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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
REASSESSMENT OF ORDER OF
PREJUDGMENT POSSESSION**

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

DATE: January 12, 2023
TIME: 2:30 p.m.
DEPT.: 517

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1 **INTRODUCTION**

2 The City of Albany is asking this Court to reassess and issue a new ruling on the
3 City’s request for an Order for Prejudgment Possession in light of the November 17, 2022,
4 Order and Preliminary Injunction staying the City of Albany from removing the Cross on
5 Albany Hill issued by U.S. District Court Judge William H. Alsup. In issuing the Preliminary
6 Injunction, the Court noted, that the Superior Court has two separate issues before it. **First**, the
7 underlying eminent domain action, which is in its early stages, will not go to trial for many
8 months and whether eminent domain will be granted. **Second**, whether the Superior Court
9 should allow the City to remove the cross pending trial.

- 10 • **The Federal Court Did Not Order the City to File an Eminent Domain Action or to**
11 **Take Any Other Action.**

12 Judge Alsup made clear that portions of his June 2018 Order were merely advisory
13 *dicta* – namely his suggestion that the City could solve its Establishment Clause problem by either
14 selling a parcel containing the cross to a private party or by filing a condemnation action.

15 (Exhibit 1 - *Order RE Preliminary Injunction* page 4)

- 16 • **If This Court Reconfirms Its August 30, 2022 Order Granting Prejudgment**
17 **Possession, The Lions Club Will Never Reconstruct The Cross, Even If The Lions**
18 **Club Prevails on the Right to Take Issue.**

19 Judge Alsup also noted that the City cannot say with any certainty whether it
20 can put the cross back up after its provisional removal should the City lose the eminent domain
21 trial. The City admitted that any decision to reconstruct the cross would need to go through
22 permitting or zoning approval, a public process, which it could not dictate or predict.
23 Consequently, removal of the cross was not just a decision merely pending litigation, but rather
24 practically, once the cross is down, it is down for good. This raises a serious exercise of
25 religion problem. (Order RE Preliminary Injunction Page 5:8-17.) In light of Judge Alsup’s
26 Clarifying Order, This Court Must Re-weigh the City’s “Need” and “Hardship” Against the
27 “Hardships” the Lions Club Will Suffer and Determine If the City’s Hardship Outweighs the
28 Lions Hardship

//

1 • **The Violation of First Amendment Rights is Always a Matter That Federal Courts**
2 **are Particularly Well Suited to Hear**

3 On August 30, 2022, over the Lions Club’s objections, this Court issued its
4 order granting the City an Order of Prejudgment Possession. On September 21, 2022, the
5 Lions Club filed a complaint in the U.S. District Court naming the City of Albany as
6 Defendant, alleging the unnecessary injury and deprivation of the Lions Club’s rights of Free
7 Exercise of Religion and Freedom of Speech guaranteed under the First Amendment of the
8 United States Constitution. While the City attempts to portray the Lions action as “forum
9 shopping;” the violation of First Amendment rights is properly redressed in Federal Court
10 pursuant to 42 USC § 1983. (Exhibit 2 U.S. District Court Lions Club Brief) The guarantee of
11 free expression is always an area of federal concern. Constitutional challenges based on the
12 first amendment right of free expression are the kind of cases that the federal courts are
13 particularly well suited to hear. *Porter v. Jones*, 319 F.3d 483, 492 (9th Cir. 2003) [Citing
14 U. S. *Ripplinger v. Collins*, 868 F.2d 1043, 1048 (9th Cir. 1989) and *J-R Distributions, Inc.*
15 *v. Eikenberry*, 725 F.2d 482, 487 (9th Cir. 1984), overruled on other grounds by *Brockett v.*
16 *Spokane Arcades, Inc.*, 472.]

17 • **The Anti-Injunction Act (28 USC § 2283) is NOT Applicable in This Matter**

18 The Anti-Injunction Act is inapplicable to the City’s eminent domain action.
19 The Anti-Injunction Act provides,

20 “A court of the United States may not grant an injunction to stay
21 proceedings in a State court except as expressly authorized by Act of
22 Congress, or where necessary in aid of its jurisdiction, or to protect or
effectuate its judgments.” (28 USC § 2283)

23 FIRST, Federal District Judge William Alsup did not grant an injunction staying
24 proceedings in the Alameda County condemnation action. Had he done so this Court could not
25 hear or consider the City of Albany's current Motion. Judge Alsup merely granted a
26 Preliminary Injunction prohibiting the City of Albany from removing the Cross until such time
27 as this Court reassesses its original Prejudgment Possession Order, in light of Judge Alsup’s
28 clarification of his rulings of June 15, 2018 in the first Federal Action. *Lions Club of Albany*,

1 *California v. City of Albany*, Case Number 3:17-05236-WHA, and other guidance as set out in
2 the Order of November 17, 2022.

3 SECOND, actions brought pursuant to 42 USC § 1983 are an expressly
4 authorized exception to that law. *Mitchum v. Foster*, 407 U.S. 225, 243; 92 S. Ct. 2151 (1972);
5 see also *Pulliam v. Allen*, 466 U.S. 522, 541, 104 S. Ct. 1970, 80 L.Ed.2d 565 (1984). The
6 *Lions Club of Albany, California v. City of Albany*, 3:22-05377-WHA is a case brought entirely
7 pursuant to 42 USC 1983. A copy of the Federal Complaint has been submitted as Exhibit A,
8 attached to the Declaration of Scott Ditfurth.)

9 Therefore, this Memorandum of Points and Authorities will only address the
10 issues of: the City’s claimed “overriding need” for prejudgment possession; whether the City
11 will suffer a “substantial “hardship” if possession is denied and whether the hardship the City
12 will suffer “outweighs” the hardships that will be suffered by the Lions if the Cross is removed.

13 **ARGUMENT**

14 **I. PRE-JUDGMENT POSSESSION IS NOT PROPER IN THIS CASE**

15 **A. The City Has Not Established an Overriding Need to Possess the**
16 **Lions Easement and Remove the Cross Prior to Final Judgment**
17 **and Has Failed to State Facts Establishing It Will Suffer A**
18 **Substantial Hardship if Prejudgment Possession is Denied**

19 There are three separate issues before the Court in this hearing: (1) whether
20 there is an overriding need for the City to possess Defendant’s property prior to the issuance of
21 a final judgment; (2) whether the City will suffer a substantial hardship if possession is denied;
22 (3) whether the hardship the City will suffer if possession is denied outweighs the hardship the
23 Lions will suffer if possession is granted. CCP § 1255.410(d)(2). The immediate question
24 before the Court now is whether the Order of prejudgment possession should be reissued
25 allowing the City to remove the cross now; or whether that Order should be rescinded or stayed
26 until the City’s right to condemn has become final, in light of Judge Alsup's clarifications and
27 guidance.

28 //

1 The City has asserted two grounds to establish the “overriding Need” and
2 “Substantial Hardship” which are essential to obtain prejudgment possession. (1) alleged need
3 to manage the Albany Hill Park including plant, bird and animal life without interference from
4 the cross, and (2) the assertion that Judge Alsup’s June 2018 order required the City to file an
5 eminent domain action to condemn the Lions Club’s property rights and the cross. Neither of
6 these two claims are supported by the evidence now before this Court.

7 **1. The Alleged Need to Manage Plants, Birds and Animal Life Without**
8 **Interference of the Cross**

9 The only evidence offered by the City of Albany supporting its claimed need to
10 manage plant, bird and animal wildlife without interference from the Cross was the declaration
11 Jeff Bond, the City’s Community Development Director. Mr. Bond gives a detailed inventory
12 of the plant life, animal life and bird life at Albany Hill Park. However, Bond is silent on the
13 real issues. Mr. Bond never says that the Lions Club’s Cross is detrimental or harmful to plant
14 life in the park. Mr. Bond never says the cross interferes with the animals or birds who live
15 within or traverse the park. Mr. Bond provides no evidence or explanation how the plants,
16 animals, and birds are threatened by the Cross as opposed to the hundreds of trees, large rocks,
17 and logs in the park. Bond also fails to explain how the Cross affects birds, animals, and plants
18 differently than the residential structures approximately 100 yards to the east of the Cross.
19 There is no evidence that the cross interferes with the City's maintenance of the park. The cross
20 has been present in the park for over 50 years without incident. The City has never lodged a
21 complaint with the Lions Club that the cross interfered with plants, animals, birds, or the City's
22 park maintenance activities.

23 The space occupied by the Cross is so small it cannot be seriously argued that it
24 interferes with the use of the park or constitutes a harm to plants, animals or birds. According
25 to the City’s General Plan, the “Albany Hill Passive Open Space/Conservation Area” is 12.75
26 acres in size. The vertical beam of the cross and the concrete footing occupy a mere 24 square
27 feet. (See Exhibits 3 and 4 Declarations of Kenneth Berner and Kevin Pope.) The concrete
28 footing occupies 24 square feet out of the entire 555,390.51 square feet of park space or less

1 than five one thousandths of one percent (0.005%) of the total Park. The City has provided no
2 evidence of a single bird or animal being harmed or injured due to the Cross. The City's
3 claims of hindering and encumbering the public's use of the park are vague, nonspecific and
4 speculative at best. The City states no facts establishing an overriding need to possess the
5 property.

6 Lions Club Past President Kenneth Berner provided a detailed description of the
7 location of the cross in his September 22, 2022, Declaration. Berner states that the cross stands
8 on the east side of the hill resting very close to a steep slope. The cross stands away from the
9 trail and does not impede pedestrian walking traffic through the park or interfere with wildlife.
10 Burner's Declaration contains two photos of the Cross; one showing its location at the edge of
11 the slope of the hill and the other showing a central trail looking in a southerly direction. The
12 Declaration and photos indisputably show that the cross does not encumber persons from using
13 the park. In fact, the two park benches associated with the cross provide an inviting resting
14 place for park goers to sit, rest and enjoy the view. The Cross has no adverse effect on the
15 plants, birds, animals in the park and no adverse effect on the City's Park maintenance.

16 The law requires the City to prove "overriding need" and "substantial harm."
17 The City has not, and cannot meet this burden.

18
19 **2. The U.S District Court Order of June 15, 2018, Did Not**
20 **Require the City of Albany To File an Eminent Domain**
21 **Action Against the Lions Club to Condemn the Cross - It**
22 **Did Not Order the City to Take Any Particular Action to**
23 **Cure its Establishment Clause Problem**

24 The City asserts as a second ground for granting prejudgment possession, that
25 U.S. District Court Judge Alsup's June 15, 2018 Order in *Lions Club of Albany v. City of*
26 *Albany* obligated the City to file an eminent domain action against the Lions Club, to condemn
27 and remove the cross. The City further asserted that failure to remove the Cross would expose
28 the City to "an unnecessary and ongoing risk of litigation." (Bond Declaration Paragraph 11)
Mr. Bond provides no facts indicating that he is an attorney or has legal knowledge or training
regarding "Establishment Clause issues." Consequently, Bond is incompetent to offer any legal

1 opinion or conclusion regarding any perceived risk to the City resulting from the Lion's
2 easement or the Cross.

3 This Court incorrectly interpreted Judge Alsup's Order. To be specific this
4 Court writes on Page 9, Lines 1-3, of its August 30, 2022 Order Granting Prejudgment
5 Possession that "Judge Alsup has held that the City of Albany is in a state of Constitutional
6 violation as matters now stand *and has ordered* Albany to cure that problem." This Court
7 expanded upon that erroneous belief stating,

8
9 "Thus, the City of Albany is on the horns of a dilemma: (1) Under the
10 Federal Action Order, the City of Albany is in a state of violation and
11 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 it seeks to avoid." Page 9, Lines 20-24

12 Subsequently, on September 21, 2022, the Lions Club filed a Complaint in
13 Federal District Court and concurrently filed a motion for an Injunction to prevent the City of
14 Albany from removing the Cross.

15 On November 17, 2022 Judge Alsup issued an Order clarifying his Order of
16 June 2018. He stated that his comments regarding the City's Establishment Clause problem
17 and possible solutions were merely advisory *dicta* and not binding on the City.

18 Regarding a possible lawsuit by a third-party against the City based on the
19 Establishment Clause problem, the June 2018 Order stated that only a party with standing
20 could file a lawsuit against the City and that lawsuit would need to be filed promptly. Now,
21 more than 4 years after the resolution of the first Federal action, no such lawsuit has been filed.
22 No third-party will file a lawsuit against the City now, after the City has filed its condemnation
23 action. A third-party lawsuit against the City would be pointless. If a lawsuit were filed it
24 would not state a cause of action against the City and be subject to a meritorious demurrer.

25 For over 40 years-from 1971 to 2015, the City accepted the presence of the
26 Cross. For all those years there was no "overriding need" to remove the cross and the City
27 suffered no "substantial hardship" by the presence of the cross. Nothing has changed; except
28 for the beliefs of members of the City Council.

1 Four years have passed since Judge Alsup’s 2018 Order. The City’s failure to
2 act promptly to cure its Establishment Clause problem is inconsistent with the City’s current
3 claims of “overriding need” and “substantial hardship.”

4 The City can avoid the “hardship” caused by a possible third-party lawsuit and
5 simultaneously resolve the Establishment Clause problem by accepting the Lions Clubs offer
6 of November 21, 2022, to purchase the lot the cross stands on for the sum of \$12,500 with all
7 costs of the sale to be paid by the Lions Club. (See Exhibit 5) The cross would then be in
8 private ownership. However, the City promptly rejected the Lions Clubs offer. (See Exhibit 6
9 copy of City's response.) In rejecting that offer the City revealed it has no interest in solving
10 the Establishment Clause problem. Its real agenda is to remove the Cross. In doing so it is
11 siding with atheists and others who oppose the Cross at the expense of Christians who revere
12 and worship at the Cross. The First Amendment not only bars any establishment of religion – it
13 also forbids any infringement of the free exercise of religion.

14 The City argues that Lions Club members are free to worship in the park if the
15 Cross is removed – therefore their right to worship is not infringed. This argument has no
16 merit. If it had merit, the City could condemn a Christian church building with impunity – and
17 argue that the congregation was free to worship on the vacant lot.

18 The City has failed to present competent evidence establishing an overriding
19 need to possess the Lions easement and remove the Cross. In fact, aside from unsubstantiated
20 conclusions, the City’s prior actions and inactions it is apparent that not only is there no
21 overriding need for prejudgment possession and certainly no substantial hardship justifying
22 prejudgment possession.

23 **B. The City Has Failed to Show It Will Suffer a Substantial**
24 **Hardship if Possession is Not Granted that Outweighs the**
25 **Hardship the Lions Club will Suffer**

26 Assuming arguendo, that the City has shown “overriding need” and “substantial
27 hardship” California Code of Civil Procedure § 1255.410(d)(2)(D) requires the City to prove
28 the hardship that the it will suffer if possession is denied or limited outweighs any hardship on

1 the defendant or occupant that would be caused by the granting of the order of possession.”

2 **1. The Lions Club Will Suffer Significant Hardship if the Cross is**
3 **Removed.**

4 **a. Removal of the Cross on Albany Hill will Cause the Lions**
5 **Substantial Hardship.**

6 The Lions Club has displayed the Cross on Albany Hill for over 50 years. The
7 Cross can be seen from many areas in the Albany and Berkeley communities and is particularly
8 visible when lighted at night. Members of the Lions Club find it rewarding and satisfying when
9 told by individuals in the community about joy and comfort they receive from seeing the Cross
10 on the hill each day. (Pope Dec. ¶ 3, 4, 5) The lighting of the Cross at Christmas and Easter are
11 recognized religious traditions during those holidays. (Pope Dec. ¶ 6) The Cross is also a
12 location and gathering place for religious worship where people in the community come to
13 pray, reflect, talk and spread the good word to others. (Pope Dec. ¶ 7, 8, and 9) For over 50
14 years the Lions have continued the tradition of Easter Morning services at the Cross.

15 **b. Once the Cross is Taken Down, it is Down Forever.**

16 If this Court reconfirms its original order for prejudgment possession, the Lions
17 Club will never be allowed to reconstruct the Cross, even if it prevails at the Right to Take
18 Trial.

19 Chapter 6 of the City’s General Plan designates the Albany Hill as “Park and
20 Open Space.” (A copy of Chapter 6 is attached as Exhibit 7.) No structures are allowed under
21 the “open Space” design. The City’s zoning Map and Zoning Ordinance / Zoning Code
22 §20.12.070 shows the Albany Hill Park as “Public Facilities.” (A copy of the Zoning Map is
23 attached as Exhibit 8) The Cross is a structure and it is privately owned. Thus, it violates both
24 the General Plan and the Zoning Code. The Cross was constructed in 1971 and the Lions
25 Club’s Easement was recorded August 24, 1973, prior to the adoption of the General Plan and
26 Zoning Designations for the Albany Hill Park. Thus, the Cross is a legal “nonconforming use.”

27 Albany Zoning Ordinance § 20.44.030 prohibits a nonconforming use from
28 being moved, altered or enlarged unless required by law. (Exhibit 9) A nonconforming use

1 may not be reestablished after it has been discontinued for a continuous period of 90 days.
2 Albany Zoning Ordinance § 20.44.040. (Exhibit 10)

3 The trial of the City’s Right to Take will not occur for at least the 150 days
4 requested by opposing counsel, and given the need to complete discovery, and the Court’s
5 calendar.

6 The City of Albany and the Lions Club have irreconcilable differences. A final
7 judgment determining that the City has no right to condemn the Cross is at least a year away.
8 There is no way the Cross can be reconstructed by the Lions Club within 90 days of the
9 effective date of an order of prejudgment possession. Given the past history of both parties, the
10 party who loses at the Right to Take Trial will appeal this Court’s decision. There can be no
11 doubt that if Cross is taken down now the Lions Club will never be able to restore it, regardless
12 of a final judgment in favor of the Lions Club.

13 At the recent hearing before the Federal District Court, the City could not say
14 with any certainty whether the Cross can be put back up after a provisional removal. The City
15 stated the decision would need to go through permitting or zoning approval, a public process
16 which the City cannot dictate or predict. (Order RE: Preliminary Injunction P 5:8-13). Judge
17 Alsup noted that the potential removal of the cross is not merely pending litigation, but rather
18 practically, a permanent removal which raises a serious exercise of religion problem. Id at
19 5:11-16

20 CONCLUSION

21 Within approximately eighteen months there will be a final judgment on the
22 right to take issue. If the City prevails on that issue it will be entitled to take possession of the
23 Cross. The City cannot demonstrate that depriving it of possession for approximately eighteen
24 months will
25 cause it any hardship.

26 On the other hand, if the Court confirms its original Order of Prejudgment
27 Possession and the Cross is taken down now, the Lions Club will never be able to restore it.
28 Even if the Lions Club prevails on the right to take issue. The Lions Club will have “won the

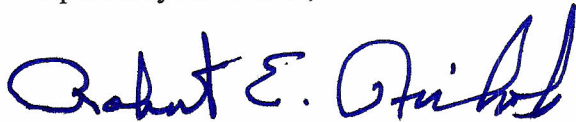
1 battle but lost the war” An unjust result.

2 The solution is obvious. This Court should vacate or stay its August 30 2022
3 Order of Prejudgment Possession until there is a Final Judgment that the City has the right to
4 condemn the Lions Club’s property and that Cross. This solution is fair and just to both
5 parties.

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Dated: December 28, 2022

Respectfully submitted,



Robert E. Nichols
Attorney for the Albany Lions Club