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11 VICTORIA TALKINGTON

12 SUPERIOR COURT OF THE STATE OF CALIFORNIA

13 COUNTY OF MARIN

14 UNLIMITED JURISDICTION

15 **BY FAX**

16 VICTORIA TALKINGTON,

17 Plaintiff,

18 v.

19 JIM McCANN and Does 1 through 10,
20 inclusive,

21 Defendants.

Case No. CIV 1603782

**FIRST AMENDED COMPLAINT FOR
DECLARATORY AND INJUNCTIVE
RELIEF**

1 **INTRODUCTION**

2 1. Over the course of its hundred year-plus history, the City of Mill Valley (“the
3 City”) has acquired property interests in an expansive network of steps, lanes, and paths
4 (“SLPs”) located within the City’s boundaries. The City has repeatedly acknowledged that these
5 SLPs are vital public assets fulfilling critical community functions. SLPs provide emergency
6 evacuation routes in the event of nature disasters, allow children to safely walk to school,
7 facilitate pedestrian and bicycle transportation to reduce traffic congestion, and connect
8 residents to City parks, trails in open space and other public lands of Mt. Tamalpais and beyond.
9 The most famous of these SLPs comprise the first three stairways of the Dipsea Steps.

10 2. The City’s officials have a fundamental and unwaivable duty to preserve and
11 protect the City’s public assets, and to expend City resources so as to do so. These officials are
12 charged with the fiduciary responsibility of safeguarding the City’s public assets in trust and for
13 the benefit of the entire community. City officials cannot lawfully transfer possession, custody
14 or control of City property, including SLPs, to private citizens without complying with
15 elaborate legal procedures intended to protect the general public, including public notice, an
16 opportunity for the City’s residents to be heard, consideration of the City’s General Plan, and a
17 formal resolution approved by a vote of the City Council. Nor can they lawfully relinquish use
18 and control of City property to private interests without securing a public benefit or other
19 adequate consideration.

20 3. In recent years the City has failed to fulfill its duties to protect and preserve the
21 City’s SLPs. It has allowed private property owners to occupy and exercise control over public
22 property and exclude City residents from public SLPs. This taxpayer action seeks declaratory
23 and injunctive relief to compel the City to fulfill its obligations to the people of Mill Valley and
24 to protect and preserve the SLPs as public assets.

25 **PARTIES**

26 4. Plaintiff Victoria Talkington is a resident of the City of Mill Valley. She has paid
27 taxes to the State of California and the City of Mill Valley within one year of the
28 commencement of this action, and brings these claims as a taxpayer and pursuant to Code of

1 Civil Procedure §526a. Plaintiff is a former Chair of the Mill Valley Planning Commission and
2 has been actively involved in the City’s efforts to inventory, preserve and protect Mill Valley’s
3 public SLPs since 2000.

4 5. Defendant Jim McCann is the City Manager of Mill Valley and a resident of
5 California. He is the senior official in the City. Defendant McCann supervises, oversees, and
6 directs all of the City’s employees and departments. He is responsible for implementing the
7 City’s policies and programs, including its General Plan, and reports directly to the City
8 Council. His statutory duties include “see[ing] that all laws and ordinances are duly enforced.”
9 Mill Valley Municipal Code §2.04.020 (A).

10 6. Does 1 through 10 are persons or entities whose true names and capacities are at
11 present unknown to Plaintiff who, therefore, sues them under such fictitious names. Plaintiff is
12 informed and believes and on that basis alleges that each of the fictitiously named Defendants
13 perpetrated some or all of the wrongful acts alleged herein, is responsible for the harm alleged,
14 and is jointly and severally liable therefor. Plaintiff will amend this complaint to state the true
15 names and capacities of such fictitiously named Defendants if and when they are ascertained.

16 **JURISDICTION AND VENUE**

17 7. This Court has jurisdiction over Plaintiff’s claims for declaratory and injunctive
18 relief pursuant to Code of Civil Procedures §525 and §526a, and because they are within the
19 Court’s general jurisdictional grant of authority.

20 8. Venue is appropriate in this judicial district because Plaintiff is a resident of
21 Marin County, the City is located in Marin County, and the wrongful conduct alleged herein has
22 occurred and is occurring in Marin County.

23 **STATEMENT OF FACTS**

24 **Creation of the SLPS**

25 9. One of the unusual features of the City is that it is connected with a network of
26 SLPs running throughout the community. These SLPs are public property administrated in trust
27 by the City for the benefit of its citizens. Their origin may be traced to the earliest days of what
28 is now known as Mill Valley.

1 10. In 1890 the core of what became Mill Valley was subdivided by the Tamalpais
2 Land and Water Company (“TLW”) through a map surveyed by Michael O’Shaughnessy
3 showing residential parcels of land connected by certain “streets, avenues, drives, lanes, paths
4 or passageways” (“Streets”). This map, referred to as TLW 1, was recorded in the Marin County
5 Recorder’s Office.

6 11. In 1898, TLW added to the land area subdivided for residential parcels
7 connected by Streets and again subdivided the land on TLW 1 by surveying and recording a
8 new subdivision map known as TLW 5. This new map, TLW 5, was also recorded in the Marin
9 County Recorder’s Office. TLW 5 effectively superseded and replaced TLW 1. At the time
10 TLW subdivided TLW 5, the City had not been incorporated. TLW originally intended to create
11 a gated, private community in what is now Mill Valley. Consequently, TLW dedicated full use
12 of the Streets to purchasers and their successors, rather than to the general public. TLW retained
13 the underlying fee in interest in the Streets.

14 12. In 1905 TLW yet again added to the area subdivided for residential parcels
15 connected by Streets by surveying and recording a third map known as TLW 8, directly
16 adjoining TLW 5 lands.

17 13. In and through TLW 5 and TLW 8, TLW did dedicate full use of the Streets to
18 all purchasers of the subdivided lots and their successors in interest as rights of way.

19 14. Plaintiff and most residents of Mill Valley are direct successors in interest to the
20 purchasers of the initial residential lots created through TLW 5 and 8. The City is also such a
21 successor in interest. In fact, Mill Valley’s City Hall, the Mill Valley Public Library, Old Mill
22 Park, Cascade Park, the Depot Plaza, Lytton Square, Edgewood Park, Kathleen Norris Park,
23 Molino Park, West Blithedale Canyon Park, and Earnscliffe Canyon Park are located on parcels
24 subdivided and sold by TLW. The residents of Mill Valley and the City itself, in their capacities
25 as direct successors in interest and/or in their capacity as residents of the City (a direct successor
26 in interest) are entitled to the full use of all the Streets created by TLW 5 and 8 by the express
27 terms of TLW 5 and 8.

28 15. In 1900 the Town of Mill Valley (later renamed the City of Mill Valley) was

1 incorporated. At the time, TLW agreed that all of land shown on TLW 5, including its Streets,
2 was properly part of the newly incorporated Mill Valley. Immediately thereafter the City,
3 residents of the City, and the general public began using the Streets, including those Streets now
4 referred to as SLPs. TLW, its officers, agents, employees acquiesced to the use of the Streets by
5 the City, its residents and the general public. The land on the 1905 TLW 8 map was annexed to
6 the City after incorporation, and City, resident, and general public use of the Streets shown
7 thereon was immediately the same as that of TLW 5.

8 16. TLW was established as an 100-year corporation. When its franchise was about
9 to expire, TLW deeded its remaining fee interest in the Streets (that TLW had retained in
10 subdividing TLW 5 and 8) to the Homestead Valley Land Trust (“HVLТ”). In 2010, HVLТ, in
11 turn, deeded the fee interest in the subgroup of the Streets known as SLPs to the City. The City
12 recorded this deed in the Marin County Recorder’s Office. Thus, the City has the right to use all
13 of the Streets created by TLW 5 and 8 both as a successor in interest to original purchasers and
14 as the actual owner of the underlying fee interest in the Streets that are the SLPs created by
15 TLW 5 and 8.

16 17. The City’s SLPs are identified by number. SLPs 5 and 167 are Streets created by
17 TLW 5, deeded to HVLТ by TLW, and subsequently deeded by HVLТ to the City. Similarly,
18 many of the other public SLPs in Mill Valley are Streets created by TLW5 and 8, deeded to
19 HVLТ and then deeded to the City.

20 18. Some of the residential parcels created by TLW 5 and 8, were purchased by
21 developers. These developers further subdivided the parcels and created additional lots and
22 Streets.

23 19. Fred Schlingman was one of these developers. In or about 1914 Schlingman
24 acquired multiple residential parcels from TLW. He further subdivided these parcels and created
25 additional Streets through a subdivision map entitled Schlingman Tract No. 6 (“Schlingman 6”).
26 One of the Streets created through Schlingman 6 is SLP 19.

27 20. Schlingman 6 was recorded in the Marin County Recorder’s Office. The
28 Schlingman 6 Map offered to dedicate the Streets identified thereon, including SLP 19, to the

1 general public. In June 1925, the City formally accepted the offer of dedication of the Streets on
2 Schlingman 6 through Resolution 360. Thus, SLP 19 became a public Street in 1925 and has
3 remained so ever since.

4 21. Developer Schlingman also acquired other residential lots from TLW which he
5 further subdivided. In doing so, he created smaller lots and additional Streets. Some of these lots
6 were surveyed and subdivided in a map entitled Map of Schlingman Tract No. 5 (“Schlingman
7 5”). Two of the Streets created through Schlingman 5 were SLPs 118 and 119 (“Dot’s Lane”).

8 22. Schlingman 5 was recorded in the Marin County Recorder’s Office. The
9 Schlingman 5 map offered to dedicate the Streets identified thereon, including SLPs 118 and
10 119, to the general public. In 1907, the City formally accepted the offer of the dedication of the
11 Streets on Schlingman 5, through Resolution unanimously adopted Tuesday, January 8th 1907.
12 Thus SLPs 118 and 119 became public Streets in 1907 and have remained so ever since.

13 23. The City’s network of SLPs expanded as the City grew through similar
14 subdivisions, dedications of Streets in subdivision maps and acceptances by the City in
15 Resolutions. The City acquired a small number of other SLPs through different means. SLP 140
16 is one example.

17 24. In 1893, TLW built a dam upstream of the junction of Lovell Avenue and
18 Cascade Drive. TLW and/or the Tamalpais Fire Association also built a fire road extending
19 from that junction, past the dam and up to Mt. Tamalpais. In the 1920s, the Marin Municipal
20 Water District (“MMWD”) acquired the dam, the lands surrounding it, and an easement over
21 the access/fire road. MMWD subsequently deeded this land and easement to the City in 1959,
22 which have been used continuously by the City, its residents, and the general public since
23 inception. The access/fire road is now known as Cascade Trail and is SLP 140.

24 **The City’s Promise to Preserve and Restore the SLPs**

25 25. In the early years of the City, SLPs were heavily used. After automobiles became
26 the principal means of transportation for residents, usage of the City’s SLPs declined. Some
27 SLPs fell into disrepair and disuse.

28 26. Interest in the City’s SLP network was rekindled following natural disasters in

1 other cities and increasing traffic congestion problems in the City. Residents came to realize
2 that protecting open SLPs and restoring overgrown SLPs would guarantee unblocked
3 evacuation routes in the event of natural disasters and provide a means of reducing vehicular
4 traffic, along with preserving historic routes to Mt. Tamalpais and providing access to natural
5 resources for health and recreational purposes. They urged the City to revitalize its network of
6 SLPs.

7 27. As a direct result of growing community interest, the City adopted provisions in
8 its 1989 General Plan reflecting a new commitment to identifying and restoring the City's SLPs.
9 Policy RC-3 mandated that:

10 The City shall preserve and restore its network of "lanes." Official abandonment
11 of any such easements or fee simple rights should occur only in the most
12 extraordinary circumstances and then only by vote of the City Council. Where
13 there is any doubt whatever about the advisability of outright abandonment,
14 private improvements shall be allowed only through a revocable encroachment
15 permit and no structure of any permanence shall be built on or over the lane.

16 28. In order to effectuate Policy RC-3, the City adopted Program RC-3-1 and RC-3-2:

17 The Parks and Recreation Department and the Department of Public Works shall
18 maintain a system of pathways, lanes and steps

19 ***

20 All of the City's "lanes," including those that have been neglected or abandoned,
21 shall be inventoried. The inventory shall give the legal status of each lane and
22 shall categorize the lane according to present condition, expense of maintaining,
23 expense of developing, and importance of the lane. The Parks and Recreation and
24 Public Works Departments shall encourage the active cooperation of
25 Neighborhood Associations and individuals with the inventory process, and
26 especially with funding of improvements. A citizens' Lanes and Steps Committee
27 shall be established to coordinate this program. The inventory shall be done by
28 citizens on a volunteer basis, rather than with City funds.

29. The City also added Program RC-3-3 to the General Plan:

30 The City should provide adequate funding to keep the existing system of
31 pathways, lanes and steps safe and accessible. Certain paths may be designated
32 for maintenance through funding, in whole or in part, by Neighborhood
33 Associations, or other organizations, or individuals.

34 30. In 2000, following the General Plan mandate, the City commenced an extensive
35 public process to inventory all of the SLPs in which the City held property interests. Plaintiff
36 Talkington, then a member of the Mill Valley Planning Commission, agreed to lead the citizens'

1 Lanes and Steps Committee to coordinate this General Plan program, conduct the inventory,
2 and report back to the City Council.

3 31. All of the public SLPs identified in the inventory appear on subdivision maps of
4 the City that are recorded in the County of Marin, with minor exceptions for certain trails
5 traversing City owned parklands/open space and portions of popular hiking trails within City
6 limits known as the Tenderfoot Trail, the Pipeline Trail, the Cypress Trail, and the Zig Zag
7 Trail.

8 32. Occupying a conference room in City Hall, a team of two administrators and
9 three attorneys started with the City's 1975 Zoning Map as amended (the "1975 Map") as the
10 baseline document. This map was provided to all City officials upon taking office. It was also
11 available for sale at City Hall. Using the 1975 Map as a location guide, the team first
12 numbered, then identified and collated City Hall's official property records on the SLPs.
13 Among other things, they examined the contents of the City vault and basement, including the
14 City Council's bound minute books, resolutions, deeds and other documentation beginning with
15 the 1900 incorporation of the City. The former City Manager instructed all City departments to
16 give the Committee access to records and files for its work pursuant to the General Plan.

17 33. Starting in or about 2002, the Committee also began working with other
18 community members to survey the condition of many of the City's SLPs, both passable and
19 impassable. A team of about 10 volunteers hiked the City, located the physical place of SLPs,
20 and logged their findings in condition reports.

21 34. In 2004, the City Council authorized the Committee to prepare a user-friendly
22 SLP map for all citizens to use. The City Council reviewed and approved as its model the
23 highly successful pedestrian paths map created by the City of Berkeley's citizens' committee
24 following the devastating 1991 Oakland Hills fire storm.

25 35. First the initial 1975 Map as annotated by the Committee, and then the proposed
26 map of the City's historic SLPs, was posted in multiple locations and published for public
27 review and comment for an extended period. There were a series of public hearings relating to
28 the proposed map. By Council decision, the map was to include both SLPs open for passage

1 and SLPs currently overgrown and impassable, the objective being to encourage use of open
2 paths and restore the impassable SLPs over time. As a result of community feedback, six SLPs
3 were excluded from the initial map publication because five adjoining neighbors provided
4 documentation suggesting that the City's records were incomplete as to those particular SLPs.
5 The public status of the remaining SLPs on the posted map was undisputed.

6 36. In 2006, the City completed its review of the SLP property inventory. Then, the
7 City Council authorized, approved and adopted a final map entitled "A Guide to Mill Valley
8 Steps – Lanes – Paths" (as revised from time to time, "the SLP Map"). This SLP Map identifies
9 SLPs accepted by the City as public property over the course of the City's 100 year history.
10 The SLP Map expressly left open the possibility that additional SLPs would be included in the
11 future. This was because the inventory process had identified approximately 125 additional
12 SLPs for which the identifying City records had not yet been located, and for which additional
13 research was required. Those other SLPs were specifically excluded from the SLP map until
14 further documentation had been located.

15 37. The SLPs identified on the SLP Map are public property and have assigned
16 numbers based on their location, e.g. SLP 5.

17 38. In a series of resolutions and formal actions over the last decade, the City
18 Council has repeatedly and consistently confirmed and acknowledged that the SLPs on the SLP
19 Map are public property and community assets. Since 2006, the City has sold the SLP Map to
20 the general public and has derived thousands of dollars in revenues therefrom. The SLP Map
21 constitutes an affirmation and representation that the SLPs are public property. The City has
22 published three successive editions of the SLP Map. Each new edition contained revised
23 content, with SLPs that were formerly shown as impassable being upgraded to "blue" color
24 designating "passable path", as the City rehabilitated formerly closed SLPs to travelable
25 condition.

26 **The Failure to Fulfill the City's SLP Promise**

27 39. The Streets of the City belong to the people and are held in trust for the use of
28 the general public. The City has a duty to administer the SLPs in public trust for the benefit of

1 its citizens. In order to carry out its responsibilities, the City initially vested its Parks and
2 Recreation Director with jurisdiction over the restoration, maintenance and protection of the
3 SLPs. It also formed a committee, consisting of the Parks and Recreation Director, the Parks
4 Superintendent, the Fire Battalion Chief, and Plaintiff, to prioritize an initial group of
5 impassable and decayed SLPs for reconstruction and rebuilding, based on emergency egress
6 needs, pedestrian circulation and traffic considerations, degree of disrepair, and access to public
7 open space and Mt. Tamalpais. This committee developed a list of 38 SLPs as the beginning
8 group of SLPs to repair and re-open with City funding and volunteer efforts where practicable,
9 with others to be added to that preliminary priority list by City staff as the initial priority paths
10 were completed. The actual list contained more than 25 paths, but was called the “Top 25” list.

11 40. In 2008, the City adopted an update to its Bicycle and Transportation Plan
12 (“Bike/Ped Plan”). Included in the Bike/Ped Plan is a map of the City’s SLPs. The Bike/Ped
13 Plan map includes the SLPs identified on the SLP Map. Table 5 to the Plan lists many of the
14 City’s SLPs, which also correspond to most of those identified on the SLP Map. The City
15 Council adopted the initial priority list of Top 25 SLPs as part of the Bike/Ped Plan. Prior to
16 formally adopting the priority list of Top 25 SLPs into the Bike/Ped Plan, the City mailed
17 notices to all property owners adjoining these Top 25 SLPs, and two members of City staff
18 visited the homes of property owners adjoining SLPs ready for reconstruction, to alert them to
19 the impending City construction on these SLPs.

20 41. From 2005 to 2010, the City’s and citizen efforts on the SLPs included actual
21 physical paths renovation and general funding, on top of the paperwork of inventorying the
22 City’s historic SLP records, formalizing the Bike/Ped Plans (2003 and 2008) and publicizing
23 and selling the SLP Map. Plaintiff and the City’s Departments of Planning, Fire Department
24 and Parks and Recreation worked together to create a volunteer path rebuilding program,
25 modeled after the successful City of Berkeley Path Wanderers program. The first restoration
26 took place in approximately 2005.

27 42. By mid-2010, the City/volunteer program had restored more than twenty-eight
28 (28) SLPs in five years. Of those 28 restored paths, almost all had been inaccessible at the

1 beginning of their restoration, and many were among the Top 25 priority SLPs on the Bike/Ped
2 Plan list (including SLPs 11, 23, 33, 39, 46, 51 and 54). By mid-2010, when Defendant McCann
3 was appointed City Manager, two additional priority paths (SLPs 19 and 167) were in the
4 pipeline to be restored over the coming year. Another property was in the process of being
5 donated by a community member to create an SLP. Volunteer discussions were underway for
6 its rehabilitation, along with providing volunteer funding for a re-routed alternative to SLP 227.
7 And decaying SLP 230, just around the corner from City Hall, was on track to be renovated.

8 43. On October 13, 2013 the City Council adopted a new General Plan called MV
9 2040 (the “MV 2040 General Plan”). The City’s decisions affecting public property and
10 community growth and development must be consistent with its General Plan. The MV 2040
11 General Plan acknowledges the existence of over 175 SLPs within the City and underscores
12 their importance to the community. It states:

13 Because of the City’s miles of hillside streets, the SLPs are especially important
14 shortcuts for the many hillside walkers, including children and others who cannot
15 drive. The SLPs function as the “sidewalks” for Mill Valley’s hillside
neighborhoods, providing a safe path of travel for pedestrians where one would
otherwise not exist.

16 MV 2040 at 56.

17 44. The MV 2040 General Plan also recognizes that the SLPs serve at least five
18 important public purposes in that they provide:

- 19 • Direct access from the hillsides to key destinations such as schools, transit
20 stops, and commercial and recreational areas;
- 21 • An alternative method of travel from an automobile;
- 22 • Direct access and routes away from danger when narrow streets and roadways
may not be readily accessible or useable during an emergency;
- 23 • Venues for outdoor health and fitness activities, including the annual Dipsea
24 Race – the oldest trail race in America; and
- 25 • A sense of community, by connecting residents and neighborhoods with
pedestrian opportunities in areas not typically served by sidewalks.

26 *Id.*, MV 2040 at 56-58.

27 45. In order to further the important public purposes of the SLPs, the City
28 incorporated M.12-1 into the MV 2040 General Plan. This provision imposes a mandatory duty

1 on the City and Defendant McCann to ensure the SLPs are maintained and preserved. It
2 mandates that:

3 The City shall preserve and restore its network of steps, lanes and paths. Official
4 abandonment of any such easements or fee simple rights of way should occur
5 only in the most extraordinary circumstances and then only by vote of the City
6 Council.

7 46. The Hazards and Public Safety Element of the General Plan also emphasizes the
8 importance of the SLPs. It identifies the SLPs as evacuation routes in the event of natural
9 disasters. *Id.*, MV 2040 at 187. Moreover, it commits the City to “[s]upport measures to
10 designate, create, maintain, resurrect, and enhance those steps, lanes and paths that also serve as
11 evacuation routes.” *Id.*, MV 2040 at 193, HZ.5-2.

12 47. In connection with the review and approval of the new General Plan, MV 2040,
13 the City issued and adopted an Environmental Impact Report. The final version of this Report,
14 dated October 7, 2013, references the SLP Map as Exhibit 3.11-4.

15 48. At the time Defendant McCann was appointed City Manager of Mill Valley in
16 June 2010, the City’s Parks and Recreation Director had jurisdiction over and responsibility for
17 the restoration, maintenance and protection of the City’s SLPs. At a date and time presently
18 unknown, Defendant McCann transferred jurisdiction over SLPs to a citizen committee lacking
19 any legal authority to implement and enforce the City’s mandate to restore, maintain and protect
20 the SLPs. Defendant McCann also brought City and community efforts to revitalize the SLPs to
21 a halt.

22 49. As a direct and foreseeable consequence of these actions, the existing
23 mechanisms for restoring, maintaining and protecting the SLPs were disrupted and/or
24 effectively eliminated. In the months and years following these actions, Defendant McCann and
25 the City have breached their obligations to preserve the SLPs for the benefit of the public, ceded
26 control of public SLPs to private property owners, acquiesced to encroachments by private
27 property owners onto SLPs, made gifts of public property to private property owners, and
28 allowed private property owners to exclude the general public from SLPs. As of the date of this
Complaint, the City and Defendant have failed to perform any renovation work on any of the

1 three SLPs that were in line for construction starting in 2011. In fact, no renovation work has
2 been done on any of the priority Top 25 SLPs, other than volunteer funding and reconstruction
3 of an alternate to SLP 227. And work on the donated SLP started, but has not been completed
4 for 3 years.

5 **The Nature and Extent of Defendant McCann's Violations**

6 50. Plaintiff and others have given Defendant McCann repeated notice of the matters
7 alleged herein and demanded that he take action. Those demands for action have consistently
8 been rebuffed or ignored. Several examples are set forth below.

9 51. SLP 5 is on the SLP Map. It is public property and a Street.

10 52. In April 2013, Plaintiff and Defendant McCann visited SLP 5 because Defendant
11 McCann had asked Plaintiff about its status as public property. They visited SLP 5 and walked
12 it. At that time, there was no barrier preventing public passage along SLP 5, although it was
13 overgrown near the top. Immediately following that meeting, Plaintiff provided Defendant
14 McCann multiple City document references showing continuous City use and regulation of SLP
15 5 beginning shortly after Mill Valley's incorporation, which supplemented the City's 2010 deed
16 to SLP 5 from HVL. Nonetheless, not long thereafter, Defendant McCann allowed an uphill
17 neighbor to construct a fence across SLP 5. The fence constitutes an encroachment into a Street.
18 The party who constructed the fence did not obtain a permit and did not pay any fee to do so.
19 The fence is a barrier and closes off public access to SLP 5. The private property owner
20 adjoining SLP 5 has effectively converted public property into their private property by
21 incorporating it into their yard. As a result of the fence, the citizens of Mill Valley and the
22 general public cannot access or use SLP 5.

23 53. Defendant McCann has been repeatedly informed of and personally observed the
24 closure of SLP 5. The 2008 Bicycle and Pedestrian Transportation Plan identified SLP 5 as a
25 priority for restoration. It was also identified as a priority in the 2010 Old Mill Safe Routes to
26 School Plan. Nevertheless, Defendant McCann has allowed and is continuing to allow a private
27 property owner to occupy SLP 5, to take possession, custody and control of SLP 5, and to
28

1 exclude the general public from SLP 5 without paying rent and without any legal authority to do
2 so. Defendant McCann has effectively given public property to a private property owner.

3 54. SLP 19 is on the SLP Map. It is a public property and a Street.

4 55. In approximately 2013, an adjoining private property owner placed sawn logs,
5 brush and construction debris on the top of SLP 19 and thereby blocked the upper portion of the
6 SLP. The sawn logs, brush and construction debris constitute encroachments into a public
7 Street. The party who placed the sawn logs, brush and construction debris on SLP 19 did not
8 obtain a permit and did not pay a fee to do so. The private property owner adjoining SLP 19
9 effectively converted public property into their private property by incorporating it into their
10 yard. As a result of the sawn logs, brush and construction debris, the citizens of Mill Valley and
11 the general public cannot access or use SLP 19.

12 56. In 2013, Plaintiff notified the City of the closure of SLP 19 and requested that
13 the City take action to reopen the SLP. The City refused to do so. Instead, in 2016 the City
14 approved a set of construction plans allowing another adjoining private property owner to
15 incorporate SLP 19 into his yard.

16 57. The 2008 Bicycle and Pedestrian Transportation Plan identified SLP 19 as a
17 priority for restoration. Similarly, the 2010 Old Mill Safe Routes to School Plan identified SLP
18 19 as a priority for restoration. Nevertheless, Defendant McCann has allowed and is continuing
19 to allow a private property owner to occupy SLP 19, to take possession, custody and control of
20 SLP 19, and to exclude the general public from SLP 19 without paying any rent and without any
21 legal authority to do so. Defendant McCann has effectively given public property to a private
22 property owner.

23 58. SLPs 118 and 119 are on the SLP Map. They are public property and Streets
24 collectively referred to as Dot's Lane.

25 59. Sometime after 2011 a private property owner constructed wooden fences and
26 gates closing off the top and lower portion of SLP 119. In 2016, this private property owner
27 began bulldozing the top of SLP 118, where it connects to SLP 119, and started constructing a
28 fence to close it off. Neighbors brought the unlawful construction activity to the City's

1 attention. Defendant McCann personally inspected the activity and informed the neighbors that
2 it was a private matter that did not concern the City.

3 60. The fencing on Dot's Lane constitutes an encroachment into a Street. The party
4 who constructed the fencing did not obtain a permit and did not pay any fee to do so. The
5 fencing is a barrier and closes off public access to SLPs 118 and 119. The private property
6 owner adjoining SLPs 118 and 119 has effectively converted public property into his private
7 property by incorporating them into his yard. As a result of the fencing the citizens of Mill
8 Valley and the general public cannot access or use SLPs 118 and 119.

9 61. Defendant McCann has been informed of and personally viewed the closure of
10 SLPs 119 and 118. These SLPs are featured in the You Tube video "Losing Our Way: Mill
11 Valley's Failure to Protect Dot's Lane" (<https://www.youtube.com/watch?v=0k70vLNfnOE>)
12 which was brought to Defendant McCann's attention at a public meeting of the Mill Valley City
13 Council. Nevertheless, Defendant McCann has allowed and is continuing to allow a private
14 property owner to occupy SLPs 118 and 119, to take possession, custody and control of SLPs
15 118 and 119, and to exclude the general public from SLPs 118 and 119 without paying rent and
16 without any legal authority to do so. Defendant McCann has effectively given public property to
17 a private property owner.

18 62. SLP 167 is on the SLP Map. It is public property and a Street.

19 63. In approximately 2010, the City expended substantial resources preparing for
20 this restoration project. The City engaged an engineer to draw up a set of plans for steps to be
21 installed on SLP 167 to facilitate travel. The City also retained a surveyor to fix the precise
22 location of the stairs. In approximately 2011, the surveyor discovered that an adjoining private
23 property owner had constructed a deck and a stone wall across SLP 167. Rather than taking
24 action to have the encroachments removed, Defendant McCann halted the renovation of SLP
25 167 and prevented construction of the public stairs. The deck and stone wall constitute
26 encroachments into a Street. The party who constructed the deck and stone wall did not obtain a
27 permit and did not pay a fee to do so. The deck and stone wall are barriers and close off public
28 access to SLP 167. In response, the private property owner adjoining SLP 167 effectively

1 converted public property into his private property by incorporating it into his yard. As a result
2 of the deck and stone wall, the citizens of Mill Valley and the general public cannot access or
3 use SLP 167.

4 64. Defendant McCann was notified about the obstruction and closure of SLP 167 by
5 City staff in or about 2011. The 2008 Bicycle and Pedestrian Transportation Plan identified SLP
6 167 as a priority SLP for restoration. The 2010 Old Mill School Safe Routes to School Plan also
7 identified SLP 167 as a priority for restoration. Nevertheless, Defendant McCann has allowed
8 and is continuing to allow a private property owner to occupy SLP 167, to take possession,
9 custody and control of SLP 167, and to exclude the general public from SLP 167 without
10 paying rent and without any legal authority to do so. Defendant McCann has effectively given
11 public property to a private property owner.

12 65. SLP 140 is on the SLP Map. It is public property and a Street.

13 66. Sometime in 2013, the private property owner adjoining SLP 140 began taking
14 action to close off public access to SLP 140. The owner posted “Private Road” and “Private
15 Property” signs on the SLP, installed a barricade, and stacked wood in the SLP. He also
16 constructed a padlocked fence over a portion of SLP 140. The barricade, fence, and stacked
17 wood constituted encroachments into a Street. The party who placed the barricades, fence and
18 the woodpile on SLP 140 did not obtain a permit and did not pay to do so. The barricades, fence
19 and the woodpile were barriers and closed off public access to SLP 140. The private property
20 owner adjoining SLP 140 effectively converted public property into his private property by
21 incorporating it into his yard. As a result of the barricade, fence and woodpile, the citizens of
22 Mill Valley and the general public were prevented from accessing or using SLP 140.

23 67. Plaintiff and others brought the closure of SLP 140 to Defendant McCann’s
24 attention. Initially, Defendant McCann allowed a private property owner to occupy SLP 140, to
25 take possession, custody and control of SLP 140, and to exclude the general public from SLP
26 140, without paying rent and without the legal authority to do so. Defendant McCann
27 effectively gave public property to a private property owner.

1 extraordinary circumstances do not exist. Defendant McCann has violated and is continuing to
2 violate this duty through the acts and conduct alleged herein.

3 73. Under applicable law, a city cannot authorize a private property owner to
4 indefinitely erect barriers over or close off a Street. Defendant McCann has a duty not to allow
5 private property owners to indefinitely erect barriers over or close off Streets. Defendant
6 McCann has violated and is continuing to violate this duty through the acts and conduct alleged
7 herein.

8 74. Under applicable law, a municipal official has a duty to preserve and protect
9 public property. Defendant McCann has violated and is continuing to violate this duty through
10 the acts and conduct alleged herein.

11 75. Under applicable law, a municipal official has a duty not to transfer public
12 property to private property owners without providing notice and obtaining the approval of the
13 City Council. Defendant McCann has violated and is continuing to violate this duty through the
14 acts and conduct alleged herein.

15 76. Under applicable law, a municipal official has a duty not to give public property
16 to private citizens. Cal. Const. Art. XVI, §6. Defendant McCann has violated and is continuing
17 to violate this duty through the acts and conduct alleged herein.

18 77. The circumstance of SLPs 5, 19, 118, 119, 167 and 140 are indicative of a
19 systemic problem. Simply put, Defendant McCann is unwilling to preserve and protect the
20 public SLPs from the efforts of adjoining private property owners to encroach on public Streets.
21 In order to avoid conflicts with private property owners, Defendant McCann has adopted a
22 policy and practice of relinquishing possession, custody and control of public SLPs to private
23 property owners who occupy public SLPs. This policy and practice constitutes a waste of public
24 property, results in unlawful gifts of public property without just compensation, constitutes a
25 breach of trust, and violates the Mill Valley Municipal Code, the City's MV 2040 General Plan,
26 the California Constitution, and the common law.

27 78. Plaintiff Talkington has repeatedly brought the matters alleged herein to the
28 attention of the City and has urged Defendant McCann to take the steps necessary to protect the

1 City's SLPs. Despite actual notice, he has failed to do so.

2 79. Plaintiff is informed and believes, and on that basis alleges, that other residents
3 of the City have also notified Defendant McCann about obstructions to public SLP access and
4 about the need to take action to preserve and protect SLPs, and that he has failed to respond to
5 those requests for action as well.

6 80. Defendant Does 1 through 10 have aided and abetted Defendant McCann's
7 violations, are continuing to do so, and are jointly and severally liable for the violations alleged
8 herein.

9 **FIRST CAUSE OF ACTION**

10 **Declaratory Relief**

11 81. Plaintiff realleges and incorporates herein the allegations of the preceding
12 paragraphs as if set forth in full.

13 82. An actual controversy exists between Plaintiff, in her capacity as a taxpayer of
14 Mill Valley, and Defendant, in his capacity as City Manager, as to their respective rights,
15 remedies, and obligations. In particular, Plaintiff contends that Defendant has violated and
16 failed to fulfill his legal duties, as alleged herein, relating to the City's public SLPs. Plaintiff
17 further contends that Defendant has permitted private parties to block public access to SLPs,
18 convert SLPs to private use, and thus waste public property without legal authority for doing so.
19 The City holds the SLPs in public trust for its citizens. Defendant's failure to protect the public
20 interest in the SLPs is a breach of that trust.

21 83. Defendant disputes Plaintiff's allegations and contends to the contrary.
22 Accordingly, Declaratory Relief is necessary to resolve this controversy.

23 WHEREFORE, Plaintiff seeks a declaration as to the respective rights and obligations of
24 the parties and prays for relief as set forth below.

25 **SECOND CAUSE OF ACTION**

26 **Injunctive Relief To Prevent Waste Of Public Property**

27 84. Plaintiff realleges and incorporates herein the allegations of the preceding
28 paragraphs as if set forth in full.

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(e) Award such other and further relief as the Court deems just and proper.

Dated: December 28, 2016

Respectfully submitted,
CHAVEZ & GERTLER LLP

By:  _____

Mark A. Chavez
Attorneys for Plaintiff Victoria Talkington

PROOF OF SERVICE

(C.C.P. §1013a(3))

1
2 STATE OF CALIFORNIA)
3 COUNTY OF MARIN) ss.
4)

5 I am employed in the County of Marin, State of California. I am over the age of 18 years
6 and not a party to the within action; my business address is Chavez & Gertler LLP, 42 Miller
7 Avenue, Mill Valley, CA 94941.

8 On December 28, 2016, I served the following documents:

- 9 • **FIRST AMENDED COMPLAINT FOR DECLARATORY AND INJUNCTIVE RELIEF**

10 on the interested parties in this action addressed to each as follows:

11 Gregory W. Stepanicich, Esq.
12 Toussaint S. Bailey, Esq.
13 Patrick D. Skahan, Esq.
14 RICHARD, WATSON & GERSHON
15 44 Montgomery St., Suite 3800
16 San Francisco, CA 94104
17 gstepanicich@rwglaw.com
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19 Tel: 415-421-8484
20 Fax: 415-421-8486

21 *Attorneys for Defendant Jim McCann*

22 [X] **BY MAIL:** I am readily familiar with the business' practice for collection and processing
23 of correspondence for mailing with the United States Postal Service. I know that the
24 correspondence is deposited with the United States Postal Service on the same day this
25 declaration was executed in the ordinary course of business. I know that the envelope was
26 sealed and, with postage thereon fully prepaid, placed for collection and mailing on this
27 date, following ordinary business practices, in the United States mail at Mill Valley,
28 California.

Executed on December 28, 2016 at Mill Valley, California.

I declare under penalty of perjury under the laws of the State of California that the foregoing is true and correct. I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.



Natalie Martin