



**SF Environment**

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A Department of the City and County of San Francisco

Edwin M. Lee  
Mayor

Deborah O. Raphael  
Director

Members of the Landmark Tree Committee:

Out of an abundance of caution, SF Environment Staff recommends that you vote to vacate your October 6, 2016, decision to support nomination of the tree at 4 Montclair Terrace for landmark status to the Urban Forestry Council (UFC).

On behalf of the UFC, staff received a letter on January 4, 2017, raising several allegations regarding the integrity of the process leading to the Landmark Tree Committee's decision to support the 4 Montclair Terrace tree for landmark status. One such allegation was that the Committee violated the Brown Act during its members' onsite evaluations of the tree because, asserts the letter, a quorum of Committee members convened at the site without advance public notice of a policy body meeting as the Brown Act requires.

We have not substantiated allegations in the letter, and staff maintain that the evaluation process for the 4 Montclair Terrace tree was conducted in a legal manner. We do not believe the Brown Act was violated. However, we place great value on the transparency of all procedures the UFC employs to conduct its business and on the public's trust in the tree landmarking process. We thus recommend that Committee vacate its October 6 to dispel any doubts.

Accordingly, we make the following recommendations to the Landmark Tree Committee and to the UFC:

That the Landmark Tree Committee adopt a motion to vacate its October 6, 2016, recommendation to the UFC to support the nomination of the tree at 4 Montclair Terrace. This motion to vacate should include the corollary steps of removing from the record of the proceeding all documents received to date regarding this tree, including but not limited to Landmark Tree Committee member evaluations, the Committee Chair's report to the UFC, written public comment and hearing minutes, and all additional information submitted thus far. This removal will ensure an entirely new process.

In addition, this motion should include a recommendation that the UFC evaluate anew the nominated 4 Montclair Terrace tree, on a clean slate, via the following steps:

- Approve the Landmark Tree Committee motion as stated above; that is, vacate the Committee's October 6 decision, and remove from the record all information received, stated, or otherwise communicated to the UFC about the tree to date, including written and oral public comment;
- Accept up to 5 UFC member volunteers from the pool of members who were not involved in the 4 Montclair Terrace onsite evaluations or the October 6 decision (i.e., any members other than Kida, Hillan, Hillson, Short, and Swae), who will perform individual onsite evaluations of the 4 Montclair Terrace tree and will refrain either directly or indirectly from speaking to one another about this matter until the public meeting of the UFC at which it will decide whether to recommend the tree to the Board of Supervisors for landmarking status;
- Request that staff arrange with the property owner appointments for these volunteers to visit the tree site at separate times, such that no two volunteers will be present on the 4 Montclair Terrace property at once;

- Schedule a hearing at the next UFC meeting to evaluate and vote on the nominated 4 Montclair Terrace tree. Thus, rather than holding a Landmark Tree Committee hearing prior to the UFC's consideration of the tree, after the volunteers complete the new site visits, the UFC will proceed directly to a UFC hearing and vote. The Chair should instruct UFC members that they must base their evaluation and vote only on information gathered after the vote to vacate the October 6 decision. This information should include the new onsite evaluations, new written public comment, and public comment at this UFC hearing.
- Notify members of the public who submitted written or oral public comment in connection with the October 6 hearing that the Committee's decision has been vacated and that their prior submitted public comment will not be considered when the issue of landmarking the tree at 4 Montclair Terrace is taken up anew. Notify these members of the public that they may again submit written or oral public comment in connection with the new hearing on the landmarking of the tree.

Finally, staff recommend that at a future meeting, the UFC amend its bylaws to concretize and make more specific a procedure for evaluating trees in connection with a nomination for landmark status.

Respectfully,



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ATTACHMENT: Montclair Terrace Association letter to the Chair of the Urban Forestry Council and the Office of the City Attorney

# MONTCLAIR TERRACE ASSOCIATION

January 4, 2017

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**Re: Objection to Homeowner's Standing to Nominate 4 Montclair Terrace Coastal Redwood for Landmark Status; Nomination Proceedings in Violation of Brown Act; and Unethical Conduct By Certain Council Members**

Dear Chairperson Flanagan and Ms. Cabrera:

At the December 9, 2016 hearing of the Urban Forestry Council, the Council considered the nomination for Landmark status of the coastal redwood tree located at 4 Montclair Terrace. More than a dozen immediate neighbors of the 4 Montclair Terrace property appeared and objected to the nomination on many grounds. The Montclair Terrace Association and its members write to reiterate the objections that are legal in nature to question the propriety of this nomination and the Council's consideration of it. Given the Council's failure to address these issues at the December 9 hearing, we now request that the City Attorney weigh-in and properly advise the Council on them.

## **1. This Tree Is Not Properly Nominated Pursuant To The Ordinance**

As originally set forth in the Association's letter sent on December 2, 2016 (a week prior to the Council's December 9 hearing), the property owners of 40 Montclair Terrace, 33 Montclair Terrace, 25 Montclair Terrace, and 1040 Lombard Street objected the Council's consideration of this coastal redwood tree's nomination because those owners did not join in that nomination. The nomination was submitted unilaterally by the property owner of 4 Montclair Terrace, even though the nominated coastal redwood tree is not *contained* on her property as required by the Ordinance. *See* Public Works Code § 810(b)(1). To the contrary, per submitted arborists' reports, this tree has roots that extend 50-60 feet from its trunk in every direction—well into these neighboring properties. It is well settled that, under California law, the parts of a tree, such as branches and roots, that extend into a property belong to that property owner. *See Grandona v. Lovdal* (1889) 78 Cal. 611, 618; *Stevens v. Moon* (1921) 54 Cal. App. 737, 740. It is obvious that the Ordinance limited nominations to “property owner whose property *contains* the subject tree” to avoid having one property owner essentially circumvent another's property rights through the nomination process. The Council did not address this legal issue during the December 9 hearing, which is not surprising given certain Council members' admissions that they had not even read the Association's December 2 letter.

We also use this opportunity to note that the Council has dealt with this precise issue before, in connection with the landmarking consideration of a coastal redwood at 455 Chenery Street. The Council ultimately rejected that nomination after the neighboring homeowner at 461 Chenery voiced opposition because that tree's branches and roots extended into his property. The same

result is warranted here. An extensive legal opinion about this issue was presented by 461 Chenery's homeowner at that time, and we attached it to the Association's December 2 letter for consideration by the Council.

We also bring to the Council's attention the analogous City procedures governing the designation of landmark buildings, which confirm that the above interpretation of the Ordinance is correct. Under the Planning Code, the process to landmark a building may be initiated by the Board of Supervisors, the Planning Commission, the Art Commission, the Landmarks Preservation Advisory Board, or "on the verified application of owners of the property to be designated or their authorized agents." San Francisco Planning Code § 1004. The Planning Code does not allow one property owner to initiate the landmark process for a building, or portions of a building, on another's property. Rather, initiation without an owner's consent is entrusted to designated public bodies. A tree that is the subject of a landmark nomination should be treated no differently.

Accordingly, we request that the City Attorney provide the Council with legal guidance regarding whether the nomination by 4 Montclair Terrace meets the Ordinance's prerequisite that the nominated tree be *contained* by the property nominating it. The Association believes it is not, and thus the Council must summarily reject the nomination without further consideration.

## **2. The Landmark Tree Committee Violated The Brown Act By Holding A Meeting At 4 Montclair Terrace Without Providing Notice To The Public**

The Landmark Tree Committee, just like the Council, is subject to the Ralph M. Brown Act, Gov. Code, § 549501 *et seq.*, because it is a standing committee. *See id.* § 54952(b). Thus, any "meeting" of the Committee, which includes "majority of the members of a legislative body at the same time and place *to hear, discuss* or deliberate upon any matter which is under the subject matter jurisdiction of the agency" must comply with the Brown Act's requirements. *See id.* § 54952.2(a) (emphasis added). Notably, the definition of a "meeting" is in the disjunctive—i.e., any hearing or discussion of a matter triggers the requirements of the Brown Act. This definition also makes it clear that the Committee need not take any action in order for a gathering to be defined as a "meeting." As the Committee is well aware by its conduct at City Hall meetings, the Brown Act requires publication of a notice, agenda, and the ability for any member of the public to attend and comment. *Id.* §§ 54954(a), 54954.2(a), 54954.3(a).

It is clear from the reports on this nomination completed by Committee and Council members Hillan, Hillson, Kida, Short, and Swae, as well as by staff member Hui, that they met on September 30, 2016 at 4 Montclair Terrace with that property's owner and the tree's nominee, Meri Jaye. Because the Committee provided no public notice in advance, the September 30 meeting of the Committee did not comply with the Brown Act. Accordingly, there was no opportunity for public comment at that initial meeting on September 30. Nevertheless, at least some of the committee members made preliminary decisions to approve the landmarking nomination that day, as evidenced by the written reports they completed. Subsequently, at the next regular Committee meeting on October 6, 2016—i.e., 6 days after the meeting at

4 Montclair Terrace—the nomination was approved with little comment by Committee members other than to reiterate the conclusions apparently formed during their September 30 meeting with Ms. Jaye at 4 Montclair. This is exactly the type of situation the Brown Act was intended to avoid—i.e., private meeting with a proponent, followed by a publicly accessible sham meeting to formally decide what was discussed and essentially decided at the private meeting.

The Brown Act sets forth civil remedies for violations of the Act. These include voiding any actions resulting from the violation. *Id.* § 54960.1. We believe that the Council should not only void the Committee’s decision, but also ask those Committee members to recuse themselves from further discussion or voting on this particular nomination if they violated the Brown Act. Accordingly, we request that the City Attorney provide the Council legal guidance regarding whether to void the Committee’s October 6 approval of the nomination, and whether the Committee’s members should further recuse themselves from any further deliberation on this matter.

### **3. Ethical Considerations For This Nomination And Going Forward**

Article X of the Council’s Bylaws state that Council members shall “refrain from using their official positions to secure special advantage or benefit for themselves or others.” The discourse at the hearing on December 9 leads us to the conclusion that certain Council members should receive further guidance by the City Attorney on the impartial and unbiased decision-making in which they must engage. It is often the case that volunteers choose to work in an area with personal appeal and significance to them. But, that reason for joining the Council cannot override the objectivity that is necessary to accomplish the civic responsibility entrusted to each Council member.

We are particularly concerned with comments made by Committee and Council member Hillson regarding this nomination. Her September 30 Evaluation adopted the nominee’s statements about the historical significance wholesale, without any attempt to verify them. These assertions, such as “[t]he property on which the tree sits was a stomping ground were William Randolph Hearst and his playmates danced the Irish jig,” were later shown to be false by examination of City’s recorded property documents. At the December 9 hearing, she raised those cultural and historical considerations in support of the nomination, but upon presentations by the neighborhood showing that these considerations were not met, member Hillson changed her focus to be “about the tree itself.” Her evaluation and comments at hearings on this nomination have made clear that she is predisposed to her initial decision in favor of landmarking despite new information. Of equal concern is her own conflict of interest in that she sought to landmark a Manzanita in her own backyard in 2008 with the support of the same arborist, Roy C. Leggitt, who was advocating for Ms. Jaye. Thus, Ms. Hillson appears to have a personal bias in favor of nominations in general, and a conflict given her personal connection with Mr. Leggitt (her own arborist) in particular for this nomination. Critically, her comments at the December 9 meeting stand in stark contrast to member Kida, who assimilated the information presented at that meeting and decided to no longer support the nomination in light of it.

January 4, 2017

Page 4

We are very concerned with Ms. Hillson's failure to disclose these apparent personal connections and biases, and in her steadfast viewpoint despite being presented with new information undermining the bases for it. Ms. Hillson, and each member of the Council, is responsible for safeguarding of all San Franciscans' rights—and not just the person who seeks to turn her tree into a landmark.

Moreover, the lack of objectivity demonstrated by other Council members in general—having been swayed by the nominee's unverified personal story and reasons for the nomination that were irrelevant to the objective criteria—is also very concerning. We request that the City Attorney provide legal guidance to the Council and to its members on their duties to all San Franciscans to prevent their personal biases from affecting the Council's decision, and to disclose their personal connections and recuse themselves where necessary and appropriate (such as where a Council member has had past dealings with nominees or the nomination's proponents).

The Association submits that the Council may not further consider the nomination of the coastal redwood at 4 Monclair Terrace until these threshold legal issues have been resolved. We look forward to your prompt response.

Best regards,

  
  
 Kassabian, President