

CITY OF TAKOMA PARK TREE COMMISSION

<i>In Re</i> Tree Removal Permit	*	
No. W006680-061521	*	
7205 Flower Avenue,	*	
Takoma Park, Maryland,	*	Case No.: TC 2021-01
Appeal from the Preliminary Denial	*	
Bobby and Carmen Mathaudhu,	*	
Applicants	*	
* * * * * * * * * * * * *		

MEMORANDUM DECISION
AND ORDER

This matter came before the City of Takoma Park (the “City”) Tree Commission (“the Commission”) on an appeal of a preliminary denial of a Tree Removal Permit (“Removal Permit”) at the property known as 7205 Flower Avenue, Takoma Park, Maryland (the “Property”). For the reasons set forth herein, the Commission affirms the City’s Urban Forest Manager’s (“UFM’s”) denial of the Removal Permit.

INTRODUCTION

The instant appeal arises out of the UFM’s denial of the Removal Permit, permit number W006680-061521, for the Property. The Applicants and owners of the Property are Bobby and Carmen Mathaudhu. In their Removal Permit application, the Applicants sought permission from the City to remove a large sycamore tree, which is located in the back center of the Property. The

tree measures approximately 45.7” in diameter at breast height.¹ The Applicants submitted their Removal Permit application to the City on June 15, 2021.² That same day, the UFM responded to the Applicants’ Removal Permit application and informed the Applicants that the Removal Permit application was denied.

On June 17, 2021, the Applicants submitted an appeal request to the UFM, a copy of which is attached hereto as Exhibit 1, thereby noting an appeal of the UFM’s denial of the Removal Permit. After scheduling delays, the Commission held a remote hearing regarding the UFM’s denial of the Removal Permit on December 7, 2021. At said hearing, only Mr. Mathaudhu appeared.³

ISSUES RAISED BY THE APPLICANT

In the appeal request, the Applicant raised several issues regarding the UFM’s denial of the Removal Permit. First, the Applicant expressed concern about branches that had previously

¹ Under Takoma Park Code (“Code”) § 12.12.020(A), an “urban forest tree” is one that measures at least “24 inches or more in circumference at four-and-one-half feet above ground level or measures seven and five-eighths inches or more [diameter at breast height].” The tree at issue meets and exceeds this requirement for an urban forest tree. Therefore, to remove the tree, the Applicants were required to apply for a Removal Permit pursuant to Code § 12.12.070(A), based on the tree’s status as an urban forest tree.

² Initially, the Applicants submitted a request for a tree impact assessment pursuant to Takoma Park Code (“Code”) § 12.12.030 on June 7, 2021, in which they requested permission to remove an urban forest tree from the Property. *See supra* at n.1. The City, through its UFM, informed the Applicants that a tree impact assessment was not an appropriate vehicle to seek the removal of a tree, and *sua sponte* converted the Applicants’ request from a request for a tree impact assessment to a Removal Permit application on June 15, 2021.

³ To the extent that Mrs. Mathaudhu failed to appear at the appeal hearing, the Commission *sua sponte* dismisses with prejudice the portion of this appeal attributable to her, pursuant to Code § 12.12.087(B); *see also Zdravkovich v. Siegert*, 151 Md. App. 295, 306, 824 A.2d 1051, 1057 (2003) (holding that an appeal may be dismissed based on a party’s failure to attend a trial or hearing). Nonetheless, the Commission will proceed in analyzing the appeal brought by Mr. Mathaudhu. Hereinafter, Mr. Mathaudhu will be individually referred to as the “Applicant” or “Mr. Mathaudhu.”

fallen from the tree. *See* Exhibit 1, p. 1. The Applicant noted that the branches that fell from the tree caused damage to vehicles that were parked on the Property. *Id.* at p. 1–6. The Applicant also expressed concerns regarding the potential for injuries to the tenants residing at the Property by way of branches falling from the tree in the future. *Id.* at p. 1, 3–4, 8. In the Applicant’s appeal request, he included portions of an arborist’s report. The arborist was retained by the Applicant and indicated that the tree should be removed for the following reasons: (1) a potential insect infestation, indicated by the presence of insect frass under the tree’s bark; (2) decay on the branches that had fallen from the tree; (3) soil compaction; (4) the “general bad placement” of the tree; (5) that the tree is “not getting enough water[;]” and (6) that the tree’s health will continue to decline in the coming days. *Id.* at p. 1, 6–8. Further, the Applicant represented that if the Removal Permit is granted, he would agree to plant two trees on the Property to replace it. *Id.* at p. 8.

The Applicant also articulated several concerns over the course of the hearing. *See generally* Hearing Record, a copy of which is attached hereto as Exhibit 2.⁴ First, the Applicant referenced a tree assessment, authored by Meg Smolinski, an ISA Certified Arborist, (the “Smolinski Report”) he had commissioned, a copy of which is attached hereto as Exhibit 3, suggested that the tree is located in a “bad location,” noting that it is located approximately six feet from the house located on the Property, and expressed concerns similar to those noted in the appeal request, such as: (1) the tree not receiving enough water; (2) soil compaction in the area surrounding the tree; (3) branches falling from the tree; and (4) damage to vehicles located on the

⁴ In the interest of brevity, citations to the Hearing Recording at Exhibit 2 will be hereinafter abbreviated to “HR” followed by a reference to the approximate time stamp for the testimony or documentary evidence from the time appearing in the lower right-hand corner of the video.

Property.⁵ HR at 19:14–15. The Applicant suggested that the tree is “crumbling” a retaining wall located near the tree and concluded that, based on the above factors, the tree is in a “state of decay.” HR at 19:14.

Second, the Applicant referenced the email he received informing him of the denial of his Removal Permit application. HR at 19:16. The Applicant contended that the relevant portion of the Code cited in said email, concerning the factors applicable to Removal Permits, was incorrect. *Id.*; *see also* emails between the UFM and Applicant, copies of which are attached hereto as Exhibit 4. The Applicant pointed out that the email informed him that his “request did not fulfill the criteria established by City Code (section 12.12.120) for tree removal[,]” a Code section that was repealed by Ordinance No. 2020-22. HR 19:16; Exhibit 4. Later in the hearing, Mr. Mathaudhu took the position that the request for a Removal Permit should be granted based on this alone. HR 19:46.

Third, the Applicant expressed concerns regarding the delay between the initial filing of the Removal Permit application and the December 7th hearing, which included a hearing that was tentatively scheduled for October 26, 2021, which was rescheduled based on the expiration of the prior Tree Commissioner’s terms and the need to orient the incoming Commissioners.⁶

⁵ During the hearing, the Applicant produced and introduced into the record a second tree risk assessment, prepared by SavATree Consulting Group (the “SavATree Report”). *See, e.g., infra* at p. 5. The SavATree report will be discussed in greater detail herein.

⁶ During the hearing, Mr. Mathaudhu indicated that the hearing—which was rescheduled—was scheduled to occur on approximately October 24, 2021. HR 19:19. The exhibits introduced at the hearing, however, reflect that the tentative date of said hearing was October 26, 2021.

SUMMARY OF MATERIAL FACTS

I. Testimony of the Applicant.

At the start of Mr. Mathaudhu's testimony, he referred to the Smolinski Report and its contents. *See* HR 19:14. He referenced portions of the Smolinski Report for the proposition that the tree's location is unsuitable due to its proximity to the structure located on the property, the tree is allegedly "crumpling" a retaining wall located nearby, and that the tree is likely not receiving sufficient water.⁷ *Id.* The Applicant concluded from this that the tree is in a "state of decay," a determination that the Smolinski Report does not make.⁸ *Id.*

Second, Mr. Mathaudhu also referenced the expenses he has incurred in response to branches falling out of the tree, which damaged vehicles parked on the Property. HR 19:15. Specifically, the report indicated that "this tree has already dropped two branches, causing \$2500 of car damage[.]" HR 19:15. The Appellant indicated that, based on the Smolinski Report, he retained the services of the SavATree Consulting Group to conduct an additional tree risk assessment report, *i.e.*, the SavATree Report. HR 19:16; *see supra* at n.5. Mr. Mathaudhu initially did not provide a copy of the SavATree Report to the City but, in response to inquiries posed by the Commissioners, agreed to share the SavATree Report with the Commission and introduced it as an exhibit. HR 19:36; HR 19:45–46.

During his testimony, Mr. Mathaudhu also raised the following issues, as noted above: (1) that the response he received from the City, denying his Removal Permit, cited a section of the Code that was repealed; and (2) the delays in scheduling the appeal hearing. HR 19:18; HR 19:22–

⁷ The tree is located approximately six feet from the structure. HR 19:14.

⁸ As far as the Tree Commission is aware, the Applicant has no relevant expertise upon which to rely in reaching this conclusion. Therefore, this conclusion is given little weight.

23. Mr. Mathaudhu also presented an exhibit, which is a compilation of severe weather events that have occurred in or around the City within the last six months, including three severe weather events between August 6th and August 24th—while he and the UFM were attempting to schedule the appeal hearing. HR 19:21. Mr. Mathaudhu relied on this exhibit and indicated that these severe weather events resulted in several trees and power lines being downed, while his appeal was pending. HR 19:21. Mr. Mathaudhu also introduced photos depicting branches that had fallen from the tree and the resulting damage to vehicles, to demonstrate his concern for the safety of his tenants, the vehicles, and the structure located on the property. HR 19:24–26.

II. Testimony of the UFM.

Mr. Frye, the City's UFM, began his testimony by setting forth the applicable factors concerning Removal Permits as set forth in Code § 12.12.080(A)(1), which guide his assessments. HR 19:58–59. Mr. Frye testified that, generally, in attempting to determine the overall condition of a tree, he aims to ascertain whether the tree has a structural defect that could be identified based on presently available methods, including the following: (1) visual inspection; and (2) a sounding mallet test. HR 20:00–01. Based on the arborist's conclusions in the Smolinski Report, Mr. Frye testified that he paid particular attention to whether there were hollow areas within the trunk of the tree. HR 20:01. To investigate this further, Mr. Frye conducted a sounding mallet test, the results of which demonstrated no indication of decay or hollow areas within the tree's trunk. *Id.*

Mr. Frye also testified that he conducted a careful visual inspection of the ground surrounding the tree and the tree itself—including its canopy—to ensure that there were no limbs on the tree that would render it hazardous. HR 20:01–02. In doing so, Mr. Frye observed very few dead branches within the tree or branches that contained structural defects, *i.e.*, pockets of

decay or evident cracks. HR 20:02. As a result, Mr. Frye testified that his inspection of the tree revealed that it was not hazardous and generally that the tree was in good condition. *Id.*

Mr. Frye testified that the tree is “outstanding” in terms of its height and the vigor of its canopy, based on the canopy’s fullness and the density of its branches. HR 20:02–03. Based on the size of the tree’s canopy, Mr. Frye testified that—if the tree were to be removed—such removal would result in a substantial reduction in tree canopy cover within the area. *Id.* In reference to the tree’s location in reference to potential targets, Mr. Frye testified that he observed several branches hanging over the structure located on the property. HR 20:04.

In assessing the tree, Mr. Frye observed some “minor deadwood” on the tree that could be addressed through pruning. HR 20:04. In response to the concerns expressed in the Smolinski Report regarding flaking bark, Mr. Frye testified that “flaking bark on a sycamore is somewhat common and is not a sign of a health problem for the tree” and that, upon closer inspection, the flaking bark was not associated with any decay of the tree. HR 20:04–05. Regarding the insect frass allegedly found under the bark of the tree, Mr. Frye testified that, while insect frass may be a concern for particular species of trees that are targeted by particular insects, the material found by the arborist who conducted the Smolinski Report was not insect frass from an “insect of concern” to sycamore trees. HR 20:05–06.

In response to the concerns raised regarding soil compaction and the growing position of the tree, Mr. Frye testified that there may be some compaction occurring. HR 20:06. He suggested that, if soil compaction were a substantial concern for the tree, it would generally manifest itself in a reduction of the vigor of the canopy of the tree. HR 20:06–07. Based on the vigor of the tree’s canopy, Mr. Frye testified that he did not believe there was much restricting the growth of

the tree and found nothing to indicate that the tree is in decline or that the tree would soon be going into decline, based on soil compaction and other factors. HR 20:07.

III. Material Facts Developed Through Cross Examination and Questions from the Commissioners.

Mr. Mathaudhu represented that he purchased the Property on July 4, 2020. HR 19:27. Commissioner Woodworth inquired of Mr. Mathaudhu as to whether the branches that fell, during the period Mr. Mathaudhu has owned the tree, were dead or alive. HR 19:27. Mr. Mathaudhu provided no substantive response, and cited his lack of expertise in arbor care as a basis for his non-response. *Id.* Mr. Mathaudhu was also unable to answer a question posed by Commissioner Woodworth regarding the number of dead branches located within the tree's canopy. HR 19:28. In reference to the quote for pruning the tree that Mr. Mathaudhu previously obtained, he was asked whether the quote was to remove dead branches specifically or simply to prune the tree generally, which he was unable to answer. HR 19:29. He suggested that the arborist who conducted the SavATree Report recommended pruning the tree in a fashion that would remove all of its branches. *Id.*

Commissioner Villa inquired concerning the recommendation of the arborist who inspected the tree and prepared the SavATree Report, a copy of which Mr. Mathaudhu did not provide to the City prior to the hearing. HR 19:30. Specifically, Commissioner Villa asked Mr. Mathaudhu whether the second arborist who inspected the tree recommended that the tree be pruned, or else branches will continue to fall from the tree. *Id.* Mr. Mathaudhu answered affirmatively but suggested that he declined to have the tree pruned based on the uncertainty of whether the City would approve his Removal Permit. HR 19:31.

Commissioner O'Brien further clarified that Mr. Mathaudhu had two tree assessments conducted, which Mr. Mathaudhu confirmed. HR 19:31. Mr. Mathaudhu then referenced the

Smolinski Report and recited the arborist's findings that "while sycamore bark does flake at the base of the tree, this appears to be flaking more than normal and in thicker flakes than normal. The sounding mallet indicates that there may be hollow areas." HR 19:32. Mr. Mathaudhu suggested that this demonstrates that the tree is in a "state of decay," and affirmed his prior representation to the City, that he would plant additional trees on the property if the Removal Permit were granted. HR 19:32–33.

In response to questions from Commissioner Martin, Mr. Mathaudhu testified that—after receiving the Smolinski Report—he has not taken any remedial measures to address soil compaction or potential insect infestation in the tree. HR 19:39.

Based on Mr. Mathaudhu's recent purchase of the Property, Commissioner Sparrow asked Mr. Mathaudhu whether he had the Property inspected, and whether the inspection contained any reference to the tree and its condition. HR 19:41. Mr. Mathaudhu responded that he had the Property inspected and that the inspector referenced the tree's close proximity to the structure located on the Property, but otherwise expressed no concern over the tree or its condition. *Id.* Mr. Mathaudhu also, in response to the question, suggested that the tree appears to be leaning. HR 19:42.

Commissioner Woodworth then asked Mr. Mathaudhu if he would be willing to share the SavATree Report that Mr. Mathaudhu had commissioned. HR 19:44. Mr. Mathaudhu agreed to introduce the SavATree Report as an exhibit. *Id.* After the Commissioners reviewed the SavATree Report, a copy of which is attached hereto as Exhibit 5, Mr. Mathaudhu referenced the language contained therein, noting that the SavATree Report indicates that it will be valid under "normal weather conditions" and referenced the compilation of severe weather events he previously

introduced to suggest that the tree may cause further harm to persons, vehicles, and the structure located on the property during severe weather events. HR 19:55; *see also* Exhibit 5, p. 6.

In response to a question from the Chair, regarding the cost associated with having the tree pruned or removed, Mr. Mathaudhu confirmed that he received several quotes to have the tree pruned, ranging between \$3,500 and \$6,000. HR 19:56. Mr. Mathaudhu also suggested that he received a quote of approximately \$15,000 to prune the tree and confirmed that the estimated cost of removing the tree was \$8,500. *Id.* Additionally, Mr. Mathaudhu testified that, because the tree is the “tallest tree in the neighborhood,” it is more prone to lightning strikes. HR 19:57.

The Commissioners also asked Mr. Frye several questions regarding his testimony. First, the Chair asked whether the tree has sufficient rooting space, based on the proximity between the tree, the retaining wall, and the structure that is located on the Property. HR 20:08. He also inquired as to whether the tree will eventually fail because of limited rooting space. *Id.* Mr. Frye testified that, in his opinion, the tree has sufficient rooting space, noting that the tree has less space to expand its roots on one side, due to the location of the retaining wall. HR 20:09. Mr. Frye also suggested that the tree has sufficient soil to spread its roots on the remaining sides of the tree. *Id.* The Chair also inquired regarding the number of dead branches within the tree’s canopy. HR 20:10. Mr. Frye noted “little to no deadwood” at the time of his inspection of the tree. *Id.*

The Chair also inquired regarding the response email, in which the Applicant was informed that his Removal Permit was denied. HR 20:20. Mr. Frye testified that the email the Applicant received was a form, template email, that is “auto-triggered” when he updates information in the City’s application processing software. *Id.* Mr. Frye confirmed that the relevant portions of the Code were updated in 2020, and the outdated Code section contained in the template had not been

updated since that revision. HR 20:21. Mr. Frye noted, however, that when he assessed the tree, he was using the standards set forth in Code § 12.12.080. *Id.*

In response to questions from Commissioner Martin, Mr. Frye suggested that it is somewhat common for mature trees to develop deadwood in their canopies, that generally branches die before falling from a tree, that such branches can be pruned to ameliorate the risks associated with falling branches, and that pruning is a typical tree management practice. HR 20:11. Commissioner Martin sought confirmation of whether identifying and removing deadwood from a tree is part of the regime of proper arbor care, which Mr. Frye answered affirmatively. HR 20:12. Commissioner Martin inquired about the presence of armillaria hyphae—a type of fungus—at the base of the tree, as noted in the UFM’s assessment, and questioned whether this was indicative of disease or decay. *Id.* Mr. Frye responded that its presence was not associated with any sign of decay at the time he inspected the tree. HR 20:13. Commissioner Martin also asked Mr. Frye about the small holes that were depicted in the photos of branches that had fallen from the tree. HR 20:36. Mr. Frye responded and indicated that, when holes are observed on dead branches, oftentimes, the insects began colonizing the branch after it had already died and, in such instances, there is generally no concern regarding an insect infestation of the tree. HR 20:37.

In response to questions from Commissioner Villa, regarding the benefits of having a tree of that size on the Property, Mr. Frye spoke broadly about the values that tree canopies provide, including cooling, intercepting stormwater, reducing flooding of waterways, and the intrinsic value of wildlife and having a “robust native ecosystem.” HR 20:20. Mr. Frye suggested that removal of the tree would negatively influence these factors and result in environmental degradation. *Id.* Commissioner Woodworth posed several questions regarding the SavATree Report. HR 20:17. Specifically, Commissioner Woodworth inquired as to whether the amount of tree pruning

recommended in the SavATree Report, could be accomplished without necessitating a tree impact assessment under the relevant Code provisions.⁹ HR 20:17. Mr. Frye confirmed that, based on the recommendation of the SavATree Report, a tree impact assessment would not be required. HR 20:18.

STANDARD OF REVIEW

The decision of the City Manager or their designee concerning a Removal Permit is presumed to be correct.¹⁰ Code § 12.12.087(A). This presumption may be rebutted by a party filing an appeal of the UFM’s decision. *See id.*; *see also supra* at n.10. A party challenging the UFM’s decision, on appeal, maintains the burden of proof and must prove, by a preponderance of the evidence, that the UFM’s decision was incorrect to rebut the aforementioned presumption. Code § 12.12.087(C). Further, the Commission may only approve a Removal Permit with conditions, reverse, or modify the UFM’s initial decision if the record contains substantial evidence to support that decision. Substantial evidence, as defined by the Code, means “such relevant evidence as a reasonable mind might accept as adequate to support a conclusion.” Code § 12.12.087(A); *accord Anderson v. Dept. of Pub. Safety and Correctional Servs.*, 330 Md. 187, 213, 623 A.2d 198, 210 (1993) (providing an identical definition of the term “substantial evidence” as found within Code § 12.12.087(A)).

ANALYSIS AND FINDINGS

In this section, the Commission will first address the preliminary issues raised by the Applicant throughout the hearing. The Commission will then proceed to analyze the denial of

⁹ *See* Code § 12.12.030(A)(5) (requiring that a tree impact assessment be performed in the event that more than 10% of an urban forest tree’s canopy will be pruned).

¹⁰ The City’s UFM is entitled to act as the City Manager’s designee in reference to the provisions of Chapter 12.12 of the Code. *See* Code § 12.12.140.

Applicant's removal permit by applying the seven (7) factors set forth in Code § 12.12.080(A)(1)(a)–(g). Ultimately, the Commission will affirm the UFM's denial of the Applicant's Removal Permit.

I. Preliminary Issues.

Prior to analyzing the substance of the appeal concerning the denial of the Applicant's Removal Permit, we address the two preliminary issues raised by the Applicant throughout the course of the hearing: (1) the delays between the Applicant's initial appeal request and the appeal hearing, and (2) the automated response the Applicant received from the City regarding the denial of the Removal Permit, which cited a provision of the City Code that was previously repealed.

A. The Applicant is not prejudiced by an alleged delay in the hearing being conducted.

With respect to the approximately six month period of time between the Applicant's initial appeal request and the appeal hearing taking place, the record before the Commission reflects the following: (1) the Commission's appeal hearing on the Removal Permit did not begin to be scheduled until September, (2) one of the tentative dates of the appeal hearing was postponed, based on the requirement that the City post a notice of the hearing for fifteen continuous days on the Property, (3) one tentative date was postponed based on the Applicant's vacation plans, which led him to suggest a date in which the fifteen day notice period could not be satisfied, and (4) a hearing was rescheduled based on the terms of the former Commission members ending and the City's need to provide an orientation to the new Commissioners prior to the present matter being heard.¹¹

¹¹ See Code § 12.12.080(B)(5) (requiring the City to post notices of hearings concerning appeals of Removal Permits on the property where the tree is located and on the City's website "for at least 15 consecutive days prior to the hearing date.").

While the Commission is sympathetic with the Applicant's frustration regarding the length of time it took for the appeal to be conducted, the Applicant does not connect the alleged delay to any prejudice he suffered. Additionally, the Commission recognizes that the relevant Code sections do not contain a provision that would require the Commission to hold the hearing within a specific period of time from the Applicant's filing an appeal request. *See* Code § 12.12.087. Without such a provision, the relevant portions of the Code provide for no relief based on the period of time between the appeal being noted and the hearing being conducted. In the absence of any prejudice to the Applicant, and in the absence of any requirement that the hearing be conducted within a certain period of time, the alleged delay is not an obstacle to the Commission hearing and deciding the matter.

B. The incorrect citation in the City's automated response is harmless error.

The Applicant suggested that the UFM's decision should be reversed, because the automated response he received from the City—denying his Removal Permit application—cited a section of the Code that was previously repealed. The Commission will assume, without deciding, that this procedural glitch is an error and conclude that it is a harmless error which does not require that the Commission reverse the UFM's decision.

Generally, under harmless-error review, a reviewing entity will not reverse a decision unless the party complaining of said error can demonstrate that it suffered some form of prejudice arising from a procedural error. *Harris v. David S. Harris, P.A.*, 310 Md. 310, 319, 529 A.2d 356, 360 (1987). In other words,

[t]o justify reversal two things are essential. There must be error and there must be injury; and unless it is perceived that the error causes the injury there can be no reversal merely because there is error.

Id. (quoting *Joseph Bro. Co. v. Schonthal*, 99 Md. 382, 58 A. 205, 210 (1904)).

As the Commission has assumed without deciding that the citation was in error, the Applicant must also show prejudice in order to succeed. On this record, there is no indication that the Applicant has suggested, identified, or shown that he was prejudiced in any way by the incorrect citation contained within the automated email he received informing them of the UFM's denial of the Removal Permit.

The response that the Applicant received from the City indicated that the Removal Permit application was being denied because the “request did not fulfill the criteria established by City Code (section 12.12.120) for tree removal.” *See* Exhibit 4. After this citation, the email informed the Applicant of the UFM's evaluation of the tree, including a numerical classification of the condition of the tree, as well as the UFM's comments. *Id.* Two days later, the Applicant filed an appeal request and informed the UFM that the Code section cited in the former email was incorrect. *Id.* at p. 2. The following day, the UFM recognized—and informed the Applicant—that the Code section setting forth the factors relevant to Removal Permits was changed by the City Council at some point in 2020 and that the citation contained within the auto-generated email template was likely not updated.¹²

It is overwhelmingly clear that the Applicant suffered no prejudice from the alleged error. After the Applicant identified the incorrect citation, he was informed of the cause, and the UFM provided an explanation. The 2020 revision to the Tree Ordinance relocated the provisions containing the factors related to tree removal from the erroneously cited and repealed § 12.12.120 to § 12.12.080(A)(1). While the 2020 revision modified the factors, the Applicant did not contend

¹² This pattern of events was consistent with the UFM's testimony. During his testimony, he indicated that the email the Applicant received—informing him of the UFM's denial of the Removal Permit—was an automated one. The automated emails are sent whenever the UFM updates an entry within the software that the City uses to manage such requests. HR 20:20.

that he was unaware of the factors relevant to his Removal Permit or that he suffered prejudice in any way. Moreover, Mr. Frye testified that, when he assessed the tree, he applied the factors set forth in Code 12.12.080(A)(1). Accordingly, the Commission assumes that the incorrect citation contained in the City's denial of Applicant's Removal Permit application is error, finds that it caused no prejudice to the Applicant and was, therefore, harmless error which does not necessitate action by the Commission.

II. Denial of the Removal Permit is Affirmed.

As to the sole question before the Commission, *i.e.*, whether the Applicant's Removal Permit should be approved, denied, or approved with modifications, the Commission is tasked with applying the seven (7) factors set forth in Code § 12.12.080(A)(1)(a)–(g). As set forth above, there is a rebuttable presumption that the UFM's decision is correct, and the Applicant maintains the burden of rebutting said presumption. Code § 12.12.087(A), (C). The Commission's findings are as follows:

A. The general health and condition of the tree.

Based on the record before it, the Commission finds that the tree is generally in good health and condition. First, although the Smolinski Report suggested a potential insect infestation, based on the presence of insect frass under its bark, the UFM testified that the brown material referenced in the Smolinski Report was not insect frass of a particular species of concern to sycamore trees. The Applicant also pointed to pictures of holes on branches that had fallen from the tree. In response, the UFM testified that these branches had likely died prior to falling from the tree. He noted that, on many occasions, branches will be attacked by insects after they die and observed that the holes in said branches were not indicative of insect infestation which occurred while the branches were living. Therefore, in his opinion, the holes in the fallen branches were not

demonstrative of insect infestation within the living portions of the tree. Third, the UFM, based upon the sounding mallet test he performed on the tree, concluded that there were no hollow areas within the trunk of the tree that would suggest the tree is infested with insects. This contradicts the arborist's indication within the Smolinski Report that "there may be hollow areas" within the trunk of the tree. Exhibit 3, p. 3. Indeed, the arborist who prepared the SavATree Report, introduced by the Applicant, found no hollow areas in the tree after conducting a sounding mallet test. Exhibit 5, p. 4. The Commission finds the UFM's testimony on this point, bolstered by the SavATree Report, persuasive and in less speculative terms than the findings of the Smolinski Report.

Next, the Applicant cited to the Smolinski Report for the proposition that the tree's bark is flaking "more than normal and in thicker flakes than normal" to suggest that the tree is in poor health. In contrast, the UFM testified that flaking bark is relatively common for sycamore trees, is not indicative of a decline in their health, and that—during his inspection of the tree—he found that the flaking bark was not associated with any decay of the tree.

With regard to the condition of the soil surrounding the tree, the Smolinski Report suggested that the soil may be compacted. *See* Ex. 3, p 5. As a result, the Smolinski Report recommended the use of an air spade to eliminate any such soil compaction. *Id.* During the hearing, the Applicant did not testify that he pursued any such remedial action such as air spading. Further, the UFM suggested that, if soil compaction was a factor negatively impacting the tree's growth, this would be reflected in a reduction of the vigor of the tree's canopy. HR 20:06–07. He then recalled that, based on his observation of the tree, that soil compaction had no negative impact on the growth of the tree, that the tree was not in a state of decline, and that there was no indication the tree would begin to decline due to soil compaction. HR 20:07. The UFM also testified that,

although the tree's roots have limited area for growth in one direction, there is sufficient room for the tree's roots to expand in the remaining directions.

Based on the foregoing, the Commission finds that this factor weighs in favor of denying the Applicant's Removal Permit.

B. The desirability of preserving the tree by reason of its age, size, species, or other outstanding quality.

During the hearing, the UFM testified that the tree is extremely large and of an outstanding quality. In fact, the UFM suggested that it is one of the largest trees—with one of the largest canopies—within the neighborhood. The Applicant did not contest this classification and—in fact—generally agreed that the tree is large. The Applicant failed to provide any testimony or evidence that would suggest that this factor would support the approval of the Removal Permit.

Based on the foregoing, the Commission finds that this factor weighs in favor of denying Applicant's Removal Permit.

C. The impact of the reduction in tree cover on the property where the tree is located, adjacent properties and the surrounding neighborhood and the extent to which said areas would be subject to environmental degradation.

Based on the Commission's finding with respect to the second factor relevant to Removal Permits, as well as the testimony adduced at the hearing, the Commission finds that the tree's canopy is large and vigorous. Because the tree is one of the largest within the surrounding area, there can be no doubt that, if this tree was to be removed, such removal would implicitly result in a substantial reduction in the tree canopy within the surrounding area and would also result in potential environmental degradation, including an increase in stormwater runoff and detrimental effects to the native ecosystem. This is in accordance with the UFM's testimony regarding the reduction in tree canopy cover in the area if the tree were to be removed, as well as the potential negative impacts on the local environment. Moreover, the Applicant provided no testimony or

other evidence that suggested—or even implied—that removal of the tree would not negatively impact the tree canopy cover within the surrounding area or result in environmental degradation.

Based on the foregoing, the Commission finds that this factor weighs in favor of denying Applicant's Removal Permit.

D. The location of the tree in relation to targets (people or property that may be subject to injury or damage due to a tree's failure).

The primary thrust of the Applicant's arguments concerning tree removal was in reference to the potential danger the tree posed to vehicles, people, and the structure located on the property. At the hearing, the Applicant produced numerous pictures of limbs that had fallen from the tree and damage the fallen limbs had caused to vehicles located on the property.

However, after reviewing the photographic documentation provided by Applicant, the Commission finds that the branches that had fallen from the tree were likely already dead, prior to falling from the tree. As a preliminary matter, the Commission finds that routine arbor care—for a tree such as this—includes the requirement of periodically removing or pruning dead branches. This is in accordance with the SavATree Report that the Applicant introduced at the hearing, as well as the testimony of Mr. Frye.

In the SavATree Report, authored by SavATree Consulting Group, the arborist determined the tree to be of a "moderate" risk. Exhibit 5, p. 5. The most telling aspect of the SavATree Report is the recommended remedial actions that be taken with respect to the tree. The SavATree Report does not suggest that the tree should be removed, instead, it provides the following:

The tree can be treated in such a way as to mitigate a portion of the risk posed by the canopy. Not all the risk can be removed from the tree. We recommend that the canopy tree [sic] pruned using a natural pruning system intended to maintain the tree's characteristic growth pattern. **We recommend that the canopy be pruned using a natural pruning system intended to maintain the tree's characteristic growth pattern. This shall be done by performing branch removal and branch reduction cuts to remove approximately 5–10% of the total buds/foliage**

throughout the crown. This is recommended to reduce the density of the foliage and reduce the overall weight of the canopy, thereby reducing risk. We recommend that the noted 3” hanger is removed from the tree and any deadwood 1” and larger is pruned. We recommend that the overextended limb receive branch reduction cuts to reduce the overall weight and extension of the limb over the roof of 7205 Flower Avenue.

Exhibit 5, p. 6 (bold added). The SavATree Report concluded that, if such remedial action were taken, the tree would then be considered to be “low” risk. *Id.* During the hearing, the Applicant conceded that, during the time he owned the property upon which the tree is located, he has not had the tree pruned. The findings of the SavATree Report significantly undermine the Applicant’s position that removal of the tree is necessary to protect the people, property, and structure that are located on the Property.

Although the Commission recognizes and respects the Applicant’s concerns regarding falling branches, the Commission finds that, had the Applicant taken the remedial action suggested by the SavATree Report—or conducted some intermittent pruning of the tree—this concern would be mitigated substantially. Any potential harm to people or property as a result of branches falling from the tree are only still in existence based on the Applicant’s failure to have the tree pruned, which—based on the UFM’s testimony—is part of the normal regime of arbor care.

Based on the foregoing, the Commission finds that this factor weighs in favor of denying the Applicant’s Removal Permit.

E. A utility or permanent structure above or below ground which the tree may have an adverse impact at present or in the future.

In terms of the fifth factor, the only potential permanent structure which the tree may have an adverse impact on is the structure located on the Property. As indicated in the Commission’s finding with respect to the fourth factor, any risk to this structure could be sufficiently mitigated by pruning the tree—a component of proper arbor care for trees such as this—which was

recommended by the arborist who conducted the SavATree Report. Simply put, any risk of harm to the building located on the Property could be sufficiently ameliorated by pruning the tree. This is in accordance with both the SavATree Report and the UFM's testimony on this point.

Based on the foregoing, the Commission finds that this factor weighs in favor of denying the Applicant's Removal Permit.

F. Any compelling reasons for the removal that the applicant has demonstrated, including hardship, and whether a reasonable alternative to removal of the tree exists.

Although not directly stated, the only portion of the Applicant's testimony which could be construed to reference this factor is the additional expenses that the Applicant has incurred or would incur in attempting to mitigate the risk associated with the tree. During the hearing, the Applicant suggested that he has paid a substantial sum for both the Smolinski and SavATree Reports. The Applicant also testified that the cost of pruning the tree could be substantial. Nonetheless, based on Mr. Mathaudhu's testimony and the exhibits introduced by the Applicant at the hearing, the Commission finds that the cost associated with pruning deadwood from the tree is substantially less than the cost of removing the tree. Essentially, having the tree pruned to remove any dead branches that would be of a particular concern is a more cost-effective method of mitigating any potential risk associated with the tree, when compared to removal.

The Commission recognizes the expenses that the Applicant has incurred prior to this point and the expenses associated with tree care. Yet the Commission finds that pruning the tree would impose less of a monetary burden on the Applicant when compared to removing the tree outright. Additionally, having the tree pruned constitutes a reasonable alternative to removing the tree, especially in light of the fact that the SavATree Report recommended pruning the tree in lieu of removal. *See Exhibit 5, p. 6.*

Therefore, based on the foregoing, this factor weighs in favor of denying the Applicant's Removal Permit.

G. The extent to which tree clearing is necessary to achieve the proposed development or land use.

This factor is not applicable to the Commission's decision in this case. The parties presented no testimony or evidence concerning the extent to which removal of the tree is necessary to achieve a proposed land use. Therefore, the Tree Commission makes no finding and does not consider this factor in reference to the Applicant's Removal Permit.

CONCLUSION

For the reasons set forth herein, the UFM's preliminary denial of the Applicant's Removal Permit is affirmed. The Applicant has not met his evidentiary burden to rebut the presumption that the UFM's decision with respect to his Removal Permit was correct. The factors set forth in Code 12.12.080(A)(1), regarding Removal Permits, taken together and on this record, support the UFM's denial of the Applicant's Removal Permit. Therefore, the Commission affirms the UFM's denial of the Applicant's Removal Permit, and the Chair of the Commission is authorized to sign an Order affirming the City's denial of the Removal Permit.

Date Issued: December 22, 2021

For the City of Takoma Park Tree
Commission:

/s/
Bart Sheard, Commission Chair

/s/
James Woodworth, Commission Secretary

/s/
Meipo Martin, Commissioner

_____/s/
Paul O'Brien, Commissioner

_____/s/
Blake Sparrow, Commissioner

_____/s/
Gorky Villa, Commissioner

NOTICE OF APPEAL RIGHTS

Section 12.12.087(F) of the Takoma Park Code provides that a person who was a party to proceedings before the Tree Commission and who is aggrieved by the decision may seek judicial review of the decision by filing a petition for judicial review in accordance with Title 7, Chapter 200, Judicial Review of Administrative Agency Decisions, of the Maryland Rules of Procedure.

CITY OF TAKOMA PARK TREE COMMISSION

In Re Tree Removal Permit *
No. W006680-061521 *
7205 Flower Avenue, *
Takoma Park, Maryland, *
Appeal from the Preliminary Denial *
Bobby and Carmen Mathaudhu, *
Applicants *

Case No.: TC 2021-01

* * * * *

ORDER

For the reasons set forth in the associated Memorandum Decision, on this 22nd day of December 2021, it is hereby

ORDERED, that the City’s preliminary denial of the Tree Removal Permit in the above referenced matter is affirmed.

For the City of Takoma Park Tree
Commission:

_____/s/_____
Bart Sheard, Commission Chair

Memorandum Decision and Order with Notice of Appeal Rights
Service Copies: All Parties of Record