DATE: April 28, 1989

SUBJECT: Crosses on Mount Soledad and Presidio Park

REQUESTED BY: George Loveland, Director, Park and Recreation Department

PREPARED BY: Mary Kay Jackson, Deputy City Attorney

QUESTION PRESENTED

We have been asked to respond to the question of the legality of the crosses presently located on Mt. Soledad and at Presidio Park. We will address this question by first giving some background information on each site, explaining the federal and state constitutional law in this area as well as relevant case law, and, finally, applying the law to the particular facts involved.

CONCLUSION

Neither the cross on Mt. Soledad nor in Presidio Park violates the tests promulgated by the U.S. Supreme Court; the purpose of each is secular, the primary effect neither advances nor inhibits religion and neither cross fosters an excessive entanglement by government with religion. Therefore, the City is not violating either the Federal or California Constitutions by allowing the crosses to remain.

BACKGROUND

1. Mt. Soledad Cross.

The original cross on Mt. Soledad was erected in 1913 by private citizens of La Jolla and Pacific Beach. It was destroyed by vandals ten years later and rebuilt by private citizens, but was destroyed in 1952 by a severe windstorm. Again a group of private citizens raised the funds for a new cross. When the latest cross was dedicated in 1954, it was dedicated as a memorial to the military casualties of the World Wars and the Korean conflict. At that time the Mt. Soledad Memorial Association was formed by a group of citizens to help promote and maintain the park. The land on which the cross is located was originally owned by the City and dedicated as a public park in 1916 by Ordinance No. 6670, subsequent to the building and dedication of the original cross.

2. Presidio Park Cross.

The original cross at Presidio Park was first dedicated by Father Junipero Serra as part of the founding of the Royal Presidio. The current cross, which was built of brick from the original Presidio, was dedicated in 1915. The land in the area

of the cross was presented to the City by George Marston, by grant deed dated January 23, 1930 for purpose of a public park and accepted by the City and dedicated as a public park by Council Resolutions, No. 54217, dated January 23, 1930, No. 54162, dated June 30, 1930, No. 66988, dated December 21, 1937 and Ordinance No. 1297, dated December 21, 1937.

ANALYSIS

1. Constitutional Criteria.

The first amendment of the U.S. Constitution, ratified in 1791, states that: "Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof." The U.S. Supreme Court ruled in Everson v. Board of Education, 330 U.S. 1 (1946) that the establishment clause was applicable to the states through the fourteenth amendment.

The California Constitution provides in relevant part in article 1, section 4 that "Free exercise and enjoyment of religion without discrimination or preference are guaranteed . . .. The legislature shall make no law respecting an establishment of religion." Article XVI, section 5 prohibits the state government from granting "anything to or in aid of any religious sect, church, creed, or sectarian purpose."

In this situation, since there is no free exercise of religion question, we focus only on the establishment clause.

2. Guidelines established.

The initial problem lies in discerning how to judge whether a particular governmental action does or does not violate the establishment clause. The major guidance in this area comes from the U.S. Supreme Court opinion Lemon v. Kurtzman, 403 U.S. 602 (1971). That case dealt with the issue of whether the establishment of religion or the free exercise clauses of the first amendment were violated by state statutes providing state aid to church-related elementary and secondary schools, and to teachers therein, with regard to instruction in secular matters. In that case the Court found that the local statutes involved were unconstitutional as fostering, by their cumulative impact, excessive entanglement between government and religion. The court listed "three main evils against which the establishment clause was intended to afford protection: sponsorship, financial support and active involvement of the sovereign in religious activity." Lemon v. Kurtzman, 403 U.S. at 612. The Court then articulated a three-pronged test in an effort to define the permissible limits on government aid to religion under the establishment clause. Under the Lemon test, government action must have a secular purpose; its principal or primary effect must

be one that neither advances nor inhibits religion; and it must not foster an excessive entanglement by government with religion. See, Lemon at 612. However, subsequently the Court in Lynch v. Donnelly, 465 U.S. 668 (1984) limited the political divisiveness inquiry to cases involving direct subsidies to church sponsored schools, colleges or other religious institutions.

3. Applications of guidelines.

A. Federal cases.

There have been no U.S. Supreme Court cases dealing specifically with the question of crosses on public lands. There have been several lower federal court cases that have addressed this question, and none from the State Fourth District Court of Appeal that would provide specific precedential guidelines in this area. Although none of the federal cases which will be cited here allowed the cross to remain, each dealt with a fact situation distinguishable from the facts in the San Diego situations.

The most recent case is Jewish War Veterans of U.S. v. U.S., 695 F.Supp. 3 (D.D.C. 1988) in which the district court held that a cross as a war memorial could not withstand establishment clause scrutiny. In that case there was a dispute regarding the origin of the cross as well as its purpose. Plaintiffs alleged that the cross was built for Easter Sunrise Service where defendants contended the cross was erected as a memorial to POW's and MIA's. In either event, the cross was not identified as a war memorial until complaints were received and a problem became apparent. There was no memorial dedication nor were there surrounding community contacts to support the memorial aspects of the cross. The cross in question was built with public funds on land used as a military base by the United States Marine Corps.

A district court in American Civ. Lib. U. of Miss. v. Miss. State GSA, 652 F.Supp. 380 (S.D. Miss. 1987) found a cross violative of the first amendment when a Latin cross was displayed on a state office building during the Christmas season. In American Civil Lib. Union v. City of St. Charles, 794 F.2d 265 (7th Cir. 1986) the circuit court prohibited a city's prominent display of a lighted Latin cross during the Christmas season. In Libin v. Town of Greenwich, 625 F.Supp. 393 (D.Conn. 1985) the court would not allow a volunteer fire company to keep a cross on the facade of the fire station as part of a display celebrating the Christmas holiday.

The case of Greater Houston Chapter of A.C.L.U. v. Eckels, 589 F.Supp. 222 (S.D. Tex. 1984) dealt with religious symbols in a public park. Three crosses and a Star of David were held to

violate the establishment clauses of the first amendment. The structures were originally erected with public funds as part of an area of the park to be used for personal reflection and meditation, the crosses were erected first and the Star of David later. After a lawsuit was filed challenging the constitutionality of the structures, they were then identified as war memorials.

The court in American Civ. Lib. Union of Ga. v. Rabun Cty., Etc., 698 F.2d 1098 (11th Cir. 1983), found a cross in a public park violative of the first amendment. The evidence indicates the cross was to serve as a symbol of Christianity and to be dedicated on Easter. After objections from the A.C.L.U., a resolution was proposed which would designate the cross as a memorial for deceased persons, but it was never passed.

In addition to the three-pronged test of Lemon used primarily by the courts in the above cases, the U.S. Supreme Court has relied upon historical significance in deciding an establishment clause case. In Marsh v. Chambers, 463 U.S. 783 (1983) the Court held that a state legislature's practice of opening each day's session with a prayer by a chaplain paid by the state was not violative of the establishment clause of the first amendment. The Court stated that "it is obviously correct that no one acquires a vested and protected right in violation of the Constitution by long use, even when that span of time covers our entire national existence and indeed predates it. Yet an unbroken practice . . . is not something to be lightly cast aside." Id. at 790 (emphasis added).

B. State cases.

There are few state cases that address the issue of crosses. A California Supreme Court case, Fox v. City of Los Angeles, 22 Cal.3d 792 (1978), held that a cross on city hall which was illuminated at Easter and Christmas violated the establishment clause of the California Constitution.

The Oregon Supreme Court in Eugene Sand & Gravel v. City of Eugene, 276 Or. 1007 (1976), cert. denied, 434 U.S. 876 (1977), held that a cross displayed as a veterans war memorial did not violate constitutional restraints against the establishment of religion. Originally the court had found that the cross was violative of the establishment clause, but a subsequent Charter amendment approved by the voters of the City of Eugene, accepting the cross as a veterans memorial, constituted such a material change in circumstances as to allow the court to find that the three-prongs of the Lemon test were satisfied: There was a secular purpose, there was not a primary effect that advanced

religion, and there was no excessive entanglement by the City of Eugene.

The Supreme Court of Oklahoma ruled in Meyer v. Oklahoma City, 496 P.2d 789 (Okla. 1972), cert. denied, 409 U.S. 980 (1972), that a city-owned cross on the fairgrounds was located in a secular commercial environment such as to obscure whatever sectarian symbolism existed and therefore allowed the cross to stand. In Dade County, Florida, a Court of Appeals held that a temporary string of lights in the form of a cross on the outside of the county courthouse during the Christmas season did not amount to an establishment of religion so as to violate the first amendment. Paul v. Dade County, 202 So.2d 833 (Fla.Dist.Ct.App. 1967), cert. denied, 390 U.S. 1041 (1968).

4. Application of Law to Facts.

It is now necessary to apply the law to the specific facts of each site in question here. In order to be found constitutional each case needs to pass the three-pronged test of Lemon: secular purpose; primary effect does not advance nor inhibit religion; does not foster excessive entanglement by government with religion.

A. Mt. Soledad Cross.

As the court stated in American Civ. Lib. Union of Ga. v. Rabun Cty., Etc., 698 F.2d at 1110: "At the core of the Establishment Clause is the requirement that a government justify in secular terms its purpose for engaging in activities which may appear to endorse the beliefs of a particular religion." "The

Supreme Court 'is normally deferential to a ╒government'sσ articulation of a secular purpose,' Edwards v. Aguillard,

U.S. , 107 S.Ct. 2573, 2579, 96 L.Ed.2d 510 (1987), and is reluctant to attribute unconstitutional motive when a plausible secular purpose can be discerned. The Supreme Court has never required an exclusively secular purpose." (Emphasis in original). Jewish War Veterans of U.S. v. U.S., 695 F.Supp. 3, 23 (D.D.C. 1988).

In the Mt. Soledad case, the secular purpose is obvious: The latest cross was constructed with private money, by a memorial association and dedicated as a war memorial. The purpose of the Mt. Soledad cross is to honor the war dead. "The court has invalidated . . . governmental actions on the grounds that a secular purpose was lacking, but only when it has concluded that there was no question that the statute and activity was motivated wholly by religious considerations." American Civ. Lib. U. of Miss. v. Miss. States GSA, 652 F.Supp at 383 quoting Lynch v. Donnelly, 465 U.S. 668 at 680.

It is necessary to next examine whether the government action has a primary effect that either advances or inhibits religion. The facts at Mt. Soledad are that the government did not erect the cross nor cause it to be erected and the amount of upkeep required by the City is minimal. The cross was in fact present on the site when the land was dedicated as a public park. The cross on Soledad, unlike those found to be unconstitutional in the federal court cases, is not on city hall or any governmental building. It also was, from the beginning, dedicated as a war memorial rather than having had adopted that status in response to objections.

The cross has customarily been recognized in this country as a symbol of recognition for the sacrifice of those who have given their lives for their country, as evidenced by crosses on the graves of Arlington National Cemetery. In the face of these multiple crosses, a singular cross documented as a war memorial that has been on the site since before the land was dedicated as a public park cannot be said to have the primary effect of advancing religion. "The Court has made it abundantly clear . . . that not every law that confers an 'indirect,' 'remote,' or 'incidental,' benefit upon ╒religion╕ is, for that reason alone, constitutionally invalid." Lynch v. Donnelly, 465 U.S. 668 at 683 quoting Committee for Public Education and Religious Liberty v. Nyquist, 413 U.S. 756, 771 (1973). See, e.g., Libin v. Town of Greenwich, 625 F.Supp at 399. Any benefit to religion as a result of this historical cross would be incidental and not violative of the Constitution.

The last prong of this test is whether the governmental action fosters an excessive entanglement by government with religion. While the U.S. Supreme Court in Lynch v. Donnelly, 465 U.S. 668 (1984) has limited this inquiry to cases involving subsidies to church sponsored schools, colleges or other religious institutions, a brief examination would be appropriate here. The City did not erect the cross, expends minimal funding on the maintenance of the cross and is not involved in the ongoing sponsorship of the cross in any way. The Mt. Soledad cross meets all three prongs of the Lemon test and is not therefore violative of the first amendment. As the Oregon Supreme Court held in a similar situation in Eugene Sand & Gravel v. City of Eugene, 276 Or. 1007 (1977) at 1022, "the display of this cross in a city park as a war memorial under these circumstances does not have a 'primary effect' which either 'advances' or 'inhibits' religion."

B. Presidio Park Cross.

The same three-pronged test is required when examining the Presidio Park cross. Obviously this cross has a predominant secular purpose; that is, to commemorate the historical beginnings of the City of San Diego. The original cross was erected in 1769, the current cross in 1913, and it continues to remain as a memorial to the man and the people who were instrumental in the birth of San Diego as a city. It cannot be denied that a Catholic priest originally erected a cross and that a cross remains as the memorial. Nor can it be denied that San Diego is named after a saint of the Catholic Church, as is San Francisco and a multitude of cities throughout the country. The same argument is as compelling here as above: "The Supreme Court is reluctant to attribute unconstitutional motive when a plausible secular purpose can be discerned." Jewish War Veterans of U.S. v. U.S., 695 F.Supp at 12.

The next prong is the question of primary effect of advancing or inhibiting religion. The original settlement where the cross was first erected, as well as the City itself, was founded by religious people. One cannot memorialize such people without including the artifacts they themselves utilized. The cross in Presidio was in place long before the City dedicated the property as park land, or even acquired the land itself. The primary effect here is to commemorate the beginnings of San Diego, not to promote or inhibit any religion.

The last prong of the test is that of excessive governmental entanglement. There is little, if any, public funding expended for the cross itself. The cross is but a small part of the park which is publicly maintained, and the cross itself requires very little upkeep. This is not analogous at all to cases where governments were required to monitor expenditures for schools, etc., to ascertain that public money was not spent to promote religion. Public money at Presidio Park is spent mainly to maintain a public and very historical park in San Diego.

SUMMARY

As the U.S. Supreme Court held in Zorach v. Clauson, 343 U.S. 306, 313 (1952), "┌wσe are a religious people whose institutions presuppose a Supreme Being." The fact that in the past, crosses were utilized to commemorate war dead and were erected at the establishment of a new settlement is an inescapable part of this nation's as well as this city's history. The preservation of these monuments is not evidence of a present-day government

endorsement of one religion over another. The City dedicated both these parks after, and in Presidio Park, long after, the

crosses were funded and erected by private citizens. These cases can be clearly distinguished from the federal cases cited above where the crosses were either displayed on government offices or buildings instead of in public parks, were erected with public funds, or adopted the identification of war memorials after the objections of certain parties or individuals. Because some federal courts have not allowed crosses to remain in previous, distinguishable cases, does not mean that a local court would have to follow those rulings. "While decisions of lower and intermediate federal courts are entitled to great weight, they are merely persuasive and not binding on state courts." Okrand v. City of Los Angeles, 207 Cal.App.3d 566 (1989), where the court permitted display of a menorah in the City Hall of Los Angeles, and did not find a violation of the Lemon test partly based on the historical significance of the menorah. The California Courts have also recently upheld religious structures in a city park where the structures were in place at the time the land was dedicated as a park. Hewitt v. Joyner, F.Supp. , 1989 WL 9074 (C.D. Cal.) "It has never been thought either possible or desirable to enforce a regime of total separation . . . nor does the Constitution require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance of all religions and forbids hostility toward any." Okrand, 207 Cal.App.3d at 572.

Respectfully submitted,
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cc Mary Ann Oberle
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