IN THE CIRCUIT COURT, 1st JUDICIAL CIRCUIT, [redacted] COUNTY

[redacted]

Plaintiff,

v. Case No.: 2019-CA-[redacted]

[redacted]

Defendants.

_____/

ORDER DENYING MOTION TO DISSOLVE TEMPORARY INJUNCTION

THIS CAUSE came before the Court, first on August 5, 2019, and again on August 27, 2019, regarding the Motion to Dissolve Temporary Injunction filed by the Defendants [redacted] ("the Defendants"), and the Court having considered the testimony of witnesses, considered exhibits, and considered the memorandums and legal arguments put forth by party counsel, hereby **ORDERS and ADJUDGES** that the Motion to Dissolve Temporary Injunction is **DENIED**, for the reasons set forth below.

Background/Introduction

The gravamen of this action is the interpretation and application of section 163.045 (1), *Florida Statutes*"[1] in response to the City of [redacted] ("the City") denying the Defendants' request to remove a 200-plus-year-old live-oak tree ("the Old Tree") located in the [redacted] governed by specific ordinances

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[1] "All new laws, though penned with the greatest technical skill, and passed on the fullest and most mature deliberation, are considered as more or less obscure and equivocal, until their meaning be liquidated and ascertained by a series of particular discussions and adjudications." James Madison, *Federalist* No. 37, in *The Federalist*, ed. George W. Carey and James McClellan (Indianapolis, IN; Liberty Fund, 2001) 183.

tailored to protect "Heritage Trees."[2] Section 163.045 (1), *Florida Statutes*, which went into effect on July 1, 2019, states that:

> (1) A local government may not require a notice, application, approval, permit, fee, or mitigation for the pruning, trimming, or removal of a tree on residential property if the property owner obtains documentation from an arborist certified by the International Society of Arboriculture or a Florida licensed landscape architect that the tree presents a danger to persons or property.

Before the effective date of section 163.045, *Florida Statutes*, the City denied a tree removal permit sought by the Defendants. After the denial, but before the effective date of section 163.045, *Florida Statutes,* the Defendants then submitted a house design plan to the City, which also called for removing the Old Tree. The City denied the design plans per section 12-6-6(B)(2)(c), *The Code of the City of* [redacted] *Florida* ("[redacted] Code"), which prescribes that an "architect, civil engineer, or planner … make every reasonable effort" to locate improvements "so as to preserve any existing tree."

After section 163.045, *Florida Statutes* went into effect, the Defendants hired Arborist [redacted] to draft a letter stating that the Old Tree was a danger to people and property. The City immediately challenged the veracity of the letter. On July 22, 2019, the City filed a Complaint for Declaratory and Injunctive Relief. Concurrently, the City obtained an *ex-parte* temporary injunction to restrain the Defendants from removing the Old Tree. On July 24, 2019, the Defendants moved to set aside the temporary

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[2] The parties are in apparent agreement that the Old Tree falls under the definition of "Heritage Tree", as that term is defined in *The Code of the City of* [redacted] *Florida.* "Heritage Tree" is not a term used in any state statute.

injunction, based on the opinion of Arborist [redacted], arguing that the letter of [redacted] satisfies section 163.045, *Florida Statutes* (2019).

On August 5, 2019, the evidentiary portion of the Defendants' Motion to Dissolve commenced, with these witnesses being called:

A. [redacted] the arborist hired by the Defendants. [redacted] confirmed [redacted] initially rendered an opinion that the Old Tree was not dangerous, and that [redacted] only changed [redacted] opinion when requested to do so the Defendants. [redacted] was also candid that [redacted] did not utilize industry standards for determining whether the Old Tree is dangerous. While [redacted] presented [redacted] as a tree expert who is ISA certified, [redacted] opinion in the instant matter lacks credibility due to [redacted] failure to utilize industry standards, and his tacit admission to changing his original opinion to suit the whims of the Defendants.

B. [redacted], a certified arborist, called by the City. [redacted] unlike [redacted] assessed the Old Tree using ISA standards and rendered an opinion that the Old Tree is healthy and vibrant, and is not a present danger to people or property.

C. [redacted], arborist called by the City. [redacted] was not ISA certified when he assessed the Old Tree; therefore, the Court puts no weight on Mr. Brown's testimony due to his lack of certification when he analyzed the Old Tree.[3]

D. [redacted] Landscape Architect, called by the City. [redacted]

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[3] This is not a blanket prohibition on this witness testifying in the future, if the witness is able to show that he inspected the Old Tree at a time when the witness was/is ISA certified.

testified that the field of Landscape Architecture does not have any written standards for assessing dangerous trees. Instead, [redacted] indicated he often relies upon ISA certified arborists to evaluate the condition of specific trees. Based upon his prior experience reviewing/analyzing the reports and opinions of ISA certified arborists regarding the condition of trees, [redacted] then testified that he considered the assessment conducted by [redacted] and that he agrees with her assessment.

E. [redacted], a City employee who presides over the City's parks and recreation department. [redacted] testimony regarding his interactions with the Defendants established that there are likely no grounds to create any form of an estoppel for the Defendants.

F. [redacted], a City building official who reviewed the house plans submitted by the Defendants. [redacted] testimony regarding his interactions with the Defendants established that there are likely no grounds to create any form of an estoppel for the Defendants.

Besides the live testimony presented at the August 5th hearing, these exhibits were admitted into evidence:

1. ISA Risk Assessment Form, with instructions.
2. Pictures of Old Tree.
3. Letter from [redacted]
4. Affidavit of [redacted]
5. Visual Inspection Report prepared by [redacted]
6. Letter from [redacted] to [redacted]
7. June 21, 2019 letter from [redacted] to the Defendants.
8. Emails between [redacted] and the Defendants.

The hearing concluded on August 27, 2019, with closing arguments.

Objections by Defendants

Defense counsel repeatedly asserted several objections throughout the multi-day hearing, and the Court deems it appropriate to consider the objections first.

A. Objection 1- The Court improperly conducted an evidentiary hearing.

The repeated objections by the Defendants to the Court exceeding its authority by both conducting an evidentiary hearing, and hearing testimony from witnesses called by the City, are overruled/denied.

A party who obtains a preliminary injunction without a hearing, must go forward with evidence when confronted with a motion to dissolve the injunction, and must establish a prima facie case to support the injunctive relief. *Dep't of Cmty. Affairs v. Holmes County*, 668 So. 2d 1096, 1101 (Fla. 1st DCA 1996). Per rule 1.610, *Florida Rules of Civil Procedure*, this Court must conduct a full evidentiary hearing once a motion to dissolve an ex-parte temporary injunction is filed. After the Defendants moved to dissolve the ex-parte preliminary injunction, this Court was bound to consider evidence from the City on whether the City can prove its prima facie case for entitlement to injunctive relief.

B. Objection 2: The City lacks standing to seek Declaratory Relief.

The repeated objections by the Defendants to the City's ability to seek declaratory relief are overruled/denied.

A party seeking declaratory relief must show doubt as to the existence or nonexistence of some right, status, immunity, power, or privilege and that the party is entitled to have such doubt removed. *Wilson v. County of Orange*, 881 So. 2d 625, 631 (Fla. 5th DCA 2004). Here, the City has a bona fide, actual, present practical need for the

declaration, because the City has enacted an extensive regulatory scheme for preserving certain types of trees in certain parts of the City. The City's interest is actual, present, adverse and antagonistic because the Defendants are seeking to nullify a portion of the City's tree regulations by asserting a newly enacted subject statute preempts the application of the City's regulations. Moreover, the matter is ripe, as the City has denied the Defendants' request to remove the Old Tree.

Therefore, the City's request for a declaration is not a mere request for legal advice, because the request involves analyzing a newly enacted statute to determine whether the City can prevent the Defendants from cutting down a tree situated on their property. Clearly, the parties are in doubt as to the interplay between the City's regulations, the newly enacted statute, and the ultimate impact on the Defendants' property. Accordingly, the City has standing under Chapter 86, *Florida Statutes,* to pursue declaratory relief.

Statutory Interpretation Analysis

The polestar of statutory interpretation is legislative intent, which is to be determined by first looking at the actual language used in a statute. *Searcy, Denney, Scarola, Barnhart & Shipley, etc. v. State*, 209 So. 3d 1181, 1189 (Fla. 2017). The statute at issue, section 163.045 (1), *Florida Statutes*, states that:

> "(1) A local government may not require a notice, application, approval, permit, fee, or mitigation for the pruning, trimming, or removal of a tree on residential property if the property owner obtains documentation from an arborist certified by the International Society of Arboriculture or a Florida licensed landscape architect that the tree presents a danger to persons or property."

If the statutory language is ambiguous, a court should look to the rules of statutory construction to help interpret legislative intent. *Hardee Cty. v. FINR II, Inc.*, 221 So. 3d 1162, 1165 (Fla. 2017). However, as Judge Learned Hand cautioned long ago, "[i]t is one of the surest indexes of a mature and developed jurisprudence not to make a fortress out of the dictionary; but to remember that statutes always have some purpose or object to accomplish," *Cabell v. Markham*, 148 F.2d 737, 739 (2d Cir. 1945), *aff'd*, 326 U.S. 404 (1945).

The verbiage at issue does not require the Court to delve into an extensive *corpus-linguistics* analysis, because the Legislature left express clues in the statutory language to narrow the scope of "danger" and "documentation." Indeed, "[w]hen several nouns ... are associated in a context suggesting that the words have something in common, they should be assigned a permissible reading that makes them similar." Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts*, 195 (2012). To this end, the doctrine of *noscitur a sociis* (a word is known by the company it keeps) is the right interpretative tool "to avoid ascribing to one word a meaning so broad that it is inconsistent with its accompanying words." *Cosio v. State*, 227 So. 3d 209, 213 (Fla. 2d DCA 2017) (*quoting Gustafson v. Alloyd Co.*, 513 U.S. 561 (1995)).

Here, the verbiage utilized in the statute shows a clear intention by the Legislature to remove local administrative barriers prohibiting property owners from removing trees that endanger other persons or property – with a qualifier that the property owner must first obtain "[d]ocumentation from an arborist certified by the International Society of Arboriculture or a Florida licensed landscape architect that the tree presents a danger to

persons or property". In a vacuum, the words "danger"[4] and "documentation"[5]are arguably vague and ambiguous because they are susceptible to innumerable interpretations. After utilizing the doctrine of *noscitur a sociis*, it becomes clear that the Legislature qualified both terms by requiring the documentation of the danger to come from either a licensed landscape architect or an ISA certified arborist.

The Legislature must be presumed to know the meaning of certified as an arborist or licensed as a landscape architect. By selecting only those two professions, the Legislature has implicitly adopted the professional standards applicable to the two respective industries. By extension, any documentation rendered on whether a tree is dangerous must conform to the respective industry standards.

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[4] All trees are potentially dangerous, and can:

1. cause serious allergies; (2) attract rodents (squirrels); (3) attract bats (who have rabies); (4) act as lightning rods; (5) drop limbs and pine cones on people and property, causing injury; (6) damage property when sap drips, or leaves fall and stain with their tannins; (7) grow root systems that damage foundations, driveways, and roads; (8) have roots that act as trip hazards; (9) fall over when a strong wind blows, damaging property or killing people and pets; (10) catch on fire; (11) be used to fashion arrows, clubs, and other weapons; (12) harbor ticks, roaches, spiders, and other critters that cause disease; (13) cast large shadows that prevent healthy sunlight from making it through to the ground; (14) harbor raccoons and other larger animals that can attack people; and (15) they attract termites that can destroy the infrastructure of any house.

[5] For example:

Could somebody simply share a beer with a licensed arborist who then scribbles on a bar napkin that a certain tree is dangerous because 'a lot of people are allergic to oak tree pollen'? Or maybe one beer later scribbles that the tree is dangerous because "trees attract lightening and lightening can cause injuries"? Or after several more cocktails scribbles that a tree is dangerous because "the tree attracts birds, and for somebody with Ornithophobia (the fear of birds), such a bird magnet would lead to traumatic results."

Accordingly, the only reasonable interpretation of section 163.045 (1), *Florida Statutes* is one where: (1) an arborist or landscape architect must determine that a tree is a danger; and (2) for the determination and documentation to be rendered utilizing only the methodologies and official documents applicable to the two respective industries.

Statutory Preemption Analysis

The subject statute does not preempt the City from challenging documentation of a dangerous tree, if the City questions whether the methods utilized by the arborist/architect rendering the documentation does not comply with industry standards.

In Florida, municipalities have broad Home Rule powers and can legislate concurrently with the State Legislature on any matter not preempted to the State. *City of Hollywood v. Mulligan*, 934 So. 2d 1238 (Fla. 2006). Limited intrusion on Home Rule is permitted only to the extent preemption is the purpose of the State Legislature. *See Tallahassee Memorial Regional Med. Center, Inc. v. Tallahassee Med Center, Inc.*, 681 So. 2d 826 (Fla. 1st DCA 1996). There are three types of preemption: (1) express preemption; (2) implied preemption; and (3) conflict preemption. *Sarasota Alliance for Fair Elections, Inc. v. Browning*, 28 So. 3d 880 (Fla. 2010).

A. Express Preemption.

Express preemption requires a specific legislative statement with explicit language, evidencing an expressed intent to preempt a particular field. *The Lake Hamilton Lakeshore Owners Assn., Inc. v. Neidlinger,* 182 So. 3d 738 (Fla. 2d DCA 2015). For example, in *Phantom of Clearwater v. Pinellas County*, 894 So. 2d 1011 (Fla. 2d DCA 2005), the appellate court considered whether Florida's statute regulating the sale and use of fireworks

preempted local regulation of the sale of fireworks. In holding, that there was no preemption, the appellate court stated:

> We conclude that section 791.001 does not contain language creating an express preemption. This statute does not contain language similar to the phrase, "It is the legislative intent to give exclusive jurisdiction in all matters set forth in this chapter"—language that has been held to establish a level of preemption in the field of telecommunication companies....It does not come close to the language of Chapter 316, which creates a "Florida Uniform Traffic Control Law," and specifies "the area within which municipalities may control certain traffic movement or parking in their respective jurisdiction." . . . If the legislature intends to preempt a field, it must state that intent more expressly than the language contained in section 791.001.

Id. at 1018-19 (citations omitted).

As with *Phantom of Clearwater*, the statute here contains no language reflecting a legislative intent to exclusively reserve jurisdiction in all matters related to trees, or dangerous trees. Moreover, the statute does not preclude local governments from ensuring that the documentation of any danger complies with the industry standards applicable to ISA certified arborists and landscape architects.

B. Implied Preemption.

There is no implied preemption contained within the statute. Implied preemption exists when the "legislative scheme is so pervasive as to evidence an intent to preempt the particular area, and where strong public policy reasons exist for finding such an area to be preempted to the Legislature." *The Lake Hamilton Lakeshore Owners Association, Inc. v. Neidlinger,* 182 So. 3d 738 (Fla. 2d DCA 2015). Further, "[w]hen courts create preemption by implication, the preempted field is usually a narrowly defined field, 'limited

to the specific area where the Legislature has expressed [its] will to be the sole regulator.'" *Id.* at 743 (quoting *Tallahassee Mem. Reg'l Med. Ctr., Inc. v. Tallahassee Med. Ctr., Inc.*, 681 So. 2d 826 (Fla. 1st DCA 1996)). The defining feature of implied preemption is the creation of an extensive regulatory scheme. Here, the Legislature did not establish a regulatory scheme and instead drafted a very narrow statutory prohibition applicable to minimal circumstances. There is simply no support to interpret section 163.045 (1), *Florida Statutes* as impliedly preempting local governments from generally regulating tree preservation.

C. Conflict Preemption.

There is no conflict preemption either. Conflict preemption applies where a local ordinance conflicts with a state statute so much that the two rules cannot co-exist–as compliance with one violates the other. *Phantom of Clearwater, Inc. v. Pinellas County*, 894 So. 2d 1011 (Fla. 2d DCA 2005). Conflict preemption does not exist simply because an ordinance is more stringent than a statute or if it regulates an area not covered by a statute. *See, e.g., F.Y.I. Adventures, Inc. v. City of Ocala*, 698 So. 2d 583, 584 (Fla. 5th DCA 1997) (upholding County ordinance which imposed stricter guidelines and standards on persons and organizations that conduct bingo games than was required by the statute); *Lamar–Orlando Outdoor Adver. v. City of Ormond Beach*, 415 So. 2d 1312 (Fla. 5th DCA 1982) (Federal Highway Beautification Act did not preempt power of city to enact ordinances regulating or prohibiting signs more strictly than that law and did not preempt enforcement provision of ordinance).

Both section 163.045 (1), *Florida Statutes,* and section 12-6-6(B)(2)(c), *The Code of the City of* [redacted], *Florida* may co-exist, as the [redacted] Code merely is simply more stringent than the statute, as it ascribes standards for arborists and architects to consider. The statute applies only when a tree is dangerous, and documentation from a certified arborist or licensed landscape architect substantiates the tree's dangerous condition. Ultimately, there is no conflict if the City challenges findings made by an ISA certified arborist, or a landscape architect, and if the findings of danger are demonstrated to fall short of industry standards.

D. Preemption Conclusion

The Legislature did not preempt local governments from challenging documentation provided under the statute. First, there is no express preemption language in the statute. Second, there is no extensive regulatory scheme promulgated to implement the statute. Finally, here in this case, there is no conflict between the statute and City Code.

Because the Legislature has identified experts to make the danger determination, then considering evidence from competing experts in the same field is a reasonable approach to resolving disputed questions on particular trees. Here, the City is not preempted from challenging, through submission of its own expert opinions, the conclusions reached by an arborist who generated questionable documentation that the Old Tree is dangerous.

Analysis of Motion to Dissolve Temporary Injunction

When a court is deciding whether to dissolve an ex-parte temporary injunction, the party who obtained the injunction must present evidence to establish a prima facie case supporting injunctive relief. *Thomas v. Osler Medical. Inc.*, 963 So. 2d 896, 900 (Fla. 5th DCA 2007) (*citing Hunter v. Bennies Contracting Co., Inc.*, 693 So. 2d 615, 616 (Fla. 2d DCA 1997). Specifically, the party seeking to keep the injunction in place must: present evidence that it will suffer irreparable harm; establish it has no adequate remedy at law; prove it will likely succeed on the merits; and establish that the injunction will serve the public interest. *Jouvence Ctr. For Advanced Health, LLC v. Jouvence Rejuvenation Ctrs., LLC*, 14 So. 3d 1097, 1099 (Fla. 4th DCA 2009). Considering the evidence presented at the hearings in this matter, then the Court finds that the City has met its burden as to each required element, as set forth below:

A. Irreparable harm.

Here, there is a likelihood of irreparable harm, as a 200-year-old oak tree, 63 inches in diameter, cannot be replaced, and its loss is irreparable.

B. No adequate remedy at law.

If the Old Tree is removed, and the removal was deemed illegal, then money damages alone cannot replace a unique 200-year-old tree which is likely much older than the State of Florida itself.

C. The City will likely succeed on the merits.

The Court does not find the Defendants' interpretation of section 163.045 (1), *Florida Statutes* to be credible. Specifically, the Court finds that the Legislature has not

preempted local governments from challenging the documentation determining a tree is a danger if the documentation and opinion are not credible. Here, the evidence at the injunction hearing raised serious doubts as to the accuracy and credibility of the documentation that the Defendants submitted to the City.

Indeed, [redacted] provided the only credible expert opinion. In [redacted] opinion, the Old Tree is not a danger.

D. To deny the Defendants' motion is in the best interest of public policy.

Public policy is best served if the laws enacted by its duly elected leaders are enforced. When the Defendants purchased their lot, the Defendants were on constructive notice of the entire [redacted] Code, including the [redacted] express provisions for preserving Heritage Trees. Furthermore, the Defendants had constructive notice of the requirement to design improvements in such a way as to protect viable trees. The Defendants did not have to purchase a lot in the [redacted] or even in the City of [redacted] once they elected to do that, then they submitted themselves to the community values represented by the regulations in the [redacted] Code.

Ruling

Based on the testimony and evidence presented, and upon the motions, briefs, and other applicable filings, the Court denies the Defendants' motion and finds that:

A. The City has met its burden of going forward with sufficient evidence to establish a prima facie case to support keeping the injunction in place.

B. The City has made the requisite showing of a likelihood of success on the merits.

C. There is an immediate danger of significant loss or damage if the injunction is not maintained, as an irreplaceable 200 plus-year-old tree will likely be removed without the injunction remaining in place.

D. The City has no adequate remedy at law because monetary damages cannot compensate for the loss of a unique 200 plus-year-old tree.

E. The injunction will serve the public interest, as the tree ordinances in place were enacted by local government officials elected by the voters of the City, and are the reflection of the public interest of the residents of [redacted]

F. The City is excused from having to post any bond since it is a municipal governmental entity.

G. Keeping the temporary injunction in places preserves the status quo.

DONE AND ORDERED in [redacted] Florida, this 30th day of October 2019.

[redacted]

Honorable [redacted]
Circuit Court Judge

cc: All counsel of record.