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UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF CALIFORNIA

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

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Plaintiffs,

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vs.

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CITY OF LOS ANGELES, et al.,

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Defendants.

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Case No. CV03-04890-CAS

**PLAINTIFFS' OPENING BRIEF ON
THE INVALIDITY OF THE
SETTLEMENT AGREEMENT
UNDER THE OPINION OF THE
CALIFORNIA COURT OF APPEAL
IN TRANCAS V. CITY OF MALIBU**

**Date: August 14, 2006
Time: 10:00 am
Courtroom: 5**

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1 As this Court knows, the litigation settlement agreement ("the Settlement
2 Agreement") made between the City of Los Angeles ("the City") and the
3 Congregation Etz Chaim ("the Congregation") allows the property at 303 S. Highland
4 Avenue ("the Highland Property") to be used by the Congregation as synagogue.
5 This use is contractually sanctioned even though no conditional use permit ("CUP"),
6 as expressly required by the City's governing ordinances, has been issued. Indeed, as
7 Plaintiffs have alleged, when the Congregation and the City followed applicable law
8 and a CUP for synagogue use was properly requested, the application was denied
9 under settled city and state law.¹

10 Plaintiffs here argue that *Trancas v. City of Malibu*, (2006) 138 Cal.App.4th
11 172 requires that the Settlement Agreement be invalidated. *Trancas* binds this Court
12 unless ". . . there is convincing evidence that the California Supreme Court would
13 decide the matter differently". See, e.g., *California Pro-Life Council, Inc. v. Getman*,
14 328 F.3d 1088, 1099 (9th Cir. 2003); *Castaic Lake Water Agency v. Whittaker Corp.*,
15 272 F.Supp.2d 1053 (C.D. Cal. 2003). There is no such evidence.²

16 *Trancas* invalidated the litigation settlement agreement before that court ("the
17 *Trancas* litigation settlement agreement") on two bases. The first basis for
18 invalidation is the holding that there can be no contractual circumvention of the
19 zoning laws. The second basis for invalidation was the Malibu city council's closed
20 session consideration and determination of the zoning decision memorialized in the
21

22 ¹ There can be no dispute that the Highland Property is a synagogue. The
23 Congregation's rabbi has so stated under oath in a tax exemption certificate, a copy of
24 which is attached hereto as Ex. "A". This open and notorious synagogue use of the
25 Highland Property, in direct violation of applicable zoning law, can be alleged and
(Plaintiffs believe) proved should the Court find that *Trancas* controls.

26 ² The Court is requested to take judicial notice that the California Supreme
27 Court has refused to review *Trancas*. A copy of the California Supreme Court's web
28 page reflecting denial of review is attached hereto as Exhibit "B".

1 agreement before that court. *Trancas* holds that the functional equivalent of a zoning
2 decision made in a private, non-public, closed session of a city council meeting
3 violates the Brown Act because the zoning laws require public hearings, the right of
4 the public to be heard, and public decision making.

5 The Settlement Agreement is invalid under both prongs of *Trancas*. It
6 contractually circumvents applicable zoning laws by contractually granting use
7 permission in direct violation of Los Angeles Municipal Code ("*LAMC*") §12.08. In
8 addition, it violates the Brown Act because it was approved in closed session of the
9 Los Angeles City Council ("the City Council") and grants rights which can only be
10 granted under *LAMC* §12.24 after notice to the public, public hearing and findings by
11 the governing zoning fact-finder.

12 **I. THE SETTLEMENT AGREEMENT IS INVALID BECAUSE IT**
13 **CONTRACTUALLY CIRCUMVENTS APPLICABLE ZONING LAW**
14

15 The first teaching of *Trancas* is simple and straightforward – the substantive
16 qualifications and procedural means for land use permission set forth in zoning laws
17 "discharge public interests" and "Circumvention of them by contract is
18 impermissible". 138 Cal.App.4th at 182. *Trancas* straightforwardly rejects the
19 fundamental concept upon which the Settlement Agreement rests – that is, that land
20 use permission can be bargained away by the City, in a contract privately negotiated
21 outside of a statutorily approved land use regime. *Trancas*' recognition that zoning
22 decisions "discharge public interests" is a re-affirmation of California's public policy
23 which demands public involvement ". . . at every level of the process when land use
24 decisions are being made." As held in *Penn-Co v. Board of Supervisors*, (1984) 158
25 Cal.App.3d 1072,

26 There is a clear policy in this state to involve the public and
27 affected property owners at every level of the process when
28 land use decisions are being made. The Legislature has
declared that 'California's land is an exhaustible resource,
not just a commodity, and is essential to the economy,
environment and general well-being of the People of

1 California . . . '[t]he Legislature recognizes the importance
2 of public participation at every level of the planning
3 process. It is therefore the policy of the state and the intent
4 of the Legislature that each state, regional, and local agency
5 concerned in the planning process involve the public
6 through public hearings, informative meetings, publicity
7 and other means available to them, and that at such hearings
8 and other public forums, the public be afforded the
9 opportunity to respond to clearly defined alternative
10 objectives, policies, and actions.'

11 158 Cal.App.3d at 1078. *See also Smith v. City and County of San Francisco*, (1990)
12 225 Cal.App.3d 38, 55 (agreement permitting development without application of
13 land use regulations invalid and unenforceable as contrary to public policy);
14 *Metzenbaum v. City of Carmel-by-the-Sea*, (1965) 234 Cal.App.2d 62, 64 (use
15 permits may be granted only as authorized by ordinance).

16 **A. The Settlement Agreement Grants The Congregation The**
17 **Functional Equivalent Of A Conditional Use Permit Without**
18 **Compliance With Law And In Violation of Law:**

19 The *Trancas* Court invalidates the *Trancas* litigation settlement agreement, in
20 part, because it granted the right to use property without requiring the owner or the
21 city to comply with the applicable zoning laws – in that case, density requirements.
22 As *Trancas* recognizes, the agreement before that court granted a contractual "red
23 carpet around" the governing (density) provisions of Malibu's zoning ordinance. *Id.*
24 at 182.

25 The Settlement Agreement also grants the right to use property without
26 requiring that the owner (the Congregation) comply with applicable zoning
27 ordinances – in this case, a ban on synagogue use of property in an R-1 zone unless a
28 statutorily based conditional use permit is granted under *LAMC* §12.24, which
mandates notice and a hearing for neighbors. As in *Trancas*, the City has given the
Congregation the equivalent of a contractual "red carpet" around the City's applicable
and governing zoning ordinances.

1 The can be no dispute that the Settlement Agreement circumvents the City's
2 zoning ordinances. A statutorily based permit for synagogue use in an R-1 zone is
3 required under *LAMC* §§12.08A(6), 12.24A and 12.24W(9). Specifically, §12.08 is
4 the City's zoning ordinance governing land use in the R-1 zone where the Highland
5 Property is located. That ordinance provides an exclusive list of uses permitted as of
6 right in that zone. It provides, in pertinent part that, "No building, structure or land
7 shall be used and no building or structure shall be . . . altered . . . or maintained"
8 except for uses as a matter of right, which are then specified. Use of a building or
9 structure as a synagogue in an R-1 zone is not a use permitted by §12.08 as a matter
10 of right.

11 In addition to the specified uses which are allowed as a matter of right in an R-
12 1 zone, §12.08 also permits certain conditional uses but only if statutory requirements
13 have been met. Section 12.08(A)(6) thus allows "[c]onditional uses enumerated in
14 Section 12.24" which include the use of property as a synagogue. *LAMC*
15 §12.24(W)(9). However, §12.08 allows these "conditional uses" under §12.24 only
16 "when the location is approved pursuant to the provisions of said section." (emphasis
17 added).

18 Section 12.24(W), in turn allows synagogue use only ". . . [i]f approved by the
19 Zoning Administrator as the initial decision-maker or the Area Planning Commission
20 as the appellate body." The procedures and requirements for review of applications
21 for use permission are set forth in *LAMC* §12.24(B) through (Q) and (W). Section
22 12.24(D) requires that the City set a public hearing on the application and give notice
23 of the hearing by publication, by mailing notices as specified, and by posting notice
24 on the site.

25 In addition, before approving any R-1 property for use as a synagogue,
26 §12.24(D) provides that:

27 [T]he decision-maker must find that the proposed location
28 will be desirable to the public welfare, is proper in relation
 to adjacent uses or the development of the community, will

1 not be materially detrimental to the character of
2 development in the immediate neighborhood, and will be in
3 harmony with the various elements of the General Plan.
(emphasis added).

4 *LAMC* §12.08 thus establishes a clear statutory scheme which regulates the use
5 of property located in an R-1 zone. No building, structure or land can be used as a
6 matter of right in an R-1 zone except as provided in the statute. A building, structure
7 or land can be used as a synagogue in an R-1 zone, but only if it is approved in
8 accordance with §12.24 which requires notice to neighbors and the neighborhood, a
9 hearing, and written findings of fact under subsection D. As Plaintiffs have alleged,
10 when these procedures were followed, the Congregation's application was denied and
11 this decision was affirmed after full administrative review and judicial appeal through
12 the California Court of Appeals.³

13 Section 12.08 is unambiguous and unequivocal in its prohibition of non-
14 enumerated uses as of right in an R-1 zone. *See TrafficSchoolOnline, Inc. v. Clarke*,
15 (2003) 112 Cal.App.4th 736, 741 (the word "no" means "no" when used in a statute -
16 the only commonsense meaning of the word "no" is just that). Section 12.08 is
17 equally clear that property can be used as a synagogue in an R-1 zone but only if

18
19 ³ Section 12.24(D) has specific notice provisions which go beyond those
20 mandated by *Cal. Gov't Code* §§65854, 65090 and 65091 which are expressly made
21 applicable to the City through *Cal. Gov't Code* §65804. Section 12.24 requires, in
22 part, that the City must hold a public hearing at which evidence is taken and that
23 notice of the hearing must be given by publication in a paper of general circulation,
24 by mailing notice of the hearing to all owners within 500 feet of the Highland
25 Property, and by requiring that the applicant post notice at the site in a conspicuous
26 place at least 10 days prior to the hearing. After taking evidence, the City must make
27 written findings that the proposed location will be desirable to public convenience or
28 welfare, is proper in relation to adjacent uses or the development of the community, is
not materially detrimental to the character of the development of the immediate
neighborhood, and will be in harmony with the elements and objectives of the
General Plan (*LAMC* §12.24D, E).

1 approved in accordance with §12.24 – something which has not happened. The Court
2 is limited to the plain language of the statute. *See, e.g., U.S. v. Partlow*, 159 F.3d
3 1218, 1219 (9th Cir. 1998) ("If the language of a statute is unambiguous, the plain
4 meaning controls"); *In re Marquez*, (2003) 30 Cal.4th 14, 20 ("If the statutory
5 language is not ambiguous, we presume the Legislature meant what it said, and we
6 apply the plain meaning of the statute without resort to extrinsic sources").

7 By the Settlement Agreement, the City has granted the Congregation use
8 permission for a synagogue at the Highland Property in direct violation and
9 circumvention of the use ban set forth in *LAMC* §12.08 and in direct contravention of
10 the City's findings under *LAMC* §12.24 when the Congregation's CUP application
11 was requested and denied. The Settlement Agreement is exactly what *Trancas*
12 condemns – a contractual circumvention of the statutory zoning scheme created by
13 the City to regulate land use in an R-1 zone. It sanctions a direct and continuing
14 violation of §12.08's use ban. Judge Aldisert, in dissent in *Congregation Etz Chaim*
15 *v. City of Los Angeles*, 371 F.3d 1122 (9th Cir. 2004), saw the Settlement Agreement
16 for what it is: a de facto conditional use permit, minus the required procedures.
17 "[T]he Settlement functioned as a conditional use permit to allow the Congregation to
18 operate a church in an R-1 zone . . ." 371 F.3d at 1134.⁴

19 Just like the de facto variance granted by the *Trancas* litigation settlement
20 agreement and invalidated in *Trancas*, the Settlement Agreement "functionally
21

22 ⁴ In *Congregation Etz Chaim v. City of Los Angeles*, 371 F.3d 1122 (9th Cir.
23 2004), in which Plaintiffs were not parties, the Ninth Circuit held the City was
24 estopped from challenging the validity of a building permit granted to the
25 Congregation pursuant to the Settlement Agreement. However, because the
26 Settlement Agreement is invalid, any building permit based on it is also invalid and
27 therefore could not be saved by principles of estoppel. *See, e.g., Pettit v. City of*
28 *Fresno*, (1973) 34 Cal.App.3d 813, 820. The validity of the Settlement Agreement
was not before Ninth Circuit in that appeal.

1 resembles" a conditional use permit because it allows use in an R-1 zone that is not
2 permissible except by a statutorily based use permit. Just like in *Trancas*, use
3 permission under the governing provisions of the City's zoning ordinances require
4 notice, public hearings, and findings under §12.24(D) which support the proposed
5 intended use.

6 As Plaintiffs have alleged, the City's findings under §12.24(D) were that the
7 Congregation's proposed intended use would violate the criteria established under that
8 ordinance. The City's Zoning Administrator denied the Congregation's application
9 for a CUP and the requested variances because there was no evidence that:

10 the proposed location will be desirable to the public convenience or
11 welfare, is proper in relation to adjacent uses or the development of the
12 community, will not be materially detrimental to the character of
development in the immediate neighborhood, and will be in harmony
with the various elements and objectives of the General Plan.

13 This denial was upheld by the City's Board of Zoning Appeals after a hearing and that
14 this determination was, in turn, appealed by the Congregation to the City Council
15 who in or about July, 1997, sustained the decision of the Zoning Board of Appeals.
16 The City Council's report declared that the Congregation's proposed use of the
17 Highland Property as a synagogue:

18 [D]etracts and diminishes the residential character and experienced
19 quality of life of a significant number of the other residents of this long
20 established single-family residential neighborhood . . . [and that] the
21 most probable result of the continuation of this use is an exacerbation of
22 the current infringement on the enjoyment of their property by the
23 nearby residents and the existing parking and traffic congestion. [The
24 Highland Property] is located in a long established and well maintained
25 single-family residential neighborhood consisting of lot sizes that can
26 not and were not intended to accommodate institutional uses that require
27 buffering and parking beyond the minimal requirements of a single-
28 family residential zone; there is no precedent in the 75 years of the
subdivision that supports the granting of this use – the historical
planning of this subdivision, in the context of the time, recognized and
planned for school sites and recreational uses within the neighborhood
with church and commercial uses at the perimeter, the longevity,
stability and quality of this single-family residential neighborhood
sustains the long term intent and substance of this residential subdivision
planning; this use compromises and is not in proper relation to the long
established and maintained intent of the original subdivision planning.
[T]here are no other church or institutional uses on the residentially
zoned properties within the notice radius for this action; this use would

1 be precedent setting and compromise the 75 year maintenance and
2 recognized quality and sought after ambience of this historical,
residential neighborhood.

3 In 1997, after the Congregation's request for a CUP and variances for the
4 Highland Property were denied by the City, the Congregation commenced an action
5 before this Court. The Congregation alleged that the City's denial of its requested
6 CUP was in violation of its statutory and constitutional rights.

7 In June, 1998, while that action was pending, the Congregation commenced a
8 second proceeding challenging the City's CUP denial. In an action filed in the Los
9 Angeles Superior Court, the Congregation sought a writ of mandate overturning the
10 City's denial of the CUP and variances. The Los Angeles Superior Court upheld the
11 City's decision and denied the Congregation's statutory and state constitutional
12 challenges. In so doing, that Court stated that:

13 The proposed conditional use would be a precedent setting
14 encroachment of an institutional use in a single family area. This could
15 destabilize what has been a long standing, quality single-family
16 residential neighborhood that has through constant efforts maintained its
17 stable, high quality residential character. . . . [a]lthough [303 So.
18 Highland] may be convenient to [the Congregation], the current
19 unauthorized use of this single-family residence as converted detracts
and diminishes the residential character and experienced quality of life
of a significant number of the other residents of this long established
single-family residential neighborhood . . . There are other locations
within a reasonable walking distance from the subject site which could
be used as a synagogue by right without the potential to impact and
disturb the quiet enjoyment of the existing residential community.

20 This judgment was affirmed by the California Court of Appeals.

21 In short, the Congregation's use of the Highland Property as a synagogue
22 violates *LAMC* §12.08, the applicable zoning law. That use is allowed only because
23 of the Settlement Agreement, despite the fact that synagogue use was denied, and that
24 denial was upheld on judicial review, when the zoning laws were appropriately
25 applied. The Settlement Agreement is exactly what *Trancas* invalidates – a
26 contractual circumvention of the zoning laws. It is respectfully submitted that this
27 conclusion is inescapable. *Trancas* is squarely on point and controlling.

1 **II. THE SETTLEMENT AGREEMENT WAS APPROVED IN CLOSED**
2 **SESSION AND IT THEREFORE VIOLATES THE BROWN ACT**
3

4 As noted above, the Brown Act was the second basis the *Trancas* Court used to
5 invalidate the *Trancas* litigation settlement agreement. The Court found that the
6 Malibu city council's closed session consideration and approval of that agreement
7 without proper notice, without public hearings and without public decision making
8 violated the legislative intention and policy of the zoning laws to include the public in
9 zoning decisions. 183 Cal.App.4th at 186.⁵

10 Like the litigation settlement agreement invalidated in *Trancas*, the Settlement
11 Agreement was also approved in a closed session meeting of a city council. This
12 closed session approval is established by the Congregation's Request for Judicial
13 Notice filed in support of its September 8, 2003 motion to dismiss Plaintiff's original
14 complaint. The chronology of the closed session approval is discussed at page 3, line
15 20 to page 4, line 20 of that motion.

16 *Trancas* acknowledged case law holding that *Gov't Code* §54956.9 allows
17 cities to enter into or approve settlement agreements in closed session. However,
18 *Trancas* holds that §54956.9,

19 . . . cannot be construed to empower a city council to take or
20 agree to take, as part of a non-publicly ratified litigation
21 settlement, action that by substantive law may not be taken
22 without a public hearing and an opportunity for the public
23 to be heard. As a matter of legislative intention and policy,
24 a statute that is part of a law enacted to assure public

23 ⁵ Although the City Council's posted agendas did indicate the City was
24 considering settlement of the Congregation's claims against it, the terms of the
25 proposed settlement were not revealed and the City's deliberations about settlement
26 were conducted in closed session. A posted city council agenda is **not** the notice
27 mandated by *LAMC* §12.24 or *Cal. Gov't Code* §§65090 and 65091. Likewise, a
28 closed session of a city council meeting is **not** a public hearing mandated by *LAMC*
§12.24 (D) and *Cal. Gov't Code* §65854.

1 decision-making, except in narrow circumstances, may not
2 be read to authorize circumvention and indeed violation of
3 other laws requiring that decisions be preceded by public
4 hearings, simply because the means and object of the
5 violation are settlement of a lawsuit. Under this vital
6 construction of section 54956.9, the city council's closed
7 session adoption of the [Trancas litigation settlement
8 agreement] thereby in essence granting Trancas a zoning
9 variance for its 32-unit project, was not authorized by the
10 section, and hence violated the Brown Act's open meeting
11 requirements.

12 138 Cal.App.4th at 186.

13 As previously noted, *LAMC* §12.24 mandates that synagogue use permission
14 be granted only after statutorily required notice, a public hearing and statutorily
15 mandated findings. Otherwise, no synagogue use permission use is allowed in an R-1
16 zone (*LAMC* §12.08). Therefore, by contractually granting use permission in a
17 closed session of the City Council without the public notice, public hearings and
18 findings mandated by the zoning laws, the Settlement Agreement violates the Brown
19 Act. *Trancas* is, again, squarely on point and controlling.

20 **III. THE CITY WOULD HAVE THE COURT RE-WRITE ITS ZONING**
21 **ORDINANCES TO PERMIT CONTRACTUALLY AUTHORIZED**
22 **LAND USE PERMISSION**

23 When previously before this Court, the City argued that the Settlement
24 Agreement's use permission was proper because, *inter alia*, it was not a CUP. The
25 City argued that CUPs "run with the land", that the Settlement Agreement is non-
26 transferable and, as such, it can not be a CUP. Therefore, argued the City, the
27 contractual land use permission granted by the Settlement Agreement is proper.⁶

28 The City's argument (aside from blatantly elevating form over substance) is

⁶ Plaintiffs have argued the non-transferability provision is itself invalid, an issue this Court has never reached.

1 wrong under *Trancas*. *LAMC* §12.08 does not authorize contractual grants of use
2 permission in an R-1 zone, whatever label the City attaches to such grants. Section
3 12.08 bars use which is not permitted as of right unless there is compliance with the
4 statutory process it spells out. Here, when that statutory process was followed, use
5 permission was denied. The Settlement Agreement is nothing more than a
6 contractual circumvention of the statutory regime embodied in §12.08 – a tactic
7 squarely condemned by *Trancas*.

8 What the City and the Congregation actually propose is a judicial re-write of
9 *LAMC* §12.08. Defendants seek a judicially created exception to §12.08's
10 unambiguous mandate barring synagogue use except when allowed in accordance
11 with the process set forth in §12.24. The judicial re-write they seek is the allowance
12 of synagogue use when granted by a litigation settlement agreement.

13 Plaintiffs respectfully submit that the Court is not authorized to amend and re-
14 write §12.08 to judicially create an exception to *LAMC* §12.08 which validates
15 contractually granted uses. *Trancas* invalidates the contractual circumvention of
16 zoning laws. If the Court validates the contractual circumvention of the zoning laws
17 under the guise of re-writing the City's ordinances, as a practical matter, it will be
18 holding itself not bound by *Trancas*. Of course, this Court is bound by *Trancas*. *See,*
19 *e.g., California Pro-Life Council, supra*, 328 F.3d at 1099; *Castaic Lake Water*
20 *Agency, supra*, 272 F.Supp.2d at 1071.

21 Even more fundamentally, this Court lacks the power to re-write §12.08, or any
22 other statute or ordinance, to create an exception which validates contractually
23 granted use permission. *See, e.g., United States v. Rutherford*, 442 U.S. 544, 555
24 (1979) (“Under our constitutional framework, federal courts do not sit as councils of
25 revision, empowered to rewrite legislation in accord with their conceptions of prudent
26 public policy”); *In re Sheehan*, 253 F.3d 507, 517 (9th Cir. 2001) (“Re-writing law is
27 not the function of the judiciary.”); *California Fed. Savings & Loan Assn. v. City of*
28 *Los Angeles*, (1995) 11 Cal.4th 342, 349 (a court's function is to construe, not to

1 amend, statutes and not to insert what has been omitted). Therefore, the Settlement
2 Agreement, according to the controlling precedent in *Trancas*, is void.

3 **IV. VALIDATING CONTRACTUAL LAND USE PERMISSION**
4 **CONTRAVENES TRANCAS' RECOGNITION THAT ZONING LAW**
5 **DECISIONS REQUIRE PUBLIC PARTICIPATION AND IT**
6 **ELIMINATES LEGISLATIVE CONTROL AND EFFECTIVE**
7 **JUDICIAL REVIEW OF LAND USE DECISIONS**
8

9
10 *Trancas* invalidated the *Trancas* litigation settlement agreement under the
11 Brown Act based, in part, on its recognition that California's zoning laws require
12 public hearings, an opportunity for the public to be heard and public decision making.
13 138 Cal.App.4th at 186.

14 In contrast, privately negotiated bilateral settlement agreements which grant
15 land use permission, are the product of an alternate land use universe. This alternate
16 universe is unsanctioned and unregulated by any legislature, it operates outside and in
17 contravention of the zoning laws, and it exists without the judicially and statutorily
18 mandated participation of the public who are affected by land use decisions. In the
19 use-permission-by-contract universe of the Settlement Agreement, the requirements
20 of *LAMC* §12.08 and the fundamentals of California land use law are swept aside. In
21 this universe, which directly conflicts with the law stated in *Trancas*, no longer are
22 Plaintiffs (or anyone else in the community) entitled to the notice and hearing
23 mandated by law in order to voice their concerns about a non-conforming use in their
24 community. No longer is the land use applicant required to comply with legislatively
25 mandated requirements for use permission and to demonstrate that the requested use
26 is consistent with the interests of the Plaintiffs and the community. No longer does
27 the City act as a disinterested decision maker under the zoning law by weighing the
28 interests of the owner, the Plaintiffs and the larger community.

1 By validating use permission granted as the result of a contractual process
2 rather than a zoning process, there is an elimination and cancellation of public
3 participation, legislative control, and the subsequent judicial review of land use
4 decisions to ensure compliance with legislatively mandated controls. In short, public
5 participation, legislative participation and judicial participation are eliminated. There
6 is a total evisceration of the "public decision making" mandated by *Trancas*.

7 Public decision making and the review of such decisions by courts is necessary
8 to insure Plaintiffs' and the community's protection from inappropriate land use
9 decisions – such as those granted by a privately negotiated contract, as has happened
10 in this case. In *Topanga Assn., etc. v. County of Los Angeles*, (1974) 11 Cal.3d 506,
11 the California Supreme Court made clear the importance of judicial involvement in
12 the land use permission process.

13 Vigorous and meaningful judicial review facilitates, among
14 other factors, the intended division of decision-making
15 labor [in land-use control]. Whereas the adoption of zoning
16 regulations is a legislative function . . . , the granting of
17 variances is a quasi-judicial, administrative one. If the
18 judiciary were to review grants of variances superficially,
19 administrative boards could subvert this intended decision-
20 making structure. They could '[amend] . . . the zoning
21 code in the guise of a variance', and render meaningless,
22 applicable state and local legislation prescribing variance
23 requirements.

19 Moreover, courts must meaningfully review grants of
20 variances in order to protect the interests of those who hold
21 rights in property nearby the parcel for which a variance is
22 sought. A zoning scheme, after all, is similar in some
23 respects to a contract; each party forgoes rights to use its
24 land as it wishes in return for the assurance that the use of
25 neighboring property will be similarly restricted, the
26 rationale being that such mutual restriction can enhance
27 total community welfare. If the interest of these parties in
28 preventing unjustified variance awards for neighboring land
is not sufficiently protected, the consequence will be
subversion of the critical reciprocity upon which zoning
regulation rests.

Abdication by the judiciary of its responsibility to examine
variance board decision-making when called upon to do so
could very well lead to such subversion.... Vigorous judicial
review ... can serve to mitigate the effects of insufficiently
independent decision-making.

1 11 Cal.3d at 517-18 (emphasis added).⁷

2 The contractual land use permission granted by the City brings into focus all of
3 the evils recognized by the Supreme Court in *Topanga*: (a) the City subverts the
4 decision making structure embodied in its own ordinances by ignoring those
5 decisions and granting use permission even when it was denied in accordance with
6 statutory requirements; (b) the City renders meaningless its own legislation (*LAMC*
7 §12.08 and §12.24) prescribing when synagogue use is permissible in an R-1 zone;
8 (c) the City ignores the interests of Plaintiffs and the community who are aggrieved
9 by unjustified non-conforming uses; (d) the City cuts out the right to meaningful
10 judicial review of discretionary land use decisions and the protection such review
11 affords to Appellants and the community by granting permission by contract rather
12 than in accordance with controlling statutes; and (e) the City takes itself out of being
13 an impartial and independent decision maker in the land use permission process and
14 replaces itself with being a partisan decision maker seeking to protect its own interest
15 (the resolution of litigation against it) in granting the use permission requested.

16 Finally, a holding which authorizes the City to contractually grant land use
17 permission and evade the requirements of the zoning statutes, so seriously undercuts
18 the use limitations protections imposed by §12.08 and §12.24, that the City's R-1
19 zoning ordinance is rendered virtually meaningless. If the Settlement Agreement is
20 valid, it follows that the City's right to contract trumps its obligation to observe and
21 enforce the zoning laws – a result clearly condemned by *Trancas*' holding that zoning

22
23 ⁷ Variances and conditional use permits are both methods by which property
24 owners may seek relief from the strict terms of a comprehensive zoning ordinances.
25 See, e.g., *Royalty Carpet Mills, Inc. v. City of Irvine*, (2005) 125 Cal.App.4th 1110,
26 1115 n. 1. Each involves the application of pre-established standards and conditions
to particular land uses. See, e.g., *W. W. Dean & Associates v. City of South San*
Francisco, (1987) 190 Cal.App.3d 1368, 1375.

1 laws may not be circumvented by contract.

2 Upholding the Settlement Agreement in the face of *Trancas* makes a
3 fundamental public policy decision never made by any legislature – that a City's
4 interest in the settlement of a lawsuit challenging land use denial is paramount to the
5 protection of Plaintiffs and the community afforded by applicable zoning law. It also
6 fundamentally alters California's clear public policy to involve the public and affected
7 property owners at every level of the process when land use decisions are being
8 made. *Penn-Co, supra*, 158 Cal.App.3d at 1078. It is respectfully submitted that any
9 such fundamental policy decisions and revision of land use laws should be made
10 legislatively and not judicially. *See, e.g., Bankamerica Corp. v. United States*, 462
11 U.S. 122, 140 (1983) (court does not rewrite a statute based on its notions of
12 appropriate policy).

13 **V. RLUIPA DOES NOT RENDER TRANCAS INAPPLICABLE**

14 Plaintiffs anticipate that The Congregation, and perhaps the City, will argue
15 that RLUIPA can transform an invalid contract in to a valid one. Any such argument
16 is wrong.

17 RLUIPA has no application to the question of the validity of a contract under
18 state law. As held in *United Commercial Ins. Service, Inc. v. Paymaster Corp.*, 962
19 F.2d 853 (9th Cir. 1992),

20 The construction and enforcement of settlement agreements
21 are governed by principles of local law which apply to
22 interpretation of contracts generally . . . This is true even
though the underlying cause of action is federal.

23 (emphasis added) 962 F.2d at 856. *Trancas* makes clear that settlement agreements
24 may not circumvent or disregard zoning laws and when they do, as in the case of the
25 Settlement Agreement, they are invalid.

26 Defendants may attempt to argue that RLUIPA should override *Trancas* and its
27 clear mandate that the Settlement Agreement be invalidated. Any such argument is
28 without merit. First, under *Paymaster*, the enforceability of settlement agreement

1 resulting from a federal claim is an issue of state law.

2 Second, the plain language of RLUIPA does not extend to local and state
3 contract law, an arena traditional left to the states. *See Medtronic, Inc. v. Lohr*, 518
4 U.S. 470, 485 (1996) (courts start with the assumption that the historic police powers
5 of the States were not to be superseded by federal law unless that is the clear and
6 manifest purpose of Congress); *Jones v. Rath Packing Co.*, 430 U.S. 519, 525 (U.S.
7 1977) ("Where, as here, the field which Congress is said to have pre-empted has been
8 traditionally occupied by the States . . . we start with the assumption that the historic
9 police powers of the States were not to be superseded by the Federal Act unless that
10 was the clear and manifest purpose of Congress . . . This assumption provides
11 assurance that 'the federal-state balance . . . will not be disturbed unintentionally by
12 Congress or unnecessarily by the courts").

13 By its terms, RLUIPA affects only land use regulations and only those
14 regulations that impose substantial burdens on religious exercise. 42 U.S.C.
15 §2000cc(1). It does not purport to govern state and local rules governing the validity
16 of contracts made by local governments and it certainly contains no language
17 regarding settlements or settlement agreements. RLUIPA can only save the
18 Settlement Agreement if its plain language is extended well beyond its reasonable
19 meaning. That is beyond the Court's authority. *See, e.g., Badaracco v. Comm'r of*
20 *Internal Revenue*, 464 U.S. 386, 398 (1984) ("Courts are not authorized to rewrite a
21 statute because they might deem its effects susceptible of improvement").

22 Third, federal courts may not sanction the action of government officials
23 settling litigation by agreements that violate or seek to trump state law. *See, e.g.,*
24 *Southern Cal. Edison v. Lynch*, 307 F.3d 794 (9th Cir. 2002) ("State officials cannot
25 enter into a federally-sanctioned consent decree beyond their authority under state
26 law"); *Perkins v. City of Chicago Heights*, 47 F.3d 212 (7th Cir. 1995).

27 Zoning ordinances, not private bilateral contracts, determine permitted R-1
28 uses. Under governing law, the Settlement Agreement violates state and local land

1 use law by permitting con-conforming uses at the Highland Property. RLUIPA does
2 not regulate the validity of contracts under California law and it therefore cannot
3 made a contract valid. Defendants may not bootstrap contract law into RLUIPA's
4 regulation of land use law. *See U. S. v. ITT Continental Baking Co.*, 420 U.S. 223,
5 235-237 (1975) (directing that a consent decree be construed as contract and holding
6 that it ". . . must be construed as it is written, and not as it might have been written
7 had the plaintiff established his factual claims and legal theories in litigation . . . and
8 [it must also be construed] without reference to the legislation the [plaintiff]
9 originally sought to enforce but never proved applicable through litigation").

10 Accordingly, the Settlement Agreement is void.

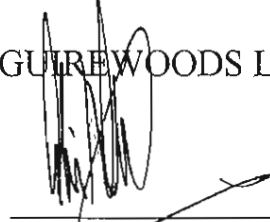
11 **VI. TRANCES INVALIDATES THE SETTLEMENT AGREEMENT**

12 As set forth above, the City and the Courts have already decided that under the
13 zoning laws, the Congregation may not operate a synagogue. The Settlement
14 Agreement is nothing more that a contractual circumvention of the zoning laws and
15 made in violation of the Brown Act. It is invalid under *Trancas*.

17 Respectfully submitted,

18 MCGUIRE WOODS LLP

19
20
21 By:



22 Leslie M. Werlin
23 Attorneys for Plaintiffs



STATE OF CALIFORNIA COUNTY OF LOS ANGELES
 RICK AUERBACH, ASSESSOR
 500 W. TEMPLE STREET, ROOM 225
 LOS ANGELES, CA 90012-2770 • 213 974.3481
 Si desea ayuda en Español, llame al número 213 974.3211
2003 CHURCH EXEMPTION
 L. Anna A. ... la ca us
 Assessor's Office

VP05 09165
 SUB TYPE FORM KEY DIVISION INDEX
 C 5 CH
 NAME AND MAILING ADDRESS 706 712 801

09 177
 TAX RATE AREA 310 ASSESSOR'S I.D. NUMBER RE APPR
 00067 002 030 013 5507 004 001 8
 LOCATION OF PROPERTY 855 803 PO
 303 S HIGHLAND AVE
 LOS ANGELES CA 90036-0000

03 JAN 23 P1:55

CONGREGATION ETZ CHAIM OF
 HANCOCK PARK
 303 S HIGHLAND AVE
 LOS ANGELES CA 90036

DESCRIPTION OF PROPERTY 861
 TRACT NO 5049 LOT 1

RECORDING DATE 20020603 SEQ NO SUB BILL NO

CLAIM FOR EXEMPTION FROM PROPERTY TAXES UNDER SECTIONS 3(f), 4(d), AND 5 OF ARTICLE XIII OF THE CONSTITUTION OF THE STATE OF CALIFORNIA AND SECTIONS 206, 206.1, 206.2, AND 256 OF THE REVENUE AND TAXATION CODE (See also sections 251, 254, 255, 260, 270, and 271 of the Revenue and Taxation Code.) To receive the full exemption, a claimant must complete and file this form with the Assessor by February 15. (Section 270, Revenue and Taxation Code, provides a partial exemption for late filing of the Church Exemption.)

RABBI CHAIM B RUBIN (name of person making claim)

- That as CHAIM B RUBIN (title, such as president, etc.) 2. of the CONGREGATION ETZ CHAIM OF HANCOCK PARK (corporate or organization name of church)
- the mailing address of which is 303 S. Highland Ave Los Angeles CA 90036 (give complete address including zip code)
- the location of the property of which is 303 S. Highland Ave Los Angeles CA 90036 (give complete address including zip code)

- that I make this claim for church exemption on behalf of this organization for the 2003-2004 fiscal year on the property listed on this form and on any accompanying forms (attach a separate form for each location);
- that all buildings and equipment claimed as exempt are used solely for religious worship; or that any building in the course of construction is intended to be used solely for religious worship;
- that the land claimed as exempt is required for the convenient use of these buildings;
- that all real property used by the church upon which exemption is claimed for parking purposes is necessarily and reasonably required for the parking of automobiles of persons attending or engaged in religious worship or religious activity, and which is not at other times used for commercial purposes. Commercial purposes does not include the parking of vehicles or bicycles, the revenue of which does not exceed the ordinary and necessary costs of operating and maintaining the property for parking purposes. Leased property used for parking purposes is eligible for exemption only if the congregation of the church, religious congregation, or sect is no greater than 500 members.

CERTIFICATION

I certify (or declare) under penalty of perjury under the laws of the State of California that the foregoing and all information hereon, including any accompanying statements or documents, is true, correct and complete to the best of my knowledge and belief.

SIGNATURE OF PERSON MAKING CLAIM [Signature] DATE Jan 16, 2003

C3
ALL

THE QUESTIONS ON THE REVERSE SIDE ARE A PART OF THIS CLAIM AND MUST BE ANSWERED.
 This exemption claim is a public record and is subject to public inspection.

DO NOT WRITE IN SPACES BELOW - FOR ASSESSOR'S USE ONLY

LAND	IMPROVEMENTS	R E EXEMPT	HOMEOWNER SEX	PERS PROP OR UNS. LAND	UNS IMPS	PERS PROP EXEMPT	UNS LAND/IMP EXEMPT
355578 SEC FX. EX	92905 UNS PP FIXTURE EXEMPT	0	0	0			
2003 EXEMPT VALUES							
640 EXM KEY <u>000</u>	<input type="checkbox"/> 604 <input type="checkbox"/> 150 <input type="checkbox"/> 141 PERS PROP	<input type="checkbox"/> 603 LAND					
141 CORR KEY 840	<input type="checkbox"/> 604 <input type="checkbox"/> 150 <input type="checkbox"/> 141 FIXTURES	<input type="checkbox"/> 602 IMP					
840 LF KEY	640 PERS. PROP. EX						
141 ORIGIN KEY	840 FIXTURE EX						
855 ORIGIN KEY	REAL ESTATE EXEMPTION	841 APPRAISAL FILE EXEMPTION					
	840						

NUMBER OF TXN	BATCH NUMBER		
3RD		KILL BILL	001
<input type="radio"/>		REBILL	004
		BILL#	
2ND		DELETE RECORD	003
<input type="radio"/>		RELEASE SWAG KEY	005
		SECURED INQUIRY	005
1ST		DELETE EXEMPTION	044
<input type="radio"/>		APPRAISAL INQUIRY	900

EXHIBIT A

FROM SHOULD BE CONTACTED DURING NORMAL BUSINESS HOURS FOR ADDITIONAL INFORMATION:

NAME RABBI CHAIM B. RUBIN
ADDRESS (street, city, state, zip code) 303 SO. HIGHLAND AVE L.A. CA 90026
DAYTIME PHONE NUMBER (323) 634-0535

QUESTIONNAIRE FOR CHURCH EXEMPTION

Answer each question below, give as much detail as you consider necessary to support your claim for exemption for this property. Leased property may be exempt if listed under line 3 or 9 below. If leased property is listed below, it is not necessary for the lessor to also claim the exemption on the Less. Exemption Claim.

1. Uses of Property:

- a. Date the property was first used by the claimant APRIL 1994
- b. State all uses of the real estate described on the front of the form (describe by parcel if there is more than one parcel).

2. Schools

- a. Is an elementary and/or secondary school being operated at this location? Yes No
- b. Is a children's day care center being operated at this location (a children's day care center includes licensed nursery schools, preschools and infant care centers)? Yes No

NOTE: If the answer is yes to 2a or 2b above, the property is not eligible for the church exemption. If the property is both owned and operated by the church and used for religious worship, preschool purposes, nursery school purposes, kindergarten purposes, school purposes of less than collegiate grade (grades 1-12), or for the purposes of both schools of collegiate grade and schools of less than collegiate grade, the claimant may qualify for the RELIGIOUS EXEMPTION. The religious exemption has a "one-time filing" provision and should be filed by February 15; contact the Assessor. The claimant may wish instead to annually file by February 15 for the WELFARE EXEMPTION.

- 3. Is the real property listed on this claim owned by the church? Yes No If no, state the name and address of the owner:

Is leased property, if any, used by the church for parking purposes? Yes No
If yes, is the congregation of the church, religious denomination, or sect greater than 500 members? Yes No
If yes, the property, or portion thereof, so used is not eligible for exemption.

NOTE: The benefit of a property tax exemption must inure to the church; if the lease or rental agreement does not specifically provide that the church exemption is taken into account in fixing the terms of agreement, the church shall receive a reduction in rental payments, or a refund of such payments, if paid, for each month of occupancy (or use), or portion thereof, during the fiscal year equal to one-twelfth of the property taxes not paid during such fiscal year by reason of the church exemption.

- 4. Are bingo games being operated on this property? Yes No If the answer is yes, a claim for the WELFARE EXEMPTION must be filed with the Assessor by February 15 each year for the property or portion of the property so used to be exempt.
- 5. Is any portion of this property used for living quarters for any person? Yes No If yes, describe that portion:

NOTE: Living quarters are not eligible for the Church Exemption or the Religious Exemption; certain living quarters may be exempt under the Welfare Exemption. (Contact the Assessor.)

- 6. Is any portion of this property vacant and/or unused? Yes No If yes, describe that portion:
- 7. Has any portion of this property been rented to, leased to, or been used and/or operated by some person or organization other than the claimant since 12:01 a.m., January 1 last year? Yes No If yes, describe that portion, its use, and the number of hours per week of such use:

NOTE: Property used by others (except for worship only) is not eligible for the Church Exemption. It may be exempt if the claimant (owner) and the user/operator both file a claim for the Welfare Exemption. (Contact the Assessor.)

- 8. Has there been any change in the use of the property or any construction commenced and/or completed on this property since 12:01 a.m., January 1 last year? Yes No If yes, describe: REMODELING OF BUILDING - BEGAN JUNE 4, 2001
- 9. Is any equipment or other property at this location being leased or rented from someone else? Yes No If yes, list in the remarks section the name and address of the owner and the type, make, model, and serial number of the property. If the property listed is not used exclusively for religious worship, please state the other uses of the property:

10. REMARKS:

FOR OFFICE USE ONLY	
ROLL CHANGES/AUTHORIZATIONS	CHANGE AND REASON
CHANGE MADE BY	DATE
APPROVED	

CALIFORNIA APPELLATE COURTS

Case Information



Supreme
Court

Supreme Court

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Court data last updated: 07/02/2006 12:53 PM

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Supreme Court Case: S143211

Opinions

Court of Appeal Case(s): Second Appellate District, Div. 8
B174674



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Case Caption: TRANCAS PROPERTY OWNERS ASSOCIATION v.
CITY OF MALIBU (TRANCAS-PHC)

Case Category: Review - Civil Appeal

Start Date: 05/09/2006

Case Status: closed

Issues: none

Disposition Date: 06/21/2006

Case Citation: none

Cross Referenced Cases

No Cross Referenced Cases Found

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EXHIBIT A

CALIFORNIA APPELLATE COURTS

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TRANCAS PROPERTY OWNERS ASSOCIATION v. CITY OF MALIBU (TRANCAS-PHC)

Help

Case Number S143211

Opinions



home

Only the following dispositions are displayed below: Orders Denying Petitions, Orders Granting Rehearing and Opinions. Go to the Docket Entries screen for information regarding orders granting review.

Case Citation: none

Date	Description
06/21/2006	Petition for review denied

[Click here](#) to request automatic e-mail notifications about this case.

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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
1800 Century Park East, 8th Floor, Los Angeles, CA 90067.

5 On July 3, 2006, I served the following document(s) described as
6 **PLAINTIFFS' OPENING BRIEF ON THE INVALIDITY OF THE**
7 **SETTLEMENT AGREEMENT UNDER THE OPINION OF THE**
8 **CALIFORNIA COURT OF APPEAL IN TRANCAS V. CITY OF MALIBU** on
the interested parties in this action by placing true copies thereof enclosed in sealed
envelopes addressed as follows:

9 **SEE ATTACHED LIST**

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

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

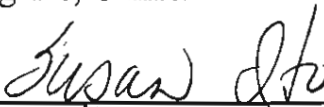
25 **BY OVERNIGHT DELIVERY:** I deposited such document(s) in a box or
26 other facility regularly maintained by the overnight service carrier, or
27 delivered such document(s) to a courier or driver authorized by the overnight
28 service carrier to receive documents, in an envelope or package designated 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))

BY PERSONAL SERVICE: I personally delivered such envelope(s) to the
addressee(s). (C.C.P. § 1011)

I declare 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 July 3, 2006, at Los Angeles, California.

27 
28 _____
Susan Ito

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