

June 21, 2021

Subject: Harbison Letter on Item 16 (Encroachment Enforcement Policy) on June 22 City Council Agenda

Honorable Mayor and City Councilmembers:

As you know, I have dedicated a great deal of personal time toward protecting our deed restrictions and thereby preserving our Parklands for public recreational use over the last eight years. My focus has not been limited to the litigation over the illegal parkland sale in 2013, but also includes walking all the paths, lanes, alleys and parklands with Ried Schott in 2011 and preparing an inventory of encroachments summarized in the attached presentation with photos, maps and diagrams; this inventory formed the basis for the City's current list of 200 encroachments. My passion for this is clear – as you can see by my license plate:



I appreciate the current effort to update the City's policies and process to deal with encroachments and the resources that have been committed to update the policies. I think we all agree that something needs to be done, since the list of encroachments continues to grow and there are examples of non-compliance even years after the homeowner was initially cited with a violation.

Unfortunately, what is being proposed by the City Manager and staff for your consideration tomorrow night does little to solve the problem. It **falls woefully short in terms of creating an environment of deterrence as well as motivation for homeowners to remediate their encroachments once cited.** I fear the problem will continue to grow and become even more pervasive.

I recognize that this is only one of many issues you must deal with as City Councilmembers, so please bear with me if I seem overzealous and perhaps even strident in this communication. But I can't help being passionate about solving this problem.

I have tried **at least six times** since June 2019 to communicate my proposal for tackling this issue in a way that I am confident will fix the problem—**but it will succeed only if the entire proposal is adapted without significant modification or omission:**

- In June 2019 a draft to two of you individually
- In September 2019 in an email to the entire Parklands Committee since I was out of town the first evening they discussed this topic
- In a speech I made to the Parklands Committee when they discussed this at their 11/14/19 meeting

- In a speech I made to the Parklands Committee when they discussed this at their 1/9/20 meeting
- In a speech I shared with at City Council on February 11, 2020
- In a letter I wrote to City Council on February 12th, 2020. I have updated that letter here reflecting comments on the current recommendations by Staff for the meeting tomorrow evening.

Unfortunately, very little of my proposal and ongoing comments have been incorporated into the current draft. **That makes me very sad, because I believe the path you are on will be frustratingly unsuccessful.** It makes me sad because **I want you to be successful in this**, and I truly believe that all of you (and all of the Parkland Committee members) want to have an effective policy that will **eliminate encroachments permanently without having to resort to costly enforcement legal actions.** But without modification that brings the proposed Policy more closely in alignment with my proposal, I am absolutely convinced it will be both a failure and lost opportunity.

Faced with this disconnect, I apologize for my ineffectiveness in clearly communicating my original proposal. *I must conclude that I have been ineffective in explaining why each of the elements are essential in order to create the motivation for residents to comply and remediate existing encroachments once identified (and adjudicated through the City processes).* So please permit me one last time to make it clear why I think all of these elements are crucial:

- **Bigger starting fines**
- **No cap on the escalation in fines if not remediated**
- **All fines due upon the end of adjudication, not after some grace period like 1-year**
- **Liens applied 1-year after fines assessed in all cases (not as a “last resort”)**
- **No grace period but 1-year amnesty from the date the new policy is enacted**
- **Legal actions to force compliance should be unnecessary**
- **Severity factors affect the size of the initial fine**

Let me approach each of these elements in turn and explain the rationale and importance of each.

Bigger starting fines

I am glad to hear that the majority of the Council has expressed an interest in bigger fines. This is critical because I believe the fines recommended by staff -- which start at \$1000 and escalate to a maximum of \$7500 -- simply won't work to address and fix/prevent the significant encroachments that are corrupting our parklands and denying public access to the paths/lanes/alleys between the streets and between the streets and our parkland. A lower fine may be sufficient to motivate action in terms of removing a 43 inch (or higher) bush or a small structural encroachment on street ROW; however, it will assuredly be ineffective in addressing the more significant encroachments when the value of retaining the encroachment in terms of residents' enjoyment and privacy while they own their home versus when the value of their property at the time they sell it far exceeds \$7500.

No cap on the escalation in fines for parkland encroachments if not remediated

Councilmember Kemp was the only councilmember in January 2020 who seemed to grasp the importance of no cap on fines. This is almost more important than the size of the initial fine. **The inevitability of a doubling for each year of inaction will truly motivate compliance and removal.**

Councilmember Davidson mentioned in January 2020 the egregious encroachments that Dr. Lugliani built on the parkland next to his property beginning in the late 1970s. Even if the fine had started at \$7500, it is only with a doubling each year that it would have reached truly motivating levels after five years (if not sooner) and quickly become more than the value of most homes in ten years. Faced with the inevitable prospect of such escalating fines, I am quite sure that Dr. Lugliani would have taken action very soon after he was originally cited in the late 1970s and certainly before this blew up in 2011 when he ignored the R05-32 citation issued in 2006. That inaction led to the notorious MOU and sale of parkland in 2012, and subsequent costly litigation to reverse the sale of parkland over the next five years. **All of that could have been avoided if this Policy proposal had been in place in 1978:**

Years since Citation	Year	Initial Fine \$2,500	Initial Fine \$5,000	Initial Fine \$10,000
0	1978	\$2,500	\$5,000	\$10,000
1	1979	\$5,000	\$10,000	\$20,000
2	1980	\$10,000	\$20,000	\$40,000
3	1981	\$20,000	\$40,000	\$80,000
4	1982	\$40,000	\$80,000	\$160,000
5	1983	\$80,000	\$160,000	\$320,000
6	1984	\$160,000	\$320,000	\$640,000
7	1985	\$320,000	\$640,000	\$1,280,000
8	1986	\$640,000	\$1,280,000	\$2,560,000
9	1987	\$1,280,000	\$2,560,000	\$5,120,000
10	1988	\$2,560,000	\$5,120,000	\$10,240,000
11	1989	\$5,120,000	\$10,240,000	\$20,480,000
12	1990	\$10,240,000	\$20,480,000	\$40,960,000
13	1991	\$20,480,000	\$40,960,000	\$81,920,000
14	1992	\$40,960,000	\$81,920,000	\$163,840,000
15	1993	\$81,920,000	\$163,840,000	\$327,680,000
16	1994	\$163,840,000	\$327,680,000	\$655,360,000
17	1995	\$327,680,000	\$655,360,000	\$1,310,720,000
18	1996	\$655,360,000	\$1,310,720,000	\$2,621,440,000
19	1997	\$1,310,720,000	\$2,621,440,000	\$5,242,880,000
20	1998	\$2,621,440,000	\$5,242,880,000	\$10,485,760,000
21	1999	\$5,242,880,000	\$10,485,760,000	\$20,971,520,000
22	2000	\$10,485,760,000	\$20,971,520,000	\$41,943,040,000
23	2001	\$20,971,520,000	\$41,943,040,000	\$83,886,080,000
24	2002	\$41,943,040,000	\$83,886,080,000	\$167,772,160,000
25	2003	\$83,886,080,000	\$167,772,160,000	\$335,544,320,000
26	2004	\$167,772,160,000	\$335,544,320,000	\$671,088,640,000
27	2005	\$335,544,320,000	\$671,088,640,000	\$1,342,177,280,000
28	2006	\$671,088,640,000	\$1,342,177,280,000	\$2,684,354,560,000
29	2007	\$1,342,177,280,000	\$2,684,354,560,000	\$5,368,709,120,000
30	2008	\$2,684,354,560,000	\$5,368,709,120,000	\$10,737,418,240,000
31	2009	\$5,368,709,120,000	\$10,737,418,240,000	\$21,474,836,480,000
32	2010	\$10,737,418,240,000	\$21,474,836,480,000	\$42,949,672,960,000

Eight Amendment citation by staff is not applicable

The staff Report says, “exponentially escalating fines might be viewed by a reviewing court as a violation of the excessive fines clause of the Eighth Amendment.” I looked this up and the full reference is: *“Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted”*. This is referred to as the *“Cruel and Unusual Punishment”* clause. It is a red herring here because the lawbreaker has the option of remedying the breach while the fine is still small. Failure to pay taxes when due cause fines to rapidly escalate with interest and penalties, and no one claims that is “cruel and unusual punishment.”

All fines due upon the end of adjudication, not after some grace period like 1-year

When someone robs a bank and gets caught, they pay a fine and/or go to jail. They don’t get a grace period in which they can correct their misdeed, return the stolen items and go away unscathed. This true with any law – if you act illegally, you pay a fine and/or serve a sentence. Why should removal of illegal encroachments be any different? It is like taxes. When someone is caught for not paying taxes they owe, even if it was an innocent error, they are assessed penalties (and then interest if they fail to pay promptly). Without fines, **there is no deterrence because there are no consequences (other than the cost of removal)**; but that deferred removal cost will be worth it to many residents because until they get caught (and one year after) they get the private use of parkland they don’t own and upon which they do not pay property taxes.

Liens applied 1-year after fines assessed in all cases (not as a “last resort”)

In previous City Council meetings, one of you asked whether it is legal to apply liens, and the City Attorney said yes. But the current proposal does not include them in all cases. These liens should not be “a last resort” as proposed by staff. A lien needs to be applied in each instance, probably automatically at the end of the one-year period. While the City cannot block the sale of a property, the City can make it difficult to get title insurance and a mortgage. And even if a buyer decided to pay cash and forego title insurance, they would inherit the rapidly escalating fine rendering their purchase prohibitively expensive. (BTW, I agree that the moratorium on permits when there is an open unresolved encroachment is appropriate.)

No grace period but 1-year amnesty from the date the new policy is enacted

Staff concluded in an earlier meeting that “amnesty is redundant.” That is true if everyone gets a one-year grace period to remove encroachments without paying a fine. But in my proposal it is **essential that the fine is assessed and due at the time of the citation (after being adjudicated** through the City’s normal Parklands Commission/Planning Commission/City Council vetting process). This motivates residents to be **self-enforcing**, in which they take the time to understand their boundaries, the rules, and live within those constraints. The amnesty period is important because it give the City time to educate the residents on the need for compliance and the severe consequences for not complying. **But once that initial amnesty period is over, there should be no exceptions – when someone breaks the law, the fine is triggered and owed AND they have to remove the encroachment.**

Legal actions to force compliance should be unnecessary

Some of your inquiries in past council meetings were about the cost of taking legal action. Legal action should not be necessary if deterrence becomes the norm. The exponential escalation of fines will cause remediation and payment to occur quickly – otherwise, the **owner won’t be able to sell their property and their liability will eventually exceed the value of their property.** The City can be patient and wait. As long as the escalation in fines is only applied to parkland encroachments which are based on deed restrictions (and not judgment which can be questioned), the City has no latitude in making exceptions (other than for public access). **Should an owner sue the City, they will lose. The City has the deed restrictions on their side, and this was validated in court during the CEPC case.**

Severity factors affect the size of the initial fine

All encroachments are clearly not the same. But it is not as simple as **vegetation vs structures.** Also needing to be considered is the degree to which blockage that restricts public access needs to be considered. For example, a dense and impassible hedge is more egregious than a paving stone or bird bath. An eight-foot-high wall is more egregious than a one-foot-high threshold wall (though that could be a tripping hazard). The fines should be expressed in a range, along with an explanation of the factors to be considered in determining the fine. *As the City Attorney pointed out, this cannot be arbitrary. But it also does not need to be specified in terms a specific list of fines for walls, pools gazebos, etc.* **The highest fines should be reserved for egregious encroachments on parkland and those are fairly obvious.**

Several other thoughts.

First, Public Education is critical. The City should use various means to educate the residents on this new policy and the importance of understanding property boundaries and whether they are in compliance so that they can take action during the amnesty period without intervention by the City. These means can include such initiatives as:

- City Website
- Pushout emails to those that subscribe to notices on the City website
- City Newsletter
- Articles in the Daily Breeze and Peninsula News
- Brochure that real estate brokers **MUST** hand out to buyers before they close on sales
- Town Halls to explain the new rules
- Reminders in City Council, Planning Commission and Parklands Committee meetings several times (for each governing body) during the first “amnesty” year
- Etc.

Second, City Right of Way Vacation. I strongly disagree with the recommendation that any city owned property is vacated and given to a resident without market compensation. All PVE residents own that common property, and it is inappropriate to give it away without compensation. This needs to be modified to apply only to the ROW along the street in front of houses. It should never be applied to ROW that includes the ninety or so Paths, Lanes and Alleys throughout our City that run between houses. Typically, these are 20 feet wide and there should be no allowance for blockage even though they are not deed restricted parkland. The Paths, Lanes and Alleys are part of the original Olmsted design of PVE which has no sidewalks; they provide passage between streets that can be important for public hiking/recreation as well as essential during such events as major earthquakes where the roads may become impassible. There have been instances in the past where the City vacated a Path and gave the land (without any compensation) to the adjacent owners. **This is what I am strongly opposed to since those paths are public property and it is totally inappropriate to grant that to adjacent owners without compensation to the City.** Since these paths are not Deed Restricted Parkland, there is no prohibition on the sale of these ROW Paths, but it should not be a free give-away for the benefit of adjacent residents at the expense of all other residents. ROW along the street is a different matter, and perhaps that is what the staff intended when they indicated that it was a possible tool for resolving enforcement. But the language of the document does not distinguish between these different types of ROW and it should.

Third, Code Enforcement Officer. The City needs a fulltime code enforcement officer now – at least until deterrence kicks in and the current backlog is resolved. If the City accepts my proposal for higher fines, escalating fines, and fines for all (no grace period after the original one-year amnesty), there will surely be more funds coming in from fines than the cost of such a code enforcement officer. At some point in the future, the situation will be more manageable, and this can become a part-time role.

+++++

I hope this brings clarity to my proposal, and that you now better appreciate how all these elements can work together to create an effective policy that cleans up the encroachments that exist today and stops new ones from being built (or planted) by providing an effective deterrence.

If any of you would like to discuss any of this with me directly, I stand ready to help. An effective Enforcement Encroachment Policy is very important to preserving the character of our City and ensuring

the vision of our City Founders and the Olmsted Brothers. An essential element of that vision was to create a desirable community as developed with a quarter of the land to be interlaced with open space **protected as parkland forever.**

Thank you for your time and consideration,

Sincerely,

A handwritten signature in blue ink, appearing to read "John Harbison". The signature is fluid and cursive, with the first name "John" and last name "Harbison" clearly distinguishable.

John Harbison
916 Via Panorama
(310) 739-1838
john_harbison@techspin.com