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ALAMEDA COUNTY
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CLERK OF THE SUPERIOR COURT
By
Deputy

SUPERIOR COURT OF THE STATE OF CALIFORNIA

COUNTY OF ALAMEDA

CITY OF ALBANY, a charter city,
Plaintiff,

Plaintiff,

v.

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

Defendants.

No. 22CV010822

ORDER GRANTING PLAINTIFF'S MOTION FOR PREJUDGMENT POSSESSION

I. INTRODUCTION

Plaintiff City of Albany ("City of Albany" or "Albany") seeks to acquire through eminent domain an easement for ingress and egress for maintenance of an existing cross over a portion of Albany Hill Park. The City of Albany now moves for an Order for Prejudgment Possession under California Code of Civil Procedure § 1255.410. The Lions Club of Albany, ("Lions Club" or "Defendant") opposes the motion. The Court heard the motion on August 18, 2022. Scott Ditfurth appeared for the City of Albany, and Robert Eugene Nichols and Richard Covert appeared for the Lions Club. The Court took the matter under submission at the hearing and now rules.

II. FACTUAL BACKGROUND

The City of Albany owns in fee simple a portion of Albany Hill Park described as Assessor Parcel Nos. 066-2754-014-05 and 066-2754-040-03 ("City Property"). On the City Property sits a 20-foot steel cross. Defendant claims an easement across the City Property "for ingress and egress to maintain the existing cross." (See Complaint, Exhibit A.) When the City

of Albany acquired the City Property in 1973, the cross and the easement came with it. The City of Albany's initial acquisition faced early litigation that ultimately resulted in the California Supreme Court's decision in *Thomson v. Call*, 38 Cal. 3d 633 (1985), which upheld Albany's acquisition and various rulings by the trial court.

The summit of Albany Hill commands a panoramic view of Albany and the San Francisco Bay. *Thomson*, 38 Cal. 3d at 638. Albany Hill is an iconic natural feature for the community and is displayed prominently on Albany's city seal. (Declaration of Jeff Bond ("Bond Decl.") ¶ 2). The City of Albany has acquired most of the ridgeline and upper slopes in and around Albany Hill Park, which are protected as permanent open spaces and are frequently visited by the public. (*Id.*) Albany Hill hosts important natural resources, including significant vegetation and plant life that are described in detail in the Declaration of Jeff Bond. The City of Albany has maintained Albany Hill Park for the public's benefit. Albany'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 Albany Hill's perimeter. (*Id.*)

The easement and the cross have been the source of some conflict in the community, including disputes between the City of Albany, the Lions Club of Albany, and various third parties. In September 2017, the Lions Club sued the City of Albany and others in an action known as *The Lions Club of Albany v. City of Albany,* U.S. District Court for the Northern District of California, Case No. C 17-05236 WHA ("Federal Action"). There, the Lions Club asserted various claims that are not directly relevant here, but the City of Albany, among other claims, challenged the validity and enforceability of the Lions Club's easement under the United States and California Constitutions. On cross-motions for summary judgment, Judge Alsup held that "the public park with the cross violates the Establishment Clause" and that the "land cannot continue as a public park with the cross on it." *Lions Club of Albany v. City of Albany*, 323 F. Supp. 3d 1104, 1115-16 (N.D. Cal. 2018). The court further held that the City of Albany "must

remedy its First Amendment violation." *Id.* at 1117. The court explained, "To remedy the Establishment Clause violation, the City [of Albany] has at least two options—either sell a parcel containing the cross to a private party or condemn the easement through its power of eminent domain. Possibly, a third option would be to adopt a zoning ordinance banning all religious symbols from its public places." *Id.* In ruling on a quiet title claim, the court reiterated, "This order holds that the Lions Club's easement is valid (but that the City [of Albany] is obligated to condemn the easement or otherwise solve its Establishment Clause problem)." *Id.* at 1118. The Ninth Circuit Court of Appeals affirmed the Order in the Federal Action. *See Lions Club of Albany, California v. City of Albany*, 788 F. App'x 428 (9th Cir. 2019).

The City of Albany now seeks to unencumber the City Property by acquiring the easement under California's Eminent Domain Law. Albany asserts that its "acquisition—including removal of the cross—is for the public purposes and necessity of enabling the public to more fully use and enjoy the park as an open space without the encumbrance, as well as to avoid any potential Establishment Clause issue arising from the placement of the cross and the Lions Club's maintenance of the cross." (Bond Decl., ¶ 4.) Towards that end, the City of Albany noticed and held a public hearing on April 4, 2022, to consider adopting a resolution of necessity to acquire the easement. At the hearing, Albany's City Council heard from the Lions Club and its representatives as well from other citizens, including those who opposed the Lions Club's unwillingness to relinquish its interest in the easement. (Bond Decl., ¶¶ 7 and 8.)

Albany's City Council unanimously voted to acquire the easement and adopted Resolution No. 2022-32 ("Resolution of Necessity") pursuant to California Code of Civil Procedure § 1240.040. (Bond Decl., ¶ 8; see Complaint Ex. B.) The Resolution of Necessity provides 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 . . . by eminent domain, is necessary for elimination of a potential establishment clause violation and to provide for unencumbered public park in the City of Albany." The Resolution of Necessity further provides, "The public use for which the real property is required to be acquired by the City of Albany [is] for the elimination

of a potential establishment clause violation and to provide for an unencumbered public park in the City of Albany." (Complaint Ex., B, Section 4.) Albany's City Council found, among other things, that the public interest and necessity require the proposed project; the proposed project will be most compatible with the greatest public good and least private injury; the easement is necessary for the project; the offers required by section 7267.2 of the California Government Code were made; and the public use for the property is a more necessary use than the use for which the property is appropriated. (*Id.,* Section 6.)

The City of Albany's appraiser estimates that the fair market value for the easement is $500,000. (Delahooke Decl., Para. 3 and Ex. B.) On April 28, 2022, the City of Albany deposited $500,000 in the State of California Condemnation Deposits Fund as probable just compensation for the easement. (*See* Notice of Deposit of Probable Just Compensation.)

The City of Albany filed this action for eminent domain on May 4, 2022. A few days later on May 6, Albany filed the motion for prejudgment possession now before the Court.

On June 9, 2022, Defendant filed an Answer and its opposition to the motion for prejudgment possession with supporting declarations.

III. DISCUSSION

As part of California's Eminent Domain Law, the Legislature enacted a prejudgment possession procedure known as a "quick-take" eminent domain action. Under these "quick-take" procedures, the government may "take early possession of the property before litigation is concluded 'upon deposit in court and prompt release to the owner of money determined by the court to be the probable amount of just compensation.' [citation] . . . Because compensation is immediately available to the property owner in a quick-take action, the date of valuation of the property is statutorily required to be no later than the date the condemner deposits 'probable compensation' for the owner. [citation] The deposit earns statutory interest until it is withdrawn. [citation] The property owner can immediately withdraw the funds, but by doing so waives all rights to dispute the taking other than the right to challenge the amount of just

compensation." *Mt. San Jacinto Cmty. Coll. Dist. v. Superior Ct.*, 40 Cal. 4th 648, 653 (2007); *see also Redevelopment Agency v. Gilmore*, 38 Cal. 3d 790, 800 (1985).

As part of the "quick-take" procedures, § 1255.410(a) provides that "at any time after filing the complaint and prior to entry of judgment, the plaintiff may move the court for an order for possession . . . demonstrating that the plaintiff is entitled to take the property by eminent domain and has deposited . . . an amount that satisfies the requirements of that article" as well as other procedural requirements. Section 1255.410(d)(2) provides that, if a motion for prejudgment possession is opposed, as is the case here, the court may make an order for possession of the property if the court finds each of the following:

> (A) The plaintiff is entitled to take the property by eminent domain.
>
> (B) The plaintiff has deposited pursuant to Article 1 (commencing with Section 1255.010) an amount that satisfies the requirements of that article.
>
> (C) There is an overriding need for the plaintiff to possess the property prior to the issuance of final judgment in the case, and the plaintiff will suffer a substantial hardship if the application for possession is denied or limited.
>
> (D) The hardship that the plaintiff will suffer if possession is denied or limited outweighs any hardship on the defendant or occupant that would be caused by the granting of the order of possession.

Code of Civ. Proc. § 1255.410(d)(2). The Court finds that the City of Albany has satisfied the elements of § 1255.410(d)(2), as explained below.

A. Albany's Entitlement to Eminent Domain

The City of Albany is entitled to take the easement through its power of eminent domain. The City of Albany has the authority to exercise the power of eminent domain under Government Code § 37350.5 ("[a] city may acquire by eminent domain any property necessary to carry out any of its powers or functions") and under Code of Civil Procedure §§ 1240.110 and 1240.120. *See also Santa Cruz Cnty. Redevelopment Agency v. Izant*, 37 Cal. App. 4th 141, 148-150 (1995) (summarizing substantive and procedural eminent domain principles under California law); *Escondido Union Sch. Dist. v. Casa Suenos De Oro, Inc.*, 129 Cal. App. 4th 944, 960-61

(2005) (similar). Section 1240.030 provides, "[t]he power of eminent domain may be exercised to acquire property for a proposed project only if all of the following are established: (a) The public interest and necessity require the project. (b) The project is planned or located in the manner that will be most compatible with the greatest public good and the least private injury. (c) The property sought to be acquired is necessary for the project." Albany's Resolution of Necessity, adopted under Article 2 of California's Eminent Domain Law, CCP § 1240.040 and 1245.210-1245.270, establishes those requirements. Under § 245.250, the City of Albany is entitled to a conclusive presumption that the § 1240.030 requirements have been established through the Resolution of Necessity. Section 1245.250(a) and (b) provide:

> (a) Except as otherwise provided by statute, a resolution of necessity adopted by the governing body of the public entity pursuant to this article conclusively establishes the matters referred to in Section 1240.030.
>
> (b) If the taking is by a local public entity, other than a sanitary district exercising the powers of a county water district pursuant to Section 6512.7 of the Health and Safety Code, and the property is electric, gas, or water public utility property, the resolution of necessity creates a rebuttable presumption that the matters referred to in Section 1240.030 are true. This presumption is a presumption affecting the burden of proof.

Civ. Proc. Code § 1245.250 (emphasis added).

Defendant's argument that the Resolution of Necessity is not entitled to a conclusive presumption but only a rebuttable presumption is incorrect. A rebuttable presumption under section 1245.250(b) exists in instances where the property subject to a taking is "electric, gas, or water public utility property," which is not the case here. (Defendant's Opposition brief at page 4:6-11 appears to misstate § 1245.250(b), omitting the limiting language).

Defendant further challenges the validity of the Resolution of Necessity and assert affirmative defenses to the taking, such as laches. At oral argument, the Lions Club further argued that the Resolution of Necessity was undermined because the Lions Club offered to buy the City Property, therefore obviating any need of Albany to spend public funds to pay just compensation. The City of Albany's determination of necessity and decision to adopt the Resolution of Necessity were quasi-legislative acts subject to limited judicial review under Code

of Civil Procedure § 1245.255 under the standard of review applicable to pretrial mandamus under Code of Civil Procedure § 1085. *See Anaheim Redevelopment Agency v. Dusek*, 193 Cal. App. 3d 249, 254 (1987) (holding that a determination of necessity is exclusively a legislative function and that the Legislature provided for a very limited collateral attack on a resolution of necessity.) Whether the Resolution of Necessity should be set aside under § 1245.255 or whether other defenses to the proposed taking defeat this action are matters for trial. The City of Albany is correct that Defendant conflates the prerequisites for an order of prejudgment possession under § 1255.410 with the merits of an eminent domain right to take trial under Code of Civil Procedure § 1260.120. *See* Legislative Committee Comment following § 1255.410 ("It should be noted that the determination of the plaintiff's right to take the property by eminent domain is preliminary only. The granting of an order for possession does not prejudice the defendant's right to demur to the complaint or to contest the taking. Conversely, the denial of an order for possession does not require a dismissal of the proceeding and does not prejudice the plaintiff's right to fully litigate the issue if raised by the defendant.")

At oral argument, the Lions Club cited *Redevelopment Agency v. Norm's Slauson*, 173 Cal. App. 3d 1121 (1985), to support its position that the Resolution of Necessity only warrants a rebuttable presumption—not a conclusive presumption—under § 1245.250. But, *Redevelopment Agency* did not address under what conditions resolutions of necessity are entitled to a conclusive presumption as opposed to a rebuttable presumption under § 1245.250 and is therefore inapposite. Rather, the court assumed that the resolution of necessity at issue there was entitled to a conclusive presumption subject to judicial review under § 1245.255. *Id.* at 1126 (stating that "(1) a resolution of necessity once adopted is conclusive on the issue of the existence of the three requirements (Code Civ. Proc., § 1245.250, subd. (a)), (2) a property owner is entitled to a judicial review of the validity of the resolution, and (3) the resolution of necessity is not conclusive if shown to have been influenced or affected by an abuse of discretion. (Code Civ. Proc., § 1245.255, subd. (b).)") In that case, the trial court found that the resolution of necessity

at issue was affected by a gross abuse of discretion under § 1245.255,[1] so the resolution of necessity was set aside. The Court of Appeal held that, in the event that a resolution of necessity is set aside, the government agency bears the burden by a preponderance of evidence to satisfy the elements of § 1240.030. The court ultimately affirmed that trial court's finding that the government agency there failed to meet its burden after an evidentiary hearing on the merits. *Id.* at 1128-1129. Here, as noted, the Lions Club may challenge the Resolution of Necessity under § 1245.255 at trial.

B. Albany's Deposited Funds

Albany has deposited $500,000 in compliance with the "quick take" procedures. This amount satisfies the requirements of Article 1, Code of Civil Procedure § 1255.010, *et seq.* Any disputes regarding just compensation may be heard at the eminent domain trial.

C. Albany's Overriding Need and Hardships

The City of Albany has established two overriding needs to possess the property prior to the issuance of final judgment and has established that it will suffer substantial hardship if the application is denied. First, as the City of Albany explained, it has an ongoing and overriding need to manage the park's open space for the benefit of public use. Management of the City of Albany's grounds, including its plant and animal life, without interference, and for the benefit of the public, creates a significant and overriding need for immediate possession prior to final judgment.

Second, the City of Albany must unencumber the public park to comply with the Order in the Federal Action and to avoid further claims of a violation of the Establishment Clause. Defendant argues that the easement and cross have existed for 50 years without commencement

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[1] In that case, before the agency conducted a hearing to determine "necessity" for the taking, the agency had already sold the property to be taken to a third party developer and issued bonds to raise funds to compensate the property owner for the proposed taking. *Redevelopment Agency*, 173 Cal. App. 3rd at 1127. Thus, the Court held that the agency hearing that led to the adoption of the resolution of necessity was a "sham" where the agency "rubber stamped" a predetermined result. *Id.*

of legal action. But, this issue has already undergone significant litigation in the Federal Action. Judge Alsup has held that the City of Albany is in a state of Constitutional violation as matters now stand and has ordered Albany to cure the problem. One cure is to condemn the easement by exercising eminent domain powers, which is what Albany is attempting to do in this action. The Ninth Circuit has affirmed the Order, making it a final federal decision on the merits. In short, curing a Constitutional violation as ordered to do in the Federal Action and avoiding further litigation on that issue constitute overriding needs; conversely, the inability to cure a Constitutional violation constitutes a substantial hardship.

In its opposition, Defendant asserts legal developments in Establishment Clause jurisprudence after the Order in the Federal Action issued. But, the Order in the Federal Action stands until it is set aside. As a final decision on the merits, the Federal Action Order has res judicata or collateral estoppel effect in this Court on the issues and claims resolved in that Order. *See Martin v. Martin*, 2 Cal. 3d 752, 764 (1970) (holding that an issue decided in prior federal court proceeding that was identical to the issue presented to the superior court was res judicata). The federal rule is that a judgment or order, once rendered, is final for purposes of res judicata until reversed on appeal or modified or set aside in the court of rendition. *Id.* at 760. The Federal Action Order cannot be collaterally attacked in this action, and the issues resolved in that Order cannot be relitigated here. To set aside that Order, Defendant would need to go back to federal court in the Federal Action (or another appropriate forum, if there is one) and litigate the matter. Thus, the City of Albany is on the horns of a dilemma: (1) Under the Federal Action Order, the City of Albany is in a state of violation and has been ordered to cure that violation; or (2) if there is to be further litigation to set aside that Order, Albany would face exactly the type of litigation that it seeks to avoid. Either way, there would be a substantial hardship unless Albany complies with the Order in the Federal Action. Solving this dilemma by exercising Albany's eminent domain powers constitutes an overriding need, and the inability to solve that dilemma constitutes a substantial hardship.

D. Balance of Hardships

Defendant's claim that prejudgment possession would result in a hardship for Defendant because it "will be unable to light the cross at Christmas and will be unable to hold its Easter Service" and, if Defendant prevails at trial, it may want to restore the cross, which would require time and money. (Opposition at 6:7-13.) The Lions Club argues that this hardship is amplified because it claims First Amendment rights to Free Speech and Free Exercise in lighting the cross and holding service on the City Property.

As the City of Albany notes, Defendant's claimed hardships regarding lighting and service, whether they include First Amendment rights or otherwise, do not relate to the timing of possession, but rather the acquisition as a whole. Put another way, the claimed hardships would be the same whether possession is granted now or later. In evaluating prejudgment possession, the Court is to balance hardships based on granting prejudgment possession, not hardships related to the overall acquisition. *See Israni v. Superior Ct.*, 88 Cal. App. 4th 621, 624 (2001) ("hardship must have a specific relationship to the particular interval between the application for the order [of immediate possession] and its proposed effective date," interpreting "hardship" under former CCP § 1255.420). The hardships the Lions Club asserts do not relate to the temporal interval contemplated by the statute.

As to the First Amendment issues, Judge Alsup in the Federal Action has already held that the public park with the cross on it violates the Establishment Clause and that Albany must cure that Establishment Clause violation. Defendant's claimed Free Speech and Free Exercise rights to light and to hold service near the cross on City Property, therefore, conflict with the Establishment Clause. In these situations, Free Speech and Free Exercise rights must ordinarily be exercised in a manner that is consistent with and that does not violate the Establishment Clause. *See DiLoreto v. Bd. of Educ.*, 74 Cal. App. 4th 267, 280 (1999) (holding that "free speech issues are subordinate to the establishment clause" and that the state has a compelling interest in acting in accordance with Establishment Clause strictures when balanced against claimed Free Exercise rights). Thus, the Lions Club's claimed First Amendment interests in Free

Speech and Free Exercise and the related hardships connected to the inhibition of those rights here are diminished because the proposed activities conflict with an Establishment Clause violation that Albany must cure. Of course, despite the removal of the cross, the grounds will remain open to the public, so Defendant may continue to enjoy Albany Hill Park as other members of the public are able to do.

As to the potential time and costs of restoring the cross in the event Defendant prevails at trial, the Court received no evidence as to those potential costs or time estimates. That claimed hardship is also speculative and contingent on the results of trial. Any such potential prejudice can be mitigated by requiring the City of Albany to preserve the cross in a safe location pending this litigation. At oral argument, Albany's counsel agreed that the Court has authority to order the City of Albany to preserve the cross pending trial.

The Court has weighed the evidence submitted by the parties and finds that the hardship the City of Albany will suffer if possession is denied or limited—failing to come into compliance with the Federal Action Order, risking further litigation on that issue, and being unable to manage and maintain its property in a manner that will be most compatible with the greatest public good as determined by Albany's elected officials through the legislative process—outweighs Defendant's claimed hardships.

IV. EVIDENTIARY OBJECTIONS

The Court declines to rule on the City of Albany's Objections to portions of the Declarations of Robert Nichols and Kenneth Berner. In granting or denying a motion, the Court need rule only on those objections to evidence that it deems material to its disposition of the motion. *See Rodriguez v. Department of Transportation*, 21 Cal.App.5th 947, 953, 961 (2018).

V. ORDERS

The Court Orders as follows:

1. The City of Albany's Motion for Prejudgment Possession is GRANTED.

2. The Court hereby issues an Order for possession pursuant to Code of Civil Procedure § 1255.410, *et seq.*

3. The City of Albany may take possession of the easement described in the Complaint at ¶¶ 2-3 and in Exhibit A thereto and remove a cross located on the City of Albany's land described as Assessor Parcel Nos. 066-2754-014-05 and 066-2754-040-03.

4. If the City of Albany removes the cross from the City Property, Albany shall preserve the cross in a safe location pending trial and final judgment in this action.

5. The City of Albany shall serve a copy of this Order in compliance with Code of Civil Procedure § 1255.450 at least 30 days before taking possession. (To be clear, the time between service under § 1255.450(b) and possession is extended from 10 days to 30 days.)[2]

6. The City of Albany is authorized to take possession of the property after October 4, 2022, and after complying with Paragraph 5 above. *See* Code of Civil Procedure § 1255.460(c).

IT IS HEREBY ORDERED.

August 30, 2022

By: _____
Somnath Raj Chatterjee
Judge of the California Superior Court

[2] At oral argument, the Lions Club requested this extended time, and Albany did not contest the issue, thereby waiving any objection to the extension.