

Outrage

Salem's U.S. Bank tree killings

The true story of how City officials and the bank president cut down five large, healthy, beautiful downtown trees for no good reason, and misled citizens about why they did it.



A report by Brian Hines.
May 2014

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*This report may be shared
freely. The truth should be.*

10 reasons to be outraged by how this stump came to be



In April 2013 residents of Salem, Oregon were shocked to learn that five large, healthy, beautiful Japanese Zelkova trees which had graced downtown's State Street for over forty years were about to be cut down.

Protests erupted. Salemians love their trees. For good reason.

The Zelkovas were marvelous in many ways. They shaded the sidewalk. They cleansed the air. They sheltered birds. They made the downtown Historic District more attractive. They brought a dash of nature into an urban landscape.

When my wife, Laurel, learned about the planned tree-cutting in a Statesman Journal newspaper story, she immediately phoned the downtown U.S. Bank office to complain.

She was connected with a man who likely was Ryan Allbritton, the bank president. He told her the trees needed to be removed because they were impacting the sidewalk and making a hazard for passers-by.

Later I learned this wasn't true. The more I dug into this issue, the more untruths I came across from Allbritton and Peter Fernandez, the City Public Works Director who authorized the tree removals.

Something wasn't right here. I'd figured that, hey, this was Oregon, not New Jersey. I didn't think we had city officials who colluded with deep-pocketed bank executives, bending rules to give them their special interest desire.

Well, the facts led me to decide this indeed did happen. In this report you'll read the conclusions I've reached after forking out \$726.61 for public records requests related to how the U.S. Bank trees came to be cut down.

That's a lot of money. A City of Salem official denied my request for a public interest fee waiver. Apparently he didn't think learning why five large healthy trees on a downtown street were removed for no good reason was a matter of public concern.

The official: Peter Fernandez. The same guy who approved the tree killings. It's a small world at City Hall.

So I paid the \$726.61 under protest. I'm trying to get my money back through a Marion County Circuit Court filing. My attorney is confident the City of Salem hasn't followed Oregon's public records law.

Regardless of the outcome of my case I'm glad I made the public records requests. As soon as I read the many documents I got, I realized that what went on behind the scenes was even more outrageous than what ordinary citizens like me had been aware of from newspaper reports.

Here's my Top 10 Reasons anyone who cares about trees, the environment, and ethical government should be outraged about how the five U.S. Bank Zelkovas came to be turned into stumps.

(1) Tree experts and the City's own Shade Tree Advisory Committee repeatedly said, "Prune, don't remove."

On July 17, 2012 the City of Salem's Shade Tree Advisory Committee turned down U.S. Bank's request to remove the five Zelkovas and replace them with much smaller trees. The City's Urban Forester, Jan Staszewski, had recommended against removal.

The minutes of the meeting say, "The Shade Tree Advisory Committee has voted to recommend that City staff, over the next few years, prune the five trees on State Street to open up views to the facade of the Ladd and Bush Building."

U.S. Bank, owner of the Ladd and Bush Building, appealed the committee's *prune, don't remove* recommendation. After hearing testimony about supposed sidewalk problems caused by the trees, on January 17, 2013 the Shade Tree

Advisory Committee once again recommended pruning the trees rather than removing them.

Thirty-four people went on record as opposing removal of these large, healthy, beautiful trees – which weren't causing any problems that couldn't be addressed by pruning. Who were the only people in favor of removing the trees? U.S. Bank officials.

(2) Even though Public Works Director Peter Fernandez and U.S. Bank president Ryan Allbritton claimed there was a 2010 agreement between the City and the bank to remove the trees, there is no evidence of this.

Ignoring the advice of the City's tree expert and Shade Tree Advisory Committee, Fernandez approved removal of the trees on March 12, 2013. This was after U.S. Bank got a second chance at a committee hearing. How the heck did this happen?

According to Fernandez' ruling, prior to his making a final decision after the first *prune, don't remove* committee recommendation Allbritton "verbally appealed" the recommendation. Nothing in writing. Just a bit of small talk between the Public Works Director and the U.S. Bank president (who also was the incoming president of the Salem Chamber of Commerce).

Fernandez' ruling says, "Given the Director's personal recollection of prior discussions related to the 'promised' removal of the trees, the matter was again referred to the [Shade Tree] Committee for recommendation."

Hmmmm. Oregon law includes this ethics policy: "The Legislative Assembly recognizes that public officials should not make private promises that are binding upon the duties of a public official, because a public official has no private word that can be binding on public duty."

Regarding the ruling, note the scare quotes around "promised."

A *scare quote* indicates the word or phrase doesn't mean what it usually signifies. So Fernandez said he made a promise that wasn't really a promise. Just sort of a promise. Understandable. Ethically and legally the Public Works Director can't openly admit to making a 2010 promise to cut down five large healthy street trees before a required application to do this was submitted in 2012.

But this sure seems to have happened.

In the minutes of a Shade Tree Advisory Committee meeting, bank president Allbritton said he wants to replace the trees "in fulfillment of the agreement they have with the City." Problem is, there's no documented evidence of that agreement.

Since all we have is Fernandez' "personal recollection," there is no way of knowing what he and Allbritton agreed to in those "prior discussions." All I can say is that back-room deals between bank presidents and public works directors

aren't something that should happen in supposedly ethically squeaky-clean Salem, Oregon.

I've searched through every document relating to the initial 2010 request by U.S. Bank to remove all eight Japanese Zelkova trees on the Commercial and State Street sides of the Ladd & Bush bank building. No official commitment to remove the State Street trees was made. All I came across in the public records was mention of the verbal just-between-us "promise" Fernandez made with Allbritton.

In 2010 the bank got approval to remove three healthy Zelkovas along Commercial Street. Removal of the five trees on State Street wasn't allowed. This was to be reconsidered after sidewalk issues on State Street were addressed by the City in two years. Which brings us to another outrage.

(4) The sidewalk in front of U.S. Bank wasn't being damaged by the trees. Even the City admitted this.

I've mentioned that when my wife phoned U.S. Bank and asked why the five trees on State Street were going to be removed, a bank official told her the trees were impacting the sidewalk, causing a hazard to pedestrians. This wasn't true.

Peter Fernandez' order allowing the trees to be cut down admits this. I'll quote the entire paragraph because it is key to the justified outrage over the unnecessary tree killings (boldface emphasis added):

"Tort liability. The proponents of removing the trees stated their concern over the safety issues related to cracked and heaved sidewalks and curbs. The **tree-caused damage to the sidewalk and curbs around the US Bank building were repaired by the City-funded project.**

Additionally, **it is the City's responsibility to repair damage to sidewalks caused by street trees,** not the adjoining owner's responsibility. As such, the liability argument by the tree removal proponents is **not pertinent to the tree removal decision."**

In other words, the State Street sidewalk had been repaired and was in good shape when the Zelkovas were cut down. At any rate, U.S. Bank wasn't liable for sidewalk problems even if they existed, which they didn't. So why was the bank so eager to cut down the trees?

(3) When pressed to explain why U.S. Bank wanted the trees removed, bank officials never came up with a good answer.

A forester told me he asked bank president Ryan Allbritton why the bank wanted the Zelkovas to be cut down. The forester's email message had a poetic ring to it. So I made it into a poem. It's got a bit of a Dr. Seuss feel to it.

Ryan Allbritton of US Bank told me
the trees were diseased.

But when I said
"I was a forester, and they weren't,"

He told me they were hazardous
and too close to the building.
But when I said
"They could be trimmed,"

He told me they were
tearing up the sidewalk.
But when I said
"That could be fixed easily,"

He told me the city
was forcing him to do it.
But when I said
"You made the request,"

He told me he would replace them
with larger than required new trees.

Ryan Allbritton did do that.
I do not know why he decided to cut down the trees.

Me neither. Every reason U.S. Bank officials gave when asked why the five beautiful, mature, healthy trees needed to be removed was untrue. The bank's July 2012 request for removal said:

"1. The trees obscure the sight lines to the building." OK, trees grow. Experts said they could be pruned to restore sight lines if this was desirable. Alternatively, one or two of the five trees could have been removed as a last resort. In fact, U.S. Bank cut down three of the trees, then had to wait until migrating birds left their nests to cut down the last two trees (because of a federal law).

I pleaded with bank officials to save the remaining trees, since obviously sight lines to the building had been restored by cutting down three of the five trees. But as soon as the birds departed, the bank got out the chain saws again. This shows that U.S. Bank didn't really care about sight lines. And as discussed below, nothing in the City tree ordinance says that street trees should be removed if they obscure sight lines to a building.

"2. The trees contribute to the cracking and deterioration of the sidewalk." Only minimally, and in the past. The sidewalk was repaired in summer 2012 to the City's satisfaction. Fernandez' removal order says the City's Urban Forester

concluded the tree roots could be pruned to avoid future negative impacts to the sidewalk, allowing the trees to be saved.

This is why, Fernandez said, “staff did not make a request to the Shade Tree Advisory Committee to revisit the issue, as had been previously planned.” Regardless, U.S. Bank isn’t responsible for the sidewalk; the City is. The City had determined that the five trees weren’t impacting the sidewalk.

“3. The tree roots and leaves clog the public stormwater lines.” The Fernandez decision document clued bank officials into a basic fact: “Any deciduous tree planted in the public right of way, by definition, will create leaf litter in the fall.” The ruling also noted that City staff believe one tree may be impacting storm water drainage. Note: *one tree, believe* and *may*. If confirmed, judicious root pruning would have fixed this minor problem.

“4. The trees are not historically contributing.” Wow. U.S. Bank really stretched the truth to breaking here. Photographs from the 1890s onward show that trees have bounded the Ladd & Bush building. This shows how little bank officials cared about maintaining the ambience of Salem’s downtown Historic District.

Thus we see that U.S. Bank never was able to come up with a reasonable explanation for why the five State Street trees should be removed. I’ve been told that bank president Ryan Allbritton’s office was on the top floor of the building, with windows facing the green canopy of these large healthy trees. Maybe he wanted a better view.

(5) Nothing in the City tree ordinance required Peter Fernandez to approve the bank’s tree removal request, despite Fernandez’ false claim that he had to do it.

Over and over, Public Works Director Fernandez said he was required to approve U.S. Bank’s request to remove the trees because of a city ordinance. This isn’t true. Nothing in the SRC (Salem Revised Code) talks about removing street trees in the downtown area. The only references are to *planting* trees.

Astoundingly, Fernandez based his removal order primarily on references to a section in the city ordinance that starts with this (emphasis added): “(c) In addition to the above regulations, the following guidelines shall **apply to the planting of trees** in the Salem Downtown Historic District and the Central Business District:”

This is outrageous – a city official wrongfully allowing valuable public assets to be destroyed for an illegal reason. I can confidently use that strong word, *illegal*, because I asked an attorney specializing in land use and environmental law to give me a written opinion about this (attached to the end of this report).

Sean Malone didn’t use the word “illegal,” but more lawyerly language. Here is his conclusion after reviewing the tree ordinance:

“Thus, Mr. Fernandez’s contention that ‘the code clearly indicated that the bank had a right to remove the trees per the provisions of SRC

86.130(c)(1)' was not substantiated by any plausible interpretation of the SRC."

Public officials are sworn to uphold the law. However, the City's Public Works Director conjured up an extremely dubious interpretation of a city ordinance pertaining to the *planting* of downtown street trees in order to justify *removing* five large, beautiful, healthy trees that the City's own Urban Forester and Shade Tree Advisory Committee repeatedly had told him should be saved – pruned, not killed.

Why did this outrage happen? Read on.

(6) Fernandez said he was going to deny U.S. Bank's tree removal request. He changed his mind after bank president Ryan Allbritton contacted him.

On August 11, 2012, Public Works Director Peter Fernandez sent an email to City Manager Linda Norris. He said, "Linda, consistent with the Shade Tree Committee's recommendation, I am not going to allow the trees to be removed." Note: *not*.

This is consistent with a prior July 17 email Fernandez sent to Mark Becketl, another City staffer: "Thanks, I think the next step is to have Kimberli Fitzgerald weigh in as part of Historic Landmarks review. Then I will make the final determination...which will be to substantially prune but leave in place." Note: *prune but leave in place*.

So after the Shade Tree Advisory Committee voted unanimously on July 17 to recommend pruning the trees rather than removing them, Fernandez was agreeable with that. Twice he told City staff he was going to save the trees. Why did he change his mind?

Well, Fernandez talked with U.S. Bank president Ryan Allbritton. On August 16 Fernandez sent an email to four city staff. He told them:

"I spoke with Ryan Allbritton last night and he expressed a very strong desire to appeal the Shade Tree Committee decision. He also offered that US Bank would pay for the purchase of substantially larger trees to replace both the ones on Commercial and State. As an aside, Mr. Allbritton expressed a lot of frustration over the commitment we had made over taking the tree removal in two phases and then backing away from that commitment."

Oh, my.

The U.S. Bank President and incoming Chamber of Commerce President is *frustrated*. Because of a back-room deal, a *commitment*, that verbal extra-legal "promise" by Fernandez to remove the State Street trees which lacks written documentation, since all we have is Fernandez' previously mentioned "personal recollection of prior discussions" with Allbritton.

So Fernandez suddenly shifted course. Later that day, August 16, a city staffer who obviously thought the trees should be saved emailed Fernandez:

“Peter – Robert told me that the request to remove the trees on State by the bank has been denied and that you agreed with the recommendation from the Shade Tree Advisory Committee...I just wanted to confirm before I issue a ‘Hip Hip Hooray.’”

In his reply Fernandez burst the staffer’s happy tree-saving bubble: “Don’t hip hip just yet.”

Allbritton and U.S. Bank got their way. A do-over. An unusual second chance to convince the Shade Tree Advisory Committee that there was a good reason to kill the five healthy Japanese Zelkovas.

On January 9, 2013, Allbritton and other bank officials made their case before the committee. And struck out again. Once more the Shade Tree Advisory Committee unanimously voted not to remove the trees but rather to prune them. This should have been the end of the tree-killing story. Sadly, it wasn’t.

(7) A City staff member acknowledged to a concerned citizen that downtown tree removal decisions were influenced by politics.

Soon after I learned about the decision to cut down the five healthy, mature, beautiful U.S. Bank trees I phoned the City of Salem’s Urban Forester, Jan Staszewski. I asked him how it was possible no one was able to appeal this indefensible action.

Staszewski told me the City considers requests to remove downtown street trees as being akin to a building permit application, such as an electrical permit. Only the applicant can appeal a rejection of the request; nobody else can appeal an approval. Which isn't really true – see my attorney’s letter at the end of this report – but this is what City officials were telling people..

The more I learned about the outrageous way the U.S. Bank tree removal request had been handled, the more absurd this electrical permit analogy appeared. For one thing, explicit criteria exist for how electrical devices should be wired and otherwise installed. Yet the City ordinances give no guidance about when it is appropriate to remove healthy downtown street trees.

Also, I’ve never heard of political pressure being put on a City official to grant an electrical permit. But this happens with street tree removal applications. As part of my public record requests I got a copy of an email from a City staff person who is familiar with tree removals.

The staffer was responding to someone who wanted to learn more about how concerned citizens can protect downtown trees.

“It is a sticky issue for sure, as businesses are often the ones who want to have the trees removed, and they can exert political pressure.”

This shows that U.S. Bank’s request to remove the five Japanese Zelkovas was utterly unlike the routine building permit-ish decision the Urban Forester claimed

it was. If the decision had been based on expert arborist advice and public testimony, Public Works Director Fernandez would have denied the request and saved the trees.

This, as we've seen, is what Fernandez planned to do before he was lobbied by bank president Ryan Allbritton. The lobbying didn't stop there, though.

(8) City councilors lobbied on behalf of U.S. Bank at the request of Ryan Allbritton.

Of all the documents I got from my public records requests, a February 25, 2013 email from bank president Allbritton to Public Works Director Fernandez is one of the most outrageous. It says a lot about how the City of Salem does the public's business – not only regarding street tree removal requests, but generally.

“Peter, I wanted to make you aware that, over the weekend, I spoke with several City Council members.

I thought it would be best to give you a heads up as you may be hearing from some of them regarding the tree replacement at Ladd and Bush. Those I spoke to were in favor of removing and replacing. I spoke with Brad Nanke, Dan Clem, Rich Clausen and Warren Bednarz. You may be receiving an email of support from those four in particular.

I also had the opportunity to speak with Counselor Bennett who did not want to email you and Linda [Norris, the City Manager] with his support but rather he wanted to personally speak with both of you regarding our tree situation.

Chuck indicated to me that he felt like the removal and replacement of the trees were 'a done deal'.

Of the counselors I spoke with I made sure to let them know of the agreement our company verbally made with city staff three years ago (replacing the Commercial St. trees first and then replacing the State St. trees in a couple of years).

Please let me know if you have any questions. I'm looking forward to working together to resolve this situation.

Warm Regards,
Ryan Allbritton
U. S. Bank Region President”

Wow. There is so much to be outraged about here.

Remember: Allbritton is writing Fernandez after the City's Shade Tree Advisory Committee had reviewed the bank's request to remove the five State Street trees in excruciating detail, per the City tree ordinance.

The committee had said “prune, don't cut down” twice, at their meeting on July 17, 2012 and then after the U.S. Bank's requested do-over meeting on January 9, 2013, where many people testified (the second “prune, don't cut

down” recommendation was made a few days later at a follow-up Shade Tree Advisory committee meeting on January 17.)

So Peter Fernandez was faced with strong opposition to cutting down the trees from the City’s own Urban Forester and Shade Tree Advisory Committee, along with expert arborists and many concerned citizens who wanted the trees saved.

Yet several weeks before Fernandez issued his March 12 order to cut down the trees, Chuck Bennett, the City councilor who represents the downtown area, told Allbritton that removing the trees was “a done deal.” Outrageous.

Another outrage: Allbritton refers to the *verbal agreement* U.S. Bank made with unnamed City staff three years previous to allow the five healthy, mature, beautiful State Street trees to be cut down. How could this happen? Again, this isn’t New Jersey. A back-room deal between a bank president and Public Works Director isn’t supposed to happen in Salem, Oregon.

Yet, it happened.

A City ordinance requires that downtown street tree removal requests be referred to the Shade Tree Advisory Committee after the Urban Forester makes an initial assessment and recommendation. Then the committee makes its recommendation to the Public Works Director.

As noted in item (2) of this report, Allbritton and Fernandez had made some sort of verbal agreement back in 2010, several years before U.S. Bank submitted its 2012 application to remove the five trees. Allbritton reminded five of the eight city councilors of this verbal agreement, which should have rung *unethical* and *illegal* alarm bells in their minds.

Or maybe they weren’t disturbed by what Allbritton told them because this is how things are typically done at City Hall these days: work out deals with special interests behind the scenes, then go through the show of holding public hearings and issuing a formal decision.

If so, the *lack* of disturbance by the city councilors is what is truly disturbing, because it points to far-reaching systemic problems in how the City of Salem does the public’s business.

(9) City Council members failed to step in when they could have prevented this tree removal debacle, partly because they were misled by City staff.

After Peter Fernandez made his deeply flawed decision to remove the U.S. Bank trees, the Shade Tree Advisory Committee made a last-ditch effort to save them. Kasia Quillinan, a committee member, sent an email to City Councilor Laura Tesler on April 5.

After noting that the committee recommended the trees not be removed “since they are not diseased or affecting the sidewalk or sewer system,” she said Fernandez overruled the recommendation based upon SRC 86.130(c) – which

does not allow trees to be planted in a location that would obscure significant architectural features of historic buildings.

Quillinan added:

"This background brings us to the latest effort by the Shade tree committee to get this matter before City Council for review. The committee after having reviewed the code provision felt that the code which was adopted in 2003 (I believe, if memory serves) did not apply to Existing trees, but only to trees to be planted in the future. The code provision says nothing about allowing for the Removal of existing trees in front of historic buildings.

But this will be a matter that council can review for themselves. As a result, the committee felt and voted to attempt to have those trees designated as Heritage trees which would then protect them until the end of their natural life. City Council has the say on whether to designate street trees as heritage trees, but the issue must first get to council somehow, preferably before US Bank cuts them down.

In short, I am wondering if you would be willing to find out how to bring this issue before city council in the very near future and present the issue for discussion. Once the trees are gone, they're gone."

Kudos to the Shade Tree Advisory Committee for recognizing that Fernandez had made a horrible decision, and the City Council needed to step in and review it.

And shame on the city councilors, Mayor, City Manager, and other staff who either put roadblocks in the way of this happening or did nothing to make it happen. Here are key members of that Hall of Shame.

Urban Forester Jan Staszewski. On March 29 he sent a memo to Fernandez and other Public Works staff describing the Shade Tree Advisory Committee's desire to save the trees by an appeal to the City Council. Even though Staszewski is the staff person assigned to work with the committee, he said:

"I recommend that in conversations with Ms. Lesher [committee chair] and Ms. Quillinan that they are assured that there is City Council support to maintain the current process and not bring forth for review of decisions that have solid legal standing."

Infuriating.

The Urban Forester is undermining the Shade Tree Advisory Committee's attempt to reverse his boss's (Fernandez') indefensible decision to remove the trees. Instead of supporting the committee vote to bring this matter before the City Council, Staszewski tells Fernandez that staff should squash this effort, wrongly claiming the removal decision had "solid legal standing."

Public Works Director Peter Fernandez. On April 8, the day of a City Council meeting where this issue could have been discussed, Fernandez emailed the Mayor and city councilors, misleading them about both his decision and the

Shade Tree Advisory Committee's attempt to have the U.S. Bank trees designated as Heritage Trees.

Fernandez wrongly claimed "a review of the code clearly indicated that the bank had a right to remove the trees per the provisions of SRC 86.130(c)(1)." That's a lie. As noted before, this part of the tree ordinance says: "Trees shall not be planted in a location which would obscure significant architectural features."

Fernandez knew the Shade Tree Advisory Committee had concluded that this section of the Salem Revised Code did not apply to street tree *removals* in the downtown area.

Fernandez did not cite any legal opinion from a City attorney supporting his assertion that the code clearly indicated the bank could remove the trees. On the other hand, my land use and environmental law attorney gave me an opinion that comes to the opposite conclusion (included with this report).

Fernandez also told the Mayor and city councilors, "Heritage Tree designation would be a Council decision, however, the subject trees do not meet the criteria set forth in SRC Chapter 86.010(b)."

Fernandez probably assumed that busy city councilors wouldn't bother to spend a minute looking up that section of the ordinance. Which reads in full:

(b) 'Heritage trees' means trees designated as such due to their location, size, or age of their species, botanical interest, commemorative plantings, or historic significance.

On April 1 Fernandez got a memo from Staszewski explaining how a tree becomes a Heritage Tree: "The trees will be designated by the City Council through nominations from the general public. The Shade Tree Advisory Committee will review all the nominations and send recommendations to the City Council."

So there is no excuse for Fernandez telling the Mayor and city councilors that the U.S. Bank trees couldn't be designated as Heritage Trees. He knew better.

The trees were large, healthy, and beautiful. Trees had graced the State Street side of the bank building since the 1890s, so they had historic significance. The Shade Tree Advisory Committee had recommended Heritage Tree designation for the U.S. Bank trees and had asked city councilors to put this issue on the Council agenda.

Every City Councilor. But the City Council sat on its hands. A concerned citizen also emailed the council, asking that this issue be discussed at its April 8 meeting. Nothing happened.

I have copies of emails from city councilors wrongly saying the City ordinance allows the trees to be removed. Not a single councilor asked obvious tough questions of Fernandez and Staszewski: What legal foundation do you have for believing the ordinance about downtown tree *plantings* justifies the *removal* of these trees? What prevents the City Council from designating the Zelkovas as Heritage Trees?

The passivity of city councilors was disturbing. They trusted inaccurate statements of City staff. They failed to act on the vote by the Shade Tree Advisory Committee to have the five trees designated as Heritage Trees.

Even worse, one councilor (Brad Nanke) thought the back-room verbal deal worked out between Fernandez and Allbritton should trump the legal process for dealing with a downtown street tree removal request. On February 18 Nanke emailed City Manager Linda Peterson and Public Works Director Fernandez:

“Linda & Peter, spoke with U.S. Bank today regarding trees along State St. I am in support of replacing the trees on both Commercial and State. If we truly made a verbal agreement, I feel it was a bad idea to take it in front of the Shade Tree Advisory Committee. Call if you would like to discuss further. Thanks, Brad.”

(10) City officials ignored many knowledgeable and heartfelt pleas from members of the public to save the trees.

Recall that City staff told me an application to remove five large, healthy, beautiful trees from the downtown Historic District was viewed as akin to a building permit – a cut-and-dried just-the-facts matter which no one other than the applicant could appeal, because no one else deserved a say.

The absurdity of this attitude is obvious.

When I applied for an electrical permit to put an electric vehicle charging station in our garage, no one else in our neighborhood was affected by the work. However, cutting down the five U.S. Bank trees was a land use decision that affected everyone who works in, lives in, or visits the State Street area.

After I got my public record requests, I was moved by reading the many pleas to save the trees that were emailed or mailed to City officials. Here are some of them. They'll give you a feel for how much those trees meant to people who, like me, had come to admire and love the Zelkovas over many years of being acquainted with them.

I moved to Salem in 1977, soon after the trees were planted. I can't tell you how many times my wife and I had driven past the U.S. Bank building and said or thought, "Those trees are so beautiful. It's wonderful to have them in downtown Salem." Obviously lots of people felt the same way.

Which is why they were so upset the City and U.S. Bank wanted to cut them down unnecessarily.

“As a resident of Salem and member of the Community Forestry Advisory Committee, I urge you to prevent the slaughter of the remaining trees in the right of way beside the US Bank...Our goal is to increase the tree canopy, not reduce it...Please save the trees that along with others enhance the livability of the city core.”

"This is very upsetting to many of those who work on or visit State Street and I strongly urge the city not to do this. This 300 block of State Street is one of the most beautiful streets in the city precisely because of the trees. It is certainly a magnet for tourists and photographers...Having a city with older urban trees greatly enhances the beauty of the city. It is common to see boulevards of older trees in European cities."

"I'm shocked that anyone would want to cut these trees down! Not only are they beautiful all year round, but they also add a lot of character to our street...They could be trimmed a bit, but they add a lot to our street which is one of the busiest. People come down here to appreciate the beauty of downtown...cutting them down would make our street look bare, cold, and uninviting! Is that what we want for downtown... I own a small shop right across the street from the bank and I will seriously be upset if they are taken with no good reason behind it!"

"As a frequent visitor to Salem from Nashville, TN I implore you to not remove the trees by USBank on State Street. We have been there in March and they are delightful, as is Salem."

"As someone who shops, conducts business, volunteers and formerly worked in the downtown area I was shocked to learn that Ladd and Bush's request to remove the mature trees on State Street has been granted by our Director of Public Works. These trees are an economic, cultural and environmental benefit to our community. They are an asset as much as a street or sewer line. The decision is especially distressing because there is no appeal process for people who want to preserve the trees... A city's trees are usually the first impression a city projects to its visitors. And they certainly enhance the quality of life for its residents."

"It's extremely disappointing to read (in the Statesman Journal yesterday) that the city's arborist – who I would expect to be an advocate for trees and their many benefits, esp. in the urban environment – going along with the least informed and most short-sighted of mindsets, and vaguely going along with tree destruction b/c of a *potential* threat to the sidewalk. The point about the "sightline" of the building doesn't even merit mentioning; it's ridiculous.

I live about 25 yards from these mature, thriving trees and will certainly consider permanently relocating if I find they've been killed since I left for work this morning. This certainly wouldn't be the first time downtown public policy has been threatened (and abandoned) in favor of short-sighted (so-called business) interests."

Conclusion

Thank you for reading this report of how the U.S. Bank trees were cut down for no good reason. I wish this tale had a happy ending. Believe me, my attorney and I, along with other advocates for the trees, did all we could to save them.

Many communications were sent to officials at the City of Salem and U.S. Bank. They were met with either indifference or outright opposition. This, even more than the horrible tree removal decision itself, made me aware that my public record requests provided a window into a much larger problem: how City officials go about their business of being “public servants.”

Understand: I was an executive service manager in Oregon state government for a number of years. I realize that making governmental decisions can be a messy business. What goes on behind the scenes often isn't textbook “How Your Government Works” stuff.

But I was shocked by what's been described in this report.

Officials at the City of Salem, both appointed and elected, ignored facts, the law, and expert testimony in reaching a terribly flawed decision to allow U.S. Bank to cut down five large, healthy trees in the Historic District.

In 2010 the City's Public Works Director made an informal back-room verbal deal with the bank president to cut down the trees that took precedence over the legal process for considering a 2012 application to remove the downtown street trees.

Public Works Director Fernandez told the Mayor, city councilors, and members of the public things that clearly weren't true, yet he was able to bamboozle them into believing that they were. For example, Fernandez had no clear legal basis for ordering the trees to be cut down, and he wrongly told the City Council it wasn't possible to consider designating them as Heritage Trees.

Recommendations of the Shade Tree Advisory Committee, backed up by advice from independent arborists, were ignored by City officials. But when Ryan Allbritton, the U.S. Bank president, lobbied city councilors, they eagerly did his bidding.

This is no way to run city government.

It isn't a liberal or a conservative issue. Democrats, Republicans, and independents should be equally outraged when important decisions are made by officials that are at odds with facts, the law, citizen values, and the broad public interest.

Currently revisions to Salem's tree ordinance are being considered. Hopefully ordinance changes will ensure that indefensible tree removal decisions like the one described in this report never will happen again.

However, City government carries on.

City officials will be making other decisions that affect Salem's pocketbook, well-being, economic development, and quality of life. Changes have to be

made at City Hall. Business as usual means more bad decisions like the U.S. Bank tree removal debacle.

Citizens shouldn't have to spend \$726.61, like I did, to learn why and how local appointed and elected officials are making important public policy decisions. Salem's City government should be open, transparent, and responsive to the broad public interest, not narrow special interests.

Concerned citizens who were justifiably perplexed by why the healthy U.S. Bank trees needed to be cut down optimistically believed that City officials would pay attention to facts, expert arborist advice, and informed testimony by people who lived and worked in the area of the bank, along with frequent visitors to downtown who realized how valuable an asset the trees were.

But in the end, all that mattered was a 2010 informal extra-legal verbal agreement between the Public Works Director, Peter Fernandez, and the bank president, Ryan Allbritton. On March 14, 2013, Allbritton emailed Fernandez: "Thank you very much for going to bat for us." Shows what team Fernandez was on.

City councilors sat on their hands while chain saws killed the entirely innocent trees. So did the Mayor and City Manager. This was a shameful, outrageous episode. Yet if it spurs reforms at City Hall, the trees will not have died in vain.

On a personal note... I took this photo of the beautiful Japanese Zelkova at the corner of Commercial and State Streets after telling the tree, "I promise that I will do everything I can to save your life."



I kept that promise. Yet the tree still was killed. I'm deeply sorry for that. Call me crazy – I've been called worse – but I felt a strong connection with that tree. I still do. It was a friend of mine.

I know this, because I've got tears in my eyes as I write these final words, and I don't cry very often. Usually just when someone or something I love touches me.

– *Brian Hines*

Following is an opinion letter from my attorney, Sean Malone, regarding (1) whether Public Works Director Peter Fernandez was correct in saying that a city ordinance supported his decision to allow the U.S. Bank trees to be removed, and (2) whether that decision could have been appealed.

His conclusion: (1) No, Fernandez didn't have legal support in the ordinance for his decision, and (2) Yes, the decision likely could have been appealed if opponents of the tree removals had been given adequate notice of the decision and accurate information about their right to appeal.

Read Malone's letter for details.

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July 11, 2013

To Brian Hines via Email

Dear Brian,

You inquired about two issues related to the City of Salem's approval of the U.S. Bank tree removal application: (1) whether Chapter 86 of the Salem Revised Code (SRC) supported approval of the U.S. Bank tree removal application; and (2) whether approval of the application could have been appealed to the Land Use Board of Appeals.

Whether Chapter 86 of the Salem Revised Code (SRC) supported approval of the U.S. Bank tree removal application

On April 8, 2013 Mr. Peter Fernandez, Public Works Director, sent an email to the Mayor and City Councilors which claimed that his decision to allow removal of the five U.S. Bank trees was "based on findings of fact and conclusions of law." Mr. Fernandez also stated that "a review of the code clearly indicated that the bank had a right to remove the trees per the provisions of SRC 86.130(c)(1)." However, SRC 86.130(c)(1) did not give U.S. Bank the right to remove the trees, and, therefore, for this and other reasons, Mr. Fernandez's findings of fact and conclusions of law were legally flawed.

First, SRC 86.130 is titled "Planting, Cutting, and Pruning of Trees," and does not contemplate removal. For example, the introductory sentence omits any reference to removal: "The following regulations are hereby established for the planting, trimming, and care of trees in or upon the public streets or alleys of the city."

Subsection (c) applies the regulations and guidelines "to the planting of trees in the Salem Historic District and the Central Business District." Again, the provision cited by Mr. Fernandez does not reference the removal of trees. SRC 86.130(c)(1) then states that "trees shall not be planted in a location which would obscure significant architectural features." Again, the SRC 86.130(c)(1) contemplates only planting, not removal.

This plain meaning interpretation of Chapter 86 was shared by the City's Shade Tree Advisory Committee. The Shade Tree Advisory Committee voted three times to preserve and

trim the trees, not remove the trees. On April 5, 2013, a member of the Shade Tree Advisory Committee, Kasia Quillinan, sent an email to Councillor Laura Tesler which read, in part:

"The Shade Tree committee initially recommended that the trees (which are mature and have been in place since 1970) not be removed since they are not diseased or affecting the sidewalk or sewer system. Peter Fernandez overruled this recommendation, based upon SRC 86.130 (c) which as he says in his staff report does not allow trees to be planted in a location which would obscure significant architectural features (of historic buildings).

This background brings us to the latest effort by the Shade tree committee to get this matter before City Council for review. The committee after having reviewed the code provision felt that the code which was adopted in 2003 (I believe, if memory serves) did not apply to Existing trees, but only to trees to be planted in the future. The code provision says nothing about allowing for the Removal of existing trees in front of historic buildings.

This indicates that those trees that were already in existence as of 2003 were "grandfathered," and, therefore, the regulations identified by Mr. Fernandez did not apply to the State Street trees.

Without some plausible interpretation that "planting" means "removal," Mr. Fernandez's conclusions of law appear to have been based on very shaky legal ground. Not only does the provision at issue not anticipate removal, but the trees at issue were healthy, non-hazardous, mature, and habitat for migratory birds.

The findings of fact are contained in the Facts and Findings section of a July 20, 2012, memo to Mr. Fernandez from Jan Staszewski, City of Salem's Urban Forester and staff to the Shade Tree Advisory Committee. Mr. Staszewski stated that "[t]he trees have grown beyond their anticipated design. Limbs prevent an unobstructive view of the facade." Clearly, trees grow after being planted, and that growth is most frequently addressed by pruning/trimming. In fact, this was the recommendation of the Shade Tree Advisory Committee as stated in the July 20 memo:

The Shade Tree Advisory Committee has voted to recommend that City staff, over the next few years, prune the five trees on State Street to open up views of the facade of the Ladd and Bush [U.S. Bank] building.

The recommendation of the City of Salem staff was consistent with the Shade Tree Advisory committee:

1. Staff recommends that the trees not be removed.
2. An alternative solution would be to remove the second and forth [sic] trees to open the canopy to allow greater view of the facade and reduce the leaf litter related problems.

On January 17, 2013 the Shade Tree Advisory Committee reiterated its recommendation after another public hearing on the U.S. Bank tree removal application:

Recommendation on Appeal of Denial of Tree Removal Request Public Hearing -- 302 State St (Ladd & Bush Bldg -- US Bank): A motion was made by Carl Goodwin and seconded by Linda Peterson not to remove the trees. Wes Bouche declined to vote due to a potential conflict of interest. All in favor. The Motion carried.

A motion was made by Don Christensen and seconded by Carl Goodwin to recommend pruning the trees according to ISA standards. All in favor. The Motion carried.

Thus, Mr. Fernandez's contention that "the code clearly indicated that the bank had a right to remove the trees per the provisions of SRC 86.130(c)(1)" was not substantiated by any plausible interpretation of the SRC. Mr. Fernandez' decision was neither supported by SRC 86.130(c)(1) nor by the findings of fact arrived at by the Shade Tree Advisory Committee -- which is charged under Chapter 86 with considering permit applications relating to trees in the Historic and Downtown Districts. It is also my opinion that if Mr. Fernandez had denied the U.S. Bank application, as the facts and law demanded, the City likely would have prevailed on appeal

Whether approval of the application could have been appealed to the Land Use Board of Appeals

The basic rule is that the Land Use Board of Appeals (LUBA) has jurisdiction over land use decisions and limited land use decisions:

Except as provided in ORS 197.320 and subsection (2) and (3) of this section, the Land Use Board of Appeals shall have exclusive jurisdiction to review any land use decision or limited land use decision of a local government, special district or a state agency in the manner provided in ORS 197.830 to 197.845.

ORS 197.825(1). However, even if a local government's action is not a statutory land use decision, LUBA may review the decision if it will have a "significant impact on present or future use of land." *Billington v. Polk County*, 299 Or 471, 478-79 (1985); *Petersen v. Klamath Falls*, 279 Or 249, 254 (1977); *City of Pendleton v. Kerns*, 294 Or 127 (1982). The significant impact

test “encompasses a broader range of decisions than those that apply, or should apply, statewide planning goals, comprehensive plans, or land use regulations.” *Citizens for Better Transit v. Metro Service Dist.*, 15 Or LUBA 482, 484 (1987). “[T]he decision must create an actual, qualitatively or quantitatively significant impact on present or future land uses. Further, the expected impacts must be likely to occur as a result of the decision, and not simply speculative.” *Carlson v. City of Dunes City*, 28 Or LUBA 411, 414 (1994).

It is my understanding that the City informed opponents of the U.S. Bank tree removal that the City’s decision could not be appealed. I find this disturbing because the City provided opponents of the tree removal with incorrect legal advice. Either the City’s agents were unaware of the significant impacts test or the City’s agents misled the opponents of the tree removal. Either way, the issue could have been appealed to LUBA. However, the City’s advice (whether intentionally misleading or not) ensured that the decision would not be appealed.

It is also my understanding that the City did not provide notice to opponents of the tree removal until the final day that the decision could be appealed. I find this disturbing because the City effectively marginalized the opposition by failing to provide adequate notice, and, again, ensured that the decision would not be appealed.

In conclusion, I believe that Mr. Fernandez’s decision was not based on plausible legal interpretation, and that LUBA could have had jurisdiction over an appeal by opponents of the tree removal application under the significant impacts test outlined above.

If you have any further questions, please do not hesitate to contact me.

Sincerely,



Sean T. Malone