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SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF SAN DIEGO

MARGARET MCCANN, an individual

Petitioner,

v.

CITY OF SAN DIEGO, a charter city; BRIAN WIDENER; and DOES 1 through 10, inclusive

Respondents.

Case No.: 37-2020-00006266-CU-WM-CTL

VERIFIED PETITION FOR WRIT OF MANDAMUS; COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF

1. This case seeks to protect 110 year-old California pepper trees that were planted in conjunction with the original Kensington Park subdivision in approximately 1910. Such trees are an important part of the community, helping to create the historic ambience of Kensington, providing substantial cooling and shading, and aiding the sequestration of greenhouse gases.

2. Because of the age of the California pepper trees, such trees are entitled to extra-protection as "heritage trees" under Council Policy CP900-19. Nevertheless, the City Forester, BRIAN WIDENER, has unilaterally rejected protected status of such trees, and has ordered the removal of multiple California pepper trees. On January 13, 2020, one of the 110 year-old trees, located at 4539 Edgeware Road, was needlessly chopped down, despite assurances from the City Forester that no trees would be removed prior to meeting with the community and Kensington Talmadge Planning Group.

3. Injunctive relief is required to prevent any further loss of the 110 year old pepper trees without following the procedures outlined in Council Policy CP900-19. A writ should be issued requiring the City Forester to designate the 110 year-old pepper trees as protected trees, and forward the Conserve-a-Tree nomination to the Community Forest Advisory Board for their input.

JURISDICTION AND VENUE

4. Petitioner brings this matter under Code of Civil Procedure §§ 1060, 1085, and other relevant statutes.

5. Venue is proper in the Central District of the San Diego Superior Court because the actions, duties and obligations arise within the City of San Diego.

PARTIES

7. Petitioner MARGARET "MAGGIE" MCCANN is an individual who lives within the City of San Diego, in a neighborhood commonly known as Kensington.

8. Respondent CITY OF SAN DIEGO is a Charter City in the State of California and is responsible for the maintenance and trimming of trees located in the public right-of-way throughout San Diego.

9. Respondent BRIAN WIDENER is the Urban Forester for the City of San Diego. It is alleged on information and belief that all actions taken by Respondent BRIAN WIDENER were done in the course of his employment with the City of San Diego.

10. The names and capacity of DOES 1-10 are unknown. DOES 1-5 are either unelected decisionmakers or otherwise responsible for the violations of law and policy complained of herein. DOES 6-10 are unknown potentially interested parties, including contractors and subcontractors hired to replace sidewalks and cut down trees. It is unknown

whether such parties have a sufficient interest in the litigation to participate in the proceedings. It is alleged on information and belief that DOES 1-10 are neither necessary nor indispensable parties and are not required to be named pursuant to Code of Civil Procedure section 389.

PRELIMINARY ALLEGATIONS

11. Petitioner incorporates all previous paragraphs as if fully set forth herein.

12. Pursuant to Code of Civil Procedure section 388, Petitioner will file a notice on the Attorney General of the State of California and furnish of copy of this pleadings within 10 days.

13. Petitioner has attempted to exhaust administrative remedies to the extent that such remedies were available through contacting her City Council representative and contacting the City Forester.

14. To the extent that there was any failure to exhaust administrative remedies, Respondent is estopped from asserting such defense based on the fact that there is no clear process for asserting her administrative remedies.

15. Petitioner has no speedy, plain or adequate relief in the ordinary course of law.

16. Petitioner will be irreparably harmed by the activities complained upon herein, in that the loss of trees will permanently damage her and the neighborhood in a manner that cannot be compensated by monetary damages, and where the loss of the 110 year-old trees will make any future relief ineffectual.

17. Petitioner seeks declaratory relief in that there is a present and current controversy over the process for designating trees for protective status and that a declaration of rights in this case can help prevent multiple lawsuits over each tree that is threatened.

18. Petitioner is entitled to attorneys' fees pursuant to Code of Civil Procedure section 1021.5 in that:

a. The successful prosecution of this lawsuit will result in the enforcement of important rights affecting the public interest and will confer significant benefits upon the public or a large class of persons. Petitioner seeks to enforce provisions of important state environmental laws for the benefit of the public and to rectify certain procedural improprieties which will benefit all future participants in the decision making process employed by Respondents

b. the necessity and financial burden of private enforcement are such as to make the award appropriate; and,

c. Such fees will not be paid out of any recovery.

19. The action of respondents herein complained of were arbitrary and capricious and petitioner is entitled to recover attorney's fees pursuant to Government Code § 800.

BACKGROUND

20. Kensington is one of the early subdivisions of San Diego, having been created in 1910. It is described in the City's Mid-City Community Plan, "Named for borough in London England, Kensington is a pioneering subdivision dating to 1910. With its stone gateways, ornamental lighting, and curving street, the neighborhood is a strong candidate for designation as a historic district."

21. According to photographs in historic promotional materials, Schinus Molle, also known as California pepper trees, were planted along the streets in what was then known as the Kensington Park subdivision. According to the City's Historical Greater Mid-City San Diego Preservation Strategy survey conducted in 1996, the historic and architectural significance of the Kensington Park subdivision was described thusly, "The development boasted the most improvements of any other subdivision in San Diego, they included; grading, sidewalks, water, gas, lighting, pepper trees were planted along the streets and a small park."

22. On or about August 23, 2018, Jeanie Camp, with the assistance of Petitioner Margaret McCann, submitted an application under the City of San Diego's "Conserve-A-Tree Program" for designation of the 33 remaining California pepper trees for protected status, via U.S. Mail. The application was accompanied by maps showing the locations of the current pepper trees and photographs showing the historical evidence that the pepper trees were planted in 1910 or shortly thereafter.

23. On or about January 17, 2019, Petitioner Margaret McCann resubmitted the application under her own name via email. The application was emailed directly to Respondent Brian Widener, as well as staff for Council President Gomez.

24. On or about January 27, 2019, Petitioner sought to find out the status of the "Conserve-A-Tree" application. She received a response from respondent Brian Widener stating

that the City was behind processing Conserve-A-Tree applications, and that it may take more than a year to process.

25. On March 5, 2019, Petitioner filed a lawsuit against the City of San Diego's CEQA process used in approving electrical undergrounding projects. One of her concerns was the potential impacts to the 110 year-old pepper trees. (*McCann v. City of San Diego,* SD. Sup. Ct. Case No. 37-2019-00011813-CU-TT-CTL.)

26. On July 29, 2019, Petitioner was informed verbally by City Contractors that the 110 year-old pepper tree in front of her house was to be removed as part of sidewalk repair at 4650 Edgeware Road. Petitioner contacted respondent Brian Widener via email inquiring into the status of the Conserve-A-Tree application. The correspondence correctly identified the standards for a "Heritage Tree" as 50 years or older or connected to a historical event, building or district or planted by a historically significant individual. By automatic reply, Ms. McCann was informed that respondent Brian Widener was on vacation and would not be back until August 5, 2019.

27. On July 29, 2019, Petitioner hired a Certified Arborist to assess the health of the pepper tree at 4650 Edgeware Road. The arborist concluded that the tree was healthy and posed no danger.

28. On July 30, 2019, Celia and David Conover, Kensington residents and friends of Petitioner, sent basically the same letter to Council President Georgette Gomez identifying the trees at heritage trees and requesting that the City declare a city-wide moratorium on removal of the mature trees until personnel from the City's Urban Forestry division and a Community Forest Advisory Board arborist performed an onsite inspection of any of the trees marked for removal.

29. On August 7, 2019, a representative from Georgette Gomez's office sent a response to Petitioner and the Conovers allegedly containing a statement from the City Forester. Of note, the statements from Brian Widener indicated that the tree in front of Petitioner's house was sound and stable, but that "although this tree does fit most of the criteria of a Heritage Tree, the City does not normally place pepper trees under protected tree status." The statement alleged that the City Forester "confirmed that the other 35 pepper trees identified as potential parkway trees do not meet the criteria or condition for that designation." The statement concluded "Given

Mr. Widener's finding, the Transportation and Storm Water Department cannot approve Ms. Camp's application."

30. On November 13, 2019, Respondent Brian Widener appeared at the monthly meeting of the Kensington Talmadge Planning Group. The agenda item was described as "Information Item: Presentation by City Staff regarding City Tree Trimming." The meeting minutes show that Mr. Widener discussed a variety of topics, none of which were removal of the 110 year old pepper trees.

31. On or about December 2, 2019, Petitioner McCann wrote to Council President Gomez noting that while she was thankful that her tree was apparently spared, two other 110 year-old California Pepper Trees had been marked for removal. Petitioner quoted the criteria from Council Policy CP900-19, noting that all the 33 remaining California pepper trees in Kensington qualified as heritage trees. Ms. McCann objected to Respondent Brian Widener's claim that pepper trees were not entitled to protected tree status based on "growth form and characteristics." At the same time, Petitioner McCann informed Council President Gomez's staff that four more historic pepper trees were marked with a white X, indicating that they were scheduled for removal.

32. In addition, Petitioner McCann demanded that respondent City Arborist employ the process outlined in Council Policy CP900-19, which required all tree removal requests to be sent to Community Planning Groups, the Community Forestry Advisory Board and Council members. Importantly, Council Policy CP900-19 states that "If the tree qualifies, the City of San Diego Urban Forester or Park Arborist will designate the tree as protected."

33. In the intervening weeks, Ms. McCann tried repeatedly to coordinate a meeting between the City Forester, the City Council Representatives and community members. On December 20, 2019, the parties agreed to postpone a meeting until after the holidays. The representative for President Gomez's office stated, "That sounds good – no trees will be taken down in the meantime. We asked that the City Forester come to the Planning Group before taking further action so our office will work with the Mayor's Office on scheduling that for early next year."

34. On January 8, 2020, the Kensington Talmadge Planning Group held a meeting. The City Forester was not present and there was no agenda topic relating to trees.

35. On January 13, 2020, a subcontractor for the City of San Diego cut down a large and stable 110-year old pepper tree at 4539 Edgeware Road, in Kensington. The sidewalk had already been repaired during the previous year and had been designed with a cut-out to prevent any damage to the pepper tree's roots. Upon talking to the arborist that supervised the removal of the 110 year-old California pepper tree, he informed Petitioner that the next tree that was scheduled to be removed was down the street and indicated the tree that was at 4650 Edgeware Road. Such tree is directly in front of Petitioner's house, and was referred to by Respondent Brian Widener thusly, "Our horticulture team evaluated the 32-inch diameter California pepper tree at 4650 Edgeware Road yesterday afternoon. The tree was found to be sound and stable at time of the evaluation."

36. Petitioner immediately filed a TRO, which was granted by Judge Taylor on January 14, 2020 in *McCann v. City of San Diego,* SD. Sup. Ct. Case No. 37-2019-00011813-CU-TT-CTL. Judge Taylor set an OSC re Preliminary Injunction for February 7, 2020. This lawsuit follows.

FIRST CAUSE OF ACTION

(WRIT OF MANDAMUS)

37. Petitioner re-alleges all previous paragraphs as if fully set forth herein.

38. Petitioner alleges on information and belief that the City Forester, or its subcontractors failed to get a tree removal permit from the City of San Diego's Parks and Recreation Director, as required by San Diego Municipal Code section 62.0604, prior to removing the tree at 4539 Edgeware, and the threatened removal of other 110 year-old trees in Kensington. Alternatively, if such tree removal permit was issued, it was issued without following the procedures outlined in City Council Policy CP900-19.

39. Petitioner alleges that the Respondent Brian Widener abused his discretion by denying the application to designate the thirty-three 110 year-old pepper trees as Heritage Trees, entitled to protected tree status, when such trees fall within the definition of "Heritage Trees" in Council Policy CP900-19.

40. Petition alleges on information and belief, that Respondent Brian Widener failed to follow the procedures outlined in City Council Policy CP900-19, by not considering or

seeking the input of community members, the Kensington Talmadge Planning Group, and the City Forestry Advisory Board, prior to causing the removal of the tree at 4539 Edgeware road, and the removal of other 110 year-old trees.

41. Respondent Brian Widener has exceeded his authority by adopting an unwritten policy of refusing to designate California Pepper Trees, or other Pepper Trees, as protected trees, contrary to CP900-19.

42. Respondent Brian Widener has exceeded his authority by adopting an unwritten policy of allowing only individuals adjacent to the street trees to seek protected status for the trees, and refusing to consider an application that seeks "heritage tree" status for 33 heritage trees.

43. Petitioner alleges, on information and belief, that Respondent Brian Widener has violated his duties under the law, and that the City of San Diego has endorsed, accepted and/or encouraged such violations, contrary to policies that mandate an increase in canopy cover and the planting of more trees.

44. Petitioner is entitled to a writ of mandamus, ordering the City Forester to rescind the denial of Petitioner's application for the heritage tree status for the thirty-two remaining 110 year-old pepper trees in Kensington.

45. Petitioner is entitled to a writ of mandamus ordering the City and the City Forester to provide notice to Kensington Talmadge Planning Group, the Community Forest Advisory Board and to City Council representative for any plans to cut down trees in Kensington, unless such trees are less than 8 inch in trunk diameter.

46. Petitioner is entitled to a writ of mandamus ordering the City and the City Forester, upon notice, to designate any tree that is over 50 years old as a heritage tree, and forward such recommendation to the Community Forest Advisory Board.

SECOND CAUSE OF ACTION

(DECLARATORY RELIEF AND INJUNCTIVE RELIEF)

47. Petitioner re-alleges all previous paragraphs as if fully set forth herein

48. Petitioner has a current beneficial interest in protecting the 110 year-old pepper trees from being chopped down in Kensington, and for the City Forester to follow the law and Council Policy CP900-19.

49. Petitioner alleges that the City Forester cannot unilaterally deny protected tree status without considering comments from residents of Kensington, from the Kensington Talmadge Planning Group and comments from the Community Forest Advisory Board.

50. Petitioner alleged that the City Forester cannot implement an unwritten rule that denies protected tree status to California pepper trees regardless of the pepper trees' age and historical significance.

51. Petitioner alleges that the City Forester broke the law and violated City Council Policy CP900-19 by cutting down the 110 year old pepper tree in front of 4539 Edgeware Road, in San Diego.

52. Upon information and belief, the City of San Diego and City Forester Brian Widener disputes such facts.

53. Whereas, a judicial declaration of this issue is necessary to avoid a multiplicity of lawsuits as the City and City Forester attempts or succeeds in cutting down the 110 year-old pepper trees in Kensington.

54. Petitioners is entitled to injunctive relief, preventing the further removal of 110 year-old California Pepper Trees, in that monetary damages are not available and would not adequately compensate petitioner for the loss caused by the removal of the trees.

PRAYER FOR RELIEF

WHEREFORE Petitioner prays for the following relief

1. For a peremptory writ of mandate directing:

(a) Respondents to vacate and set aside all current plans, permits or contracts for the removal of the 110 year-old pepper trees in Kensington until it complies with the law and Council Policy CP900-19

(b) Respondents to provide notice to the Kensington Talmadge Planning Group, the Community Forest Advisory Board and City Council members and consider

comments from such entities or comments submitted to such entities prior to removing any of the 110 year-old California pepper trees in Kensington

(c) Respondents to designate the 110 year old pepper trees as Heritage Trees entitled to protection as set forth in Council Policy CP900-19;

2. For declaratory relief that the City of San Diego and the City Forester violated the law and Council Policy CP900-19 when it caused the removal and destruction of the 110 year-old California pepper tree at 4539 Edgeware, and threatened the removal of other 110 year-old California pepper trees;

3. For declaratory relief that the City of San Diego and City Forester violated the law and Council Policy CP900-19 when it implemented an unwritten policy and law refusing to designate the species Schinus Molle for protected tree status, despite trees qualifying for such protected status under the CP900-19;

4. For preliminary and permanent injunctive relief, prohibiting the City of San Diego and the City Forester from removing any of the 110 year-old California pepper trees, unless it makes findings and complies with all the requirements outlined in CP900-19(C);

5. For costs of suit incurred herein;

6. For an award of attorneys' fees, and;

7. For other or further equitable relief that the court considers just and proper.

DATE: February 3, 2020

LAW OFFICE OF TODD T. CARDIFF

Todd T. Cardiff, Esq.
Attorney for Petitioner
Margaret McCann

VERIFICATION

I, MARGARET MCCAN, DECLARE

I am the petitioner in the above titled action. I have read the foregoing petition for writ of mandamus and am familiar with its contents. I verify that the facts recited in the petition are true of my own personal knowledge, except for facts alleged on information and belief, and as to those facts, I believe them to be true.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. Executed on February 3, 2020, in San Diego, California.

Margaret McCann