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8 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
9 COUNTY OF ALAMEDA  
10

11 CITY OF ALBANY, a charter city,

12  
13 Plaintiff,

14 v.  
15

16 ALBANY LIONS CLUB, LIONS  
INTERNATIONAL, a California Non-Profit  
17 Corporation; DOES 1-10, and ALL  
18 PERSONS UNKNOWN CLAIMING AN  
INTEREST IN THE PROPERTY,  
19

20 Defendants.  
21

Case No. 22CV010822

Assigned for all purposes to:  
HON. SOMNATH RAJ CHATTERJEE  
Department: 517

**MEMORANDUM OF POINTS AND  
AUTHORITIES IN OPPOSITION TO  
PLAINTIFF'S MOTION FOR ORDER  
OF PREJUDGMENT POSSESSION**

Action Filed: May 4, 2022  
Trial Date: Not Set

DATE: July 28, 2022  
TIME: 1:30 p.m.  
DEPT.: 517

22 **I**  
23 **SUMMARY OF DEFENDANT'S OPPOSITION**

24 When a public agency files a condemnation action to construct a project [a road,  
25 fire station, school, etc.] it can take years before the agency gets title to the property. When  
26 there is an urgent need for the project, the public agency applies for an Order for Possession of  
27 the Property so it can proceed with construction. Here the City of Albany has no project to  
28 build. Its so-called "project" is a possible Establishment Clause violation and its alleged need

1 to get fee simple title to a few lots which are subject to Defendants easement to maintain the  
2 cross. The City does not need an Order of Possession to achieve its goals. This court will  
3 decide whether the City has the right to take Defendant's property. If the City does not have  
4 that right, it does not have the right to take possession of Defendant's property.

5           The City argues that it needs an Order for Possession for two reasons. First, that  
6 the presence of the cross interferes with its maintenance of the park on Albany Hill. This  
7 suggestion is false. The cross has never interfered with park maintenance. This lawsuit is the  
8 first time the City has made such a claim. Second, the City insinuates there is a risk of lawsuit  
9 against the City by third parties, because of their concerns about a potential violation of the  
10 Establishment Clause. The potential for such a lawsuit has existed for fifty years but no lawsuit  
11 has been filed. If it were filed now, an Order of Possession would do nothing to help the City's  
12 lawsuit. The City has already made its position clear by filing this eminent domain action to  
13 remove the cross.

14           Defendant will suffer substantial hardship if the Order for Possession is granted.  
15 If the Order is granted the City will remove the cross. Defendant will be unable to light the  
16 cross at Christmas and will be unable to hold its Easter service. If the Order of Possession is  
17 granted and this court subsequently sustains Defendant's objections to the City's right to take  
18 the easement and cross, the Lions Club will be required to obtain a permit from the City to  
19 restore the cross. Assuming the permit is granted, the Lions Club will need to hire a contractor  
20 to construct and install a new cross. All this will cost time and money.

21           Defendant has filed an Answer denying that the acquisition of the easement and  
22 removal of the cross is necessary for any project; that public interest and necessity require  
23 acquisition of the easement and cross and that the "project" is compatible with the greatest  
24 public good and least private injury. Defendant has also asserted Ten Affirmative Defenses  
25 which Defendant believes to be meritorious. Plaintiff's attempt to obtain possession of  
26 Defendant's property should be denied, until such time as this court affirms Plaintiff's right to  
27 take.

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**II**  
**ARGUMENT**

**A. PREJUDGMENT POSSESSION IS NOT APPROPRIATE**

When a public agency files a condemnation action to construct a project [a road, fire station, school, etc.] it can take years before the agency gets title to the property. When there is an urgent need for the project, the public agency applies for an Order for Possession of the property so it can proceed with construction. Here the City of Albany has no project to build. Its so-called "project" is a possible Establishment Clause violation and its alleged need to get fee simple title to a few lots which are subject to Defendants easement to maintain the cross. The City does not need an Order of Possession to achieve its goals. This court will decide whether the City has the right to take Defendant's property.

The Lions are entitled to a trial on whether the City has a "right to take." CCP §1260.110 *et seq.* If the cross is removed prejudgment and the City is unsuccessful at trial restoration of the cross will be time consuming and expensive, if such restoration is even possible. In the interim between the cross and removal and trial the Lions will have lost the ability to light the cross on Christmas, Easter and hold Easter Morning Services at the cross.

A Defendant may oppose a motion for prejudgment possession by filing written opposition supported by a declaration stating the facts of a hardship. (CCP §1255.410) A declaration from Lions Club President Kenneth Berner stating facts describing the hardships that will be suffered by the Lions if the Plaintiff's motion is granted has been filed in conjunction with this memorandum, as required by CCP §255.410(c).

To overcome the Lions opposition the City must establish all of the following:

- The Plaintiff is entitled to take the property by eminent domain;
- There is an overriding need for the plaintiff to possess the property prior to the issuance of final judgment;
- Plaintiff will suffer a substantial hardship if the application for possession is denied or limited; and,
- The hardship the plaintiff will suffer outweighs any hardship to the Defendant that would be caused by granting the order.

CCP §1255.410(d)(2)(A-D).

1           **1. The City's Resolution of Necessity is NOT Entitled to a Conclusive**  
2           **Presumption.**

3           The City of Albany misleads the Court when it argues that its Resolution of  
4 Necessity is entitled to conclusive presumption as to the findings required by §1240.030, it is  
5 not. CCP §1245.250(a) which in some cases allows a conclusive presumption begins, "Except  
6 as otherwise provided by statute. . ." However, §1245.250(b) provides exactly such an  
7 exception in this case. Subsection (b) states in pertinent part,

8                     "If the taking is by a local entity, [other than certain specified local  
9 entities, none of which would include the City] the resolution of  
10 necessity creates a rebuttable presumption that the matters referenced in  
11 the resolution are true. This presumption is a presumption affecting the  
burden of proof."

12 The City of Albany is a local entity and not entitled to a conclusive presumption.

13           **2. The City has Failed to Establish an Overriding Need for Prejudgment**  
14           **Possession and Failed to Establish the City will Suffer a Substantial**  
15           **Hardship if Possession is Denied.**

16           The City's interest in prejudgment possession is negligible. The City has  
17 presented no competent and substantial evidence of any hardship it will suffer if their motion is  
18 denied. The only evidence presented is the Declaration of Jeff Bond which claims a need for  
pretrial possession of the easement and cross because

19                     *"the City is presently managing the Property as Albany Hill Park and*  
20                     *has an ongoing and overriding need to continue managing the open*  
21                     *space, with all of its plant and animal life, for the public."*

22           This statement makes no sense. The cross has never interfered with the City's  
23 maintenance of the park. Bond admits that the City is presently managing the property as  
24 Albany Hill Park and offers no reason why that management cannot continue.

25           The second rational offered by the City for prejudgment, acquisition, of the  
26 Lions' easement and removal of the cross is Mr. Bond's assertion that:

27                     *"there will be an unnecessary and ongoing risk of litigation due to*  
28                     *the possibility that the cross raises concerns under the Establishment*  
*Clause."*

1           The City insinuates there is a risk of lawsuit against the City by third parties,  
2 because of their concerns about a potential violation of the Establishment Clause. The potential  
3 for such a lawsuit has existed for fifty years but no lawsuit has been filed. If it were filed now,  
4 an Order of Possession would do nothing to help the City's lawsuit. The City has already made  
5 its position clear by filing this eminent domain action to remove the cross.

6           Mr. Bond identifies himself as the Community Development Director, not an  
7 attorney and offers no foundation or basis for his ability to interpret the legal cases he  
8 references or the current state of constitutional law. Furthermore, Mr. Bond's assertion of an  
9 "overriding need to possess prior to judgment," and "overriding need" are nothing but  
10 unsubstantiated speculation. Bond's assertions of the "possibility" and "concerns" of  
11 "unnecessary" litigation are equally vague uncertain and incomprehensible. The offered  
12 justification falls far short of the type of evidence necessary for a reasonable fact finder to  
13 determine if the public interest requires the project or whether the acquisition of the easement  
14 and cross are necessary to the project. (CCP §1240.030(c))

15           Mr. Bond's unsubstantiated conclusion of an immediate need for possession  
16 strains credulity. The easement and cross have existed for 50 years and no legal action  
17 concerning establishment clause issues has been filed.

18           Contrary to Mr. Bond's declaration the legal landscape has changed since the  
19 2018 decision in *Lion Club v. City of Albany*. The 2019 United States Supreme Court decision  
20 in *American Legion v. American Humanist Association*, 588 U.S. \_\_\_; 139 S. Ct. 2067; 204  
21 L.Ed.2d 452 (2019) leaves serious doubt whether any legal action against the City for an  
22 establishment clause issue is possible. The Supreme Court found that with sufficient time,  
23 religiously expressive monuments, symbols, and practices, such as the cross, can become  
24 embedded features of a community's landscape and identity. The community may come to  
25 value them without necessarily embracing their religious roots. Consequently, the Court held  
26 that "the passage of time gives rise to a strong presumption of constitutionality." The 50-year  
27 history of the Albany Hill cross gives rise to such a presumption.

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1 Similarly, the concurring opinion of Justices Gorsuch and Thomas suggests that  
2 with the abandonment of the “Lemon Test” [*Lemon v. Kurtzman*, 403 U. S. 602] the offended  
3 third party has no standing to sue the City of Albany. See, *American Legion v American*  
4 *Humanist Association*, Justice Gorsuch concurring opinion.

5 **3. The Lions Club Will Suffer Significant and Permanent Hardship if the**  
6 **Cross is Removed.**

7 Defendant will suffer substantial hardship if the Order for Possession is granted.  
8 If the Order is granted the City will remove the cross. Defendant will be unable to light the  
9 cross at Christmas and will be unable to hold its Easter service. If the Order of Possession is  
10 granted and this court subsequently sustains Defendant's objections to the City's right to take  
11 the easement and cross, the Lions Club will be required to obtain a permit from the City to  
12 restore the cross. Assuming the permit is granted, the Lions Club will need to hire a contractor  
13 to construct and install a new cross. All this will cost time and money.

14 **B. THE CITY OF ALBANY HAS FAILED TO ESTABLISH THE FACTS**  
15 **NECESSARY FOR THE EXERCISE EMINENT DOMAIN**

16 The power of eminent domain may only be exercised to acquire property when:

- 17 (a) The public interest and necessity require the project;  
18 (b) The project is planned or located in the manner that will be most  
19 compatible with the greatest public good and the least private injury; and,  
20 (c) The property sought to be acquired is necessary for the project.

21 Code of Civil Procedure §1240.030. The City’s Resolution of Necessity fails to establish any  
22 of these requirements but merely cites them in conclusionary terms.

23 **1. Neither the Public Interest and Necessity nor the**  
24 **Property Sought to be Acquired are Necessary for any “Project”**

25 The exercise of eminent domain requires a finding that the property” [the Lions  
26 Club easement and removal of the cross] are necessary for a “project.” (CCP §1240.030) The  
27 City’s Resolution of Necessity fails to describe a “project.” Absent a “project” it is impossible  
28 for an unbiased fact finder to determine if the public interest and necessity require acquisition  
of the property. The City has also failed to explain why the Lions easement and removal

1 of the cross are necessary for its undescribed “project.”

2  
3 **C. THE RESOLUTION OF NECESSITY WAS ADOPTED AND ITS CONTENTS**  
4 **INFLUENCED AND AFFECTED BY A GROSS ABUSE OF DISCRETION BY**  
5 **THE GOVERNING BODY.**

6 The City of Albany has a history of favoring atheism and/or non-Christian  
7 religions over Christianity and its symbols.

8 In 2015, a group called the East Bay Atheists began criticizing the Albany Hill  
9 cross. Members of the Albany City Council immediately expressed personal and religious  
10 disapproval of the cross. In 2016, in an attempt to force removal of the cross, the City  
11 instructed PG&E to disconnect utility service to the cross shutting down the power for 106  
12 days and thereby preventing the lighting of the cross. Ultimately, the power was restored and a  
13 legal action was filed alleging First Amendment violations. In that action the City  
14 counterclaimed against the Lions asking the Court to order the cross removed. The City’s  
15 action was dismissed on summary judgment and the dismissal was sustained by the United  
16 States Court of Appeal for the 9<sup>th</sup> Circuit. Now, after four (4) years and no third-party lawsuits  
17 the City has brought this action in eminent domain.

18 A majority of Albany City Councilmembers voting on the resolution of  
19 necessity have repeatedly expressed anti-cross sympathies and have now brought those  
20 prejudices into this action. Councilmembers have made statements evidencing bias and  
21 prejudice such as: the city wished the cross removed from Albany Hill; the City Council would  
22 like to replace the cross with something nonsectarian; and expressed support for the efforts of  
23 the atheists’ group asking that the cross be removed. Councilmembers urged City employees to  
24 block the view of the cross by planting large, fast-growing trees on the east side of the structure  
25 to obstruct the public’s view of the cross.

26 The Lions are entitled to a fair hearing before an unbiased governing body that  
27 would fairly evaluate the public necessity for condemning Defendant’s easement and cross.  
28 The Lions Club did not receive a fair hearing. Under CCP 1245.255 a resolution of necessity  
passed due to a gross abuse of discretion is entitled to no presumption what-so-ever. Such a

1 resolution of necessity cannot support an eminent domain action.

2 **1. There is no public necessity to condemn the Lions Club property**

3 In 1971 Hubert Call, a devout Christian, installed a cross on Albany Hill. Call  
4 was a member of the Albany City council and a member of the Albany Lions Club. Call  
5 placed the cross on 1.1 acres which he subdivided into lots. Call imposed an easement for the  
6 maintenance of a cross on these lots. Call designated the Albany Lions Club as the owner of  
7 the easement and cross. In 1972 a real estate developer sought the City's approval of a  
8 residential subdivision on Albany Hill. The City required the developer to dedicate certain lots  
9 to the City, for a public park. The developer offered those lots, including the lots subject to the  
10 Albany Lions Club's easement. The City accepted all the lots, with full knowledge that its  
11 acceptance of the lots subject to the easement, created a potential violation of the  
12 Establishment Clause--the First Amendment to the Constitution of the United States prohibits  
13 government from establishing religion and guarantees the free exercise of religious belief by  
14 the people.

15 For 50 years the City took no action to correct this problem. In 2015 East Bay  
16 atheists began criticizing the cross.

17 In March 2022 the City notified the Lions Club that the City Council would  
18 meet to adopt a Resolution of Necessity, authorizing condemnation of the Lions Club cross and  
19 easement. The proposed Resolution states that "eminent domain is necessary for the  
20 elimination of a potential establishment clause concern and to provide for an unencumbered  
21 public park"

22 On March 23, 2022 the Lions Club responded to the City. The Club offered to  
23 buy the City's underlying fee interest in the lot containing the cross from the City. The cross  
24 would then be in private ownership—there would be no Establishment Clause problem. At the  
25 public hearing on the Resolution the Lions Club reiterated its offer. The City's attorney  
26 advised the Council that it could accept the Lions Club offer. Members of the public spoke in  
27 opposition to the cross. The Council adopted the Resolution of Necessity.

28 CCP Sections 1240.030 and 1245.230 require that the Lions Club property [the



1 cross and the easement] is necessary for the project. The City defines the project as the  
2 elimination of the Establishment Clause problem. Had the City accepted the Lions Club offer  
3 to buy the property upon which the cross is located, there would be no Establishment Clause  
4 problem and no need for this condemnation action. By this Answer, the Lions Club makes an  
5 irrevocable offer, as a Judicial Admission, that it will purchase the City's underlying fee  
6 interest in the lots subject to the Lions Club easement to maintain the cross.

7 **2. Promissory Estoppel**

8 The City created the establishment clause problem in 1972 when it accepted the  
9 lots subject to the Lions Club easement and the cross, for park purposes. The City could have  
10 rejected the dedication of these lots but it chose not to do so. In reliance on the City's actions,  
11 the Lions Club spent substantial sums for maintenance of the cross and its lighting system and  
12 paid PG&E bills. Lions Club members spent substantial time and energy n these efforts, and in  
13 organizing the Easter Sunday Service. Now after 50 years, the City attempts to renege on the  
14 deal it made with the Lions. Promissory Estoppel bars such conduct.

15 **3. The Complaint is barred by the Statute of Limitation**

16 For 50 years the City took no action against the cross. In response to the  
17 complaints of those who oppose the cross the City files this action. The longest limitation in  
18 the CCP is the 10-year limit provided by CCP section 337.15 for latent deficiencies in  
19 planning, or construction of improvements, to real property. CCP section 343 provides that  
20 where a cause of action is given no specific time limiting the filing of an action, the limitation  
21 for such a cause of action is four years. Plaintiff's eminent domain action is such an action--it  
22 has been barred for decades.

23 **4. Laches**

24 The Complaint and cause of action are barred, in whole by the defense of  
25 laches. The unreasonable and inexcusable delay by Plaintiff, the City of Albany, have caused  
26 substantial prejudice to the Lions Club provisions of the California and US Constitutions  
27 regarding the taking of private property.

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**5. The Complaint Fails to State a Cause of Action**

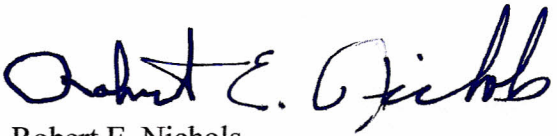
The Lions' Club is determined to preserve the cross. The City can solve the Establishment Clause Problem by selling its underlying fee interest in the lots subject to the easement to the Lions' Club. There is no case or statutory authority which allows a condemnation action, under these facts. This eminent domain action violates the provisions of the California and United States Constitutions, regarding the taking of private property.

**III**  
**CONCLUSION**

There is a substantial probability that the City has no right to condemn Defendant's easement and cross. The Defendant is entitled to a trial by the Court on the right issue and the affirmative defenses asserted in their answer. All issues in an eminent domain action are determined by the Court, not a jury. The City has none-the-less expressed its intent to immediately remove the cross from Albany Hill should its motion be granted. The City has not demonstrated any substantial hardship it will suffer if its application for immediate possession is denied. However, removing the cross prior to trial will result in a hardship on the Lions. In balancing the hardships, the Court should maintain the *status quo* and deny the City's motion for prejudgment possession.

Dated: June 9, 2022

Respectfully submitted,



Robert E. Nichols  
Attorney for the Albany Lions Club

ATTORNEY OR PARTY WITHOUT ATTORNEY: STATE BAR NO: 100028 NAME: ROBERT E. NICHOLS FIRM NAME: STREET ADDRESS: 713 Key Route Blvd. CITY: Albany, STATE: CA ZIP CODE: 94706 TELEPHONE NO.: 510710-7033 FAX NO. : E-MAIL ADDRESS: renichols01@comcast.net ATTORNEY FOR (name): Defendant Lions Club of Albany, California	FOR COURT USE ONLY     CASE NUMBER: 22CV010822  JUDICIAL OFFICER: Somnath Raj Chatterjee
SUPERIOR COURT OF CALIFORNIA, COUNTY OF Alameda STREET ADDRESS: 24405 Amador Street MAILING ADDRESS: CITY AND ZIP CODE: Hayward, California 94544 BRANCH NAME: Hayward Hall of Justice	
PLAINTIFF/PETITIONER: City of Albany DEFENDANT/RESPONDENT: Albany Lions Club	DEPARTMENT: 517

**PROOF OF ELECTRONIC SERVICE**

1. I am at least 18 years old.
  - a. My residence or business address is (specify):  
713 Key Route Blvd. Albany, CA 94706
  - b. My electronic service address is (specify):  
renichols01@comcast.net
2. I electronically served the following documents (exact titles):  
 Defendant's Verified Answer, Memorandum of Points and Authorities in Opposition to Plaintiff's Motion for Order of Prejudgment Possession, Declaration of Kenneth Berner, Declaration of Robert E. Nichols, Declaration of Richard Covert

The documents served are listed in an attachment. (Form POS-050(D)/EFS-050(D) may be used for this purpose.)

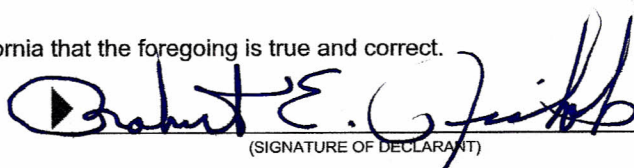
3. I electronically served the documents listed in 2 as follows:
  - a. Name of person served: Scott W. Ditfurth  
 On behalf of (name or names of parties represented, if person served is an attorney):  
 City of Albany
  - b. Electronic service address of person served :  
 scott.ditfurth@bbklaw.com
  - c. On (date): June 9, 2022

The documents listed in item 2 were served electronically on the persons and in the manner described in an attachment. (Form POS-050(P)/EFS-050(P) may be used for this purpose.)

Date: June 9, 2022

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

Robert E. Nichols  
 \_\_\_\_\_  
 (TYPE OR PRINT NAME OF DECLARANT)

  
 \_\_\_\_\_  
 (SIGNATURE OF DECLARANT)

1 ROBERT E. NICHOLS  
State Bar Number 100028  
2 RICHARD W. COVERT  
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5 eMail: [renichols01@comcast.net](mailto:renichols01@comcast.net)

6 Attorneys for Defendant  
7 Lions Club of Albany, California

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
9 COUNTY OF ALAMEDA

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11 CITY OF ALBANY, a charter city,

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

19  
20 Defendants.

Case No. 22CV010822

Assigned for all purposes to:  
HON. SOMNATH RAJ CHATTERJEE

Department: 517

**DECLARATION OF ROBERT E. NICHOLS  
STATING FACTS SUPPORTING  
HARDSHIP AND OPPOSING  
PREJUDGMENT POSSESSION**

Action Filed: May 4, 2022  
Trial Date: Not Set

DATE: July 28, 2022  
TIME: 1:30 p.m  
DEPT: 517

21  
22 I, Robert E. Nichols, declare:

23 1. I am the attorney for the Lions Club of Albany, California and my State  
24 Bar Number is listed above.

25 2. I have represented the Lions Club in matters regarding the cross on  
26 Albany Hill including the legal action, *Lions Club of Albany, California v. The City of Albany*,  
27 United States District Court for the Northern District of California Docket Number C17-05236  
28 WHA and defended the Lions Club in the Counterclaim, *City of Albany v. The Lions Club of*

1 *Albany California.*

2 3. In 2015, I was provided a flyer from the East Bay Atheists group which  
3 complained about the cross on Albany Hill and made certain safety assertions.

4 4. On February 1, 2016, the Albany City Council conducted a public  
5 hearing concerning the "Lions' cross." I have reviewed the minutes and tapes of the meeting.

6 5. At the February 1, 2016 city council meeting the members of the City  
7 Council including Councilmember Nason, unanimous expressed the desire that the Lions cross  
8 be removed from Albany Hill.

9 6. At the February 1, 2016, Preston Jordan appeared as a private citizen  
10 prior to his election to the City Council, now Mayor Jordan stated: "I just want to add my voice  
11 of support to all the good thinking that you've heard already for removing the cross. I know it's a  
12 very difficult thing to get accomplished, and I commend you for pursuing it in the most cost-  
13 efficient manner possible. But please pursue it."

14 7. On February 4, 2016, Councilmember Nason attended a regular meeting  
15 of the Albany Lions Club. I was also in attendance at this Lions Club meeting. At the meeting  
16 Councilmember Nason expressed the City's dissatisfaction with the cross because it is a  
17 religious symbol. Councilmember Nason stated that the City wished the cross removed from  
18 Albany Hill and the Lions Club's easement relinquished to the City.

19 8. On November 18, 2016, Councilmember Nason issued a public  
20 statement saying, "[T]he Albany City Council (including me) would like to replace it [the cross]  
21 with something nonsectarian. We envision a site that could still be used for Easter services and  
22 other Christian and non-religious purposes."

23 9. On November 19, 2016, Councilmember Nason issued a public statement  
24 saying: "I am about to be sued by the Albany Lions Club for advocating that the cross on  
25 Albany Hill be replaced by a nonsectarian substitute site that would be appropriate for use by  
26 non-Christians and non-religious people as well as Christians."

27 10. In a Declaration filed with the U.S. District Court Councilmember Nason  
28 stated: "During the 1970s, the Cross on Albany Hill when lit was clearly visible from the front

1 porch of my family home. My parents objected to it for a number of reasons, including the fact  
2 they felt its presence in the public park constituted a municipal endorsement of Christianity.”

3           11. Councilmember Nason also stated in her Declaration: “I recall that at the  
4 time of the decision of the California Supreme Court in *Thomson v. Call*, in May 1985, when I  
5 was a first-year law student, I read a comment in the newspaper by then-Mayor Henry Kruse  
6 that the Cross would remain in the public park because of its popularity in Albany. I recall  
7 disagreeing with his position, but also believing it would be only a matter of time until the cross  
8 would be removed, as members of older generations retired and more contemporary policies  
9 and practices were adopted in Albany.”

10           12. Councilmember Nason stated in her Declaration: “When, as a member of  
11 the City Council in 2014, I learned that atheist groups were asking that the cross be removed, I  
12 was supportive of their efforts and assumed that this would be an uncomplicated matter.”

13           13. In a November 11, 2017 “Mayor’s Statement” then Mayor Peggy  
14 McQuaid stated, “The Albany City Council was dismayed to learn that in a departure from  
15 historical practice, the cross on Albany Hill was lit by the Albany Lions Club on Friday,  
16 November 10. I am sure many Albany residents recognized Veterans Day in a manner which  
17 was appropriate and meaningful for them. I want to reiterate that the neither City Council nor  
18 the City of Albany endorses in any way the lighting of the cross for any occasion, religious or  
19 nationalistic, or supports its continued presence on public property.”

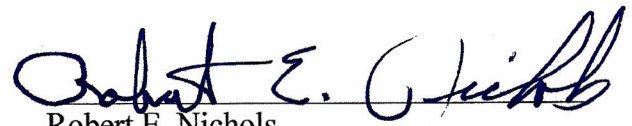
20           14. I also recall attending at least one city council meeting where Preston  
21 Jordon now Mayor Jordon urged the City to obstruct the public view of the cross by planting  
22 large, fast growing trees on the east side of the structure.

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15. It is my belief that Mayor Jordon and councilmembers Nason and McQuaid were biased and prejudiced against the cross on Albany Hill when considering and passing the City's Resolution of Necessity.

I declare under the penalty of perjury under the laws of the state of California that the foregoing is true and correct and that this Declaration was executed on June 9, 2022 at Albany, California.

  
Robert E. Nichols  
Attorney for  
Lions Club of Albany, California

1 ROBERT E. NICHOLS  
State Bar Number 100028  
2 RICHARD W. COVERT  
State Bar Number 34582  
3 713 Key Route Blvd.  
4 Albany, California 94706  
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6 Attorneys for Defendant  
7 Lions Club of Albany, California

8 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
9 COUNTY OF ALAMEDA

10  
11 CITY OF ALBANY, a charter city,

12  
13 Plaintiff,

14 v.

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

19  
20 Defendants.

Case No. 22CV010822

ASSIGNED FOR ALL PURPOSES TO:  
**HON. SOMNATH RAJ CHATTERJEE**

Department: 517

**DECLARATION OF KENNETH BERNER  
STATING FACTS SUPPORTING  
HARDSHIP AND OPPOSING  
PREJUDGMENT POSSESSION**

Action Filed: May 4, 2022

Trial Date: Not Set

DATE: July 28, 2022

TIME: 1:30 p.m

DEPT: 517

21  
22 I, Kenneth Berner declare:

23 1. I am the President of the Albany Lions Club.

24 2. I have been a member of the Albany Lions Club for more than 53 years.

25 3. I know of my personal knowledge that the Albany Lions Club

26 constructed the steel and plexiglas lighted cross on property owned by Hubert and Ruth Call in  
27 1971.

28 4. I am informed and believe that on August 24, 1973, Hubert and Ruth Call



1 granted the Albany Lions Club an easement for ingress and egress to maintain the cross  
2 standing on his property on Albany Hill.

3 5. The Albany Lions Club has lighted the Cross prior to every Christmas  
4 and prior to every Easter.

5 6. The Albany Lions Club has also hosted Easter Morning Services every  
6 Easter Morning.

7 7. The Albany Lions Club has also occasionally lighted the cross on special  
8 occasions such as the 75<sup>th</sup> anniversary of the Pearl Harbor attack and Veterans Day.

9 8. I am informed and believe that members of the local community have  
10 held other religious services at the site of the Cross, such as celebrations of life.

11 9. Since 1971, the Albany Lions Club has expended considerable time and  
12 money repairing and maintaining the cross. The Club has paid a monthly utility bill to maintain  
13 electrical service at the cross. The Club has regularly maintained the cross - replacing lights,  
14 light fixtures, plexiglass material, removing graffiti, repairing acts of vandalism and installing  
15 and maintaining security devices.

16 10. I have personally visited the park at the top of Albany Hill on many  
17 occasions and observed the park to have a dirt walking trail that is between ten (10) and thirty  
18 (30) yards wide depending on the location. A significant amount of grasses, brush and trees  
19 grow to the west of this path with a smaller amount of grass, brush and trees growing mostly on  
20 a steep eastern slope. The path is consistently used by walkers and hikers. The most significant  
21 natural areas of the park consist of trees, grasses and brush that are located on the west side of  
22 the park. Narrow hiking trails extend through this western area. The Cross rests on the east side  
23 of the lot very near to the edge of a steep slope. The Cross is located such that it does not  
24 interfere with plant, animal life or the public from using any path in the park.

25 11. I have reviewed the legal documents served on the Lions Club by the  
26 City and understand that the City is seeking an Order of Prejudgment Possession so that the City  
27 can remove the cross from Albany Hill. The removal of the cross will cause the Lions Club a  
28 significant hardship. Removal of the Cross will prevent the Lions Club from illuminating the

1 Cross at Christmas and Easter and will end Easter Morning Services at the cross.

2 12. The removal of the Cross from Albany Hill will deprive the Albany Lions  
3 Club of its First Amendment right to freedom of speech and free exercise of religion by  
4 preventing the lighting the cross and the hosting of Easter Morning Services. The Lions will  
5 suffer the loss of their long established and exercised First Amendment rights should the City's  
6 motion be granted and the Cross removed.

7 13. If the Order of Possession is granted and this court subsequently sustains  
8 Defendant's objections to the City's right to take the easement and cross, the Lions Club will be  
9 required to obtain a permit from the City to restore the cross. Assuming the permit is granted,  
10 the Lions Club will need to hire a contractor to construct and install a new cross. All this will  
11 cost time and money.

12 14. The cross on Albany Hill has become an embedded feature of the  
13 community's landscape and identity. Many in the community have come to value the cross and  
14 the Club regularly receives notes of thanks as well as community support for its continued  
15 maintenance.

16 15. The Albany Lions Club also receives community support for its projects  
17 as well as financial support from local churches and individuals who appreciate and support the  
18 Cross and Cross related activities. Removal of the Cross by the City will damage this support.

19 I declare under the penalty of perjury under the laws of the state of California  
20 that the foregoing is true and correct and that this Declaration was executed on  
21 June 9, 2022 at Anaheim Hills, California.

22  
23  
24 

25 KENNETH BERNER  
26 President  
27 Lions Club of Albany, California  
28

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8 SUPERIOR COURT OF THE STATE OF CALIFORNIA  
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11 CITY OF ALBANY, a charter city,

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

19  
20 Defendants.

Case No. 22CV010822

Assigned for all purposes to:  
HON. SOMNATH RAJ CHATTERJEE

Department: 517

**DECLARATION OF RICHARD COVERT  
OPPOSING PREJUDGMENT  
POSSESSION**

Action Filed: May 4, 2022  
Trial Date: Not Set

DATE: July 28, 2022  
TIME: 1:30 p.m  
DEPT: 517

21  
22 I, Richard W. Covert, declare:

23 1. I am an attorney licensed to practice law in California.

24 2. My first employment was as a trial attorney for the State Division of  
25 Highways [now CalTRANS]. I was hired in 1964. At that time our office only did eminent  
26 domain/condemnation work.

27 3. Later in my career I represented the Contra Costa Water District, the  
28 Oakley Water District, the California Department of Water Resources, and the City of Santa

1 Barbara in eminent domain cases.

2 4. I've tried over fifty eminent domain cases and filled and settled  
3 hundreds.

4 5. In my experience it can take years between the time a public agency files  
5 an eminent domain action and the time it gets title to the property via a Final Order of  
6 Condemnation. When there is an urgent need to construct the public project, the agency applies  
7 for an Order of Possession so it can construct the project before it gets title to the property.

8 6. In my experience there were many times when an eminent domain  
9 action was filed years before anticipated construction. In these cases, the public agency never  
10 applied for an Order for Possession.

11 7. This case is the first time I have witnessed a public agency applying for  
12 an Order for Possession, where it has no physical project to construct.

13 I declare under the penalty of perjury under the laws of the state of California  
14 that the foregoing is true and correct and that this Declaration was executed on  
15 June 9, 2022 at San Francisco, California.

16  
17  
18 */s/ Richard W. Covert \**  
19 Richard W. Covert  
20 Attorney for  
21 Lions Club of Albany, California  
22  
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25  
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27 \_\_\_\_\_  
28 \* The declarant, before filing, has physically signed a printed form of the document. By electronically filing the document, the electronic filer certifies that the original, signed document is available for inspection and copying at the request of the court or any other party. California Rule of Court 2.257(b)(2)