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SUPERIOR COURT OF THE STATE OF CALIFORNIA
COUNTY OF CONTRA COSTA

SAVE LAFAYETTE TREES, MICHAEL DAWSON
and DAVID KOSTERS,

Petitioners and Plaintiffs,

v.

CITY OF LAFAYETTE, and DOES 1 through 100,

Respondents and Defendants,

PACIFIC GAS AND ELECTRIC COMPANY, and
DOES 101 through 200,

Real Parties in Interest.

Civ. No.

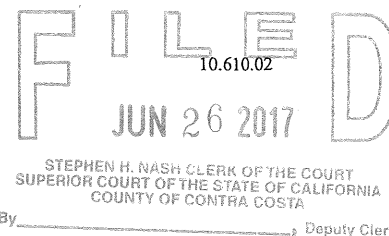
N17-1142

**VERIFIED PETITION FOR WRIT OF
MANDATE AND COMPLAINT FOR
DECLARATORY AND INJUNCTIVE
RELIEF AND FOR ATTORNEYS
FEES**

CEQA CASE

Action Filed: June 26, 2017

Petitioners and Plaintiffs SAVE LAFAYETTE TREES, MICHAEL DAWSON
and DAVID KOSTERS (collectively, "Save Lafayette Trees") hereby petition the Court for a writ of
mandate and declaratory and injunctive relief ordering defendant and respondent City of Lafayette
("City") to rescind its approval on March 27, 2017 of a Letter Agreement for Tree Removal ("Tree
Removal Agreement"). The Tree Removal Agreement allows real party in interest Pacific Gas and
Electric Company ("PG&E") to remove 272 healthy, mature and in many cases, iconic old growth oak,
redwood and other native trees as large as 7 feet in diameter – including 216 trees protected by the City's
Tree Protection Ordinance, Lafayette Municipal Code Sections 6-1701 to 6-1713 – without compliance
with state and municipal laws protecting the environment and in violation of the Due Process rights of
the City's residents. By this Verified Petition for Writ of Mandate and Complaint for Declaratory and



1 Injunctive Relief and for attorney's Fees ("Verified Petition"), Save Lafayette Trees alleges as follows:

2 **INTRODUCTION**

3 1. This is a public interest citizen suit to enforce the California Environmental Quality Act,
4 Public Resources Code section 21000 et seq. ("CEQA"), the Planning and Zoning Law, Government
5 Code section 65000 et seq. ("PZL"), the California Constitution's Due Process Clause, and the City of
6 Lafayette's General Plan and Tree Protection Ordinance. CEQA is California's preeminent
7 environmental law. It requires all public agencies to examine the potential adverse impacts of their
8 actions before taking them. It is designed to protect California's extraordinary environmental resources
9 from uninformed and needlessly destructive agency actions. The PZL is California's comprehensive
10 land use planning law that assures that local land use and resource development decisions are consistent
11 with the governing general and specific plans and applicable zoning and environmental protection
12 ordinances such as the City's Tree Protection Ordinance. Compliance with the PZL assures that the
13 publicly reviewed and adopted land use goals, policies and programs for each community are honored
14 and implemented rather than ignored and violated. California's Due Process Clause – Article I, section 7
15 – guarantees that each Californian "may not be deprived of life, liberty or property without due process
16 of law" including a duly noticed, fair hearing in which each person has an opportunity to present
17 evidence and arguments before a public agency may take administrative action, such as the City's
18 exemption of PG&E from the City's Tree Protection Ordinance, that harms that person's protected
19 property rights.

20 2. Contrary to these statutory and constitutional protections of petitioners' – and the public's –
21 rights on March 27, 2017 the City Council by a bare quorum of 3 votes purported to approve the Tree
22 Removal Agreement allowing PG&E to remove 272 healthy, mature and in many cases, iconic native
23 trees that define, protect and enrich public and private open space of inestimable value to all residents of
24 the City. Trees to be removed include scores of massive and venerable coastal live oaks, valley oaks,
25 coast redwoods, California buckeyes, and other protected native tree species located along the popular
26 Lafayette Reservoir Rim Trail, the Lafayette-Moraga Regional Trail, and other public open space highly
27 valued for their scenery and wildlife habitat. The City failed to provide petitioners and the public with
28 required public notice before it entered into the Tree Removal Agreement with PG&E. The City's

1 approval of the Tree Removal Agreement without any notice to petitioners or the public violated the City
2 General Plan and its Tree Protection Ordinance, evaded the detailed environmental analysis required by
3 CEQA, the comprehensive planning review mandated by the PZL and the City Municipal Code
4 provisions governing planning and land use including Title Six, Sections 6-205, 6-211, 6-215 and 6-225,
5 and violated the public notice and fair hearing commands of the California Constitution and Government
6 Code section 65090 et seq.

7 3. The sole basis for the City's entry into the Tree Removal Agreement was a false and
8 misleading propaganda campaign rolled out by PG&E touting the supposed benefits of implementing its
9 "Community Pipeline Safety Initiative" ("CPSI"). According to PG&E's marketing campaign, the CPSI
10 reflects PG&E's commitment "to the safety of its customers and the communities it serves" and is
11 intended to "clear areas around pipelines of trees so that first responders and crews have immediate
12 access, the pipe can be properly inspected, and tree roots do not damage the pipe." (City Staff Report
13 summarizing PG&E's rationale for its proposed tree removal campaign prepared for the City Council's
14 March 27, 2017 Meeting, at p. 1.)

15 4. In fact, none of the three ostensible purposes of the CPSI is true. As attested by a Fire
16 Captain with the San Ramon Fire Protection District and other qualified fire suppression professionals,
17 first responders would not remove trees or their roots in responding to a threatened or actual natural gas
18 explosion or fire. Instead, they would "isolate and deny entry" to the affected area and wait until the
19 pipeline's automatic shut-off valve (or PG&E itself) shut off the gas, and PG&E conducted the repairs.
20 Second, the gas lines in question are already accessible to vehicles along the Lafayette Reservoir Rim
21 Trail, the Lafayette-Moraga Regional Trail, and other pipeline locations in which PG&E proposes to
22 remove healthy and mature trees. Third, PG&E has never presented any documentation of a single
23 instance where tree roots created a hazard for gas pipelines. To the contrary, the only study PG&E ever
24 conducted of this issue, a 2014 report, concludes to the contrary that "[a]vailable data provides no direct
25 evidence that the presence of live tree roots in contact with the [gas] pipe increased the susceptibility to
26 the initiation of stress corrosion cracking," "[a]bove ground [pipeline] surveys are not significantly
27 affected by the presence of tree roots," and "the effectiveness of External Corrosion Direct Assessment
28 (ECDA) does not appear to be adversely affected by the presence of tree roots."

1 5. PG&E's motivation for its CPSI appears instead to be to reduce the cost of monitoring the
2 condition of its gas pipelines by facilitating examination from the air rather than from the ground.
3 Monitoring by air, however, is neither as accurate nor as complete as monitoring by ground, resulting in
4 less rather than greater public safety.

5 6. Although PG&E has implied that the CSPI is intended to assure the public that PG&E has
6 "learned its lesson" from the catastrophic September 2010 San Bruno gas pipeline explosion caused by
7 its criminal negligence, the facts do not support this claim. According to the National Transportation
8 Safety Board investigation of that explosion, its probable cause was a substandard and poorly welded
9 section of pipeline installed in 1956, coupled with PG&E's 96-minute delay in shutting off the gas
10 supply after the explosion had occurred. Cutting down Lafayette's heritage trees does nothing to address
11 the actual hazards posed by PG&E's gas pipelines, many of which were installed between 1962 and
12 1967. Thus, rather than improving public safety, PG&E's CPSI is intended to reduce PG&E's costs of
13 pipeline maintenance and may expose the public to greater safety hazards due to less effective aerial
14 monitoring and reduced lateral and subjacent soil support for pipelines in areas where live tree roots help
15 stabilize steep slopes and protect soils otherwise exposed to erosion along creeks such as Las Trampas
16 Creek.

17 7. Save Lafayette Trees brings this action in order to vindicate the public's statutory and
18 constitutional right to public notice and the City's compliance with CEQA's command that agencies
19 carefully examine the environmental impacts of their projects before approving them and the PZL's
20 requirements that the City comply with its General Plan and implementing land use ordinances including
21 its Tree Protection Ordinance. Contrary to these mandates, the City approved the Tree Removal
22 Agreement without first providing public notice, conducting CEQA review, and complying with its land
23 use laws.

24 8. Save Lafayette Trees asks this Court to order the City to rescind its unlawful decision to
25 approve the Tree Removal Agreement, and to direct the City to provide the public notice, and comply
26 with CEQA and the City's land use procedures and standards, that is required by law before taking any
27 further action on PG&E's proposed Tree Removal Agreement.
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10. Pursuant to Code of Civil Procedure section 388 and Public Resources Code section 21167.7, petitioners is serving the California Attorney General with a copy of this Verified Petition concurrently with the filing of this action, and consistent with Public Resources Code section 21167.5, petitioners are serving the City and PG&E with notice of this suit.

11. Petitioner Save Lafayette Trees is a non-profit unincorporated association whose members reside, work, or recreate in the City and use and enjoy the healthy, mature native trees that PG&E proposes to remove pursuant to its Tree Removal Agreement with the City. Save Lafayette Trees has collected more than 2,000 digital signatures supporting its opposition to the Tree Removal Agreement from persons who reside, work or recreate in the City. Save Lafayette Trees and its members are therefore beneficially interested in the City's compliance with CEQA, the PZL, the City's General Plan and Municipal Code, and the California Constitution in connection with its approval of the Tree Removal Agreement, and accordingly seek this Court's writ of mandate, and declaratory relief., enforcing these laws and overturning the City's unlawful approval of the Tree Removal Agreement.

13. Petitioner David Kusters resides in the City with his family and is the Secretary of Save Lafayette Trees. He and his family regularly use and enjoy the healthy, mature trees that PG&E proposes to remove pursuant to the Tree Removal Agreement, and therefore have a vital and direct interest in the City's compliance with the laws governing that agreement, and accordingly seek this Court's writ of

1 mandate, and injunctive and declaratory relief, enforcing CEQA, the PZL, the City's General Plan and
2 Municipal Code, and the California Constitution, and overturning the City's unlawful approval of the
3 Tree Removal Agreement.

4 14. Respondent City of Lafayette is a municipality and public agency subject to the
5 requirements of the California Constitution, CEQA, the PZL, the City's General Plan and Municipal
6 Code in connection with its approval of the Tree Removal Agreement. Contrary to and without
7 compliance with those laws, on March 27, 2017 the City purported to approve the Tree Removal
8 Agreement.

9 15. Real Party in Interest PACIFIC GAS AND ELECTRIC COMPANY ("PG&E") is a
10 corporation organized under the laws of California in 1905. It purported to enter into the Tree Removal
11 Agreement on April 26, 2017.

12 16. The true names and capacities of respondents DOES 1-100, inclusive, are unknown to
13 petitioners who therefore sue such respondents by such fictitious names pursuant to Code of Civil
14 Procedure section 474. Petitioners will, with leave of court if necessary, further amend this Verified
15 Petition when the true names and capacities of said DOE respondents have been ascertained.

16 17. Petitioners are unaware of the true names and capacities of real parties in interest sued
17 herein as DOES 101- 200, and sue such real parties in interest herein by fictitious names. Petitioners are
18 informed and believe, and based on such information and belief allege, that the fictitiously named real
19 parties in interest have a financial or other beneficial interest in the City's approval of the Tree Removal
20 Agreement. When the true identities and capacities of these real parties in interest have been
21 determined, petitioners will, with leave of the Court if necessary, amend this Verified Petition to insert
22 such identities and capacities.

23 LEGAL BACKGROUND

24 CEQA

25 18. CEQA is California's primary statutory mandate for environmental protection. It applies to
26 all state and local agencies, and requires them to "first identify the [significant] environmental effects of
27 projects, and then to mitigate those adverse effects through the imposition of feasible mitigation
28 measures or through the selection of feasible alternatives." (*Sierra Club v. State Board of Forestry*

1 (1994) 7 Cal.4th 1215, 1233.) Its most important substantive imperative requires “public agencies to
2 deny approval of a project with significant adverse effects when feasible alternatives or feasible
3 mitigation measures can substantially lessen such effects.” (*Sierra Club v. Gilroy City Council* (1990)
4 222 Cal.App.3d 30, 41.)

5 19. CEQA’s mandate for detailed environmental review “ensures that members of the
6 [governmental decision-making body] will fully consider the information necessary to render decisions
7 that intelligently take into account the environmental consequences” of their proposed action. (*Mountain*
8 *Lion Foundation v. Fish and Game Commission* (1997) 16 Cal.4th 105, 133; Public Resources Code
9 §§ 21080.5(d)(2)(D), 21091(d)(2); 14 C.C.R. [CEQA Guidelines] (“Guidelines”) § 15088.) The CEQA
10 process thus “protects not only the environment but also informed self-government.” (*Citizens of Goleta*
11 *Valley v. Board of Supervisors* (1990) 52 Cal.3d 553, 564.)

12 20. All California “public agencies” must comply with CEQA when they approve discretionary
13 projects. (Public Resources Code § 21080(a).) The City is both a “public agency” and a “local agency”
14 as those terms are defined in CEQA. (Public Resources Code §§ 21062, 21063.) Therefore the City is
15 subject to CEQA. (*Id.*)

16 21. A proposed governmental action requires environmental review under CEQA if (1) the
17 agency is contemplating an “approval” of an action as defined by Guidelines section 15352, (2) the
18 subject matter of the contemplated approval constitutes a “project” under Public Resources Code section
19 21065 and Guidelines section 15378(a), and (3) the project to be approved does not fall within a
20 statutory exemption created by the Legislature under Public Resources Code section 21080(b) and
21 recognized under CEQA Guidelines sections 15260-15285, or a categorical exemption in the Guidelines
22 as promulgated by the California Resources Agency pursuant to Public Resources Code section 21084(a)
23 and Guidelines sections 15061(b)(2), 15300-15333 and 15354.

24 22. Even if a project is subject to a categorical exemption, it is subject to CEQA if it falls within
25 an exception to the categorical exemptions as provided under Public Resources Code section 21084 and
26 Guidelines section 15300.2. If a project is not exempted by statute or regulation, then it may nonetheless
27 be exempt from CEQA only if “it can be seen with certainty that there is no possibility that the activity in
28 question may have a significant effect on the environment.” (Guidelines § 15061(b)(3) (the “common

1 sense” exemption).)

2 23. If a local agency such as the City is considering approval of a project that is subject to
3 CEQA, then it must prepare an Environmental Impact Report (“EIR”) if the project “may have a
4 significant effect on the environment.” (Public Resources Code § 21151(a).) In determining whether a
5 project may have such an effect, the agency must engage in a “three-step” process for determining how
6 to proceed. (Guidelines §§ 15002(k), 15061, 15063-15065, 15070, 15081.)

7 24. First, assuming that the agency has determined that a proposal it may approve does in fact
8 constitute a “project,” then the agency must determine whether the project is subject to a statutory
9 exemption, a categorical exemption, or the “common-sense” exemption. (Guidelines § 15062.)

10 25. Second, if the project is not exempt from environmental review, then the agency must
11 prepare an “initial study” to determine the level of environmental review that is required for CEQA
12 compliance. (Guidelines § 15063.) In doing so, the lead agency (such as the City here) must consult
13 “informally” with responsible and trustee agencies, who may offer recommendations as to whether an
14 EIR or negative declarations should be prepared. (Guidelines § 15063(g); Public Resources Code
15 § 21080.3(a).) If the agency concludes that a negative declaration or a mitigated negative declaration,
16 rather than an EIR, is the appropriate environmental document, then the initial study must set forth the
17 agency’s reasoning in reaching that conclusion. (Guidelines § 15063(c)(5).)

18 26. The third and final step for the agency in applying CEQA depends on the conclusions of the
19 initial study. If the initial study and public comment thereon show that there is no substantial evidence
20 (or reasonable inferences therefrom) that the project may cause significant adverse environmental
21 impacts, then the agency must adopt a “negative declaration.” If the initial study reveals substantial
22 evidence that significant impacts might occur, but that the project applicant is able and willing to modify
23 the project to eliminate all such potential or significant impacts, then the lead agency should adopt a
24 “mitigated negative declaration” confirming that, as mitigated, the project clearly has no potential for
25 causing a significant effect on the environment. (Public Resources Code §§ 21064.5, 21080(c)(2);
26 Guidelines §§ 15006(h), 15064(f)(2).) If the initial study and public comment thereon indicate that there
27 is substantial evidence that one or more significant environmental impacts may occur, and the project
28 proponent is either unwilling or unable to mitigate them to insignificance, then the lead agency must

1 prepare an EIR analyzing those effects and suggesting feasible means, if any, of mitigating or avoiding
2 them including alternatives that would achieve most of the basic objectives of the project without
3 causing significant environmental effects. (Public Resources Code §§ 21002, 21002.1, 21061;
4 Guidelines §§ 15080-15096, 15120-15132, 15160-15170.)

5 27. In applying these CEQA procedures, an agency may not segment a project to avoid
6 preparing an EIR on the entirety, or whole, of the project. Guidelines § 15378(a), (c), (d). CEQA's
7 "requirements cannot be avoided by chopping up proposed projects into bite-size pieces which,
8 individually considered, might be found to have no significant effect on the environment or to be only
9 ministerial." (*Plan for Arcadia, Inc. v. City Council of Arcadia* (1974) 42 Cal.App.3d 712, 726.)

10 28. The final step in the CEQA process is public notice of any CEQA approval. A public
11 agency must provide adequate notice when it "approves or determines to carry out a project that is
12 subject to [CEQA]." (Public Resources Code § 21108; Guidelines § 15062(c)(1); *County of Amador v.*
13 *El Dorado County Water Agency* (1999) 76 Cal.App.4th 931, 962-965.) When a local agency files a
14 notice of exemption ("NOE") confirming approval of a project that is allegedly exempt from CEQA, that
15 notice "shall be filed with the county clerk of *each* county in which the project will be located."
16 (Guidelines § 15062(c)(2) (emphasis added).) A similar notice must be given when a local agency files a
17 notice of determination ("NOD") confirming approval of a project that is subject to CEQA. (Guidelines
18 § 15075(d).)

19 PLANNING AND ZONING LAW

20 29. California's Planning and Zoning Law ("PZL") is set forth in Government Code sections
21 65000 et seq. It governs land use planning, zoning and related development permit processes in counties
22 and general law cities such as the City of Lafayette. It requires local governments to adopt
23 comprehensive general plans, and requires that land use planning decisions be consistent with them.
24 (Government Code section 65300 et seq.) It also governs the procedures for adoption of general and
25 specific plans and other land use controls, and prescribes the public notice required for their approval.
26 (Government Code section 65090 et seq.) The PZL directs that each general plan shall include a land
27 use element, circulation element, housing element, conservation element, open space element, noise
28 element, safety element, and environmental justice element. Each plan must be internally consistent, and

1 zoning and subordinate land use decisions and permits must be consistent with the general plan.
2 (Government Code sections 65300.5 and 65860.)

3 30. Because the “general plan is atop the hierarchy of local government law regulating land
4 use,” local governments such as the City must “proceed [in the manner required by] their general plan.
5 (*Neighborhood Action Group v. County of Calaveras* (1984) 156 Cal.App.3d 1176, 1183 (first quote);
6 C.C.P. § 1094.5(b) (second quote).) The requirement that all permits allowing land use including
7 decisions allowing the removal of trees such as the City’s approval of the Tree Removal Agreement
8 challenged in this action must be consistent with the general plan

9 is necessarily to be implied from the hierarchical relationship of the land use laws. To
10 view them in order: a use permit is struck from the mold of the zoning law ([Government
11 Code section] 65901); the zoning law must comply with the adopted general plan (§
12 65860); the adopted general plan must conform with state law (§§ 65300, 65302). The
13 validity of the permit process derives from compliance with this hierarchy of planning
14 laws. *These laws delimit the authority of the permit issuing agency to act and establish
15 the measure of a valid permit* A permit action taken without compliance with the
16 land use laws is *ultravires* as to any defect implicated by the uses sought by the permit.

17 (*Neighborhood Action Group, supra*, 156 Cal.App.3d at 1184 (emphasis added).)

18 31. In accordance with the PZL, the City has adopted a General Plan that contains several
19 elements that establish goals, policies and programs to protect public health and safety and
20 environmental resources. As summarized in its Introduction, the General Plan is premised on and
21 implements four Guiding Principles, the first and third of which are particularly pertinent here and direct
22 as follows:

23 1. “*Preserve and enhance* the character of Lafayette as a *semi-rural* community.”

24 * * *

25 3. “*Protect the natural and scenic quality* of our surrounding hillsides and ridgelines, creek
26 areas, *trees* and other vegetation.”

27 (City of Lafayette General Plan, as adopted by Resolution 2002-56 on October 28, 2002, Introduction,
28 page 1.) Consistent with the foregoing “Guiding Principles,” the General Plan repeatedly emphasizes the
importance of the City’s “[u]nique . . . magnificent natural setting,” and “stresses the protection of
Lafayette’s natural beauty” including “preservation of the scenic quality of the surrounding hills.” (*Id.*)
The General Plan calls out for specific recognition and protection

1 [t]he City's natural terrain – undeveloped hillsides, generous spans of open space, *mature*
2 *oaks*, natural creeks and numerous tributaries, and spectacular scenic viewsheds
3 Complementing this foothill environment are the Lafayette Reservoir and the area's trail
4 system, including the nation['s] first rail-to-trail project – the Lafayette-Moraga Trail.”

5 (*Id.* (emphasis added).)

6 32. Consistent with and to implement the General Plan's Guiding Principles of protecting the
7 City's "unique . . . magnificent natural setting" including its "undeveloped hillsides, general spans of
8 open space, mature oaks . . . and spectacular scenic viewsheds," the General Plan's Open Space and
9 Conservation Element repeatedly emphasizes "the vital role that open space plays in defining the
10 character of the community and our quality of life." Its Policy OS-1.3, for example, requires the City to
11 "[p]rotect areas of special ecological significance, including . . . woodlands, wildlife corridors [and]
12 riparian areas" (City of Lafayette General Plan, Open Space and Conservation Element, adopted by
13 Resolution 2002-56 on October 28, 2002, at III-3.)

14 33. Similarly, Lafayette General Plan Policy OS-1.5 requires the City to "[p]reserve, protect,
15 and where necessary, restore open space for wildlife habitat to assure the continued viability and health
16 of diverse, natural animal and plant communities." (*Id.*) This Element calls out for particular
17 recognition and protection Lafayette's notable "oak woodlands," and "[a]long creeks and streams, [the
18 City's] riparian woodlands, where a variety of larger oaks, walnut, California buckeye, cottonwood and
19 bay trees thrive." (*Id.* at III-6.) These irreplaceable open space areas provide habitat for "thirteen
20 Sensitive Plant Species and ten wildlife species that are classified as sensitive or endangered by either
21 the state or federal government." (*Id.*) "Groves of trees" in particular are identified as "a valuable
22 resource to the community." (*Id.*)

23 34. The Open Space and Conservation Element contains specific policies intended to protect the
24 City's large, healthy and iconic native trees. For example, Policy OS-4.3 requires that the City
25 "[p]reserve existing woodlands and their associated vegetation." (*Id.*) Likewise, Policy OS-4.4 directs
26 that the City must "[p]rotect important groves of trees and significant existing vegetation." (*Id.*)

27 35. To assure proper implementation of the General Plan's policies requiring protection and
28 preservation of existing woodlands and their important groves of trees, the General Plan contains
29 numerous Programs of particular relevance to this lawsuit. Program OS-4.3.1, for example, requires the

1 City to “[e]xpand the City’s Tree Protection Ordinance to include *protection for significant native trees*
2 *and woodlands.*” (*Id.* at III-7 (emphasis added).) Similarly, Program OS-4.4.1 “[r]equire[s] that site
3 planning, construction and maintenance of new development *preserve existing healthy trees and native*
4 *vegetation to the maximum extent feasible.*” (*Id.* (emphasis added).)

5 36. The General Plan’s Parks, Trails and Recreation Element likewise recognizes the
6 importance of “large areas of open space” managed by the East Bay Municipal Utilities District
7 (“EBMUD”) and the East Bay Regional Parks District (“EBRPD”) that “constitute a major part of the
8 beautiful natural setting of the City.” (City of Lafayette General Plan, Parks, Trails and Recreation
9 Element, adopted by Resolution 2005-56 on October 28, 2002 and amended in part by Resolution 2008-
10 36 on July 28, 2008, at IV-1.) These regional open space areas include “Lafayette Reservoir, located in
11 the southwest corner of the City,” that “provides a trails system, boat rental, fishing, picnic facilities,
12 group camping and biking” for community members.” (*Id.*)

13 37. This Element also recognizes the importance of the City’s extensive open space trail
14 system:

15 “Trails offer scenic views, commute alternatives and recreational opportunities. Lafayette
16 has an extensive system of trails provided by the City, the East Bay Regional Park District
and the East Bay Municipal Utilities District.”

17 (*Id.* at IV-4.) This General Plan element recognizes in particular the importance of the Lafayette-Moraga
18 Regional Trail, “which was “the first ‘rails to trail’ conversion of its kind (dedicated in 1978)” (*Id.*)
19 This element also recognizes the “extensive network of trails adjacent to the Lafayette Reservoir.” (*Id.*)
20 The City’s extensive “trails system as shown on the Lafayette Master Trails Plan provides access to
21 public places and to scenic vistas that represent a significant natural amenity to the community.” (*Id.*)

22 38. Against this backdrop of the City’s overarching and abiding interest in identifying and
23 protecting the City’s open space resources, including its riparian woodlands and other important groves
24 of native tree species, in 2003 the City adopted its Tree Protection Ordinance, which was strengthened in
25 2010. (Lafayette Municipal Code chapter 6-17, adopted in Ordinance No. 539 § 1 (2003) and amended
26 by Ordinance No. 593 § 1 adopted March 22, 2010.) The City’s Tree Protection Ordinance explains its
27 purpose as follows:

28 “The City of Lafayette consists of oak woodland and savannah covered hills and valleys

1 that originally contained many large and majestic orchards and creeks lined with giant
2 valley oak, madrone, buckeye and black walnut trees It is now recognized that the
3 preservation of trees enhances the natural scenic beauty, increases property values,
4 encourages quality development, aids in tempering the effect of extreme temperatures,
5 helps to reduce air and noise pollution, furnishes habitat for wildlife and gives Lafayette
6 an identity and quality that enhances the environment for all residents and the business
7 community. As seen in the master and specific plans adopted by the city, *trees are vital to*
8 *the community* The general plan has goals and policies for the preservation of the
9 community's biological resources, including its trees, and *it is the purpose of this*
10 *ordinance to implement these goals and policies."*

11 (Lafayette Municipal Code, Title 6, Section 6-1701(a).)

12 39. To this end, the City's Tree Protection Ordinance directs that:

13 "The policies of the city are to *protect existing woodlands* and their associated vegetation,
14 *protect native trees, preserve riparian habitat*, encourage the planting of native species,
15 and *avoid the cutting of mature trees.*"

16 (*Id.* at Section 6-1701(b) (emphasis added).)

17 40. Accordingly, the City's Tree Protection Ordinance directs that:

18 "It is a violation of this chapter for any person to remove or destroy a protected tree
19 without a category I or category II permit under Sections 6-1706 or 6-1707, or without the
20 approval of an exception under Section 6-1705."

21 (*Id.*) Each of these sections prescribes detailed procedures that the City must follow and investigations it
22 must conduct before deciding whether to issue a permit allowing the removal or destruction of a
23 protected tree. Category I permits are required for any removal or destruction of a tree on property not
24 associated with a development application; a category II permit is required to remove or destroy a
25 protected tree on property that is associated with a development application. (*Id.*)

26 41. The Tree Protection Ordinance allows only limited exceptions to its coverage, and
27 prescribes a detailed, discretionary process that must be followed before the City may grant any person
28 an exception to the requirements of this Ordinance. (*Id.*) Section 6-1705, which governs exceptions,
prescribes a discretionary permit process whereby the City evaluates each exception request under five
criteria. (*Id.*)

DUE PROCESS CLAUSE OF THE CALIFORNIA CONSTITUTION

42. The California Constitution provides in Article I, section 7 in pertinent part that "[a] person
may not be deprived of life, liberty, or property without due process of law" (*Id.*) This provision
has been broadly construed by California courts to encompass a right to a fair hearing in proceedings

1 before an administrative body. (*Nightlife Partners, Ltd. v. City of Beverly Hills* (2003) 108 Cal.App.4th
2 81, 90) The *sine qua non* of a fair hearing is notice reasonably calculated to apprise those directly
3 affected by a proposed agency decision of the opportunity to appear and present evidence and argument
4 with regard to the proposal. (*Horn v. County of Ventura* (1979) 24 Cal.3d 605, 616-618.) And, persons
5 whose property interests are potentially harmed are entitled to have the agency make its decision based
6 on evidence in the public record rather than extra-record evidence obtained *ex parte*. (*English v. City of*
7 *Long Beach* (1950) 35 Cal.2d 155, 158; *Franz v. Board of Medical Quality Assurance* (1982) 31 Cal.3d
8 124, 138-140.)

9 43. Both the PZL and the Lafayette Municipal Code prescribe the public notice that is required
10 before the City may issue a discretionary land use approval such as an exception to the Tree Protection
11 Ordinance. Government Code sections 65090 and 65091 direct that written “[n]otice of the hearing shall
12 be mailed or delivered at least 10 days prior to the hearing to all owners of real property . . . within 300
13 feet of the real property that is the subject of the hearing.” (Government Code section 65091(a)(1).)
14 Additionally, notice must also either be “[p]ublished pursuant to [Government Code] section 6061 in at
15 least one newspaper of general circulation within the local agency which is conducting the proceeding at
16 least ten days prior to the hearing” or “[p]osted at least 10 days prior to the hearing in at least three
17 public places within the boundaries of the local agency, including one public place in the area directly
18 affected by the proceeding.” (*Id.* at (a)(5).) Title Six of the Lafayette Municipal Code likewise requires
19 written 10-day notice by publication, posting and mailing to affected property owners before the City
20 may make land use decisions affecting them. (Lafayette Municipal Code § 6-211.)

21 FACTUAL BACKGROUND

22 44. Petitioners Michael Dawson and David Kusters, and hundreds of other members of
23 petitioner Save Lafayette Trees, reside in proximity to trees that would be removed under the City’s Tree
24 Removal Agreement challenged in this action. Additionally, thousands of supporters of petitioner Save
25 Lafayette Trees regularly use and enjoy regional parks and trail systems in the City of Lafayette that
26 would lose healthy, mature native trees under the City’s Tree Removal Agreement harming them. Many
27 of these petitioners and their supporters, and other members of the public, reside within 300 feet of the
28 trees slated for removal pursuant to the Tree Removal Agreement.

1 45. The City failed to provide any written notice, by mail, posting, publication or otherwise, to
2 petitioners and their supporters, let alone the 10-day notice required by law before approving the Tree
3 Removal Agreement.

4 46. The City conducted no environmental review under CEQA before approving the Tree
5 Removal Agreement.

6 47. The City made no determination that the Tree Removal Agreement is exempt from CEQA
7 before approving that agreement.

8 48. Petitioners did not learn of the City's approval of the Tree Removal Agreement until they
9 read about this action in the *Lamorinda Weekly*, a locally owned, community newsletter, which reported
10 on this action on April 5, 2017.

11 49. The Lafayette Municipal Code provides no procedure whereby affected members of the
12 public may seek reconsideration of a City Council decision to approve a land use project such as the Tree
13 Removal Agreement. Lafayette Municipal Code Sections 6-217 thru 6-238 and 8-2110 (referenced in
14 the Tree Protection Ordinance at section 6-1712) make no provision for appeals from decisions by the
15 City Council.

16 50. Promptly after learning of the City Council's approval of the Tree Removal Agreement,
17 petitioners repeatedly asked, both in writing and through appearances before the City Council at its
18 public meetings, that the City Council to reconsider its approval of that agreement.

19 51. To date, the Lafayette City Council has failed to take any action to reconsider its approval of
20 the Tree Removal Agreement.

21 52. The City failed to provide the public and petitioners with any opportunity to comment upon
22 and object to the City's approval of the Tree Removal Agreement and thereby prevented the public and
23 petitioners from objecting to the City's approval of the agreement on the grounds it violated CEQA, the
24 PZL, the General Plan and the Tree Protection Ordinance.

25 53. The Tree Removal Agreement will foreseeably result in significant effects on the
26 environment and on petitioners.

27 54. The City is the lead agency for the Tree Removal Agreement, as no other state or local
28 agency exercises authority over its approval. (Public Resources Code § 21067; Guidelines §15367.)

55. Prior to approving the Tree Removal Agreement, the City did not prepare an initial study, a negative declaration, a mitigated negative declaration, or an EIR, despite the fact that the Tree Removal Agreement is a discretionary project subject to CEQA that will have a demonstrably adverse impact on the environment.

FIRST CAUSE OF ACTION

**(Writ of Mandate, Declaratory and Injunctive Relief
to Set Aside Project Approval as Contrary to CEQA)**

(Alleged by Petitioners Against All Defendants and Real Parties)

56. The paragraphs set forth above are realleged and incorporated herein by reference.

57. Petitioners bring this First Cause of Action pursuant to Public Resources Code sections 21168 and/or 21168.5, on the grounds that the City failed to act in accordance with law, and committed a prejudicial abuse of discretion, in that it considered and approved the Tree Removal Agreement without undertaking an analysis of its potential environmental impacts as required by CEQA.

58. The City is a “public agency” and a “local agency” within the meaning of CEQA. (Public Resources Code §§ 21062, 21063; Guidelines §§ 15368, 15379.) CEQA requires public agencies to conduct environmental review prior to approving any discretionary project that may have a significant impact on the environment. (Public Resources Code §§ 21080(a), 21151; Guidelines § 15004(a).) The City’s approval of the Tree Removal Agreement project is a discretionary project. (Guidelines § 15357.)

59. Under CEQA, the term “project” means the “whole of an action, which has a potential for resulting in either a direct physical change in the environment, or a reasonably foreseeable indirect physical change in the environment.” (Guidelines § 15378(a).) The term “project” refers to the “activity which is being approved and which may be subject to several discretionary approvals by government agencies” and not the governmental approvals themselves. (*Id.* § 15378(c).) The Tree Removal Agreement is subject to CEQA and the environmental analysis required under CEQA encompasses the “whole” of this project.

60. “Approval” of a project, for purposes of CEQA, means a decision by the agency “which commits the agency to a definite course of action in regard to a project intended to be carried out by any person.” (*Id.* § 15352(a).) The City’s consideration and approval of the Tree Removal Agreement

1 constitutes the “approval of a project” under CEQA.

2 61. If there is any possibility that a discretionary project being approved by a public agency may
3 cause a significant effect on the environment, directly or indirectly, the agency’s review of the project
4 must comply with CEQA. (Public Resources Code §§ 21065, 21080(a), 21151.) The Tree Removal
5 Agreement will result in a number of “reasonably foreseeable indirect physical change[s] in the
6 environment” as well as direct physical changes in the environment.

7 62. On June 26, 2017, petitioners faxed, emailed and mailed notice to the City in accordance
8 with Public Resources Code section 21167.5, informing it of petitioners’ intention to file this action
9 immediately. Concurrently with the filing of this Verified Petition and Complaint, petitioners provided
10 notice of the pendency of this proceeding to the California Attorney General as required by Public
11 Resources Code section 21167.7 and Code of Civil Procedure section 388. Petitioners have also served
12 the California Attorney General and the City with this Verified Petition and Complaint.

13 **SECOND CAUSE OF ACTION**

14 **(Writ of Mandate, Declaratory and Injunctive Relief to Set Aside**

15 **Project Approval as Contrary to Planning and Zoning Law)**

16 63. The paragraphs set forth above are realleged and incorporated herein by reference.

17 64. Government Code sections 65000, et seq. prescribe procedures and substantive standards
18 that general law cities such as the City of Lafayette must follow in adopting a comprehensive, long-term
19 general plan for the use and physical development of land within the City, and in developing goals,
20 policies and programs to implement that plan. Government Code section 65400 directs that the general
21 plan shall serve “as a pattern and guide for the orderly physical growth and development and the
22 preservation and conservation of open space land of the county or city, and as a basis for the efficient
23 expenditure of [the city’s or county’s] funds relating to the subjects of the general plan” (*Id.*) The
24 general plan is, in short, a “constitution” for all further development with the City. (*O’Loane v.*
25 *O’Rourke* (1965) 231 Cal.App.2d 774, 782.)

26 65. Government Code section 65302 directs that the general plan “shall consist of a statement
27 of development policies and shall include a diagram or diagrams and text setting forth objectives,
28 principles, standards and plan proposals.” (*Id.*) It must include elements for land use, circulation,

1 housing, conservation, open space, noise and additional elements as needed to regulate land use and
2 protect and preserve environmental resources.

3 66. Government Code section 65030.1 directs that it is state policy that “decisions involving the
4 future growth of the state, most of which are made and will continue to be made at the local level, should
5 be guided by an effective planning process, including the local general plan” (*Id.*)

6 67. Government Code section 65564 directs that “[e]very local open-space plan shall contain an
7 action program consisting of specific programs which the legislative body intends to pursue in
8 implementing its open-space plan.” (*Id.*)

9 68. Government Code section 65566 directs that “[a]ny action by a county or city by which
10 open-space land or any interest therein is acquired or disposed of or its use restricted or regulated,
11 whether or not pursuant to this part, must be consistent with the local open-space plan.” (*Id.*)

12 69. Pursuant to the Planning and Zoning Law and in accordance with its General Plan, the City
13 of Lafayette adopted its Tree Protection Ordinance to provide for the protection and preservation of the
14 City’s healthy, mature trees. (Lafayette Municipal Code, Chapter 6-17, Section 6-1701 to 6-1713;
15 Lafayette General Plan, Open Space and Conservation Element, Policy OS-4.3 (“[p]reserve existing
16 woodlands”) and Program OS-4.3.1 (“[e]xpand the City’s *tree-protection ordinance* to include
17 protection for significant native trees and woodlands”).)

18 70. Contrary to the PZL, the Lafayette General Plan, and the City’s Tree Protection Ordinance,
19 the City approved the Tree Removal Agreement without complying with the substantive and procedural
20 requirements of these planning laws and ordinance.

21 71. The City proceeded in excess of its jurisdiction and abused its discretion when it approved
22 the Tree Removal Agreement because it failed to comply with the substantive and procedural
23 requirements of the PZL, Lafayette General Plan, and the Tree Protection Ordinance. The City’s
24 approval of the Tree Removal Agreement is therefore invalid and must be set aside.

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City's Approval of Tree Removal Agreement

72. The above paragraphs are incorporated herein by reference.

73. Petitioner and its members are constitutionally entitled to due process including public notice of proposed City land use approvals that would harm their property and related environmental interests. (California Constitution, Article I, § 7.)

74. The right of petitioner and its members to due process encompasses a right to public notice of the City's proposed adoption of the Tree Removal Agreement and the right to a fair hearing before the City Council so that petitioner and its members may present evidence and argument in opposition to the Tree Removal Agreement. (*Horn v. County of Ventura, supra*, 24 Cal.3d at 617-618.) Required notice must be "calculated to apprise directly affected persons of a pending decision that effects their property interests." (*Id.*)

75. Denial of adequate public notice of an agency hearing for a decision affecting the property interests of a person is reviewable and remediable under both Code of Civil Procedure section 1085 and Code of Civil Procedure section 1094.5. (*Clark v. City of Hermosa Beach* (1996) 48 Cal.App.4th 1152, 1177-1183 (section 1094.5(b)); *Mednik v. State Dept. of Health Care Services* (2009) 175 Cal.App.4th 631, 639 (section 1085).)

76. The City violated the rights of petitioner and its members to public notice of the Tree Removal Agreement because it failed to provide the notice required by law prior to approving that agreement.

77. For each of these reasons, petitioners were denied their right to due process in violation of Article I, section 7 of the California Constitution when the City purported to approve the Tree Removal Agreement without providing the public notice of its proposed action to petitioners as required by law. Accordingly, the City's approval of the Tree Removal Agreement is invalid and must be set aside.

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Project Approval as Contrary to C.C.P. §§ 1085 and 1094.5)

78. The paragraphs set forth above are realleged and incorporated herein by reference.

79. The City proceeded in excess of its authority and abused its discretion in approving the Tree Removal Agreement without compliance with CEQA, the PZL, the City's General Plan, the Municipal Code, and the Due Process Clause of the California Constitution. Said approval therefore violates Code of Civil Procedure sections 1085 and 1094.5 in the following respects, among others:

b. said approval was not supported by, or was contrary to, the evidence available to the City; and

80. The City's actions in approving the Tree Removal Agreement without first complying with the procedures required by Code of Civil Procedure sections 1085 and 1094.5, CEQA, the PZL, the General Plan, the Municipal Code and the California Constitution exceed the City's jurisdiction and constitute a prejudicial abuse of discretion. Accordingly, the City's approval of the Tree Removal Agreement is contrary to law and invalid and must be set aside.

81. The paragraphs set forth above are realleged and incorporated herein by reference.

83. Petitioners timely seek appropriate mandamus, declaratory and injunctive relief to prevent the City from attempting to implement any part of the Tree Removal Agreement before this action is resolved on its merits.

84. An actual controversy exists between petitioners and the City. Petitioners contend that the City has acted in violation of applicable law as alleged hereinabove, and must therefore vacate and set aside its approval of the Tree Removal Agreement. Petitioners are informed and believe, and thereon allege, that the City disputes these contentions. A judicial resolution of this controversy is therefore necessary and appropriate.

85. At all times mentioned herein, the City was able to conduct environmental review and analysis of the Tree Removal Agreement as required by CEQA, the PZL and the Municipal Code, and to provide the public notice thereof required by the law. Nonetheless, the City has failed and continues to fail to perform its duty to conduct this required environmental review and analysis under CEQA, the PZL and the Municipal Code, and to provide the public notice thereof required by law.

86. If the City is not ordered to set aside its approval of the Tree Removal Agreement, petitioners and the public will be irreparably harmed. Petitioners have no plain, speedy, and adequate remedy in the ordinary course of law. Unless this Court issues its writ of mandate or injunctive relief vacating the City's approval of the Tree Removal Agreement, and requiring the City to comply with CEQA , the PZL, the General Plan, the Municipal Code and the California Constitution, the City's approval challenged herein would violate applicable law. No monetary damages or other legal remedy could adequately compensate petitioners for the harm to essential environmental reviews, protected property interests and environmental quality threatened by the City's approval of the Tree Removal Agreement.

RELIEF REQUESTED

WHEREFORE, petitioners pray for judgment and further relief as follows:

1. For a peremptory writ of mandate directing the City of Lafayette to set aside and vacate its approval of the Tree Removal Agreement;
2. For declaratory relief declaring the Tree Removal Agreement to be unlawful;
3. For injunctive relief preventing the City of Lafayette from implementing the Tree Removal Agreement unless and until the City of Lafayette has complied with CEQA, the PZL, the General Plan, the Municipal Code and the California Constitution;
6. For attorneys' fees under Code of Civil Procedure section 1021.5;

1 7. For costs incurred in this action; and

2 8. For such other equitable or legal relief as the Court may deem just and proper.

3
4 Dated: June 26, 2017

LAW OFFICES OF STEPHAN C. VOLKER

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6 
STEPHAN C. VOLKER

Attorney for Petitioners and Plaintiffs

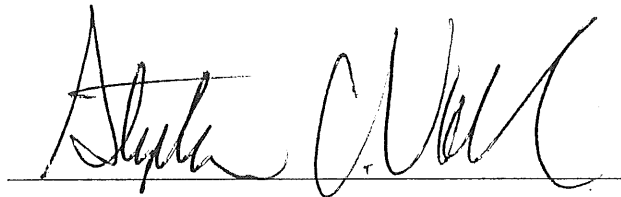
7 SAVE LAFAYETTE TREES, MICHAEL DAWSON
8 and DAVID KOSTERS

VERIFICATION

I am the attorney for petitioners and plaintiffs SAVE LAFAYETTE TREES, MICHAEL DAWSON and DAVID KOSTERS in this action. Petitioners and plaintiffs are absent from the County of Alameda, in which I maintain my office. I have read the foregoing Verified Petition for Writ of Mandate and Complaint for Declaratory and Injunctive Relief and Attorneys' Fees and the documents therein referenced. I am informed and believe, and on that basis attest, that the matters therein are true.

I declare under penalty of perjury that the foregoing is true and correct.

Executed this 26th day of June, 2017, in Berkeley, Alameda County, California.

A handwritten signature in black ink, appearing to read 'Stephan C. Volker', is written over a horizontal line.

STEPHAN C. VOLKER