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10 UNITED STATES DISTRICT COURT  
11 FOR THE CENTRAL DISTRICT OF CALIFORNIA  
12

13 THE LEAGUE OF RESIDENTIAL  
NEIGHBORHOOD ADVOCATES,  
14 etc., et al.,

15 Plaintiffs,

16 vs.

17 THE CITY OF LOS ANGELES, et al.,

18 Defendants.  
19

CASE NO. 03-4890-CAS (Ex)

**PLAINTIFFS' FURTHER  
MEMORANDUM, PURSUANT TO  
THE COURT'S ORDER OF  
MARCH 29, 2004, IN OPPOSITION  
TO MOTION TO DISMISS THE  
FIRST AMENDED COMPLAINT  
BROUGHT BY DEFENDANTS  
CITY OF LOS ANGELES, JAMES  
HAHN AND ROCKARD  
DELGADILLO**

**Hearing Date: March 29, 2004  
Time: 10:00 am  
Ctroom: 5  
Honorable: Christina Snyder**

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1 In *Commonwealth v. Bowie*, 243 F.3d 1109 (9th Cir. 2001), the Court  
2 eloquently observed,

3 The authentic majesty in our Constitution derives in large measure from the  
4 rule of law--principle and process instead of person. Conceived in the shadow  
5 of an abusive and unanswerable tyrant who rejected all authority save his  
6 own, our ancestors wisely birthed a government not of leaders, but of servants  
7 of the law.

6 243 F.3d at 1124.

7 The City's ordinances (*LAMC* §§12.08 and 12.24) and *Government Code*  
8 (§§65033, 65090, 65091, 65094, 65804, 65854 and 65905) speak directly to the  
9 question of when a landowner may use property inconsistently within a relevant  
10 zone, and require (1) the landowner to apply for a conditional use permit, (2) the  
11 City to provide mandated procedures to include the neighboring landowners in the  
12 process, and (3) the City to employ neutral principles of law in determining whether  
13 the nonconforming use may be imposed in the zoned district. Before this case, (1)  
14 the Congregation filed a request for a nonconforming use, typically called a  
15 conditional use permit, (2) the City followed its mandatory procedures, and (3) the  
16 City applied its neutral principles of *law to conclude that the Congregation could*  
17 *not satisfy the city's requirements and therefore could not use its property*  
18 *inconsistently with the neighborhood* (FAC ¶11-14).

19 In entering into the Settlement Agreement, the City skirted its plain law, and  
20 arbitrarily and unilaterally granted the Congregation permission to use its property  
21 inconsistently with the R-1 zone where it is located. In exchange, the Congregation  
22 dismissed its lawsuit against the City. The question in this case is whether a City  
23 may use the cover of a Settlement Agreement to ignore the plain law governing its  
24 actions, to grant special favors to landowners who do not satisfy the City's law, and  
25 to grant special treatment to a landowner simply because it is religious. Plaintiffs  
26 claim that such arbitrary action violates the Constitutional guarantees of due  
27 process, equal protection, and the separation of church and state, as well as City and  
28 California law.

1 The Settlement Agreement grants the Congregation the right to use 303 N.  
2 Highland in Hancock Park (R1 zoned property) as a synagogue, a use inconsistent  
3 within the R-1 zone (FAC ¶4, 6, 11-27). Nevertheless, the Hon. Harry Hupp  
4 concluded the Settlement Agreement is valid, characterizing the use permission it  
5 grants as a "contractual" right rather than use permission as it is defined under the  
6 City's ordinances and state law. Judge Hupp concluded that the Settlement  
7 Agreement's grant of use permission is not a CUP, and therefore need not comply  
8 with any statutory requirements, in part, because it does not "run with the land."

9 The reasoning underlying Judge Hupp's decision appears to be that a City has  
10 carte blanche authority to enter into contracts with private parties, regardless of the  
11 statutory and constitutional rights of third parties. He identified the Settlement  
12 Agreement as a contract, because it only gives permission for inconsistent use  
13 within the neighborhood to the City's fellow contract partner, the Congregation. It  
14 is respectfully submitted that a Constitutional violation is still a violation, whether it  
15 lasts for the life of the one gaining the unconstitutional benefit or for eternity. A  
16 violation also exists even if a private party is willing to take advantage of the  
17 government's willingness to ignore and violate governing law.

18 No government in the United States can ever operate with impunity outside  
19 the bounds of the law, whether it is statutory or constitutional. *See, e.g., Alderman*  
20 *v. United States*, 394 U.S. 165, 202 ("It is a fundamental principal of our  
21 constitutional scheme that government, like the individual, is bound by the law")  
22 (Justice Fortas concurring and dissenting). By calling what the City did in this case  
23 a "contract," which entails avoidance of all statutory requirements, the Court opened  
24 the door for cities to bargain away whatever rights they wish, as long as their  
25 agreement is with a private party. For example, under this contract-as-immunity  
26 theory, a city could enter into an agreement with a private contractor to agree to  
27 exclude all minorities from city business.

28 The argument that the Settlement Agreement's use permission is not a CUP

1 because it does not "run with the land" was first raised by the Congregation at page  
2 2 of its reply brief in support of its Rule 12(b)(6) motion to dismiss. The  
3 Congregation's argument on this point was based on its assertion that the rights  
4 granted to the Congregation are personal and can not be transferred (presumably  
5 referring to Sec. VII of the Settlement Agreement - Ex. "A", p. 28, lines 14-16).

6 Plaintiffs submit that the "run with the land" argument is misplaced –  
7 eliminating the permission granted from running with the land does not immunize  
8 such permission from the requirements of the City's ordinances, state law or the US  
9 and California Constitutions.

10 **A. The Non-Transfer Provision Of The Settlement Agreement Is Invalid:**

11 Plaintiffs respectfully suggest that the non-transfer provision of the Settlement  
12 Agreement is simply part and parcel of the City's arbitrary and unilateral dismissal  
13 of governing law in favor of a private party. The Agreement is ultra vires and  
14 unconstitutional, whether or not it grants the illegal special privilege for a limited  
15 time or eternity. The City cannot act to grant land use permission divorced from  
16 City law, even if it only intends to benefit a single landowner, rather than all  
17 subsequent landowners. The non-transfer provision of the Settlement Agreement  
18 does not transform the fact the City has approved a use permission that is  
19 inconsistent with the R-1 zone, and therefore at odds with the City's mandatory use  
20 permission laws and procedures. Had the Congregation been able to prove it had a  
21 right to a conditional use permit, the CUP would have run with the land. When the  
22 City granted the right to use the property inconsistently with its R-1 zone, it  
23 rendered a land use determination. Even if it coupled that use permission with a  
24 caveat that the use was limited to the Congregation, that caveat could not alter the  
25 fact that *the City still rendered a land use determination*. The same law that  
26 mandates procedures for obtaining such use still stands behind the determination,  
27 even if it does not run with the land. The City lacks the power to render ad hoc  
28 non-statutory land use determinations any way it sees fit, and the non-transferability

1 provision does no more than prove the arbitrary nature of the City's decision. The  
2 non-transferability provision is itself void. *Soundheim v. City of San Dimas*, (1996)  
3 47 Cal.App.4th 1181, 1187 (condition specifically relating to an individual is  
4 invalid); *Anza Parking Corp. v. City of Burlingame*, (1987) 195 Cal.App.3d 855,  
5 860.

6 Whether or not it "runs with the land", the use permission granted by the City  
7 fits the classic definition of a use permit. As held by the California Supreme Court  
8 in *Sports Arenas Properties, Inc. v. City of San Diego*, (1985) 40 Cal.3d 808, 814,

9 . . . a zoning ordinance permits certain uses for an area but provides that other  
10 uses may be permitted after consideration by a governmental agency as to  
11 whether the proposed other use will be in the best interests of public  
12 convenience and necessity and not contrary to the public welfare [citations].  
13 *A conditional use permit, unlike a nonconforming use, allows a use permitted*  
14 *rather than proscribed by the zoning regulations, but because of the*  
15 *possibility that the permitted use could be incompatible in some respects*  
16 *with the applicable zoning, a special permit is required.* When a conditional  
17 use permit is obtained, the permittee may make those uses of the property  
18 authorized by the zoning ordinance in the absence of a permit and in  
19 addition those uses authorized by the permit . . . (emphasis added).

20 Pursuant to *LAMC* §§12.08 and 12.24 – uses that are inconsistent within a  
21 zoned district can only be granted, in the words of *Sports Arenas Properties*, ". . .  
22 after consideration by a governmental agency as to whether the proposed other use  
23 will be in the best interest of public convenience and necessity." *LAMC* §12.24D, E.  
24 In other words, the City's land use law does not contemplate an exception whereby  
25 the City can avoid its land use procedure in order to benefit itself or a private party.

26 **B. The City's Position Eviscerates The Community's Constitutional Due**  
27 **Process Rights and California's Comprehensive Zoning Laws:**

28 The City argues that the insertion of a non-transferability clause into a  
contract that unilaterally provides use permission that is inconsistent with the zoned  
district is an escape hatch from all of the constitutional and statutory safeguards  
afforded citizens under the zoning laws. The City thereby concedes that in the

1 absence of the transferability provision, the Settlement Agreement would have been  
2 a de facto CUP (and therefore in plain violation of city, state, and federal law). The  
3 argument elevates form over substance: as long as the City limits the duration of its  
4 illegal action, that action thereby becomes legal. The City can not engage in such  
5 ad-hoc repeals of its own ordinances and it certainly has no power to repeal statutory  
6 law or the Constitution—whether the beneficiary of the repeal receives a temporary  
7 or a permanent benefit. The cases could not be clearer on this point. *See, e.g.,*  
8 *Alpha Beta, etc. v. Retail Clerks, etc.*, (1955) 45 Cal.2d 764, 771 (gov't regulations  
9 cannot be varied, evaded by private contract); *Bright v. Bechtel Petroleum, Inc.*, 780  
10 F.2d 766, 772 n. 7 (9th Cir. 1986); *See Young v. City of Simi Valley*, 216 F.3d 807,  
11 815-16 (9th Cir. 2000) (a local government's power over land use must be exercised  
12 within constitutional limitations).

13 The City can not circumvent the zoning laws by the simple expedient of a use  
14 permission contract with a non-transferability provision, thereby attempting to  
15 construct an argument that such a permit is not a CUP because it does not "run with  
16 the land". As stated in *Penn-Co v. Board of Supervisors*, (1984) 158 Cal.App.3d  
17 1072,

18 There is a clear policy in this state to involve the public and affected  
19 property owners at every level of the process when land use decisions are  
20 being made. The Legislature has declared that "California's land is an  
21 exhaustible resource, not just a commodity, and is essential to the economy,  
22 environment and general well-being of the People of California." [citation].  
23 And further, "[t]he Legislature recognizes the importance of public  
24 participation at every level of the planning process. It is therefore the policy  
of the state and the intent of the Legislature that each state, regional, and local  
agency concerned in the planning process involve the public through public  
hearings, informative meetings, publicity and other means available to them,  
and that at such hearings and other public forums, the public be afforded the  
opportunity to respond to clearly defined alternative objectives, policies, and  
actions.

25 158 Cal.App.3d at 1078. *Metzenbaum v. City of Carmel-by-the-Sea*, (1965) 234  
26 Cal.App.2d 62, 64 (use permits may be granted only as authorized by ordinance).

27 The City should not be rewarded and the community penalized for the City's  
28 improper attempt to contractually circumvent statutory and constitutional

1 requirements.

2       When the use, which is now permitted by the Settlement Agreement, was  
3 requested in accordance with statutory mandates, the City found such use is *not* in  
4 the community's interest and the Congregation was denied use permission (FAC  
5 ¶12, 14). That finding was upheld throughout all legal challenges by the  
6 Congregation. Now: (a) even though the Congregation's use is *still detrimental to*  
7 *the community (that finding has never changed)*; (b) even though the community  
8 was denied their constitutionally mandated right to notice and opportunity to be  
9 heard when the City Council was considering in closed session the use provisions  
10 which the Settlement Agreement now permits; (c) even though the City has never  
11 made the legally mandated findings required for use permission, the City stands  
12 before this Court and argues it has unlimited authority to grant use permission  
13 without regard to constitutional or statutory requirements as long as the use  
14 permission granted is contained in a contract and is non-transferable.

15       The City's position makes a shambles of the Constitutional due process rights  
16 of the community, California's statutory zoning scheme and the City's detailed and  
17 comprehensive zoning ordinances. It also reflects an astoundingly callous disregard  
18 for the City's obligation under its own statutes to consider the community's interest  
19 when considering non-conforming use permission rather than its own self-interest in  
20 settling litigation. *See, e.g., Wells Fargo Bank v. Town of Woodside*, (1983) 33  
21 Cal.3d 379, 386 (zoning reflects the public's interest in controlling development to  
22 protect health and safety); *See also Miller v. Board of Public Works*, (1925) 195 Cal.  
23 477 in which the Court recognized that residentially zoned districts exist for "the  
24 general welfare" and "the general welfare of a community is but the aggregate  
25 welfare of its constituent members." 195 Cal. at 492-93. The City had no authority  
26 to waive the benefits and protections of the zoning laws by the simple expedient of  
27 an attempted non-transferability clause. Zoning ordinances are public benefit laws  
28 *See, e.g., Consolidated Rock Prods. Co. v. City of Los Angeles*, (1962) 57 Cal.2d

1 515, 524 (primary purpose of comprehensive zoning is protection of the general  
2 public); *Strong v. County of Santa Cruz*, (1975) 15 Cal.3d 720, 727 (gov't may not  
3 waive the requirements of ordinance enacted for the public benefit); *Friedman v.*  
4 *Pacific Outdoor*, (1946) 74 Cal.App.2d 946, 953 (ordinance enacted for public good  
5 may not be contravened by contract).

6 **C. The City Cannot Contractually Avoid Its Own Ordinances:**

7 The City asserts that it can avoid the statutory framework and Constitutional  
8 mandates for issuance of CUPs by attempting to make the use permission non-  
9 transferable so that it does not run with the land. However, the use permission  
10 granted by the Settlement Agreement violates the City's own ordinances (as well as  
11 state and Constitutional law) and the City lacks the power to waive or consent to the  
12 violation of its zoning laws. *Hansen Bros. Enterp., Inc. v. Board of Supervisors*,  
13 (1996) 12 Cal.4th 533, 564; *See Mapp v. Ohio*, 367 U.S. 643, 659 (1961) ("Nothing  
14 can destroy a government more quickly than its failure to observe its own laws, or  
15 worse, its disregard of the charter of its own existence").

16 The property in question is zoned R1 (first amended complaint ¶6). *LAMC*  
17 §12.08 provides that in an R1 zone, "No building . . . shall be erected, structurally  
18 altered or maintained . . ." except for uses the ordinance then lists. Use as a  
19 synagogue is *not* a permitted use under §12.08. However, §12.08(6) does allow ". . .  
20 conditional uses enumerated in Section 12.24 *when the location is approved*  
21 *pursuant to the provisions of said section.*" (emphasis added).

22 Section 12.24 sets forth the procedures to obtain use permission for ". . . uses  
23 in zones when not permitted as of right" and it provides for "conditional use  
24 approvals" as specified Sections U, V and W of the ordinance. Section 12.24(W)(9)  
25 allows R1 zoned property to be used as a house of worship ". . . *if approved* by the  
26 Zoning Administrator as the initial decision maker or the Area Planning  
27 Commission as the appellate body" (emphasis added). *No such approval has ever*  
28 *been given by the City to the Congregation – in fact, such permission was denied*

1 (FAC ¶12). Neither §12.08 nor §12.24 except from their operation any use  
2 permission which is made non-transferable or specified not to run with the land. To  
3 the contrary, the City has enacted *LAMC* §11.02 which provides, in pertinent part,  
4 that,

5       Notwithstanding any other provisions of this Code or any other  
6       ordinance of the City of Los Angeles, *no permit . . . shall be issued in*  
7       *violation of any provisions of this Code or any other ordinance of the*  
8       *City of Los Angeles; if any permit . . . is issued in violation of any*  
9       *provision of this Code or any other ordinance of the City of Los*  
10       *Angeles the same shall be void.* (emphasis added).

11 Section 11.02 sets forth the City's intention that its zoning laws not be subject to any  
12 end run by any "permit" which is issued outside the procedures set forth in its  
13 ordinances. By §11.02 and by providing that "No building" can be used as a  
14 synagogue in an R1 zone except as permitted by §12.24, the City has provided the  
15 exclusive means by which such use permission can be granted. *See*  
16 *TrafficSchoolOnline, Inc. v. Clarke*, (2003) 112 Cal.App.4th 736, 741 (the word "no"  
17 means "no" when used in a statute - the only commonsense meaning of the word  
18 "no" is just that).

19       Section 12.08 thus permits an R1 zoned property to be used as a synagogue  
20 *only* if it has been approved pursuant to the procedures set forth in §12.24 – *which*  
21 *never happened*. Thus, the City has no power or authority to contractually allow the  
22 Congregation to use the 303 N. Highland property as a synagogue.

23       The City may assert that the generalized grant of authority to settle litigation  
24 found in Charter Sec. 273 somehow overrides the mandates of the City's zoning  
25 ordinances and the City's expression of the exclusive manner in which use  
26 permission can be granted in an R1 zone.<sup>1</sup> This argument must be rejected for each

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27       <sup>1</sup> Beyond arguing that this Court must follow the prior ruling of the Hon.  
28 Harry Hupp, the City has never publicly articulated any position regarding the  
validity of the Settlement Agreement or stated any reasoning to defend it.

1 of the following reasons:

2 1. the Charter is interpreted in the same manner as a statute. *See, e.g.,*  
3 *Castaneda v. Holcumb*, (1981) 114 Cal.App.3d 939, 942. It is an unreasonable and  
4 absurd construction of Sec. 273 to argue it allows use permission in direct violation  
5 of the City's own ordinances which provide an exclusive means of granting use  
6 permission and which detail the criteria for permission. Statutes should never be  
7 interpreted in a manner which renders them a nullity or superfluous. *See California*  
8 *Teacher Assn v. Governing Board*, (1997) 14 Cal.4th 627, 634. In addition, no  
9 contract can avoid the operation of a statute. *See, e.g., Alpha Beta, supra* (gov't  
10 regulations cannot be varied, evaded by private contract); *Bright v. Bechtel*  
11 *Petroleum, supra*.

12 2. If Charter Sec. 273 is read to exempt the City from all zoning laws, truly  
13 absurd and bizarre consequences follow. If the Settlement Agreement is upheld, the  
14 City by contract may simply exempt property from any zoning regulation, re-zone  
15 property on an ad hoc basis, or overrule or defy its own administrative decisions and  
16 findings – as happened here. Section 273 could never have been intended to lead to  
17 such absurd results or permit such mischief and it should not be so interpreted by  
18 this Court. As held in *California Mfrs. Assn v. Public Utilities Commn*, (1979) 24  
19 Cal.3d 836, statutory interpretations that "defy common sense, or lead to mischief or  
20 absurdity, are to be avoided." at 844. Under the City's argument, its own zoning  
21 laws and those mandated by the State (all designed to protect the City's citizens) can  
22 be ignored and overridden whenever and in whatever manner the City decides is in  
23 own best interest and as long as it is done by a contract.

24 3. Accepting the City's interpretation of Sec. 273 permits the City to avoid  
25 and thereby nullify the Constitutional and statutory protections which are mandated  
26 when a City grants use permission. Again, such a reading of the statute is absurd.  
27 *The City can not, by contract, grant itself the right to act unconstitutionally.*

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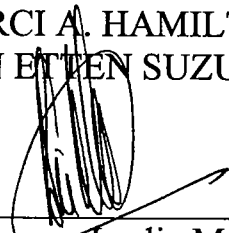
**D. Conclusion:**

The City does not and can not avoid the requirements of the US and California Constitutions, the mandates of the California Government Code, and the mandates of its own statutes (as cited in the opposition and herein) by the simple expedient of making the use permission non-transferable rather than permanent. The City lacks the power to grant land use permissions beyond the laws that plainly govern. The City's arbitrary and unilateral action of substituting a private contract for governing law, and thereby jettisoning the Constitutional and statutory rights of other citizens, is improper. The motion to dismiss should and must be denied.

Finally, even if this Court were to find that it is reasonable to conclude that the Settlement Agreement is valid because it is a contract and not a use permission, that is no justification for dismissal of the entirety of Plaintiffs' complaint. Plaintiffs have alleged that the Settlement Agreement violates state and federal constitutional law, including the equal protection and establishment clauses, by providing the Congregation special treatment. The City's actions--even when entering into a settlement agreement--are all subject to constitutional prohibitions. *See, e.g., Barenblatt v. U.S.*, 360 U.S. 109, 112 (1959) (all branches of gov't must exercise powers subject to the limitations placed by the Constitution on gov't action); *Katzberg v. Regents*, (2002) 29 Cal.4th 300, 306 (all branches of gov't are required to comply with Constitutional directives).

Respectfully submitted,

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By:   
\_\_\_\_\_  
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1 **PROOF OF SERVICE**

2 **STATE OF CALIFORNIA, COUNTY OF LOS ANGELES**

3 I am employed in the County of Los Angeles, State of California. I am over  
4 the age of eighteen years and not a party to the within action; my business address is  
1620 26th Street, Suite 6000 North, Santa Monica, California 90404.

5 On April 5, 2004, I served the following document(s) described as  
6 **PLAINTIFFS' FURTHER MEMORANDUM, PURSUANT TO THE**  
7 **COURT'S ORDER OF MARCH 29, 2004, IN OPPOSITION TO MOTION TO**  
8 **DISMISS THE FIRST AMENDED COMPLAINT BROUGHT BY**  
9 **DEFENDANTS CITY OF LOS ANGELES, JAMES HAHN AND ROCKARD**  
10 **DELGADILLO** on the interested parties in this action by placing true copies  
11 thereof enclosed in sealed envelopes addressed as follows:

12 **SEE ATTACHED LIST**

13  **BY MAIL:** I am "readily familiar" with the firm's practice of collection and  
14 processing correspondence for mailing with the United States Postal Service.  
15 Under that practice, it would be deposited with the United States Postal  
16 Service that same day in the ordinary course of business. Such envelope(s)  
17 were placed for collection and mailing with postage thereon fully prepaid at  
18 Santa Monica, California, on that same day following ordinary business  
19 practices. (C.C.P. § 1013 (a) and 1013a(3))

20  **BY FACSIMILE:** At approximately \_\_\_\_\_, I caused said document(s) to be  
21 transmitted by facsimile pursuant to Rule 2008 of the California Rules of  
22 Court. The telephone number of the sending facsimile machine was (310)  
23 315-8210. The name(s) and facsimile machine telephone number(s) of the  
24 person(s) served are set forth in the service list. The document was  
25 transmitted by facsimile transmission, and the sending facsimile machine  
26 properly issued a transmission report confirming that the transmission was  
27 complete and without error.

28  **BY OVERNIGHT DELIVERY:** I deposited such document(s) in a box or  
other facility regularly maintained by the overnight service carrier, or  
delivered such document(s) to a courier or driver authorized by the overnight  
service carrier to receive documents, in an envelope or package designated by  
the overnight service carrier with delivery fees paid or provided for,  
addressed to the person(s) served hereunder. (C.C.P. § 1013(d)(e))

**BY HAND DELIVERY:** I delivered such envelope(s) by hand to the office  
of the addressee(s). (C.C.P. § 1011(a)(b))

I declare under penalty of perjury under the laws of the United States 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 April 5, 2004, at Santa Monica, California.

\_\_\_\_\_  
MELANIE SAULO

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