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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' MEMORANDUM OF
POINTS AND AUTHORITIES IN
OPPOSITION TO MOTION
BROUGHT BY DEFENDANTS
CITY OF LOS ANGELES, JAMES
HAHN AND ROCKARD
DELGADILLO TO DISMISS
PLAINTIFFS' SECOND AMENDED
COMPLAINT**

Date: June 14, 2004

Time: 10:00 am

Ctroom: 5

Honorable: Christina Snyder

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1 **I. INTRODUCTION**

2 The second amended complaint ("SAC") challenges the validity of a
3 settlement agreement (SAC ¶18-19, Ex. "A") ("the Settlement Agreement") made
4 between the City of Los Angeles ("the City") and Congregation Etz Chaim ("the
5 Congregation").¹ The Settlement Agreement put to rest for the City litigation
6 commenced in this Court by the Congregation challenging the City's refusal to grant
7 a conditional use permit ("CUP") allowing a single family residence at 303 S.
8 Highland Avenue in Hancock Park ("the Highland Property") to be used as a
9 synagogue. The Settlement Agreement grants the Congregation use permission for
10 synagogue at the Highland Avenue property, even though that use was denied by the
11 City when applicable statutes were followed and even though the City found such
12 use would be detrimental to Plaintiffs' community (SAC 11-19). The Settlement
13 Agreement's use permission is unauthorized by the City's applicable zoning laws
14 which govern residential neighborhoods and violates the City's use ban set forth in
15 *Los Angeles Municipal Code ("LAMC")* §12.08. The Settlement Agreement was
16 also made in violation of the Plaintiffs' State and Federal constitutional rights and in
17 violation of California's governing zoning statutes.

18 The City here brings on a motion to dismiss pursuant to *Rule* 12(b)(6) based
19 on the doctrine of law of the case. The City argues that the Court is bound by Judge
20 Hupp's rulings dismissing the first amended complaint on motion of the
21 Congregation.

22 Plaintiffs submit that the doctrine of law of the case does not bar this Court
23 from deciding the issues here presented and denying the City's motion to dismiss.
24 As set forth herein, the law of the case doctrine is inapplicable because Judge Hupp
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27 ¹ The Settlement Agreement's validity is determined under California law.
28 *United Commercial, etc. v. Paymaster Corp.*, 962 F.2d 853, 856 (9th Cir. 1992).

1 never ruled on the issues presented by the SAC and argued herein.

2 **A. Background:**

3 In 1996, the Congregation made application to the City for a CUP to use the
4 R1 zoned Highland Property as a synagogue (SAC ¶6, 11). The Congregation's
5 application was denied at all levels of consideration – first by the Zoning
6 Administrator, then by the Board of Zoning Appeals, then by the City Council and
7 thereafter on review and appeal in the California courts (SAC ¶12-15). All claims
8 by the Congregation, attacking denial of the permission sought, were also rejected
9 by this Court. The only reason that the Congregation had a claim after losing its
10 administrative and legal challenges, was the federal government’s 2000 enactment
11 of the Religious Land Use and Institutionalized Persons Act, 42 U.S.C. §§2000cc et
12 seq. (RLUIPA). Shortly after passage, the Congregation amended its federal
13 complaint to include a claim under RLUIPA which provides privileges to
14 landowners based on their religious status, if the landowner bears the burden of
15 persuasion that land use laws “substantially burden” the landowner’s religious
16 exercise. *San Jose Christian College v. City of Morgan Hill*, 360 F.3d 1024 (9th
17 Cir. 2004). After that claim was asserted, the City entered into the Settlement
18 Agreement which granted to the Congregation the use permission which had been
19 properly denied by statute and affirmed after a legal challenge (SAC ¶16-18).

20 The Settlement Agreement's grant of this use permission: (a) violates the
21 City's governing ordinances; (b) was made without complying with Constitutionally
22 and statutorily required procedures, including mailed notice to adjacent property
23 owners and public hearings – which, as set forth herein, are applicable whether or
24 not the use permission requested and granted rises to the level of a CUP; and (c) was
25 made in direct contravention of the City's own findings that the Congregation's use
26 would be detrimental to the interest of the neighborhood where the individual
27 Plaintiffs reside (SAC 12-32).

28 The Settlement Agreement thus turns 180 degrees from the City’s proper

1 application of its generally applicable, neutral zoning laws. By the Settlement
2 Agreement, the City has given the Congregation a contractual use permit which
3 allows the Highland Property to be operated as a synagogue: (a) even though that
4 use is illegal under the City's own binding and applicable statute, *LAMC* §12.08; (b)
5 even though that use was granted without complying with the procedures mandated
6 by applicable law (SAC ¶¶22, 40-45); (c) even though the use was granted in
7 violation of Constitutional and statutory provisions – applicable regardless of
8 whether the permission granted can be characterized as a CUP – which mandate that
9 Plaintiffs be given notice and an opportunity to be heard and that statutorily required
10 findings be made which satisfy stated legal standards (SAC ¶¶22-30, and 40-44); and
11 (d) even though the use permission violates Plaintiffs' State and Federal
12 Constitutional rights of due process, equal protection and under the Establishment
13 Clause (SAC ¶¶54-67).

14 **II. PLAINTIFFS' CLAIMS ARE NOT BARRED BY THE DOCTRINE OF**
15 **LAW OF THE CASE**

16 The City, James Hahn and Rockard Delgadillo here move to dismiss on the
17 basis that, on December 22, 2003, the Hon. Harry Hupp granted a *Rule* 12(b)(6)
18 motion made by the Congregation finding, inter alia, that the Settlement Agreement
19 is valid ("Judge Hupp's Order"). In effect, Defendants assert that because Judge
20 Hupp dismissed the FAC as against the Congregation, this Court must reach the
21 same result on this motion.

22 Plaintiffs here argue that this Court is not bound by the doctrine of law of the
23 case for each of the following reasons:

- 24 1. the doctrine does not apply where, as here, the Court's prior decision did
25 not address or dispose of the arguments which are here asserted;
- 26 2. even in its most rigorous application, the doctrine is not mandatory or
27 jurisdictional; rather it is discretionary and does not require that this Court adhere to
28 a prior ruling which is now shown to be clearly erroneous.

1 **A. The Law of The Case Doctrine Does Not Apply To Preclude Issues**
2 **Not Decided by Judge Hupp - Judge Hupp Never Decided If the**
3 **Settlement Is Invalid If the Use Permission Granted Does Not Fit**
4 **The Legal Definition Of A CUP :**

5 Assuming its application, the doctrine of law of the case applies only to
6 matters that were decided explicitly or by necessary implication. *See, e.g., Liberty*
7 *Mutual Ins. v. EEOC*, 691 F.2d 438, 441 (9th Cir. 1982) (silence does not amount to
8 necessary implication). Necessary implication means that the determination (now
9 claimed to be law of the case) must have been necessary to the decision the court
10 actually rendered. *See Pitney Bowes, Inc. v. Hewlett-Packard Co.*, 141 F.Supp.2d
11 288, 299 (D. Conn. 2001).

12 The doctrine of law of the case does not apply to issues that were not decided
13 by Judge Hupp's Order. *See, e.g., United States v. State of Louisiana*, 669 F.2d 314,
14 315 (5th Cir. 1982); *Sprint Telephony PCS v. County of San Diego*, 2004 WL
15 718424 (S.D. Cal. 2004) (law of the case does not apply where the Court has not
16 considered the specific issue presented on motion for judgment on the pleadings
17 after motion to dismiss); *See Liberty Mut. Ins. Co. v. EEOC*, 691 F.2d 438, 441 (9th
18 Cir. 1982) (law of the case does not bar lower court from deciding issue not
19 determined by appellate court after remand).

20 In this instant case, Judge Hupp based his determination of the validity of the
21 Settlement Agreement on his conclusion that the "Settlement Agreement did not
22 create a CUP" and that Plaintiffs' assertion that the Settlement Agreement created a
23 de facto CUP underlay all of Plaintiffs' claims (Judge Hupp's Order, page 5, ¶3).
24 Thus concluded the Court, "Since the settlement agreement did not create a CUP
25 within the meaning of the zoning acts, all of the deficiencies alleged against it must
26 fail" (Judge Hupp's Order, page 7, end of the first paragraph).

27 Judge Hupp's Order does not determine or address whether the Settlement
28 Agreement is invalid even assuming the use permission granted fails to fit the legal

1 definition of a CUP. As set forth herein, the Settlement Agreement's grant of use
2 permission contravenes the law even if the permission it grants does fit the legal
3 definition of a CUP. This brief now turns to this question.²

4 **B. Even Assuming The Use Permission Granted Is Not A CUP, The**
5 **Settlement Agreement Grants Use Permission In Contravention Of**
6 **the City's Own Ordinances And It Is Therefore Invalid:**

7 The invalidity of the Settlement Agreement does not turn on whether the
8 Settlement Agreement's use permission fits within the legal definition of a CUP.
9 Even if the permission granted does not fit the definition of a CUP, the Settlement
10 Agreement is invalid because it grants the Congregation permission to use the
11 Highland Property as a synagogue in direct violation of *LAMC* §12.08 and
12 applicable provisions of California law. These statutory provisions are invoked
13 even assuming the use permission granted fails to fit within the legal definition of a
14 CUP (because it does not run with the land). Application of these statutes – and the
15 City's violation of these statutes by granting contractual use permission – is not
16 dependent on whether the permission granted "runs with the land". There is no
17 language in the applicable provisions of the Los Angeles Municipal Code or the
18 California Government Code which limits their application to use permission which

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21 ² Plaintiffs assert alternatively that the use permission granted is a de facto
22 CUP. As set forth in Plaintiffs' April 5, 2004 further memorandum, the non-
23 transferability provision contained in the Settlement Agreement is void under
24 California law. It is the non-transferability provision which was the basis for Judge
25 Hupp's conclusion that the use permission allowed by the Settlement Agreement is
26 not a CUP. Neither Judge Hupp nor this Court has ruled on Plaintiffs' argument that
27 the non-transferability provision is void and the use permission granted is, therefore,
28 a de facto CUP. However, even if this Court concludes the non-transferability
provision is not void, the Settlement Agreement still grants use permission in
violation of *LAMC* §12.08 and it is improper whether or not that permission fits
within any legal definition of a CUP.

1 "runs with the land" or to use permission which fits within a legal definition of a
2 CUP.³

3 Judge Hupp never reached the question of the zoning laws' application to use
4 permission which may not fit the definition of a CUP. Therefore, his prior
5 determinations are not law of the case on the questions here presented.

6 **1. The Use Permission Granted By The Settlement Agreement**
7 **Is Invalid Because It Allows Use In Violation of LAMC §12.08:**

8 LAMC §12.08 provides an exclusive list of uses permissible in an R1 zone.⁴
9 It provides, in pertinent part that, "No building, structure or land shall be used and
10 no building or structure shall be . . . altered . . . or maintained" except for uses as a
11 matter of right, which uses the ordinance then specifies. Use of a building or
12 structure as a synagogue in an R1 zone is **not** a use permitted by §12.08 as a matter
13 of right.

14 In addition to those uses allowed as a matter of right in an R1 zone, §12.08
15 also permits certain specific conditional uses.⁵ Thus, §12.08(A)(6) allows
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18 ³ In construing the cited California statutes and ordinances, the Court may not
19 insert qualifications or limitations which were not included by the enacting
20 legislatures. *See, e.g., Black v. Richfield Oil Corp.*, 146 F.2d 801, 804 (9th Cir
21 1945); *Ventura County Deputy Sheriffs Assn v. Board of Retirement*, (1997) 16
22 Cal.4th 483, 492.

21 ⁴ The City's ordinances have the same force and effect within the City as does
22 a statute within the State of California. *See, e.g., Monterey Club v. Superior Court*,
(1941) 48 Cal.App.2d 131, 147.

23 ⁵ The uses are conditional not because the ordinance requires that they run
24 with the land (there is no such requirement) but rather because, if the City approves
25 the requested use in accordance with its procedures, it may impose conditions
26 "which it deems necessary to protect the best interests of the surrounding property or
27 neighborhood, to ensure the development is compatible with the surrounding
28 properties or neighborhood, or to lessen or prevent any detrimental effect on the
surrounding property or neighborhood . . .". LAMC §12.24(F).

1 "Conditional uses enumerated in Section 12.24" which include the use of property
2 as a synagogue. *LAMC* §12.24(W)(9). However, §12.08 allows this specified use
3 under §12.24 only ". . . **when the location is approved pursuant to the provisions**
4 **of said section**" (emphasis added).

5 The uses specified under §12.24(W), including use as a synagogue, "may be
6 permitted . . . [**if approved by the Zoning Administrator as the initial decision-**
7 **maker or the Area Planning Commission as the appellate body**" (emphasis
8 added). The procedures for review of applications for use permission are set forth in
9 §12.24(B) through (Q). *LAMC* §12.24(D), in turn, requires that the City shall set a
10 public hearing on the application and give notice of the hearing by publication, by
11 mailing notices as specified, and by posting notice on the site.⁶ In addition, before
12 approving any R1 property for use as a synagogue, §12.24(D) provides that,

13 ". . . the decision-maker must find that the proposed location will be desirable
14 to the public welfare, is proper in relation to adjacent uses or the development
15 of the community, will not be materially detrimental to the character of
development in the immediate neighborhood, and will be in harmony with the
various elements of the General Plan."

16 *LAMC* §12.08 thus establishes a clear statutory scheme which regulates the
17 use of property located in an R1 zone. No building, structure or land can be used in
18 an R1 zone except as provided in the statute. A building, structure or land can be
19 used as synagogue **but only if it is approved in accordance with §12.24(D)** which
20 requires specific notice to neighbors and the neighborhood, a hearing and written

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22 ⁶ Section 12.24(D) has specific notice provisions which go beyond those
23 mandated by California law through *Gov't Code* §§65854 and 65901 and which are
24 expressly made applicable to charter cities such as Los Angeles by *Gov't Code*
25 §65804. The ordinance requires publication in a newspaper of general circulation
26 not less than 24 days before the hearing, the mailing of written not less than 24 days
27 before the hearing to property owners within 500 feet of the property, and the
28 posting of notice in a conspicuous place on the property at least 10 days prior to the
hearing. The provisions were violated when the Settlement Agreement was made
(SAC ¶22).

1 findings.

2 In the case before this Court, when these procedures were followed, the
3 Congregation's application was denied (SAC ¶12-14). In making the Settlement
4 Agreement, none of the procedures set for in §12.24 were followed and there were
5 no findings mandated by §12.24(D) (SAC 21-29 and 40-49).

6 By the Settlement Agreement, the City has granted the Congregation use
7 permission for a synagogue at the Highland Property in direct violation of the use
8 ban set forth in *LAMC* §12.08. The Settlement Agreement is an undisguised end run
9 around the statutory scheme created by the City to regulate land use in an R1 zone
10 and it sanctions a direct and continuing violation of §12.08. As such, the Settlement
11 is Agreement is invalid for each of the following reasons, none of which were
12 reached by Judge Hupp's Order – whether or not the use permission it allows is a
13 CUP:

14 1. Section 12.08 is unambiguous and unequivocal in its prohibition of non-
15 enumerated uses in an R1 zone. *See TrafficSchoolOnline, Inc. v. Clarke*, (2003) 112
16 Cal.App.4th 736, 741 (the word "no" means "no" when used in a statute - the only
17 commonsense meaning of the word "no" is just that). Section 12.08 is equally clear
18 that property can be used a synagogue in an R1 zone only if approved in accordance
19 with §12.24 – **something which has not happened** (SAC ¶21-26).

20 2. The only manner in which a synagogue can be approved for use in an R1
21 zone, and avoid the bar of §12.08, is by compliance with §12.24 – **something which**
22 **has not happened**. Whether the use permission which results from compliance
23 with §12.24 is or is not a CUP is irrelevant. What is critical is that synagogue use is
24 not permissible under §12.08 unless granted in accordance with §12.24 – **again,**
25 **something which has not happened** (SAC ¶21-26).

26 3. The invalidity of the Settlement Agreement does not turn on whether the
27 Settlement Agreement's use permission fits the definition of a CUP. The Settlement
28 Agreement is invalid because §12.08 bars use of the Highland Property as a

1 synagogue unless that use is approved in accordance with §12.24. No such
2 permission has been granted and the Congregation's use of the Highland Property as
3 a synagogue violates §12.08.

4 **C. LAMC §12.08 Cannot Be Circumvented By The Settlement**
5 **Agreement:**

6 Another issue never reached by Judge Hupp's Order is whether the City's
7 zoning ordinances can be circumvented by the Settlement Agreement. Judge Hupp
8 never reached this question because he determined the Settlement Agreement's use
9 permission is not a CUP and therefore the zoning laws are not invoked. As his
10 order states, "Since the settlement agreement does not create a CUP within the
11 meaning of the zoning acts, all of the deficiencies alleged against it must fail." For
12 the reasons now set forth, the Settlement Agreement cannot circumvent the bar of
13 §12.08 and the use permission it grants is void.

14 **1. The Use Permission Granted By The Contract is Void Under**
15 **LAMC §11.02:**

16 The City has statutorily limited the validity of its land use permits to those
17 that are granted pursuant to its ordinances. *LAMC* §11.02 provides, in pertinent
18 part, that,

19 Notwithstanding any other provisions of this Code or any other
20 ordinance of the City of Los Angeles, no permit . . . shall be issued in
21 violation of any provisions of this Code or any other ordinance of the
22 City of Los Angeles; if any permit . . . is issued in violation of any
23 provision of this Code or any other ordinance of the City of Los
24 Angeles **the same shall be void.** (emphasis added).

25 Section 11.02 is an explicit recognition by the City that Charter Sec. 273 will
26 not authorize land use permission granted under a litigation settlement agreement or
27 any other kind of contract – use permits must be granted in accordance with
28 ordinances or (as here) they are void.

It is without dispute that that Settlement Agreement grants the Congregation
the right to use the Highland Property as a synagogue. Thus, the Settlement

1 Agreement is, to this extent, a "permit" within the meaning of §11.02. Section
2 11.02 makes this "permit" (i.e., the written use permission granted) void.⁷

3 Judge Hupp never ruled on the applicability or effect of §11.02. Rather, he
4 determined that because no CUP was issued (because the use permission does not
5 run with the land), no zoning laws are applicable. As Plaintiffs here argue, the
6 zoning law are applicable even if the use permission granted by the Settlement
7 Agreement does not fit the definition of a CUP.

8 **2. The City's Ordinances Do Not Allow Use Permission To Be**
9 **Granted By Contract:**

10 The City and the Congregation went through the land use approval process
11 when the Congregation first sought to use the Highland Property as a synagogue.
12 (SAC 4, 11-14). Thus, the Congregation's request for permission to use the
13 Highland Property as a synagogue is a request for land use permission. There is
14 nothing in the City's statutory zoning scheme which even remotely suggests that
15 land use permission can be granted by contract and without application of its
16 ordinances. To the contrary, *LAMC* §11.02 is an explicit statement by the City that
17 land use permits can be granted only pursuant to ordinance.

18 California rules of statutory interpretation demand that courts avoid
19 construing statutes in a manner which results in unwise policy or which creates
20 mischief or absurdity. *See, e.g., S.D. Meyers, Inc. v. City and County of San*
21 *Francisco*, 336 F.3d 1174, 1179 (9th Cir. 2003). It is respectfully submitted that a
22 decision to recognize a city's power to contractually circumvent the requirements of

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24 ⁷ Although §11.02 does not define "permit", the words of an ordinance are to
25 be given their ordinary meaning. *See, e.g., People v. Talibdeen*, (2002) 27 Cal.4th
26 1151, 1554 (words in a statute are given their ordinary meaning); *Rodriguez v. Solis*,
27 (1991) 1 Cal.App.4th 495, 502 (the rules of construction for statutes are applicable
28 to ordinances). A "permit" is commonly defined as written permission (Plaintiffs'
Request for Judicial Notice, Exs. "A" and "B").

1 the zoning laws will eviscerate all zoning law (at least in the State of California).
2 Thus, by contract with a property owner, any city could place adult book stores or
3 liquor stores contiguous to schools, toxic chemical facilities in residential areas, or
4 place together any other utterly incompatible uses – all without recourse by the
5 affected residents under the theory that the government has the power to enter into
6 contracts. This result ignores the very premise of zoning laws which exist for the
7 public health, safety and welfare. As in this case, cities will have the power to
8 negotiate deals which serve their own self-interest and which sacrifice the interests
9 of citizens for whose benefit the zoning laws exist. This result turns the law of
10 zoning on its head – the City is not entitled to ignore the law intended for its
11 citizens' benefit simply because to do so is in its self-interest. Validating contracts
12 which circumvent and evade the law elevates contracts above the law and it
13 recognizes that city contracts are an exception to every law. Finally, such a decision
14 violates the following applicable settled rules of statutory construction and
15 governing case law:

16 1. The City is without authority to waive the requirements of the zoning laws.
17 *See Hansen Bros. Enterp., Inc. v. Board of Supervisors*, (1996) 12 Cal.4th 533, 564
18 (county without authority to waive the requirements of its zoning laws).
19 Nevertheless, by finding that the City can contractually allow the Highland Property
20 to be used as a synagogue – even though such use violates the prohibition set forth
21 in LAMC §12.08 – the Court is sanctioning a waiver of §12.08's statutory
22 prohibition on use of land as a synagogue except as permitted in accordance with
23 **LAMC §12.24, the requirements of which have not been met.**⁸

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26 ⁸ Of course, this Court is bound by the decisions of the California Supreme
27 Court on questions of California law. *See, e.g., Aydin Corp. v. Loral Corp.*, 718 F.3d
28 897, 904 (9th Cir. 1983).

1 2. The City has no authority to waive the requirements of any statute,
2 including §12.08, enacted for the public benefit. *Civil Code* §3513; *See, e.g., Strong*
3 *v. County of Santa Cruz*, (1975) 15 Cal.3d 720, 727 (gov't may not waive the
4 requirements of ordinance enacted for the public benefit); *Friedman v. Pacific*
5 *Outdoor*, (1946) 74 Cal.App.2d 946, 953 (ordinance enacted for public good may
6 not be contravened by contract). Of course, zoning laws **are** laws enacted for the
7 public's benefit. *See, e.g., Consolidated Rock Prods. Co. v. City of Los Angeles*,
8 (1962) 57 Cal.2d 515, 524 (primary purpose of comprehensive zoning is protection
9 of the general public); *Wells Fargo Bank v. Town of Woodside*, (1983) 33 Cal.3d
10 379, 386 (zoning regulations reflect the public's interest in controlling development
11 to protect health and safety); *Ehrlich v. City of Culver City*, (1996) 12 Cal.4th 854,
12 881 (the general purpose of zoning is regulate land to promote public welfare).
13 Nevertheless, by finding that the City can contractually allow the Highland Property
14 to be used as a synagogue – even though such use violates the prohibition set forth
15 in *LAMC* §12.08 – the Court is sanctioning a waiver of §12.08's statutory
16 prohibition on use of land as a synagogue except where allowed in accordance with
17 *LAMC* §12.24, **the requirements of which have not been met.**

18 3. *LAMC* §12.08 carves out specific exceptions – those that are approved in
19 accordance with the procedures set forth in §12.24. By expressly setting forth the
20 exclusions from the operation of §12.08, the ordinance bars judicial implication of
21 additional exceptions – such as an exception pursuant to contract. As held in
22 *Parmett v. Superior Court*, (1989) 212 Cal.App.3d 1261, 1266 ". . . the existence of
23 specific exceptions does not imply that others exist. The proper rule of statutory
24 construction is that the statement of limited exceptions excludes others, **and**
25 **therefore the judiciary has no power to add additional exceptions**; the
26 enumeration of specific exceptions precludes implying others." (emphasis added).

27 4. *LAMC* §12.08 carves out a specific method by which a synagogue's land
28 use application can overcome the use bar set forth in §12.08. That carve out is

1 permission granted under §12.24 "when approved pursuant to the provisions of said
2 section". By allowing synagogue use when approved pursuant to contract (as in this
3 case) rather than pursuant to statute, the Court sanctions the City's contractual
4 nullification or waiver of its own statutory scheme. No such result can be justified
5 even by reference to the City's general authority to settle litigation, found in Charter
6 Section 273, or its general authority to contract (LAMC §10.1) (Request for Judicial
7 Notice, Ex. "C"). Not only is this contrary to the California Supreme Court's
8 decisions in *Hansen Bros.* and *Strong v. County of Santa Cruz*, *supra*, it is also
9 contrary to the directives of the California Supreme Court, the Ninth Circuit and the
10 United States Supreme Court that statutory requirements cannot be evaded by
11 private agreement. *See, e.g., Alpha Beta, etc. v. Retail Clerks, etc.*, (1955) 45 Cal.2d
12 764, 771 (gov't regulations cannot be varied, evaded by private contract); *Bright v.*
13 *Bechtel Petroleum, Inc.*, 780 F.2d 766, 772 n. 7 (9th Cir. 1986); *See Connolly v.*
14 *Pension Benefit Guar. Corp.*, 475 U.S. 211, 224 (1986) (if a regulatory statute is
15 within Congress' power, the application of the statute cannot be defeated by private
16 contract).

17 Despite the requirements of the statutes and the controlling appellate authority
18 cited, Judge Hupp apparently determined that validating the Settlement Agreement
19 is justified because otherwise litigation such as that brought by the Congregation
20 could never be settled (Judge Hupp's Order, p. 6-7). Plaintiffs respectfully submit
21 that the settlement of litigation is not an end which justifies the violation of law or
22 the violation of the rights of third parties including Plaintiffs. No contract is above
23 the law and that includes a litigation settlement agreement. *See, e.g., Folsom v.*
24 *Butte County Assn. of Gov'ts*, (1982) 32 Cal.3d 668, 677 (settlement agreements are
25 governed by the same standards applicable to all contracts); *Adams v. Johns-*
26 *Manville Corp.*, 876 F.2d 702, 704 (9th Cir. 1989) (under California law, settlement
27 agreements are governed by general principles of contract law); *Timney v. Lin*,
28 (2003) 106 Cal.App.4th 1121, 1126-27 (an illegal forfeiture provision is not

1 validated because it is contained in a settlement agreement). Also, California law
2 disfavors settlements which, as here alleged, operate in derogation of the rights of
3 others. *Siciliano v. Fireman's Fund*, (1976) 62 Cal.App.3d 745, 758.⁹

4 5. The use permission granted by the Settlement Agreement exempts the
5 Congregation's continuing violation of the use ban set forth in *LAMC* §12.08 (SAC
6 ¶6).¹⁰ The Settlement Agreement thus clearly violates public policy and may not be
7 enforced. *See, e.g., In Re Marriage of Fell*, (1997) 55 Cal.App.4th 1058, 1065
8 (agreements whose object, directly or indirectly, is to exempt a party from a
9 violation of law is against public policy and may not be enforced (cited with
10 approval in *Armendariz v. Foundation Health, etc.*, (2000) 24 Cal.4th 83, 100)).

11 6. Section 12.08 contains an express exemption from its use prohibition for
12 synagogues **if** approved in accordance with §12.24. By allowing the Highland
13 Property to be used as a synagogue because of the Settlement Agreement, the Court
14 will be judicially re-writing §12.08 to include an exception based on a contract with
15 the City. Judicial amendments of statutes are improper. California law forbids
16 courts from creating exceptions which are not contained in a statute. *See, e.g.,*
17 *Parmett v. Superior Court, supra*, 212 Cal.App.3d 1261, 1266; *Accord Camarena v.*
18 *State Personnel Bd.*, (1997) 54 Cal.App.4th 698, 702 (in construing a statute, a court
19 cannot create exceptions or insert what has been omitted from the statute).

20 7. By allowing the City to grant use permission which is prohibited by
21 §12.08, the Court effectively nullifies this statute and holds that its prohibition can

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23 ⁹ Plaintiffs note also that Judge Hupp's conclusion, that the litigation between
24 the City and the Congregation could not have been settled except by the grant of use
25 permission found in the Settlement Agreement, does not come from Plaintiffs'
26 complaint. Plaintiffs believe this is a factual determination made by the Court.
Such determinations are inappropriate on a *Rule* 12(b)(6) motion.

27 ¹⁰ Section 12.08 is violated both by use and by erection, alteration or
28 maintenance of a structure for a use not authorized by the statute.

1 be evaded whenever the City elects to contract. Since the City has the general
2 authority to contract under *LAMC* §10.1, a holding validating the Settlement
3 Agreement is clear precedent that a local government can evade the zoning statutes
4 whenever it is authorized to enter into a contract. Such a holding makes application
5 of all zoning laws subject to evasion by contract with the City. It is respectfully
6 submitted that no-one, including a city, can contractually nullify a statutory scheme
7 enacted for the public benefit. The City by contract cannot place itself above the
8 law nor give itself the unfettered power to evade the law. By any definition, such a
9 contract must be deemed to offend public policy. No contract – including the
10 Settlement Agreement – can validate use permission which is granted in
11 contravention of state law or the City's own ordinances. *See Timney v. Lin, supra*
12 (although there is a strong public policy favoring settlement, this policy does not
13 excuse illegal or unjust clauses).

14 **D. The Settlement Agreement Is Void Because It Abrogates The City's**
15 **Police Powers:**

16 Land use regulation is the exercise of the government's police power. *See,*
17 *e.g., Smith v. City and County of San Francisco*, (1990) 225 Cal.App.3d 38, 55. No
18 government may contractually surrender or impair its delegated governmental
19 powers or that of successive legislative bodies. *See, e.g., Alameda County Land Use*
20 *Assn. v. City of Hayward*, (1996) 38 Cal.App.4th 1716, 1724. By the Settlement
21 Agreement, the City has surrendered its governmental power, set out in *LAMC*
22 §12.08 and 12.24, to allow use of land as a synagogue in an R1 zone only if the use
23 meets the City's ordinance based criteria.

24 The Settlement Agreement exempts the Congregation from the current zoning
25 statute and also bars the City from any zoning law enforcement for violation of
26 applicable statutes or the permission granted in the Settlement Agreement. This is
27 an impermissible contracting away of the City's right to exercise its police powers in
28 the future. *See, e.g., Avco Comm. Dev. v. South Coast Reg. Commn.*, (1976) 17

1 Cal.3d 785, 800. As Judge Hupp noted, the City can only enforce the Settlement
2 Agreement, if breached in the future, as a contract and not as a criminal violation of
3 the zoning laws. (Judge Hupp's Order, p. 6 ¶2).

4 **III. THE COURT IMPROPERLY DISMISSED PLAINTIFFS'**
5 **CONSTITUTIONAL CLAIMS**

6 In its April 22, 2004 Order, the Court dismissed Plaintiffs' federal and state
7 constitutional challenges to the Settlement Agreement. Plaintiffs respectfully
8 submit that those rulings were clearly erroneous and ask that the Court re-visit those
9 claims on this motion to dismiss.

10 **A. Plaintiffs State A Due Process Claim:**

11 This Court concluded that Plaintiffs did not state a procedural dues process
12 claim because Plaintiffs did not allege a Brown Act violation. Plaintiffs respectfully
13 submit that their due process claims do not rest on whether there has been a
14 violation of the Brown Act.¹¹ Rather, Plaintiffs' due process rights are invoked
15 because, when granting an exemption under *LAMC* §12.08, the City was required by
16 law under *LAMC* §12.24 and *Gov't Code* §85804 and 65854 to give specific defined
17 notice, hold a hearing, and engage in a quasi-judicial fact finding process. The City
18 failed give Plaintiffs notice, failed to afford them the opportunity to he heard, failed
19 to engage in required fact finding mandated to by §12.24(D) (SAC ¶28), and failed
20 to approve use through an impartial decision maker. Rather, the Settlement
21 Agreement was approved by The City, a party to the Settlement Agreement which
22 resolved the Congregation's lawsuit against the City. Of course, an impartial
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24
25 ¹¹ The Brown Act simply requires that certain local government meetings be
26 held in public. It does not displace, repeal or supercede the requirements of the
27 Government Code and the Los Angeles Municipal Code, cited above, which
28 mandate notice and an opportunity to be heard in connection with the required quasi
judicial determination of whether use permission should be granted.

1 decision maker is a required element of due process. *See, e.g., Goldberg v. Kelly,*
2 397 U.S. 254, 271 (1970).

3 The quasi-judicial process by which the City can grant an exemption to
4 *LAMC* §12.08 is subject to due process protections. *See Richardson v. Perales,* 402
5 U.S. 389, 401 (1971) (procedural due process is applicable to adjudicative
6 administrative proceeding); *Lane Hollow Coal v. Director,* 137 F.3d 799, 806 n. 3
7 (4th Cir. 1998) (the requirement of due process fully applicable to administrative
8 agencies' adjudicative proceedings).

9 Federal due process protections governing administrative adjudicative
10 proceedings are applicable to the City through the 14th Amendment. As held in
11 *New York State Nat , etc. v. Pataki,* 261 F.3d 156 at 163 (2d Cir. 2001),

12 ". . . the Fourteenth Amendment guarantee of due process is fully
13 applicable to adjudicative proceedings conducted by state and local
government administrative agencies."

14 In *Brody v. City of Mason,* 250 F.3d 432, 437 (6th Cir. 2001), the Court explicitly
15 recognized that Federal due process rights protect affected landowners in the context
16 of administrative zoning decisions. The California Supreme Court has also
17 recognized that adjudicative zoning decisions are subject to Federal Due Process
18 protections. *See, e.g., Horn v. County of Ventura,* (1979) 24 Cal.3d 605, 612-14,
19 616 (the due process requirements discussed herein are not rooted in statute but are
20 compelled by the stronger force of constitutional principle). *Accord Scott v. City of*
21 *Indian Wells,* (1972) 6 Cal.3d 541, 547-58 (under 14th Amendment, affected
22 landowner must be notified and be heard on zoning decision even where property
23 outside the city making zoning decision); *Hayssen v. Board of Zoning Adj.,* (1985)
24 171 Cal.App.3d 400, 403-05 (adjoining and nearby property owners have due
25 process right on CUP application). Here all such protections were bypassed when
26 the City acted outside the law.

27 Judge Hupp also determined that ". . . the Settlement Agreement did not
28 deprive plaintiff (sic) of a property right inherent in the zoning laws . . ." (December

1 22, 2004 Order, page 7, ¶3). However, the Settlement Agreement in a vacuum does
2 not deprive Plaintiffs of protected property rights – rather, Plaintiffs were denied
3 notice and an opportunity to be heard in what should have been a quasi-judicial
4 hearing. Certainly, to the extent Judge Hupp determined that Plaintiffs had no
5 protectible property interest sufficient to invoke due process, Plaintiffs respectfully
6 submit that determination is clearly erroneous and can be corrected by this Court.
7 See *Castner v. First Nat. Bank*, 278 F.2d 376 (9th Cir. 1960), if after examination of
8 the record and the law, this Court is convinced that an error of law has been
9 committed,

10 "The second judge must conscientiously carry out his judicial function in a
11 case over which he is presiding. He is not doing so if he permits what he
believes to be an erroneous ruling to control the case . . ."

12 278 F.2d at 380. See *Pareto v. FDIC*, 139 F.3d 696 n.1 (9th Cir. 1998) (law of the
13 case doctrine does not require that erroneous ruling be followed).

14 As held in *Pettitt v. City of Fresno*, (1973) 34 Cal.App.3d 813,

15 "In the field of zoning laws, we are dealing with a vital public interest--
16 not one that is strictly between the municipality and the individual
17 litigant. ***All the residents of the community have a protectable
property and personal interest in maintaining the character of the
area as established by comprehensive and carefully considered
zoning plans . . .*** These ***protectable interests*** further manifest
18 themselves in the preservation of land values, in esthetic considerations
19 and in the desire to increase safety by lowering traffic volume."
(emphasis added).

20 34 Cal.App.3d at 822-23. Accord *Brody v. City of Mason*, 250 F.3d 432, 437 (6th
21 Cir. 2001) where the Court explicitly recognized that Federal due process rights
22 protect affected landowners in the context of administrative zoning decisions. The
23 California Supreme Court has also recognized that adjudicative zoning decisions are
24 subject to Federal Due Process protections. See, *Horn v. County of Ventura*, (1979)
25 24 Cal.3d 605, 612-14, 616 (due process requirements discussed herein are not
26 rooted in statute but are compelled by the stronger force of constitutional principle).
27 Accord *Scott v. City of Indian Wells*, (1972) 6 Cal.3d 541, 547-58 (under 14th
28 Amendment, affected landowner must be notified and be heard on zoning decision

1 even where property outside the city making zoning decision); *Neighborhood Action*
2 *Group v. County of Calaveras*, (1984) 156 Cal.App.3d 1176, 1886 (affected citizens
3 may challenge CUP issued in violation of law); *Haysen v. Board of Zoning Adj.*,
4 (1985) 171 Cal.App.3d 400, 403-05 (adjoining and property owners in the vicinity
5 have due process rights on CUP application).

6 The *LAMC* also recognizes that all persons in the Hancock Park community
7 have a protectible property interest in the prevention of non-conforming uses. The
8 City's zoning ordinances are intended, among other things, to conserve and stabilize
9 the value of property, to lessen congestion, and to promote the general welfare of
10 all. *LAMC* §12.02. To that end, *LAMC* §12.24E requires that before use permission
11 can be granted, the City must make the findings set forth on page 7 of this brief.

12 Any assertion that residents of a residential zone have no protectible property
13 interest in their neighborhood's preservation and the elimination of non-conforming
14 use, is not only refuted by the authorities set forth above, it ignores the core of
15 residential neighborhood zoning law. *See, e.g., Wells Fargo Bank, supra*, 33 Cal.3d
16 at 386 (zoning regulations reflect the public's interest in controlling development to
17 protect health and safety); *See also Miller v. Board of Public Works*, (1925) 195 Cal.
18 477 in which the Court recognized that residentially zoned districts exist for "the
19 general welfare" and "the general welfare of a community is but the aggregate
20 welfare of its constituent members." 195 Cal. at 492-93.¹²

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22 _____
23 ¹² In view of *Pettitt* and the authorities cited herein, it is unclear why Judge
24 Hupp determined that Plaintiffs have no protectable property interest. This Court is
25 required to defer to decisions by intermediate California appellate courts unless
26 there is convincing evidence the California Supreme Court would decide differently.
27 *California Pro-Life Council v. Getman*, 328 F.3d 1088, 1099 (9th Cir. 2003). In
28 view of the authorities cited herein, Plaintiffs respectfully submit there is no such
convincing evidence and that this Court is bound by the decisions referenced.

1 **B. Plaintiffs State An Establishment Clause Claim:**

2 Judge Hupp dismissed Plaintiffs' Establishment Clause claims in the first
3 amended complaint without explanation (other than to say there is no constitutional
4 violation). In its April 22, 2004 Order, this Court dismissed these claims finding
5 that the Settlement Agreement has a secular purpose, there is no excessive
6 entanglement, and finding that the primary effect of the Settlement Agreement is not
7 to endorse religion. State action violates the Establishment Clause if it fails to
8 satisfy any of these prongs. See, e.g., *Edwards v. Aguillard*, 482 U.S. 578, 583.

9 Plaintiffs have alleged that the City has adopted a policy of non-enforcement
10 against the Congregation's religious use of The Highland Property and the City is
11 thereby preferring the Congregation's religious use over the interests of Plaintiffs,
12 that the City granted the Congregation an ad hoc exemption from the zoning laws
13 because their purpose is religious (SAC ¶55) and that the City's conduct was not
14 reasonable accommodation but rather an ad hoc preference for a religious land use
15 applicant which was granted even though the Congregation had lost its bid for use
16 permission through legal challenges (SAC ¶56).

17 **C. Plaintiffs State An Equal Protection Claim:**

18 In dismissing Plaintiffs' equal protection claims, the Court determined that the
19 City had a rational basis for entering into the Settlement Agreement. However, the
20 conduct of which Plaintiffs complain is not the settling of litigation. Rather it is
21 granting the Congregation use permission in violation of law and based on religious
22 status, and a policy of exempting Defendants from zoning requirements because of
23 religion.

24 The SAC alleges that Defendants have been selectively and preferentially
25 treated based on religious status under the City's policy, of which the Settlement is a
26 part, of non-enforcement of its zoning ordinances based on religion (SAC ¶60).
27 Plaintiffs further allege that Plaintiffs have been treated differently than persons in
28 other R1 zones who are afforded notice and an opportunity to be heard before

1 inconsistent uses are permitted (SAC ¶61).

2 The equal protection clause requires that government govern impartially and
3 evenhandedly apply its general rules to all persons within its jurisdiction. *See, e.g.,*
4 *McQueary v. Blodgett*, 924 F.2d 829, 834 (9th Cir. 1991). The gravamen of an
5 equal protection claim is the unequal treatment of similarly situated persons.
6 *Mlikotin v. City of Los Angeles*, 643 F.2d 652, 654 (9th Cir. 1981). Plaintiffs have
7 clearly alleged the gravamen of this claim. The Court determined in its April 22,
8 2004 order that no equal protection claim is stated because the City had a rational
9 basis to enter into the Settlement Agreement. However, an arbitrary, discretionary,
10 and ad hoc zoning policy which treats persons unequally depending on whether they
11 are a religious applicant must be strictly scrutinized and struck down unless the
12 policy is supported by a compelling governmental interest. *Cf. Church of the*
13 *Lukumi v. City of Hialeah*, 508 U.S. 520, 531 (1993); *American Jewish Congress v.*
14 *City of Beverly Hill*, 90 F.3d 379, 383-84 (9th Cir. 1996).¹³

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25 ¹³ In contrast, a statutory zoning scheme that distinguishes uses, including
26 religious uses, is examined under a deferential rational basis review. *See, e.g., City*
27 *of Cleburne v. Cleburne Living Center*, 473 U.S. 432, 450, 461 (1985);
28 *Congregation Kol Ami v. Abington Township*, 309 F.3d 120, 133-34(3rd Cir. 2002).

1 **IV. CONCLUSION**

2 For all the foregoing reasons, Plaintiffs pray this motion be denied. Should
3 the Court determine it should be sustained, Plaintiffs request leave to amend. *See,*
4 *e.g., U.S. ex rel. Lee v. SmithKline, etc.,* 245 F.3d 1048, 1052 (9th Cir. 2001) (leave
5 to amend should be granted unless pleading could not possibly be cured).

6 Respectfully submitted,

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