted tree removal and unpermitted construction. Following direction from Code Enforcement staff, the property owner submitted a required building permit application (B20-6871) to resolve the Code violation. Planning Director preliminary determinations made during Planning review of the building permit application:

1. would approve the tree removal, subject to mitigation as required by the Tree Ordinance, and
2. would approve new construction as compliant with applicable regulations.

These preliminary determinations were appealed to Planning Commission pursuant to Zoning Code [§20-62.030](#). During review of the appeal at a public hearing held on March 25, 2021, Planning Commission denied the appeal and upheld Planning Director's preliminary determinations.

The appeal to Council is filed in accordance with Tree Ordinance regulations contained in City Code [§17-24.090 Appeals](#), which allow appeal of a Planning Commission decision made under the Tree Ordinance to the City Council by any interested person within 10 days of the Planning Commission's decision.

BACKGROUND

Regulatory Framework for Appeals

Building permit applications proposing new development for which Planning discretionary review is not required, such as new residential construction or additions to existing residential development, are reviewed by Planning staff for compliance with applicable City and Zoning Code regulations, including compliance with the Tree Ordinance and zoning district development standards if necessary. Determinations made during Planning review are referred to as Planning Director determinations.

The City's Tree Ordinance regulates approval and mitigation of tree alteration, removal, or relocation on property proposed for development ([§17-24.050 Permit category II](#)). Zoning Code [§20-50.020 \(Table 5-1\)](#), which regulates permit application and filing, identifies the Planning Director as the City official responsible for reviewing and making Tree Removal Permit decisions. When a building permit proposes tree removal in conjunction with development, Planning reviews and mitigates the tree removal per the Tree Ordinance during Planning review of the building permit application.

Sections [20-50.020 \(Table 5-1\)](#) and [20-62.020 \(Table 6-1\)](#), which regulate appeals of decisions and determinations of the Director, Zoning Administrator, DRB, CHB, and Commission, establish the Planning Commission as the review authority for appeals of Director determinations. While the Tree Ordinance also directs appeals of Director decisions to the Planning Commission, it then further directs that a decision of the Planning Commission may be made to the City Council ([§17-24.090 Appeals](#)).

| Permit Type | Planning Division Review Authority | Appeal Body | Appeal Body |
|------------------------|---|---------------------|--------------------|
| Building Permit | Director | Planning Commission | - |
| Tree Permit | Director | Planning Commission | City Council |

CE20-0139 Resolution Requirements

To resolve the Code violations established in CE20-0139, Code Enforcement required that the property owner comply with City permit requirements by obtaining approval for the tree removal and a building permit for the modifications in accordance with authority granted to the Chief Building Official in California Building Code Section 104 Duties and Powers of Building Official, [A] 104.1 General. It directed the property owner to submit a building permit application with a project scope that included the tree removal and new construction activities.

The building permit requirement was communicated to the property owner in August/September 2020.

| | |
|-----------------------|--|
| Aug 6, 2020 | Code Enforcement initiates response to complaints. (See Section 4 for additional information about Code Enforcement response.) |
| Aug-Sep 2020 | Code Enforcement issues requirement that a building permit be obtained for unpermitted construction. Property Owner responds to Code Enforcement requirements and submits initial Building Permit application. The application is rejected as incomplete by Building Division. |
| Sep 17, 2020 | Code Enforcement issues a Notice of Violation for tree removal. A Notice of Violation for unpermitted construction is not issued; however, Code Enforcement has previously required that unpermitted construction be resolved. |
| Dec 7, 2020 | Planning responds to Chief Building Official (CBO) request for preliminary review of unpermitted tree removal and construction. |
| Dec 7, 2020 | Complainant is informed of Planning Division's response to CBO. |
| Dec 11, 2020 | Building Permit application B20-6871 to legalize unpermitted construction, including tree removal, is opened. Planning review determines that the proposed project complies with all applicable Zoning Code and other municipal code regulations. |
| Dec 14, 2020 | Planning Division receives Appeal Application submitted by Kathy Parnell (Attachment 7) |
| Dec 17, 2020 | Planning Division receives amended Appeal Application submitted by Kathy Parnell (Attachment 7) |
| March 25, 2021 | Planning Commission denies appeal and upholds Planning Director determinations (Attachment 8) |

Planning staff has included other relevant application information, documents, and correspondence in **Attachments 4 thru 12**.

Building Permit and Appeal Applications

The property owner first submitted the required building permit application in September 2020. The application was deemed incomplete and was not accepted. During Fall 2020, the property owner worked with various land development professionals to prepare required application information. Building Permit application B20-6871 was submitted on December 11, 2020, and required application fees were paid at time of submittal. Planning began review of the building permit application for compliance with the Tree Ordinance and Zoning Code.

During the week of December 7, 2020, the Chief Building Official advised the appellant of City staff's decision regarding the pathway to resolve CE20-0139. On December 9, 2021, prior to submittal of the building permit application, the appellant submitted a Planning Commission appeal of the Planning Director's preliminary

determinations to the City Manager's Office. On December 14, 2021, the appeal application was forwarded to Planning staff for processing. Payment of the appeal application fee was made on December 16, 2021. On December 17, 2020, the appellant filed an amended appeal application. The Planning Commission grounds for appeal are provided below and the appeal applications are provided as Attachment 7. The "Attachments to follow" indicated in the grounds for appeal were not received by Planning staff until March 22, 2021.

Appeal Application dated December 14, 2020 (Attachment 7)

The grounds upon which this appeal is filed are:

1. *Per CBO (J. Oswald), the unpermitted home addition on the frontage Scenic Brush Creek Rd is now able to be permitted because "building setback lines placed on the Final Map Supplemental sheet are not enforceable." I disagree. This is a zoning code violation, whereby a property set-back (building envelope) is being voided to enable an illegal build.*
2. *A redwood heritage tree was removed on frontage Brush Creek in a scenic set-back and outside a building envelope to enable illegal build. Per CBO, this would have been approved for removal in accordance with the Tree Ordinance." I disagree. (Attachments to follow)*

The specific action which the undersigned wants the City Planning Commission to take is:

Enforce the building set-backs shown on deed maps for 1900 Brush Creek Rd. Enforce zoning code and tree violations. Require illegal build to be re-built within set-back lines with trees planted and fence returned along shared driveway.

Amended Appeal Application dated December 17, 2020 (Attachment 7)

The grounds upon which this appeal is filed are:

1. *Zoning code violation – Home addition of 12'x30' with 9'x30' through a building envelope. Per CBO (J. Oswald), the building envelope was removed by the City enable the legalization of the unpermitted build and removal of a heritage tree Attachments to follow.*

The specific action which the undersigned wants the City Planning Commission to take is:

Enforce the building set-backs shown on deed maps for 1900 Brush Creek Rd. Enforce zoning code and tree violations. Require illegal build to be re-built within set-back lines with trees planted and fence returned along shared driveway.

Preliminary Planning Director Determinations

In December 2020, the Planning Director made preliminary Planning review determinations about Building Permit B20-6871. The determinations were never recorded on the application record because an appeal had been accepted by Planning Division. The preliminary determinations are as follows:

1. The tree removal is approved subject to mitigation in accordance with [§ 17-24.050\(C\)\(1\)](#). For each six inches or fraction thereof of the diameter of a tree which was approved for removal, two 15-gallon trees of the same genus and species as the removed tree (or another species, if approved by the Director), shall be planted on the project site.
 - In accordance with the mitigation formula provided above, the mitigation requirement is planting of 26 Coast Redwood trees, each a minimum of 15-gallon container size ($74 / 6 = 12.33$ 6-inch increments, which rounds up to 13 sections).
 - In accordance with Subsection 17-24.050(C)(3), if the development site is inadequate in size to accommodate the replacement trees, the trees shall be planted on public property with City Recreation and Parks Department approval. Upon the request of the developer and the approval of the Director, the City may accept an in-lieu payment of \$100.00 per 15-gallon replacement tree on condition that all such payments shall be used for tree-related educational projects and/or planting programs of the City. The total payment in-lieu fee would be \$2,600.
2. The residential addition complies with all current applicable code requirements pertaining to building setbacks and that the Final Map does not contain any other enforceable setback requirements.

Review of Appeal by Planning Commission

Following review of the Planning Commission appeal during a public hearing on March 25, 2021, the Planning Commission denied the appeal and upheld Director determinations made during Planning review of the required building permit. This decision was appealed to City Council by Kathy Parnell in an appeal application filed on April 5, 2021.

PRIOR CITY COUNCIL REVIEW

Not applicable.

ANALYSIS

The City Council appeal application identifies six (6) grounds upon which the appeal is filed and six (6) actions which the appellant wants City Council to take (see Attachment 2). The grounds for appeal cite abuses of process and discretion by the City in its handling of the unpermitted tree removal and construction at 1900 Brush Creek Road. Based upon Planning staff's review of the City and Zoning Code review

and appeal authorities, the only appealable issue to be considered by City Council is whether or not the Planning Director's processing of the unpermitted tree removal and subsequent mitigation, as upheld by Planning Commission, complies with City and Zoning Code regulations. Appeal of Planning Commission's decision to uphold Director determinations regarding unpermitted construction is not authorized by the Zoning Code [Section [20-62.020 \(Table 6-1\)](#)].

To focus the analysis specifically on the appealable item, Planning staff has categorized the grounds for appeal and reviews each category.

Grounds for Appeal without basis for review (Items 3-6)

- 3. The City further evidenced an abuse of process through denial and unreasonable delay in production of public records and unjustifiably redacting and withholding other public records.*

Staff Response: The City received numerous PRA requests related to this project and City staff provided thorough responses to all requests consistent with the PRA. Public Records Act compliance is not germane to an appeal asserting that the City's Tree Ordinance was incorrectly applied.

- 5. The City failed to validate assertions made in Applicant's explanation of the light complaint, which was a requirement to enable "legalization" of build.*

Staff Response: Outdoor lighting was not identified as a grounds for appeal in the Planning Commission appeal application; therefore the appeal period has expired for this issue. Exterior lighting installed as part of new construction is required to comply with the City's Outdoor Lighting Ordinance. The building permit application under review will address any reported violations and require that any new lighting comply with the Outdoor Lighting Ordinance.

- 6. There was an abuse of process in that the staff member that served as the Director for purposes of rendering a decision of conformance and approval of heritage tree removal is the same staff member who prepared and delivered the staff report to the Planning Commission. As a practical matter, the staff member is incentivized to defend his own work and affirm the determinations already rendered.*

Staff Response: Planning Division's administrative policies are not regulated by the Zoning Code. Planning staff are expected to act in an objective, fair manner at all times, including during presentations before review authorities. Although an individual staff member may prepare and deliver a staff report and recommendation, the position represents the Department and is not at the sole discretion of any individual staff member.

Grounds for Appeal with basis for review

- 1. The Planning Director's determination and the Planning Commission's decision to uphold that determination resulted in prejudicial abuse of discretion because: (1) the City failed to proceed in a manner required by law; (2) the decision was*

not supported by any findings; and (3) any implied findings were not supported by evidence. Examples of the abuse of discretion includes, but is not limited to:

- A. Determination that building envelopes as shown on pg. 4 of Parcel Map are not applicable/enforceable.*
- B. Determination that an interior side setback is the applicable dimension for measuring compliance.*
- C. Determination that the conditions of approval for Parcel Map 609 are not applicable/enforceable.*
- D. Absence of consideration or applicability of scenic road factors in evaluating the illegal heritage tree removal.*

Staff Response: As has been discussed, 1.a – 1c do not have standing because the decision made by the Planning Commission to uphold the Planning Director’s determination that the new construction complies with the applicable regulations is not appealable to City Council. Ground for appeal 1.d is discussed later in this analysis.

- 2. The appeal of the Planning Director’s determination submitted on 12/9/20 was unreasonably and improperly withheld by staff resulting in an abuse of process. During that time, the building permit was “legalized” by Staff, when a “stay” should have been in effect. The importance of this procedural abuse is recharacterizing the zoning code violation appeal to an appeal of a building permit, which the applicant and City affirm as a ministerial process.*

Staff Response: [Section 20-62.030 Filing and processing of appeals](#), Subsections B(3) and (5), state that “Appeals from the determinations or decisions of the Director shall be addressed to the Zoning Administrator, DRB, CHB, or Commission, as applicable to the decision, and filed with the Department” and “Appeals shall be accompanied by the required filing fee, in compliance with the Council’s Fee Schedule.” Planning staff dated the Appeal Application received on December 14, 2020, when it was forward to PED by the City Manager’s Office.

- The Zoning Code clearly establishes how appeals of Director decisions are to be made. In December 2020, PED was accepting in-person and electronically submitted applications. If the appellant had complied with Zoning Code regulations, then the appeal application would have been received by PED as required.
- PED policy is that an application is not submitted until the application fee has been paid. PED does not make any exceptions to this policy. The appeal application fee was paid on December 16, 2020.
- Appeals of Director decisions can only be made after there is an action to appeal. If the appellant argues that the first appeal application should have been accepted on December 9, 2020, then it would have been an appeal with no basis for an appealable action.

- Section 20-62.030(B)(4) provides specific guidance about what should be included in the written appeal. It states that the appeal “shall state the pertinent facts of the case and shall specify the following:
 - a. The decision appealed from (e.g., City assigned case number);
 - b. The basis for the appeal;
 - c. The specific action which the appellant wants taken in the appeal;
 - d. Each and every ground upon which the appellant relies in making the appeal.

The appeals submitted in December 2020 indicate that “Attachments to follow.” The referenced attachments were not received until March 22, 2021, which was three days before the scheduled Planning Commission public hearing.

4. *The City also abused its discretion in January 2021 by approving an in-lieu fee petition as mitigation to the illegal heritage tree removal permit.*

Staff Response: Pursuant to [Section 17-24.050\(C\)\(3\)](#), the City may accept an in-lieu payment of \$100.00 per 15-gallon replacement tree if the development site is inadequate in size to accommodate the replacement trees. All such payments shall be used for tree-related educational projects and/or planting programs of the City.

Discussion

When a City Code violation is identified and a Code Enforcement (CE) case opened, CE staff work with the property owner to resolve the violation and bring the property into compliance with City Codes. When a violation involves unpermitted development/construction, unpermitted land use, or other activity for which a permit is required, CE staff coordinate with Planning and Building Divisions, and the City Attorney’s Office as needed, to provide a permit pathway for the property owner to obtain required permits. Planning, Building, Code Enforcement, and the City Attorney’s Office determined that the unpermitted tree removal and construction activities could be legalized through the building permit process that included review of the tree removal. Planning’s review of the activities is intended to ensure compliance with the Zoning Code and other applicable Codes that Planning is charged with administering. Planning reviewed the tree removal in accordance with [Section 17-24.050 Permit category II](#) – Tree alteration, removal or relocation on property proposed for development, and the level of mitigation required is consistent with that required for a tree approved for removal.

Tree Ordinance [Article VII Enforcement](#) directs City response to unpermitted tree removals. Planning, Building, Code Enforcement, and City Attorney staff reviewed [Section 17-24.140 Violation](#) when evaluating the permit pathway that would resolve CE20-0139. Staff considered that had the required building permit application been submitted prior to any action taking place, the scope of work would have included tree removal and new construction. Therefore, staff did not separate out the unpermitted tree removal activity as a violation of the Tree Ordinance.

[Section 17-24.050 Permit Category II](#) for trees removed on property proposed for development allows removal of trees when necessary to support proposed development. This section's Tree Replacement Program requires mitigation for trees approved for removal and for trees removed without approval (Subsection C).

Mitigation for Approved Tree Removal – Each six inches or fraction thereof of the diameter of a tree which was approved for removal, two trees of the same genus and species as the removed tree (or another species, if approved by the Director), each of a minimum 15-gallon container size, shall be planted on the project site, provided however, that an increased number of smaller size trees of the same genus and species may be planted if approved by the Director, or a fewer number of such trees of a larger size if approved by the Director.

Mitigation for Removal of Tree Not Approved – Each six inches or fraction thereof of the diameter of a tree which was not approved for removal, four trees of the same genus and species as the removed tree (or another species, if approved by the Director), each of a minimum 15-gallon container size, shall be planted on the project site, provided however, that an increased number of smaller size trees of the same genus and species may be planted if approved by the Director, or a fewer number of such trees of a larger size if approved by the Director.

During Planning review, staff reviewed the tree removal and assessed mitigation consistent with the Mitigation for Approved Tree Removal. This mitigation is consistent with the City's position on the how to remedy the unpermitted activity, which is to provide a pathway to legalize the unpermitted activity.

Grounds for Appeal #1.d

Absence of consideration or applicability of scenic road factors in evaluating the illegal heritage tree removal.

The removed tree was a split trunk Coastal Redwood tree with a co-dominant stem. Total tree height was approximately 55-feet, and total diameter at breast height was 74 inches (**Attachment 4**). The tree classifies as a Heritage Tree ([§ 17-24.020](#)) and removal is subject to [Section 17-24.050 Permit Category II](#) for removal on property proposed for development, as well as [Section 20-28.050\(F\) Tree Removal](#) of the Scenic Road combining district.

Removal of a Heritage Tree is allowed with approval by the Planning Director and mitigation as described in the Tree Ordinance. Building and Planning Division practice is to process tree removal proposed as part of construction concurrently. In these cases, Planning approval of the building permit application effectively permits tree removal in accordance with the Tree Ordinance. Required mitigation is determined and provided to the applicant through the issued building permit. In this case, Code Enforcement directed the property owner to legalize the improvements by obtaining a building permit; therefore, the tree removal was reviewed during Planning review of the building permit. The Planning Director's determination was that:

1. The Tree Removal is approved subject to mitigation requirements.

2. Mitigation requirements – In accordance with [§ 17-24.050\(C\)\(1\)](#), for each six inches or fraction thereof of the diameter of a tree which was approved for removal, two trees of the same genus and species as the removed tree (or another species, if approved by the Director), each of a minimum 15-gallon container size, shall be planted on the project site, provided however, that an increased number of smaller size trees of the same genus and species may be planted if approved by the Director, or a fewer number of such trees of a larger size if approved by the Director. The total diameter of the removed tree is 74 inches (48+26).
 - In accordance with the mitigation formula provided above, the mitigation requirement is planting of 26 Coast Redwood trees, each a minimum of 15-gallon container size ($74 / 6 = 12.33$ 6-inch increments, which rounds up to 13 sections).
 - In accordance with Subsection 17-24.050(C)(3), If the development site is inadequate in size to accommodate the replacement trees, the trees shall be planted on public property with the approval of the Director of the City's Recreation and Parks Department. Upon the request of the developer and the approval of the Director, the City may accept an in-lieu payment of \$100.00 per 15-gallon replacement tree on condition that all such payments shall be used for tree-related educational projects and/or planting programs of the City. The total payment in-lieu fee would be \$2,600.

On January 4, 2021, the property owner requested that the Planning Director accept and approve mitigation in the form of payment to the City's Tree Fund in the amount of \$2,600 (**Attachment 6**). The Planning Director has approved this mitigation.

Optional Approach to Mitigation

The Tree Ordinance regulates both the permitting of tree removals and unpermitted removal of trees. Planning Division has processed the 1900 Brush Creek Road project as an unpermitted project that can be legalized through approval and mitigation of the tree removal and finalization of a building permit/certificate of occupancy. The mitigation required complies with Ordinance mitigation requirements for a tree approved for removal in that it requires replanting of 2 15-gallon trees for each 6 inches of truck diameter.

If a removed tree is not approved for removal, the Ordinance requires a mitigation of 4 15-gallon trees for each 6 inches of truck diameter of the removed tree. Additionally, a violation of the Tree Ordinance can be mitigated at the same level *in lieu of prosecution* ([Section 17-24.130](#)).

FISCAL IMPACT

A decision on this item does not have a fiscal impact on the General Fund.

ENVIRONMENTAL IMPACT

When a project proposes tree removal in conjunction with new development and no other discretionary review is required, Planning and Building Division direct the applicant to request tree removal approval as part of the building permit application. Tree removals approved in this manner and for which mitigation consistent with the Tree Ordinance is required are ministerial in nature. Additionally, the City's issuance of a Building Permit involves only the use of fixed standards or objective measurements. Therefore, review of this building permit is a ministerial action that is not subject to the California Environmental Quality Act (CEQA).

Ministerial projects are statutorily exempt from the requirements of CEQA (CEQA Guidelines, § 15268). "A ministerial decision involves only the use of fixed standards or objective measurements, and the public official cannot use personal, subjective judgment in deciding whether or how the project should be carried out." (CEQA Guidelines, § 15369). The California Supreme Court has explained further that "[a] 'ministerial' decision is one that involves little or no judgment or discretion by the approving official about the wisdom or manner of carrying out the project..." (Stockton Citizens for Sensible Planning v. City of Stockton (2010) 48 Cal.4th 481, 512, citing CEQA Guidelines §§ 15357, 15369; see also Sierra Club v. Napa County Bd. of Supervisors (2012) 205 Cal.App.4th 162, 179 "CEQA does not apply to an agency decision simply because the agency may exercise some discretion in approving the project or undertaking."

BOARD/COMMISSION/COMMITTEE REVIEW AND RECOMMENDATIONS

Following review of the appeal during a public hearing on March 25, 2021, the Planning Commission denied the appeal and upheld Director determinations made during Planning review of the required building permit. As previously noted, these determinations (1) approved the tree removal, subject to mitigation required by Tree Ordinance for trees approved for removal, and (2) concluded that new construction complies with required development standards.

NOTIFICATION

The project was noticed as a public hearing per the requirements of Chapter 20-66 of the City Code. Notification of this public hearing was provided by posting an on-site sign, publishing notice in a newspaper of general circulation, mailed notice to surrounding property owners and occupants, electronic notice to parties that had expressed interest in projects taking place in this geographic area of Santa Rosa, and bulletin board postings at City Hall and on the City website. Pursuant to Government Code Section 65091, where necessary, the City has incorporated notice procedures to the blind, aged, and disabled communities. These procedures include audio amplifier/assistive listening device support at public meetings, closed captioning, and optical character recognition conversion of electronic notices.

ATTACHMENTS

- Attachment 1 Neighborhood Context and Location Map
- Attachment 2 Proposed Site Plan
- Attachment 3 City Council Appeal Application dated received by the City on April 5, 2021
- Attachment 4 Building Permit Application B20-6871 dated received by the City on December 9, 2020
- Attachment 5 Tree Removal Documentation prepared by Robertson Engineering, Inc. dated October 30, 2020
- Attachment 6 Tree Mitigation Request prepared by Property Owner and dated received by the City on January 4, 2020
- Attachment 7 Planning Commission Appeal and Amended Appeal dated received by the City on December 14, 2021
- Attachment 8 Planning Commission Resolution No. 12049 dated March 25, 2021
- Attachment 9 Appellant Correspondence
- Attachment 10 Code Enforcement Correspondence
- Attachment 11 Planning Division Correspondence
- Attachment 12 Property Owner Correspondence
- Attachment 13 Late Correspondence thru June 8, 2021
- Resolution

CONTACT

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