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MEMORANDUM OF LAW

DATE: February 24, 2005

TO: Mayor Dick Murphy

FROM: City Attorney

SUBJECT: Donation of the Mt. Soledad Memorial Property to the Federal National Park System

INTRODUCTION

By memorandum dated December 3, 2004, the Mayor requested our advice regarding federal legislation recently enacted authorizing the federal government to accept a transfer of the property atop Mt. Soledad, including the existing cross and war memorial, to the National Park System for preservation as a national memorial honoring veterans of the United States Armed Forces. This Memorandum identifies and addresses the legal issues implicated by such a transfer.

QUESTIONS PRESENTED

1. Does the City have the legal authority to transfer the Memorial Property as dedicated park land to the federal government?
2. Would the transfer of the Memorial Property to the federal government for the purpose of preserving the cross violate the California Constitution?
3. If the Memorial Property is transferred, would the presence of the cross on federal land violate the United States Constitution?

SHORT ANSWERS

1. Yes, the City has the legal authority to transfer the Memorial Property, but it does not presently have the ability to make such a transfer because the City does not hold clear title to the property. Based on the Ninth Circuit Court of Appeal's ruling, the District Court has declared the second sale void, but has not re-vested title in the City. Should the City regain title to the Memorial Property, the City could, consistent with Charter section 55, transfer the property into the National

Park System for its continued use as parkland, upon a resolution of the City Council.

2. Yes, the Ninth Circuit Court of Appeal has held that the Mount Soledad cross is a sectarian symbol that conveys a religious message and has stated that governmental action that works to preserve the cross violates article XVI, section 5 (the no aid to religion clause) of the California Constitution.
3. Yes, based on existing case law, the presence of the cross on federal property would likely be held to be unconstitutional.

BACKGROUND

On June 26, 2002, an *en banc* panel of the Ninth Circuit Court of Appeals ruled that the City of San Diego's second sale of public land surrounding the Mt. Soledad cross "violated Article XVI, Section 5 of the California Constitution" because the manner of the sale provided financial benefit to parties who intended to maintain the cross on the property as opposed to those who would remove it. *Paulson v. City of San Diego*, 294 F.3d 1124, 1132 (9th Cir. 2002). In its ruling, the Ninth Circuit observed "there are several possible ways to cure [the] violation" and left it to the parties and the United States District Court to devise "a remedy for the constitutional violation." *Id.* at 1134; City Att'y Rep. No. RC-2004-16 (June 28, 2004).

In the City Attorney Report analyzing the *Paulson* decision, this Office recommended as a remedy to the constitutional violation that the City lease the footprint of the existing Mt. Soledad War Memorial and conduct a third sale of one-half acre of land atop Mt. Soledad [the Memorial Property] subject to the lease. City Att'y Rep. No. RC-2004-16, pp. 6-8. The lease would not include any rights to the cross but would preserve the substantial improvements that had been made to the Memorial by the Mt. Soledad Memorial Association [the Memorial Association] and its contributors. *Id.* This Office recommended that the sale be authorized by the electorate through the passage of a new proposition that does not seek to preserve the cross but only to sell the land through an open and neutral process. *Id.*

On July 27, 2004, the City Council adopted an ordinance authorizing the placement on the November ballot of a new proposition, Proposition K, as recommended. Additionally, among other items, the Council's action provided that should the voters reject Proposition K, the City would enter into the settlement agreement proffered by Memorial Association and the Plaintiffs in the *Paulson* litigation, calling for the removal of the cross from the Memorial Property. Proposition K failed.

Subsequently, after the November 2nd election, on November 20, 2004, the United States Congress adopted Bill No. 4818 [the Bill], 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. Section 116 of the Bill states that the

Memorial “consists 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.” Section 116 incorporates the same legal description as that for the Memorial Property. The Bill provides that upon donation of the Memorial from the City to the United States, the Secretary of the Interior shall accept all right, title and interest to the Memorial and that the Secretary shall enter into a memorandum of understanding with the Mt. Soledad Memorial Association [the Memorial Association] for the continued maintenance of the cross and surrounding memorial walls and plaques.

DISCUSSION

I. Does the City Have the Legal Authority to Transfer Title to the Federal Government?

A. Current Title to the Memorial Property.

The City does not currently hold clear title to the Memorial Property. In 1998, the Association took title to the Memorial Property as the high bidder in the second sale. It is this sale that the Ninth Circuit Court of Appeals found unconstitutional.

The second sale of the Mt. Soledad land on which the cross stands was structured to provide a direct, immediate, and substantial financial advantage to bidders who had the sectarian purpose of preserving the cross. For that reason, the sale violated article XVI, section 5, of the California Constitution.

Paulson, 294 F.3d at 1132. The Ninth Circuit remanded the case to the District Court for the District Court and the parties “to devise a remedy for the constitutional violation.” *Id.* at 1134.

The District Court declared the second sale void *ab initio*, but did not vest title to the Memorial Property back in the City. Instead, the Court further ordered that the parties “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.”¹ To date, no briefing schedule has been set by the District Court. Further, both the plaintiff Phillip Paulson and the Memorial Association have filed Notices of Appeal from the District Court’s decision voiding the second sale of the Memorial Property. Accordingly, at this time the City does not have clear title to the Memorial Property. Without clear title to the Memorial Property, the City cannot

¹As discussed in the City Attorney’s Report, since the sale of the Memorial Property in 1998, the Memorial Association has expended over \$900,000 improving the site with extensive landscaping and walls of granite plaques engraved with the names and photographs of veterans of various wars, and have equitable rights based on those expenditures. City Att’y Rep. No. RC-2004-16 at pp. 2, 4.

effectuate a land transfer.

B. Legal Authority for Sale of the Property

Assuming that the City of San Diego regains clear title to the Memorial Property in the course of the District Court proceedings, the next question is whether the City has the legal authority to transfer the property to the federal government. The City, as a municipal corporation, generally has the power to “sell, lease, convey, exchange, manage and dispose of” its property. San Diego Charter § 1. Specific restrictions apply to the City’s ability to transfer parkland (Charter § 55), pueblo lands (Charter § 219), and property of 80 or more contiguous acres (Charter § 221).

Soledad Natural Park, which includes the Memorial Property, is dedicated parkland. Charter section 55 provides that dedicated parkland “shall not be used for any but park, recreation or cemetery purposes without such changed use or purpose having been first authorized or later ratified by a vote of two-thirds of the qualified electors of the City voting at an election for such purpose.” In an effort to comply with Charter section 55, the City has twice sought the approval of the electorate for the sale of the Memorial Property.

1. Authorization for a Sale Under Propositions F and K.

In 1992, City of San Diego voters passed Proposition F, which provided:

Shall the removal from dedicated park status of that portion of Mt. Soledad Natural Park necessary to maintain the property as an historic war memorial, and the transfer of the same parcel by The City of San Diego to a private non-profit corporation for not less than fair market value be ratified?

Although the specific language of Proposition F did not mention the cross or preservation of the cross, in finding against the City in *Paulson*, the Ninth Circuit considered the broader purpose of Proposition F, as stated by its proponents:

They explained that the purpose of Proposition F was to authorize the transfer of the land under the Mt. Soledad cross to the Association in order to “SAVE THE CROSS.” The argument described the cross as a “historic landmark and a dedicated war memorial,” and they urged a “YES” vote on the measure to “SAVE THE MOUNT SOLEDAD CROSS. SAVE OUR HISTORY.”

Paulson, 294 F.3d at 1126. In its opinion, the Ninth Circuit cited this sectarian purpose of preserving the cross in its analysis of the constitutionality of the sale and in reaching its ultimate conclusion that the second sale was unconstitutional. 294 F.3d at 1131-1132, 1134.

Accordingly, in November 2004, the City of San Diego submitted Proposition K to the voters seeking new authority to sell the Memorial Property. Proposition K provided:

Shall the City be authorized to remove from dedicated park status and sell to the highest bidder a portion of Mount Soledad Natural Park, subject to a lease to the Mount Soledad Memorial Association to preserve and maintain the existing granite walls and plaques, and to transfer ownership of the cross to the new buyer who will determine whether to maintain, relocate, or remove the cross or to replace it with another appropriate monument?

Proposition K failed.

More importantly, neither the language of Propositions F or K would serve the City in a transfer of the Memorial Property to the federal government. Proposition F only authorized the sale of the Memorial Property “to a private non-profit corporation for not less than fair market value.” Whereas in both previous sale attempts, the Memorial Property was to be sold to a private non-profit organization for fair market value, the Bill contemplates a transfer to the United States as a donation.

2. Compliance with Charter Section 55.

Although Propositions F and K were submitted to the electorate in an effort to comply with section 55 of the City’s Charter, the relevant language of that section applies to any change in use of parkland, not strictly to a transfer or sale of parkland. If the park use will be preserved as part of the land transfer, and the use of the land will not be changed, then a vote of the electorate is not required. 1981 Op. City Att’y 16, 18.

The transfer contemplated by the Bill enacted by Congress provides for the Memorial Property to become part of the National Park System and retain its current use as a war memorial. Monuments and memorials have long been recognized as park uses. 1986 City Att’y MOL 561, 562, *citing In re Central Parkway, City of Schenectady*, 251 N.Y.S. 577, 580 (1931). Accordingly, a strict reading of Charter Section 55 allows the City to transfer the Memorial Property to the federal government for its continued use as a war memorial without a two-thirds vote of the people.

3. Compliance with the Municipal Code.

San Diego Municipal Code section 22.0907 authorizes the direct sale of City property to another public entity “whenever the Council shall find that lands belonging to the City are

required for public purposes” and provided “that the sale shall be at such price and upon such terms as the Council shall deem to be fair and equitable and in the public interest.” Accordingly, a proposed transfer of the Memorial Property would require the adoption of a resolution by the City Council setting forth the purpose and terms of the transaction, and the Council’s finding that the transaction is fair, equitable, and in the public interest.

A donative transfer as contemplated by the Bill would not be viewed as a gift of public funds, because the property would be transferred to a public entity to be used for a public purpose. *County of Alameda v. Janssen*, 16 Cal. 2d 276, 281 (1940). “[I]t is well settled that, in determining whether an appropriation of public funds or property is to be considered a gift, the primary question is whether the funds are to be used for a ‘public’ or a ‘private’ purpose.” *Id.* If the funds are for a public purpose, they are not a gift within the meaning of section 31 of article IV of the California Constitution. *Id.*

II. Would Transfer of the Memorial Property to the Federal Government for the Purpose of Preserving the Cross Violate the California Constitution?

In its *en banc* opinion, the Ninth Circuit focused its analysis on the “No Aid to Religion” Clause of the California Constitution, article XVI, section 5. Citing the breadth of the prohibition against government aid to religion, the Court stated:

It is possible for the government’s transfer of “anything” to violate the provision if the transfer is “in aid of” any “sectarian purpose.” Therefore, all forms of governmental “aid” are subject to scrutiny.

Drawing from its opinion earlier in the history of the matter (*Murphy v. Bilbray*, 782 F.Supp. 1420, 1438 (S.D. Cal. 1991), *aff’d sub nom. Ellis v. City of La Mesa*, 990 F.2d 1518 (9th Cir. 1993)), the Court identified preservation of the Mt. Soledad cross as a sectarian purpose.

In view of our holding in *Ellis* that the Mt. Soledad cross is a sectarian symbol that conveys a religious message, governmental conduct that operates affirmatively to preserve the cross aids a sectarian purpose: the preservation of a symbol that conveys a specifically Christian message.

Paulson, 294 F.3d at 1132. In doing so, the Court left only one question to be resolved in its analysis: whether, through its structure of the sale, the City aided the sectarian purpose of preserving the cross. *Id.*

The transfer of the Memorial Property to the federal government poses the same question: would the City, in transferring the Memorial Property pursuant to the Bill, directly, immediately, and substantially aid the sectarian purpose of preserving the cross? Like Proposition F, the Bill seeks to preserve the cross. The Bill specifically identifies the cross and provides for its continued maintenance and preservation. Transferring the Memorial Property to

the federal government as provided in the Bill, even if done by the City for a secular purpose such as defraying maintenance costs, could arguably be viewed as directly, immediately, and substantially aiding in the preservation of the cross by allowing the federal government to pursue that purpose. As the Ninth Circuit Court has determined that preservation of the cross is a sectarian purpose, the City's action substantially in aid of that purpose, would violate the California Constitution.

III. The Presence of the Cross on the Memorial Property, Even if Transferred to the United States, Will Likely Violate the United States Constitution.

If the Memorial Property were transferred to the National Park System, based on existing case law, the presence of the cross on federal property would probably not survive scrutiny under the United States Constitution. *See, e.g., Buono v. Norton*, 371 F.3d 543 (9th Cir. 2004). In *Buono*, the Ninth Circuit Court of Appeal held that a Latin cross located on federally-owned land in the Mojave National Preserve and managed by the National Park Service violated the Establishment Clause.

However, although the *Buono* case follows a long line of similar cases and holdings, there is new uncertainty as to whether the law will remain the same or vastly change directions. Two "Ten Commandments" cases (*ACLU v. McCreary County*, 354 F.3d 438 (6th Cir. 2003), *cert. granted* 125 S. Ct. 310 (2004), and *Van Orden v. Perry*, 351 F.3d 173 (5th Cir. 2003), *cert. granted* 160 S. Ct. 346 (2004)), are currently set for argument on March 2, 2005, before the United States Supreme Court. While the Court in *Buono* considered both the effects prong of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), and the endorsement test from Justice O'Connor's concurrence in *Lynch v. Donnelly*, 465 U.S. 668, 687 (1984) (as did many of the other holdings), the *McCreary* case questions whether the *Lemon* test should be overruled. Such a ruling may allow cases such as the City's transfer to be viewed in a different manner and conceivably pass constitutional review.

RECOMMENDATION

It is the opinion of the City Attorney that the proposed donation of the Memorial Property to the federal government as contemplated by section 116 of Bill No. 4818 would, based on the Ninth Circuit's ruling, be for a religious purpose and as such would be unconstitutional. The legislation adopted by Congress specifically identifies the cross as part of the Memorial, and seeks to preserve it through a maintenance agreement with the Memorial Association. It was this same purpose and intent that caused the Ninth Circuit in *Paulson* to fault the City's efforts for the sale of the Memorial Property under Proposition F.

Further, based on current case law, such a transaction would also violate the federal constitution and, in all likelihood, provide fodder for additional legal proceedings against the City. If the plaintiffs prevailed in those proceedings and recovered attorney's fees, the proposed donation would conclude as a futile and very costly endeavor.

To stop the continued expenditure of City funds on this matter, the City Attorney recommends that the City Council follow through on its July 27, 2004, action and immediately enter into the proposed settlement agreement with the Memorial Association and the *Paulson* plaintiffs to remove the cross from the Memorial Property.

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