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REPORT TO THE HONORABLE
MAYOR AND CITY COUNCIL

MT. SOLEDAD MEMORIAL PROPERTY

INTRODUCTION

The City of San Diego ("City") has been involved in litigation regarding the presence of a Latin cross located at the top of Mt. Soledad, in an area commonly known as the Mt. Soledad Veterans Memorial, since 1989. There are two lawsuits pending in state and federal court relating to the cross. In the coming weeks, the City must decide on the direction it wishes to take in these litigation matters.

BACKGROUND

In 1913, a redwood cross was erected atop Mt. Soledad by private citizens. Three years later, the City dedicated the property where the cross was located as a public park. Vandals destroyed the redwood cross in 1923, and strong winds destroyed its wood-stucco replacement in 1952. Later that year, private citizens again raised funds for a new cross which stands today. The Mt. Soledad Memorial Association ("Memorial Association") was subsequently formed by a group of citizens to help promote and maintain the park. In 1954, the Memorial Association dedicated the cross as a tribute to veterans of World War I, World War II, and the Korean War.

1. *Philip Paulson v. City of San Diego*, United States District Court Case No. 89cv00820-GT (POR)

In 1989, Plaintiff Philip Paulson ("Paulson") brought suit in the United States District Court alleging the presence of the cross on public property violated both the United States and California Constitutions. In December 1991, the District Court ruled the presence of the cross on City property violated the No Preference Clause of the California Constitution (article I, section 4), which prohibits government from providing, or appearing to provide, preferential treatment to one religion over another. *Murphy v. Bilbray*, 782 F. Supp. 1420, 1428 (S.D. Cal. 1991). The court issued a permanent injunction prohibiting the existence of the cross on public property.

The Ninth Circuit Court of Appeals subsequently affirmed the District Court's findings, ruling that the designation of the cross as a "war memorial" was insufficient to satisfy the constitutional concerns raised by Paulson. Rejecting the City's contentions that the cross had taken on a secular commemorative meaning as a veterans memorial and historic landmark, the

Ninth Circuit commented that “[a] sectarian war memorial carries an inherently religious message and create[s] an appearance of honoring only those servicemen of that particular religion.” *Ellis v. City of La Mesa*, 990 F.2d 1518, 1528 (9th Cir. 1993).

A. First Sale of the Memorial Property

In an effort to remedy the constitutional violation and comply with the injunction, the City Council voted to sell a small area of parkland immediately surrounding the cross to the Memorial Association. As required by the City Charter to sell dedicated parkland, Proposition F was placed on the June 1992 ballot. Proposition F sought voter approval to “remov[e] from dedicated park status . . . that portion of Mt. Soledad Natural Park necessary to maintain the property as a historic war memorial, and the transfer of the same parcel . . . to a private non-profit corporation for not less than fair market value.” San Diego voters approved Proposition F, and the City sold approximately 222 square feet of land immediately beneath the cross to the Memorial Association in 1994. Paulson objected to the sale and requested that the District Court enforce the injunction. Certain ballot material associated with the campaign to approve the proposition stated the purpose of the proposition was to “SAVE THE CROSS.” The District Court voided the sale in 1997, finding it violated the California Constitution in three respects: (1) the conduct of the sale created the appearance of favoring the Christian religion; (2) excluding other potential purchasers gave the appearance the City’s purpose for conducting the sale was to preserve the cross; and (3) the sale involved too small a plot of land to remedy the violation.

B. Second Sale of the Memorial Property

The City subsequently conducted a second sale of one-half acre of land surrounding the cross (“Memorial Property”), soliciting public bids for the express purpose of maintaining a historic war memorial. The City neither required nor precluded retention of the cross as a condition of the sale. The cross, however, was the only structure atop Mt. Soledad that could be considered a war memorial at that time. The Memorial Association submitted the highest bid of \$106,000 and took title to the property. Thereafter, the Association commenced an improvement program in 1999 to build a world-class memorial honoring military veterans, eventually investing over \$900,000 in the site.

Paulson again objected to the sale and argued that the terms of the second sale violated the United States and California Constitutions. The District Court upheld the sale and found the City had acted properly and legally. Paulson appealed to the Ninth Circuit Court of Appeals. A three-judge panel initially rejected Paulson’s arguments and found the second sale valid under all relevant constitutional provisions. Paulson then requested that an *en banc* panel of eleven judges review the decision upholding the second sale. In 2002, an *en banc* panel, voting 7-4, reversed the decisions of the District Court and the three-judge panel finding that the second sale violated the No Aid to Religion Clause of the California Constitution. Article XVI, section 5 of the California Constitution prohibits the government from granting or aiding any form of benefit to a sectarian purpose regardless of the government’s secular intent. The only exception is when the

sectarian benefit is found to be indirect, remote, or incidental to the government's secular purpose. This occurs when the benefit is available on an equal basis to both those with sectarian or secular objectives. The Ninth Circuit found that the manner in which the second sale was conducted provided a financial benefit to parties who intended to maintain the cross as opposed to those who would remove it, thereby creating a special sectarian benefit to those bidders who supported the preservation of the cross. *Paulson v. City of San Diego*, 294 F.3d 1124, 1132-33 (9th Cir. 2002). A request by the City for further review by the United Supreme Court was denied.

As the prevailing party, Paulson was entitled to recover attorneys' fees and costs from the City. In 2003, the City paid \$233,638.72 to settle Paulson's claim for attorneys' fees and costs.

C. Attempted Third Sale of the Memorial Property

The Ninth Circuit left it to the District Court and the parties to identify and select the appropriate means to remedy the second sale's constitutional infirmity. In October 2004, the District Court declared the second sale void. The District Court, however, did not re-vest title to the property back to the City. Instead, the court ordered the parties to "brief the issue of the various rights and interests of the parties in the improvements made to the land and the cross or submit a written stipulation as to such rights and interests." To date, the parties have not briefed these issues. Shortly after the October 2004 ruling, both Paulson and the Memorial Association filed appeals to the Ninth Circuit. These appeals have subsequently been dismissed.

In June 2004, this Office issued a Report to the Honorable Mayor and City Council (City Att'y Rep. No. RC-2004-16) addressing the status of the litigation surrounding the cross in light of the Ninth Circuit's *en banc* decision. The report identified two possible options for remedying the constitutional issues surrounding the cross: (1) negotiate a settlement with Paulson and the Memorial Association which included the removal of the cross from the property; or (2) conduct a third sale of the Memorial Property structured to allow the high bidder to determine whether to maintain, relocate, or remove the cross or replace it with another appropriate monument. This Office recommended that a third sale be attempted and that the sale be subject to a long-term lease with the Memorial Association as a means of preserving the substantial improvements made by the Memorial Association and its contributors. Under either option, it was recommended that the City avoid giving the appearance of preference for, or aid to, religion in order to prevent potential challenges to its conduct.

On July 27, 2004, a public hearing was held before the City Council that included presentations by the City Attorney as well as representatives on behalf of Paulson and the Memorial Association. These representatives argued against attempting a third sale of the Memorial Property. Instead, they advocated entering into a settlement agreement which called for the relocation of the cross to a nearby, privately-owned site. At the hearing, the City Council adopted Ordinance No. O-19306 authorizing Proposition K for the November 2004 ballot seeking voter authorization to conduct a third sale. Although the language does not appear in

Ordinance No. O-19306, the Council minutes reflect that council gave direction given to the City Attorney to enter into the proposed settlement agreement with Paulson and the Memorial Association if Proposition K failed to pass.

Proposition K failed to gather sufficient votes as 59 percent of the voters rejected the proposition in the November 2004 election. On November 20, 2004, the United States Congress adopted legislation calling for the creation of a national memorial honoring veterans of the United States Armed Forces on the Memorial Property. As a result of the federal action, the proposed settlement agreement was not finalized by the parties.

2. *Philip Paulson v. Charles Abdelnour, et al.*, San Diego Superior Court Case No. GIC849667

As stated above, the United States Congress adopted Bill No. 4818 on November 20, 2004, calling for the designation of the Mt. Soledad Veterans Memorial as a national memorial honoring veterans of the United States Armed Forces. The Bill was signed into law on December 8, 2004, as part of the Fiscal Year 2005 Omnibus Appropriations Act (P.L. No. 108-447). The Bill authorized the Secretary of the Interior to accept all rights, title, and interest to the Mt. Soledad Veterans Memorial, specifically defined as “consist[ing] of a 29 foot-tall cross and surrounding granite memorial walls containing plaques engraved with the names and photographs of veterans of the United States Armed Forces,” upon donation from the City to the federal government for the purpose of creating the national memorial.

On February 24, 2005, this Office issued a Memorandum of Law (City Att’y MOL No. ML-2005-4) addressing the legal issues implicated by the federal legislation and proposed donative transfer of the Memorial Property by the City to the federal government. It was, and is, the opinion of this Office that the proposed donation of the Memorial Property as contemplated by the federal legislation, even if done by the City for a secular purpose, would be viewed as an act substantially to aid in the preservation of the cross and, therefore, would be unconstitutional under the California Constitution. This conclusion was based on the events and circumstances surrounding the enactment of the federal legislation as well as the language of the legislation itself which evidenced an intent to maintain and preserve the cross. Foreseeing that such a transaction would provide fodder for additional legal proceedings against the City and, in all likelihood, prove to be a futile and costly endeavor, this Office recommended that the City Council follow through on its stated action of July 27, 2004, and enter into a settlement agreement with Paulson and the Memorial Association.

On March 8, 2005, the City Council declined to donate its rights, title, and interests in the Mt. Soledad Veterans Memorial to the federal government. Thereafter, the San Diegans for the Mount Soledad National War Memorial submitted referendary petitions that caused the City Council to either rescind its decision declining the federal government’s offer or call for a special election so that the electorate could consider the adoption of the resolution declining the donation offer. On May 17, 2005, the City Council rescinded Resolution No. R-300207 in light of the

referendary petitions. The City Council then passed Ordinance No. O-19378 authorizing Proposition A for the Special Municipal Election held July 26, 2005. The proposition asked the electorate, "Shall the City of San Diego donate to the federal government all of the City's rights, title, and interest in the Mt. Soledad Veterans Memorial property for the federal government's use of the property as a national memorial honoring veterans of the United States Armed Forces?"

On June 24, 2005, Paulson initiated a pre-election challenge to Proposition A in the matter of *Paulson v. Abdelnour, et al.*, San Diego Superior Court Case No. GIC849667. Paulson argued, among other things, that Proposition A would result in an unconstitutional act if passed by the electorate as it represented the latest unconstitutional attempt to preserve the cross on Mt. Soledad. Proposition A passed as 76 percent of the voters favored the proposed donation. On October 7, 2005, the Superior Court issued its decision finding both Ordinance No. O-19378 and Proposition A to be unconstitutional and, therefore, invalid and unenforceable. The Superior Court found, based on consistent, repeated, and numerous references to saving the cross as the reason for the donation, that the proposed transfer to the federal government demonstrated an unconstitutional preference to religion in violation of the No Preference Clause of the California Constitution. The court also found that the transfer of the memorial with the cross as its centerpiece to the federal government for no compensation for the purpose of saving the cross "AS IT IS, WHERE IT IS," would also unconstitutionally aid religion in violation of the No Aid to Religion Clause of the California Constitution. The Superior Court further found that maintaining the cross as part of a national veterans memorial would violate the Establishment Clause of the United States Constitution. Judgment was entered against the City on November 28, 2005. The Superior Court subsequently awarded \$268,541.02 to Paulson for attorneys' fees and costs to be paid by the City.

LITIGATION OPTIONS

There appear to be two courses of action available to the City:

- (1) Appeal the decision of the Superior Court in *Paulson v. Abdelnour* and continue efforts to donate the City's rights, title, and interest in the Memorial Property to the federal government; or
- (2) Abandon the appeal and renew discussion with Paulson and the Memorial Association in an effort to settle *Paulson v. City of San Diego*.

Option One - Appeal of Superior Court's Decision in *Paulson v. Abdelnour, et al.* San Diego Superior Court Case No. GIC849667

One option available to the City is to pursue an appeal of the Superior Court's decision invalidating Proposition A in *Paulson v. Abdelnour* and continue efforts to donate the Memorial Property to the federal government. Notices of appeal on behalf of the City and the City Clerk

were previously filed in order to preserve the right to appeal if the City wishes to pursue this option.

The question to be decided on appeal is whether the proposed donation called for by Proposition A would either demonstrate a preference for religion or aid in the sectarian purpose of preserving the cross, both of which are prohibited under the California Constitution. As anticipated, the Superior Court held that the proposed transfer demonstrated an unconstitutional preference for and aid to religion in violation of the California Constitution. The Superior Court based its decision, among other things, on a finding that the City passed Ordinance No. O-19378 placing Proposition A on the ballot as a reaction to the referendary petitions undertaken to save the cross and permit the donative transfer of the Memorial Property to the federal government. As in the past, the court also found that the campaign arguments in favor of Proposition A reiterated that voting for the proposition was a way to preserve the cross "AS IT IS, WHERE IT IS."

If lessons can be learned from the past, the probability of overturning the Superior Court's decision on appeal is unlikely. The City's repeated efforts to sell the Memorial Property failed as courts found the City's actions gave the appearance of attempting to preserve the cross in violation of the California Constitution. Unfortunately, the proposed donation to the federal government contemplated by Proposition A suffers from the same infirmities. An appeal, therefore, would likely be a futile effort exposing the City to further financial liability for Paulson's attorneys' fees and costs.

Option Two - Abandon the Appeal and Renew Settlement Discussions in *Paulson v. City of San Diego*, United States District Court Case No. 89cv00820-GT (POR)

Alternatively, the City could abandon the appeal in *Paulson v. Abdelnour*, and renew settlement discussions with Paulson and the Memorial Association in order to bring closure to *Paulson v. City of San Diego*. Previously, this Office identified two possible options for resolving the constitutional issues surrounding the cross. The two options were to either negotiate a settlement with Paulson and the Memorial Association or attempt a third sale of the Memorial Property. As discussed above, the electorate rejected Proposition K in November 2004, declining to grant authorization to conduct a third sale. Absent a transfer of the Memorial Property to the federal government, settlement appears to be the only remaining viable option for the City to pursue.

If the City Council desires not to pursue an appeal, the City should renew settlement discussions with Paulson and the Memorial Association. The last meaningful settlement discussions between the parties took place in July 2004. Because neither the City nor the Memorial Association currently holds clear title to the Memorial Property, any potential settlement would have to address the ownership interests in the memorial improvements as well as the cross itself. Further, it would appear that the City should consider a long-term lease of the Memorial Property to the Memorial Association for the continued maintenance of the property.

Honorable Mayor and
City Council

-7-

October 18, 2006

The District Court has expressed a willingness to assist the parties in these discussions, if necessary.

CONCLUSION

The City is at a crossroads and must now decide how it wishes to proceed in the long-standing litigation surrounding the Mt. Soledad cross. The parties are due to appear in District Court on April 19, 2006, on Paulson's motion to enforce the injunction. The City Council may choose either to continue efforts to donate the Memorial Property to the federal government by appealing the Superior Court's decision that invalidated Proposition A or abandon an appeal and renew settlement discussions with Paulson and the Memorial Association. This Office reaffirms its earlier recommendation that the City halts its continued expenditure of funds on this matter and enters into a settlement with Paulson and the Memorial Association. It is time to move forward and bring the dispute over the cross to a conclusion.

Respectfully submitted,

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MJA:DJK:dmt.Civ.
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