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7 CITY OF ALBANY, a Charter City

8 UNITED STATES DISTRICT COURT
9 NORTHERN DISTRICT OF CALIFORNIA

11 THE LIONS CLUB OF ALBANY,
CALIFORNIA, A Nonprofit Corporation,

12 Plaintiff,

13 v.

14 THE CITY OF ALBANY, a Charter City; and
15 DOES 1 through 25,

16 Defendants.

Case No. 3:22-cv-05377-WHO

**DEFENDANT CITY OF ALBANY'S
BRIEF IN SUPPORT OF JUDICIAL
REFERRAL OF DETERMINING
RELATIONSHIP**

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1 The City of Albany (“City”) submits this brief in support of the Referral for Purpose of
 2 Determining Relationship issued by Judge William H. Orrick for consideration of whether the
 3 above captioned case is related to *Lions Club of Albany, California v. City of Albany*, Case No. 17-
 4 05236-WHA.

5 The City is now, and has been for some time, the fee owner of the real property (i.e., Albany
 6 Hill Park) on which a cross is located, more particular described as Assessor Parcel Numbers 066-
 7 2754-14-05 and 066-2754-40-03 (“Subject Property”). The City acquired the Subject Property on
 8 or about August 21, 1973, after it accepted a land donation from the corporation that purchased the
 9 Subject Property from Plaintiff’s former member. As part of the conveyance from Plaintiff’s
 10 former member to the corporation, and, eventually, from the corporation to the City, the seller
 11 excepted from the sale an easement, in Plaintiff’s favor, for ingress/egress over the Subject Property
 12 to maintain the cross on Albany Hill Park. This complex transaction involving Plaintiff, its former
 13 member, the corporation, and the City, among others, resulted in a series of lawsuits concerning
 14 the Subject Property. *Lions Club of Albany, California v. City of Albany*, 323 F.Supp.3d 1104
 15 (N.D. Cal. 2018) (“*Lions Club I*”) (summarizing history of the litigation.)¹

16 On September 11, 2017, Plaintiff filed an action in this court against the City for alleged
 17 violations of the First and Fourteenth Amendments. In *Lions Club I*, Plaintiff alleged the City
 18 ordered the Pacific Gas and Electric Company to shut down power to the cross for 106 days.
 19 Plaintiff alleged this decision was part of a continued campaign to harass Plaintiff even though the
 20 City had legitimate safety concerns in carrying out that decision, including the ongoing fire hazard
 21 to the public. The City thereafter filed a Cross-Complaint against Plaintiff for Quiet Title,
 22 Trespassing, Nuisance, and Declaratory relief. The matter was assigned to the Honorable Judge
 23 William Alsup.

24 The parties eventually filed dueling summary judgment motions, which Judge Alsup
 25 granted in part, and denied in part. In so doing, Judge Alsup stated, in no uncertain terms, that “The
 26 City Must Remedy Its First Amendment Violation.” Judge Alsup also held that “**the public park**
 27

28 ¹ The instant lawsuit is sometimes herein referred to as *Lions Club III*.

1 **with the cross violates the Establishment Clause” and that the “land cannot continue as a**
2 **public park with the cross on it.”** Because of this key finding, Judge Alsup identified three
3 possible choices for the City to overcome this critical issue. First, the City could sell the portion of
4 the Subject Property to a private owner where the easement and cross are located. Second, the City
5 could condemn the easement through its eminent domain power. Third, the City could adopt a
6 zoning ordinance to ban all religious symbols from its public spaces. The Ninth Circuit affirmed
7 Judge Alsup’s order. *See, Lions Club of Albany, California v. City of Albany*, 788 F. App’x 428
8 (9th Cir. 2019). After careful consideration, and in line with one of the options Judge Alsup
9 provided to the City, the City decided to explore condemning Plaintiff’s easement interest in the
10 Subject Property.

11 Thereafter, amongst other reasons, in an attempt to rectify the Establish Clause problem
12 Judge Alsup noted, the City initiated an eminent domain lawsuit to condemn the Lion Club’s
13 easement and remove the cross. The City’s proposed acquisition, including removal of the cross,
14 is (1) for the public purposes and necessity of enabling the public to more fully use and enjoy
15 Albany Hill Park as an open space without the encumbrance, and (2) to avoid any potential
16 Establishment Clause issue arising from Plaintiff maintaining the cross. The City adopted a
17 resolution of necessity to acquire the easement and remove the cross.

18 On May 4, 2022, the City filed its Complaint in Eminent Domain in the Alameda County
19 Superior Court, styled as *City of Albany v. Albany Lions Club, Lions International, et al.*, and
20 bearing case number 22CV010822 (“*Lions Club II*” or “State Court Action”). The City filed a
21 Motion for Prejudgment Possession of Plaintiff’s easement two days later, and it deposited
22 \$500,000 in the State of California Condemnation Deposits Fund for withdrawal by Plaintiff as
23 probable just compensation for the easement. Plaintiff opposed the Motion for Prejudgment
24 Possession, raising similar, if not the identical, arguments, positions, and claims being asserted in
25 this current federal lawsuit, i.e., *Lions Club III*. On August 30, 2022, the Court in *Lions Club II*
26 granted the City’s Motion for Prejudgment Possession, and in the event the City decided to remove
27 the cross, it ordered the City to preserve the cross in a safe location pending trial and final judgment
28

1 in the State Court Action.

2 As Judge Alsup is familiar with the topics at issue in this matter, and provided a previous
3 ruling that provided direction to the City regarding the cross, it seems appropriate for Judge Alsup
4 to handle this present lawsuit.

5
6 Dated: October 28, 2022

BEST BEST & KRIEGER LLP

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8 By: /s/ Scott W. Ditfurth

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PROOF OF SERVICE

At the time of service I was over 18 years of age and not a party to this action. My business address is 3390 University Avenue, 5th Floor, P.O. Box 1028, Riverside, California 92502. On October 28, 2022, I served the following document(s):

DEFENDANT CITY OF ALBANY’S BRIEF IN SUPPORT OF JUDICIAL REFERRAL OF DETERMINING RELATIONSHIP

By fax transmission. Based on an agreement of the parties to accept service by fax transmission, I faxed the documents to the persons at the fax numbers listed below. No error was reported by the fax machine that I used. A copy of the record of the fax transmission, which I printed out, is attached.

By United States mail. I enclosed the documents in a sealed envelope or package addressed to the persons at the addresses listed below (specify one):

Deposited the sealed envelope with the United States Postal Service, with the postage fully prepaid.

Placed the envelope for collection and mailing, following our ordinary business practices. I am readily familiar with this business's practice for collecting and processing correspondence for mailing. On the same day that correspondence is placed for collection and mailing, it is deposited in the ordinary course of business with the United States Postal Service, in a sealed envelope with postage fully prepaid.

I am a resident or employed in the county where the mailing occurred. The envelope or package was placed in the mail at Riverside, California.

By messenger service. I served the documents by placing them in an envelope or package addressed to the persons at the addresses listed below and providing them to a professional messenger service for service. A Declaration of Messenger is attached.

By overnight delivery. I enclosed the documents in an envelope or package provided by an overnight delivery carrier and addressed to the persons at the addresses listed below. I placed the envelope or package for collection and overnight delivery at an office or a regularly utilized drop box of the overnight delivery carrier.

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By the Court’s CM/ECF system. All registered CM/ECF users in this case, including the following, will be served with the foregoing document by receiving a notification of such filing (NEF) and a hyperlink to said document, by the court’s CM/ECF system.

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I declare that I am employed in the office of a member of the bar of this court at whose direction the service was made.

Executed on October 28, 2022, at Riverside, California.



Ana Horta

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