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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.

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

21
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 9th 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.

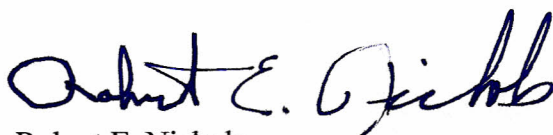
III

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