

City of Durham
CITY COUNCIL MINUTES
October 22, 2019

A. OPEN REGULAR MEETING. Mayor Schirado opened the Durham City Council meeting at 7:30pm at Durham City Hall

B. ROLL CALL. *Council Present:* Gery Schirado, Chris Hadfield, Leslie Gifford, Keith Jehnke
Council Absent: Chuck Van Meter
Staff Present: Linda Tate and Emily Baker
Public Present: Jim Myers, Durham Property Owner

C. COUNCIL MINUTES. Councilor Gifford moved to approve the City Council minutes from September 24, 2019. Councilor Hadfield seconded the motion and asked for clarification on the “retire to rehire” comment with Sergeant Steele at the meeting. Mayor Schirado and Tate explained the comment and the context of it. The vote was unanimous (4-0). **MO 102219-1**

D. WORK SESSION MINUTES. Councilor Hadfield moved to approve the minutes from the Durham Work Session on September 17, 2019. Councilor Gifford seconded the motion. The Vote was unanimous (4-0). **MO 102219-2**

E. Mayor Schirado read the **CALENDAR OF MEETINGS.**

Tuesday, November 5, 2019, Regular Meeting of the Planning Commission at 7:30 p.m., Durham City Hall.

Tuesday, November 26, 2019, Regular Meeting of the City Council at 7:30 p.m., Durham City Hall.

City Hall will be closed on **Monday, November 11** for Veterans Day and **November 28 and 29** for Thanksgiving.

F. PUBLIC FORUM. None.

G. PLANNING COMMISSION UPDATE AND TREE REMOVAL PERMIT FOR 17865 Upper Boones Ferry Rd. Tate pointed out to the Council that the draft minutes from the last Planning Commission, with the Commission discussions on the tree, were in their meeting packets. Mayor Schirado began by reading and giving background on the Planning Commission’s recommendation for the tree removal permit application. “The Planning Commission recommends the mitigation of one tree and a fine up to the full \$720.” He explained that part of the reasoning behind the recommendation was the fact the property owner did not attend the meeting and threatened litigation if he was fined. The Planning Commission wanted the City Council to make the final decision since there was a threat of litigation.

Tate gave more background on the applicant and application. Earlier in the year, the individual who was interested in purchasing the property attempted to apply to remove two trees on the property prior to closing on the property. Since he was not the property owner at the time, he was not able to submit his applications. On July 3rd Tate had a pre-construction meeting with the new property owner and his architect, during which, she asked them to save and protect the cedar in question. On July 17th two tree removals were approved (one was dying and one was in the footprint of permitted construction). During the removal process of these approved trees, the large cedar was heavily pruned. In September, the property owner applied for two more tree removal permits. Tate was able to approve one of the permits because the tree was diseased. However, the second permit was for the cedar she asked them to save during the pre-

construction meeting. The property owner had an arborist report that gave three reasons for removal. One of the reasons was that the tree had been damaged by the construction. Tate informed the property owner that he had damaged the tree to the point of it needing to be removed and was liable for the \$720 fine. She asked if he wanted to present to the Planning Commission for a reduction of the fine. He declined and stated he would litigate if the City fined him. The city Attorney stated that this applicant would fall under Section 8.1; a person causing or allowing a tree to be cut without a current, valid city permit or who girdles or tops a tree, and that the City can issue a citation. Tate asked Councilor Jehnke to look at the tree and he said the plans provided did not appear to be accurate for the locations of the trees and that the tree could have been saved if the proper measures were taken during excavation. She presented this information to the Planning Commission who recommended the property owner be fined \$720 and be required to mitigate the tree. On October 11th, Tate heard from the property owner that he wanted to present to the Planning Commission, and she told him he could present to the City Council at their meeting on October 22nd.

Jim Myers presented his case to the Council. He apologized for threatening litigation. He stated that at the pre-construction meeting with Tate and staff, he presented his plans and agreed to try to protect the tree that was shown next to the deck. He wanted the tree removed because he believed it would be damaged during construction, but agreed to try to protect it during construction and see if it was possible to avoid damaging it. He stated limbing the tree was neither here nor there and the only thing it did was make the tree top heavy. He said the tree was a danger and that it was not desirable having it over the house in the first place. He believes they followed what was discussed at the pre-construction meeting. After the roots were damaged during construction, he hired an arborist who said the tree was too close to the foundation, the roots were torn, and that it is top heavy. Myers stated when he got the report and asked for the tree to be removed he was told he could be fined \$720, which he did not think was fair. If he had left the pre-construction meeting believing he needed to save the tree at all cost, he would have had to change the foundation of the building; which he never contemplated. He felt like he followed the process and now he is being fined. He said the tree needs to be removed due to damages they knew would happen in the first place.

Councilor Jehnke said he agrees that the pruning is not why the tree is a problem. He asked Myers what was done during excavation to protect the roots, because it looks like the backhoe dug right through them. Myers responded that the excavator put a barrier around the tree and did not dig up into the tree, only dug up enough space for him to work, and tried to minimize the excavation. He said in the pre-conference meeting they discussed evaluating the tree after the construction to see if it would be ok. Councilor Jehnke said the plans should have specified how they were going to cut the roots by the foundation and explained the process of proper root-safe excavation. He said when the backhoe grabs the roots it tears it back toward the tree and that the process could have been done more surgically.

Councilor Gifford asked where the barriers around the tree were. Myers responded that they had been taken down and that they are now working around the tree. She followed up asking where they were during the digging and Myers said up around the tree. She asked if there was any proof of this. He said the proof is in the fact they only excavated the amount of space necessary to put in the foundation. He added that if the tree survived the construction, he still would have asked to remove it, because he would not want it looming over the house. Councilor Jehnke added that the structural roots are compromised on the side of tree against the foundation.

Councilor Hadfield asked why the tree was so heavily pruned if they were planning on saving it. Myers responded that he had planned to remove the trees eventually, but there was miscommunication between him, the previous owner, and the tree service that was hired which resulted in the excessive limbing of the tree. Councilor Hadfield clarified they were in the process of taking the limbs off in order to remove the tree until Myers informed them it was the wrong tree, and Myers said that is what happened.

Councilor Jehnke asked if the excavator knew the tree needed to be saved. Myers said the builder and excavator were the same person and that he did know he needed to save the tree. Councilor Jehnke added that it seemed like the builder did not understand what was needed to preserve the tree during the work. Councilor Hadfield asked if the architect tried to work around the tree, to which Myers replied he drew up the plans and the location of the addition was placed in its location to utilize the space next to the chimney for a doorway into the addition and maintain the aesthetic look of the house from the street.

Mayor Schirado clarified that with the proper methodologies the tree could have been saved and followed up by asking who is responsible. Tate replied, per the Ordinance, the property owner is responsible for the work done on their property. Councilor Jehnke said that it is expecting a lot and there are many times when not all parties understand they need to protect the tree. Myers said his takeaway from the pre-construction meeting was to try to work around the tree. Tate said she told them to save and protect the tree. Mayor Schirado added that the tree could have been preserved and asked whose responsibility was it that it was not preserved. The property owner is held responsible but they are not the person who is on the ground supervising the decisions being made. Councilor Hadfield said that does not change the responsibility or liability of the property owner. Durham has a tree ordinance that was violated, the violation has gone through the proper process at Planning Commission, and he does not feel the additional facts they have heard from the property owner should change the recommendation of the Planning Commission.

Myers added he paid \$435 for an arborist report and requested they consider that in the making of the final decision. Councilor Jehnke added that as an arborist he knows there is a lot of confusion during construction, so he would be in favor of lowering the fine. Tate said the Planning Commission probably would have reduced the fine if Myers was at their meeting.

Councilor Gifford said that from what she's heard, it sounded like Myers and the builder believed the tree would not survive. Myers replied the architect and builder knew the tree would have to be removed eventually. Councilor Jehnke added this is typical unless they really wanted to save the tree. Councilor Gifford said the architect and builder's expectation was that the tree would come out and she does not see Myers as having gone to any extra length to save the tree even though it was requested of him. Myers replied that he could see where she was coming from, but that it was a mischaracterization of the situation. He said if he did not get a permit, he would not have cut the tree down and that they proceeded with construction per their takeaway from the pre-construction meeting. He did not intend to work against the City. His frustration was from the fact he asked to remove the tree before he began construction and now he is being fined for asking to remove it again. He added it felt like he was getting fined for limbing the tree. Mayor Schirado said the limbing issue is more one of perception. From the Council's perspective, there is a tree ordinance that was not followed and the City cannot hold the contractor responsible; instead, it has to hold the property owner responsible. The Council also has to validate the Planning Commission's findings of a violation being committed and their recommendation of a full fine. Tate added that they were willing to lower it, but since Myers was not there they

recommended the full fine. Mayor Schirado summed up his thought process as there was a violation and there should be some penalty that reflects that.

Councilor Hadfield expanded on Mayor Schirado's comments. He said there were multiple trees already granted and mitigation was only required for one of them. If they require mitigation on this tree then that would be a total of two mitigation trees. He asked if Myers had plans for mitigation. Myers replied that he did not have plans at this time, but he intends to plant several trees on the property. Councilor Hadfield added that his thought process was to go in the direction of increasing the mitigation requirement and reducing the fine. Tate pointed out Commissioner Volm's opinions, in the Planning Commission draft minutes, of a \$250 fine and the requirement of two mitigation trees or a \$500 fine and the requirement of one mitigation tree. Myers added that they are planning on planting 4-5 trees. Councilor Gifford asked Myers what types of trees he is planning on planting. Myers said he preferred deciduous trees, but that he would plant whatever the City tells him to.

Mayor Schirado read Commissioner Volm's recommendation. He said he wants to validate and support the Planning Commission's decisions and said Commissioner Volm's recommendation is a good place to start a discussion. Councilor Gifford added that a stipulation should be that the mitigation trees for the cedar be evergreens. Mayor Schirado asked Myers his opinion and Myers replied he would prefer a different type of tree, but that he would plant what the City wanted him to.

Mayor Schirado and the Councilors discussed the wording of the motion to incorporate everything they have discussed. Councilor Hadfield asked about the City's requirements for mitigation trees and fines. Tate explained size requirements and timeframes.

Councilor Gifford asked Myers when he plans to finish construction. Myers said it was a four month construction project and they are about three months from finishing. Councilor Gifford added that they would then finish in April, which would be a good month for planting.

Councilor Hadfield asked Myers about his business and other properties. Myers said his business is in-home adult care giving and that this property would be an expansion of that business, giving clients another level of care.

Mayor Schirado continued working on the wording of a motion. Councilor Hadfield suggested the two tree option on top of Myers' existing mitigation tree requirement, because the Tree Ordinance is a Tree *Preservation* Ordinance. Mayor Schirado and the Councilors reworded the motion.

Councilor Gifford moved that the City Council, in concurrence with the findings of the Planning Commission, approve the tree removal and require the property owner to plant two mitigation trees and pay a fine of \$250; mitigation to take place within 6 months and the mitigation be with 6' conifers, in compliance with the tree preservation ordinance. Councilor Jehnke seconded the motion. The vote was unanimous (4-0). **MO 102219-3**

Mayor Schirado acknowledged the work of the Planning Commission did on this.

I. ORDINANCE 261-19, AN ORDINANCE OF THE CITY OF DURHAM ADOPTING REGULATIONS RELATING TO LITTERING AND REPEALING ORDINANCE 173-93. Councilor Gifford moved to adopt Ordinance 261-19. Councilor Jehnke seconded the motion. Mayor

Schirado noted that this was a housekeeping change to the ordinance. The vote was unanimous (4-0). **MO 102219-4**

J. APPLICANT FOR VACANCY ON PLANNING COMMISSION. Mayor Schirado said he had a telephone interview with Matt Winker and was impressed. Councilor Hadfield asked about a second candidate. Tate explained the second applicant, Josh Drake, just turned in his application and therefore had not gone through the interview process. Mayor Schirado said the current opening is to replace Julie Atwood and there is no other opening at this time. Tate explained that there could be a second vacancy because there is a Planning Commissioner who has only attended one Planning Commission meeting in 2019. Mayor Schirado added there are possible health concerns that are keeping the Commissioner from regularly attending meetings and that he may politely invite the Commissioner to resign. Mayor Schirado said the Planning Commission does not have an attendance clause, but if the Commissioner accepts the invitation to resign there would be a second opening that could be filled by Drake. However, this meeting is to consider filling Julie Atwood's vacancy with Matt Winkler and the Mayor would recommend his appointment.

Councilor Hadfield asked if they could also consider Drake. Mayor Schirado replied that he only received the application earlier that day and has not had a chance to speak with him, but he is fairly confident they may be able to fill an upcoming vacancy with Drake. Councilor Hadfield explained why he wants Drake to be on the Planning Commission and that he thinks he would be an excellent addition to the Planning Commission. He added that he thinks Winkler is also a good addition. Mayor Schirado said he will call Drake and would be happy to bring his name up at the November meeting if the vacancy opens up. Councilor Hadfield explained that Drake had started filling out the application right away, but he had to get approval from the bank he works at before he could submit it.

Councilor Gifford moved to approve Matt Winkler's appointment to the Planning Commission. Councilor Jehnke seconded the motion. The vote was unanimous (4-0). **MO 102219-5**

K. PROPOSAL TO SET UP COMMUNICATION HUB FROM MYN/CERT. Mayor Schirado began the conversation by addressing questions from the previous minutes about a HAM radio with MYN/CERT. He said the \$676 was for the radio and if no Councilor wanted to take it, it would stay with Barbara Bracken or Judy Arthur. Tate added that the current plan for Washington County to communicate with Durham is to post information on the door, but there is also the option of FirstNet cell phones for City Hall, which are \$40 a month. She said she was considering swapping the land line for the cell phones at City Hall, but the alarm system is connected to the Fax line.

Councilor Gifford asked why the batteries were being bought at Amazon when there are cheaper options available. Tate said they could be bought anywhere; Amazon was just an example for a ballpark idea of the cost.

Mayor Schirado asked about the decision that needs to be made. If the radio will be set up at Barbara's house, they just need to appropriate the money and authorize the purchase of the materials. Councilor Jehnke said he is fine with the radio. Tate said since it is an expenditure there needs to be a motion and that she will have to look at the budget and see where she can get the money for it, adding that it may be in the next fiscal year.

Mayor Schirado asked about the price breakdown for the radio. Councilor Gifford said they want two transceivers for \$144. Mayor Schirado said he will let staff find the money for it in the budget.

Councilor Hadfield moved to approve the setup of a communications hub for the MYN/CERT for Durham at the expenditure of \$676. Councilor Jehnke seconded the motion. The vote was unanimous (4-0). **MO 102219-6**

L. ORDINANCE 262-19, AN ORDINANCE OF THE CITY OF DURHAM PROVIDING FOR A LICENSE AND FEES FOR USE AND OCCUPANCY OF PUBLIC RIGHTS OF WAY BY PROVIDERS OF TELECOMMUNICATIONS, AND REPEALING ORDINANCE 256-13. Tate explained the Right of Way Ordinance currently states all users of the Right of Way must get a license or franchise and this change of the Telecommunications Ordinance will incorporate 5G into the licensing category. She said once the new ordinance is in place, then the Council can do a resolution stating dollar amounts for the license. The telecommunication fees were \$2500 for the first four years, then after that the Council could decide how they wanted to change the terms for any renewals and at the July meeting the Council decided they wanted to change it to \$3000. Mayor Schirado asked about the advantage of this change. Tate responded that this would eliminate the need to negotiate franchises. Councilor Gifford moved to have the first reading of the ordinance by title. Councilor Hadfield seconded the motion. The vote was unanimous (4-0). Mayor Schirado read the Ordinance by title. **MO 102219-7**

M. DISCUSSION ON TREE ORDINANCE. Mayor Schirado explained that this section of the agenda was to follow up on the ongoing tree ordinance discussion. Tate said an item that has come up is the definition of the term “economically beneficial.” She also said if they want to change something, it should be to change the Ordinance to match the Land Use Code. Mayor Schirado added that at the League of Oregon Cities conference he received a lot of information about urban forest management plans and once he has had the time to go through it all he will share it with the Council. He also said he has looked into a definition of the term “economically beneficial,” and that it would be difficult to come up with one. Councilor Jehnke said he thinks the Planning Commission better understands the City Councils expectations. Mayor Schirado added that in his conversation with Matt Winkler he asked him about thoughts on trees in Durham. Winkler responded that he was not familiar with the tree ordinance, but would be open minded and rational around the issue of tree preservation.

N. ADMINISTRATOR’S REPORT. Tate gave the Councilors a draft meeting calendar for the next year, 2020, and asked if there were any changes the Council would like to make; pointing out the December meeting date on the 22nd. Councilor Gifford said she would like the December meeting to be on the 15th. Councilor Hadfield asked about an August meeting, and Tate replied she will schedule it in case of an issue arising. Councilor Jehnke said he will not be at the November 2019 meeting and would like to change the date of the March 2020 meeting. Tate asked if the 31st of March would work and Councilor Jehnke said it should.

O. FINANCIAL REPORTS. There were no questions about the financial reports. Councilor Gifford moved to approve payroll checks 572 to 574, vendor checks 16555 to 16581, and electronic transfers totaling \$6782.17. Councilor Hadfield seconded the motion. The vote was unanimous (4-0). **MO 102219-8**

P. COUNCIL COMMENTS & MISC INFORMATION ITEMS. Tate said Frontier is planning to transfer to Northwest Fiber and next month a representative from MACC will be presenting

MACC's recommendation that the Council approve this transfer. Tate added Jessica from Frontier said she is willing to come and answer any questions that may arise.

Councilor Jehnke said the Tigard Water Board has some at-large people. One is from outside of Tigard, they are having trouble finding people, and one currently works for Tigard Water. Councilor Gifford said that is a huge conflict of interest. Councilor Jehnke said he thinks there should be someone outside of Tigard in that position. Councilor Gifford asked where they have to live. Councilor Jehnke said on Bull Mountain outside of Tigard or in Durham. Councilor Hadfield asked about recruiting. Councilor Jehnke said they are putting things in papers and at neighborhood groups. Councilor Gifford asked when they meet. Councilor Jehnke replied Wednesdays at 5:30 every two to three months. Tate said staff could put something in the January Newsletter if Councilor Jehnke provided staff with the necessary information for the article.

Councilor Hadfield said he could not find the City Charter on the website. Tate said she will look for it and follow up with him. He also asked if any additional documents were passed out along with the packets about the playground decision at the last meeting. Tate said there were a lot of papers displayed for the Councilors to look at, but none were handed out individually to the Councilors.

Q. ADJOURN. Mayor Schirado adjourned the meeting at 9:30 pm.

Approved:

GERY SCHIRADO, MAYOR

Attest:

LINDA TATE, CITY ADMINISTRATOR/RECORDER