S245996

IN THE SUPREME COURT OF THE
STATE OF CALIFORNIA

SAN DIEGANS FOR OPEN GOVERNMENT,

Plaintiff, Appellant and Respondent,

v.

PUBLIC FACILITIES FINANCING AUTHORITY OF THE CITY OF SAN DIEGO, et al.,

Defendants, Respondents and Petitioners.

NOTICE OF INTENT TO CITE ADDITIONAL AUTHORITIES

FROM A DECISION OF THE COURT OF APPEAL,
FOURTH APPELLATE DISTRICT, DIVISION ONE
D069751

Mara W. Elliott, City Attorney (Bar No. 175466)
MElliott@sandiego.gov
George F. Schaefer, Assistant City Attorney (Bar No. 139399)
GSchaefer@sandiego.gov
Meghan Ashley Wharton, Senior Deputy City Attorney
(Bar No. 250498)
MWharton@sandiego.gov
OFFICE OF THE CITY ATTORNEY
1200 Third Avenue, Suite 1100, San Diego, CA 92101
Telephone: (619) 533-5800 ♦ Facsimile: (619) 533-5856

ATTORNEYS FOR DEFENDANTS, RESPONDENTS AND PETITIONERS
PUBLIC FACILITIES FINANCING AUTHORITY OF
THE CITY OF SAN DIEGO, ET. AL.

NOTICE OF INTENT TO CITE ADDITIONAL AUTHORITIES

Pursuant to paragraph 4 of the Notice to Counsel Appearing for Oral Argument before the Supreme Court of California served on September 11, 2019, Defendants/Respondents/Petitioners hereby notify the Supreme Court of California and opposing counsel of its intent to cite during oral argument the following additional authorities not contained in the papers and briefs submitted to the Supreme Court:

> *Lions Club of Albany, Cal. v. City of Albany*, 323 F.Supp.3d 1104 (N.D. Cal. June 15, 2018) ("Opinion").

A true and correct copy of the Opinion and Exhibit TTT referenced therein is attached to this Notice.

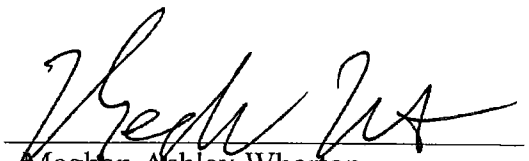
At footnote 1 of the Opinion, the District Court took judicial notice of Exhibit TTT pursuant to Federal Rule of Evidence 201(b) and noted that its accuracy cannot reasonably be questioned. Exhibit TTT is the May 2, 1978 Findings of Fact and Conclusions of Law of Judge Robert H, Kroninger of the Superior Court for the County of Alameda in *Tompson v. Call*, Civ. 44375. Judge Kroninger's Findings and Conclusions is cited and referenced extensively by the First District Court of Appeal in *Thomson v. Call*, 198 Cal.Rptr. 320, 331-332 (1983) which is referenced in Petitioners' briefs. In paragraph 1 of the Conclusions of Law, the Court states as follows:

> Plaintiffs, and each of them, had at the commencement of this action, standing to bring said action, and complied with all requirements and prerequisites for the bringing of said action. Plaintiffs, and each of them, where therefore authorized by law to commence said action for the benefit of the City of Albany.

The Opinion issued after Petitioners submitted the Opening Brief to the Supreme Court on April 24, 2018. At the time Petitioners submitted the Reply Brief on August 27, 2018, counsel for Petitioners was not aware of the Opinion or the existence of Exhibit TTT.

Dated: September 19, 2019

MARA W. ELLIOTT, City Attorney

By 

Meghan Ashley Wharton
Senior Deputy City Attorney
Attorneys for Respondents

IN THE SUPREME COURT

OF STATE OF CALIFORNIA

PROOF OF SERVICE

SAN DIEGANS FOR OPEN GOVERNMENT,
Petitioner and Plaintiff,
v.

PUBLIC FACILITIES FINANCING AUTHORITY OF THE CITY OF SAN DIEGO, ET AL.,
Respondent and Defendant.

After Decision of the Court of Appeal,
Fourth Appellate District, Division One, Case No. 069751

San Diego County Superior Court
The Honorable Joan M. Lewis
Case No. 37-2015-00016536-CU-MC-CTL

I, the undersigned, declare that:

I was at least 18 years of age and not a party to the case; I am employed in the County of San Diego, California. My business address is 1200 Third Avenue, Suite 1100, San Diego, California, 92101.

On September 19, 2019, I served true copies of the following document(s) described as:

- **NOTICE OF INTENT TO CITE ADDITIONAL AUTHORITIES**

on the interested parties in this action as follows:

Clerk of Court of Appeal Fourth District, Division One 750 B Street, Suite 300 San Diego, CA 92101	**Via TrueFiling**
Cory J. Briggs, Esq. Anthony N. Kim, Esq. Briggs Law Corporation 4891 Pacific Hwy #104 San Diego, CA 92110 Tel: (619) 497-0021 cory@briggslawcorp.com anthony@briggslawcorp.com	Attorneys for Plaintiff and Appellant
Rachel E. Moffitt, Esq. Higgs Fletcher & Mack LLP 401 West A Street, Ste 2600 San Diego, CA 92101 Tel: (619) 236-1551 moffittr@higgslaw.com	
Attorneys for San Diegans for Open Government	**Via TrueFiling**
Honorable Joan M. Lewis c/o Appeals Division San Diego Superior Court 220 Broadway, Room 3005 San Diego, CA 92101	Superior Court Trial Judge **Via Personal Service**

[xx] (BY ELECTRONIC SERVICE) By transmitting via TrueFiling to the above parties at the email addresses listed above.

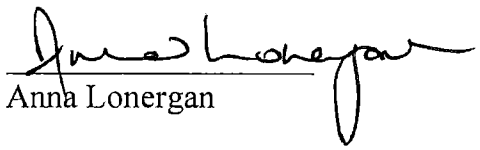
[xx] (BY PERSONAL SERVICE) I provided copies to Nationwide Legal for personal service on this date to be delivered to the office of the addressee(s) listed above.

[ ] (BY OVERNIGHT DELIVERY) I enclosed said document(s) in a sealed envelope or package provided by Golden State Overnight (GSO) and addressed to the person(s) at the address(es) listed above. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of GSO.

[ ] **(BY UNITED STATES MAIL)** I enclosed the document(s) in a sealed envelope or package addressed to the person(s) at the address(es) listed above and placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing with the United States Postal Service and that the correspondence shall be deposited with the United States Postal Service with postage fully prepaid this same day in the ordinary course of business.

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

Executed on this 19th day of September 2019, at San Diego, California.



Anna Lonergan

323 F.Supp.3d 1104
United States District Court, N.D. California.

The LIONS CLUB OF ALBANY, CALIFORNIA, a non-profit corporation, Plaintiff,
v.
The CITY OF ALBANY, a charter city, et al., Defendants and Counter-Claimants,
v.
The Lions Club of Albany, California, a non-profit corporation, and The Albany Lions Club Foundation, Counter-Defendants.

No. C 17-05236 WHA
|
Signed 06/15/2018

Synopsis
Background: Non-profit corporation brought action against city and five city officials in their individual and official capacities alleging various claims arising out of shutdown of power to religious symbol that corporation had illuminated every Christmas and Easter season. Parties filed cross-motions for summary judgment.

Holdings: The District Court, William Alsup, J., held that:

[1] easement was valid ab initio;

[2] primary effect of continued presence of symbol advanced religion;

[3] continued presence violated Establishment Clause;

[4] genuine issues of material fact as to whether city cut off power because it presented a safety hazard precluded summary judgment; and

[5] city did not violate California Takings Clause by disconnecting power.

Motions granted in part and denied in part.

West Headnotes (30)

[1] **Property**
Ownership and incidents thereof

A private land owner is perfectly free to erect a cross on his or her land, subject to zoning ordinances.

Cases that cite this headnote

[2] **Easements**
Subject-matter and parties in general

A private land owner is perfectly free to allow someone else to erect a cross on the owner's land and to grant an easement to maintain it.

Cases that cite this headnote

[3] **Easements**
Right as Against Purchasers of Servient Tenement

If an owner sells land on which he granted an easement to allow someone else to erect and maintain a cross, the buyer must take the land subject to the easement.

Cases that cite this headnote

[4] **Easements**
Dedication or appropriation to public use
Municipal Corporations
Capacity to acquire and hold property in general

Non-profit corporation's easement on city owned land granted by prior private landowners to maintain religious symbol erected on land

was valid ab initio; landowners were free to sponsor symbol and to grant an easement, no zoning ordinance prohibited symbol, symbol's presence on land did not raise any constitutional issues, city could have rejected the deal, and once city accepted title and began converting land into public park it then could have solved Establishment Clause problem by condemning easement under power of eminent domain, selling off, if feasible, a subdivided parcel containing symbol to a private party, or by possibly imposing zoning restrictions against all religious displays on public land. U.S. Const. Amend. 1.

Cases that cite this headnote

[5] **Easements**
Purposes of use

An easement may not authorize activity prohibited by a zoning ordinance or other pertinent laws.

Cases that cite this headnote

[6] **Constitutional Law**
Establishment of Religion
Constitutional Law
Advancement, endorsement, or sponsorship of religion; favoring or preferring religion

The Establishment Clause means that government may not promote or affiliate itself with any religious doctrine or organization. U.S. Const. Amend. 1.

Cases that cite this headnote

[7] **Constitutional Law**
Establishment of Religion

The Establishment Clause runs against all state, local, and federal governments. U.S. Const. Amend. 1.

Cases that cite this headnote

[8] **Constitutional Law**
Establishment of Religion

The *Lemon v. Kurtzman* test generally governs in evaluating an alleged Establishment Clause violation. U.S. Const. Amend. 1.

Cases that cite this headnote

[9] **Constitutional Law**
Establishment of Religion

The *Lemon v. Kurtzman* inquiry used when evaluating an alleged Establishment Clause violation asks whether the religious practice or symbol at issue: (1) has a secular purpose, (2) has a primary effect that neither advances nor inhibits religion, and (3) does not foster excessive state entanglement with religion. U.S. Const. Amend. 1.

Cases that cite this headnote

[10] **Constitutional Law**
Establishment of Religion

A challenged government practice must survive all three prongs of the *Lemon v. Kurtzman* analysis used when evaluating an alleged Establishment Clause violation in order to be held constitutional. U.S. Const. Amend. 1.

Cases that cite this headnote

[11] **Constitutional Law**
Parks and forests in general

Municipal Corporations
Parks and Public Squares and Places

Primary effect of continued presence of religious symbol advanced religion, and thus city's ownership and park use of land burdened with symbol violated the Establishment Clause; symbol was overtly and solely religious, large, bolted permanently into a concrete base, and prominently displayed at summit of public park, symbol was illuminated during Easter and Christmas seasons, a reasonable observer would have perceived an impermissible endorsement, symbol did not have any historical relevance, and symbol was not a memorial of any kind. U.S. Const. Amend. 1.

Cases that cite this headnote

[12] **Constitutional Law**
Advancement, endorsement, or sponsorship of religion; favoring or preferring religion

The second prong of the *Lemon v. Kurtzman* analysis used when evaluating an alleged Establishment Clause violation asks whether, irrespective of government's actual purpose, the practice in fact conveys a message of endorsement or disapproval of religion. U.S. Const. Amend. 1.

Cases that cite this headnote

[13] **Constitutional Law**
Government Property

The mere fact that private conduct is involved does not preclude Establishment Clause concerns once the land arrives in public hands. U.S. Const. Amend. 1.

Cases that cite this headnote

[14] **Constitutional Law**
Advancement, endorsement, or sponsorship of religion; favoring or preferring religion

When determining whether there is governmental endorsement of religion in violation of the Establishment Clause, the relevant inquiry is whether a reasonable observer would perceive governmental endorsement of religion. U.S. Const. Amend. 1.

Cases that cite this headnote

[15] **Constitutional Law**
Advancement, endorsement, or sponsorship of religion; favoring or preferring religion

Whatever else the Establishment Clause may mean, it certainly means at the very least that government may not demonstrate a preference for one particular sect or creed. U.S. Const. Amend. 1.

Cases that cite this headnote

[16] **Constitutional Law**
Parks and forests in general

Continued presence of religious symbol in public park violated Establishment Clause, and thus land could not continue as a public park with symbol on it; city accepted land with easement for maintenance of symbol, city turned land into public park with symbol, and conversion to public park was unsuitable use of land. U.S. Const. Amend. 1.

Cases that cite this headnote

[17] **Judgment**
Nature and requisites of former recovery as bar in general

"Res judicata," or "claim preclusion," prevents relitigation of the same cause of action in a

second suit between the same parties or parties in privity with them.

Cases that cite this headnote

[18] **Judgment**
Scope and Extent of Estoppel in General

"Collateral estoppel," or "issue preclusion," precludes relitigation of issues argued and decided in prior proceedings.

Cases that cite this headnote

[19] **Federal Courts**
Conclusiveness; res judicata and collateral estoppel

State-court judgments are given the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered.

Cases that cite this headnote

[20] **Federal Civil Procedure**
Civil rights cases in general
Federal Civil Procedure
Land and land use, cases involving in general

Genuine issues of material fact as to whether city cut off electric power to religious symbol, on land subject to easement granted to non-profit corporation for maintenance of symbol, because it presented a safety hazard precluded summary judgment in corporation's free speech, free exercise, equal protection, due process, and interference with easement claims. U.S. Const. Amend. 1.

Cases that cite this headnote

[21] **Eminent Domain**
Electricity; power lines

City did not violate California Takings Clause by disconnecting electric power to religious symbol on land subject to easement granted to non-profit corporation for maintenance of symbol, where property was not taken or damaged for public use. Cal. Const. art. 1, § 19.

Cases that cite this headnote

[22] **Easements**
Subject-matter and parties in general
Municipal Corporations
Capacity to acquire and hold property in general

Easement granted to non-profit corporation for maintenance of religious symbol that is now in public park was valid, and thus city that maintained park was not entitled to quiet title.

Cases that cite this headnote

[23] **Trespass**
Title or right of possession of defendant or third person

Non-profit corporation's entry onto public land to maintain religious symbol was authorized, and thus entry did not constitute trespass, where easement granted to corporation for maintenance of symbol was valid.

Cases that cite this headnote

[24] **Trespass**
Entry

The essence of the cause of action for trespass is

an unauthorized entry onto the land of another.

Cases that cite this headnote

[25] **Trespass**
Intent
Trespass
Entry

Unauthorized entries onto the land of another are characterized as intentional torts, regardless of the actor's motivation.

Cases that cite this headnote

[26] **Trespass**
Wrongful act after rightful entry and trespass ab initio

A trespass may be committed by the continued presence on the land of a structure, chattel, or other thing which the actor has placed on the land with the consent of the person then in possession of the land, if the actor fails to remove it after the consent has been effectively terminated.

Cases that cite this headnote

[27] **Nuisance**
What Constitutes Nuisance in General
Nuisance
Matters constituting public nuisances in general

Presence of religious symbol on public land subject to easement granted to non-profit corporation for maintenance of symbol was neither public nor private nuisance, where the city, not corporation, was violating First Amendment. U.S. Const. Amend. 1.

Cases that cite this headnote

[28] **Constitutional Law**
Applicability to governmental or private action; state action

The Constitution runs against governmental entities, not private parties.

Cases that cite this headnote

[29] **Civil Rights**
Government liability

Non-profit corporation was not entitled to punitive damages after city cut off electric power to religious symbol on land subject to easement granted to corporation for maintenance of symbol; city was immune from punitive damages under § 1983, and whether city's conduct amounted to fraud or oppression was disputed. 42 U.S.C.A. § 1983; Cal. Civ. Code § 3294.

Cases that cite this headnote

[30] **Civil Rights**
Government liability

A municipality is immune from punitive damages under § 1983. 42 U.S.C.A. § 1983.

Cases that cite this headnote

Attorneys and Law Firms

*1107 Robert Eugene Nichols, Law Offices of Robert E. Nichols, El Cerrito, CA, Don Willenburg, Gordon & Rees LLP, Oakland, CA, for Plaintiff and Counter-Defendants.

Gregory Mellon Fox, Bertrand, Fox, Elliot, Osman &

Wenzel, San Francisco, CA, for Defendants and Counter-Claimants.

ORDER GRANTING IN PART AND DENYING IN PART CROSS-MOTIONS FOR SUMMARY JUDGMENT

William Alsup, United States District Judge

INTRODUCTION

A cross on a hill stands at the center of this case. The town wants it down. The sponsor wants it up. Both sides invoke the First Amendment and both have moved for summary judgment.

STATEMENT

Since 1971, a twenty-foot electrically-illuminated steel and plexiglass Latin cross has stood atop Albany Hill, the prominent knoll near the intersection of Interstates 80 and 580. At the time of its erection, the 1.1 acres hosting the cross belonged to Hubert and Ruth Call (who lived in Albany but not on the 1.1 acres). They allowed The Lions Club of Albany, California, a non-profit corporation, to erect the cross and to illuminate it (and the Lions Club proceeded to illuminate it every Christmas and Easter season up to the present) (Dkt. Nos. 43 at 10, 44, Exh. TTT). Hubert Call was then a member of both the Lions Club and Albany City Council.

All would have remained well for the cross but for a multi-party real estate deal by which defendant The City of Albany acquired title to the 1.1 acres along with adjacent parcels in exchange for approving a high-rise project nearby. The details remain important, so this order will lay them out.

Developer Interstate General Corporation (IGC) sought to develop high-rise condominiums on its real property located along the western slope and base of Albany Hill. In April 1972, IGC asked the City for permission for the development. The City saw opportunity and replied that it wanted an "overlook" park on Albany Hill. In May 1972, the Albany City Council passed an ordinance requiring a Council-issued use permit before any building or structure could proceed on Albany Hill. IGC's land and the Call's land (including the cross) fell within this restriction.

In July 1972, IGC applied to the Council for a use permit. In October 1972, the City proposed conditions for issuing the requested ***1108** use permit, including requiring IGC to deed the City two hilltop acres for parkland use. After a series of negotiations, IGC eventually proposed a so-called "$600,000 plan"—a complex multi-party agreement involving, among others, IGC (and its affiliates), the City, and the Calls. Under this plan, IGC offered to allocate $600,000 of its own money to purchase additional private property for the City's desired Overlook Park (now Albany Hill Park)—including the Calls' 1.1 acres at the summit of Albany Hill—and to convey it to the City. In November 1972, the Council issued IGC's use permit and accepted IGC's proposed $600,000 plan (Dkt. No. 44, Exh. TTT).

Pursuant thereto, IGC offered to pay the Calls $258,000 for title to their 1.1-acre parcel "free of liens, encumbrances, easements ... and conditions of record ... other than exceptions of record." 38 Cal. 3d at 641, 214 Cal.Rptr. 139, 699 P.2d 316.[1] IGC and the Calls eventually reached an agreement whereby the Calls deposited two grant deeds into escrow—a grant deed conveying the Call parcel to an IGC affiliate and another grant deed conveying to the Lions Club an "easement for ingress and egress to maintain the existing cross standing" on the Call parcel. Before closing escrow, Call insisted upon burdening the parcel with the easement and would sell only on the condition that the cross would remain with an easement for access. The developer went along and deposited in escrow a grant deed conveying the Call parcel to the City. That deed did not indicate that title to the Call parcel was subject to the easement (but it did not have to for the easement to be effective). *See* 38 Cal. 3d at 642 n.10, 214 Cal.Rptr. 139, 699 P.2d 316. The City followed by depositing the building permit in escrow.

In the instant case, the City suggests that it was not actually aware of the easement but concedes that it was on at least constructive notice (*see* Dkt. No. 72). When escrow closed, the easement deed to the Lions Club was recorded before the grant deed to the City. 198 Cal.Rptr. at 330. The City thus acquired the Call parcel subject to

the Lions Club's easement.

Taxpayers subsequently filed a suit challenging the City's land acquisition, alleging that Hubert Call's role as city council member at the time of the transaction created a conflict of interest. The taxpayer suit itself raised no easement or Establishment Clause problem. The City, the Calls, various council members, and IGC (and its affiliates) became named defendants. The suit became known as the *Thomson* litigation.

In 1978, the Alameda County Superior Court found that although the transaction was non-fraudulent and although Call had abstained in the approval process, Call nevertheless had a proscribed financial interest under California's Government Code Section 1090 in the agreement between IGC and the City. The Superior Court ordered the Calls to pay the City the full ***1109** $258,000 amount (plus interest) received by the Calls for the parcel and denied relief as to the other defendants (Dkt. No. 44, Exh. TTT).

The Establishment Clause became part of that litigation, ironically, at the behest of the Calls. *See* 198 Cal.Rptr. at 336. They argued that the City's acceptance of the deed to the land burdened by the easement protecting the cross violated the Establishment Clause. The trial court, however, held that the City's acceptance of the Call parcel was consistent with the Establishment Clause because of the acquisition's secular purpose (namely, "to provide additional park land to the City"), it neither advanced nor inhibited religion, and it did not constitute excessive governmental entanglement with religion (Dkt. No. 44, Exh. TTT).

On appeal, the Calls challenged their liability and the taxpayers appealed the denied relief as to the corporate defendants. The California Court of Appeal affirmed the lower court's holding that the agreement between IGC and the City was void due to Call's proscribed financial interest in the contract under Section 1090. (This had nothing to do with the easement.) *Thomson v. Call*, 150 Cal.App.3d 354, 198 Cal.Rptr. 320, 342 (1983).

In challenging their liability, the Calls again argued that the City's acquisition of the land burdened with an easement protecting the "Christian type cross" was constitutionally invalid. *Id.* at 336. The California Court of Appeal noted the potential constitutional infirmities presented by the cross, stating that "the cross and the easement present problems requiring consideration," including "some of the constitutional proscriptions cited by the Calls." *Ibid.* It, however, refused to let the Calls escape the consequences of Section 1090 "by reason of problems of their own making." *Ibid.* The cross and easement did not affect the invalidation of the contract between IGC and the City. That invalidity was due to Call's conflict of interest. *Id.* at 337. Moreover, the California Court of Appeal held that IGC breached its contract with the City by allowing the land to be burdened with the easement and reversed, *sua sponte*, the trial court's "narrow view" of the pleadings, which it believed led the trial court to let IGC "escape liability to the City." *Id.* at 340.

The California Court of Appeal left undisturbed the trial court's finding that the City's acquisition of the Call parcel was valid because it had the secular purpose of public park use. *Id.* at 336. It, however, distinguished this finding from the constitutional problems related to the land's value and "its use as a public park in the future." *Id.* at 337. Indeed, the California Court of Appeal found that because the easement protected the cross's location and existence, "the land is consequently unsuitable for use as a municipal park because of the constitutional proscriptions which preclude the display of a religious symbol on public property." *Id.* at 339.

The California Supreme Court vacated the Court of Appeal's decision in answering the specific question of what remedies were available once a Section 1090 violation was found and the fully performed underlying contract was adjudged void. *Thomson*, 38 Cal. 3d at 638, 214 Cal.Rptr. 139, 699 P.2d 316. The California Supreme Court upheld—without reaching the constitutional analysis—the trial court's remedy of allowing the City to both keep the Call parcel and recover $258,000 plus interest from the Calls. *Id.* at 651–52, 214 Cal.Rptr. 139, 699 P.2d 316. The California Supreme Court affirmed that the IGC-City contract was void due to Call's Section 1090 violation (the conflict of interest problem). *Id.* at 646, 214 Cal.Rptr. 139, 699 P.2d 316. It, however, reversed the California Court of Appeal's finding that IGC was ***1110** liable to the City, noting that the $600,000 plan "did not vest in the city any right or power to control the real property acquisitions of IGC in its performance of the plan." *Id.* at 653, 214 Cal.Rptr. 139, 699 P.2d 316.

The California Supreme Court addressed the easement only in the Section 1090 context. After acknowledging without commenting on the trial court's constitutional findings, it then evaluated potential remedies for Call's Section 1090 violation. In evaluating the potential remedies, it recognized that the Call parcel's fair market value was "obviously" diminished by the easement and cross, which affected development prospects on the parcel. *Id.* at 651, 214 Cal.Rptr. 139, 699 P.2d 316.

Justice Stanley Mosk concurred in the judgment against the Calls and dissented in the absolution of the corporate defendant's liability. *Id.* at 653, 214 Cal.Rptr. 139, 699 P.2d 316. Justice Mosk noted that although IGC "was motivated solely by a desire to obtain a building permit and to protect its development," it knew the City wanted to make a public park at Albany Hill's summit and thus promised the City "a unique, superb and useful view park for the public enjoyment." *Ibid.* Thus, IGC's contract "obligated [IGC] to convey fair value to the city in the form of *land suitable for use as a public park.*" *Id.* at 654, 214 Cal.Rptr. 139, 699 P.2d 316 (emphasis added). Justice Mosk further noted that due to the easement's protection of the location and existence of the cross, the land was rendered "unsuitable for use as a park because of the constitutional proscriptions precluding the display of a religious symbol on public property." *Ibid.* By allowing the Call parcel to be burdened by the easement, Justice Mosk believed that IGC thus negated the City's very purpose in acquiring the land, as "of course, *the perpetual religious symbol rendered the property legally unsuitable for park* or other public purposes." *Ibid.* (emphasis added). These separate comments took for granted the validity of the easement.

So, the litigation ended, and Albany Hill Park took shape as municipal undeveloped space with tall eucalyptus trees bisected by a walking trail with a large cross near the summit.

Decades passed.

Every Christmas and Easter season, the Lions Club turned on the switch to illuminate the cross, visible all the way to the East Bay Hills. Those enjoying the park could hardly miss the cross, it being next to the trail and being the park's largest structure (actually the *only* structure other than gates, benches, signs, and a rope swing).

In 2015, East Bay Atheists began criticizing the cross. In 2016, municipal officials had PG & E shut down power to the cross for 106 days. The City claims the shutdown came as a result of legitimate safety issues and fire hazards. The Lions Club claims it came as part of a harassment campaign to force the cross off the hill (Dkt. Nos. 44 at 11–14, 46 at 9–11).

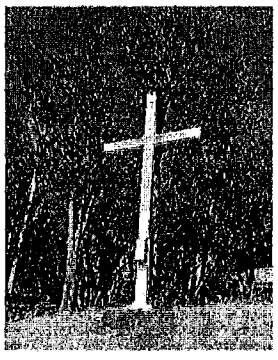
In September 2017, the Lions Club commenced this civil action against the City and five city officials in their individual and official capacities, alleging a conspiracy between defendants and the East Bay Atheists. The Lions Club alleges the conspiracy began in November 2015 when the City began raising allegedly bogus safety concerns about the electrical wire connected to the disputed cross (Dkt. Nos. 1, 43 at 11, 47 at 2).

In November 2017, the City and five city officials counterclaimed against The Lions Club of Albany (and its affiliates).[2] The gravamen of the City's claims focuses on ***1111** the invalidity and unenforceability of the Lions Club's easement under the United States and California Constitutions.

The Lions Club now moves for summary judgment both on their claims and against the counterclaims. The Lions Club's claims include (1) taking of property without compensation; (2) interference with easement; (3) due process violations under the United States and California Constitutions; (4) equal protection violations under the United States and California Constitutions; (5) free speech violations under the United States and California Constitutions; (6) free exercise violations under the United States and California Constitutions; and (7) costs, expenses, and reasonable attorney's fees (Dkt. No. 43 at 3–4).

The City cross-moves for summary judgment on its counterclaims. The counterclaims include (1) quiet title; (2) trespass; (3) nuisance; (4) an injunction to remove the cross; and (5) partial summary judgment against punitive damages (Dkt. No. 47 at 1–2).[3]

With counsel for all parties, the undersigned judge conducted a view of Albany Hill Park and the cross on June 5, 2018 (Dkt. No. 82). The following photographs were taken by his law clerk:



Front View From Off-Trail

Side View From Trail (Near Summit)

ANALYSIS

Summary judgment is appropriate if there is no genuine dispute as to any material fact. FRCP 56(a). A genuine dispute of material fact is one that "might affect the outcome of the suit under the governing law." *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 247–48, 106 S.Ct. 2505, 91 L.Ed.2d 202 (1986).

1. THE LIONS CLUB'S EASEMENT WAS VALID AB INITIO.

[1] [2] [3]A private land owner is perfectly free to erect a cross on his or her land ***1112** (subject, of course, to zoning ordinances). Likewise, a private land owner is perfectly free to allow someone else to erect a cross on the owner's land and to grant an easement to maintain it. If the owner sells the land, the buyer must take the land subject to the easement. So, when the Calls allowed the Lions Club to erect the cross and granted it an easement for maintenance, all was well.

[4] [5]The City nevertheless argues that the easement in question was created for the unconstitutional purpose of protecting a cross's presence on what was destined to become public land. True, an easement may not authorize activity prohibited by a zoning ordinance or other pertinent laws. *See Baccouche v. Blankenship*, 154 Cal. App. 4th 1551, 65 Cal.Rptr.3d 659 (2007); *Teachers Ins. & Annuity Ass'n. v. Furlotti*, 70 Cal. App. 4th 1487, 83 Cal.Rptr.2d 455 (1999). Here, no zoning ordinance prohibited the cross. Nor did the cross's presence on the Calls' land raise any constitutional issues. The Calls remained free to sponsor the cross and to grant an easement.

The City cites *First Unitarian Church of Salt Lake City v. Salt Lake City Corporation*, 308 F.3d 1114 (10th Cir. 2002), to argue that an easement is invalid if it violates the First Amendment. In *First Unitarian*, a city retained a public pedestrian easement after selling a portion of a public street to a religious entity. *Id.* at 1117. The easement, however, restricted expressive activities. *Id.* at 1118. The United States Court of Appeals for the Tenth Circuit held that because the public easement constituted a traditional public forum, the restriction violated the Free Speech Clause. *Id.* at 1123, 1133.

First Unitarian is distinguishable. *First*, that court held that the easement's *restrictions* on speech activities were invalid. The court did not render the easement itself invalid or unenforceable. *Second*, the issue in *First Unitarian* focused on the *city's* actions with respect to the easement's terms. *Id.* at 1122. Here, the easement's terms were solely between the Calls and the Lions Club.

This order assumes for the sake of argument that the purpose of the easement was to require subsequent owners to honor the cross, including public owners. Nevertheless, the City, which was on at least constructive notice of the easement, could have simply refused to close the deal. As was observed in the *Thomson* litigation, "[h]ad the City refused to accept the Call Parcel in performance of the $600,000 Plan, IGC would have retained said real property under its ownership" (Dkt. No. 44, Exh. TTT).

While the City portrays itself as a victim of the easement, the fact is that the City must bear responsibility. To repeat, the City could have rejected the deal, burdened as it was by the easement. The First Amendment ran against the City, not the private parties. Once the City accepted title and began converting the land into a public park, it then could have solved its Establishment Clause problem by condemning the easement (and paying its value) under its power of eminent domain, selling off, if feasible, a subdivided parcel containing the cross to a private party (and keeping the rest for a park), or by possibly imposing zoning restrictions against all religious displays on public land.

Ultimately, the City cites no First Amendment authority for the idea that an otherwise *valid* easement simply goes limp the moment the land goes into the City's ownership. That theory would turn the *Thomson* litigation on its head—the easement issues addressed by the trial court all the way to the California Supreme Court could have been easily waved away had the easement problem been as simply avoided ***1113** as by a theory of unenforceability upon public ownership.

2. THE PUBLIC PARK WITH THE CROSS VIOLATES THE ESTABLISHMENT CLAUSE.

To repeat, the Establishment Clause runs against public entities, not private parties. After the City acquired the land burdened with the cross and turned it into a public park, the City also acquired an Establishment Clause problem and should have solved it by condemning the easement via its power of eminent domain, selling off a parcel with the cross to a private party, or enacting a valid zoning ordinance. Now follow the details.[4]

A. Federal Establishment Clause.

[6] [7]The Establishment Clause of the First Amendment to the United States Constitution states that "Congress shall make no law respecting an establishment of religion...." The Establishment Clause has come "to mean that government may not promote or affiliate itself with any religious doctrine or organization...." *Cty. of Allegheny v. Am. Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U.S. 573, 590, 109 S.Ct. 3086, 106 L.Ed.2d 472 (1989), *abrogated on other grounds by Town of Greece v. Galloway*, 572 U.S. 565, 134 S.Ct. 1811, 188 L.Ed.2d 835 (2014). It runs against all governments—state, local, and federal. *See Everson v. Bd. of Ed. of Ewing Tp.*, 330 U.S. 1, 15, 67 S.Ct. 504, 91 L.Ed. 711 (1947).

[8] [9] [10]The *Lemon* test still generally governs in evaluating an alleged Establishment Clause violation. *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971); *Trunk v. City of San Diego*, 629 F.3d 1099, 1106 (9th Cir. 2011). The *Lemon* inquiry asks whether the religious practice or symbol at issue (1) has a secular purpose; (2) has a primary effect that neither advances nor inhibits religion; and (3) does not foster excessive state entanglement with religion. *Lemon*, 403 U.S. at 612–13. "[T]he challenged [government] practice must survive all three prongs of the *Lemon* analysis in order to be held constitutional." *Vernon v. City of Los Angeles*, 27 F.3d 1385, 1396–97 (9th Cir. 1994).

[11]This order holds, based on our own court of appeals' holdings in cross cases, that the primary effect of the continued presence of the Albany Hill cross advances religion. Thus, under the second prong, municipal ownership and park use of land burdened with the cross violates the Establishment Clause.

[12]The second prong "asks whether, irrespective of government's actual purpose, the practice ... in fact conveys a message of endorsement or disapproval [of religion]." *Lynch v. Donnelly*, 465 U.S. 668, 690, 104 S.Ct. 1355, 79 L.Ed.2d 604 (1984) (O'Connor, J., concurring). *Buono v. Norton*, 371 F.3d 543 (9th Cir. 2004), directs this analysis. Our court of appeals held in *Buono* that the display of a Latin cross on public land impermissibly conveyed endorsement of a particular religion in violation of the Establishment Clause. It found such a primary effect even though the cross was originally erected and maintained by private individuals and meant to serve as a war memorial. *Id.* at 548–50.

***1114** *Buono* relied on *Separation of Church & State Committee v. City of Eugene of Lane County, State of Oregon*, 93 F.3d 617, 620 (9th Cir. 1996), which held that "[t]here is no question that the Latin cross is a symbol of Christianity, and that its placement on public land by the City of Eugene violates the Establishment Clause[, b]ecause the cross may reasonably be perceived as governmental endorsement of Christianity." And, in a similar case, the United States Court of Appeals for the Tenth Circuit also so held in *American Atheists, Inc. v. Davenport*, 637 F.3d 1095 (10th Cir. 2010), holding that privately-owned and maintained memorial crosses bearing official insignia on public land had the primary effect of governmental endorsement of Christianity.

Similar to *Buono*, the cross at issue here is a large, twenty-foot Christian cross bolted permanently into a concrete base and prominently displayed at the summit of a public park. This overtly religious symbol, which stands alone, is prominent in the park itself and remains visible, through clearings in the trees, far beyond the parkland's immediate vicinity (*see* Dkt. No. 43, Exh. A). The cross stands close by the only public trail through the park and close by park benches, all of which remains reachable on foot within a couple of minutes from the parking lot. The cross is illuminated during Easter and Christmas seasons. And, unlike in *Buono*, the cross has never been a war memorial. It is solely a religious symbol (*see* Dkt. Nos. 43 at 11, 60, Exh. Z).

The Lions Club argues decisions such as *Buono* do not govern because they do not apply to private actors. The Lions Club, not the City, built and maintains the cross, it says. And, the easement, the Lions Club argues, is no weaker a property right than a fee simple—had the cross been on a small parcel titled to the Lions Club, there would, it says, have been no constitutional issue.

[13]*First*, *Buono* acknowledged that the conduct there at issue originally derived from private citizens. *Buono*, 371 F.3d at 548. The mere fact that private conduct is involved does not preclude Establishment Clause concerns once the land arrives in public hands. And, to the extent that the Establishment Clause and *Buono* (in which the cross was eventually deeded to the City) require government action to apply, such government action is plainly present in the instant case. Here, the City owns and uses as a public park land burdened by an easement perpetuating the religious symbol.

[14]The relevant inquiry for evaluating the primary effect of the City's parkland burdened with the easement and the cross is whether a "reasonable observer" would *perceive* governmental endorsement of religion.[5] *See id.* at 549–50. Here, a reasonable observer would perceive—knowing "the history and context of the community and forum in which" the cross appears—an impermissible endorsement. The reasonable observer would be aware

that the cross stands on city parkland, it celebrates Christian holy days, and the City has supported this religious activity for decades (*see* Dkt. Nos. 44 at 28–29, 79 at 1).

Second, it is true that the Establishment Clause problem might go away if the cross stood on a separate, coherent *private* parcel even though adjacent to the parkland. But it is not on a separate parcel. The ***1115** cross stands on public land. The easement is not a separate parcel, much less a separate coherent parcel. Contrary to counsel, we cannot treat the easement as if it were a condominium hovering over and separate from the land itself. Were that the case, then municipalities could grant religious easements with abandon and avoid First Amendment liability.

The Lions Club cites *Van Orden v. Perry*, 545 U.S. 677, 125 S.Ct. 2854, 162 L.Ed.2d 607 (2005), the Ten Commandments case. It, however, is distinguishable. The Supreme Court there permitted the Ten Commandments display on state capitol grounds in part because of its *historic* significance. Although the Ten Commandments monument had religious overtones, it also alluded to the history of the United States government, as "[t]here is an unbroken history of official acknowledgment by all three branches of government of the role of religion in American life from at least 1789." *Id.* at 686, 125 S.Ct. 2854. Here, the Lions Club cannot assert that the cross conveys American history, has any other historical relevance, or serves some secular purpose. Rather, the Lions Club emphasizes the cross's plain religious significance (*see, e.g.*, Dkt. No. 60 at 7).

The Lions Club's reliance on *Salazar v. Buono*, 559 U.S. 700, 130 S.Ct. 1803, 176 L.Ed.2d 634 (2010)—a related appeal following *Buono*—is also misplaced. The sole question addressed by *Salazar* was whether a statute enabling a government transfer of land hosting a cross to a private party violated an injunction granted in *Buono* (the issue was remanded). *Id.* at 706, 130 S.Ct. 1803. As such, our court of appeals' holding in *Buono* still controls under the facts of this case. And, the dictum in *Salazar* seized upon by the Lions Club is distinguishable. *Salazar* observed that "[t]he goal of avoiding governmental endorsement does not require eradication of all religious symbols in the public realm" and that "[a] cross by the side of a public highway marking, for instance, the place where a state trooper perished need not be taken as" governmental endorsement. *Id.* at 718–19, 130 S.Ct. 1803. Here, however, the cross at issue is not a memorial of any kind. It is solely a religious symbol to celebrate holy days by casting its glow upon Christians and non-Christians alike.

[15]"Whatever else the Establishment Clause may mean ... it certainly means at the very least that government may not demonstrate a preference for one particular sect or creed (including a preference for Christianity over other religions)." *Separation of Church & State Comm.*, 93 F.3d at 619 (citation omitted) (quoting *Cty. of Allegheny v. Am. Civil Liberties Union, Greater Pittsburgh Chapter*, 492 U.S. 573, 590, 109 S.Ct. 3086, 106 L.Ed.2d 472 (1989)). Here, the City's establishment of a public park featuring a large cross projects an appearance of governmental preference for the Christian religion. Thus, the City's use of land bearing the cross fails to satisfy the primary effect prong and accordingly violates the Establishment Clause.

B. This Conclusion is Consistent with *Thomson.*

[16]The Lions Club submits that the *Thomson* litigation established, once and for all, that the easement was valid and that the cross constituted no Establishment Clause violation. This, however, is an overstatement, both of *Thomson* and of the law of res judicata and collateral estoppel.

[17] [18] [19]Res judicata, or claim preclusion, "prevents relitigation of the same cause of action in a second suit between the same parties or parties in privity with them." ***1116** *Mycogen Corp. v. Monsanto Co.*, 28 Cal. 4th 888, 896, 123 Cal.Rptr.2d 432, 51 P.3d 297 (2002). Collateral estoppel, or issue preclusion, "precludes relitigation of issues argued and decided in prior proceedings." *Ibid.* State-court judgments are given "the same preclusive effect as would be given that judgment under the law of the State in which the judgment was rendered." *Coeur D'Alene Tribe of Idaho v. Hammond*, 384 F.3d 674, 688 (9th Cir. 2004) (citation omitted).

While there are aspects in the *Thomson* litigation that still inform the real estate and easement issues in our present controversy, and while the First Amendment issue played a role in *Thomson*, we now have a new controversy that was not previously litigated—namely, whether the continued presence of a cross in a public park violates the Establishment Clause.

The primary focus of *Thomson* was the validity of the multi-party agreement masterminded by IGC and the Section 1090 issue. As such, *Thomson* analyzed the cross and easement mainly in terms of how they affected land value and prejudiced the suitability of the land for use as a

public park. The constitutional issue arose as a gimmick by the Calls to escape the consequences of the conflict of interest—a ploy the courts disfavored.

The California Supreme Court, moreover, did not review the trial court's constitutional findings in affirming the trial court decision. *See id.* at 644. For that matter, the trial court's constitutional findings merely blessed the City's "*accepting the deed* to the Call Parcel" (Dkt. No. 44, Exh. TTT) (emphasis added). Here, by contrast, the issue is, once the City accepted the land, and once the City turned it into a public park with the cross, did the City thereby violate the Establishment Clause?

The California Court of Appeal recognized this distinction, stating that "the constitutional problems presented by the cross and the easement pertain only to ... its use as a public park in the future. They do not reach the trial court's determinations ... which were to the effect that the *acquisition* of the land by the City was valid" and that "[t]he existence of the cross and the easement does not affect the determination that the contract between ICG and the City was void." *Thomson*, 198 Cal.Rptr. at 336. It went further, stating that "the easement actually protects the location and existence of the cross, and that the land is consequently *unsuitable for use as a municipal park* because of the constitutional proscriptions which preclude the display of a religious symbol on public property." *Id.* at 339 (emphasis added). Justice Mosk in his separate opinion echoed this distinction, stating that the "perpetual religious symbol rendered the property legally *unsuitable for park* or other public purposes." *Thomson*, 38 Cal. 3d at 654, 214 Cal.Rptr. 139, 699 P.2d 316 (1985) (emphasis added). In other words, it was common ground among all concerned in *Thomson* that the easement was alive and well and its main effect on the deal was to render the land unsuitable for use as a public park and/or to diminish the value of the land.

Nevertheless, in the face of these warnings, the City, having accepted the raw land, proceeded to do exactly what was said to be unsuitable—namely, converting the land for use as a public park.

In sum, while the *Thomson* litigation conflicts with the City's unenforceability theory and while the trial court found that the City could accept the deed without violating the Establishment Clause, that litigation also recognized that downstream ("in the future") the land would be "unsuitable" for use as a public park by reason of the cross. The instant order, with the benefit of the downstream record, agrees that the land cannot continue as a public park with the cross on it.

***1117 3. THE CITY MUST REMEDY ITS FIRST AMENDMENT VIOLATION.**

To remedy the Establishment Clause violation, the City has at least two options—either sell a parcel containing the cross to a private party or condemn the easement through its power of eminent domain. Possibly, a third option would be to adopt a zoning ordinance banning all religious symbols from its public places.

If the City chooses to sell to a private party, it must do so at fair market value and it must do so in a manner that avoids other forms of Establishment Clause violations. The subdivision must be a coherent, separate parcel in such a manner that the public may recognize that the cross no longer stands on public land. If the City condemns the easement, it would have to pay the Lions Club just compensation, as determined by fair market value by a jury.

In the procedural context of this case, however, there is actually no party adverse to the municipal defendant seeking to pursue any of these avenues against the City. This order has reached this juncture only to explain why the City is wrong in its argument that the easement somehow became lifeless upon title flowing into public hands. Before the Court would entertain any motion to compel the City to deal with its Establishment Clause problem, a plaintiff with standing would need to move to intervene (and would need to do so promptly). At that point, the specifics of any remedial plan could be vetted to avoid yet further constitutional problems.

4. QUESTIONS OF FACTS REMAIN REGARDING THE EXTENT, IF AT ALL, THE CITY VIOLATED THE LIONS CLUB'S RIGHTS.

[20]Meanwhile, the fact is that the cross has stood on Albany Hill for almost half a century and, even though the City should not have built its park around it, the cross has been a fact of life. The City should not have interfered (if it did) with the Lions Club's easement and/or religious observances.

Whether or not the City violated the Lions Club's free speech, free exercise, equal protection, and/or due process rights and/or interfered with the Lions Club's easement implicate heavily disputed facts. The City argues that it cut off electric power to the cross because it presented a

safety hazard. The Lions Club argues that the City's safety concerns reek of pretext and that the scheme received ratification by the City's policymakers.

Genuine disputes of material facts exist. The Lions Club's motion for summary judgment on its free speech, free exercise, equal protection, due process, and interference with easement claims are thus **DENIED**. A jury will have to decide.

5. MISCELLANEOUS CLAIMS.

A. California Takings Clause.

[21]The Lions Club claims that the City violated the California Takings Clause by disconnecting the electricity to the cross. Article I, Section 19 of the California Constitution provides that "[p]rivate property may be taken or damaged for public use only when just compensation ... has first been paid to ... the owner." This provision "never was intended, and never has been interpreted, to impose a constitutional obligation upon the government to pay 'just compensation' whenever a governmental employee commits an act that causes loss of private property." *Customer Co. v. City of Sacramento*, 10 Cal. 4th 368, 378, 41 Cal.Rptr.2d 658, 895 P.2d 900 (1995). Without property taken or damaged for "public use," the Lions Club is not entitled to just compensation under the California Constitution. The Lions Club's motion for summary judgment on the California Takings Clause claim is thus **DENIED**.

*1118 B. Quiet Title.

[22]The City seeks to quiet title on the ground that the Lions Club's easement was "granted for the improper, illegal and unconstitutional purpose of displaying a religious symbol on public property" and is thus invalid (Dkt. No. 46 at 15). This order holds that the Lions Club's easement is valid (but that the City is obligated to condemn the easement or otherwise solve its Establishment Clause problem). The Lions Club's motion for summary judgment in its favor on the quiet title claim is thus **GRANTED**.

C. Trespass.

[23] [24] [25] [26]The City argues that the presence of the cross in its park constitutes trespass. "The essence of the cause of action for trespass is an 'unauthorized entry' onto the land of another. Such invasions are characterized as intentional torts, regardless of the actor's motivation." *Civic Western Corp. v. Zila Indus., Inc.*, 66 Cal. App. 3d 1, 16, 135 Cal.Rptr. 915 (1977). "A trespass may be committed by the continued presence on the land of a structure, chattel, or other thing which the actor ... has placed on the land ... with the consent of the person then in possession of the land, if the actor fails to remove it after the consent has been effectively terminated." *Mangini v. Aerojet-Gen. Corp.*, 230 Cal. App. 3d 1125, 1141–42, 281 Cal.Rptr. 827 (1991).

Because the Lions Club's easement remains valid, its entry onto the City's land was authorized. The Lions Club's motion for summary judgment in its favor on the trespass claim is thus **GRANTED**.

D. Nuisance.

[27]The City bases its private nuisance claim on "the unconstitutional condition perpetuated by" the cross's ongoing presence and the City's "seeming endorsement" of "Christianity above other religions and above no religion" (Dkt. No. 47 at 9–10). It bases its public nuisance claim on the cross's unconstitutional condition, which is allegedly "offensive to many members of the community," conveys the appearance of government religious preference, alienates certain community members, and "interferes with the use and enjoyment" of the park (Dkt. No. 46 at 17). The Lions Club counters that its cross is a "beloved symbol of Albany Hill" and causes no interference with the use and enjoyment of the public park (Dkt. No. 44 at 19).

[28]We must remember that the Constitution runs against governmental entities, not private parties, and that the City, not the Lions Club, is the one who is violating the First Amendment.

The City cites decisions involving, for example, theaters

and bookstores exhibiting obscene materials (*People ex rel. Busch v. Projection Room Theater*, 17 Cal. 3d 42, 130 Cal.Rptr. 328, 550 P.2d 600 (1976)), construction of airport fuel tanks near an industrial park (*Koll-Irvine Center Prop. Owners Ass'n. v. County of Orange*, 24 Cal. App. 4th 1036, 29 Cal.Rptr.2d 664 (1994)), and hazardous waste (*Mangini v. Aerojet-Gen. Corp.*, 230 Cal. App. 3d 1125, 281 Cal.Rptr. 827 (1991)). The cross does not compare. The Lions Club's motion for summary judgment in its favor on the nuisance claim is thus **GRANTED**.

E. Request for Punitive Damages.

[29] [30]The Lions Club moves for punitive damages, arguing that the City's safety hazards concerns were a "contrived fraud" and that it was "relentlessly harassed" by the City (Dkt. No. 60 at 18–19). Punitive damages may be appropriate where a defendant "has been guilty of oppression, fraud, or malice." ***1119** Cal. Civ. Code § 3294. A municipality, however, is immune from punitive damages under Section 1983. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 271, 101 S.Ct. 2748, 69 L.Ed.2d 616 (1981). Moreover, regarding the Lions Club's interference with easement claim, whether the City's conduct amounts to fraud or oppression is disputed. The Lions Club's request for punitive damages is thus **DENIED**.

CONCLUSION

Those of the Christian faith may dislike some conclusions in this order. If the tables were turned, however, and a Star of David or Star and Crescent instead blazed from the top of Albany Hill, how would they feel? The undersigned judge is confident that the fair-minded will see the problem. Please remember that religious faith is precious in our country, a most personal and individual choice. Our governments have no business sponsoring one or the other. That is the law under our First Amendment.

For the reasons stated above, the Lions Club and the City's cross-motions for summary judgment are **GRANTED IN PART AND DENIED IN PART**. A further case management conference will be held on **JULY 5 AT 11:00 A.M.**

IT IS SO ORDERED.

All Citations

323 F.Supp.3d 1104

Footnotes

1 Citation to "38 Cal. 3d" refers to the California Supreme Court decision, which can be more fully found at *Thomson v. Call*, 38 Cal. 3d 633, 214 Cal.Rptr. 139, 699 P.2d 316 (1985). Citation to "198 Cal. Rptr." refers to the California Court of Appeal decision in related litigation, which can be more fully found at *Thomson v. Call*, 150 Cal.App.3d 354, 198 Cal.Rptr. 320 (1983). The Lions Club requests judicial notice of Exhibit TTT (Dkt. No. 44), and the City has not opposed. This exhibit is the judgment rendered in *Thomson v. The City of Albany*, Case No. 448248-8 (Alameda Cty. Super. Ct. May 2, 1978). A court may judicially notice a fact that is not subject to reasonable dispute because it "can be accurately and readily determined from sources whose accuracy cannot reasonably be questioned." FRE 201(b). Accordingly, the Lions Club's request for judicial notice is **GRANTED**.

2 The Lions Club International and the individual defendants in their individual capacities have since been voluntarily dismissed (Dkt. Nos. 41, 68).

3 The City objects to the Lions Club's second motion for summary judgment against the City's counterclaims. The City argues that the Lions Club's second motion violates the page limit under Civil Local Rule 7-2(b), which limits motions to 25 pages in length. The Lions Club's two motions are sufficiently different in substance. Thus the City's objection is **OVERRULED**.

4 The City also argues the cross is unconstitutional under the California Constitution's No Preference and No Aid Clauses. Our court of appeals instructs that "courts should avoid adjudication of federal constitutional claims when alternative state grounds are available." *Hewitt v. Joyner*, 940 F.2d 1561, 1565 (9th Cir. 1991). Here, while the No Preference Clause is applicable, federal constitutional analysis is appropriate in light of apparent tension in the California Constitution's No Preference Clause jurisprudence. *See East Bay Asian Local Dev. Corp. v. State of California*, 24 Cal. 4th 693, 719, 102 Cal.Rptr.2d 280, 13 P.3d 1122

(2000).

5 A reasonable observer would "be deemed aware of the history and context of the community and forum in which the religious display appears." *Buono*, 371 F.3d at 550 (citing *Capitol Square Review & Advisory Bd. v. Pinette*, 515 U.S. 753, 780–81, 115 S.Ct. 2440, 132 L.Ed.2d 650 (1995)) (O'Connor, J., concurring)).

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EXHIBIT TTT

FINDINGS OF FACT

1. Plaintiffs, and each of them, were at all times relevant to this litigation residents of the City of Albany, and within one year prior to the commencement of this litigation, plaintiffs, and each of them, paid a tax to the City of Albany.

2. Plaintiffs, and each of them, made a timely demand on the City of Albany to institute and commence the subject litigation, and the City of Albany refused to institute or commence the subject litigation.

3. Plaintiffs timely instituted and commenced the subject litigation after the denial by the City of Albany of plaintiffs' demand that the City of Albany institute and commence the subject litigation.

4. Defendant Joseph Carlevaro ("Carlevaro"), George C. Hein ("Hein"), Lewis M. Howell ("Howell") and Hubert F. Call ("Call"), and each of them, were members of the Albany City Council during the years 1972 and 1973.

5. Defendant Ruth L. Call was at all times relevant and is the lawful wife of defendant Hubert F. Call.

6. Defendant City of Albany was at all times relevant and is a municipal corporation, authorized and existing under and by virtue of the laws of the State of California.

7. Defendant Interstate General Corporation ("IGC") was at all times relevant and is a corporation organized and existing under and by virtue of the laws of the State of Delaware, and conducted business within the County of Alameda.

8. Defendant Cebert Properties, Inc. ("Cebert") was at all times relevant and is a corporation organized and existing under and by virtue of the laws of the State of Delaware, and conducted business within the County of Alameda.

9. Defendant Interstate Albany Corporation ("IAC") was at all times relevant and is a corporation organized and existing under and by virtue of the laws of the State of California, and has its principal place of business, and conducted business, within the County of Alameda.

10. Defendant Interstate General Development ("IGD") was at all times relevant and is a corporation organized and existing under and by virtue of the laws of the State of Delaware, and conducted business within the County of Alameda.

11. Defendant IAC was at all times relevant and is a subsidiary of IGD. IGD was at all times relevant and is a subsidiary of IGC. The stock of Cebert was at all relevant times and is owned by James J. Wilson as trustee for the benefit of the children of Robert T. Wilson, brother of James J. Wilson. James J. Wilson was at all times relevant and is the president of IGC, IGD and IAC, and was and is a director of IGC, IGD, IAC and Cebert. For all relevant matters, IGC, IGD, IAC and Cebert, and each of them, acted as agents and servants for each other, and had unity of purpose and concurrence of action.

12. For more than one year prior to April, 1972, the City of Albany and residents of the City of Albany had an

interest in and plans for an "overlook" park on Albany Hill. The park plans of that period included land owned by defendants Ruth Call and Hubert Call.

13. Prior to April, 1972, IGC owned certain real property at the western base and along the western slope of Albany Hill, a hill located in the City of Albany, County of Alameda, which it wished to develop with high-rise residential construction totaling approximately 2,500 individual dwelling units, and with related parking facilities and commercial development. Inquiries were made in approximately April of 1972 of James Turner ("Turner"), City Administrator of the City of Albany, by Robert O'Donnell, a planner acting at the request of and on behalf of IGC, as to the steps necessary to apply to the City for permission to construct the aforementioned development.

14. On or about May 15, 1972, by Ordinance No. 72-05, the Albany City Council ("Council") ordered that no permit for the erection of any building or structure could be issued by the City for the area denominated as the Hill Control District by Ordinance 61-011 unless and until a use permit was first obtained from the Council. By Ordinance 72-013, passed on or about September 5, 1972, the Council extended the effectiveness of Ordinance 72-05 for an additional eight months beyond its September 15, 1972 termination date. The land which IGC wished to develop, as well as the relevant land owned by Ruth and Hubert Call, were within the Hill Control District.

15. In or about July, 1972, IGC applied to the Council for a use permit, to allow it to proceed with its planned development. Between July and November of 1972, the Council held public hearings concerning the pending IGC application.

16. On or about October 24, 1972, the City, through Lawrence Saler ("Saler"), City Attorney for the City of Albany, and James Turner, communicated to IGC the proposed conditions under which the City was willing to issue the requested use permit. (Exhibit 2.) Condition 5 required IGC to deed to the City two hilltop acres and four creekside acres for use as parkland. Condition 6 required IGC to preserve and maintain as perpetual open spece, with recordation of appropriate deed restrictions, 18 acres of its land, and to allow public access to that land for passive recreational pursuits during all hours at which adjacent parks were open to the public. Conditions 7 and 8 required IGC, at its own expense, to make improvements on the lands described in Conditions 5 and 6.

17. On or about November 3, 1972, IGC rejected in part the proposed conditions of the City, and offered a counter-proposal by letter to the Council, as well as by proposed conditions. (Exhibit 4.) The proposed conditions were silent as to privately-owned open space, with public access, but did offer to dedicate and deed two hilltop acres to the City as parkland. The accompanying letter of the same date stated:

"As an alternative to the public open space on a portion of our property, we offer...the following:

"Should our application be granted, we agree to allocate $600,000.00 to acquire such of the real property as may be available, first by private negotiation at what we, in our judgement, regard to be reasonable prices, at the hilltop area of Albany Hill, within the boundary line designated by the City of Albany's park and Overlook Park."

18. On or about November 10, 1972, Saler and Turner, on behalf of the City, rejected in part the conditions proposed by IGC for its requested use permit, and proposed conditions to IGC. Condition 5 sought the same land by dedication and deed as had the City's proposed conditions of October 24, 1972, and Condition 6 sought the same 18 acres of perpetual open space, privately owned and maintained, but open to the public. Condition 7 required IGC to improve and maintain the perpetual open space referenced in Condition 6.

19. On or about November 12, 1972, IGC rejected in part the proposed conditions of the City, and offered a counter-proposal by letter to the Council, as well as by proposed conditions. The proposed conditions were silent as to privately-owned open space, with public access, but did offer to dedicate

and deed two hilltop acres to the City as parkland. The accompanying letter of the same date stated that IGC would establish the undeveloped land as perpetual open space, with appropriate deed restrictions, and that IGC would maintain said property, but declined to allow public access to that area. The same letter renewed the offer of November 3, 1972 to dedicate and deed two hilltop acres to the City as parkland and "to allocate $600,000.00 for the purpose of first purchasing additional private property to encompass the proposed Overlook Park of Albany Hill, all at or above the 200' contour of the hill..." for the use by the City as parkland. The same letter offered, as an alternative to the two hilltop acres and the $600,000 allocation, to dedicate and deed to the City the four creekside acres referenced in the City's original proposed Condition 5. IGC's proposal to the City of Albany includes the implied condition that the land to be actually tendered to the City pursuant to the $600,000 Plan would be constitutionally suitable for ownership by a city and use by it as a public park.

20. On occasion, Hubert Call asked the City Attorney whether or not he could speak on certain issues or vote on certain issues pending before the Albany City Council, and on such occasions was advised not to speak or vote if real property in which he had a financial interest was involved in the pending issues. Call followed such advice when it was sought and given. Call was told by the City Attorney that he could discuss

and vote on IGC's applications for rezoning and for Use Permit No. 20.

21. On November 13, 1972, at a regularly scheduled Council meeting, the Council, with affirmative votes by Coucilmen Call, Hein, Howell and Carlevaro, granted a request by IGC for a rezoning of its property from R-1-H-C [single-family residences] to R-3-H-C [high density, high-rise development] to allow the planned development. Thereafter, at the same meeting, with the same affirmative votes, the Council granted Use Permit No. 20 to IGC, approving with minor modification the proposed conditions submitted by IGC on or about November 12, 1972. Thereafter, at the same meeting, with affirmative votes by Councilmen Clark, Carlevaro, Hein and Howell, and with an abstention by Councilman Call, the Council accepted the offer of IGC made in its letters of November 3 and November 12, 1972 to allocate $600,000 ("the $600,000 Plan") for the purchase of private property to supplement the two hilltop acres owned by IGC, to encompass the proposed Overlook Park of Albany Hill.

22. The offer of the $600,000 Plan, and the acceptance thereof by the City of Albany on November 13, 1972, did not vest in the City of Albany any right or power to control the real property acquisitions of IGC in its performance of the $600,00 Plan. At no time did the City of Albany attempt to control any act of IGC relating to said real property acquisitions. IGC was neither the agent nor the trustee for the City

of Albany or for any other person or entity as a consequence of the $600,000 Plan.

23. Among the parcels of real property within the boundaries established by the $600,000 Plan was a parcel of real property owned jointly by Councilman Hubert Call and Ruth Call. Such real property ownership by Ruth and Hubert Call within said boundaries was disclosed by Hubert Call to the other members of the City Council and to the public prior to voting by the Albany City Council on the offer of IGC of the $600,000 Plan.

24. In mid-February, 1973, Eugene Hill ("Hill"), a vice president of IGC, IGD and Cebert, was sent by IGC to the Albany area to obtain a building permit for the project, to acquire or oversee the acquisition of property pursuant to the $600,000 Plan, and, in general, to get the proposed development constructed.

25. In furtherance of IGC's performance under the $600,000 Plan, Hill retained Elliot Ball, an appraiser, to appraise the real property available that met the terms of the $600,000 Plan and the desires and needs of the parties. The only real property meeting said qualifications were a 2.1-acre parcel owned by Albany Hill Associates, a 1.1-acre parcel owned by Ruth and Hubert Call, and approximately 2 acres of an approximately 11.5-acre parcel owned by Golden Gate Hill Development Company.

26. Pursuant to his assignment, Elliot Ball appraised the three available parcels of real property, and submitted written reports of his appraisals to Hill. Ball appraised the parcel owned by Ruth and Hubert Call ("Call Parcel") at $63,800, appraised the upper portions of the parcel owned by Golden Gate Hill Development Company ("Golden Gate Parcel") at $31,900 per acre, and appraised the Albany Hill Associates parcel at $211,700.

27. On the basis of the Elliot Ball appraisals, Hill forwarded written offers to the owners of all three parcels. Hill offered $63,800 for the Call Parcel, $211,700 for the Albany Hill Associates parcel, and, while intending to follow the appraisal, offered $31,900 for the entire 11.5-acre Golden Gate Parcel. Each offer made was conditional in that each stated that "the closing of this offer will be a concurrent condition with the issuance of a complete building permit on all properties of the undersigned by the appropriate authorities of the City of Albany." Call and the Albany Hill Associates rejected said offers in writing, and submitted counteroffers. Golden Gate Hill Development Company did not respond to the offer. At the time Hill forwarded the offer to Call, Hill knew that Call was a member of the Albany City Council.

28. When the offers were rejected, expressly or by silence, Hill was instructed by James Wilson ("Wilson"), founder and president of IGC, to authorize a real estate broker to negotiate with the property owners to arrange purchases in

satisfaction of the $600,000 Plan. Pursuant to said instructions, Hill authorized Jack Krystal ("Krystal"), a Marin County real estate broker, in writing to commence negotiations for the purchase of the available parcels of real property.

29. Krystal contacted Golden Gate Hill Development Company concerning Hill's offer, and was told that the offer was too low. Krystal advised that the offer was for the top two acres, not the entire parcel, and raised the offer to $40,000 for the two acres. His offer was rejected, and he was told no negotiations could continue in the absence of a further written offer. Krystal verbally invited a counteroffer to his offer of $40,000, suggesting a counteroffer of $100,000, but no counteroffer was made, and Krystal made no further written offers. Krystal then abandoned negotiations for the Golden Gate Parcel.

30. The City of Albany was aware, in 1973, that if Golden Gate Hill Development Company ever sought permission to develop portions of its approximately 11.5-acre parcel, such permission could probably be conditioned upon the deeding by Golden Gate Hill Development Company to the City of the upper 2 acres of the aforementioned parcel.

31. In response to Call's rejection of Hill's offer of $63,800, and in response to Call's written counteroffer of $360,000 for the Call Parcel, Krystal offered, in writing, $180,000 to $190,000 for the 1.1-acre Call Parcel. Thereafter, through verbal negotiations, Krystal and Ruth and Hubert Call

agreed on $258,000 as the price of the Call Parcel. During the aforementioned negotiations, Krystal told Call that the Call Parcel would be deeded to the City for use as a park, pursuant to the $600,000 Plan.

32. The agreement between Ruth and Hubert Call and Krystal was reduced to writing on June 25, 1973 in the form of a Real Estate Purchase Contract and Receipt for Deposit (Exhibit 31), in which IGC obligated itself to pay $258,000 to Ruth and Hubert Call for the Call Parcel. Said contract was "conditioned upon purchaser being issued all necessary permits to a project located adjacent to this property."

33. Neither the IGC proposal to the City of Albany nor the Real Estate Purchase Contract and Receipt for Deposit between IGC and Ruth and Hubert Call required that the Call Parcel be offered to the City as part performance of the $600,000 Plan, nor did either require that the City accept the Call Parcel if offered to the City burdened with a cross and with an easement for the maintenance of the cross for the benefit of a private service club. Money could have been tendered in complete satisfaction of the $600,000 Plan.

34. In reponse to Albany Hill Associates' rejection of Hill's offer of $211,700, and in response to Albany Hill Associates' counteroffer of $450,000 for its parcel, Krystal offered $280,000 or $290,000. Thereafter, through verbal negotiations, Krystal and Albany Hill Associates agreed on $340,000 as the price of the Albany Hill Associates parcel. On

June 25, 1973, said agreement was reduced to writing. (Exhibit 32.) Said contract was "conditioned upon purchaser being issued all necessary permits to a project located adjacent to this property."

35. In 1973, two consolidated lawsuits against IGC, which raised issues unrelated to the instant litigation, were settled, and, as part of the settlement, IGC agreed to deed to the City of Albany concurrently with the issuance by the City of Albany of a building permit for the project the approximately 4-acre creekside parcel referenced in the negotiations for Use Permit #20. Said parcel was conveyed to the City of Albany concurrently with the issuance to IGC of the initial building permit.

36. On or about August 17, 1973, Ruth and Hubert Call submitted escrow instructions (Exhibit 11) to the escrow holder, conveying a Grant Deed to Cebert for the Call Parcel (Exhibit 19) and a Grant Deed to the Albany Lions Club and Lions International for an easement on the Call Parcel for ingress and egress for the maintenance of a cross (Exhibit 18), and directing said escrow holder to deliver said deeds to the grantees upon deposit with the escrow holder of the $258,000 sale price for the Call Parcel. On or about the same date, Albany Hill Associates also submitted escrow instructions to the escrow holder. (Exhibit 13.)

37. On or about August 23, 1973, the City submitted escrow instructions to the escrow holder, conveying a Building

Permit for the first phase of the IGC development, and instructing the escrow holder to transmit said Building Permit to IAC when the escrow holder was able to transmit to the City $68,012.35 (Building Permit application fee), $2,000 (the unexpended balance of the $600,000 Plan), grant deeds for the two hilltop acres, the Call Parcel, the Albany Hill Associates Parcel, and the four-acre creekside parcel which IGC agreed to convey in settlement of unrelated ligitation, and a copy of the Building Permit after execution of same by the owner, architect or builder of the development. (Exhibit 22.)

38. On or about August 23, 1973, IAC submitted escrow instructions to the escrow holder, referencing anticipated deposits of $600,000 and $68,012.35, and instructing the escrow holder to use the $600,000 to fulfill instructions submitted by sellers (Ruth and Hubert Call, Albany Hill Associates), with the balance to the City, and to deliver to the City $68,012.35, once the escrow holder obtained possession of the issued Building Permit for the first phase of the development. (Exhibit 12.)

39. The foregoing escrow instructions of IAC and the City were in reference to escrow number OK-220776, while the instructions of Albany Hill Associates and Ruth and Hubert Call were in reference to escrow numbers OK-220776A and OK-220776B, respectively. The escrow holder was Title Insurance and Trust Company, Oakland, California. The aforementioned escrow or escrows closed on or about August 24, 1973, and the grant deeds from Ruth and Hubert Call to the Albany Lions Club, Lions

International, and to Cebert, were recorded in that order on the same date. The grant deed from Albany Hill Associates to Cebert was recorded on the same date, as were grant deeds from Cebert to the City concerning the Call Parcel and the Albany Hill Associates parcel. The aforementioned grant deeds from Ruth and Hubert Call were signed by them on August 17, 1973, and the deed of easement from Ruth and Hubert Call to the Albany Lions Club and Lions International was recorded ahead of the deed from the Calls to Cebert.

40. Prior to the formal close of escrow, with the attendant conveyances of real property and delivery of funds and the Building Permit, the grant deed from Cebert to the City had to be accepted formally by the City pursuant to Government Code §26281. On August 21, 1973, the Council adopted Resolution 73-76, a formal resolution entitled "A Resolution of the Council of the City of Albany Accepting a Corporation Grant Deed from Cebert Properties, Inc., a Delaware Corporation, and Authorizing the Mayor to Accept and Consent to Such Deed." (Exhibit 33.) Call abstained from voting on Resolution 73-76, on the advice of the City Attorney, stating that "he formerly held interest in a portion of th property involved" (Exhibit 9), but Councilmen Carlevaro, Clark and Howell voted in favor of the resolution, with Councilman Hein absent.

41. At the same meeting, the Council, at the request of Wells Fargo Bank, an institution providing the financing to IGC for the acquisitions under the $600,000 Plan, adopted

Resolution 73-78, "A Resolution of the Council of the City of Albany Ratifying the Purchases of Certain Properties in Satisfaction of the Agreement with Interstate General Corporation" (Exhibit 34), affirmative votes being cast by Councilmen Carlevaro, Clark and Howell, with Call abstaining on the advice of the City Attorney, and with Councilman Hein absent. Said resolution stated, in relevant part, that "WHEREAS, the Council has examined the expenditures made for the purchases referred to herein...the Council of the City of Albany does approve and ratify the purchases of the certain real properties more fully described in that Grant Deed referred to in Resolution No. 73-76."

42. At the same meeting, the Council, by Resolution 73-66, approved IGC's tract map for the project, with all councilmen present voting affirmatively.

43. On or about August 23, 1973, Turner issued Building Permit No. 1703 to IAC, said issuance being conditioned upon compliance with all building codes, all conditions of Use Permit No. 20 and all terms of or obligations created by the $600,000 Plan. (Exhibit 23.)

44. The purchases of real property by IGC through Cebert, and the conveyances of said real property to the City were in performance of a single agreement entered into between IGC and the City, the terms and conditions of which are reflected in IGC's letters of November 3, 1972 and November 12, 1972, the relevant resolutions adopted by the Council concerning the Use Permit, the $600,000 Plan, the acceptance of deeds from Cebert

and the ratification of purchases made by IGC or Cebert of real property for conveyance to the City, the Use Permit, the Building Permit, the Real Estate Purchase Contracts and Receipts for Deposit concerning the Call Parcel and the Albany Hill Associates Parcel, and the escrow instructions concerning the purchase and conveyance of the Call Parcel and the Albany Hill Associates Parcel. Call had a financial interest in said agreement.

45. The Council meeting of August 21, 1973 was preceded by a work session of the Council open to the public but attended only by Saler, Turner and Councilman Howell, who was then also the Mayor of the City of Albany. At the work session, Mayor Howell was advised of the parcels being purchased pursuant to the $600,000 Plan, as well as the amount to be paid for each parcel. Specifically, Mayor Howell was advised that a total of only 3.2 acres would be purchased for $598,000, that Albany Hill Associates would receive $340,000, or $3.72 per square foot, that Ruth and Hubert Call would receive $258,000, or $5.38 per square foot, and that, since the purpose of the meeting was to consider acceptance of the real property by the City and a determination by the Council that the values indicated were reasonable, he should ask Turner at the meeting itself to delineate the cost relationships just reviewed in order that all members of the Council could be fully apprised. At the meeting of August 21, 1973, however, the Mayor made no such request of Turner, and the other Councilmen were not advised of the aforementioned details of the transactions.

46. Had the City refused to accept the Call Parcel in performance of the $600,000 Plan, IGC would have retained said real property under its ownership for the protection of the privacy and visual integrity of its project at the western base of Albany Hill.

47. In approximately 1971, Call allowed the erection by the Albany Lions Club on the Call Parcel of a metal and glass cross, of approximately fifteen to twenty feet in height. Said cross remained on said property through the trial of the subject litigation. An electrical permit was issued to the Albany Lions Club when the cross was erected, and the cross was constructed so that it could be illuminated by the Albany Lions Club.

48. When Ruth and Hubert Call contracted with IGC for the sale of the Call Parcel, there existed no express easement on the Call Parcel concerning or relating to the aforementioned cross, and the written agreement between Ruth and Hubert Call and IGC, dated June 25, 1973, was silent concerning the cross.

49. Shortly before the close of the aforementioned escrow, Call insisted that the Call Parcel be burdened with an easement for the maintenance of the cross, and IGC offered no objection. By Grant Deed dated August 17, 1973, recorded on or about August 24, 1973, Ruth and Hubert Call granted to the Albany Lions Club, and to Lions International, "an easement for

ingress and egress to maintain the existing cross standing on a portion" of the Call Parcel.

50. When the City accepted the deed to the Call Parcel from Cebert on August 21, 1973, by Council Resolution No. 73-76, and when the City took title to said parcel by recordation of the Grant Deed on or about August 24, 1973, the aforementioned cross was upon the Call Parcel.

51. The act of the City in accepting the deed to the Call Parcel had a secular purpose -- the City accepted the Call Parcel for use by the public as a park.

52. IGC, IAC, IGD and Cebert breached no duties owed to the City of Albany, complied with all conditions imposed upon it by the City of Albany, and performed all obligations owed by it to the City of Albany, in the issues raised by the pleadings in the subject litigation.

53. No defendant in the subject litigation was involved in a conspiracy to defraud the City, to breach any fiduciary duties owed to the City, to cause a violation of Government Code §1090, or to cause an illegal expenditure of public funds.

54. No defendant in the subject litigation was guilty of perpetrating a fraud, actual or constructive, on the City.

CONCLUSIONS OF LAW

From the foregoing findings of fact, the Court makes the following conclusions of law:

1. Plaintiffs, and each of them, had at the commencement of this action, standing to bring said action, and complied with all requirements and prerequisites for the bringing of said action. Plaintiffs, and each of them, were therefore authorized by law to commence said action for the benefit of the City of Albany.

2. With respect to the $600,000 Plan, and the satisfaction of its obligations thereunder, IGC was neither the agent nor the trustee of the City of Albany.

3. Call's financial interest in the agreement as set forth in Finding of Fact No. 44 between IGC and the City was an interest proscribed by Cal. Gov. Code §1090, which provides that "City officers or employees shall not be financially interested in any contract made by them in their official capacity, or by any body or board of which they are members."

4. Ruth and Hubert Call sold the Call Parcel to the City of Albany through Cebert as a conduit, but the use of a conduit creates no difference in substance and very little difference in form from a direct sale, and both methods of conveyance are proscribed by Gov. Code §1090.

5. Because of the proscribed financial interest of Call in the agreement between IGC and the City, pursuant to which Ruth and Hubert Call received $258,000 for the Call Parcel, and because the Call Parcel was owned by Ruth and Hubert Call jointly, and sold and conveyed by them jointly, Ruth and Hubert Call are indebted to the City in the full

amount received by them in the performance of the agreement, which amount is $258,000. Furthermore, because said liability is for a liquidated amount, received by Ruth and Hubert Call pursuant to specific action of the City on a specific date, Ruth and Hubert Call are liable to the City for interest on the $258,000 at the rate of 7% per annum from August 21, 1973 until paid in full. Finally, because the agreement under which Ruth and Hubert Call received the aforementioned monies was prohibited by statute, specifically Gov. Code §1090, Ruth and Hubert Call are not entitled to a return of their property given in consideration for said agreement, and title to the Call Parcel remains and shall remain in the City of Albany.

6. Councilmen Howell, Carlevaro and Hein exercised bad judgment in their consideration and acceptance of the $600,000 Plan in November, 1972, but no liability to the City arose thereby.

7. Councilmen Howell and Carlevaro are not liable to the City in any amount or at all for their acceptance of the grant deeds from Cebert and in their ratification of the real property purchases made pursuant to said $600,000 Plan, because of the terms of the $600,000 Plan, and the discretion vested in IGC thereby. Said councilmen could not have failed to so accept and ratify.

8. The Use Permit issued by the City of Albany to IGC on November 13, 1972 was issued in conformance with all laws of the City of Albany, the County of Alameda, and the

State of California, and was and has been, at all times since its issuance, a valid and proper use permit.

9. The issuance of a building permit in the City of Albany is a ministerial act, provided the applicant has complied with any and all conditions placed on such issuance by the City of Albany, and has paid all necessary fees.

10. The building permit issued to IAC in August of 1973 was issued in conformance with all laws of the City of Albany, the County of Alameda, and the State of California, and was and has been, at all times since its issuance, a valid and proper building permit.

11. No alleged failure of IGC, IGD or IAC to perform properly and fully any obligations owed by any of them to the City of Albany under the $600,000 Plan, nor any alleged or purported breach by any of them of any such obligation, affects the validity of either the use permit or the building permit issued by the City of Albany.

12. IGC, IAC, IGD and Cebert breached no duties to the City in the matters raised by the pleadings in the subject litigation, and are not liable to the City in any sum, or at all.

13. The primary effect of the acceptance of the Call Parcel by the City -- the addition of 1.1 acres of land to the City's park system -- neither advanced nor inhibited religion; rather, the primary effect was to provide additional park land

to the City and had negligible, if any, effect on any religious freedom.

14. The acceptance of the Call Parcel by the City did not constitute excessive governmental entanglement with religion.

15. The acceptance by the City of real property encumbered by an easement for ingress and egress for the maintenance of a cross did not constitute action in violation of the First Amendment to the United States Constitution or any law, statutory or decisional.

Let judgment be entered accordingly.

Dated: May 2, 1978.

Judge of the Superior Court