

From: [Bill Connors](#)
To: [Board of Public Works](#)
Cc: [Brown, Ian K.](#); [Lankella, Badri](#); [Guequierre, John](#)
Subject: Smart Growth's Concerns re Street Tree Protection Ordinance
Date: Tuesday, September 16, 2025 1:37:16 PM

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Members of the Board of Public Works:

I am writing this email to you assuming that this evening, the Common Council will grant the Board's request to re-refer the street tree protection ordinance to the Board.

Below is a link to version 2 of the street tree protection ordinance. There are very few differences between version 2 of the ordinance and the ordinance as introduced.

<https://madison.legistar.com/View.ashx?M=F&ID=14772264&GUID=FA4CF5CC-61EB-4489-BCD5-931FE468F09E>

The changes are marked by double underlining. The only changes are the addition of the word "unauthorized" in two places (which Smart Growth requested and appreciates being added) and some corrections to cross references. That is all.

Smart Growth requests that the Board of Public Works add a provision to the proposed ordinance to create some intermediate penalty short of revoking the street and/or right-of-way use permits if an employee of a contractor or subcontractor damages or kills a street tree that was supposed to be preserved.

Without such a change, it would be foolish for a developer, equity investor, lender or contractor to even consider an infill development project on any site in Madison that is adjacent to a street tree which the city government would require to be preserved during construction. Unfortunately, mistakes happen during all construction projects and cannot be eliminated despite best efforts to prevent them. The risk of permit revocation will make any such infill development project too risky to consider for many developers, investors and general contractors.

City Forester Ian Brown has repeatedly said in recent public meetings that if an employee of a contractor or subcontractor damages or kills a street tree that was supposed to be preserved, he will not jump straight to suspending or revoking the project's street and/or right-of-way permits and will work with the developer and general contractor on some sort of remediation arrangement that is more substantial than the payments required by the proposed ordinance. He has said it only in worst cases, such as where the developer and contractor make no effort or only a token effort to reach a remediation arrangement with him or someone with authority intentionally ordered the removal of the street tree, would city staff suspend or revoke the street and/or right-of-way use permits.

But that intermediate step of working out a remediation arrangement is not in writing in the proposed ordinance. The elements of such a remediation arrangement are not in writing in the proposed ordinance. There is nothing in writing in the proposed ordinance that matches, or

even authorizes, what City Forester Brown has said will happen in most cases where an employee has, regrettably, damaged or killed a street tree that was supposed to be preserved.

City Forester Brown has repeatedly pointed out that if city staff suspend or revoke the street and/or right-of-way use permits because an employee has damaged or killed a street tree that was supposed to be preserved, in the existing code of ordinances, there is a process to appeal the suspension or revocation to the Board of Public Works. But to the best of my knowledge, there are no written standards in the existing code, and there certainly are no written standards in the proposed ordinance, for the Board of Public Works to consider and apply when determining whether to grant the appeal and restore the use permit(s).

In a tight infill development setting, it is extremely challenging if not impossible to construct a new building that has its front facade only a few feet from the sidewalk unless the general contractor and subcontractors are able to use the street and terrace to construct the building. A permanent revocation of street and right-of-way use permits during construction of an infill development project would be a death sentence for many projects, resulting in massive financial liability for the developer and/or general contractor.

Furthermore, even if the Board of Public Works grants the appeal and reinstates the street and right-of-way use permits, the long pause in construction during the appeal process could have massive financial consequences for the project.

Developers and general contractors cannot protect against this through better communication and training. Unfortunately, people make mistakes during construction projects. For example, contractors and subcontractors constantly communicate and train employees about safety on the work site, yet, unfortunately, injuries sometimes still happen.

In contrast, development sites in newer areas near the periphery of the city do not have any mature street trees that would need to be preserved. This proposed ordinance would make those sites far more attractive to developers than infill development sites with adjacent mature street trees. The proposed ordinance would push more development projects to the periphery of the city.

In summary, (a) the lack of anything in writing in the proposed ordinance about an alternative consequence to revocation or suspension of street and right-of-way permits if an employee of a contractor or subcontractor damages or kills a street tree that was supposed to be preserved and (b) the lack of any written standards in the existing code of ordinances or proposed ordinance for the Board of Public Works to consider when determining whether to grant or deny an appeal of a revocation or suspension of permits, creates a situation where consequences are completely unpredictable and might be arbitrarily administered now or in the future. Developers, equity investors and lenders will be reluctant to invest when there is an unpredictable risk of being hit with a massive, disproportionate negative consequence. Similarly, general contractors will be reluctant to take on the risk of such projects.

There is a better alternative. The current city code of ordinances and development agreements between the city government and developers require developers "either to repair the public right-of-way and to pay a degradation fee, or to restore the right-of-way," and the developer must give the city government a letter of credit that is 125% of the estimated cost of anticipated damage to the right-of-way.

The proposed ordinance and the development agreements could specify a large amount of liquidated damages based on tort law regarding compensation for damaging or killing someone else's tree so that the financial penalty for damaging or killing a street tree would be much more substantial and not just a "cost of doing business." The development agreement could require the developer to provide a letter of credit for 125% of the liquidated damages amount. This would eliminate the need to impose the massively disproportionate penalty of revoking the street and/or right-of-way permits.

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