

APPEAL RESPONSE LETTER FROM THE  
CITY'S LANDSCAPE ADMINISTRATOR  
(CITY OFFICIAL)



Emily Braht, RLA  
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08 May, 2017

Chief Building Official Rick Herzberger  
**Board of Adjustments**  
City of McKinney  
221 N. Tennessee Street  
McKinney, TX 75069

RE: Response to McKinney Entertainment, LLC's Revised Formal Request for a Hearing before the Board of Adjustment to Appeal an Administrative Official's Decisions Regarding the Enforcement of Section 146-136 – Tree Preservation

Mr. Herzberger:

As you know, I am the Landscape Administrator for the City of McKinney. In this role I am charged with the responsibility to administer the provisions of Section 146-136, "Tree Preservation," of the Code of Ordinances, City of McKinney, Texas ("McKinney Code") (the "Tree Preservation Ordinance"). Following is my response, as the Administrative Official for the Tree Preservation Ordinance, to the appeal asserted by McKinney Entertainment, LLC ("McKinney Entertainment") regarding the application of the Tree Preservation Ordinance to the trees that were removed from property owned by McKinney Entertainment.

## **I. BACKGROUND**

### **A. The Tree Preservation Ordinance**

The purpose of the Tree Preservation Ordinance is to "promote tree preservation through site design and by controlling indiscriminate removal of trees; and to contribute to the long-term viability of existing trees through their protection during construction or land disturbing activities; while balancing rights of property owners with the interests of the community." McKinney Code § 146-136(a). The Tree Preservation Ordinance is

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specifically intended to prohibit indiscriminate “clear-cutting,” and protect healthy “quality trees” and promote the natural ecological, environmental and aesthetic qualities of the city. *Id.* In this regard, the phrase “clear-cutting” means the removal of ten or more “protected trees” from a property with a 90-day period. McKinney Code § 146-136(b).

The Tree Preservation Ordinance defines a “tree” to be “any self-supporting woody plant, which will attain a trunk caliper of two inches or more when measured at a point 4½ feet above ground level and normally an overall height of at least 15 feet with a canopy of at least 15 feet in caliper at maturity.”<sup>1</sup> *Id.* A “quality tree” is defined to mean a tree species that typically has significant positive characteristics worthy of preservation, as listed in Section A-2 of Appendix A to the Tree Preservation Ordinance.<sup>2</sup> *Id.* Those quality trees that have a trunk which is six inches or greater in caliper at four feet six inches above the ground (“Diameter at Breast Height” or “DBH”) are considered to be “protected trees” under the Tree Preservation Ordinance. *Id.*

## **B. Tree Permits Are Required**

There are a number of situations where tree permits are required by the McKinney Code. Tree permits are required before clear-cutting; selectively thinning a forested area; critically altering a diseased tree; critically altering a protected tree; before any building, paving, grading or construction on a tract of land; and before grubbing under any drip lines, as detailed below.

### **1. Before Clear Cutting**

Clear-cutting is prohibited unless specifically authorized by a tree permit. McKinney Code § 146-136(f)(1).

### **2. Before Selectively Thinning a Densely Forested Area**

The Landscape Administrator may issue a limited purpose tree permit for selective thinning of certain protected trees from a densely forested area. McKinney Code § 146-136(f)(5). The Landscape Administrator will, as part of the tree permit review process, determine whether the selective thinning proposed will be performed in a professionally accepted manner that will enhance the likelihood of survival for the remaining trees. *Id.* If the landscape administrator issues a permit for selective thinning, the protected trees covered by the permit shall be exempt from the tree replacement and tree protection requirements of the Tree Preservation Ordinance. *Id.*

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<sup>1</sup> The Tree Preservation Ordinance does not use the term “sapling” and does not distinguish between trees based on their maturity. Rather, the Tree Preservation Ordinance focuses on the size and species of trees to determine whether the tree should be protected.

<sup>2</sup> This list includes fifty-six types of trees including, but not limited to, ash trees, cedar trees, elm trees and pecan trees.



3. Before critically altering a diseased tree

Subject to the grant of a tree permit, a diseased protected tree may be critically altered to reduce the chances of spreading the disease to adjacent healthy trees. McKinney Code § 146-136(f)(6). If the landscape administrator issues a limited purpose tree permit for such purpose, the protected trees covered by the permit shall be exempt from the tree replacement and protection requirements of the Tree Preservation Ordinance. *Id.*

4. Before any protected tree is critically altered

A tree permit is required to be obtained from the Landscape Administrator before any protected tree is critically altered. McKinney Code § 146-136(c)(1). Critically altering a tree means "uprooting or severing the main trunk of a tree, or any act that causes or may reasonably be expected to cause a tree to die." *Id.* at § 146-136(b). Critical alteration also includes, but is not limited to: (a) damage that is inflicted on the root system of a tree by machinery, storage of materials, or the compaction of soil above the root system of a tree; (b) a change in the natural grade above the root system of a tree; (c) an application of herbicidal chemical or the misapplication of beneficial chemicals; (d) excessive pruning; (e) placement of non-permeable pavement over the root system of a tree; (f) trenching within the primary root zone; or (g) altering or disturbing more than 25 percent of the primary root zone at natural grade, or removing more than 25 percent of the canopy of a tree." *Id.* The authorization to critically alter trees through the issuance of a tree permit is limited to those trees identified and approved for critical alteration as shown on documentation submitted for the tree permit. McKinney Code § 146-136(c)(2)(a)(3).

5. Before any building, paving, grading or construction on the Property

A tree permit is required to be obtained from the Landscape Administrator prior to: (1) any building, paving, grading, or construction of a subdivision or public improvements, McKinney Code § 146-136(c)(2)(a)(1); or, (2) prior to any building, paving, grading, or construction of a building. *Id.* at § 146-136(c)(2)(a)(2).

6. Before Grubbing Under Drip Lines

A tree permit is required to be obtained from the Landscape Administrator before clearing and grubbing of brush located within or under the drip lines of protected trees. McKinney Code § 146-136(f)(9)

**C. Course of Dealing with McKinney Entertainment**

The following timeline highlights some of the more pertinent events that have occurred regarding the removal of trees from property located adjacent to Eldorado Parkway at its intersection with College Street in the City of McKinney which tract of land is owned



by McKinney Entertainment (the "Property"). An aerial photograph of the Property is attached hereto as Exhibit 1 and incorporated herein by reference for all purposes allowed by law. This timeline may assist in placing this enforcement action in context given that McKinney Entertainment did not perform a tree survey or obtain any development permits for work on and about the Property before initiating development related activities including, but not limited to, clearing and grubbing of brush located within or under the drip lines of protected trees and selective thinning of a densely forested area; both of which activities require a tree permit.

- **December 14, 2016** – Erosion Control was alerted that dirt was being stockpiled the Property. The City's Senior Erosion Inspector ("Inspector") responded and upon arrival on the Property saw stockpiles of soil and trees that had been removed on the main site and in flood plain upon and across the Property. Please see the photographs attached hereto as Exhibits 2 through 7, which exhibits are incorporated herein by reference. The Inspector talked to the truck driver on the Property who was dumping the soil and asked the truck driver to stop work on the Property. The truck driver identified the owner of the Property who hired him as Don Day. The Inspector then contacted Mr. Day and informed him a **stop work order** was issued for the Property and instructed Mr. Day to contact the City of McKinney's offices and obtain the proper permits for work being performed on the Property. This stop work order and the need to obtain permits were documented in an email to Mr. Day and City Staff on the same day.
- **December 16, 2016** – The Inspector and Emily Braht, RLA (Landscape Architect and Administrative Official for the Tree Preservation Ordinance) visited the Property to document the soil that had been dumped on the Property and evaluate the extent of the tree removal that had occurred on the Property. A large number of trees on the Property had already been removed and the trunks and limbs of the removed trees had been cut into smaller lengths and stacked in piles or chipped as reflected in the photographs attached hereto as Exhibits 4 through 12 that are incorporated herein by reference. It also appeared that some of the trunks and limbs of the removed trees had already been sold for firewood and hauled away as there was a sign posted on a fence around the Property advertising fire wood for sale on the Property with a contact telephone number.

The fact that the trees had already been cut down and the trunks and logs of such removed trees were cut into smaller lengths and placed in stacks, chipped, or removed from the Property, made it infeasible to try to locate and measure the diameter of each of the removed trees at a point 4'-6" above the ground as specifically spelled out in Section 146-136 of the McKinney Code to determine the diameter at breast height of a tree that is subject to the Tree Preservation Ordinance. Consequently, our evaluation of the removed trees was based on the only evidence readily available on the Property – the tree stumps from the removed trees that had been cut off at ground level as can be seen primarily in Exhibit 4. The varieties of the trees removed and the diameter of the tree stumps

were measured and recorded for those quality trees that I believed were at least six inches in diameter or greater at breast height (4'-6" above ground).

While on site we noticed that about 50 feet of silt fence has been put on the Property after the stop work order had been issued on December 14, 2016. A second stop work order was sent to McKinney Entertainment to stop any additional work on the Property. Later the same day, City Staff visited the Property to evaluate the disturbance within the flood plain on the Property and further examine the tree removal.

- **January 11, 2017** – A meeting was held with Mr. Day, in his capacity as the Registered Agent for McKinney Entertainment, in the City of McKinney's offices to discuss the unauthorized tree removal on the Property.
- **January 18, 2017** – City Manager Paul G. Grimes sent a letter to Mr. Don Day, as the Registered Agent for McKinney Entertainment regarding the unauthorized tree removal and required tree mitigation that we identified (the "January 18 Letter"). A copy of the January 18 Letter is attached hereto as Exhibit 13 and is incorporated herein by reference.
- **March 6, 2017** – A meeting was held between the City's representatives and McKinney Entertainment's representatives in the City of McKinney's offices to discuss the January 18 Letter. During this meeting McKinney Entertainment disclosed that it had hired an Arborist to visit the Property and evaluate the Property and the information regarding unauthorized tree removal and required tree mitigation set out in the January 18 Letter. During the meeting, McKinney Entertainment's representatives stated that all of the trees which were removed were dead or less than 6" in diameter; and, that McKinney Entertainment's arborist determined some of the trees which were removed were of a different species or size than the species and sizes identified by the City.
- **March 7, 2017** -- McKinney Entertainment's representatives forwarded a copy of the report prepared by their arborist entitled "16.784 acre tract on Eldorado Parkway-Consultation Report" that was prepared by Ronnie Nelson, a certified Arborist, with Simply Horticulture, LLC ("Consultation Report") on behalf of McKinney Entertainment. A copy of the Consultation Report is attached hereto as Exhibit 14 and is incorporated herein by reference. As noted above, this Consultation Report was discussed during the meeting on March 6, 2017.

Our review of the Consultation Report indicated that the arborist retained by McKinney Entertainment used the same process for measuring the diameter of the trees that the City employed despite the fact that the methodology used by the City was not disclosed in the January 18 Letter. That is, the arborist retained by McKinney Entertainment also examined and measured the stumps of the removed trees to identify the species and diameter at breast height. In addition,



while the Consultation Report indicates Mr. Nelson was told by "the contractors [ ] that they tried to only removed (sp?) dead, diseased and dying tree[s] that were above 6-inches DSH," Consultation Report p. 3, the Consultation Report prepared by Mr. Nelson only identifies two trees as being diseased and does not indicate that any of the trees over six-inches (6") in diameter identified in the January 18 Letter were dead before such trees were cut down.

- **March 8, 2017** – We returned to the Property and reviewed the removed trees again after hearing the representations made during the March 6, 2017 meeting with McKinney Entertainment and reviewing the Consultation Report. We modified the list of unlawfully removed trees giving McKinney Entertainment the benefit of the doubt based on this additional visit to the Property, the information contained in the Consultation Report, and the arguments made by McKinney Entertainment's representatives by: (1) changing the species of certain trees to match Mr. Nelson's findings set out in the Consultation Report; (2) changing the tree diameters to match the findings set out in the Consultation Report except in those instances where Mr. Nelson increased the diameter of the removed trees (which occurred ten times in the Consultation Report); and, removing trees that we had previously measured that were less than 8" in diameter to account for any possible reduction in the trunk size if measured 4'-6" above the ground (DBH).
- **March 30, 2017** – City Manager Paul G. Grimes sent a second letter to McKinney Entertainment's representatives that revised the original unauthorized tree removal and required tree mitigation letter taking into account the arguments that were made by McKinney Entertainment's representatives and the Consultation Report (the "March 30 Letter"). A copy of the March 30 Letter is attached hereto as Exhibit 15 and is incorporated herein by reference. .

## II. APPLICABLE ORDINANCE PROVISIONS

The Tree Preservation Ordinance, found in McKinney Code § 146-136(a), states the purpose for such ordinance as follows:

*"Purpose.* The purpose of this section is to promote tree preservation through site design and by controlling indiscriminate removal of trees; and to contribute to the long-term viability of existing trees through their protection during construction or land disturbing activities; while balancing rights of property owners with the interests of the community. This section is specifically intended to:

- (1) Prohibit indiscriminate clear-cutting;



- (2) Protect and increase the value of residential and commercial properties within the city;
- (3) Maintain and enhance a positive image to attract new residences and business enterprises to the city; and
- (4) Protect healthy quality trees and promote the natural ecological, environmental and aesthetic qualities of the city."

The following definitions, taken from McKinney Code § 146-136(b) of the Tree Preservation Ordinance, are pertinent to this discussion:

*"Clear-cutting* means the removal of ten or more protected trees from a property with a 90-day period."

*"Critically alter, critical alteration* means uprooting or severing the main trunk of a tree, or any act that causes or may reasonably be expected to cause a tree to die. This includes, but is not limited to: damage inflicted upon the root system of a tree by machinery, storage of materials, or the compaction of soil above the root system of a tree; a change in the natural grade above the root system of a tree; an application of herbicidal chemical or the misapplication of beneficial chemicals; excessive pruning; placement of non-permeable pavement over the root system of a tree; or trenching within the primary root zone. Additionally, a tree may be considered critically altered if more than 25 percent of the primary root zone is altered or disturbed at natural grade, or more than 25 percent of the canopy is removed."

*"Diameter at breast height (DBH)* means tree trunk diameter measured in inches at a height of 4.5 feet above the ground. If a tree splits into multiple trunks below 4.5 feet, the trunk is measured at its most narrow point beneath the split."

*"Drip line* means whichever is greater:

- (1) A vertical line running through the outermost portion of the canopy of a tree and extending to the ground;  
or
- (2) If the tree is damaged or deformed, a circular area with a radius equal to two feet per inch of caliper."

*"Grubbing* means excavating or removing a significant part of the root system."

*"Protected tree* means a quality tree with a trunk six inches or greater in caliper at four feet six inches above the ground. The caliper of a multi-trunk protected tree shall be determined by adding the total caliper of the largest trunk to one-half the caliper of each additional trunk."

*"Quality tree* means a tree species that typically has significant positive characteristics worthy of preservation, as listed in this section (see section A-2 of appendix A to this chapter.)"

*"Tree* means any self-supporting woody plant, which will attain a trunk caliper of two inches or more when measured at a point 4½ feet above ground level and normally an overall height of at least 15 feet with a canopy of at least 15 feet in caliper at maturity. A tree may have one main stem or trunk or several stems or trunks."

Further pertinent Tree Preservation ordinance requirements include:

"146-136(f) *Standards*.

(1) *Clear-cutting*. Clear-cutting is prohibited unless specifically authorized by a tree permit.

. . . .

(5) *Selective thinning*. The landscape administrator may issue a limited purpose tree permit for selective thinning of certain protected trees from a densely forested area. The landscape administrator will, as part of the tree permit review process, determine whether the selective thinning proposed will be performed in a professionally accepted manner that will enhance the likelihood of survival for the remaining trees. If the landscape administrator issues a permit for selective thinning, the protected trees covered by the permit shall be exempt from the tree replacement and tree protection requirements of this section.

(6) *Diseased trees*. Upon issuance of a limited purpose tree permit, a diseased protected tree may be critically

altered to reduce the chances of spreading the disease to adjacent healthy trees. If the landscape administrator issues a limited purpose tree permit for such purpose, the protected trees covered by the permit shall be exempt from the tree replacement and protection requirements of this section.

....

(8) *Removal of underbrush.* Removal of underbrush, not including grubbing under drip lines, shall not require a tree permit.

(9) *Grubbing under drip lines.* The landscape administrator shall issue a limited purpose tree permit allowing the clearing and grubbing of brush located within or under the drip lines of protected trees.”

“146-136(k) *Violations.*

(1) A person commits an offense if the person critically alters a protected tree not meeting an exception listed in this section without first obtaining a tree permit from the city.

....

(5) Allegation and evidence of a culpable mental state is not required for the proof of an offense defined by this section.”

### III. APPEAL INFORMATION

#### A. Asserted Basis for Appeal

McKinney Entertainment appeals the Landscape Administrator’s determination, which is set out in the March 30 Letter attached hereto as Exhibit 15, as summarized below:

1. Tree Nos. 6, 10, 20, 22, 27, 32, 33, 34, 43, 44 and 45 measured incorrectly and the fee is unreasonable

McKinney Entertainment calls these eleven trees that are identified as numbers 6, 10, 20, 22, 27, 32, 33, 34, 43, 44 and 45 “saplings,”<sup>3</sup> and complains that the City measured

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<sup>3</sup> As noted above, the McKinney Code does not use the term “sapling” and simply denotes trees as trees. The U.S. Forestry Service defines saplings as being live trees that are 1.0 to 4.9 inches in diameter at



the trees at ground level instead of at the correct height of 4'-6" above the ground. McKinney Entertainment asserts the ground level measurements will always be larger than the measurements taken at the ordinance prescribed height of 4'-6" above the ground, and the mitigation fee of \$16,000 for these eleven trees is an unreasonable charge.

2. Tree No. 29 was not a "healthy quality tree"

McKinney Entertainment characterizes tree number 29 to have been a rotting hole in the ground. McKinney Entertainment asserts that the Tree Preservation Ordinance only applies to "healthy quality trees" and that a rotting hole in the ground is not a "healthy quality tree."

3. Tree No. 26 was a dead tree

McKinney Entertainment asserts that tree number 26 was a dead, barkless stump that broke off around 15 feet above the ground in the past and McKinney Entertainment cut up and stacked for removal. McKinney Entertainment asserts that the Tree Preservation Ordinance does not require a tree permit to remove a dead tree.

4. Tree Nos. 14, 19 and 23 are all logs from the same dead tree

McKinney Entertainment asserts that tree numbers 14, 19 and 23 are all logs removed from the same dead tree.

5. Tree No. 30 was a dead fallen tree

McKinney Entertainment asserts that tree number 30 had fallen in years past and was lying on the ground beside two other trees it apparently took down as it fell.

6. Tree No. 24 is a limb that fell from a dead tree

McKinney Entertainment asserts that tree number 24 is a limb that fell from a pecan tree and is not a 12 inch diameter cedar tree.

**B. City Response**

McKinney Entertainment asserts that it only cleared decades of accumulated weeds, underbrush, trash, fallen limbs and dead trees as well as saplings less than six inches in diameter measured at four foot and six inches above the ground as allowed in the Tree Preservation Ordinance; and that no permit from the City is required because Section 146-136(f)(8) of the McKinney Code states that the "removal of underbrush, not

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breast height. The trees referenced by number here range in size from 7" to 13" in diameter at ground level.

including grubbing under drip lines shall not require a permit.” However, McKinney Entertainment’s assumption that this one subsection provides an exemption for compliance with the Tree Preservation Ordinance is flawed. First, the work that was performed by McKinney Entertainment on the Property was performed in a densely wooded area that McKinney Entertainment asserts contains in excess of 1,200 trees. Large portions of the work were performed under the drip line of other adjacent trees that are still in place. The “drip line” that is referred to in Section 146-136(f)(8) of the McKinney Code is defined to mean “whichever is greater:

- (1) A vertical line running through the outermost portion of the canopy of a tree and extending to the ground;  
or
- (2) If the tree is damaged or deformed, a circular area with a radius equal to two feet per inch of caliper.”

See McKinney Code § 146-136(b). In addition, the very next provision that follows the section quoted by McKinney Entertainment as exempting their work from obtaining a permit specifically provides that a tree permit is required when working within or under the drip lines of protected trees as follows:

*“Grubbing under drip lines. The landscape administrator shall issue a limited purpose tree permit allowing the clearing and grubbing of brush located within or under the drip lines of protected trees.”*

McKinney Entertainment should have obtained a permit for the work it performed on the Property. If McKinney Entertainment had simply inquired as to whether a tree permit was required they would have learned that a permit was indeed necessary.

#### 1. Measurement Issues

McKinney Entertainment’s actions in removing the trees without first obtaining a tree permit and performing the tree survey required in support of such a tree permit prevented the City from being able to measure the diameter of the removed trees at a point 4’-6” above ground level (DBH) in accordance with the ordinance. By the time the City of McKinney learned about the unpermitted tree removal McKinney Entertainment had already cut the removed trees at ground level, cut the trunks and logs of such removed trees into smaller lengths and stacked those trunks and logs in large piles and either or both chipped some of the trunks and logs or sold some of the trunks and logs for firewood.

The Landscape Administrator either had to (1) ignore the fact protected trees were removed without a tree permit or (2) make a reasonable interpretation of the Tree Preservation Ordinance and apply it to the tree removal that occurred on the Property



given that the trees were removed without the preparation of a tree survey or an application for a tree permit. Consequently, the Landscape Administrator evaluated the only evidence that was readily available – the remaining tree stumps that had been cut off on the Property at ground level. As is noted above, the variety of the trees removed and the diameter of the tree stumps were measured and recorded for those quality trees that I believed were at least six inches in diameter or greater at breast height (4'-6" above ground).

The City simply could not go through the stacks of wood in hopes of piecing together all of the trees removed in proper sequence to be able to measure each removed tree's diameter at breast height. So the City measured the stumps of the removed trees on the Property which were cut off at ground level. This process of measuring the diameter of the removed trees at ground level to determine their diameter at breast height was further affirmed by the Consultation Report prepared by the certified arborist, Ronnie Nelson, who McKinney Entertainment hired to evaluate the City's January 18 letter.

In his Consultation Report the Arborist not only measured the stumps of the removed trees but he also increased the diameter of ten of the 26 trees which the City asked McKinney Entertainment to mitigate by either payment into the tree reforestation fund or planting additional trees. Despite this difference in measurement, the City kept the size of its original measurement and did not assess McKinney Entertainment for the increased caliber size indicated by McKinney Entertainment's own hired Arborist's Consultation Report.

There were a couple of trees, as noted above, Mr. Nelson stated "appeared to be" a differing species. The City also accommodated McKinney Entertainment and removed two trees where the particular species identified by Mr. Nelson were not a protected species.

In addition, as noted above, there were four trees within the 6" to 7" caliper size. The City removed these four trees from the required mitigation because they were so close to the minimum 6" caliper protected tree cut-off size and it is possible that the trunks of those four trees might have been less than 6" in diameter at breast height even though the Consultation Report identified them as being the same diameter as the City's initial determination.

McKinney Entertainment should not be allowed to challenge the City's reasonable interpretation and application of the Tree Preservation Ordinance and set aside the measurements that were taken by the Landscape Administrator of the removed trees' stumps for tree numbers 6, 10, 20, 22, 27, 32, 33, 34, 43, 44 and 45 because McKinney Entertainment created this need by its own unilateral decision to cut down protected trees without a tree permit or even performing a tree survey that would have specifically identified the exact diameter and species of each tree. In addition, the diameter of these eleven trees agrees with or is smaller than the diameter of the same trees as measured by McKinney Entertainment's own arborist.



## 2. "Healthy Quality Trees"

McKinney Entertainment's assertion that it was not required to obtain a tree permit for the removal of tree number 29 because it was not a healthy tree is flawed. Section 146-136(f)(6) of the Tree Preservation Ordinance specifically requires a limited purpose tree permit be issued before a diseased protected tree may be critically altered to reduce the chances of spreading the disease to adjacent healthy trees. It is only if the Landscape Administrator issues a limited purpose tree permit for such purpose, that the diseased protected tree is exempt from the tree replacement and protection requirements of the Tree Preservation Ordinance. See McKinney Code § 146-136(f)(6).

## 3. Dead Trees

The City's Landscape Administrator determined that all of the trees which are listed within the mitigation list in the March 30 Letter, attached hereto as Exhibit 15, specifically including tree numbers 26, 14, 19, 23, 30 and 24 were alive at the time of removal. The determination of the City's Landscape Architect is also supported by the Consultation Report prepared by McKinney Entertainment's arborist. Nothing contained within the Consultation Report indicates that Mr. Nelson believed tree numbers 26, 14, 19, 23, 30 and 24 were dead prior to their removal.

There was a discussion in the Consultation Report of tree numbers 29 and 30 having an advanced progression of decay. As noted above, the Tree Preservation Ordinance is not limited to "healthy protected trees." But, if a protected tree is diseased the owner of the property or the person performing work on and about the tree must obtain a tree permit before the diseased tree can be critically altered. See McKinney Code § 146-136(f)(6).

If an arborist is going to state a condition of a tree in their Consultation Report, certainly dead is a condition of a tree that should be reported. It would seem particularly important for the arborist retained to perform an analysis of a letter accusing his client of critically altering trees without a permit to identify any trees that might have been dead at the time they were removed when the Tree Preservation Ordinance does not apply to dead trees. Again, the Consultation Report prepared by McKinney Entertainment's arborist does not state that tree numbers 26, 14, 19, 23, 30 and 24 were dead at the time they were removed by McKinney Entertainment.

## 4. Tree Numbers 14, 19, 23 Are Logs From the Same Tree

The City's Landscape Administrator determined that the logs identified as tree numbers 14, 19 and 23 were from different trees. In this regard, Mr. Nelson's Consultation Report that was prepared for McKinney Entertainment states that the logs from Tree numbers 17 and 19 were from the same tree. The City revised the tree list to eliminate tree number 17 so as to avoid penalizing McKinney Entertainment two times for the

removal of a single tree. BUT the Consultation Report prepared by Mr. Nelson does not indicate that tree numbers 14, 19 and 23 were all part of the same dead tree. Rather, Mr. Nelson's report indicates that tree numbers 14, 19 and 23 are three different trees and that the trees were alive at the time the trees were removed by McKinney Entertainment.

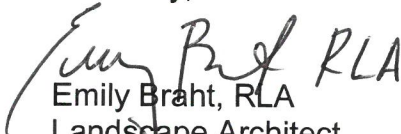
#### 5. Unreasonable Tree Mitigation Charges

The amount of the fee to be assessed or the size, number and type of trees to be planted as mitigation for each tree removed in violation of the Tree Preservation Ordinance is not determined by the Landscape Administrator. Rather it is based on the assessment required by the McKinney Code after the size of the removed trees is determined. If McKinney Entertainment is opposed to paying a penalty into the tree reforestation fund, McKinney Enterprises can participate in a tree mitigation plan whereby it plants replacement trees in agreement with the City or engages in a combination of both processes.

#### **CONCLUSION**

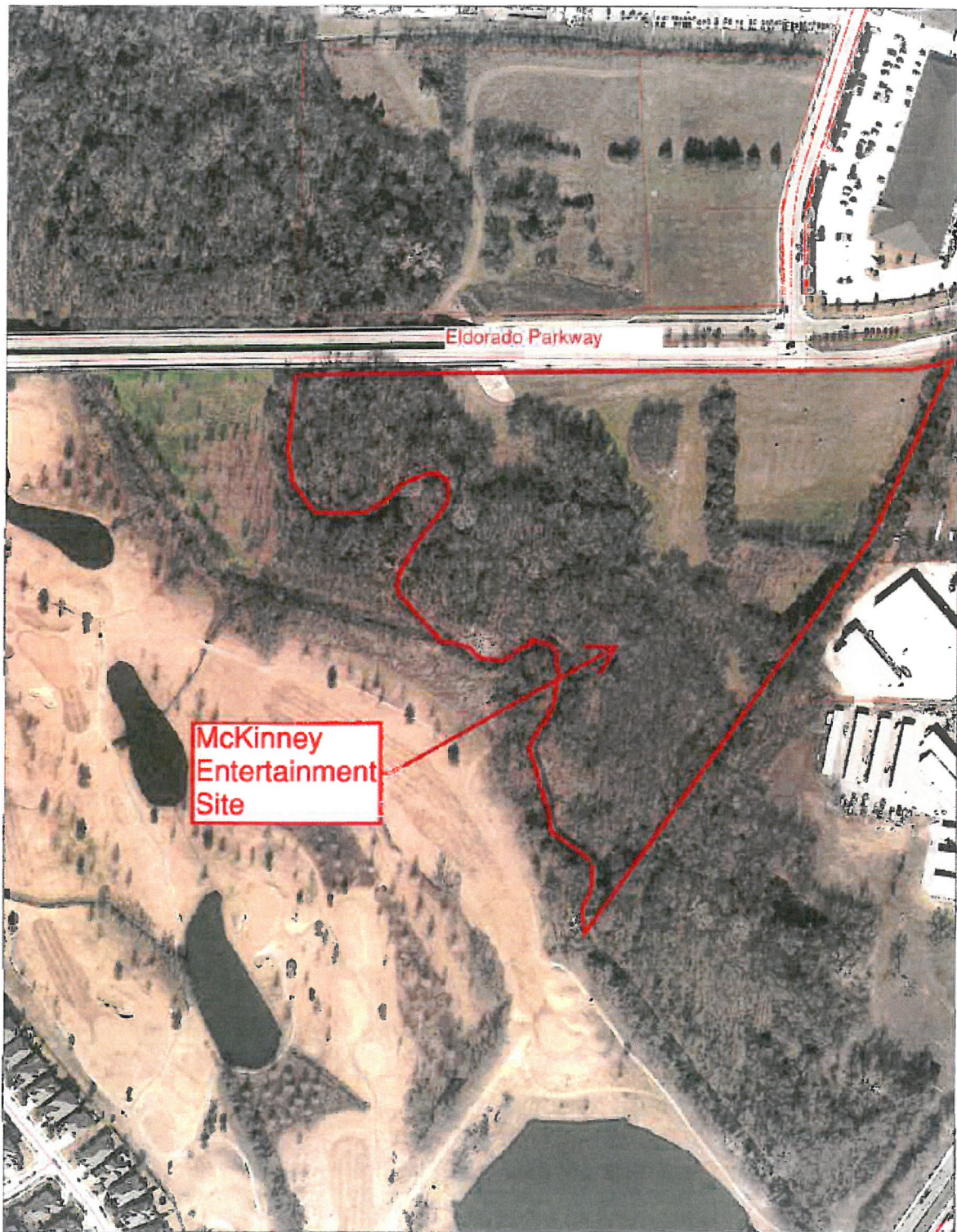
For the foregoing reasons, the City of McKinney respectfully requests that the Board of Adjustments uphold the decisions of the Administrative Official for the Tree Preservation Ordinance and require McKinney Entertainment, LLC to either (1) pay cash mitigation in the amount of Forty-Four Thousand Eight Hundred Dollars (\$44,800.00) into the Tree Reforestation fund; or (2) plant forty-three (43) four-inch (4") caliper trees and eighteen (18) six-inch (6") caliper trees in accordance with the specific requirements of McKinney Code § 146-136 for the unauthorized and unpermitted tree removal prior to issuance of any development permits for this site.

Sincerely,

 RLA  
Emily Braht, RLA  
Landscape Architect  
City of McKinney



**EXHIBIT 1**





**EXHIBIT 2**



**EXHIBIT 3**





**EXHIBIT 4**





**EXHIBIT 5**





**EXHIBIT 6**





**EXHIBIT 7**





**EXHIBIT 8**





**Exhibit 9**





Exhibit 10





**Exhibit 11**





**EXHIBIT 12**



**Exhibit 13**



January 18, 2017

*Via Electronic Mail:  
And United States Certified Mail,  
Return Receipt Requested;*

djd4599@yahoo.com

CMRRR No.7014-0150-0000-4561-5654

Mr. Don Day  
Registered Agent  
McKINNEY ENTERTAINMENT, LLC  
110 E. Louisiana Street  
Suite 200  
McKinney, Texas 75069-4569

**RE: Unauthorized Tree Removal and Required Tree Mitigation**

**16.784 Acre Tract of Land situated along the south side of Eldorado Parkway in an area west of McDonald Street east of Barranca Street and north of The Golf Club at McKinney identified by the Collin County Appraisal District as Property ID: 262194 situated on Tract 50 in the McFarland Survey, Abstract No. 558 (the "Property")**

Mr. Day,

This letter is being sent to you regarding certain construction activities being performed on the Property without the required City permits and in violation of the Code of Ordinances, City of McKinney, Texas ("McKinney Code"). You are hereby advised that the contractor, Stapleton Truck Lines, LLC, retained by McKinney Entertainment, LLC ("McKinney Entertainment") engaged in soil disturbing activities on the Property including within the area of the flood plain upon and across the Property. You are also hereby advised that persons identified by you as employees of McKinney Entertainment also cut down and removed a large number of trees from the Property without first performing a required tree survey and obtaining the proper tree removal permits from the City of McKinney ("City") to perform such tree removal. The majority of the trees that were wrongfully removed were situated within the area of the flood plain upon and across the Property.  
**City of McKinney**

P.O. Box 517 • McKinney, Texas 75070 • Metro 972-562-6080

www.mckinneytexas.org



Mr. Don Day  
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These unlawful soil disturbing and tree removing activities first came to the attention of the City on December 14, 2016 and a stop work order was promptly issued to the contractors, agents and employees of McKinney Entertainment that were on the Property to cease and desist any further activities. You were thereafter contacted on December 16, 2016, and January 4, 2017, and again directed to stop work on the Property and reminded of the outstanding Stop Work Order on the Property.

The tree removal activities in particular destroyed what was a thriving ecosystem and habitat. The City does not have a specific number and catalogue of each and every tree that was wrongfully removed from the Property. But the onsite visit performed by the City's Landscape Administrator, together with other members of City Staff, allowed the City to determine the size and number of some of the trees, at a minimum, that were wrongfully removed from the Property by McKinney Entertainment through its agents, contractors and employees.

#### **Trees Removed Without a Permit**

The City's Landscape Administrator was able to plainly identify twenty (20) healthy trees, between six-inches (6") and sixteen inches (16") in diameter, that were cut down and removed from the Property without obtaining a tree removal permit for their removal prior to their cutting. The City's Landscape Administrator was also able to plainly identify six (6) healthy trees, between seventeen-inches (17") and twenty-one inches (21") in diameter, that were cut down and removed from the Property without obtaining a tree removal permit for their removal prior to their cutting. This clear-cutting and removal of trees was not authorized by the City of McKinney.

The City's Landscape Administrator is certain that other healthy trees in excess of the twenty-six (26) trees referenced herein-above were unlawfully cut down and removed from the Property based on aerial photographs of the Property and the tree cover on other adjacent undeveloped properties. However, most of the physical evidence regarding the full scope of the trees that were cut down and removed without a permit was also removed from the Property before the City became aware of this wrongful activity. This unauthorized and unpermitted removal of trees violates the City's Tree Preservation Ordinance, McKinney Code § 146-136. Pursuant to the City's Code of Ordinances, McKinney Entertainment is responsible for mitigating the loss of such clear-cut trees. See McKinney Code of Ordinances § 146-136.

#### **Mitigation Option Choices**

In this regard, McKinney Entertainment has the option of mitigating the unlawful removal of trees from the Property in one of the following methods: (1) planting

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replacement trees on the Property together with the installation of irrigation facilities to support such mitigation trees as explained herein-below and in accordance with Section 146-136(g)(1)(a) and (b) of the McKinney Code ("Planting"); or (2) making a payment into the City of McKinney's Reforestation Fund in the amount calculated by the City's Landscape Administrator in accordance with Section 146-136(g)(1)(c) of the McKinney Code ("Payment"); or, (3) a combination of Planting and Payment, which combination shall be subject to the approval of the City's Landscape Administrator as fulfilling the mitigation requirement ("Combination"). The twenty-six trees referenced above as being unlawfully removed are identified in the Tree Mitigation spreadsheet developed by the City's Landscape Administrator ("Spreadsheet"), which Spreadsheet is attached hereto and incorporated herein by reference for all purposes allowed by law as Exhibit A.

The Spreadsheet indicates the type of tree removed, tree size, and the Planting or Payment mitigation required for each tree that was removed in violation of the City's tree preservation ordinances by McKinney Entertainment. Please note that the attached Exhibit only identifies twenty-six (26) trees that were removed and which were more than six inches (6") in diameter. As indicated above, please note that there were additional trees the Landscape Administrator believes to have been removed unlawfully that are not included in this documentation.

#### **Payment Mitigation Option**

The total Payment mitigation required for the unauthorized tree removal performed by McKinney Entertainment of those trees whose trunks were more than six inches (6") in diameter is Seventy-Four Thousand Six Hundred Dollars (\$74,600.00). (This amount does NOT include any trees that were cut down and removed for which the Landscape Administrator could not confirm the size, variety and general location of such tree or any trees that were less than six-inches (6") in diameter.) If McKinney Entertainment chooses the Payment mitigation option, McKinney Entertainment is hereby directed to remit payment to the City in the full amount of Seventy-Four Thousand Six Hundred Dollars (\$74,600.00) ("Mitigation Payment") at its earliest convenience and no later than thirty (30) days from the date of this letter. Checks should be made payable to the "City of McKinney, Texas." Please forward the Payment mitigation to the attention of Emily Braht, RLA, the City's Landscape Administrator, so the mitigation may be properly credited to the Property.

#### **Planting Mitigation Option**

The total Planting mitigation required for the unauthorized tree removal performed by McKinney Entertainment of those trees whose trunks were more than six inches (6") in diameter is fifty-eight (58) four-inch (4") caliper trees and thirty-seven (37) six-inch (6") caliper trees. The caliper or diameter of each



Mr. Don Day  
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replacement tree shall be determined by measuring the diameter of the primary trunk at a location six inches (6") above ground level. Each replacement tree must be a "quality tree" selected from the list of quality trees contained in Section A-2 of Appendix A to the City of McKinney's Zoning Ordinance. In addition, each replacement tree must be at least twelve-feet (12') in height when planted. Please know that Planting mitigation also carries the requirements that (a) operational irrigation must be provided to each replacement tree, (b) the replacement trees cannot be used to satisfy any landscaping requirements for future development of the Property, (c) replacement trees cannot be removed in the future even if they are in the way of a road or utility required to develop the Property, and (d) the property owner must remove and replace any replacement tree that dies with a new replacement tree that meets the same requirements set out hereinabove. If McKinney Entertainment chooses the Planting mitigation option, McKinney Entertainment is hereby directed to schedule the Planting mitigation with the City's Landscape Administrator at its earliest convenience and within thirty (30) days from the date of this letter. The planting of the replacement trees shall also be completed at McKinney Entertainment's earliest convenience and no later than ninety (90) days from the date of this letter.

#### **Combination Mitigation Option**

As indicated above, McKinney Entertainment also has the option to combine parts of the Payment mitigation option and the Planting mitigation option. This Combination mitigation option is available based on an analysis of the attached Spreadsheet and selecting each removed tree for which McKinney Entertainment wants to replant two or more replacement trees through the Planting mitigation option and selecting each removed tree for which McKinney Entertainment wants to pay cash into the City of McKinney's Reforestation Fund through the Payment mitigation option. If McKinney Entertainment chooses the Combination mitigation option, McKinney Entertainment is hereby directed to (a) remit payment to the City in the full amount of each removed tree, identified in the Spreadsheet, for which McKinney Entertainment desires to pay cash into the Reforestation Fund at its earliest convenience and no later than thirty (30) days from the date of this letter, and (b) schedule the replanting of the replacement trees required for each removed tree, identified in the Spreadsheet, with the City's Landscape Administrator at its earliest convenience and within thirty (30) days from the date of this letter and thereafter complete the Planting mitigation no later than ninety (90) days from the date of this letter.

#### **Mitigation and Other Requirements to Lift Pending Stop Work Order**

Please note that no further work will be permitted on the Property until such time as the Planting Mitigation and/or Payment Mitigation is completed by McKinney Entertainment and formally accepted by the City. In addition, before the pending Stop Work Order is lifted and any additional work may be instituted on the

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Property, McKinney Entertainment must correct the grading on the Property that was performed without a permit. More particularly, McKinney Entertainment will be required to submit a set of civil grading plans for the Property to the City for approval so the soil disturbing activities on the Property may be corrected in accordance with the McKinney Code and Texas law. McKinney Entertainment will also have to submit a tree survey and tree preservation plan for the remaining trees and the replacement trees, if any, described hereinabove situated on the Property and submit applications for a tree permit and a grading permit together with any other supporting documents and fees as required by the McKinney Code before any additional work may be performed on the Property.

Once the Planting Mitigation and Payment Mitigation has been accepted by the City of McKinney and the applications and supporting documents identified herein-above and in the McKinney Code have been submitted for review and approval, the City will set up a pre-construction meeting with McKinney Entertainment as well as an initial erosion inspection before any other work may be performed.

If you have any questions, please feel free to contact me. Thank you in advance for your courtesy and cooperation in this matter.

Sincerely,



Paul G. Grimes  
City Manager

Enclosures

Cc: Barry Shelton, AICP, Assistant City Manager  
Michael Quint, Executive Director of Development Services  
Mark Hines, P.E., City Engineer  
Mark Houser, City Attorney  
Emily Braht, RLA, Landscape Administrator



**EXHIBIT A**

<b>Tree Mitigation - College and Eldorado Site</b>					
<b>Trees 16" caliper or less = Mitigation 1:1 caliper inches</b>					
<b>Tree Number</b>	<b>Tree Type Removed</b>	<b>Tree Caliper Size Removed</b>	<b>Planting Mitigation Required Replacement Tree Number and Caliper Size</b>	<b>Payment Mitigation Required</b>	<b>Notes</b>
3	Cedar	6" caliper	Two (2) 4" caliper	\$1,000.00	
4	Cedar	7" caliper	Two (2) 4" caliper	\$1,000.00	
5	Cedar	6" caliper	Two (2) 4" caliper	\$1,000.00	
6	Cedar	10" caliper	Three (3) 4" caliper	\$1,500.00	
9	Cedar	7" caliper	Two (2) 4" caliper	\$1,000.00	
10	Cedar	8" caliper	Two (2) 4" caliper	\$1,000.00	
12	Cedar	9" caliper	Three (3) 4" caliper	\$1,500.00	
14	Ash	10" caliper	Three (3) 4" caliper	\$1,500.00	
17	Ash	14" caliper	Four (4) 4" caliper	\$2,000.00	
19	Ash	14" caliper	Four (4) 4" caliper	\$2,000.00	
20	Elm	9" caliper	Three (3) 4" caliper	\$1,500.00	
22	Pecan	8" caliper	Two (2) 4" caliper	\$1,000.00	
24	Cedar	12" caliper	Three (3) 4" caliper	\$1,500.00	
27	Cedar	13" caliper	Three (3) 4" caliper	\$1,500.00	
30	Pecan	16" caliper	Four (4) 4" caliper	\$2,000.00	
32	Elm	10" caliper	Three (3) 4" caliper	\$1,500.00	
33	Pecan	9" caliper	Three (3) 4" caliper	\$1,500.00	
34	Elm	12" caliper	Three (3) 4" caliper	\$1,500.00	
44	Pecan	14" caliper	Four (4) 4" caliper	\$2,000.00	
45	Pecan	11" caliper	Three (3) 4" caliper	\$1,500.00	
<b>≤ 16" caliper Subtotal</b>				<b>\$29,000.00</b>	

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Trees Greater than 16" caliper = Mitigation 2:1 caliper inches					
Tree Number	Tree Type Removed	Tree Caliper Size Removed	Planting Mitigation Required Replacement Tree Number and Caliper Size	Payment Mitigation Required	Notes
11	Cedar	17" caliper	Six (6) 6" caliper	\$7,200.00	
23	Elm	21" caliper	Six (6) 6" caliper	\$8,400.00	
26	Elm	18" caliper	Six (6) 6" caliper	\$7,200.00	
28	Pecan	20" caliper	Seven (7) 6" caliper	\$8,400.00	
29	Elm	18" caliper	Six (6) 6" caliper	\$7,200.00	
43	Pecan	17" caliper	Six (6) 6" caliper	\$7,200.00	
> 16" caliper Subtotal				\$45,600.00	
GRAND TOTAL				\$74,600.00	



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**EXHIBIT 14**

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**Simply Horticulture, LLC**

*5120 Blackwood Dr., McKinney, TX 75071*

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*ISA Certified Arborist TX-3917A | ASCA Consulting Arborist | Texas Oak Wilt Qualified #123 | Tree Risk Assessment Qualified | TCEQ Licensed Irrigator #19258 | TDA Commercial Applicator # 665452 | Certified Landscape Irrigation Auditor*

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February 8, 2017

McKinney Entertainment, LLC.

Attn: Mr. Don Day

***Subject: 16.784 acre tract on Eldorado Parkway-Consultation Report***

Dear Mr. Day,

Enclosed is a field report based on my evaluation of the trees along the southside Eldorado Parkway, in an area west of McDonald St., east of Barranca St., and north of the The Golf Club at McKinney identified by the Collin County Appraisal District as Property ID: 262194 situated on Tract 50 in the McFarland Survey, Abstract No. 558. This report is a summary of our observations, opinions and interpretations from the data presented by the contractors and the information submitted by the City of McKinney.

This report should be used as a supporting document. Many of the measurements and methods used to evaluate these trees for removal were inaccurate and inconsistent with proper methods used in arboriculture. The report provided had many errors including species identification, trunk measurements, methods for evaluating trunk diameter at standard height (dsh), as well as double counting removed trees. I suggest revisiting with the City of McKinney to come to a resolution based a more accurate account of the trees removed.

Please review this report and let me know if there is anything that I may do to better serve you on this matter. I appreciate this opportunity to consult on this matter.

Sincerely,

Ronny Nelson,

Agronomist-Horticulturist

ISA Certified Arborist TX-3917A

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## **16.784 Acre Tract on Eldorado Parkway**

**Prepared for: McKinney Entertainment, LLC.**

**Attn: Mr. Don Day**

**Prepared by:**

**Ronny Nelson, B.S. Agronomy-Horticulture**

**Simply Horticulture, LLC.**

**5120 Blackwood Drive**

**McKinney, TX 75071**

**(972)-750-8386**

**February 8, 2017**



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February 8, 2017

16.784 Acre Tract on Eldorado Parkway

Simply Horticulture, LLC.

## Summary

Mr. Ross Wells, of Abernathy, Roeder, Boyd, and Hullett PC, requested my consulting services for a new site development owned by Mr. Don Day of McKinney Entertainment, LLC. This site is along the southside Eldorado Parkway, in an area west of McDonald St., east of Barranca St., and north of the The Golf Club at McKinney. In the City of McKinney, Texas, a tree protection ordinance and permitting process has been set to prevent removal and clearing of land. This protects many tree species over 6-inch **diameter at standard height (DSH)**<sup>1</sup>. Due to the cost of the mitigation options, the client has requested that I evaluate the trees to determine if the methods used to measure these trees were consistent with the city ordinance and proper arboriculture.

Mr. Ross Wells and Mr. Don Day, both provided the letter sent from the City of McKinney to Don of McKinney Entertainment, LLC. The payment mitigation option would require the land developer to pay a total of \$74,600.00. The planting, mitigation option requires (58) 4-inch caliper trees and (37) 6-inch caliper trees.

After reviewing the documents, photographic records, an onsite evaluation, I have determined that the measurements were not taken at 54-inches above ground in accordance to the city ordinance. The photographic records indicate that the methods used to measure the trees were cross-sectional measurements using a standard tape. These measurements were at grade, slightly above or at the base of tree trunks. As arborist, artisan **trunk diameter** measuring tapes are used to accurately measure trunk diameter.

During my site evaluation, I was escorted to specific trees that the contractors were able to locate, compare, and identify to be the same as the trees specified by the city. After reviewing the wood characteristics shown in the photographic records and comparing them to the trees that I was escorted to, I determine that I was evaluating the correct trees.

While evaluating these trees, we found many errors in Exhibit A provided by the city. These errors include; trunk diameter measurements, methods, species, identification of individual trees, and health of trees.

## Introduction

### Background & History

McKinney Entertainment, LLC., began clearing trees and underbrush along the south side of Eldorado Parkway near South College Street in McKinney, prior to my involvement. The City of McKinney's Landscape Administrator, Ms. Emily Braht, became aware of property development in-progress at this location. On December 14, 2016, the City of McKinney issued a stop work order to McKinney Entertainment, LLC.

The Landscape Administrator and associates evaluated the site and came to the conclusion that (26) protected trees were removed during operations. They claim that (20) healthy trees between

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<sup>1</sup> Terms in bold font appear in glossary at the end of the report



February 8, 2017

16.784 Acre Tract on Eldorado Parkway

Simply Horticulture, LLC.

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(6") six and (16") sixteen inches DSH were removed. Additionally, they are claiming that (6) between (17") seventeen and (21") twenty-one inches DSH were removed. The city officials claim that the developer did not obtain proper permitting prior to removing these trees.

#### **Assignment**

I was contacted on January, 24, 2017 by Mr. Ross Wells of Abernathy, Roeder, Boyd, and Hullett PC. He is the attorney for Mr. Don Day of McKinney Entertainment. Ross sent me the letter from the city and we discussed the situation. After discussing my terms for employment, I agreed to evaluate the trees, provide an independent, and unbiased review of the trees that were removed.

#### **Limits of the Assignment**

I evaluated the site approximately 2-months after the beginning of the land development operations.

#### **Purpose of the Report**

This report is intended to represent my opinions, observations, and recommendations based on my field evaluation completed on January, 28, 2017. This information is to assist McKinney Entertainment, LLC with their tree mitigation submittal to the City of McKinney, on February 18, 2017. It does not represent legal advice and should not be used in any other manner than intended.

#### **Observations**

##### **Site Visit**

On Saturday, January 28, 2017, at 3:00pm, I met the representatives of McKinney Entertainment, LLC and their associates on site. I was escorted by to the trees that the Landscape Administrator submitted for mitigation. My assignment as the consulting arborist is to review the trees on the site and determine if there are any errors with the mitigation report. I performed a basic visual assessment of the trees, using proper arboricultural methods to measure trees and to determine if the trees in the mitigation report are correct.

##### **Site Location and Condition**

This site is along the southside Eldorado Parkway, in an area west of McDonald St., east of Barranca St., and north of the The Golf Club at McKinney. These trees are within a naturalized flood plain.

##### **Tree Description and Conditions**

All trees were evaluated by the City of McKinney's Landscape Administrator prior to my involvement. Photographic records and measurements were shared with the developer, Mr. Don Day. The dominant tree species that I evaluated are Cedar Elm '*Ulmus crassifolia*', Ash '*Fraxinus* spp.' and Pecan '*Carya illinoensis*'. Other species include Eastern Red Cedars

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*'Juniperus virginiana'*, Bois d'Arc *'Macular pomifera'*, and Honey Locust *'Gleditsia triacanthos'*.

Most of the standing trees appear to be in good health. The contractors specified that they tried to only removed dead, diseased and dying tree that were above 6-inches DSH.

### Field Analysis

During my field evaluation, I recorded trunk diameter measurements using an artisan trunk diameter tape (*see Field Notes in Appendix A*)<sup>2</sup>. Measurement were taken at the same locations as seen in the mitigation report. The contractors and I used the photographs and documents to confirm each tree that they were able to locate. Each tree was closely examined to confirm.

We evaluated the **buttress roots** of trees #29 and #30. These two trees had an advance stage of decay progression located in the butt and trunk of the tree. We used a standard measuring tape to determine the depth of the **decay columns**. The fungi appeared to match the characteristics of a **white rot fungi**.

I recorded field notes (*see Appendix A*) of each tree that I examined. A comparison was made in the field of the report provided by the city and actual data collected onsite. We created a list of errors found in their report. See the bullet point list below.

- Trees #11 and #12 - Honey Locust, a non-protected species.
- Tree #17 and #19 - Logs from the same tree.
- Tree #20 - Cedar Elm, 9-inch DSH (per city report) and adjusted to 7-inch DSH (per arborist)
  - *See Photo #1 in Appendix B*
- Tree #22 - Pecan, 8-inch (per city report), Eastern Red Cedar, 8-inch (per arborist) after evaluating wood characteristics.
- Tree #23 - Elm, 22-inch (per city report), Ash, 21.5-inch (per arborist) after evaluating bark characteristics.
- Tree #24 - Cedar, 12-inch (per city report), Pecan, 13.5-inch (per arborist)
- Tree #28 - Pecan, 20-inch (per city report), Bois d'Arc, 22-inch (per arborist)
  - Bois d'Arc is not a protected species.
- Tree #29 and #30 in the photographs had advanced progression of decay.
- Tree #43 - Pecan, 14-inch (per city report), Pecan, 12-inch (per arborist).
- Tree #44 - Pecan, 14-inch (per city report), Pecan, 8.75-inch (per arborist).
- Tree #45 - Pecan, 11-inch (per city report), Pecan, 7-inch (per arborist).

<sup>2</sup> See Field Notes in Appendix



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## Discussion

Arborist use investigative methods for identifying species. This may include species characteristics of decay fungi, tree species, reactions to injuries, and other host specific patterns. The key to this type of work is to identify trends within species and age groups. This could include common **abiotic** and **biotic** pathogens. Data is used to determine a **pattern of mortality** (Dunster, Smiley, Matheny, and Lilly, 2013). Descriptive field notes may include specific details to explain these patterns. I performed a level 2-basic visual assessment (Dunster, Smiley, Matheny, and Lily, 2013) while evaluating the trees on this site.

I was able to collect general information to determine the health and condition of trees with intermediate and advanced stages of wood decay. Factors for determining decay progression in trees include; tree and fungal species characteristics, compartmentalization of decay, tree age and vigor, type of pathogen (weakly or strongly pathogenic), interaction between tree and fungal species, site moisture and temperature (Dunster, Smiley, Matheny, and Lily, 2013).

Trees are not always circular. Site factors can induce load stress on a specific area of a tree. Tree respond by developing **reaction wood**. There are two main forms of reaction wood; **compression wood** and **tension wood**. This formation of reaction wood can cause an enlarge, or bulge in the trunk. Measuring a tree using a trunk diameter tape increases accuracy of trunk measurements.

Trees develop a **root flare** at the butt of the tree. This development increases the size of the tree diameter. **Trunk caliper** is a synonym for trunk diameter used to measure the size of nursery stock. The national standards for measuring nursery stock of 4-inch caliper and smaller trees is to be measured at 6-inches above the ground, while trees above 4-inch caliper should be measured at 12-inches above the ground (Clark and Matheny, 2004). Mature trees are measured at 54-inches above ground. This is generally referred to as Diameter at Standard Height that replaces the former term **Diameter at Breast Height (DBH)**.

This report should be submitted to the City of McKinney as a supporting document in review of the tree mitigation options provided by the landscape administrator.

## Conclusion

We determine that the mitigation report provided by the city had many errors. These errors included misidentification of tree species, sizes, and health. Some of the trees that were misidentified were unprotected species and should be removed from mitigation. Trees with advanced decay progression should not be preserved.

## Recommendations

Based on my investigation and conclusions, I recommend that the following actions and conditions to be considered for mitigation.

1. Submit this report to the City of McKinney as a supporting document.
2. Review and negotiate for a mitigation options.

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3. Apply for permitting with the city prior to removing any trees on this site.
4. Contract a Certified Arborist to create a tree protection plan



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February 8, 2017

16.784 Acre Tract on Eldorado Parkway

Simply Horticulture, LLC.

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## Glossary

**Abiotic Pathogens-** non-living chemical or physical factors that may affect plant functions.

**Basal Decay-** decay organisms located in the base (buttress roots) of a tree.

**Biotic Pathogens-** living organisms that may destroy, distort or cause a plant to decline.

**Buttress root-** roots at the trunk base that help support the tree and equalize mechanical stress.

**Cavity-** open or closed hollow within a tree stem, usually associated with decay.

**Compartmentalization-** Physiological process that creates the chemical and physical boundaries that act to limit the spread of disease and decay organisms (Matheny and Clark, 1994).

**Compression Wood** – Type of reaction wood that develops on the underside of branches and leading trunks in coniferous trees that tend to maintain branch angle of growth or straighten the trunk.

**Decay column-** depth of decay measured at the point of injury.

**Diameter at Breast Height (DBH)** – a measurement of trunk diameter at 54 inches above grade. See *Diameter at Standard Height (DSH)*.

**Diameter at Standard Height (DSH)** – a measurement of trunk diameter at 54 inches above grade.

**Pattern of Mortality-** common modes of tree failure within a tree species, or failure of multiple trees in a contiguous area that share similar site histories or environmental conditions.

**Pest-** insect or pathogen that can either destroy, distort or disfigure natural plant development processes.

**Phototropism** – an orientation of a plant to grow in response to light, either toward (positive) or away (negative).

**Reaction Wood-** Specialized secondary xylem that develops in response to a lean or similar mechanical stress, to restore the stem to the vertical. *Occurs as compression wood in conifers and tension wood in angiosperms.*

**Size-** measurement usually identified as diameter at standard height

**Sound(ing)** – process of striking a tree with a mallet or other appropriate tool and listening for tones that indicate dead bark, a thin layer of wood outside a cavity, or cracks in wood.

**Tension Wood-** Type of reaction wood in angiosperms that forms on the upper side of branches and stems, acting to pull the member back to a vertical orientation or a genetically programmed angle of growth.

**Trunk Diameter Tape-** A tool used in arboriculture to measure the trunk diameter of trees.

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### **Bibliography**

Clark, J., and Matheny, N. (2004). *Arboriculture: Integrated Management of Landscape Trees, Shrubs, and Vines*, 4<sup>th</sup> Edition.

Clark, J., and Matheny, N. (1999). *Trees and Development: A Technical Guide to Preservation of Trees During Land Development*.

Council of Tree & Landscape Appraisers (2000). *Guide for Plant Appraisal*, 9<sup>th</sup> Edition.

Dunster, J., Smiley, T., Matheny, N., and Lilly, S. (2013) *Tree Risk Assessment Manual*. Champaign, Illinois: International Society of Arboriculture.



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Simply Horticulture, LLC.

## Appendix A- Field Notes

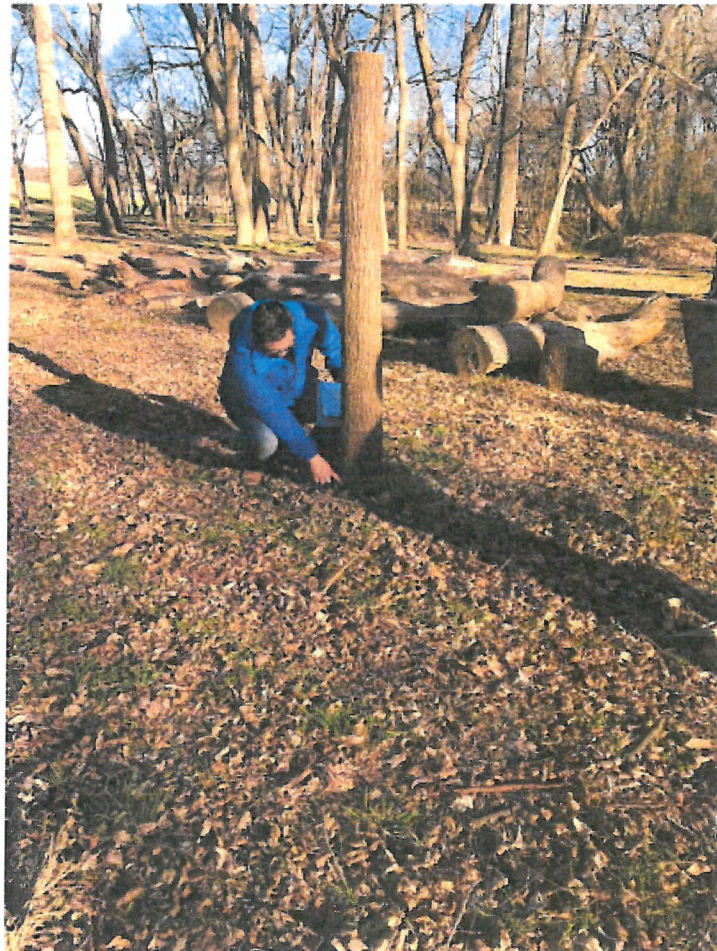
Photograph #	Species Per City	DSH Per City	Species Per Arborist	DSH Per Arborist	Comments
11	Cedar	17	Honey Locust	19	Using trunk diameter tape were able to identify mis-calculated trunk measurements. Species was also incorrect. Species appeared to be a Honey Locust.
12	Cedar	9	Honey Locust	11	Using trunk diameter tape were able to identify mis-calculated trunk measurements. Species was also incorrect. Species appeared to be a Honey Locust.
14	Ash	10	Ash	11	Using trunk diameter tape were able to identify mis-calculated trunk measurements.
17	Ash	14	Ash	15	Same tree as Photo #19. Brandon Napoleon (contractor) states that the photo #23 came from a log of the same tree.
19	Ash	14	Ash	15	Same tree as Photo #17. Brandon Napoleon (contractor) states that the photo #23 came from a log of the same tree.
20	Elm	9	Elm	7	Measurement was recorded approximately 3 inches above grade. At this height the trunk diameter was 9-inches as measured by the city. ****We found the congruent trunk and were able to put this tree back together. Measurement at 54-inches above grade was 7 inches above grade.
22	Pecan	8	Eastern Red Cedar	8	Species was incorrect.
22	Elm	22	Ash	21.5	Species incorrect.
24	Cedar	12	Pecan	13.5	Using trunk diameter tape were able to identify mis-calculated trunk measurements. Species was also incorrect.
26	Elm	18	Elm	19.5	Using trunk diameter tape were able to identify mis-calculated trunk measurements.
28	Pecan	20	Bois'd Arc	22	Using trunk diameter tape were able to identify mis-calculated trunk measurements. Species was also incorrect. Bois'd Arcs are not a protected species in the City of McKinney.
29	Elm	18	Elm	21	This tree has extensive amount of internal decay. The trunk measured 21-inches in diameter. It had an internal decay column that was 16-inches wide (horizontally) by 12 inches long (vertically). Trees with 2/3 or more internal decay (cross-section) should be removed.
30	Pecan	16	Pecan	18	Measurement recorded at 31" above grade. This tree has extensive decay. A decay column 12-inches wide (horizontally) by 24 inches long (vertically) were identified. Tree had a significant lean toward NNE.
43	Pecan	14	Pecan	12	City employees measured the top portion of the tree trunk. At the base of this trunk the tree measured 12-inches. At the same location per their measurements, it was 9.5 inches.
44	Pecan	14	Pecan	8.75	Using trunk diameter tape were able to identify mis-calculated trunk measurements.
45	Pecan	11	Pecan	7	Using trunk diameter tape were able to identify mis-calculated trunk measurements.

February 8, 2017

16.784 Acre Tract on Eldorado Parkway

Simply Horticulture, LLC.

## Appendix B – Photos and Examples



**Photo 1:** Tree Photograph #20, Cedar Elm 9-inch DSH (per city), adjusted to 7-inch DSH (after locating trunk and measuring at 54-inches above ground.


February 8, 2017

16.784 Acre Tract on Eldorado Parkway

Simply Horticulture, LLC.

### **Appendix C- Assumptions and Limitations**

- 1.) Loss or alteration of any part of this report invalidates the entire report
- 2.) Care has been taken to obtain information from reliable sources. All data has been verified insofar as possible; however, the consultant can neither guarantee nor be responsible for the accuracy of information provided by others.
- 3.) The consultant shall not be required to give testimony or attend court by reason of this report unless subsequent contractual arrangements are made, including payment of an additional fee for such services as described in the fee schedule and contract of engagement.
- 4.) Possession of this report or a copy does not imply right of publication or use for any purpose by other than the person to whom it is addressed, without the prior expressed written or verbal consent of the author.
- 5.) Unless otherwise specified, the information contained in this report covers only those items that were examined and reflects the condition of these items at the time of inspection. The inspection is limited as stated in the text of this report. There is no warranty or guarantee that the problems or deficiencies of the tree in question will not arise in the future.
- 6.) The recommendations provided herein the report are based on the authors professional judgement and experience and cannot be construed in any manner other than directed.

Signature:   
Date: 2/8/2017



February 8, 2017

16.784 Acre Tract on Eldorado Parkway

Simply Horticulture, LLC.

### **Appendix E – Certificate of Performance**

I, Ronny Nelson, certify that:

- I declare that I have personally inspected the trees and the property referred to in this report and have stated my findings accurately. The extent of the evaluation is stated in the attached report and the Terms of Assignment.
- I have no current or prospective interest in the vegetation or the property that is subject of this report and have no personal interest or bias with respect to the parties involved.
- The analysis, opinions, and conclusions stated herein are my own and are based on current scientific procedures and facts.
- My analysis, opinions, and conclusions were developed and this report has been prepared according to commonly accepted arboricultural practices.
- No one provided significant professional assistance to me, except as indicated within the report.
- My compensation is not contingent upon the reporting of a predetermined conclusion that favors the cause of the client or any other party or upon the results of the assessment, the attainment of stipulated results, or the occurrence of any subsequent events.

I further certify that I am a member in good standing of the American Society of Consulting Arborist and the International Society of Arboriculture. I have been involved in the field of Horticulture and the care and study of trees since 1998.

Signature: 

Date: 2/8/2017

**EXHIBIT 15**



March 30, 2017

*Via United States Certified Mail,  
Return Receipt Requested:  
And Electronic Mail:*

CMRRR No. 7014 0150 0000 4561 5661

Mr. Robert Roeder  
Mr. Ross Wells  
ABERNATHY ROEDER BOYD HULLETT  
1700 Redbud Boulevard  
Suite 300  
McKinney, Texas 75070-1210

rroder@abernathy-law.com  
rwells@abernathy-law.com

RE: Your Client: McKinney Entertainment, LLC  
Unauthorized and Unpermitted Tree Removal

Messrs. Roeder and Wells,

This letter follows up on our meeting of March 6, 2017, and supplements and modifies my letter of January 18, 2017.

The City's Landscape Administrator, Emily Braht, has re-evaluated the scope of the tree removal that occurred on your Client's property and the required mitigation related thereto based on our discussion during the March 6 meeting as well as the report prepared by the licensed arborist, Ronny Nelson of Simply Horticulture, LLC, retained by your client and Ms. Braht's follow up visit to the property owned by your Client that is situated along the south side of Eldorado Parkway (the "Property") to re-examine the tree stumps and logs remaining from the removal of a number of trees on the Property.

Attached to this letter is a revised Tree Mitigation spreadsheet ("Revised Spreadsheet") developed by Ms. Braht, which is incorporated herein by reference for all purposes allowed by law as Exhibit 1. The Revised Spreadsheet utilizes the same numbering system and restates the information contained in the original spreadsheet prepared by the Landscape Administrator. The Revised Spreadsheet also contains a column referencing Mr. Nelson's comments and a column containing Ms. Braht's follow-up remarks as well as columns reflecting the changes, if any, made regarding each such tree identified in the original spreadsheet.

The mitigation required for the unauthorized and unpermitted tree removal performed by McKinney Entertainment of those trees whose trunks were more than six inches (6") in  
**City of McKinney**

P.O. Box 517 • McKinney, Texas 75070 • Metro 972-562-6080

www.mckinneytexas.org

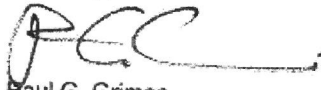
Mr. Robert Roeder  
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diameter can be addressed through a cash payment to the City's reforestation fund or through the planting of replacement trees or a combination of both. The amount of the cash mitigation has been reduced by the Landscape Administrator to Forty-Four Thousand Eight Hundred Dollars (\$44,800.00). The number of replacement trees required as mitigation has similarly been reduced to forty-three (43) four-inch (4") caliper trees and eighteen (18) six-inch (6") caliper trees.

McKinney Entertainment can resolve this matter by selecting one of the options set out in my January 18, 2017 letter and coordinating that effort through the City's Landscape Administrator, Ms. Braht.

Thank you in advance for your courtesy and cooperation in this matter.

Sincerely,



Paul G. Grimes  
City Manager

Enclosures

Cc: Barry Shelton, AICP, Assistant City Manager  
Michael Quint, Executive Director of Development Services  
Mark Hines, P.E., City Engineer  
Mark Houser, City Attorney  
Emily Braht, RLA, Landscape Administrator

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# EXHIBIT 1

Tree Mitigation - College and Colorado Site									
Trees 16" caliper or less = Mitigation 1:1 caliper inches									
Tree #	Tree Type	Tree Caliper Size	Planned Mitigation/Replacement Tree Number and Caliper Size	Payment/Mitigation Cost	CONVENE From Property Owner's Address	RESPONSE City of Inglewood's Landmarks Administrator	Tree Caliper Size as Documented on Record	Planned Mitigation/Replacement Tree Number and Caliper Size	Planned Payment/Mitigation Cost
3	Cedar	6" caliper	6" = (2) 4" caliper	\$1,700.00	None (Owner removed tree less than 16" caliper at breast height.)	It is possible to keep height and leave less than 16" diameter at breast height. Removed tree.	REMOVED	REMOVED	\$0.00
4	Cedar	7" caliper	7" = (2) 4" caliper	\$1,700.00	None (Owner removed tree less than 16" caliper at breast height.)	It is possible to keep height and leave less than 16" diameter at breast height. Removed tree.	REMOVED	REMOVED	\$0.00
5	Cedar	8" caliper	8" = (2) 4" caliper	\$1,700.00	None (Owner removed tree less than 16" caliper at breast height.)	It is possible to keep height and leave less than 16" diameter at breast height. Removed tree.	REMOVED	REMOVED	\$0.00
6	Cedar	10" caliper	10" = (2) 4" caliper	\$1,700.00	None		REMOVED	REMOVED	\$0.00
9	Cedar	7" caliper	7" = (2) 4" caliper	\$1,700.00	None (Owner removed tree less than 16" caliper at breast height.)	It is possible to keep height and leave less than 16" diameter at breast height. Removed tree.	REMOVED	REMOVED	\$0.00
10	Cedar	8" caliper	8" = (2) 4" caliper	\$1,700.00	None		REMOVED	REMOVED	\$0.00
12	Cedar	7" caliper	7" = (2) 4" caliper	\$1,700.00	Owner removed tree less than 16" caliper at breast height.	Removed. Mitigation required.	REMOVED	REMOVED	\$0.00
14	Ash	10" caliper	10" = (2) 4" caliper	\$1,700.00	Increased due to 16" caliper	The City retained to be on the replacement.	10" caliper	10" = (2) 4" caliper	\$1,700.00
17	Ash	14" caliper	14" = (4) 4" caliper	\$4,000.00	High removal to tree 16" diameter at breast height.	The City retained Tree #27.	REMOVED	REMOVED	\$0.00
18	Ash	15" caliper	15" = (4) 4" caliper	\$4,000.00	High removal to tree 16" diameter at breast height.	The City retained to be on the replacement AND removed Tree #27.	14" caliper	14" = (4) 4" caliper	\$4,000.00
20	Birch	9" caliper	9" = (2) 4" caliper	\$1,700.00	Decreased due from 9" to 7" diameter.	Unable to locate tag, the City retained to be on the replacement.	9" caliper	9" = (2) 4" caliper	\$1,700.00
22	Pecan	8" caliper	8" = (2) 4" caliper	\$1,700.00	Owner removed to code.	Cedar is also a protected tree. No charges for mitigation.	8" caliper	8" = (2) 4" caliper	\$1,700.00
30	Cedar	12" caliper	12" = (3) 4" caliper	\$3,000.00	Owner removed to code.	Pecan is also a protected tree. The City retained to be on the replacement.	12" caliper	12" = (3) 4" caliper	\$3,000.00
Trees 16" caliper or less = Mitigation 1:2 caliper inches (cont.)									
Tree #	Tree Type	Tree Caliper Size	Mitigation Required	Mitigation Cost	CONVENE From Property Owner's Address	RESPONSE City of Inglewood's Landmarks Administrator	Tree Caliper Size as Documented on Record	Planned Mitigation/Replacement Tree Number and Caliper Size	Planned Payment/Mitigation Cost
27	Cedar	10" caliper	10" = (2) 4" caliper	\$1,700.00	None		10" caliper	10" = (2) 4" caliper	\$1,700.00
30	Pecan	16" caliper	16" = (4) 4" caliper	\$4,000.00	Tree down, REMOVED due to 16"	A tree permit is required to remove a tree with a 16" caliper measurement tag.	16" caliper	16" = (4) 4" caliper	\$4,000.00
32	Birch	10" caliper	10" = (2) 4" caliper	\$1,700.00	None		10" caliper	10" = (2) 4" caliper	\$1,700.00
33	Pecan	9" caliper	9" = (2) 4" caliper	\$1,700.00	None		9" caliper	9" = (2) 4" caliper	\$1,700.00
34	Birch	12" caliper	12" = (3) 4" caliper	\$3,000.00	None		12" caliper	12" = (3) 4" caliper	\$3,000.00
40	Pecan	10" caliper	10" = (2) 4" caliper	\$1,700.00	Decreased due to 16" caliper	Verified in field. DECEASED.	9" caliper	9" = (2) 4" caliper	\$1,700.00
45	Pecan	11" caliper	11" = (3) 4" caliper	\$1,700.00	Decreased due to 16" caliper	Verified in field. DECEASED.	7" caliper	7" = (2) 4" caliper	\$1,700.00
Subtotal				\$29,000.00					\$29,000.00

Mr. Robert Roeder  
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Trees Greater than 16" caliper = Mitigation 2:1 caliper inches									
11	Other	17" caliper	34" = 68" caliper	\$7,200.00	Removal of tree and stump, 1" diameter, 16' height	Removal Non-protected species	REMOVED	REMOVED	\$0.00
23	Other	21" caliper	42" = 84" caliper	\$8,400.00	Observed to be in Ash, 1" diameter, 16' height	Ash is also a protected tree. The City maintains its earlier measurement.	21" caliper	42" = 84" caliper	\$8,400.00
26	Other	18" caliper	36" = 72" caliper	\$7,200.00	Observed to be in Ash, 1" diameter, 16' height	The City maintains its earlier measurement.	18" caliper	36" = 72" caliper	\$7,200.00
28	Pecan	30" caliper	60" = 120" caliper	\$14,400.00	Observed to be in Ash, 1" diameter, 16' height	Observed to be in Ash, 1" diameter, 16' height	REMOVED	REMOVED	\$0.00
30	Other	18" caliper	36" = 72" caliper	\$7,200.00	Observed to be in Ash, 1" diameter, 16' height	A tree permit is required to remove a tree with decay. Better measurement is kept.	18" caliper	36" = 72" caliper	\$7,200.00
41	Pecan	17" caliper	34" = 68" caliper	\$7,200.00	Observed to be in Ash, 1" diameter, 16' height	Verified in field, DCH6468D	17" caliper	34" = 68" caliper	\$15,000.00
> 16" caliper subtotal				\$46,000.00					\$46,000.00
GRAND TOTAL				\$46,000.00					\$46,000.00