

ELECTRONICALLY FILED

Superior Court of California,
County of Alameda

05/06/2022 at 10:14:37 AM

By: Darnekia Oliver, Deputy Clerk

1 SCOTT W. DITFURTH, Bar No. 238127
scott.ditfurth@bbklaw.com
2 MEGAN BESHAI, Bar No. 308225
megan.beshai@bbklaw.com
3 BEST BEST & KRIEGER LLP
3390 University Avenue
4 5th Floor
P.O. Box 1028
5 Riverside, California 92502
Telephone: (951) 686-1450
6 Facsimile: (951) 686-3083

7 Attorneys for Plaintiff
CITY OF ALBANY, a charter city

EXEMPT FROM FILING FEES PURSUANT
TO GOVERNMENT CODE SECTION 6103

9 SUPERIOR COURT OF THE STATE OF CALIFORNIA

10 COUNTY OF ALAMEDA

11
12 CITY OF ALBANY, a charter city,
13 Plaintiff,

14 v.

15 ALBANY LIONS CLUB, LIONS
INTERNATIONAL, a California Non-Profit
16 Corporation; DOES 1-10, inclusive; and ALL
PERSONS UNKNOWN CLAIMING AN
17 INTEREST IN THE PROPERTY,

18 Defendants.

Case No. 22CV010822
Assigned to Hon. Somnath Raj Chatterjee

DECLARATION OF JEFF BOND IN
SUPPORT OF MOTION FOR
PREJUDGMENT POSSESSION

[ASSESSOR PARCEL NOS. 066-2754-14-
50, 40-3]

[Filed concurrently with:

- 1. Complaint in Eminent Domain
- 2. Notice of Deposit; Declaration of Scott Delahooke;
- 3. Notice of Motion and Motion for Order for Prejudgment Possession; and
- 4. [Proposed] Order for Prejudgment Possession.]

DATE: July 28, 2022

TIME: 1:30 p.m.

DEPT.: 517

Reservation ID: 771800785701

BEST BEST & KRIEGER LLP

DECLARATION OF JEFF BOND

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

I, Jeff Bond, hereby declare that:

1. I am the Community Development Director for the City of Albany (“City”). In this role, I oversee the Community Development Department and its divisions, including Planning & Zoning, Building, Transportation, and Sustainability.

2. The City is the fee owner of land described as Assessor Parcel Nos. 066-2754-014-05 and 066-2754-040-03 (the “Property”) which it has maintained as a portion of Albany Hill Park for the benefit of the public since the 1970s. At 338 feet above sea level, Albany Hill is the City’s most iconic natural feature and an ecological icon for the community. Among other things, Albany Hill appears on the City seal. Most of the ridgeline and upper slopes have been acquired by the City and are protected as permanent open space. In a recent survey of residents, Albany Hill was the fourth most visited public open space out of 13 facilities. Several plant communities are present on Albany Hill. Coast live oak woodland occurs on the northern and eastern slopes of the Hill, and along the banks of the City’s creeks. Coast live oaks dominate the canopy in these areas, with other species such as bigleaf maple, arroyo willow, California bay, California buckeye, and coast redwood present. Eucalyptus groves dominate the ridgeline and western slopes. Several significant plants on the East Bay California Native Plant Society’s watch list are found on Albany Hill, including red fescue, big squirrel tail grass, gumplant, golden aster, California Melic grass, purple needlegrass, and marsh bristlegrass. The eucalyptus groves on Albany Hill have sheltered roosting Monarch Butterflies. The City’s objectives for Albany Hill are to manage vegetation on the hill to reduce fire hazards, restore native habitat, and provide appropriate levels of public access by maintaining and expanding the system of trails, including connections between Creekside Park and the neighborhoods on the hill’s perimeter.

3. Albany Lions Club, Lions International, a California Non-Profit Corporation (“Lions Club”) claims an easement across the City’s Property for ingress and egress to maintain an existing 20-foot steel cross at the Park near the west side of the 700 block of Taft Street. The easement was granted by then City Council member and Lions Club member Hubert F. “Red” Call

1 and his wife shortly before the City acquired the Property in connection with approval of a
2 development project.

3 4. The City seeks to unencumber the Property that it owns in fee simple from this
4 easement by acquiring the easement from the Lions Club. The City's acquisition—including
5 removal of the cross—is for the public purposes and necessity of enabling the public to more fully
6 use and enjoy the Park as an open space without the encumbrance, as well as to avoid any potential
7 Establishment Clause issue arising from the placement of the cross and the Lions Club's
8 maintenance of the cross. Due to the nature of the City's project, the City necessarily must acquire
9 the Lions Club's easement. There is no other interest in land that the City could use or acquire to
10 remove the encumbrance on its fee interest and avoid an Establishment Clause issue arising from
11 the Lions Club's display at the Park.

12 5. As reflected in the appraisal by Scott Delahooke, MAI dated July 17, 2021, the fair
13 market value of the Lions Club's interest is \$500,000.

14 6. It is my understanding that the City provided a copy of this appraisal to the Lions
15 Club in a letter dated November 12, 2021, in which the City offered to purchase the Lions Club's
16 interest for \$500,000. A true and correct copy of the City's letter is attached here as Exhibit "A".
17 As of this time, the Lions Club has not indicated whether it will accept the City's offer or not.

18 7. The City duly and properly noticed a public hearing for April 4, 2022, to consider
19 whether a resolution of necessity to acquire the easement should be adopted, and conducted the
20 hearing as scheduled on that date. In response, the City received notice from the Lions Club that it
21 intended to appear at the April-4 hearing and voice its objection to the adoption of a resolution of
22 necessity.

23 8. At the April 4 hearing of the City Council, the City Council heard from, among
24 others, the Lions Club and its representatives as well as citizens concerned by the Lions Club's
25 unwillingness to relinquish its interest and to, instead, fight for something the community may not
26 want. Upon considering all comments and information, the City Council unanimously adopted
27 Resolution No. 2022-32, a resolution of necessity declaring the necessity of acquiring the Lions
28 Club's easement across Albany Hill Park, and removing the cross itself, for the public purposes of

1 unencumbering the Park and avoiding a potential Establishment Clause issue. A certified copy of
2 the Resolution of Necessity is attached as Exhibit "B" to the Complaint in Eminent Domain filed
3 concurrently with this declaration.

4 9. Pursuant to the Resolution of Necessity, the City found and determined that (a) the
5 public interest and necessity require the proposed Project; (b) the proposed Project is planned or
6 located in a manner that will be most compatible with the greatest public good and the least private
7 injury; (c) the acquisition of the real property interests described in Exhibit A of the Complaint is
8 necessary for the Project; and, (d) an offer to purchase the interests in the Property as required by
9 section 7267.2 of the Government Code was made. Having adopted the Resolution of Necessity,
10 and having made the requisite findings to adopting the resolution, thus, there is a conclusive
11 presumption that the City has the right to acquire the Property through eminent domain.

12 10. The City has an overriding need for prejudgment possession of the Property, free of
13 the Lions Club easement and cross, because the City is presently managing the Property as Albany
14 Hill Park and has an ongoing and overriding need to continue managing the open space, with all of
15 its plant and animal life, for the public.

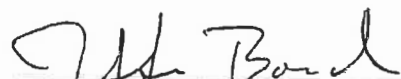
16 //
17 //
18 //
19 //
20 //
21 //
22 //
23 //
24 //
25 //
26 //
27 //
28 //

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

11. The City will suffer hardship without prejudgment possession because there will be an unnecessary and ongoing risk of litigation due to the possibility that the cross raises concerns under the Establishment Clause as summarized by the Honorable William Alsup in his 2018 order: *Lions Club of Albany, California v. City of Albany* (N.D. Cal. 2018) 323 F.Supp.3d 1104. As a courtesy, this order is attached here as Exhibit C. In the event that secondary litigation is commenced against the City during the pendency of this eminent domain action and the Court refuses to order prejudgment possession, the City could be required to expend sums, including attorney's fees, in connection with that litigation even though this eminent domain matter is ongoing.

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

Executed this 28 th day of April, 2022 at Albany, California.



Jeff Bond, Community Development Director
for the City of Albany

EXHIBIT A



BEST BEST & KRIEGER
ATTORNEYS AT LAW

Indian Wells
(760) 568-2611

Irvine
(949) 263-2600

Los Angeles
(213) 617-8100

Manhattan Beach
(310) 643-8448

Albany
(909) 989-8584

3390 University Avenue, 5th Floor, P.O. Box 1028, Riverside, CA 92502
Phone: (951) 686-1450 | Fax: (951) 686-3083 | www.bbklaw.com

Riverside
(951) 686-1450

Sacramento
(916) 325-4000

San Diego
(619) 525-1300

Walnut Creek
(925) 977-3300

Washington, DC
(202) 785-0600

Scott W. Ditfurth
(951) 826-8209
scott.ditfurth@bbklaw.com
File No. 38159.03002

November 12, 2021

VIA EMAIL – PBROWN94806@YAHOO.COM

**VIA U.S. MAIL AND EMAIL -
RENICHOLS01@COMCAST.NET**

Patricia Brown
President
Albany Lions Club, Lions International
713 Key Route Boulevard
Albany, CA 91406

Bob Nichols
Attorney
Albany Lions Club, Lions International
713 Key Route Boulevard
Albany, CA 91406

Re: Offer to Purchase Easement Located on a Portion of Albany Hill Park located on west side of the 700 block of Taft Street, APN 066-2754-040-03

Dear Ms. Brown and Mr. Nichols:

The City of Albany (the “City”) is interested in purchasing the easement interest located in Albany, California, located in Albany Hill Park, on the west side of the 700 block of Taft Street (Assessor Parcel No. 006-2754-040-03). The acquisition of this property interests is needed for the public park where the easement exists. A copy of the legal description of the property sought to be acquired is set forth grant deed and aerial photos attached hereto.

Pursuant to California Government Code section 7267.2, the City has authorized us to make an offer of \$500,000 for the easement interest, which includes removal of the cross. The City’s offer is not less than what has been determined to be the fair market value of the property. A copy of the appraisal report issued by the appraiser is attached. It is the City’s hope that this price is agreeable to you and that the acquisition can begin immediately. This offer is, however, conditioned upon the City Council’s ratification of the offer.

Pursuant to Government Code section 7267.2(a)(2), we have also enclosed an informational pamphlet explaining the eminent domain process. The City has made no decision to exercise its powers of eminent domain and can do so only after it holds a hearing at which all affected property owners have had the opportunity to be heard. The City reserves the right to consider any environmental issues that may pertain to the property.



BEST BEST & KRIEGER
ATTORNEYS AT LAW

VIA EMAIL: PBROWN94806@YAHOO.COM
VIA EMAIL - RENICHOLS01@COMCAST.NET

Patricia Brown, President
Bob Nichols
November 12, 2021
Page 2

Pursuant to Code of Civil Procedure section 1263.025, you are entitled to reimbursement from the City for the reasonable costs, not to exceed \$5,000, for an independent appraisal, should you retain an appraiser. In order to receive this reimbursement, the independent appraisal can only be conducted by an appraiser licensed by the Office of Real Estate Appraisers.

If you wish to accept this offer, please do so by written communication directed to my attention as soon as possible. An agreement of purchase and sale will then be prepared and forwarded to you for your approval.

If you have any questions, do not hesitate to contact me.

Sincerely,

A handwritten signature in black ink, appearing to read 'SOK'.

Scott W. Ditfurth
of BEST BEST & KRIEGER LLP

SWD:swd

Enclosures: Appraisal Report
Informational Brochure

***AN APPRAISAL REPORT PREPARED FOR
BEST, BEST & KRIEGER LLP
OF THE PROPERTY LOCATED AT
North Taft Street
Albany, California 94706***

***PREPARED BY
The Delahooke Appraisal Company
Scott D. Delahooke, MAI***

***THE EFFECTIVE DATE OF APPRAISAL IS
July 17, 2021***



*The Delahooke Appraisal Company
Scott D. Delahooke, MAI
225 S. First Avenue, Suite #201
Arcadia, California 91006*

November 8, 2021

Best, Best & Krieger, LLP
Scott Ditfurth, Attorney-at-Law
3390 University Avenue, 5th Floor
Riverside, California 92501

Dear Mr. Ditfurth:

At your request, an appraisal has been prepared of the property located at:

**North Taft Street
Albany, California 94706**

Property Description: The legal description includes the following:

An easement over Lots 1-18, Block 8, Plat of Cerrito Hill,
City of Albany, County of Alameda, State of California.
Portion of Assessor Parcel #066-2754-14-5,40-3

Purpose of the Appraisal: The purpose of the assignment is to provide an opinion of value of the existing easement held by the *Albany Lions Club, Lions International, A California Non-Profit Corporation*, which is described on Document 73-116351, recorded 8/24/73 as being:

An Easement For Ingress And Egress To Maintain The Existing Cross Standing On A Portion Of The Following Described Premises... (Legal stated above).

Notably, the legal description of the easement does not state where on the servient property the cross is to be located, but rather notes it is an *Existing Cross*. While ultimately a legal opinion, this could be interpreted to mean that the cross can be relocated to any portion of the servient property, with the retained rights of ingress and egress extending to the entire site.

Property History: The existing cross on Albany Hill has a long history, which is summarized below:

1971 A 20' high cross was erected on privately owned land (reportedly roughly 1.1 acres). This cross is illuminated on Easter and Christmas each year (it is reportedly visible "all the way to the East Bay Hills").

- 1973 As part of securing entitlements for a proximate development, the buyer (IGC) purchased from the property owner (Call) land which included an easement for ingress/egress to the existing cross in favor of the Lion's Club. The developer (IGC) then deeded the land to the City of Albany, subject to the underlying Lion's Club easement (the District Court later affirmed there was constructive notice).
- 1978 Termed the *Thomson litigation*, there were several court challenges to the transfer, extending all the way to the California State Supreme Court. The transfer of the land to the City was deemed valid, but there were several other portions of the decision that had financial implications for those named in the suit.
- 2017 The Lions Club filed suit against the City of Albany alleging conspiracy between the defendants and the East Bay Atheists. The District Court Judge visited the park and cross in 2018. Several motions for summary judgement by the Lions Club were granted, while others were denied.
- 2019 The 9th Circuit Court of Appeal affirmed the District Court's ruling.

Fair Market Value Defined: As the acquiring entity is a public agency with the right of eminent domain (this right has reportedly not yet been formalized), the value opinion will be based on the definition stated in the California Code of Civil Procedure, Section 1263.320:

The fair market value of the property taken is the highest price on the date of valuation that would be agreed to by a seller, being willing to sell but under no particular or urgent necessity for so doing, nor obliged to sell, and a buyer, being ready, willing, and able to buy but under no particular necessity for so doing, each dealing with the other with full knowledge of all the uses and purposes for which the property is reasonably adaptable and available. The fair market value of property taken for which there is no relevant, comparable market is its value on the date of valuation as determined by any method of valuation that is just and equitable.

Property Rights Appraised: The final value estimate represents the easement rights held by the Lions Club to a property owned in Fee (subject to the underlying easement) by the City of Albany. The Fee Simple Estate is defined as follows, according to the Dictionary of Real Estate Appraisal, 6th Edition:

Absolute ownership unencumbered by any other interest or estate, subject only to the limitations imposed by the governmental powers of taxation, eminent domain, police power, and escheat.

Legal Instruction: The appraiser was provided with the following legal instruction: *The larger parcel, for purposes of appraisal, is limited to the easement and not to the underlying land owned by the City, as there is no unity of ownership between the City and the Lions Club.* This instruction has been followed in this appraisal assignment.

Application of CCCP in Valuation: Along with the Uniform Standards of Professional Appraisal Practice, real estate appraisers analyzing value in an eminent domain setting also look to the California Code of Civil Procedure for guidance. The definition of Fair Market Value, summarized above, is one of the CCCP requirements. Traditionally, there are three approaches to value which can be utilized by an appraiser in a

given assignment. These include the Sales Comparison Approach (which uses sales of comparable property, applying proper adjustments), the Income Approach (which looks at cash flow to a given property and market-based return rates) and the Cost Approach (which considers the value of the land as vacant and adds the depreciated value of the existing improvements). All three approaches are market-based, and rely on an active market from which to research and analyze transactional information. However, if the property being appraised is truly unique, there might not be truly comparable market information upon which to base value. In that case, the last sentence of CCCP 1263.320 becomes important:

The fair market value of property taken for which there is no relevant, comparable market is its value on the date of valuation as determined by any method of valuation that is just and equitable.

The Lions Club International (LCI) is a 501(c)(4) tax-exempt social welfare organization. Section 1235.155 of the California Code of Civil Procedure states:

“Nonprofit, special use property” means property which is operated for a special nonprofit, tax-exempt use such as a school, church, cemetery, hospital, or similar property. “Nonprofit, special use property” does not include property owned by a public entity.

Further, Section 1263.321 of the California Code of Civil Procedure states:

A just and equitable method of determining the value of nonprofit, special use property for which there is no relevant, comparable market is as set forth in Section 824 of the Evidence Code, but subject to the exceptions set forth in subdivision “c” of Section 824 of the Evidence Code.

Lastly, Section 824 of the Evidence Code states:

(a) Notwithstanding any other provision of this article, a just and equitable method of determining the value of nonprofit, special use property, as defined by Section 1235.155 of the Code of Civil Procedure, for which there is no relevant, comparable market, is the cost of purchasing land and the reasonable cost of making it suitable for the conduct of the same nonprofit, special use, together with the cost of constructing similar improvements. The method for determining compensation for improvements shall be as set forth in subdivision (b).

(b) Notwithstanding any other provision of this article, a witness providing opinion testimony on the value of nonprofit, special use property, as defined by Section 1235.155 of the Code of Civil Procedure, for which there is no relevant, comparable market, shall base his or her opinion on the value of reproducing the improvements without taking into consideration any depreciation or obsolescence of the improvements.

While not an attorney, it is my preliminary opinion that since the owner of the rights being acquired is a tax-exempt non-profit organization, and as there is no “relevant comparable market” (that is, no discernable active market for the purchase and sale of the type of rights being acquired) the special-use provision noted

above would apply, and the value should be based in part on “the cost of purchasing land and the reasonable cost of making it suitable for the conduct of the same nonprofit, special use”.

USPAP/Scope of Work: This report complies with the Uniform Standards of Professional Appraisal Practice. The report has been presented in the Appraisal Report format, in compliance with Standard Rule #2. The appraiser complies with the Competency Provision of USPAP, and has valued numerous types and sizes of government-owned property, easement rights, private property owned in Fee, unique and special purpose property over the past forty years. The intended use of this report is for Best, Best & Krieger and the City of Albany to analyze the potential property/easement value, with the intended users being the clients and others they designate. This report may be used to support the required deposit in a future Condemnation action, but is not to be used for designated expert litigation exchange purposes.

Sales History: The subject property has not been involved in a market-based sale transaction over the past twenty years according to public records.

Market Area Overview: The subject property is located in the City of Albany, which is in the eastern San Francisco Bay area. Adjacent cities include El Cerrito and Kensington (County) to the north and Berkeley to the south. The San Francisco Bay is adjacent-west. The 80 Freeway runs north/south along the western city border, and there is a foothill range to the east. The population in Albany is approximately 19,696. The median household income is \$95,400, and the total employment 2,506. Most of the employment is in the service industry. There has been some higher-density development in the western section of the city (multi-family), however most buildings are older in age and lower-density in design. Use patterns are well established. No significant change in property use is anticipated over the next several years.

Religious Symbol Easement Relevant Comparable Market: As previously noted, this assignment involves valuation of the easement rights held by the Lions Club, a not-for-profit private organization. There are many types and sizes of religious facilities. In some market areas, there are many religious facilities which have been constructed over the years. In these markets, it is not uncommon for religious types of facilities to be listed for sale and sold/purchased by similar organizations who are looking to grow or down-size. This type of activity, in the opinion of the appraiser, represents a “relevant, comparable market”, with both demand and supply. If a religious facility property in this area were to be taken by eminent domain, there tends to be sufficient supply which would allow the Condemnee to find a suitable replacement property proximate to the one being acquired. However, if the religious facility is of a unique size or location, there may be very little opportunity to find a similar property to purchase. In that instance, Section 824(a)(b) of the California Evidence Code would apply, allowing the Condemnee to purchase land and build a new, similar facility to replicate what was lost (which is why deducting depreciation in the valuation approach is not permitted, because the Condemnee has to construct a new building).

The issue of determining if there is a “relevant, comparable market” in this assignment is of great importance. The appraiser has conducted significant market research to ascertain if there has been the transfer of either a property owned in fee or an easement which has as its sole improvement a religious symbol (of any kind). Based on research conducted during this assignment, there does not appear to be a “relevant comparable market” for this type of property use. Based on Section 1235.155, the subject property appears to be clearly

in the classification of the “Non-Profit, Special Use Property” (it is a *special nonprofit, tax-exempt use*). The last section of Section 1263.320 states:

The fair market value of property taken for which there is no relevant, comparable market is its value on the date of valuation as determined by any method of valuation that is just and equitable.

In the valuation section of this report, additional discussion will be presented as to the type of market data and methods of valuation that, in the opinion of the appraiser result in a conclusion that is just and equitable.

Property Description: The Larger Parcel in this assignment, in consultation with the client, is the easement right held by The Lion’s Club which allows access to and from, and maintenance of, a cross structure. This easement right blankets eighteen lots which are along the west side of Taft Street, extending north of Hillside Avenue. Adjacent-north and west are additional lots which, combined with the eighteen lots blanketed by the easement, represent the *Albany Hill Park*. This park is largely unimproved with structures (there is a concrete paved walkway), but does have several mature eucalyptus trees varying in height. The park is accessible from both Taft Street and Jackson Street. The cross is in the eastern/central section of the park, roughly 30' below the highest elevation. Due to both the elevation and density of trees, the cross is primarily visible to the east, in the communities of Albany, Berkeley, El Cerrito and Kensington. The easement does not limit the cross size or illumination, nor does it specify the cross location.

The cross is on a 4' x 6' concrete pad. The total cross elevation is roughly 23'-24', and the total width is approximately 10'-12'. The cross is metal-framed. An elevated electrical line extends to the cross structure from the east. The eastern side of the cross illuminates. No deferred maintenance was noted. There are two benches, one on either side of the cross, which is for use by park patrons. Based on inspection of the area around the cross, there appears to be a roughly 5,000sf usable pad area (no specific area was noted in the easement document, only that the easement holder has the right to access and maintain the existing cross).

Highest and Best Use: The land underlying the cross easement is reportedly owned by the City of Albany for use as a public park. The park land has a zoning classification of PF, or Public Facilities. The General Plan Designation is Parks & Open Space. The zone classification and general plan designation is oriented toward operation of “public facilities”, and applies to property which is government-owned. Religious institutions are considered “Public and Quasi-Public Use Classifications”, and are allowed under R-1, R-2 and R-3 zoning (subject to CUP). The Highest and Best Use of the property owned by the City of Albany is continued operation as a public park. If the property were sold to a private developer, the Highest and Best Use would likely change to a residential classification consistent with surrounding privately-held property.

Market Value Analysis: The three approaches to value typically utilized by a real estate appraiser include the following:

Sales Comparison Approach

In this approach, comparable sales of properties similar in use and utility are researched and compared to the subject property, with adjustments made for characteristics that differ. The comparables should have a similar Highest and Best Use to the subject property.

Income Approach

In this approach, market-based cash flows are analyzed for the subject property, with vacancy and expenses being deducted to arrive at net operating income. This resulting income is then capitalized at an appropriate market return rate to arrive at a value indicator. The comparables utilized should have a similar Highest and Best Use to the subject property.

Cost Approach

This approach first involves valuation of the underlying land "as if vacant", utilizing sales of sites similar in location, zoning, uses permitted and size. The value of the land as vacant is added to the estimated depreciated improvement value (unless it is a Special Use property as noted in the CCCP) to arrive at an overall property value. As with the other two approaches, comparables should reflect a similar Highest and Best to the subject property.

All three approaches have at their core the principle of substitution, which holds that a potential buyer would not pay more for a property than the cost (price, rental rate or cost of land and building) of acquiring a reasonable substitute in the general marketplace. Each approach depends on an active market which includes available alternative property to the one being appraised. The appropriate approaches will be summarized in the following sections. The Cost Approach has not been utilized due to the limited improvement value.

As part of this assignment, the appraiser interviewed the Albany Director of Development Services, Mr. Jeff Bond. Questions were asked about the subject property, as well as the underlying Zoning Code and General Plan. One of the questions asked was about potential zoning classifications that would accept a cross improvement similar to the subject, because one approach to value could include analysis of relocation of the cross to another section of the City which had similar site prominence.

Sales Comparison Approach: There are two scenarios which were considered in this assignment for application of the Sales Comparison Approach. The first was to research potential sales of sites improved with religious symbols similar to the subject (this search extended to the entire State of California). The second was to research sales of potential cross replacement sites owned privately in the market area around the subject property. Both scenarios are presented below.

Religious Symbol Sales

After a State-wide search for this type of comparable transaction, the only sale which was found was the *Mount Soledad Cross* property. This property is located in La Jolla, California. Termed the "Mount Soledad Easter Cross", this religious symbol was first built in 1913. It is located on the top of a hill known as Mount Soledad. The cross currently stands at a total elevation of 43' (29' cross, 14' base). Easter services were held at the cross for forty years. The cross was involved in litigation from 1989 to 2015. The cross was originally on public land. In 1998, the City of San Diego sold the land under the cross (and the cross structure) to a non-profit organization, which then became part of a larger Korean

War Memorial. The land under the cross was then transferred to the Federal government, however there were subsequent lawsuits and challenges to ownership by the Federal government. In July of 2015, the Mount Soledad Memorial Association bought the land under the cross (22,215sf) plus an access easement over surrounding government-owned land from the Department of the Navy for \$1,369,000, ending the Establishment Clause legal challenges (Quitclaim Deed, Document #0379341). The Assessor Parcel is #353-010-17-00, in San Diego County.

The improvements in place for this comparable are much more extensive than those for the subject property (there is paved access, there are brick and concrete walkways, there are stone walls with named war veterans, and there is the cross). Additionally, the acquisition was of the Fee interest, which is generally superior to an easement interest. While an upward adjustment is warranted for improving market conditions, a significant downward adjustment is warranted for the superior improvements and rights acquired as compared with the subject property.



Sales of Replacement Property

The search for replacement property sale comparables included the submarkets around the subject property, including El Cerrito, Kensington, northern Berkeley and Albany. The search focused on elevated sites which had views and could be seen in a manner similar to the subject site. These elevated sites were almost entirely residential in zoning (these classifications generally allows development of religious facilities, however typically Conditional Use Permits are required). These sales are summarized in the following table.

View-Oriented Residential Sale Comparables							
Sale	Location/APN	Site Area	Site Zoning Topography/View	Buyer Seller	Sale Date/Doc. Sources	Sale Price	Price/SqFt
1	8246 Terrace Drive El Cerrito, CA #505-262-059	10,065sf	RS-5 Level/Ltd. City	Zadeh/Sajjadian Kaake/Ebertza	6/11/21 #0170943 MLS/Broker-Eckert	\$600,000	\$59.61
2	10 Garden Drive Kensington, CA #572-080-017-5	7,840sf	R-6/TOV/K Steep/Bay View	Lieber Murray	8/17/20 #0173338 MLS/Broker-Feiner	\$531,000	\$67.73
3	940 Arlington Blvd. El Cerrito, CA #505-301-046-7	5,000sf	RS-5 Steep/Bay View	Wadsworth Arlington Prosp. LLC	8/28/19 #0139306 MLS	\$580,000	\$116.00
4	6518 Hagen Blvd. El Cerrito, CA #501-322-014-9	6,000sf	RS-5 Steep/Bay View	Malik/Razzaq Karpinski	7/9/19 #0105120 MLS/Hyun	\$375,000	\$62.50
5	1196 Curtis Street Albany, CA #065-2643-066	8,175sf	R-1 Level/No View	NAMC Holdings Wipaki	4/30/19 #0078480 MLS/Broker-Rose	\$535,000	\$65.44
6	185 Hill Road Berkeley, CA #060-2493-071	4,960sf	R-1H Steep/Bay View	Millennium Trust Neilands	4/18/18 #0076949 MLS/Broker-Gordon	\$460,000	\$92.74
7	1074 Sterling Avenue Berkeley, CA #063-2980-019	5,310sf	R-1H Steep/Bay View	Fong/Kim Wilde/Park Trusts	1/3/18 #0000872 MLS/Broker-McPhail	\$450,000	\$84.75

Comparable Sale Comments:

Sale #1 involves a new two story home nearing completion. Sale #2 is on a smaller street with center median. Sale #3 involves a vacant lot in an area of new home development. Sale #4 has a new two level home nearing completion. Sale #5 has a new two story home in place. This is the only residential land sale which could be found in Albany. It has no view, and involves a level lot. Sale #6 is still vacant. Sale #7 is in an area of new home construction. The escrow period was one year.

Below is a summary of the information based on the sales presented:

Sale Comparable Summary			
	Range	Variance (Top = Denominator)	Mean
Lot Size	4,960sf-10,065sf	50.7%	6,764sf
Sale Price	\$375,000-\$600,000	37.5%	\$504,430
Price/Sq.Ft.	\$59.61/sf-\$116.00/sf	48.6%	\$78.40/sf

The smallest variance is in the total sale price unit of measure. It is important to note that installation of a religious symbol similar in size to the subject is not a use by right, and will require a Conditional Use Permit in most cases. This type of symbol would likely receive some neighbor opposition, especially if it is lit in the evenings. So an upward adjustment to the indicators summarized above would be appropriate to account for the risk associated with obtaining the proper approvals, which are not assured. The estimated value based on the comparables summarized is in the range of from **\$450,000-\$550,000**.

Income Approach: This approach to value considers market rental revenue for a property or property use, and applies appropriate market return rates to arrive at a value indicator. The easement right is specific to the cross improvement which is visible to thousands of people, especially when illuminated during the evening (there appear to be no limitations on how often the cross can be lit). While the cross is tied to a particular religious practice, it does not highlight a specific church or religious location (although there are no limitations against having one specified). The easement also does not restrict the cross to a specific size, although the cross structure currently in place does appear to have been there for many years. In some ways, this structure is a religious reminder. Many religious groups rent billboard space showing only a religious symbol, while others advertise a specific religious facility.

General research was conducted on single-faced billboard sign revenue potential for a non-freeway sign. Assuming a 14' x 48' standard board size, annual gross advertising revenue of \$97,500 would be reasonable to expect. Allowing 20% for vacancy, the effective gross advertising income would be \$78,000. Real estate net rent is typically 25%-30% of effective gross advertising income, which would result in real estate rental of from \$19,500 to \$23,400. Capitalization rates for billboard easements generally range from 7.0% to 8.0%. Utilizing a 7.5% rate, the range of value would be from \$260,000 to \$312,000, or say **\$300,000**.

Final Value Estimates: Based on the analysis conducted in this assignment, which is based on the data summarized in this report as well as additional information held in the appraiser's work file, the indicated values are:

Summary of Value Indicators	
Sales Comparison Approach : Cross Comparable	\$1,369,000 (Prior to Adjustments)
Sales Comparison Approach : Residential Land Comparables	\$450,000-\$550,000
Income Approach : Billboard Revenue	\$300,000

As noted earlier, significant downward adjustments to the purchase price of the Mt. Soledad cross are warranted for site prominence, interest acquired, visibility and memorial improvements, while an upward adjustment is warranted for improving market conditions. While quantifying an adjustment is extremely difficult, a reasonable value for the subject based on this transaction would be in the \$500,000-\$750,000 range in the opinion of the appraiser. The residential land comparables represent a price for cross relocation to a site with visibility and prominence. The billboard revenue analysis is a secondary approach due to the lack of similarity to the subject, but it is given some consideration. After consideration of all available data, and taking into account the special use nature of the property and the lack of a relevant comparable market, the estimated Fair Market Value of the easement right being analyzed is:

Five Hundred Thousand Dollars
\$500,000

Extraordinary Assumptions: Below, the extraordinary limiting condition utilized as part of this assignment is summarized:

1. The opinion of value assumes the subject property is free from all forms of environmental contamination. If environmental contamination is later found, the appraiser reserves the right to amend value as appropriate.

Hypothetical Conditions: No hypothetical conditions have been utilized in this assignment, other than valuation of the property rights being acquired prior to consideration of any post-acquisition impacts.

Respectfully submitted,



Scott D. Delahooke, MAI
The Delahooke Appraisal Company
State Certification #AG002796
Expires 7/2/2022

RECORDED EASEMENT

RECORDING REQUESTED BY

OK- 220770-B
TITLE INS. & TRUST COMPANY

ALBANY LIONS CLUB
LIONS INTERNATIONAL
c/o Mr. Hubert F. Call
823 San Pablo Ave.
Albany, California

RECORDED AT REQUEST OF
TITLE INSURANCE & TRUST CO.

M. Pa. 400 P. 41

RE: 3497 W. 152

AUG 24 1973

73-110351

OFFICIAL RECORDS OF
ALAMEDA COUNTY, CALIFORNIA
JACK G. BLUE
COUNTY RECORDER

SPACE ABOVE THIS LINE FOR RECORDERS USE

SAME AS ABOVE

DOCUMENTARY TRANSFER TAX \$ NONN-107 Fran \$180.
COMPLETED ON FULL VALUE OF PROPERTY CONVEYED.
OR COMPUTED ON FULL VALUE AS SHOWN
EXEMPTIONS REMAINING AS OF 8/1/71
Hubert F. Call
Signature of Declarant or Agent Determining Tax.

EASEMENT
Grant Deed

TS 400 (02-11-72)

THIS FORM FURNISHED BY TITLE INSURANCE AND TRUST COMPANY

FOR A VALUABLE CONSIDERATION, receipt of which is hereby acknowledged,
HUBERT F. CALL AND RUTH L. CALL, HIS WIFE

hereby GRANT(S) to
ALBANY LIONS CLUB, LIONS INTERNATIONAL, A California Non-Profit
Corporation

the following described real property in the CITY OF ALBANY
County of ALAMEDA, State of California:

AN EASEMENT FOR INGRESS AND EGRESS TO MAINTAIN THE EXISTING CROSS
STANDING ON A PORTION OF THE FOLLOWING DESCRIBED PREMISES:

Lots 1 through 18, in Block 8, as shown on a plat of Cerrito Hill,
Alameda County, California, Filed in the office of the Recorder of
said county on May 13, 1909, in Map Book 24, Page 70.

Excepting therefrom that portion thereof conveyed to the City of
Albany, A Municipal Corporation, by Deed dated August 29, 1960,
Recorded January 4, 1961, under Recorder's Series No. AS/637,
Alameda County Records.

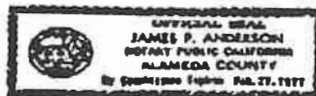
Dated August 17, 1973

Hubert F. Call
Ruth L. Call

STATE OF CALIFORNIA } ss.
COUNTY OF Alameda }
On August 17, 1973 I, Notary Public in and for said State, personally appeared
Hubert F. Call and
Ruth L. Call

Known to me
to be the person whose name is subscribed to the within
instrument and acknowledged that they executed the same.
WITNESS my hand and official seal.

Signature James P. Anderson
Name (Typed or Printed)



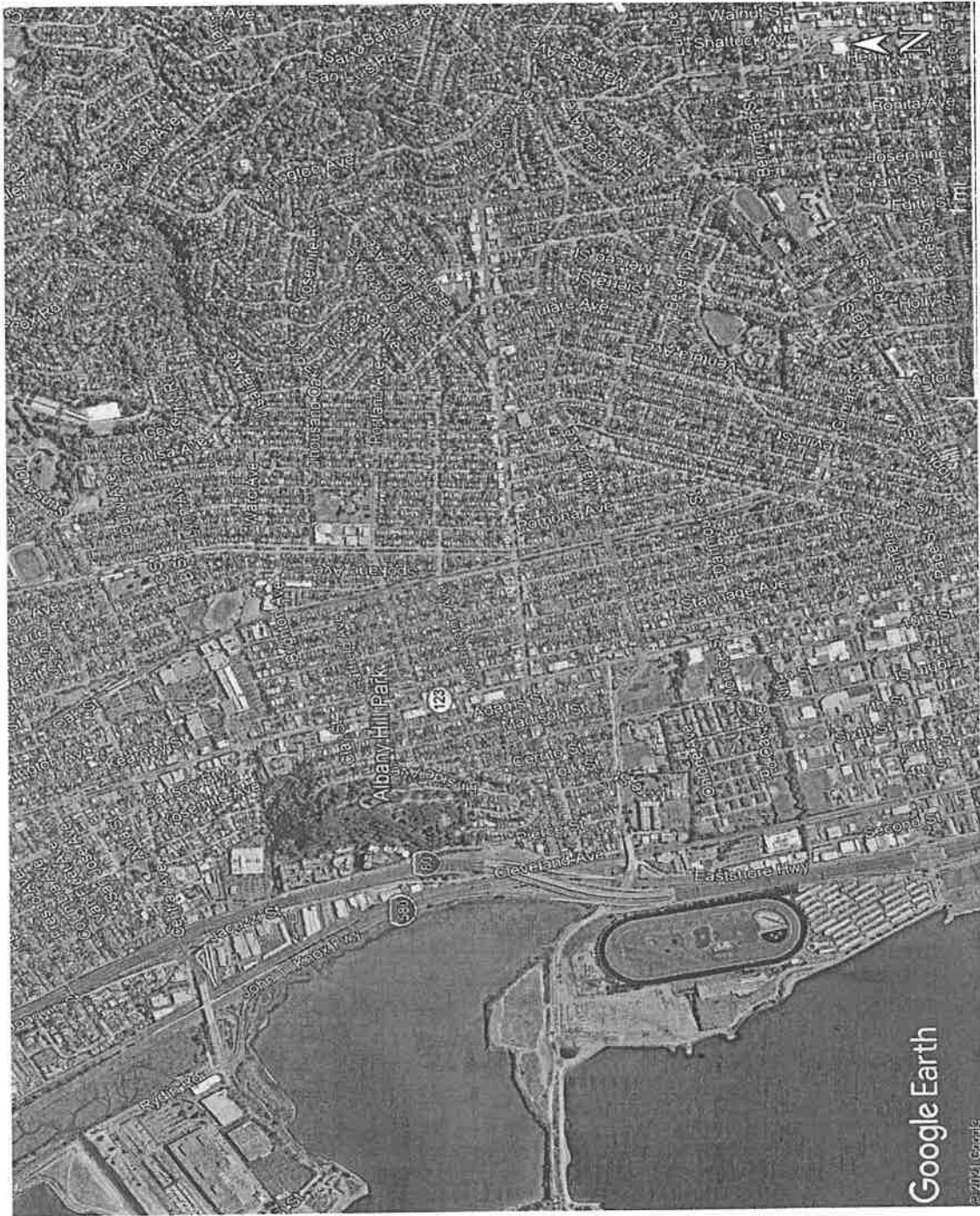
Title Order No. _____ Recorder or Lender No. _____

MAIL TAX STATEMENTS AS DIRECTED ABOVE

AERIAL VIEW



AERIAL VIEW



CERTIFICATION OF SCOTT D. DELAHOKE, MAI

I certify that, to the best of my knowledge and belief:

The statements of fact contained in this report are true and correct.

The reported analyses, opinions and conclusions are limited only by the reported Assumptions and Limiting Conditions and Hypothetical Conditions, and are my personal, impartial, and unbiased professional analyses, opinions and conclusions.

I have no present or prospective interest in the property that is the subject of this report, and I have no personal interest with respect to the parties involved. I have no bias with respect to the property that is the subject of this report or to the parties involved with this assignment. My engagement in this assignment was not contingent upon developing or reporting predetermined results.

I have performed no services, as an appraiser or in any other capacity, regarding the property that is the subject of this report within the three-year period immediately preceding acceptance of this assignment.

My compensation for completing this assignment is not contingent upon the development or reporting of a predetermined value or direction in value that favors the cause of the client, the amount of the value opinion, the attainment of a stipulated result, or the occurrence of a subsequent event directly related to the intended use of this appraisal.

The reported analyses, opinions and conclusions were developed, and this report has been prepared, in conformity with the requirements of the Code of Professional Ethics and Standards of Professional Practice of the Appraisal Institute, and also conform with the requirements of the Uniform Standards of Professional Appraisal Practice.

Carmen Steele provided research and verification assistance. I have made a personal inspection of the property that is the subject of this report.

As of the date of this report, I have completed the continuing education program for Designated Members of the Appraisal Institute. The use of this report is subject to the requirements of the Appraisal Institute relating to review by its duly authorized representatives. If this assignment involves historical or prospective valuation, this certification will be signed as of the date of report completion. The statements in this certification apply to both the date of value and the date of report completion.



Signed-Scott D. Delahooke, MAI
(AG002796 : Expires 7/2/2022)

11-8-21

Report Completion Date

ASSUMPTIONS AND LIMITING CONDITIONS

1. The appraiser assumes no responsibility for matters of a legal nature affecting the property appraised or the title thereto, nor does the appraiser render any opinion as to the title, which is assumed to be good and marketable. The property is appraised as though under responsible ownership.
2. No survey has been made of the property and it is assumed that the improvement is well within the lot lines and in accordance with local zoning and building ordinances. This fact can only be ascertained by an engineering survey, which is beyond the appraiser's area of expertise.
3. All information furnished by others are from reliable sources and are assumed to be true and correct. No responsibility is assumed for errors or omissions nor for information not disclosed by others which might otherwise affect the value estimate.
4. The appraiser assumes that there are no hidden or unapparent conditions of the property, subsoil or structures, which would render it more or less valuable. The appraiser assumes no responsibility for such conditions, or for engineering, which might be required to discover such factors. The appraiser can only report items which could be seen during the property inspection. The appraiser used due diligence in inspecting the property, however if access was limited for any reason the appraiser cannot be responsible for items which were hidden or unapparent due to the limited access.
5. The appraiser shall not be required to give testimony or appear in court by reason of this appraisal, unless prior arrangements have been made therefore. The client shall advise appraiser as to testimony required. If the appraiser is to provide expert testimony on behalf of the client, the client shall provide the appraiser with legal representation and pay for such legal representation as may be required.
6. Possession of this report does not carry with it the right of publication, nor may it or any part thereof, be used by anyone but the applicant without the previous written consent of the appraiser. The appraiser has no accountability, obligation or liability to any third party. If the client gives this report, or a copy of this report, to a third party, this limit of appraiser liability should be fully explained and communicated. The report must always be observed in its entirety.
7. Neither all nor any part of the content or the report or copy thereof (including the conclusions as to the property value, the identity of the appraiser, professional designations, reference to any professional appraisal organizations, or the firm with which the appraiser is connected) shall be used for any purposes by anyone but the client specified in the report, the mortgagee or its successors and assigns, mortgage insurers, consultants, professional appraisal organizations, any state or federally approved financial institutions any department, agency or instrumentality of the United States or any state or the District of Columbia, without the previous written consent of the appraiser; nor shall it be conveyed

by anyone to the public through advertising, public relations, news, sales or other media, without the written consent and approval of the appraiser.

8. No search was made for insect infestation or rot in existing structures if any.
9. In this appraisal assignment, the existence of potentially hazardous material used in the construction or maintenance of the building, such as the presence of urea formaldehyde foam insulation and/or existence of toxic waste (which may or may not be present on the property) was not observed by the appraiser nor does the appraiser have any knowledge of the existence of such materials on, in, or near the property. The appraiser, however, is not qualified to detect such substances. The existence of urea-formaldehyde insulation or other potentially hazardous waste material may have an effect on the value of the property. The client is urged to retain an expert in this field, if needed. .
10. In April of 1992, the United States Congress passed landmark legislation known as the "Americans with Disabilities Act". It has unique and strong requirements on all property owners which is retroactive. At some point in the future, all buildings must provide adequate access to persons with disabilities. Due to the design of some structures, this could become extremely expensive and potentially alter property value. The appraiser is not an expert in architecture and can make no claims regarding the subject property's compliance with this act. The client should be aware that at some future date requirements may be made by governmental agencies for upgrades to the subject property.
11. The appraised value is based on the assumption all required licenses, certificates of occupancy, permits/conditional use permits or other operating approvals are in place and can be renewed in the future allowing reasonable property operation. In the event the subject site has been improved with legal, non-conforming structures, the appraiser assumes all such structures have been implemented with proper permits. It is also assumed that in the event of demolition, the building department having jurisdiction would allow reconstruction to the level of legal non-conforming use existing prior to destruction.
12. The appraised value is as of a specific date. The appraiser is not an economist and cannot predict or project future economic events which may impact the future value of the subject property. The appraiser can only take into account current and historic market information to estimate value.
13. If the client or any third party brings legal action against the appraiser and the appraiser prevails, the party initiating such legal action shall reimburse the appraiser for any and all costs of any nature, including attorney's fees, incurred during such legal action.

SCOTT D. DELAHOOKE, MAI
225 S. First Avenue, Suite #201
Arcadia, California 91006
(626)-445-0500

GENERAL EDUCATION

1981 University of Southern California, B.S., Business Administration
Finance & Business Administration Program

APPRAISAL EDUCATION

1980 Real Estate Valuation-Courses 101/201
University of Southern California
1983 Society of Real Estate Appraisers-Course R-2
1984 Society of Real Estate Appraisers-Course 202
1991 Comprehensive Appraisal Workshop-Appraisal Institute

TEACHING EXPERIENCE

Course 110 Appraisal Institute (Introduction to Appraisal)
Course 310 Appraisal Institute (Capitalization- Theory)
Course 510 Appraisal Institute (Capitalization-Application)
Seminars Lectured at multiple seminars on a range of topics.
Consultation Lectured at banking institutions on valuation principles.
Guest Lecturer USC Law School/UCLA Business School

APPRAISAL EXPERIENCE

Office Includes valuation of office projects ranging in size from 1,500 sq.ft. to over 200,000 sq.ft., and from low-rise to mid-rise complexes.
Retail Includes valuation of anchored and non-anchored centers ranging in size from 2,000 sq.ft. to over 150,000 sq.ft., with most being multi-tenant in use and from neighborhood to regional in design.
Industrial Includes valuation of single and multi-tenant industrial facilities, including incubator projects and business parks. Project sizes have ranged from 5,000 sq.ft. to over 150,000 sq.ft.
Apartment Includes valuation of apartment projects ranging in size from 10 to over 250 units including conversion issues and feasibility.
Residential Includes single family dwellings and residential subdivisions ranging in size from 10 sites to over 100 sites (both vacant and improved).
Vacant Land A wide range of vacant sites have been valued, including land zoned for commercial, industrial, multi-residential and residential use.

SPECIAL PURPOSE PROPERTIES

Bowling Centers
Service Stations
Private Schools
Self Storage Facilities
Hotel/Motel Valuation

Car Wash Facilities
Religious Facilities
Mobile Home Parks
Airport Fixed Base Operations
Conservancy Land

REAL ESTATE INTERESTS VALUED

Fee Simple Estate-Income and Non-Income
Leased Fee Estate
Leasehold Estate
Partial Interests

CONSULTATION ASSIGNMENTS

Feasibility Analysis
Developer Consultation
Marketing Oversight

Loan Portfolio Analysis
Highest and Best Use Analysis
Entitlement Assistance

PARTIAL LIST OF CLIENTS

Financial Institution Clients

Pacific Western Bank
Chase Bank
Banco Popular-North America
East/West Bank
California State Bank
Wells Fargo Bank
General Bank
Inland Community Bank
Bank Audi of New York
Imperial Capital Bank
Broadway Federal, FSB
First Security Corporation
Southern California Bank
Capital Crossing Bank
Marathon National Bank
First Union National Bank
Kaiser Federal Bank

City National Bank
Citibank
Mercantile National Bank
Farmers & Merchants Bank
Comerica Bank
Luther Burbank Savings
Fidelity Federal Bank
US Bank
Silvergate Thrift & Loan
Foothill Independent Bank
First Professional Bank
First Federal Bank
Gilmore Bank
First Bank of Beverly Hills, FSB
Thai Farmers Bank
United Mizrahi Bank
Pacific Mercantile Bank

General Client Summary

University of Southern California	Pepperdine University
Metropolitan Mtg. & Securities, Inc.	GE Capital Corporation
George Elkins Mortgage Banking Company	Imperial Commercial Capital Corporation
Weyerhaeuser Financial Investments, Inc.	Int'l. Brotherhood of Electrical Workers
GMAC Mortgage	George Smith Partners
Deutsche Bank Securities	ARCS Commercial Mtg. Company
Bankers Insurance Group	Safeco Insurance Company
Teachers Insurance & Annuity Assoc.-America	Cobham/Sargent Fletcher Corporation
AES/Southland Corporation	Aetna Casualty Insurers
State Farm Insurance Company	The Travelers Insurance Company
Scottsdale Insurance	TransAmerica Financial Services
Star Insurance Company	North America Title Insurance Company
Kindercare Learning Centers, Inc.	Savers Property & Casualty Insurance
Community Housing Services	TransAmerica Title Insurance
CIM Group	Stewart Title Insurance Company
Pankow Companies	Kaiser Permanente
Ronald McDonald House	Presbytery of San Gabriel Valley
Orion Outdoor Media	Pacific Theaters
All-Saints Church-Pasadena	Affordable Housing Development Corp.
Marlborough School	Stock Building Supply

Public Agency Clients

L.A. Unified School District	Metropolitan Transit Agency
Federal Deposit Insurance Corporation	City of Glendale
City of El Monte	City of Pasadena
Housing/Urban Development	U.S. Department of Justice
City of Los Angeles	State of California
Perris Unified School District	Los Angeles C.R.A.
Val Verde Unified School District	City of South Pasadena
City of Palmdale	City of Santa Monica
City of South Pasadena	City of Cathedral City
City of San Juan Capistrano	City of Downey
City of Highland	City of Azusa

LITIGATION ASSIGNMENTS

Qualified Expert Witness:

County of Los Angeles, Superior Court
County of Orange, Superior Court
County of Riverside, Superior Court
County of Santa Clara, Superior Court
United States Bankruptcy Court,
Central District of California

Litigation Client Summary

O'Melveny & Myers	Briedenbach, Swainston, Crispo & Way
Myers, Nave, Riback, Silver & Wilson	Best, Best & Krieger
Cooksey, Toolen, Gage, Duffy & Woog	Buchalter, Nemer, Fields & Younger
Loeb & Loeb, LLP	Hornberger & Brewer
Jones, Bell, Abbott, Fleming & Fitzgerald	Hunter, Molloy & Salcido
Holland & Knight, LLP	Cahill, Davis & O'Neill
Gaglione, Dolan & Kaplan	Polk, Scheer & Prober
Palmieri, Hennessey & Leifer	Stone, Rosenblatt & Cha
Reed & Brown	Hill, Wynne, Troop & Meisinger
Nossaman, Guthner, Knox & Elliott	Solomon, Grindle, Silverman & Spinella
Hughes, Hubbard & Reed	The Law Offices of John S. Peterson
Nigro, Karlin & Segal	Rosenfeld, Wolff, Aronson & Klein
Dubia, Erickson, Tenerelli & Russo	Hill, Farrer & Burrill
Demetriou, Del Gercio, Springer & Francis	Hahn & Hahn
Stringfellow & Associates	Oliver, Sandifer & Murphy
Paul, Hastings, Janofsky & Walker	Jones, Mahoney, Brayton & Soll
Lewis, D'Amato, Brisbois & Bisgaard	Rodi & Pollock
Blue & Schoor	Haight, Brown & Bonesteel
Hunt, Ortmann, Blasco, Palffy & Rosell	Jeffer, Mangels, Butler & Marmaro
Senn, Palumbo & Muelemans	Castro & Associates
Sullivan, Workman & Dee	Schrieffer, Nakashima & Downey
California Eminent Domain Law Group	Kendrick & Jackson
Kessler & Schneider	Gipson, Hoffman & Pancione
Richards, Watson & Gershon	DLA Piper, US
Richardson & Harman	Perona, Langer, Beck, Llande & Serbin
Wolf, Rifkin, Shapiro & Schulman	Price, Postel & Parma
Anglin, Flewelling, Rasmussen, Campbell & Trytten	Carpenter, Rothans & Dumont
Gresham, Savage, Nolan & Tilden	Cooksey, Toolen, Gage, Duffy & Woog

PROFESSIONAL DESIGNATIONS

Appraisal Institute

MAI Designation

PROFESSIONAL AFFILIATIONS

Past President-
Board of Directors-

Los Angeles Chapter, Appraisal Institute
Los Angeles Chapter, Appraisal Institute

STATE CERTIFICATION

State of California-

Office of Real Estate Appraisers-#AG002796

EXHIBIT "A"

**LEGAL DESCRIPTION
RECORDED GRANT DEED
AERIAL MAPS**

Lots 1-18, Block 8, Map 00024, Page 70, Plat of Cerrito Hill, City of Albany, County of Alameda, State of California.

APN: 66-2754-14-5, 40-3

RECORDED EASEMENT

RECORDING REQUESTED BY
 OK- 220770-B
 TITLE INS. & TRUST COMPANY
 AND WHEN RECEIVED MAIL TO

ALBANY LIONS CLUB
 LIONS INTERNATIONAL
 c/o Mr. Hubert F. Call
 823 San Pablo Ave.
 Albany, California

NAME AS ABOVE

RECORDED AT REQUEST OF
TITLE INSURANCE & TRUST CO.
 At _____ MIA. PAID 4.00 P.M. RE: 3497 IN. 152
 AUG 24 1973 73-116351

OFFICIAL RECORDS OF
 ALAMEDA COUNTY, CALIFORNIA
JACK G. BLUE
 COUNTY RECORDER

SPACE ABOVE THIS LINE FOR RECORDER'S USE

DOCUMENTARY TRANSFER TAX \$ NONE - 187 - 180 - 180
 ... COMPUTED ON FULL VALUE OF PROPERTY CONVEYED.
 ... COMPUTED ON FULL VALUE OF PROPERTY CONVEYED.
 ... COMPUTED ON FULL VALUE OF PROPERTY CONVEYED.
Hubert F. Call
 Recorder of Deeds or Agent Determining Tax.

EASEMENT Grant Deed

THIS FORM FURNISHED BY TITLE INSURANCE AND TRUST COMPANY

FOR A VALUABLE CONSIDERATION, receipt of which is hereby acknowledged,
 HUBERT F. CALL AND RUTH L. CALL, HIS WIFE

hereby GRANT(S) to
ALBANY LIONS CLUB, LIONS INTERNATIONAL, A California Non-Profit Corporation

the following described real property in the **CITY OF ALBANY**
 County of **ALAMEDA**, State of California:

AN EASEMENT FOR INGRESS AND EGRESS TO MAINTAIN THE EXISTING CROSS STANDING ON A PORTION OF THE FOLLOWING DESCRIBED PREMISES:

Lots 1 through 18, in Block 8, as shown on a plat of Cerrito Hill, Alameda County, California, Filed in the office of the Recorder of said county on May 13, 1909, in Map Book 24, Page 70.

Excepting therefrom that portion thereof conveyed to the City of Albany, A Municipal Corporation, by Deed dated August 29, 1960, Recorded January 4, 1961, under Recorder's Series No. AS/637, Alameda County Records.

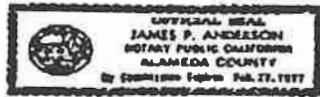
Dated August 17, 1973

STATE OF CALIFORNIA }
 COUNTY OF Alameda } ss.
 On August 17, 1973 before me, the undersigned, a Notary Public in and for said State, personally appeared Hubert F. Call and Ruth L. Call

known to me to be the persons whose names are subscribed to the within instrument and acknowledged that they executed the same.

WITNESS my hand and official seal.

Notary *James P. Anderson*
James P. Anderson
 Name (Typed or Printed)


 JAMES P. ANDERSON
 NOTARY PUBLIC CALIFORNIA
 ALAMEDA COUNTY
 My Commission Expires Feb. 17, 1977

MAIL TAX STATEMENTS AS DIRECTED ABOVE

AERIAL VIEW



AERIAL VIEW



INFORMATIONAL PAMPHLET
OVERVIEW OF THE EMINENT DOMAIN PROCESS
AND DESCRIPTION OF PROPERTY OWNER RIGHTS

(Government Code Section 7267.2(a)(2))

Whenever a public agency makes a formal offer to purchase property under Section 7267.2 of the Government Code, it is required by law to provide a description of the eminent domain process. This pamphlet details the process of eminent domain and property owner rights under eminent domain law.

Public agencies acquire property for all types of public projects, such as schools, roads, water and sewer service, flood control, and fire protection. Sometimes public agencies may have to use eminent domain to acquire property for these projects. Eminent domain is the power to acquire property for a public use conditioned upon payment of just compensation.

The Appraisal Process

Before public agencies can use the power of eminent domain, they must follow certain procedures designed to protect the rights of property owners and the public.

If a public agency is potentially interested in acquiring property for a public project and makes an offer under Section 7267.2 of the Government Code, it is required to send to the owner notice of its decision to appraise the property. This notice will advise the owner that the agency has retained an appraiser to appraise the property. The notice may also provide background information on the acquisition process. It may advise that a business on the property potentially could have a claim for loss of business goodwill. It may also advise that occupants on the property may be entitled to relocation assistance, which can include relocation counseling and the payment for certain costs such as moving costs.

The fact that a public agency has sent a notice of decision to appraise does not mean that it has decided to acquire the property or to use eminent domain. It simply means that the public agency has decided to appraise the property.

The appraiser must also notify the owner that the appraiser is available to meet with the owner to discuss and view the property. After investigating the property and other similar properties, the appraiser will prepare an appraisal report and forward it to the agency.

The Offer of Just Compensation

Upon reviewing the appraisal, the public agency may decide to make an offer to acquire the property. This offer must be in writing. The offer cannot be less than the fair market value established by the approved appraisal. The offer must include certain information, including the public use for which the property is to be acquired and a detailed description of the basis for the

conclusions of value. If the comparable sales approach is used, a description of the principal sales must be included. The appraisal report does not have to be provided unless an owner-occupant of residential property with four or fewer units requests to inspect the report.

The offer must be based upon fair market value. Fair market value is a technical legal phrase but generally it means the highest price that a seller and buyer would agree to on a particular date, with neither being under pressure to buy or sell, and with both being fully informed as to the uses available for the property. The proposed public project for which the property may be acquired is not to be considered for either decreasing or increasing the fair market value.

If only a portion of the property is being acquired, such as for a road widening or an underground sewer pipeline, the appraisal may also consider what are called severance damages. Generally, this refers to the reduction in fair market value to the remaining portion of the property that is not being acquired that results from the partial acquisition or the public project. Sometimes a proposed project will actually increase the value of the remaining property. These benefits can be considered in offsetting severance damages, if there any such damages. These benefits cannot be used to lower the value of the actual portion of the property that is being acquired.

A property may be improved and these improvements, if affixed to the realty, may be taken into consideration in the appraisal and the offer. Businesses may also have a claim for loss of business goodwill.

Just compensation is a concept that comes from the California and U. S. Constitutions. The written offer described above is intended to be an offer for just compensation.

The Negotiation Process

The public agency is required to negotiate in good faith upon making its offer of just compensation. It may not use threatening or coercive tactics. The offer process is a voluntary, negotiation process. The owner is under no obligation to agree to the offer.

In making the offer, the public agency must also offer up to \$5,000 to the owner to retain an appraiser selected by the owner. The appraiser must be state licensed and other conditions may apply.

The owner and the public agency's representatives may negotiate. If the owner believes that certain information is wrong or incomplete, or if the owner has other information that the agency should know about, the owner may offer that information to the public agency. The owner may make a counter-offer, asking for more compensation or suggesting a change in the proposed acquisition. Or, if the owner does not wish to sell the property, the owner may simply reject the offer or not respond.

When property is occupied, the occupants may be entitled to what is called relocation assistance. These are benefits and services to be given to occupants if the proposed acquisition

and public project will require an occupant to move. An occupant need not be an owner of the property to be entitled to such benefits. The nature and extent of the benefits can be technical and will depend upon the particular circumstances of the occupant. Laws and regulations set the amount and nature of applicable benefits. Businesses, homeowners, and renters may be eligible for relocation benefits. These benefits are protections offered by legislation and are different from and in addition to just compensation. When relocation is involved, the public agency will provide an explanation and itemization of the proposed relocation assistance benefits. What is required for relocation is subject to discussion and occupants can provide information they think is important in determining the amount and type of benefits.

Starting Eminent Domain

If the public agency's offer to purchase is not accepted, the public agency may then consider the use of eminent domain. Eminent domain involves the acquisition of property without the owner's consent for a public use conditioned upon payment of just compensation. A public agency may only use the power of eminent domain if it is granted that power by state statute.

The Requirement for a Public Hearing

Before a public agency can consider using eminent domain, it must conduct a public hearing. The public hearing is before the legislative body of the public agency. For example, if a city wishes to consider using eminent domain to build a road, the public hearing must be conducted by the city council. The owner, as identified by the latest tax rolls, is entitled to written notice of the hearing and has a right to speak before the legislative body. At the hearing the public agency considers the adoption of what is called a resolution of necessity. The hearing concerns whether the public interest and necessity require the project, whether the acquisition is most compatible with the greatest public good and the least private injury, whether the property is necessary for the project, and whether the written offer for just compensation has been made. The owner and the legislative body are to address these topics. The owner may be represented by someone at the hearing. This can be legal counsel but does not have to be. The owner must make a timely request to be heard. The notice for the hearing must explain this requirement.

Upon completing the hearing on these topics, the legislative body will determine whether findings on these topics properly can be made, and will consider adopting the resolution of necessity. The resolution can only be adopted if at least two thirds of the full legislative body votes to adopt the resolution.

The Court Process

If the resolution of necessity is adopted, the public agency is then authorized to bring an eminent domain action in state court. This action has to be filed in the county where the property is located. Those with an interest in the property will be named in the action. The action is a lawsuit that must be served on the named parties. The named parties have a right to respond by filing legal papers. In these papers the responding parties may raise legal issues regarding compensation or the public agency's right to use eminent domain.

Once an eminent domain action is filed, the public agency may ask the court for what is called prejudgment possession. This allows the agency to acquire possession of the property so it can begin work on its project without awaiting completion of the court action. The agency may have several actions in court regarding other properties and may not be able to wait until all those actions are resolved before proceeding with construction of its proposed project, such as a road, school, or water pipeline.

To obtain such possession, the public agency must first file and serve a motion on the affected parties. These parties have the right to object and have these objections heard in court. The public agency must also deposit with the court or the State Condemnation Fund the amount of probable just compensation for the property. This amount must be based upon a certified and detailed valuation statement. The owner has the right to challenge this deposit and can file a motion asking to increase the deposit. Those claiming an interest in the deposit may apply to the court to withdraw the deposit or a portion of it.

If the court finds that certain requirements are satisfied and that there are no valid objections to granting prejudgment possession, the court may grant the public agency's motion for possession. State law provides certain time periods to property owners and occupants before possession can take effect.

In many projects, such as road widenings or storm drains, relocation may not be involved at all. If relocation is involved, the public agency must provide relocation counseling and financial benefits to the affected parties. The specific requirements for such counseling and benefits are set by legislation and regulations. Relocation disagreements are subject to appeal to the public agency. Relocation claims may also be presented in court through a lawsuit brought by the claimant. These lawsuits are usually separate from the eminent domain action in court.

The eminent domain action may proceed to trial on the right to use eminent domain or on the amount of just compensation. Trials concerning the right to use eminent domain are conducted only before a judge, without a jury. The California Constitution gives the public agency and the property owner the right to a jury trial on the issue of just compensation. Trials on just compensation focus on the testimony of qualified valuation witnesses. The valuation positions of both sides are usually exchanged in writing on a scheduled date before the trial. These positions are then supported at trial by live testimony, which is subject to cross-examination. At trial, no side has the burden of proof on just compensation. A jury normally must reach a verdict within the range of the valuation opinions allowed into evidence by testimony. In other words, the jury generally cannot find less than the lowest valuation testified to in the trial nor more than the highest valuation.

Before trial either side can make a formal offer to settle. After the trial, if the trial judge finds that the public agency's offer to settle was unreasonable and the owner's offer to settle was reasonable, the public agency is required to pay the owner's reasonable litigation and expert expenses. The public agency cannot recover litigation expenses from the owner for contesting the amount of just compensation. Interest on the awarded just compensation is determined by the court.

During the eminent domain court proceedings, a public agency occasionally may decide that it does not wish to proceed with the acquisition. The owner is given the opportunity to object to the public agency abandoning the proceedings. If the public agency does abandon proceeding with the acquisition, it must pay the other side's reasonable litigation and expert expenses.

Either side may appeal an eminent domain judgment. The appeal process may involve going to the California Court of Appeal, to the California Supreme Court, and to the U. S. Supreme Court. The Court of Appeal must hear a timely appeal. Further review by the California Supreme Court and U. S. Supreme Court is generally within the discretion of those courts.

You Should Seek Professional Advice

This pamphlet is intended to give you an overview of the eminent domain process and property owner rights under state eminent domain law. A public agency does not and cannot represent you or give you legal advice. If you have questions or concerns at any time, you should consider consulting a professional, including an attorney. You always have the right to legal counsel.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

RESOLUTION NO. 2022-32

A RESOLUTION OF NECESSITY BY THE CITY COUNCIL OF THE CITY OF ALBANY, CALIFORNIA, DECLARING THAT THE ACQUISITION OF THE EASEMENT INTEREST FOR THE EXISTING CROSS, AS WELL AS REMOVAL OF THE CROSS ITSELF, ON A PORTION OF ALBANY HILL PARK LOCATED ON THE WEST SIDE OF THE 700 BLOCK OF TAFT STREET, IDENTIFIED AS ASSESSOR PARCEL NOS. 066-2754-14-5, 066-2754-40-3, BY EMINENT DOMAIN, IS NECESSARY FOR ELIMINATION OF A POTENTIAL ESTABLISHMENT CLAUSE VIOLATION AND TO PROVIDE FOR AN UNENCUMBERED PUBLIC PARK IN THE CITY OF ALBANY, ALAMEDA COUNTY, CALIFORNIA

WHEREAS, the City of Albany (the "City") proposes to acquire the easement interest regarding ingress and egress for maintenance of an existing cross, as well as removal of the cross itself, on a portion of Albany Hill Park, more particularly described as Assessor Parcel Nos. 066-2754-14-5, 066-2754-40-3, in order for the elimination of a potential establishment clause violation and to provide for an unencumbered public park in the City of Albany, Alameda County, California, pursuant to the authority granted to it by section 37350.5 of the California Government Code and sections 1240.010, 1240.020 and 1240.030 of the California Code of Civil Procedure; and

WHEREAS, pursuant to section 1245.235 of the California Code of Civil Procedure, the City scheduled a public hearing for Monday, April 4, 2022, at 7:00 p.m., to be held via Zoom conference, and gave to each affected person, or entity identified as having a possessory interest in the existing easement, notice and a reasonable opportunity to appear at said hearing and be heard on the matters referred to in section 1240.030 of the California Code of Civil Procedure; and

WHEREAS, said hearing was held by the City and each person whose property interest is to be acquired by eminent domain was afforded an opportunity to be heard on said matters; and

WHEREAS, the City may now adopt a Resolution of Necessity pursuant to section 1240.040 of the California Code of Civil Procedure.

1
2 **NOW, THEREFORE, THE CITY COUNCIL OF THE CITY OF ALBANY, CALIFORNIA,**
3 **DOES HEREBY RESOLVE, DETERMINE AND ORDER AS FOLLOWS:**

4
5 **SECTION 1.** The recitals above and true and correct and are hereby adopted as findings by the
6 City Council.

7
8 **SECTION 2.** The City Council finds that this Resolution is not subject to the requirements of the
9 California Environmental Quality Act (“CEQA”) for the following reasons:

- 10 A. The Resolution is not a “project” within the meaning of Section 15378 of the State
11 CEQA Guidelines. (See State CEQA Guidelines, § 1560, subd. (c)(3) [“An activity
12 is not subject to CEQA if...[t]he activity is not a project as defined in Section
13 15378”]. Here, the Resolution is not a “project” within the meaning of Section
14 15378 because the Resolution has no potential “for resulting in a direct physical
15 change in the environment, or a reasonably foreseeable indirect physical change in
16 the environment,” as further discussed below. (State CEQA Guidelines, § 15738.)
- 17 B. In the alternative, and if a project, this Resolution is exempt under State CEQA
18 Guidelines section 15061(b)(3), the common sense exemption, because it can be
19 seen with certainty that there is no possibility that the activity in question may have
20 a significant effect on the environment.

21 Notably, this Resolution will not result in any construction or development. Rather, this Resolution
22 simply: (1) acquires the easement interest currently in favor of the Albany Lions Club, Lions
23 International for ingress and egress to maintain an existing cross standing on a portion of the
24 property; and (2) removes a standing cross from the property. For these reasons, the Resolution
25 has no potential to result in a direct, or unforeseeable indirect, physical change in the environment,
26 and it can be seen with certainty that there is no possibility that the activity in question may have a
27 significant effect on the environment.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

SECTION 3. Compliance with California Code of Civil Procedure and California Environmental Quality Act. There has been compliance by the City with the requirements of section 1245.235 of the California Code of Civil Procedure regarding notice and hearing and with the California Environmental Quality Act.

SECTION 4. Public Use. The public use for which the real property is required to be acquired by the City of Albany for the elimination of a potential establishment clause violation and to provide for an unencumbered public park in the City of Albany, Alameda County, California. Section 37350.5 of the California Government Code authorizes the City to acquire by eminent domain real property necessary for such purposes.

SECTION 5. Description of Property. Attached and marked as **Exhibit A** is the legal description and assessor map of the interest to be acquired by the City, which describes the general location and extent of the property to be acquired with sufficient detail for reasonable identification.

SECTION 6. Findings. The City hereby finds and determines each of the following:

- (a) The public interest and necessity require the proposed project;
- (b) The proposed project is planned or located in the manner that will be most compatible with the greatest public good and least private injury;
- (c) The real property described in **Exhibit A** is necessary for the proposed project;
- (d) The offers required by section 7267.2 of the California Government Code were made; and
- (e) The public use for this property is a more necessary use than the use for which the property is appropriated.

1
2 **SECTION 7. Use Not Unreasonably Interfering with Existing Public Use.** Some or all of the
3 underlying real property to be acquired is owned by the City as a public park. The legal descriptions
4 regarding this ownership is on file with the City and describes the general location and extent of
5 the public park sufficient detail for reasonable identification. In the event the herein described use
6 or uses will not unreasonably interfere with or impair the continuance of the public use as it now
7 exists or may reasonably be expected to exist in the future, counsel for the City is authorized to
8 acquire the real property subject to such existing public use(s) pursuant to section 1240.510 of the
9 California Code of Civil Procedure.

10
11 **SECTION 8. More Necessary Public Use.** Some or all of the underlying real property to be
12 acquired is owned by the City as a public park for existing public uses. The acquisition described
13 herein is not believed to interfere with or impair the existing public use of the property. To the
14 extent that the herein described use or uses will unreasonably interfere with or impair the
15 continuance of the public use as it now exists or may reasonably be expected to exist in the future,
16 the City finds and determines that the herein described use or uses are more necessary than said
17 existing public use. Legal Counsel for the City is authorized to acquire the real property
18 appropriated to such existing public use(s) pursuant to section 1240.610 of the California Code of
19 Civil Procedure. Staff is further authorized to make such improvements to the real property being
20 acquired that it determines is reasonably necessary to mitigate any adverse impact upon the existing
21 public use.

22
23 **SECTION 9. Further Activities.** Legal Counsel for the City is hereby authorized to file legal
24 proceedings necessary to acquire the hereinabove described real property interest in the name of
25 and on behalf of the City by eminent domain, and counsel is authorized to institute and prosecute
26 such legal proceedings as may be required in connection therewith. Legal counsel is further
27 authorized to take such steps as may be authorized and required by law, and to make such security

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

deposits as may be required by order of court, to permit the City to take possession of and use said real property at the earliest possible time. Legal Counsel is further authorized to correct any errors or to make or agree to non-material changes in the legal description of the real property that are deemed necessary for the conduct of the condemnation action or other proceedings or transaction required to acquire the subject real property. Legal Counsel is further authorized to reduce or modify the extent of the interests or property to be acquired so as to reduce the compensation payable in the action where such change would not substantially impair the reason for what the real property is being acquired.

SECTION 10. This Resolution supersedes all prior resolutions to the extent that such resolutions conflict with this Resolution

SECTION 11. Effective Date. This Resolution shall take effect upon adoption.

PASSED AND ADOPTED by the City Council of the City of Albany at its meeting on the 4th day of April, 2022, by the following vote:

AYES: Council Members Gary, McQuaid, Nason, Tiedemann and Mayor Jordan

NOES: none

ABSENT: none

ABSTAINED: none


PRESTON JORDAN, MAYOR

EXHIBIT "A"

**LEGAL DESCRIPTION
RECORDED GRANT DEED
AERIAL MAPS**

Lots 1-18, Block 8, Map 00024, Page 70, Plat of Cerrito Hill, City of Albany, County of Alameda, State of California.

APN: 66-2754-14-5, 40-3

RECORDED EASEMENT

RECORDING REQUESTED BY

OK- 220776-B
TITLE INS. & TRUST COMPANY

ALBANY LIONS CLUB
LIONS INTERNATIONAL
c/o Mr. Hubert F. Call
823 San Pablo Ave.
Albany, California

RECORDED AT REQUEST OF
TITLE INSURANCE & TRUST CO.

M. _____ Mtd. Paid 4.00 P.M.

AUG 24 1973

RE: 3497 IM: 152

73-110351

OFFICIAL RECORDS OF
ALAMEDA COUNTY, CALIFORNIA
JACK G. BLUE
COUNTY RECORDER

SPACE ABOVE THIS LINE FOR RECORDER'S USE

SALE AS ABOVE

DOCUMENTARY TRANSFER TAX & NONN-
COMPUTED ON FULL VALUE IS PROMPTLY CONVERTED.
OR COMPUTED ON FULL VALUE IS 1973
REMANING A
\$100.
Hubert F. Call
Ruth L. Call

EASEMENT

Grant Deed

THIS FORM FURNISHED BY TITLE INSURANCE AND TRUST COMPANY

FOR A VALUABLE CONSIDERATION, receipt of which is hereby acknowledged,
HUBERT F. CALL AND RUTH L. CALL, HIS WIFE

hereby GRANT(S) to
ALBANY LIONS CLUB, LIONS INTERNATIONAL, A California Non-Profit Corporation

the following described real property in the CITY OF ALBANY
County of ALAMEDA, State of California:

AN EASEMENT FOR INGRESS AND EGRESS TO MAINTAIN THE EXISTING CROSS
STANDING ON A PORTION OF THE FOLLOWING DESCRIBED PREMISES:

Lots 1 through 18, in Block 8, as shown on a plat of Cerrito Hill,
Alameda County, California, Filed in the office of the Recorder of
said county on May 13, 1909, in Map Book 24, Page 70.

Excepting therefrom that portion thereof conveyed to the City of
Albany, a Municipal Corporation, by Deed dated August 29, 1960,
Recorded January 4, 1961, under Recorder's Series No. AS/637,
Alameda County Records.

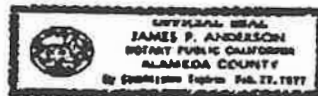
Dated August 17, 1973

Hubert F. Call
Ruth L. Call

STATE OF CALIFORNIA }
COUNTY OF Alameda }
the August 17, 1973 }
signed, a Notary Public in and for said State, personally appeared }
Hubert F. Call and }
Ruth L. Call }

Known to me to be the persons whose names are subscribed to the within
instrument and acknowledged that they executed the same
WITNESS my hand and official seal.

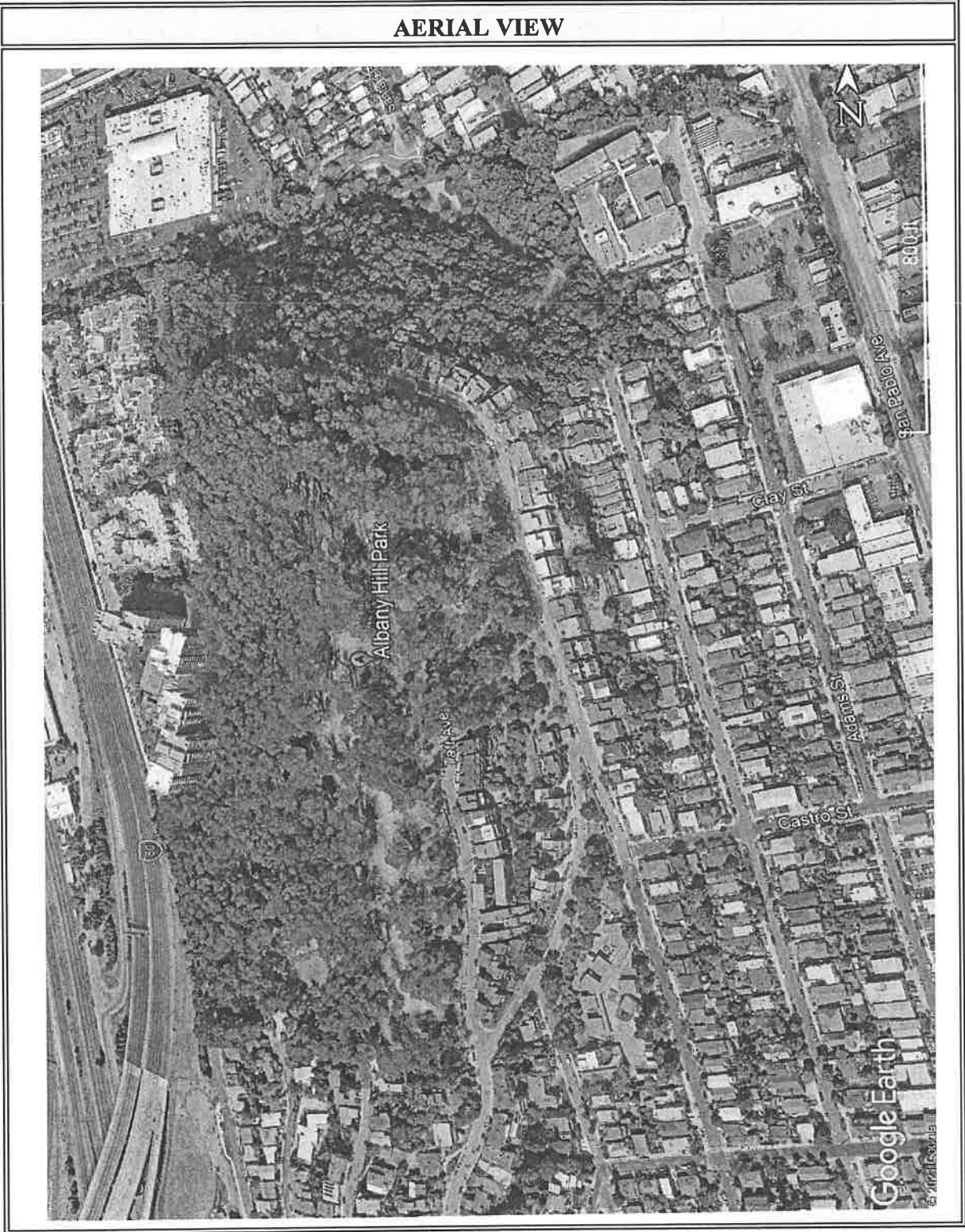
James P. Anderson
Name - Typed or Printed



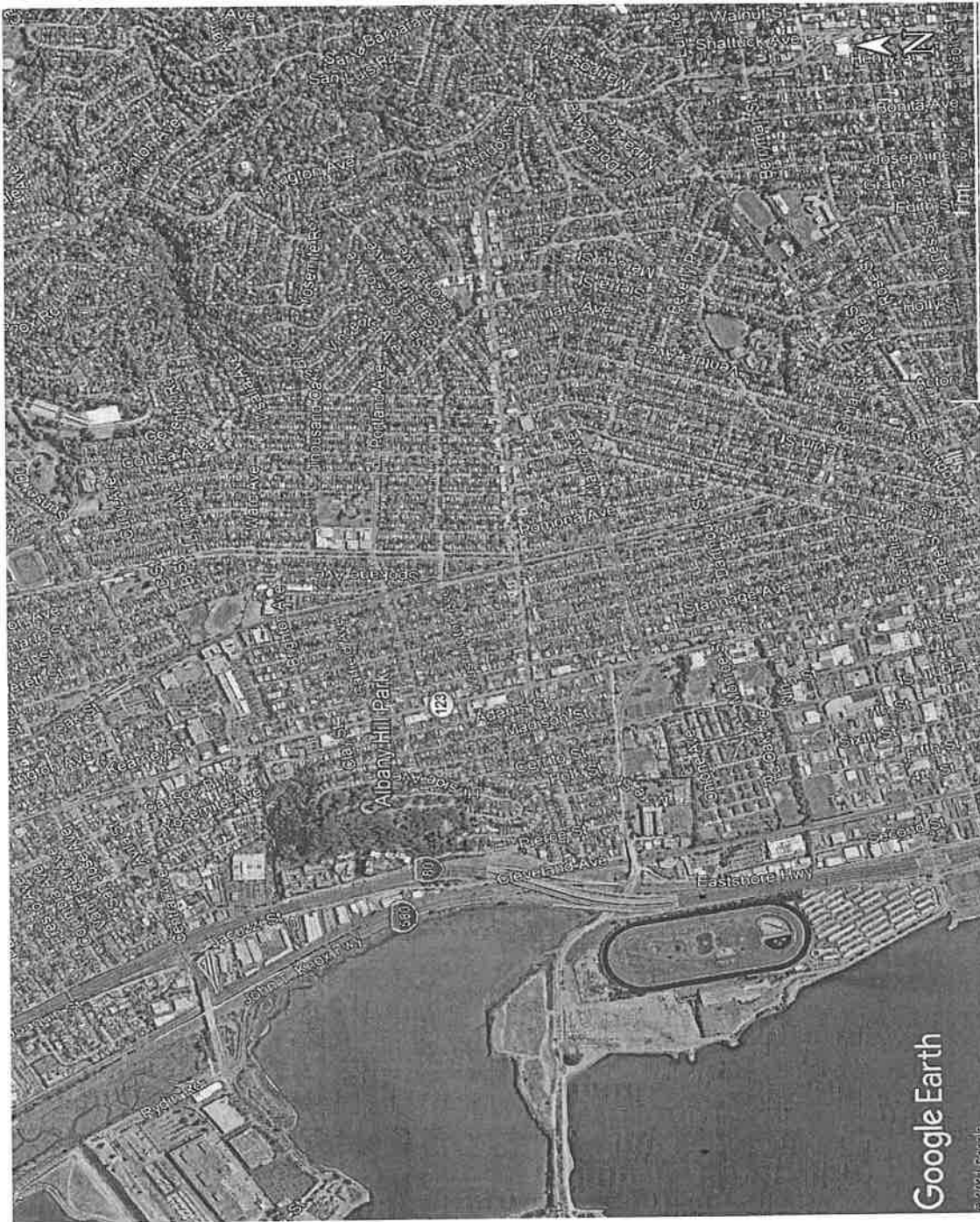
Title Order No. _____ Renewal or Extension No. _____

MAIL TAX STATEMENTS AS DIRECTED ABOVE

AERIAL VIEW



AERIAL VIEW





City of Albany

1000 San Pablo Avenue • Albany, California 94706
(510) 528-5710 • www.albanyca.org

RESOLUTION NO. 2022-32

PASSED AND APPROVED BY THE COUNCIL OF THE CITY OF ALBANY,

The 4th day of April, 2022, by the following votes:

AYES: Council Members Gary, McQuaid, Nason, Tiedemann and Mayor Jordan

NOES: none

ABSENT: none

ABSTAINED: none

RECUSED: none

WITNESS MY HAND AND THE SEAL OF THE CITY OF ALBANY, this 5th
day of April, 2022.

Anne Hsu
CITY CLERK

The City of Albany is dedicated to maintaining its small town ambiance, responding to the needs of a diverse community, and providing a safe, healthy and sustainable community.

1
2
3
4
5
6
7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28

United States District Court
For the Northern District of California

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA

THE LIONS CLUB OF ALBANY,
CALIFORNIA, a non-profit corporation,

Plaintiff,

No. C 17-05236 WHA

v.

THE CITY OF ALBANY, a charter city, *et al.*,

Defendants and Counter-
Claimants,

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

v.

THE LIONS CLUB OF ALBANY,
CALIFORNIA, a non-profit corporation, and
THE ALBANY LIONS CLUB FOUNDATION,

Counter-Defendants.

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

1 (who lived in Albany but not on the 1.1 acres). They allowed The Lions Club of Albany,
2 California, a non-profit corporation, to erect the cross and to illuminate it (and the Lions Club
3 proceeded to illuminate it every Christmas and Easter season up to the present) (Dkt. Nos. 43
4 at 10, 44, Exh. TTT). Hubert Call was then a member of both the Lions Club and Albany City
5 Council.

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

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

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

26 Pursuant thereto, IGC offered to pay the Calls \$258,000 for title to their 1.1-acre parcel
27 “free of liens, encumbrances, easements . . . and conditions of record . . . other than exceptions
28

1 of record.” 38 Cal. 3d at 641.¹ IGC and the Calls eventually reached an agreement whereby the
 2 Calls deposited two grant deeds into escrow — a grant deed conveying the Call parcel to an
 3 IGC affiliate and another grant deed conveying to the Lions Club an “easement for ingress and
 4 egress to maintain the existing cross standing” on the Call parcel. Before closing escrow, Call
 5 insisted upon burdening the parcel with the easement and would sell only on the condition that
 6 the cross would remain with an easement for access. The developer went along and deposited
 7 in escrow a grant deed conveying the Call parcel to the City. That deed did not indicate that
 8 title to the Call parcel was subject to the easement (but it did not have to for the easement to be
 9 effective). *See* 38 Cal. 3d at 642 n.10. The City followed by depositing the building permit in
 10 escrow.

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

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

20 In 1978, the Alameda County Superior Court found that although the transaction was
 21 non-fraudulent and although Call had abstained in the approval process, Call nevertheless had a
 22 proscribed financial interest under California’s Government Code Section 1090 in the
 23 agreement between IGC and the City. The Superior Court ordered the Calls to pay the City the
 24

25 ¹ Citation to “38 Cal. 3d” refers to the California Supreme Court decision, which can be more fully
 26 found at *Thomson v. Call*, 38 Cal. 3d 633 (1985). Citation to “198 Cal. Rptr.” refers to the California Court of
 27 Appeal decision in related litigation, which can be more fully found at *Thomson v. Call*, 198 Cal. Rptr. 320 (Ct.
 28 App. 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**.

1 full \$258,000 amount (plus interest) received by the Calls for the parcel and denied relief as to
2 the other defendants (Dkt. No. 44, Exh. TTT).

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

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

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

27 The California Court of Appeal left undisturbed the trial court's finding that the City's
28 acquisition of the Call parcel was valid because it had the secular purpose of public park use.

1 *Id.* at 336. It, however, distinguished this finding from the constitutional problems related to
2 the land's value and "its use as a public park in the future." *Id.* at 337. Indeed, the California
3 Court of Appeal found that because the easement protected the cross's location and existence,
4 "the land is consequently unsuitable for use as a municipal park because of the constitutional
5 proscriptions which preclude the display of a religious symbol on public property." *Id.* at 339.

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

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

21 Justice Stanley Mosk concurred in the judgment against the Calls and dissented in the
22 absolution of the corporate defendant's liability. *Id.* at 653. Justice Mosk noted that although
23 IGC "was motivated solely by a desire to obtain a building permit and to protect its
24 development," it knew the City wanted to make a public park at Albany Hill's summit and thus
25 promised the City "a unique, superb and useful view park for the public enjoyment." *Ibid.*
26 Thus, IGC's contract "obligated [IGC] to convey fair value to the city in the form of *land*
27 *suitable for use as a public park.*" *Id.* at 654 (emphasis added). Justice Mosk further noted
28 that due to the easement's protection of the location and existence of the cross, the land was

1 rendered “unsuitable for use as a park because of the constitutional proscriptions precluding
2 the display of a religious symbol on public property.” *Ibid.* By allowing the Call parcel to be
3 burdened by the easement, Justice Mosk believed that IGC thus negated the City’s very purpose
4 in acquiring the land, as “of course, *the perpetual religious symbol rendered the property*
5 *legally unsuitable for park* or other public purposes.” *Ibid.* (emphasis added). These separate
6 comments took for granted the validity of the easement.

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

9 Decades passed.

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

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

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

23 In November 2017, the City and five city officials counterclaimed against The Lions
24 Club of Albany (and its affiliates).² The gravamen of the City’s claims focuses on the invalidity
25 and unenforceability of the Lions Club’s easement under the United States and California
26 Constitutions.

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

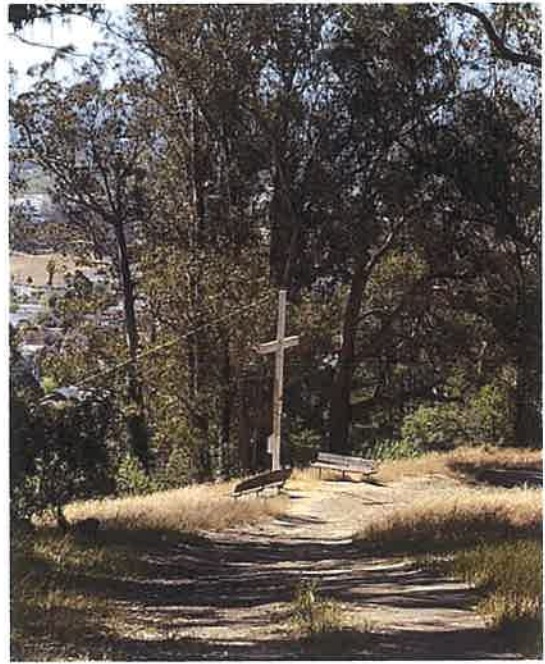
1 The Lions Club now moves for summary judgment both on their claims and against the
2 counterclaims. The Lions Club's claims include (1) taking of property without compensation;
3 (2) interference with easement; (3) due process violations under the United States and
4 California Constitutions; (4) equal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

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

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



24 Front View From Off-Trail



25 Side View From Trail (Near Summit)

26
27 ³ The City objects to the Lions Club's second motion for summary judgment against the City's
28 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**.

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 (1986).

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

A private land owner is perfectly free to erect a cross on his or her land (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.

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 (2007); *Teachers Ins. & Annuity Ass’n v. Furlotti*, 70 Cal. App. 4th 1487 (1991). 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

1 unenforceable. *Second*, the issue in *First Unitarian* focused on the *city's* actions with respect to
 2 the easement's terms. *Id.* at 1122. Here, the easement's terms were solely between the Calls
 3 and the Lions Club.

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

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

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

24 **2. THE PUBLIC PARK WITH THE CROSS**
 25 **VIOLATES THE ESTABLISHMENT CLAUSE.**

26 To repeat, the Establishment Clause runs against public entities, not private parties.
 27 After the City acquired the land burdened with the cross and turned it into a public park, the
 28 City also acquired an Establishment Clause problem and should have solved it by condemning

1 the easement via its power of eminent domain, selling off a parcel with the cross to a private
2 party, or enacting a valid zoning ordinance. Now follow the details.⁴

3 **A. Federal Establishment Clause.**

4 The Establishment Clause of the First Amendment to the United States Constitution
5 states that “Congress shall make no law respecting an establishment of religion” The
6 Establishment Clause has come “to mean that government may not promote or affiliate itself
7 with any religious doctrine or organization” *Cty. of Allegheny v. Am. Civil Liberties*
8 *Union, Greater Pittsburgh Chapter*, 492 U.S. 573, 590 (1989), *abrogated on other grounds by*
9 *Town of Greece v. Galloway*, 134 S. Ct. 1811 (2014). It runs against all governments — state,
10 local, and federal. *See Everson v. Bd. of Ed. of Ewing Tp.*, 330 U.S. 1, 15 (1947).

11 The *Lemon* test still generally governs in evaluating an alleged Establishment Clause
12 violation. *Lemon v. Kurtzman*, 403 U.S. 602, 612–13 (1971); *Trunk v. City of San Diego*, 629
13 F.3d 1099, 1106 (9th Cir. 2011). The *Lemon* inquiry asks whether the religious practice or
14 symbol at issue (1) has a secular purpose; (2) has a primary effect that neither advances nor
15 inhibits religion; and (3) does not foster excessive state entanglement with religion. *Lemon*, 403
16 U.S. at 612–13. “[T]he challenged [government] practice must survive all three prongs of the
17 *Lemon* analysis in order to be held constitutional.” *Vernon v. City of Los Angeles*, 27 F.3d
18 1385, 1396–97 (9th Cir. 1994).

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

23 The second prong “asks whether, irrespective of government’s actual purpose, the
24 practice . . . in fact conveys a message of endorsement or disapproval [of religion].” *Lynch v.*
25 *Donnelly*, 465 U.S. 668, 690 (O’Connor, J., concurring). *Buono v. Norton*, 371 F.3d 543

26 ⁴ The City also argues the cross is unconstitutional under the California Constitution’s No Preference
27 and No Aid Clauses. Our court of appeals instructs that “courts should avoid adjudication of federal
28 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 (2000).

1 (9th Cir. 2004), directs this analysis. Our court of appeals held in *Buono* that the display of a
2 Latin cross on public land impermissibly conveyed endorsement of a particular religion in
3 violation of the Establishment Clause. It found such a primary effect even though the cross was
4 originally erected and maintained by private individuals and meant to serve as a war memorial.
5 *Id.* at 548–50.

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

15 Similar to *Buono*, the cross at issue here is a large, twenty-foot Christian cross bolted
16 permanently into a concrete base and prominently displayed at the summit of a public park.
17 This overtly religious symbol, which stands alone, is prominent in the park itself and remains
18 visible, through clearings in the trees, far beyond the parkland’s immediate vicinity (*see* Dkt.
19 No. 43, Exh. A). The cross stands close by the only public trail through the park and close by
20 park benches, all of which remains reachable on foot within a couple of minutes from the
21 parking lot. The cross is illuminated during Easter and Christmas seasons. And, unlike in
22 *Buono*, the cross has never been a war memorial. It is solely a religious symbol (*see* Dkt. Nos.
23 43 at 11, 60, Exh. Z).

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

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

8 The relevant inquiry for evaluating the primary effect of the City’s parkland burdened
9 with the easement and the cross is whether a “reasonable observer” would *perceive*
10 governmental endorsement of religion.⁵ *See id.* at 549–50. Here, a reasonable observer would
11 perceive — knowing “the history and context of the community and forum in which” the cross
12 appears — an impermissible endorsement. The reasonable observer would be aware that the
13 cross stands on city parkland, it celebrates Christian holy days, and the City has supported this
14 religious activity for decades (*see* Dkt. Nos. 44 at 28–29, 79 at 1).

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

22 The Lions Club cites *Van Orden v. Perry*, 545 U.S. 677 (2005), the Ten Commandments
23 case. It, however, is distinguishable. The Supreme Court there permitted the Ten
24 Commandments display on state capitol grounds in part because of its *historic* significance.
25 Although the Ten Commandments monument had religious overtones, it also alluded to the
26 history of the United States government, as “[t]here is an unbroken history of official
27

28 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(1995)) (O’Connor, J., concurring)).

1 acknowledgment by all three branches of government of the role of religion in American life
2 from at least 1789.” *Id.* at 686. Here, the Lions Club cannot assert that the cross conveys
3 American history, has any other historical relevance, or serves some secular purpose. Rather, the
4 Lions Club emphasizes the cross’s plain religious significance (*see, e.g.*, Dkt. No. 60 at 7).

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

16 “Whatever else the Establishment Clause may mean . . . it certainly means at the very
17 least that government may not demonstrate a preference for one particular sect or creed
18 (including a preference for Christianity over other religions).” *Separation of Church & State*
19 *Comm.*, 93 F.3d at 619 (citation omitted) (quoting *Cty. of Allegheny v. Am. Civil Liberties Union,*
20 *Greater Pittsburgh Chapter*, 492 U.S. 573, 590 (1989)). Here, the City’s establishment of a
21 public park featuring a large cross projects an appearance of governmental preference for the
22 Christian religion. Thus, the City’s use of land bearing the cross fails to satisfy the primary
23 effect prong and accordingly violates the Establishment Clause.

24 **B. This Conclusion is Consistent with *Thomson*.**

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

1 Res judicata, or claim preclusion, “prevents relitigation of the same cause of action in a
2 second suit between the same parties or parties in privity with them.” *Mycogen Corp. v.*
3 *Monsanto Co.*, 28 Cal. 4th 888, 896 (2002). Collateral estoppel, or issue preclusion, “precludes
4 relitigation of issues argued and decided in prior proceedings.” *Ibid.* State-court judgments are
5 given “the same preclusive effect as would be given that judgment under the law of the State in
6 which the judgment was rendered.” *Coeur D’Alene Tribe of Idaho v. Hammond*, 384 F.3d 674,
7 688 (9th Cir. 2004) (citation omitted).

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

12 The primary focus of *Thomson* was the validity of the multi-party agreement
13 masterminded by IGC and the Section 1090 issue. As such, *Thomson* analyzed the cross and
14 easement mainly in terms of how they affected land value and prejudiced the suitability of the
15 land for use as a public park. The constitutional issue arose as a gimmick by the Calls to escape
16 the consequences of the conflict of interest — a ploy the courts disfavored.

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

23 The California Court of Appeal recognized this distinction, stating that “the
24 constitutional problems presented by the cross and the easement pertain only to . . . its use as a
25 public park in the future. They do not reach the trial court’s determinations . . . which were to
26 the effect that the *acquisition* of the land by the City was valid” and that “[t]he existence of the
27 cross and the easement does not affect the determination that the contract between ICG and the
28 City was void.” *Thomson*, 198 Cal. Rptr. at 336. It went further, stating that “the easement

1 actually protects the location and existence of the cross, and that the land is consequently
 2 *unsuitable for use as a municipal park* because of the constitutional proscriptions which preclude
 3 the display of a religious symbol on public property.” *Id.* at 339 (emphasis added). Justice
 4 Mosk in his separate opinion echoed this distinction, stating that the “perpetual religious symbol
 5 rendered the property legally *unsuitable for park* or other public purposes.” *Thomson*, 38 Cal. 3d
 6 at 654 (1985) (emphasis added). In other words, it was common ground among all concerned in
 7 *Thomson* that the easement was alive and well and its main effect on the deal was to render the
 8 land unsuitable for use as a public park and/or to diminish the value of the land.

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

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

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

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

23 If the City chooses to sell to a private party, it must do so at fair market value and it must
 24 do so in a manner that avoids other forms of Establishment Clause violations. The subdivision
 25 must be a coherent, separate parcel in such a manner that the public may recognize that the cross
 26 no longer stands on public land. If the City condemns the easement, it would have to pay the
 27 Lions Club just compensation, as determined by fair market value by a jury.
 28

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

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

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

14 Whether or not the City violated the Lions Club's free speech, free exercise, equal
 15 protection, and/or due process rights and/or interfered with the Lions Club's easement implicate
 16 heavily disputed facts. The City argues that it cut off electric power to the cross because it
 17 presented a safety hazard. The Lions Club argues that the City's safety concerns reek of pretext
 18 and that the scheme received ratification by the City's policymakers.

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

22 **5. MISCELLANEOUS CLAIMS.**

23 **A. California Takings Clause.**

24 The Lions Club claims that the City violated the California Takings Clause by
 25 disconnecting the electricity to the cross. Article I, Section 19 of the California Constitution
 26 provides that "[p]rivate property may be taken or damaged for public use only when just
 27 compensation . . . has first been paid to . . . the owner." This provision "never was intended, and
 28 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

1 private property.” *Customer Co. v. City of Sacramento*, 10 Cal. 4th 368, 378 (1995). Without
2 property taken or damaged for “public use,” the Lions Club is not entitled to just compensation
3 under the California Constitution. The Lions Club’s motion for summary judgment on the
4 California Takings Clause claim is thus **DENIED**.

5 **B. Quiet Title.**

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

12 **C. Trespass.**

13 The City argues that the presence of the cross in its park constitutes trespass. “The
14 essence of the cause of action for trespass is an ‘unauthorized entry’ onto the land of another.
15 Such invasions are characterized as intentional torts, regardless of the actor’s motivation.”
16 *Civic Western Corp. v. Zila Indus., Inc.*, 66 Cal. App. 3d 1, 16 (1977). “A trespass may be
17 committed by the continued presence on the land of a structure, chattel, or other thing which the
18 actor . . . has placed on the land . . . with the consent of the person then in possession of the land,
19 if the actor fails to remove it after the consent has been effectively terminated.” *Mangini v.*
20 *Aerojet-Gen. Corp.*, 230 Cal. App. 3d 1125, 1141–42 (1991).

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

24 **D. Nuisance.**

25 The City bases its private nuisance claim on “the unconstitutional condition perpetuated
26 by” the cross’s ongoing presence and the City’s “seeming endorsement” of “Christianity above
27 other religions and above no religion” (Dkt. No. 47 at 9–10). It bases its public nuisance claim
28 on the cross’s unconstitutional condition, which is allegedly “offensive to many members of the

1 community,” conveys the appearance of government religious preference, alienates certain
 2 community members, and “interferes with the use and enjoyment” of the park (Dkt. No. 46 at
 3 17). The Lions Club counters that its cross is a “beloved symbol of Albany Hill” and causes no
 4 interference with the use and enjoyment of the public park (Dkt. No. 44 at 19).

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

7 The City cites decisions involving, for example, theaters and bookstores exhibiting
 8 obscene materials (*People ex rel. Busch v. Projection Room Theater*, 17 Cal. 3d 42 (1976)),
 9 construction of airport fuel tanks near an industrial park (*Koll-Irvine Center Prop. Owners Ass’n*
 10 *v. County of Orange*, 24 Cal. App. 4th 1036 (1994)), and hazardous waste (*Mangini v. Aerojet-*
 11 *Gen. Corp.*, 230 Cal. App. 3d 1125 (1991)). The cross does not compare. The Lions Club’s
 12 motion for summary judgment in its favor on the nuisance claim is thus **GRANTED**.

13 **E. Request for Punitive Damages.**

14 The Lions Club moves for punitive damages, arguing that the City’s safety hazards
 15 concerns were a “contrived fraud” and that it was “relentlessly harassed” by the City (Dkt. No.
 16 60 at 18–19). Punitive damages may be appropriate where a defendant “has been guilty of
 17 oppression, fraud, or malice.” Cal. Civ. Code § 3294. A municipality, however, is immune from
 18 punitive damages under Section 1983. *City of Newport v. Fact Concerts, Inc.*, 453 U.S. 247, 271
 19 (1981). Moreover, regarding the Lions Club’s interference with easement claim, whether the
 20 City’s conduct amounts to fraud or oppression is disputed. The Lions Club’s request for punitive
 21 damages is thus **DENIED**.


22 **CONCLUSION**

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

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

4 **IT IS SO ORDERED.**

5
6 Dated: June 15, 2018.



WILLIAM ALSUP
UNITED STATES DISTRICT JUDGE

United States District Court
For the Northern District of California

7
8
9
10
11
12
13
14
15
16
17
18
19
20
21
22
23
24
25
26
27
28