

CITY COUNCIL AGENDA ITEM
CITY OF SHORELINE, WASHINGTON

AGENDA TITLE:	Public Hearing on Four Month Moratorium On Hazardous Tree Exemption to Clearing Permits
DEPARTMENT:	Planning and Development Services, City Attorney's Office
PRESENTED BY:	Joe Tovar, Director of Planning and Development Services

PROBLEM/ISSUE STATEMENT: On January 3, 2006 the Council adopted Ordinance No. 407 which established a four month moratorium on that portion of the City's development regulations which exempt the cutting of hazardous trees from the requirement for clearing and grading permits. This moratorium is adopted upon the use or application of the exemption codified in SMC 20.50.310.A.1. Ordinance No. 407 also adopted an interim control in place of the prior exemption provision.

During the moratorium, no land clearing and grading shall be permitted on private property except as permitted under the interim control. The interim control affirms other code exemptions from clearing permits (e.g. cutting six trees per parcel if outside critical areas) and allows cutting of hazardous trees without a permit if authorized by the City prior to removal. See Ordinance N. 407 Section 3.

Public comment expressed by some citizens at the January 3, 2006 Council meeting questioned the rationale and legal basis for adopting Ordinance No. 407 with no notice and prior to a public hearing. The short answer is that to announce the council's intention to consider adoption of a moratorium would very likely hasten a rush to the permit counter by people attempting to take advantage of the prior rules. A longer answer, including the legal basis for not providing notice and hearing before the adoption of such moratoria, follows.

The statute authorizing land use moratoria is RCW 35A.63.220 and under the Growth Management Act, RCW 36.70A.390. The key features authorize adoption of an ordinance without public hearing notice or recommendation from the Planning Commission. The moratorium ordinance must be scheduled for a public hearing and adoption of findings within 60 days from its initial passage. It may remain in effect for up to six months, but may be extended after a second public hearing.

Given a liberal vesting rule for development of property in this state, Washington courts have expressly endorsed the use of moratoria to freeze the status quo quickly to prevent owners from securing a vested right by filing an application

before a deliberative review of land use changes can be completed. This well-established legal principle was summed up by a legal scholar as follows:

“ Moratoriums and interim zoning are generally recognized techniques designed to preserve the status quo so that new plans and regulations will not be rendered moot by intervening development. Recognizing the emergency, temporary, and expedient nature of such regulations, the courts have tended to be more deferential than usual to the local legislative body.”

Richard L. Settle, *Washington Land Use and Environmental Law and Practice* §23, at 72 (ed.1983).

Two other points of clarification are in order regarding the actual operation and administration of the interim controls under Ordinance No. 407. First, some have expressed the belief that the Ordinance has established a moratorium on tree cutting, per se, and that even hazardous trees may not be cut. This is incorrect. The moratorium temporarily sets aside the prior rule which provided an exemption from City permitting requirements for the cutting of hazardous trees. The interim control sets forth new, interim rules to govern hazardous tree cutting.

Second, some have construed the phrase “utilizing hand implements only” in Section 3 of Ordinance No. 407 to suggest that chainsaws are not permitted tools in removing hazardous trees, or portions of such trees. The staff did not intend and does not interpret this phrase to prohibit the use of chainsaws when the cutting of a hazardous tree is authorized pursuant to the other provisions of the interim controls. A chainsaw is a hand implement. A Bobcat, trackhoe, or other vehicle would be prohibited by this phrase.

The Staff Report submitted on January 3, 2006 in support of the moratorium and interim control is attached to this report as Attachment A; Ordinance No .407 is Attachment B.

ALTERNATIVES ANALYZED:

The action before the Council is to conduct a public hearing on Ordinance No. 407 required by state law in order to continue this Ordinance in effect for the full four month term. If the Council is satisfied with the ordinance as passed, no further action need be taken. Staff recommends no further action at this time.

Alternatively, the Council may decide to amend or repeal Ordinance No. 407. In such a case, the Council would direct staff to prepare amendments to the findings in the ordinance or the provisions of the ordinance itself based on testimony at the public hearing.

FINANCIAL IMPACT: There are no financial impacts of this council action, which is to take public testimony.

RECOMMENDATION

Staff recommends that Council hold a public hearing for Ordinance No. 407. No additional action is required to keep this moratorium and interim control in effect, and the staff recommends no additional Council action.

Approved By:

City Manager 

City Attorney 

Attachments:

Attachment A: Staff Report for Ordinance No. 407

Attachment B: Ordinance No. 407

Council Meeting Date: January 3, 2006

Agenda Item:

CITY COUNCIL AGENDA ITEM
CITY OF SHORELINE, WASHINGTON

AGENDA TITLE: Moratorium and Interim Controls to regulate tree cutting DEPARTMENT: Planning and Development Services PRESENTED BY: Joseph W. Tovar, FAICP, Director

The subject of tree cutting and critical areas ordinance (CAO) regulations have been controversial and difficult subjects for this community. The Planning Commission spent a considerable amount of time in 2005 hearing and weighing public testimony and forwarded its recommendations for updated critical areas regulations to the Council. Those recommendations are scheduled for Council review on January 17 and action on February 13, 2006.

As staff earlier reported, the vast majority of public testimony that the Planning Commission heard on the CAO focused on the question of tree cutting and much of that comment focused on historical and current events in the Innis Arden area of Shoreline. In October of 2005, the Council decided to segregate out those portions of the Planning Commission's CAO recommendations that addressed the subjects of tree cutting, clearing and grading. The Council directed the city staff to engage the primary disputants in Innis Arden, namely the Innis Arden Club and the Association for the Responsible Management of Innis Arden (ARM), in a mediated discussion of the subject.

The staff had several preliminary discussions with both the Club and ARM, and retained a professional mediator to assist with the effort. As Council heard at its December 27, 2005 special meeting, ARM has withdrawn from the mediation effort and it is therefore for all intents and purposes ended.

In recent months the staff has been notified by the Innis Arden Club of its intent to cut dozens of "hazardous trees" in the Reserves. These requests were made pursuant to the provisions of SMC 20.50.310.A.1, which appears in Attachment C to this memo. This section of the code describes actions exempt from permit requirements. As written, it grants broad discretion for a property owner to determine what trees, including significant trees, are "hazardous" and to cut and remove any number of them without a permit or city oversight. In my judgment, the present exemptions language allows far more trees to be cut under the rubric of "hazardous" than actual circumstances warrant. This is particularly

problematic when such tree cutting and clearing occurs within environmentally sensitive areas, such as wetlands, creek setbacks, and steep slopes.

The subject of tree cutting and vegetation removal continues to be an active controversy consuming much of the attention of the city staff, including the Community Response Team and Code Enforcement Officer. Among activities within the past several weeks are cutting and clearing that occurred in the Blue Heron Reserve of Innis Arden. Attached are two photographs depicting recent cutting in the upper portion of the Blue Heron Reserve adjacent to NW 186th St.

Attachment A, photographed in December of 2005 shows the cutting activities that have taken place in the past several months under the exemptions granted by the existing Shoreline Municipal Code. This area of the Blue Heron Reserve contains both a wetland and a stream.

Attachment B is an aerial photograph from mid 2005. This photograph also shows the upper portion of the Blue Heron Reserve. In this photograph, you can see the end of the cul-de-sac where the previous picture was taken, located on the left center of the page. The home and yard that are visible in the previous photograph are located easterly of the Blue Heron Reserve, on the right hand side of the page. As you can see, the canopy and tree cover that was once present in the upper portion of this reserve has been fully removed allowing an unobstructed view from the cul-de-sac on NW 186th through to the adjoining properties on Springdale Ct. NW.

Please note that the staff is not asserting that the above described cutting in Blue Heron Reserve violates the City's codes as it presently reads. We can neither prove nor disprove a violation because city staff has been specifically barred from entering the property. We are attempting to ascertain all the facts before a final determination of whether a violation has occurred. Significantly, however, even were we to assume that no violation of present code language (i.e., exemptions under SMC 20.50.310.A.1) has occurred, such a premise makes the case for setting aside that code language immediately. As noted above, Blue Heron Reserve is a critical area, containing both a wetland and a stream. Removal of vegetation from a critical area on the scale of what is illustrated in Attachments A and B does not, on its face, meet the City's duty to protect critical areas under state law.

In my professional opinion, the existing code provisions undercut the City's ability to meet its statutory mandates to protect critical areas and to provide clear, fair, and enforceable rules for the Department to administer. It is necessary to immediately set aside the exemption language of SMC 20.50.310.A.1, adopt interim regulations to govern hazardous tree cutting activities, and to direct that the City staff and Planning Commission revisit this policy question.

The Planning Commission's previous recommendations dealing with parts this issue should be the starting point. However, the staff believes that additional alternatives should be presented for the Commission's consideration and public testimony. Both ARM and the Innis Arden Club, as well as other interested groups and citizens, should be invited to work with the City staff and Planning Commission in an open public process to craft permanent regulations that protect critical areas while also giving due consideration to private property rights and need to protect life and property. Staff believes that four months should be sufficient time for the Planning Commission to present a final recommendation to the City Council regarding permanent regulations. In order to protect the City's options during that review, it is important to adopt a moratorium and adopt interim regulations.

RECOMMENDATION

Staff recommends that the City Council adopt the enclosed ordinance to declare a moratorium on SMC 20.50.310.A.1 and adopt interim controls for a period of four months regulating the cutting of hazardous vegetation. Since the City needs to complete the CAO revisions by the end of April, and any final revisions to tree cutting in critical areas should be incorporated in the new CAO, a four month moratorium should prove adequate.

Approved By: City Manager _____ City Attorney _____

ORDINANCE NO. 407

AN ORDINANCE OF THE CITY OF SHORELINE, WASHINGTON, ADOPTING A MORATORIUM AND INTERIM CONTROL PURSUANT TO RCW 35A.63.220 PROHIBITING THE CUTTING OF TREES IN CRITICAL AREAS AND PROHIBITING LAND CLEARING OR GRADING IN CRITICAL AREAS, AND DECLARING AN EMERGENCY

WHEREAS, under the provisions of the Growth Management Act the City is required to adopt development regulations to designate and protect critical areas; and

WHEREAS, SMC 20.50.310.A.1 effectively authorizes property owners to remove “hazardous trees” without a before-the-fact judgment by the City as to whether the circumstances constitute an actual and immediate threat to public health, safety or welfare; and

WHEREAS, SMC 20.50.310.A.1 does not require removal of hazardous trees from private property in a manner which will protect critical areas or the replanting of trees to prevent the loss of critical area functions and values after removal ;

WHEREAS, the continued operation of SMC 20.50.310.A.1 is likely to result in ongoing tree cutting, clearing and grading in critical areas of the City, contrary to the state’s explicit public policy of protecting critical areas and the general public interest; and

WHEREAS, an interim control for four months will allow the City to preserve planning options and prevent substantial change to critical areas while the Planning Commission and city staff engage the public and various stakeholder groups in crafting permanent development regulations, including but not limited to such alternatives as a vegetation management plan; and

WHEREAS, the City Council has determined from recent public correspondence and comment that the City’s ability to protect its critical areas will suffer irreparable harm unless interim controls are placed on the cutting of trees and the modification of land surfaces within such areas; and

WHEREAS, the potential adverse impacts upon the public safety, welfare, and peace, as outlined herein, justify the declaration of an emergency; and

WHEREAS, pursuant to SEPA regulations, SMC 20.30.550 adopting Washington Administrative Code Section 197-11-880, the City Council finds that an exemption under SEPA for this action is necessary to prevent an imminent threat to public health and safety and to prevent an imminent threat of serious environmental degradation through continued development under existing regulations. The City shall conduct SEPA review of any permanent regulations proposed to replace this moratorium; now, therefore,

**THE CITY COUNCIL OF THE CITY OF SHORELINE, WASHINGTON, DO
ORDAIN AS FOLLOWS:**

Section 1. Finding of Fact. The recitals set forth above are hereby adopted as findings of the City Council.

Section 2. Moratorium. A moratorium is adopted upon the use or application of SMC 20.50.310.A.1 (hazardous vegetation exemption for clearing and grading permits for private property). No land clearing and grading shall be permitted on private property except as permitted under the interim control as adopted in Section 3 of this ordinance.

Section 3. Interim Controls adopted. The City adopts the following interim controls pursuant to the authority of RCW 35A.63.220:

Emergency situations on private property involving danger to life or property or substantial fire hazards.

In addition to other exemptions of Subchapter 5 of the Development Code, SMC 20.50.290-.370, the proposed cutting of any tree or clearing vegetation that is an immediate threat to public health and safety shall be allowed without a permit if it is evaluated and authorized by the City prior to such work being performed. The evaluation shall be done using the International Society of Arboriculture method, Hazard Tree Analysis for Urban Areas, in its most recent adopted form. Authorization to cut or clear vegetation under this exemption may only be given if the City concludes that the condition constitutes an actual and immediate threat to life or property in homes, private yards, buildings, public or private streets and driveways, improved utility corridors, or access for emergency vehicles. The party proposing cutting or clearing under this exemption shall contact the City regarding the emergency prior to taking the action and shall allow City access to assess the hazardous vegetation prior to, during and after removal and to assure compliance with conditions. If deemed by the City to be necessary, the City may retain, at the applicant's cost, an arborist/tree consultant to evaluate the request prior to any final determination. The City shall authorize only such alteration to existing trees and vegetation as may be necessary to eliminate the hazard and shall condition authorization on means and methods of removal necessary to minimize environmental impacts, including replanting. Any authorized work shall be done utilizing hand implements only and the City may require that all or a portion of cut materials be left on-site.

Section 4. Public Hearing. Pursuant to RCW 35A.63.220 the City Clerk shall notice a public hearing before the City Council to take testimony concerning this moratorium within sixty days of passage of this ordinance.

Section 5. Severability. Should any section, paragraph, sentence, clause or phrase of this ordinance, or its application to any person or circumstance, be declared unconstitutional or otherwise invalid for any reason, or should any portion of this ordinance be pre-empted by state or federal law or regulation, such decision or preemption shall not affect the validity of the remaining portions of this ordinance or its application to other persons or circumstances.

Section 6. Effective Date. The City Council declares that an emergency exists requiring passage of this ordinance for the protection of public health, safety, welfare and peace based on the Findings set forth in Section 1 of this ordinance. This ordinance shall take effect and be in full force immediately upon passage and shall expire four months from its effective date unless extended or repealed according to law.

Section 7. Publication. A summary of this ordinance consisting of the title shall be published in the official newspaper of the City.

PASSED BY THE CITY COUNCIL ON JANUARY 3, 2006

Mayor

ATTEST:

APPROVED AS TO FORM:

Scott Passey
City Clerk

Ian Sievers
City Attorney

Date of Publication:
Effective Date:

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