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7 **UNITED STATES DISTRICT COURT**
 8 **SOUTHERN DISTRICT OF CALIFORNIA**

10	JOHN VAN DE WALKER, TRACY) Case No.
11	VAN DE WALKER)
12		) PETITION AND COMPLAINT FOR
13	PLAINTIFFS,	) WRIT OF MANDATE, INJUNCTIVE
14		) RELIEF AND DAMAGES
15	vs.)
16		) FEDERAL AND STATE CIVIL RIGHTS,
17	BRIAN K. WIDENER,	) INVERSE CONDEMNATION, CALIFORNIA
18	INDIVIDUALLY AND AS AN	) ENVIRONMENTAL QUALITY ACT;
19	EMPLOYEE OF THE CITY OF	) CALIFORNIA CONSTITUTION VIOLATIONS
20	SAN DIEGO, FEDERAL AVIATION)
21	ADMINSTRATION,)
22	SAN DIEGO COUNTY REGIONAL	) [49 CRF §24, 42 USC §1983, United States
23	AIRPORT AUTHORITY,	) Constitution, Fifth Amendment, California Art. 16
24	CALIFORNIA COASTAL	) Sec. 6, Art 1, Sec. 13, Public Resources Code
25	COMMISSION, DOES 1-50	) §21167]
26)
	DEFENDANTS.)

INTRODUCTION

1
2 1. BRIAN K. WIDENER (“CITY FORESTER”) wants the city of San Diego to
3 remove all tall palm trees, including, but not limited to those on Newport Avenue, Santa
4 Barbara and Newport to Venice Street in Ocean Beach, California in addition to having the
5 taxpayers in California bear the cost of the environmental impact for improving airport
6 safety without an environmental impact study being approved and ratified by the California
7 Coastal Commission or by having a public forum open to discussion by the homeowners in
8 this district.

9 2. In attempting a quick grab for federal money available from the Federal
10 Aviation Administration (FAA), the City of San Diego City Forester is attempting to slip
11 under the radar of public scrutiny and to avoid environmental review of the significant
12 impacts of mitigation violating FAA procurement rules by instructing the City Forester to
13 cut down, extract and/or destroy iconic and historic palm trees, including, but not limited
14 to those located on Newport Avenue, Santa Barbara and Newport to Venice Street.
15 (“PROJECT”)

16 3. On October 22, 2021, PLAINTIFFS, through counsel sent a cease and desist
17 letter to the San Diego Mayor, City Attorney, City Forester and the FAA. (A true copy is
18 attached as Exhibit A)

19 4. Upon information and belief all city, county and federal government officials
20 are ignoring the multiple attempts by undersigned counsel in favor of CITY FORESTER
21 extraction efforts. The result has been a conscious effort to avoid providing public notice to
22 the City of San Diego residents, including, but not limited to the PLAINTIFF. Property
23 owners and taxpayers in this district, including the plaintiffs were never told about the plan
24 to remove the 100 year old, iconic palm trees until they received a boiler plate letter from
25 the San Diego Airport Authority on or about October 16, 2021 and still have not been
26 presented with any details of what and when the City of San Diego or the FAA sets out to
do. (A true copy of the correspondence is attached as Exhibit B)

1 Recorder that was purchased on April 4, 2008 and have lived in this neighborhood and
2 district for over 25 years. (herein as the SUBJECT PROPERTY).

3 13. At all times material, PLAINTIFFS have attempted to participate fully in the
4 public comment and public hearing process involving the palm trees lined on Newport.

5 14. PLAINTIFFS have exhausted all administrative remedies, including objecting
6 consistently to the Project as it has been presented and considered, raising the factual and
7 legal objections asserted in this complaint, and through repeated attempts to obtain
8 authority in compliance with laws and procedures herein alleged have been violated.

9 15. In the case of *Aaron v City of Los Angeles*, the Court of Appeal, Second
10 District, Division 5, held that the City was liable as the owner of Los Angeles Airport in
11 inverse condemnation to the owners of residential property in the neighborhood and had its
12 property value damaged and reduced in market value by the noise from jet aircraft taking
13 and landing at the airport; and in the landmark case of *United States v Causby*, 328 U.S 256
14 (1946), the Supreme Court held that the taking of property without compensation was in
15 violation of the Fifth Amendment of United States Constitution.

16 16. On June 23, 2005, the Supreme Court of California upheld the constitutionality
17 of the California Coastal Commission that has authority for land use planning along the
18 state's coastline including, but not limited to hearing applications for coastal permits,
19 promulgating regulations to preserve coastal resources, including, but not limited to, palm
20 trees.

21 17. Defendants DOES 1 through 50, inclusive, are sued herein under fictitious
22 names. Their true names and capacities are known to Plaintiffs. When their true names and
23 capacities are ascertained, Plaintiffs will amend this Complaint by inserting their true
24 names and capacities herein. Each of the fictitiously named Defendants are responsible in
25 some manner for the occurrences herein alleged, and Plaintiffs' damages as herein alleged
26 were proximately caused by those Defendants. Each reference in this Complaint to

1 “Defendant,” “Defendants,” or specifically named Defendant, refers also to all Defendants
2 sued under fictitious names.

3 18. Each of the Defendants, including all Defendants sued under fictitious names,
4 was the agent and employee of each of the remaining Defendants, and in doing the things
5 hereinafter alleged, was acting within the course and scope of this agency and employment.

6 19. At all times relevant herein, Defendants have acted under the color of authority
7 of the law of the State of California, of the United States, or in active concert with such
8 Defendants who are so acting.

9 20. Relief is sought against each and all defendants as well as their agents,
10 assistants, successor, employees and persons acting in concert or cooperation with them or
11 at their direction or under supervision.

12 **III. JURISDICTION AND VENUE**

13 21. Federal court jurisdiction of the federal law questions is founded upon Title 28
14 U.S.C. sections 1331 and 1343. This Court has supplemental jurisdiction of the state law
15 claims regarding the same transaction and events under 28 U.S.C. §1367(a) in that those
16 claims form part of the same case or controversy under Article III of the United States
17 Constitution.

18 22. Plaintiff’s claims, alleged herein, arose in this district. Therefore, venue lies in
19 the Southern District of California pursuant to 28 U.S.C. §1391(b)(c).

20 **IV. GENERAL ALLEGATIONS**

21 23. PLAINTIFFS make the following allegations based upon information and
22 belief. The paragraphs below will refer to information in numerous documents relating to
23 this lawsuit, all of which will be duly filed with this court as a part of the record of
24 proceedings, herein incorporated by reference.

25 24. On or about April 4, 2008, PLAINTIFFS purchased its SUBJECT
26 PROPERTY that included the ambience and style of being surrounded by tall and iconic
palm trees majestically lined up in regal fashion. PLAINTIFFS allege that the CITY OF

1 SAN DIEGO has long coveted the palm trees for its own agenda. Upon information and
2 belief the palm trees to be extracted in Point Loma appear to be Fan Palms that are
3 indigenous to the State of California that require protection by the California Coastal
4 Commission. The current attempt to take or remove these palm trees while evading an
5 eminent domain action would use federal FAA money to extract these trees as putative
6 “mitigation” of the environmental impacts by the San Diego International Airport miles
7 away.

8 25. Plaintiff’s at the time they purchased their property, reasonably assumed that
9 the historical palm trees would continue to grow, thus embellishing its property value and
10 the aesthetics of the coastal neighborhoods as planned by the father of Ocean Beach, Charlie
11 Collier that planted the palm trees on or about 1910 before anyone put an airfield at
12 Lindbergh field that opened on August 16, 1928.

13 26. Inverse Condemnation is a Fifth Amendment, US Constitution legal concept
14 that entitles property owners to just compensation if their property is damaged or
15 diminished by a public use.

16 27. Meanwhile, without any proper environmental analysis, without any
17 explanation of a public purpose or description of the “project” the defendants has
18 threatened to willy-nilly extract, mutilate and remove palm trees notwithstanding the
19 vehement objections of the PLAINTIFFS and other homeowners and taxpayers in this
20 district.

21 **FIRST CAUSE OF ACTION**

22 **VIOLATION OF REAL PROPERTY ACT**

23 (Against FAA and the San Diego International Airport)

24 28. PLAINTIFFS incorporate all previous allegations as if fully set forth, and for a
25 first caue of action, alleges as follows:

26 29. DEFENDANT FAA is required to administer and monitor the federal Real
Property Act, 59, CFR 24 (“Real Property Act”).

1 International Airport attempt to skirt payment of compensation to acquire or utilize
2 property interests based on an alleged public benefit.

3 31. By the actions of the FAA as alleged in this suit, the FAA has knowingly or
4 negligently allowed the San Diego International Airport to violate the Real Property Act
5 though its actions as alleged in this suit.

6 32. The property of the plaintiffs will be damaged or taken by the Airport
7 methodical and systematic destruction of the palm trees. Plaintiff's will prove that the
8 destruction of the palm trees are done not for an ostensible or altruistic airport related
9 project, but for an undisclosed hidden agenda by the SAN DIEGO FORESTER and to use
10 public funds for that purpose.

11 33. As alleged herein, all threatened loss of palm trees in the subdivision,
12 including plaintiff's, has incurred loss of value, and loss of all or some use by the Airport
13 Authority's alleged safety concerns.

14 34. The FAA has thereby allowed the CITY FORESTER to advance the time of
15 condemnation and that the PLAINTIFFS request that the defendants deposit funds with the
16 court, and to take other coercive action in order to induce an agreement on the price to be
17 paid for property, and to limit acquisitions to those owners sufficiently distressed to compel
18 their sale.

19 SECOND CAUSE OF ACTION

20 VIOLATION OF FIFTH AMENDMENT DUE PROCESS AND CIVIL RIGHTS

21 (42 USC §1983, Against all Defendants)

22 35. PLAINTIFFS incorporate all previous allegations as if fully set forth, and for a
23 second cause of action, alleges as follows:

24 36. By its acts, policies and practices, the Authority has deprived plaintiffs of their
25 due process rights under the Fourteenth Amendment of the United States Constitution. The
26 oppressive tactics taken by the Authority deprives plaintiffs of their right to just
compensation under the Fifth Amendment of the U.S. Constitution and Art. 1, §19 of the
California Constitution.

1 37. Plaintiffs see damages already incurred and request an injunction against
2 further impositions upon the value and use of its private property, and such other relief as
3 provided by law.

4 **THIRD CAUSE OF ACTION**

5 **INVERSE CONDEMNATION DAMAGES**

6 38. PLAINTIFFS incorporate all previous allegations as if fully set forth, and for a
7 third cause of action, alleges as follows:

8 39. The California and United States constitutions require just compensation for a
9 taking of private property for public purposes.

10 40. By the following actions, the Airport Authority has imposed inverse
11 condemnation damages upon the plaintiffs:

12 a. Depreciation to their single family residence due to threatened removal of
13 palm trees. By repeated conduct of the CITY FORESTER, the PLAINTIFFS' property has
14 depreciated. Any offers to purchase PLAINTIFFS single family residence under such threat
15 results in a distressed sale.

16 b. Impairment of improvements. The public acquisition of private properties in
17 the PLAINTIFFS subdivision has damaged and is damaging the ability of the PLAINTIFFS
18 to economically acquire the infrastructure to improve their properties and the subdivision.

19 c. Increased flooding. The removal of the palm trees will cause ponding, reduced
20 drainage, and increased flooding throughout the subdivision and at PLAINTIFFS'
21 properties.

22 41. PLAINTIFFS seek a judgment that the public acquisition of private properties
23 and the removal of public palm trees as to the property value of the PLAINTIFFS residence
24 and for the award of those damages by a jury. PLAINTIFFS also seek precondemnation
25 damages caused by the Authority's statements that all palm trees will be removed to protect
26 the airspace that surrounds San Diego International Airport

1 **FOURTH CAUSE OF ACTION**

2 **VIOLATIONS OF THE CALIFORNIA ENVIRONMENTAL QUALITY ACT**

3 (Government Code §§21000 et seq., Against All Defendants)

4 42. PLAINTIFFS incorporate all previous allegations as if fully set forth, and for a
5 fourth cause of action, alleges as follows.

6 43. The San Diego International Airport (“DEFENDANT”) abused its discretion
7 and failed to act in the manner required by law or was arbitrary and capricious in that it
8 failed to conduct an environmental analysis in violation of the California Environmental
9 Quality Act (“CEQA”).

10 44. A fair argument of potentially significant environmental impacts can be made
11 by PLAINTIFFS as detailed in the allegations herein.

12 45. By its arbitrary and capricious removal of the palm trees, the San Diego
13 International Airport has embarked on a removal project without completing CEQA-
14 mandated environmental review.

15 46. Violations of the CEQA by the Authority include but are not limited to:

16 a. Failure to provide public notice. The Authority is required under PRC §21092
17 to provide public notice of actions to the PLAINTIFFS. CEQA invokes the policy of
18 permitting full public participation throughout the environmental review process it
19 commands. The Authority never complied with PRC §21092. It still hasn’t.

20 b. Failure to provide a proper project description. The Authority has never
21 provided a definitive description of the Airport Project. The Authority has never described
22 where and when the palm tree removal project might occur, how it would be achieved, how
23 many properties it would acquire and where, when the mitigation would be achieved.

24 c. Failure to analyze and describe potentially significant environmental impacts
25 of the project. The Authority’s apparent plan to “remove” the palm trees, or some of them,
26 somewhere, would create significant environmental impacts, including but not limited to
the removal of the drainage system that was constructed to drain the surface of the

1 subdivision, resulting in changed drainage. It would change land use. It would propagate
2 invasion of protected species on adjacent private lands.

3 d. Failure to describe and analyze habitat impacts. The palm tree removal project
4 is apparently predicated upon airport safety as substitution for the impacts caused by the
5 airport expansion. However, the Authority has no basis at all for identifying and describing
6 where, what and how such habitat will be created, much less analyze the impacts of those
7 efforts upon adjoining private properties. Creating habitat next to private property will
8 potentially impact adjoining private properties by exposing those properties to species
9 invasion.

10 e. Failure to analyze alternatives. CEQA required a formal description and
11 evaluation of alternative to a proposed project. The random extraction or removal of palm
12 trees had never been compared with other alternatives which might be more or less
13 successful in achieving the mitigation once a mitigation project is actually described for
14 proper comparison.

15 47. Therefore, PLAINTIFFS seek an immediate injunction of the Court to enjoin
16 any removal of the palm trees within the subdivision, to pursue any regulatory approvals, or
17 to implement any physical changes to the palm trees pending any final ruling, decision,
18 mandate or permanent injunction of the Court, and that a writ issue mandating conformance
19 with CEQA, including an EIR properly describing and analyzing the project and
20 alternatives to it.

21 **FIFTH CAUSE OF ACTION**

22 **VIOLATION OF CONSTITUTION PROHIBITION OF PRIVATE GIFTS OF**
23 **PUBLIC MONEY**

24 (California Constitution Article XVI, §6, Against Authority Only)

25 48. PLAINTIFFS incorporate all previous allegations as if fully set forth, and for a
26 fifth cause of action, alleges as follows:

1 49. California Constitution Article XVI, §6, prohibits gifts of public funds for
2 private purpose as alleged by the tortious conduct of the CITY OF SAN DIEGO
3 FORESTER, BRIAN K WIDENER.

4 50. PLAINTIFFS seek an injunction, writ of mandate or other such relief as may
5 be necessary by the Court to prohibit the San Diego International Airport use of public
6 funds to extract any palm trees that are scheduled for removal.

7 **PRAYER**

8 WHEREFORE, PLAINTIFFS pray:

9 1. That the Court issue a writ of mandate requiring the Authority's compliance
10 with the California Environmental Quality Act by the certification on an environmental
11 impact report addressing all potential environmental impacts of the proposed mitigation,
12 with notice to the plaintiff and all private property owners providing compliance with
13 CEQA;

14 2. For a judgment of inverse condemnation caused by San Diego International
15 Airport by the promotion of extracting, removing or mutilating 100 year old palm trees that
16 embellish PLAINTIFFS subdivision, and by the impairment of easements and other means
17 of improving the plaintiffs' property and to other property owners, and for a jury trial for an
18 award of damages.

19 3. For such injunctive and declaratory relief as in the Court's judgment is
20 necessary to compel compliance with the federal Real Property Act, the California
21 Constitution prohibition against the gifts of public funds, and to guarantee plaintiffs' due
22 process and civil rights;

23 4. For costs of the suit and attorney's fees; and

24 5. For other and further relief s the court finds proper.

25 Date: October 28, 2021 s/s Marc Steven Applbaum
26 Marc Steven Applbaum, Esq.
Attorney for PLAINTIFFS